



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

Sixth Report of Session 2006–07

Drawing special attention to:

*Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006
(S.R. 2006/439)*

*Ordered by The House of Lords to be printed
24 January 2007*

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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. or on 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.

Committee staff

The current staff of the Committee are Mick Hillyard (*Commons Clerk*), Kath Kavanagh (*Lords Clerk*) and Jacqueline Cooksey (*Committee Secretary*).

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Instruments reported

At the Committee's meeting on 24 January 2007, it scrutinised a number of instruments and decided to draw the special attention of both Houses to **one** of them in accordance with its Standing Orders. The Instrument and the ground for reporting it is given below. The relevant Departmental memorandum is published as an appendix to this report.

1 S.R. 2006/439: reported for defective drafting

Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (S.R.2006/439)

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

1.2 Regulation 4(1) provides that, for the purpose of these Regulations, a person ("A") discriminates against another person ("B") if he treats B less favourably than he treats or would treat other persons in the same circumstances and does so by reason that B has: (a) brought proceedings against A or any other person under these Regulations, or (b) given evidence or information in connection with proceedings brought by any person against A or any other person.

1.3 In a memorandum printed in the Appendix, the Office of the First Minister and Deputy First Minister implicitly states that "proceedings" in sub-paragraph (b) is intended to refer to proceedings brought under the Regulations. It suggests that "proceedings should have read "the proceedings", but the Committee does not consider that such a formulation would assist in clarifying the scope of the sub-paragraph. Either the phrase "proceedings brought under these Regulations" or "such proceedings" would be more satisfactory. **The Committee accordingly reports regulation 4 for defective drafting, acknowledged by the Department.**

1.4 Regulation 29(1) provides that the Equality Commission for Northern Ireland may issue codes of practice for the elimination of discrimination and harassment *in the field of housing* and the promotion of equality of opportunity *in the field of housing* between persons of different sexual orientations. Regulation 29(4) imposes requirements as to consultation in respect of the preparation of any draft code of practice *relating to the field of housing*. Regulation 29(2), however, states that, without prejudice to paragraph (1), a code of practice issued under regulation 29 may include practical guidance as to what steps it is reasonably practicable for providers of goods, facilities or services to take for the purpose of preventing acts made unlawful by the Regulations. This appears to allow such a code of practice to cover matters unrelated to housing.

1.5 The Department undertakes to amend regulation 29 to make it clear that its scope is restricted to housing. **The Committee accordingly reports regulation 29(2) for defective drafting, acknowledged by the Department.**

1.6 Regulations 31(3) and 32(1) refer to the Commission giving notice “in the prescribed manner”, and regulation 32(1) requires notice to be given “in the prescribed form”. The Regulations do not explain what is meant by these expressions. The Department states that “prescribed” is intended to mean “prescribed by an order made by the Office of the First Minister and Deputy First Minister”, and undertakes to correct this error at the earliest opportunity by inserting an appropriate definition.

1.7 The Committee does not consider that such a correction would be acceptable. The Equality Act 2006, which confers the power to make these Regulations, does not expressly permit the Regulations to confer powers on the Office to legislate by order. There would therefore be serious doubt as to the vires of any order which was purported to be made to prescribe the form and manner of giving notice. The appropriate action for the Department to take is to amend the Regulations so that they themselves specify the form and manner. **The Committee accordingly reports regulations 31(3) and 32(1) for defective drafting, acknowledged by the Department.**

1.8 The Regulations contain several references to notices or decisions having become “final”. The Department acknowledges that this expression should have been defined, and undertakes to correct this error. **The Committee accordingly reports these Regulations for defective drafting in this respect, acknowledged by the Department.**

1.9 Regulation 44 permits the Commission in certain circumstances to seek an undertaking from a person as to his conduct. As the Department acknowledges, the Regulations do not set out what the effect of a failure to comply with such an undertaking would be, and undertakes to correct this error. **The Committee accordingly reports regulation 44 for defective drafting in this respect, acknowledged by the Department.**

1.10 The Department also acknowledges a typographical error in regulation 52(2), which it will correct.

Instruments not reported

The Committee has considered the instruments set out in the Annex to this Report and has determined that the special attention of both Houses does not require to be drawn to any of them.

