



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

Twenty-second Report of Session 2006–07

Drawing special attention to:

Road Tunnel Safety Regulations 2007 (S.I. 2007/1520)

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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.

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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*). Advisory Counsel: Peter Davis, Peter Brooksbank and Christine Cogger (*Commons*) and Peter Milledge (*Lords*).

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Instruments reported

At the Committee's meeting on 4 July 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 grounds for reporting it are given below. The relevant Departmental memorandum is published as an appendix to this report.

1 S.I. 2007/1520: reported for defective drafting and unexpected use of the enabling power

Road Tunnel Safety Regulations 2007 (S.I. 2007/1520)

1.1 The Committee draws the special attention of both Houses to these Regulations on the ground that they are defectively drafted in several respects and make an unexpected use of the enabling power in two others.

1.2 Regulation 5(2) imposes various duties on the administrative authority in relation to a road tunnel for which it is the administrative authority. One of these, set out in regulation 5(2)(c), is to "ensure operational and organisational schemes are in place in accordance with paragraph (3)". Regulation 5(3) provides as follows:

(3) The administrative authority shall ensure that such operational and organisational schemes (including emergency response plans) are drawn up as are necessary for the training and equipping of the emergency services in the event of an emergency in relation to a road tunnel for which it is the administrative authority, and it shall ensure that –

(a) the schemes are in writing;

(b) a copy of the schemes is held as part of the safety documentation;

(c) the schemes are sent to the relevant emergency services; and

(d) the schemes are updated from time to time.

1.3 Given that regulation 5(2)(c) appears to add nothing to the duties imposed by regulation 5(3), the Committee asked the Department for Transport to explain the purpose of including the former. In a memorandum printed at Appendix 1, the Department states that the purpose of regulation 5(2) is to impose "a composite duty" on the administrative authority, drawing together the various obligations falling on it, and that regulation 5(2)(c) cross-refers to the more detailed requirements set out in paragraph (3).

1.4 The Committee is somewhat puzzled by this response. All four paragraphs of regulation 5, which is headed "Duties of Administrative Authority", impose duties on that authority, and those set out in paragraphs (1) and (4) are not similarly replicated in paragraph (2). Thus paragraph (2) neither brings nor purports to bring together into a single provision a "composite duty drawing together the various obligations". As it is, regulation 5(2)(c) serves no legislative purpose, and ought not to have been included. **The Committee accordingly reports regulation 5(2)(c) for defective drafting.**

1.5 Regulation 9(3) requires the Tunnel Manager for a road tunnel, within one month of an accident or significant incident occurring within the tunnel, to (a) prepare an incident report and (b) send the incident report to “such of the emergency services as are appropriate (including the administrative authority and the safety officer)”. The Department accepts that the administrative authority and the safety officer are not emergency services (as defined) and that regulation 9(3) should have referred to them in their own right rather than as being included within the term “emergency services”. **The Committee accordingly reports regulation 9(3) for defective drafting, acknowledged by the Department.**

1.6 Paragraph (1) of regulation 12 requires the administrative authority for a road tunnel to appoint a person to be the inspection entity in relation to the tunnel. Paragraph (2)(a) requires the person appointed as the inspection entity to be a Chartered Engineer or headed by a Chartered Engineer. Paragraph (3) states that the administrative authority may undertake the role of inspection entity provided that it fulfils the criteria set out in paragraph (2). By virtue of regulation 4, the administrative authority must be the Secretary of State, the Scottish Ministers, the National Assembly for Wales, the Department for Regional Development, Transport for London or a local authority. Except in the case of the Secretary of State, such an authority cannot be a Chartered Engineer, and the Committee doubts that it is intended that the Secretary of State should himself carry out the functions of the inspection entity even if he happens to be one. Similarly, the possibility of any other such authority being headed by a Chartered Engineer seems at best coincidental. The Department’s explanation for the inclusion of regulation 12(3) is that it was inserted to meet a competence level requirement in Directive 2004/54/EC but it adds the statement that it intends to review the drafting of this provision. The Committee suggests that the review should cover the underlying aim of the provision as well as the drafting. It observes that, in the context explained, any properly thought out approach to meeting the requirement in question would have involved consideration of qualifications and functions beyond the coincidental qualifications (or lack of them) on the part of the organisational head **and accordingly reports regulation 12(3) as an unexpected use of the enabling power.**

