



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

**Sixth Report
of Session 2010-11**

Drawing special attention to:

Scottish Parliament (Elections etc.) Order 2010 (Draft S.I.)

Seal Products Regulations 2010 (S.I. 2010/2068)

*Local Government Pension Scheme (Miscellaneous) Regulations 2010
(S.I. 2010/2090)*

Cornwall Inshore Fisheries and Conservation Order 2010 (S.I. 2010/2188)

*Isles of Scilly Inshore Fisheries and Conservation Order 2010
(S.I. 2010/2213)*

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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, Nicholas Beach and Peter Milledge (*Lords*).

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Contents

Report	<i>Page</i>
Instruments reported	2
1 Draft S.I. Reported for defective drafting	2
2 S.I. 2010/2068: Reported for unjustified breach of the 21-day rule	3
3 S.I. 2010/2090: Reported for defective drafting	3
4 S.I. 2010/2188 and S.I. 2010/2213: Reported for defective drafting	4
Instruments not reported	5
Annex	5
Appendix 1	6
Draft S.I.: memorandum from the Scotland Office	6
Appendix 2	9
S.I. 2010/2068: memorandum from the Department for Environment, Food and Rural Affairs	9
Appendix 3	9
S.I. 2010/2090: memorandum from the Department for Communities and Local Government	9
Appendix 4	10
S.I. 2010/2188 and 2213: memorandum from the Department for Environment, Food and Rural Affairs	10

Instruments reported

At its meeting on 10 November 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 five of 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 Draft S.I. Reported for defective drafting

<i>Scottish Parliament (Elections etc) Order 2010 (Draft S.I.)</i>
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1.1 **The Committee draws this draft Order to the special attention of both Houses on the ground that in four respects it is defectively drafted.**

1.2 Article 2(1) defines “European Parliamentary Election” even though that expression is not used elsewhere in the draft Order. In a memorandum printed at Appendix 1, the Scotland Office agrees that the definition ought not to have been included. **The Committee reports article 2(1) for defective drafting, acknowledged by the Department.**

1.3 Article 3(1) provides that an alteration in a published version of the register of electors under section 13A of the Representation of the People Act 1983 is not to have effect for the purposes of an election, if the alteration is to take effect after the fifth day before the date of the poll. The Committee asked the Department why this provision was thought necessary, in the light of section 13B(1) and (4)(b) of that Act.

1.4 In its memorandum the Scotland Office points out that, because section 13B(1) and article 3(1) measure periods of days by reference to, respectively, working days and calendar days (it does not say whether this discrepancy is intentional or accidental) their legal effect is not identical, although it seems from paragraphs 5 and 6 of the memorandum that their practical effect will be the same. In the light of that, the Department considers that “article 3(1) does not add anything to the scheme of registration provisions contained in the 1983 Act”. The Committee concludes from this that article 3(1) is unnecessary, or at least that it does not have the effect that the Department intended it should have. **The Committee therefore reports article 3(1) for defective drafting.**

1.5 Article 4(5) makes provision for cases where “as a result of a decision on appeal under this article ... an alteration in the register of electors is made ...”. The Committee asked the Scotland Office how an appeal under article 4 might result in an alteration in the register of electors. As is evident from its memorandum, the Department considers that some form of provision is needed in article 4 about alterations of the kind it describes in paragraph 12 of the memorandum, but it acknowledges that the article as drafted does not reflect the type of alterations that it has in mind. **The Committee accordingly reports article 4(5) for defective drafting, acknowledged by the Department.**

1.6 Rule 20(3) of the Scottish Parliamentary Election Rules set out in Schedule 1 provides that the minor errors in nomination papers which may be corrected under rule 20 include “errors as to a person’s electoral number”. The Committee asked the Scotland Office which provision of the Rules requires a person’s electoral number to be included in a nomination paper. In its memorandum, the Department agrees that the nomination papers in question would not include electoral numbers and that the provision for their correction is therefore unnecessary. **The Committee accordingly reports rule 20(3) for defective drafting, acknowledged by the Department.**

2 S.I. 2010/2068: Reported for unjustified breach of the 21-day rule

Seal Products Regulations 2010 (S.I. 2010/2068)

2.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that there was an unjustified breach of the 21-day rule.**

2.2 These short Regulations breach the 21-day rule mentioned in section 4.13 of *Statutory Instrument Practice*, which requires that instruments subject to annulment should not normally be brought into force until at least 21 days after laying. The Regulations were made on 15 August 2010, laid before Parliament on 17 August and came into force on 20 August, allowing the reader little opportunity to consider them before commencement. They provide for the enforcement of (EC) Regulation No. 1007/2009 which was published in the Official Journal on 31 October 2009. In a memorandum printed at Appendix 2 the Department for Environment, Food and Rural Affairs recognises that the 21-day rule should have been observed on this occasion and expresses its regret for the breach. **The Committee reports the Regulations accordingly.**