An extract from the Explanatory Memorandum from the Department of Trade and Industry in connection with the Companies Act 2006 (Commencement No. 1, Transitional Provisions And Savings) Order 2006 (S.I. 2006/3428) and the Companies (Registrar, Languages And Trading Disclosures) Regulations 2006 (S.I. 2006/3429) is printed at Annex 2.

Annex 1

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

Draft S.I. Mental Capacity Act 2005 (Loss of Capacity during Research Project) (England) Regulations 2007

Instruments subject to annulment

S.I. 2006/3264	Medicines (Pharmacies) (Applications for Registration and Fees) Amendment Regulations 2006
S.I. 2006/3274	Social Security (Miscellaneous Amendments) (No. 5) Regulations 2006
S.I. 2006/3275	Asylum (Designated States) (Amendment) (No. 2) Order 2006
S.I. 2006/3282	Structural Funds (National Assembly for Wales) Regulations 2006
S.I. 2006/3284	Gambling (Operating Licence and Single-Machine Permit Fees) Regulations 2006
S.I. 2006/3285	Gambling (Personal Licence Fees) Regulations 2006
S.I. 2006/3287	Gambling Appeals Tribunal Fees Regulations 2006
S.I. 2006/3294	Public Lending Right Scheme 1982 (Commencement of Variation) Order 2006
S.I. 2006/3295	Town and Country Planning (Environmental Impact Assessment) (Amendment) Regulations 2006
S.I. 2006/3303	Civil Aviation (Provision of Information to Passengers) Regulations 2006
S.I. 2006/3304	Local Elections (Principal Areas) (England and Wales) Rules 2006
S.I. 2006/3305	Local Elections (Parishes and Communities) (England and Wales) Rules 2006
S.I. 2006/3306	National Health Service (Charges to Overseas Visitors) (Amendment) Regulations 2006
S.I. 2006/3315	Waste Electrical and Electronic Equipment (Waste Management Licensing) (England and Wales) Regulations 2006
S.I. 2006/3318	Building and Approved Inspectors (Amendment) (No. 2) Regulations 2006
S.I. 2006/3320	Town and Country Planning (Regional Spatial Strategies) (Examinations in Public) (Remuneration and Allowances) (England) (Revocation) Regulations 2006
S.I. 2006/3329	European Communities (Designation) (Amendment) Order 2006
S.I. 2006/3346	Education (Special Educational Needs) (England) (Consolidation) (Amendment) Regulations 2006
S.I. 2006/3363	Enterprise Act 2002 (Amendment) Regulations 2006
S.I. 2006/3367	Olive Oil (Marketing Standards) (Amendment) Regulations 2006
S.I. 2006/3368	Smoke-free (Premises and Enforcement) Regulations 2006