1.7 Regulation 13(1) refers variously to “visual inspections”, “examinations” and “investigations”. Regulation 13(2) refers to these as “inspections and examinations”, and regulation 13(3) refers to them as “inspections and investigations”. The Department acknowledges that the drafting of regulation 13 is inconsistent and also that the wording of regulation 13(2)(d), which has a missing opening, is defective, and **the Committee accordingly reports regulation 13 for defective drafting, acknowledged by the Department.**

1.8 Regulation 15(7) requires the administrative authority to provide the Secretary of State, as soon as possible, with a plan for the gradual compliance of a specified category of existing road tunnels with the requirements of the Regulations, and to report on the state of the plan and any changes to it by 1 October 2006. These Regulations were made on 22 May 2007 and came into force on 22 June 2007. The Department admits that the reference to 1 October 2006 should have been to 1 October 2008, and **the Committee reports regulation 15(7) for defective drafting, acknowledged by the Department.**

1.9 According to the Explanatory Note to this instrument, regulation 20 provides for good record keeping in cases where one individual occupies two roles in the management of a tunnel. However, regulation 20 makes no provision as to the keeping of records. Instead, it states that, where the Regulations impose an obligation on an administrative authority, a Tunnel Manager or the Secretary of State to send information or documentation to another of those authorities, that obligation shall apply notwithstanding that the same person acts as both authorities. In other words, it requires an authority to send documents to itself.

1.10 The Department considers that regulation 20 should ensure that complete sets of records will be created in relation to each role, but that would only be achieved by making it an express requirement. In the Committee's view, the provision as it stands imposes a pointlessly indirect requirement, and **it accordingly reports regulation 20 for making an unexpected use of the enabling power. In so far as the Explanatory Note fails to give an accurate description of the effect of regulation 20, the Committee reports it for defective drafting.**

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.

Annex

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

- *denotes that the written evidence submitted in connection with the instrument is printed with this Report*
- *denotes written evidence has been submitted but not printed*

Draft instruments requiring affirmative approval

Draft S.I.	Data Retention (EC Directive) Regulations 2007
Draft S.I.	Disability Discrimination Act 1995 (Amendment etc.) (General Qualifications Bodies) (Alteration of Premises and Enforcement) Regulations 2007
Draft S.I.	Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2007
Draft S.I.	Terrorism (Northern Ireland) Act 2006 (Transitional Provisions and Savings) Order 2007
Draft S.I.	Verification of Information in Passport Applications Etc.(Specified Persons) Order 2007

Instruments subject to annulment

S.I. 2006/3332	Health Service Commissioner for England (Special Health Authorities) (Revocation) Order 2006
S.I. 2007/1609	Justices of the Peace (Training and Development Committee) Rules 2007
S.I. 2007/1610	Family Proceedings Courts (Constitution of Committees and Right to Preside) Rules 2007
S.I. 2007/1611	Youth Courts (Constitution of Committees and Right to Preside) Rules 2007
S.I. 2007/1629	Education (Mandatory Awards) (Amendment) Regulations 2007
S.I. 2007/1630	Education (Student Loans) (Amendment) (England and Wales) Regulations 2007
S.I. 2007/1679	European Communities (Designation) (No.3) Order 2007
S.I. 2007/1683	Education (Student Loans) (Repayment) (Amendment) Regulations 2007
S.I. 2007/1688	Education (School Teachers' Pay and Conditions) (No. 2) (Amendment) Order 2007
S.I. 2007/1736	Road Traffic (Permitted Parking Area and Special Parking Area) (City of Manchester) (Amendment) Order 2007
S.I. 2007/1755	Bovine Products (Restriction on Placing on the Market) (England) (No. 2) (Amendment) Regulations 2007
S.I. 2007/1762	Criminal Justice Act 2003 (Reviews of Sentencing) (Consequential and Supplementary Provisions) Order 2007