3 S.I. 2010/2090: Reported for defective drafting

Local Government Pension Scheme (Miscellaneous) Regulations 2010 (S.I. 2010/2090)

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

3.2 Regulation 19(c) substitutes a new paragraph (4) in regulation 20 of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007. The text of new paragraph (4) is obviously incomplete. In a memorandum printed at Appendix 3 the Department for Communities and Local Government explains that it intended only to substitute the introductory wording in paragraph (4) rather than the entire paragraph. It aims to lay a correcting instrument within the next three months. **The Committee reports regulation 19(c) of these Regulations for defective drafting, acknowledged by the Department.**

4 S.I. 2010/2188 and S.I. 2010/2213: Reported for defective drafting

Cornwall Inshore Fisheries and Conservation Order 2010 (S.I. 2010/2188)
Isles of Scilly Inshore Fisheries and Conservation Order 2010 (S.I. 2010/2213)

4.1 **The Committee draws the special attention of both Houses to these Orders on the ground that each is defectively drafted in two related respects.**

4.2 These Orders are made under the Marine and Coastal Access Act 2009. The first Order provides for the establishment of the Cornwall Inshore Fisheries and Conservation District and for the Cornwall Inshore Fisheries Conservation Authority for that district. Article 16(1) provides that the expenses incurred by the Authority must be defrayed by Cornwall Council. In a memorandum printed at Appendix 4 the Department for Environment, Food and Rural Affairs confirms that there is no other relevant council that might be called on under the Act to defray the expenses of that Authority. As section 180(1) of the Act already has effect to ensure that in such circumstances the expenses incurred by that Authority are defrayed by Cornwall Council, article 16(1) should have been omitted, together with a redundant reference in the preamble to the enabling power in section 180(2) of that Act, which is only relevant where there is more than one relevant council for the district in question. These points are acknowledged in the memorandum, which indicates that the Department will bring forward an amending instrument (presumably to cover article 16(1) rather than the preamble, which is not so amendable) as soon as possible. **The Committee accordingly reports the preamble and article 16(1) for defective drafting, acknowledged by the Department. Equivalent points arise also in relation to the second Order.**

Instruments not reported

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

Annex

Draft Instruments requiring affirmative approval

- Draft S.I.** National Minimum Wage (Amendment) (No. 2) Regulations 2010
- Draft S.I.** National Assembly for Wales (Representation of the People) (Amendment) Order 2010
- Draft S.I.** Producer Responsibility Obligations (Packaging Waste) (Amendment) Regulations 2010

Instruments subject to annulment

- S.I. 2010/2538** National Health Service Bodies (Membership and Procedure) Amendment Regulations 2010
- S.I. 2010/2539** Primary Care Trusts (Membership, Procedure and Administration Arrangements) Amendment Regulations 2010
- S.I. 2010/2540** Health Protection Agency (Amendment) Regulations 2010
- S.I. 2010/2546** Education (Student Support) Regulations 2009 (Amendment) Regulations 2010
- S.I. 2010/2564** Controlled Drugs (Drug Precursors) (Intra-Community Trade and Community External Trade) Regulations 2010
- S.I. 2010/2567** Structural Funds (National Assembly for Wales) (Amendment) Regulations 2010
- S.I. 2010/2568** Revenue Support Grant (Specified Body) (England) Regulations 2010
- S.I. 2010/2571** Care Leavers (England) Regulations 2010
- S.I. 2010/2577** Civil Procedure (Amendment No. 3) Rules 2010
- S.I. 2010/2591** Social Fund Cold Weather Payments (General) Amendment (No. 2) Regulations 2010
- S.I. 2010/2599** Child Trust Funds (Amendment No. 4) Regulations 2010

Instruments not subject to Parliamentary proceedings laid before Parliament

- S.I. 2010/2474** Montserrat Constitution Order 2010

Appendix 1

Draft S.I.: memorandum from the Scotland Office

Scottish Parliament (Elections etc.) Order 2010 (Draft S.I.)

1. In its letter of 3rd November, the Joint Committee requested a memorandum on the following points in relation to the above instrument:

(1) Explain where the expression "European Parliamentary Election" defined in article 2 (1) is used elsewhere in the draft Order.

(2) In the light of section 13B(1) and (4)(b) of the Representation of the People Act 1983, explain the reference to "section 13A" in article 3(1).

(3) Explain in what way an appeal under article 4 might result in an alteration in the register of electors, as contemplated in article 4(5).

(4) Which provision of Part 2 of Schedule 2 requires a person's electoral number to be included in a nomination paper, so that it might require correction under rule 20(3)(a) of Schedule 2?