- S.I. 2006/3371** Enterprise Act 2002 (Part 8 Notice to OFT of Intended Prosecution Specified Enactments) Order 2006
- S.I. 2006/3372** Enterprise Act 2002 (Part 8 Community Infringements Specified UK Laws) Order 2006
- S.I. 2006/3373** National Health Service (Pharmaceutical Services) (Amendment) Regulations 2006
- S.I. 2006/3385** Financial Services and Markets Act 2000 (EEA Passport Rights) (Amendment) Regulations 2006
- S.I. 2006/3386** Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) (Amendment) Regulations 2006
- S.I. 2006/3388** Personal Injuries (NHS Charges) (General) and Road Traffic (NHS Charges) (Amendment) Regulations 2006
- S.I. 2006/3391** Gambling Act 2005 (Relevant Offences) (Amendment) Order 2006
- S.I. 2006/3395** Council Tax and Non-Domestic Rating (Amendment) (England) Regulations 2006
- S.I. 2006/3396** Council Tax (Discount Disregards) (Amendment) (England) Order 2006
- S.I. 2006/3398** Personal Injuries (NHS Charges) (Reviews and Appeals) and Road Traffic (NHS Charges) (Reviews and Appeals) (Amendment) Regulations 2006
- S.I. 2006/3405** Assistants to Justices' Clerks Regulations 2006
- S.I. 2006/3408** Education (Aptitude for Particular Subjects) (Amendment) (England) Regulations 2006
- S.I. 2006/3409** Education (Infant Class Sizes) (England) (Amendment) Regulations 2006
- S.I. 2006/3410** Private Security Industry (Licences) (Amendment) Regulations 2006
- S.I. 2006/3411** Private Security Industry Act 2001 (Duration of Licence) (No. 2) Order 2006
- S.I. 2006/3413** Financial Services and Markets Act 2000 (Disclosure of Confidential Information) (Amendment) Regulations 2006
- S.I. 2006/3414** Financial Services and Markets Act 2000 (Appointed Representatives) (Amendment) Regulations 2006
- S.I. 2006/3419** Bus Lane Contraventions (Approved Local Authorities) (England) (Amendment) (No. 8) Order 2006
- S.I. 2006/3420** Road Traffic (Permitted Parking Area and Special Parking Area) (City of Wolverhampton) Order 2006
- S.I. 2006/3421** Road Traffic (Permitted Parking Area and Special Parking Area) (Borough of Warrington) Order 2006
- S.I. 2006/3424** Road Traffic (Permitted Parking Area and Special Parking Area) (Metropolitan Borough of South Tyneside) Order 2006
- S.I. 2006/3425** Bus Lane Contraventions (Approved Local Authorities) (England) (Amendment) (No. 7) Order 2006
- S.I. 2006/3426** Hydrocarbon Oil Duties (Sulphur-free Diesel) (Hydrogenation of Biomass) (Reliefs) Regulations 2006
- S.I. 2006/3428** Companies Act 2006 (Commencement No. 1, Transitional Provisions and Savings) Order 2006
- S.I. 2006/3429** Companies (Registrar, Languages and Trading Disclosures) Regulations 2006
- S.I. 2006/3449** Police (Amendment) (No. 2) Regulations 2006

- S.I. 2006/3472** Official Controls (Animals, Feed and Food) (England) Regulations 2006
- S.I. 2006/3474** Mental Capacity Act 2005 (Appropriate Body) (England) (Amendment) Regulations 2006
- S.I. 2007/3** Animals and Animal Products (Import and Export) (England) (Amendment) Regulations 2007
- S.I. 2007/4** Cider and Perry and Wine and Made-wine (Amendment) Regulations 2007

Instruments subject to annulment (Northern Ireland)

- S.R. 2006/486** Rules of the Supreme Court (Northern Ireland) (Amendment No.3) 2006
- S.R. 2006/487** Criminal Appeal (Trial without jury where danger of jury tampering and Trial by jury of sample counts only) Rules (Northern Ireland) 2006
- S.R. 2006/499** Crown Court (Amendment) Rules (Northern Ireland) 2006
- S.R. 2006/500** Local Government Companies (Best Value) Order (Northern Ireland) 2006
- S.R. 2006/507** Recovery of Health Services Charges (Amounts) Regulations (Northern Ireland) 2006
- S.R. 2006/515** Insolvent Partnerships (Amendment) Order (Northern Ireland) 2006

Instruments not subject to Parliamentary proceedings laid before Parliament

- S.I. 2006/3277** Immigration (Designation of Travel Bans) (Amendment) Order 2006
- S.I. 2006/3326** United Nations (International Tribunals) (Former Yugoslavia and Rwanda) (Amendment) (No. 2) Order 2006

Instruments not subject to Parliamentary proceedings not laid before Parliament

- S.I. 2006/2959** Outer Space Act 1986 (Bermuda) Order 2006
- S.I. 2006/3242** Housing (Right to Buy) (Priority of Charges) (England) (No.3) Order 2006
- S.I. 2006/3330** Local Authorities (Armorial Bearings) Order 2006
- S.I. 2006/3360** Childcare Act 2006 (Commencement No. 1) Order 2006
- S.I. 2006/3397** Health and Social Care (Community Health and Standards) Act 2003 (Commencement) (No. 11) Order 2006
- S.I. 2006/3400** Education and Inspections Act 2006 (Commencement No. 2) Order 2006
- S.I. 2006/3412** Electoral Administration Act 2006 (Commencement No. 2, Transitional and Savings Provisions) Order 2006
- S.I. 2006/3416** Political Parties, Elections and Referendums Act 2000 (Commencement No. 3 and Transitional Provisions) Order 2006
- S.I. 2006/3422** Criminal Justice Act 2003 (Commencement No.15) Order 2006
- S.I. 2006/3423** Domestic Violence, Crime and Victims Act 2004 (Commencement No. 7 and Transitional Provision) Order 2006