Instruments not subject to Parliamentary proceedings not laid before Parliament

- S.I. 2006/2660** Education (Inspectors of Education and Training in Wales) Order 2006
- S.I. 2007/1372** Representation of the People (National Assembly for Wales) (Relevant Registration Officer) Order 2007
- S.I. 2007/1386** Medical Act 1983 (Qualifying Examinations) Order 2007
- S.I. 2007/1527** Gambling Act 2005 (Commencement No. 6 and Transitional Provisions) (Amendment) Order 2007
- S.I. 2007/1668** Housing Act 2004 (Commencement No. 8) (England and Wales) Order 2007
- S.I. 2007/1682** Inspectors of Education, Children's Services and Skills (No. 3) Order 2007

Appendix 1

S.I. 2007/1520: memorandum from the Department for Transport

Road Tunnel Safety Regulations 2007 (S.I. 2007/1520)

By a letter dated 20th June 2007 the Committee has asked for a memorandum on the points listed below, which have been addressed in turn —

(1) *Explain the purpose of including regulation 5(2)(c), given the terms of regulation 5(3).*

The purpose of regulation 5(2) is to impose a composite duty on the administrative authority drawing together the various obligations falling on it. In the case of operational and organisational schemes, regulation 5(2)(c) cross refers to the more detailed requirements set out in regulation 5(3).

(2) *Are the administrative authority and the safety officer emergency services? If not, why does regulation 9(3) suggest that they are?*

The administrative authority and safety officer are not emergency services. The Department accepts that regulation 9(3) should not have suggested that they are but should rather have referred to them separately, in their own right.

(3) *Explain the purpose and intended effect of regulation 12(3), given that the administrative authority must be a traffic authority as defined in regulation 4(5)(b), using examples of when the traffic authority should be allowed to undertake the role of inspection entity.*

Regulation 12(3) was included in order to give effect to Article 7 of Directive 2004/54/EC, which states that “The Administrative Authority may perform this function”. An Administrative Authority will only be able to act as an inspection entity where, in accordance with regulation 12(3), it meets the requirements of regulation 12(2). Administrative authorities are not generally headed by a Chartered Engineer as required by regulation 12(2)(a), which was inserted to meet the requirement in Article 7 that the inspection entity “has a high level of competence”. The Department intends to review the drafting of this provision.

(4) *Regulation 13 appears to use the words “inspection”, “examination” and “investigation” as if they all mean the same thing. If they are intended to mean the same thing, why are different expressions used? If they are not, why are they used inconsistently?*

Regulation 13(1) refers to “visual inspections”, “detailed examinations” and “detailed examinations and testing”. All are regarded as types of inspection involving varying degrees of scrutiny and in some cases physical intervention. However, the Department accepts that the drafting of regulation 13 as a whole is inconsistent and that it requires amendment.

(5) *Should regulation 13(2)(d) begin: “an examination under (1)(d), within three years” rather than “(1)(d) be carried out within three years”?*

The Department agrees words such as “examination and testing” were wrongly omitted from regulation 13(2)(d).

(6) *Explain how the administrative authority is expected to be able to comply with the obligation in regulation 15(7) to provide a report to the Secretary of State by 1st October 2006.*

The reference to 1st October 2006 should have been a reference to 1st October 2008. Owing to technical problems towards the end of the drafting process an earlier version of the instrument had to be reverted to and the need to alter this date was inadvertently overlooked.

(7) *Why does regulation 16 not deal with a tunnel which was put into operation after 29 April 2006 but before 22 June 2007?*

No tunnels which would be caught by these Regulations were brought into operation during this period and it was felt unnecessary to provide for this hypothetical situation. However, the Department accepts it would have been better drafting practice not to have left this gap.

(8) *According to the Explanatory Note, regulation 20 provides for good record keeping in cases where one individual occupies two roles in the management of a tunnel. Explain how regulation 20 has that effect, given that it says nothing about the keeping of records, but merely requires a person to send information or documentation to himself.*

The Department considers that regulation 20 provides for good record keeping in that it makes clear that information and document must still be sent under the Regulations even though the same person performs both the role of sender and recipient. The Department considers that the regulation should ensure that complete sets of records will be created in relation to each role.

The Department apologises to the Committee for the errors referred to above which will be corrected at an early opportunity.

Department for Transport

26th June 2007