2. The Scotland Office's responses to those points are set out below.

(1) Explain where the expression "European Parliamentary Election" defined in article 2 (1) is used elsewhere in the draft Order."

3. The Committee has highlighted an error in the draft Order. The term "European Parliamentary Election" is not used in the draft Order and the inclusion of a definition of that term in article 2(1) is not necessary and should be removed from the Order. The Scotland Office is grateful for the Committee drawing this to Scotland Office's attention, apologises for this error and proposes to remove this redundant definition at the earliest suitable opportunity.

(2) In the light of section 13B(1) and (4)(b) of the Representation of the People Act 1983, explain the reference to "section 13A" in article 3(1).

4. A revised version of the register of local government electors is prepared each year following an annual canvass (section 13 of the Representation of the People Act 1983 ("the 1983 Act")). At any time after the publication of that revised version of the register, if certain trigger events occur (such as the registration officer having determined an application for registration in favour of the applicant), then the registration officer must issue a notice of alteration under section 13A(2) of the 1983 Act. Such notices would normally be issued and take effect on the first working day of the month following the trigger event or the month following that, depending on when in the month the trigger event fell.

5. Article 3(1) of the present draft Order provides that, subject to certain provisions, an alteration to the register is not to have effect for the purposes of an election if the alteration would take effect after the fifth (calendar) day before the date of the poll. So, for a poll on 5 May 2011, an alteration which would otherwise take effect from the beginning of 3 May (the first working day of May) is to be disregarded.

6. Section 13B(1) provides that if, by virtue of section 13A(2), an alteration in a published version of a register is to take effect after the fifth (working) day before the date of the poll, then it does not have effect for the purposes of that election. (Section 13B(6) provides for non-working days to be discounted in calculating the five day period.) For a poll on 5 May 2011, such an alteration which would otherwise have effect from the beginning of 3 May is to be disregarded.

7. Section 13B(3) provides for certain alterations to the register to take effect on “the appropriate publication date” (i.e. the fifth or sixth working day before the poll, as determined by the registration officer). Similarly section 13B(3B) and (3D) provide for certain alterations (occasioned by the result of an appeal or the correction of a clerical error respectively) to take effect on the day that the appropriate notice is issued, which can be up to and including the date of the poll.

8. Article 3(1) is made expressly subject to section 13B, so any alterations to the register which take effect on the appropriate publication date under section 13B(3) or up to the date of poll under section 13B(3B) or (3D) will have effect for the purposes of the election in question.

9. The equivalent provisions in the previous Orders made in 1999 (as amended in 2001), 2002 and 2007 have all purported to have certain alterations made after a particular date disregarded. To the best of Scotland Office’s knowledge, the inclusion of such provisions has not caused any administrative problems or prejudiced voters or the lawful conduct of elections. During the preparation of the present draft Order, including consultation with the Electoral Commission and engagement with electoral administrators this was not a provision of the 2007 Order which was identified as being in need of amendment. Scotland Office is, however, grateful to the Committee for drawing this point to their attention.

10. On reviewing article 3(1) in light of the point raised by the Joint Committee, Scotland Office is of the view that article 3(1) does not add anything to the scheme of registration provisions contained the 1983 Act. Before taking steps to amend or omit article 3(1), however, Scotland Office would wish to consult on any changes required, including statutory consultation with the Electoral Commission.

(3) Explain in what way an appeal under article 4 might result in an alteration in the register of electors, as contemplated in article 4(5).

11. In terms of paragraph 4 of Schedule 3 to the present draft Order, a copy of the register provided for use at a polling station must be marked with the letter “A” against

an entry for a voter who has a postal vote at the election. That indicates to polling staff that the elector is not entitled to vote in person at the polling station.

12. If an elector starts with a postal vote, applies to the registration officer for a proxy vote instead, the registration officer refuses the application and the elector successfully appeals to the sheriff under article 4; then the letter “A” should be removed from the polling register so that the proxy (or the elector, if the elector attended the polling station before the proxy) is not prevented from voting at the polling station.

13. Such alterations do not, however, take effect under the provisions of the 1983 Act listed in article 4(5). Scotland Office therefore acknowledges that article 4 is not cast correctly to reflect the type of changes to the register that may be necessary.

14. As with article 3(1), previous Orders have contained similar provisions on appeals without, to the best of Scotland Office’s knowledge, causing any administrative problems or prejudicing voters or the lawful conduct of elections. Again, during the preparation of the present draft Order this was not a provision of the 2007 Order which was identified as being in need of amendment. Scotland Office is once again grateful to the Committee for drawing this point to their attention. Before taking steps to amend article 4 Scotland Office would wish to consult on any changes required, including statutory consultation with the Electoral Commission.

(4) Which provision of Part 2 of Schedule 2 requires a person’s electoral number to be included in a nomination paper, so that it might require correction under rule 20(3)(a) of Schedule 2?