Annex 2

S.I. 2006/3428 and 2006/3429: extract from the Explanatory Memorandum from the Department of Trade and Industry

Companies Act 2006 (Commencement No. 1, Transitional Provisions And Savings) Order 2006 (S.I. 2006/3428), and Companies (Registrar, Languages And Trading Disclosures) Regulations 2006 (S.I. 2006/3429)

“3.1 The Department regrets that the Regulations and certain provisions of the Order will come into force less than 21 days after they have been laid. The Department experienced unexpected difficulties in preparing the Order, including in respect of the need to take account of comments from various sources including outside bodies. The Department accepts that this is not an adequate reason for failing to comply with the “21-day rule”. It is highly unlikely, however, that anyone will be put at a disadvantage as a result of this non-compliance. The First Company Law Amendment Directive requires implementation by 1 January 2007; and the Companies Act 2006 provides that certain of its provisions will have effect on 1 January 2007 and requires the Regulations to come into force on that date. Relevant interest groups have therefore been expecting the Regulations and the provisions in question in the Order to come into force then: indeed, when the Department indicated that it was considering whether to bring them into force on a slightly later date which would have complied with the “21-day rule”, representations were received indicating that this would be unwelcome because of the expectation that the date would be 1 January.”

Appendix

S.R. 2006/439: memorandum from the Office of the First Minister and Deputy First Minister

Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (S.R.2006/439)

The Office of the First and deputy First Minister was grateful to receive the Committee's questions of 14 December on the above Regulations. We have considered carefully the issues that you have raised with us and acknowledge that the original Regulations contain drafting errors in certain areas as you have highlighted. It is the Department's intention to bring forward amending Regulations at the earliest opportunity.

We have set out below an answer to each of the specific points you have raised.

(1) Is regulation 4(1)(b) intended to be restricted to cases where the proceedings are brought under these Regulations and, if so, why is this not stated?

The Department agrees that "proceedings" should have read "the proceedings" and will correct this under amending Regulations.

(2) Regulation 29(1) and (4) appears to permit the issue of codes of practice containing guidance in respect of housing only, while regulation 29(2) "without prejudice to the generality of paragraph (1)" appears to cover the provision of goods, facilities or services. What is the intended scope of regulation 29?

The Department will, under amending Regulations, define clearly that the scope of regulation 29 is restricted to housing.

(3) Explain the meaning of the expression "in the prescribed manner" in regulations 31(3) and 32(1), and the expression "in the prescribed form" in regulation 32(1).

"Prescribed" is intended to mean "prescribed by an order made by the Office of the First Minister and deputy First Minister". The omission of a definition is an error and the Department will correct this error within amending Regulations at the earliest opportunity.

(4) The Regulations contain several references to notices or decisions having become final (see regulations 37(4) and (7), 39(1)(b), 40(1), 41, 43(5) and 47(1)). Why is there no indication of what this means?

The definition of "Final" is absent. This is an error the Department will correct this error within amending Regulations at the earliest opportunity. This will define "final" as it is defined in Article 2, sub paragraph 3 of the Race Relations NI Order 1997, (copy below):

3) For the purposes of this Order a non-discrimination notice or a finding by a court or tribunal becomes final when -

(a) an appeal against the notice or finding is dismissed, withdrawn or abandoned; or

(b) the time for appealing expires without an appeal having been brought;

and for the purposes of sub-paragraph (a) an appeal against a non-discrimination notice shall be taken to be dismissed if, notwithstanding that a requirement of the notice is quashed on appeal, a direction is given in respect of it under Article 56(3).

(5) What is the effect of a failure to comply with an undertaking given under regulation 44 (both generally and where the court has decided that a person has failed to comply)?

The Department accepts that the Regulations do not set out what the effect of a failure to comply with an undertaking given under regulation 44 would be. The Department will correct this error under amending Regulations at the earliest opportunity.

(6) Has something been omitted from regulation 52(2)?

The provision at regulation 52(2) contains a typographical error: “from the respondent” should read “that the respondent”. The Department will correct this error under amending Regulations at the earliest opportunity.