15. The Committee has highlighted an error in the draft Order. No provision of Part 2 of Schedule 2 requires a person’s electoral number to be included in a nomination paper. The inclusion of a reference to electoral numbers in rule 20(3)(a) is unnecessary and should not have been included. The Scotland Office is grateful for the Committee drawing this to Scotland Office’s attention, apologises for this error and proposes to remove this redundant provision at the earliest suitable opportunity. In the meantime, to minimise any confusion that might arise, Scotland Office will contact the returning officers and advise them that rule 20(3)(a) was included in error.

Scotland Office
4 November 2010

Appendix 2

S.I. 2010/2068: memorandum from the Department for Environment, Food and Rural Affairs

Seal Products Regulations 2010 (S.I. 2010/2068)

1. The Committee has asked the Department for Environment, Food and Rural Affairs for a memorandum on the following point:

Explain why this short SI was made and laid before Parliament only a few days before it came into force on 20 August, 2010, given that Regulation (EC) No. 1007/2009 was published in the Official Journal on 31 October 2009, consultation on the SI ended in May 2010 and only six responses were received, with a broad consensus in favour of adopting the regulatory model proposed.

2. Policy responsibility for implementing the Regulation is shared between the Department, Foreign and Commonwealth Office and Department for Business, Innovation and Skills. Cross departmental discussions and agreement on the provisions in the SI led to delays in finalising the text. The Department recognises that the 21 day rule should have been observed on this occasion and very much regrets the breach.

Department for Environment, Food and Rural Affairs
2nd November 2010

Appendix 3

S.I. 2010/2090: memorandum from the Department for Communities and Local Government

Local Government Pension Scheme (Miscellaneous) Regulations 2010 (S.I. 2010/2090)

1. The Committee has requested a memorandum on the following point –

“New paragraph (4) substituted by regulation 19(c) is obviously incomplete. Explain the intended effect of this provision.”

Regulation 20 (early leavers: ill-health) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (S.I.2007/1166)

2. As explained in the Explanatory Memorandum, regulation 20 sets out the eligibility criteria for the release of retirement benefits on the grounds of ill health. Experience of the practical application of the ill health regime since its introduction in April

2008, has led to a need to modify some of the early retirement ill-health provisions. In particular, independent registered medical practitioners (IRMPs) were concerned about the effect of the ‘obtaining any gainful employment’ phrase which featured throughout regulation 20 as originally drafted. IRMPs were of the view that the effect was to expect them to give an opinion which went beyond their professional competence.

3. Accordingly regulation 19 of S.I. 2010/2090 seeks to amend the ill-health eligibility criteria by replacing the phrase ‘obtaining any gainful employment’ with, ‘capable of undertaking any gainful employment’. The word ‘obtaining’ has been replaced with ‘undertaking’ where it occurs in regulation 20.
4. The intention of regulation 19(c) was to make the ‘capable of undertaking any gainful employment’ amendment, and also to insert a reference to the member reaching normal retirement age if earlier. It was not the intention to substitute paragraph (4) in its entirety, but only to substitute the introductory wording in paragraph (4) that immediately precedes sub-paragraphs (a) and (b) as those sub-paragraphs require no amendment. Owing to a drafting error, the effect of the amendment as made was unfortunately to substitute the whole of paragraph (4).
5. Whilst this particular amendment has not raised concerns amongst local government pension scheme practitioners (who have assumed that the effect was as intended: see the editorial note to the Local Government Employers, LGPS Timeline Regulations website – <http://timeline.lge.gov.uk/LGPS2008Regs/SI20102090/20071166.htm#reg20>), the Department will aim to lay a correcting instrument within the next three months, copies of which will be made available free of charge to purchasers of SI 2010/2090.

Department for Communities and Local Government
2nd November 2010

Appendix 4

S.I. 2010/2188 and 2213: memorandum from the Department for Environment, Food and Rural Affairs

Cornwall Inshore Fisheries and Conservation Order 2010 (S.I. 2010/2188)
Isles of Scilly Inshore Fisheries and Conservation Order 2010 (S.I. 2010/2213)

1. The Committee has asked the Department for Environment, Food and Rural Affairs for a memorandum on the following points:

In relation to the inclusion of section 180(2) of the Marine and Coastal Access Act 2008 in the preamble and of article 16(1), is there any other relevant council that

might have been called on to defray the expensed of the Authority as identified in the Order? If not, why were they included?

2. The Department confirms that in relation to the two orders there are no other relevant councils that might be called on to defray the expenses of the Authority. It acknowledges that referring to section 180(2) in the preamble and including article 16(1) in the orders were oversights. The Department apologises for these oversights and will bring forward an amending instrument as soon as possible.

Department for Environment, Food and Rural Affairs
2nd November 2010