(7) Section 24 of the Northern Ireland Act 1998 provides that a Northern Ireland department has no power to make any subordinate legislation so far as the legislation is incompatible with any of the Convention rights or discriminates against a person or class of person on the ground of religious belief or political opinion. Explain why the Department considers that these Regulations do not fall foul of that section.

Section 24(1)(c) of the Northern Ireland Act 1998 (“the NI Act”) states that

“ (a) Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act—

(a) is incompatible with any of the Convention rights;

... (c) discriminates against a person or class of person on the ground of religious belief or political opinion”.

The question raised by the Committee is how the Regulations comply with this provision.

If it is assumed that “discrimination” is not limited to “direct discrimination” by section 98 of the Act, section 24(1)(c) must be read in conjunction with section 24(1)(a) of the Act, section 3 of the Human Rights Act 1998, and the relevant provisions of the European Convention on Human Rights. Section 3 in particular states that all legislation must be read, where possible, to be in compliance with the Convention rights, and this applies to both the Regulations, and to section 24 of the NI Act.

To read section 24(1)(c) as giving ‘primacy’ to the right to manifest religious belief above or to the exclusion of all other rights contained in the ECHR would itself be in contravention

of Article 14 of the ECHR, section 3 of the Human Rights Act, and even section 24(1)(a) of the Northern Ireland Act. In order to comply, section 24(1)(c) must be read as a reiteration of specific rights already included in section 24(1)(a). To do otherwise, notwithstanding the provision of section 13(1) of the Human Rights Act urging the importance of the right to freedom of religious belief and manifestation on the judiciary, would be to afford those rights a primacy that would be in conflict with the ECHR.

We consider that the fact that ‘rights to manifest religious beliefs’ are not given “primacy” in the regulations does not mean that the regulations discriminate within the meaning of section 24(1)(c) read with section 3 of the Human Rights Act.

Rather, the right to manifest religious beliefs is subject to the same qualifications as are produced in Article 9 of the Convention, and mirrored in Article 3 of the Fair Employment and Treatment (Northern Ireland) order 1998 (NI 21).

In both cases,

- (a) any requirement or condition which applies equally to everyone, but which a considerably smaller number of adherents to a particular faith can comply with, or
- (b) any criterion, provision or practice which applies equally to everyone, but puts adherents to a particular faith at a particular disadvantage,

is not regarded as discriminatory if it can be justified (or in the case of (b) is a proportionate means of achieving a legitimate aim).

In the case of these Regulations the aim is the protection of everyone from discrimination on the grounds of sexual orientation, a right that itself attracts the protections of Articles 8 and 14 of the Convention. The protection of persons from discrimination is a justifiable aim; indeed it is in the name of such protection (of the right to freedom from discrimination on the ground of religious belief) that the Committee raised this question.

The means employed to achieve the aim is the present set of regulations. These regulations, which apply to everyone regardless of religious belief, or lack of religious belief, include regulation 16 which clearly protects the right to hold a religious belief, and protects key doctrinal practices. A provision is included that prevents discrimination by religious organisations against persons on the ground of sexual orientation where the organisation is carrying out public functions on behalf of a public authority with public money. This is considered a minor limitation on the more general protection afforded to religious organisations, and, it is viewed as a proportionate means of achieving the legitimate aim set out above. It is therefore, we consider, compliant with both section 24(1)(c) of the NI Act and the provisions of the Convention, and certainly within the margin of appreciation that the Court accepts exists in such cases (see *Dudgeon v UK* (7525/76) [1981] ECHR 5, paragraph 54).

We trust this provides adequate clarification for the Committee on the question raised. We would however point out as a side note, that the definition of discrimination set out in section 98 of the NI Act, and which applies to section 24(1)(c) of the Act, arguably includes

only “direct discrimination”, within the meaning of Article 3(2)(a) and (2A)(a) of the Fair Employment and Treatment (Northern Ireland) Order, and not “indirect discrimination” within the meaning of Article 3(2)(b) and (2A)(b).

As such, it is arguable that as the Regulations clearly apply equally to persons regardless of religious belief or lack thereof, that even by this standard, the Regulations cannot be regarded as discriminatory, and issues of proportionality do not arise. However, should the Committee take the other view, it is argued that the Regulations are compliant with section 24(1)(c).