

EXPLANATORY MEMORANDUM TO
THE UK BORDER AGENCY (COMPLAINTS AND MISCONDUCT)
REGULATIONS 2009

2009 No. 2133

1. This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 These regulations provide for the Independent Police Complaints Commission (IPCC) to provide independent oversight of serious complaints and conduct matters (including incidents where a death or serious injury has taken place) that arise as a result of UK Border Agency (UKBA) officers and officials exercising the functions of the Secretary of State in relation to immigration, asylum and customs.
- 2.2 The aim of the regulations is to provide for a system under which the IPCC will have oversight of UKBA officers carrying out immigration, asylum and customs functions following the transfer of staff from Her Majesty's Revenue and Customs (HMRC) to UKBA pursuant to the Borders, Citizenship and Immigration Act 2009 (the 2009 Act).

3. Matters of special interest to the Joint Committee on Statutory Instruments *or* the Select Committee on Statutory Instruments

- 3.1 The regulations are made under section 41 of the Police and Justice Act 2006, as amended by section 30 of the 2009 Act. The section 30 amendments give the Secretary of State power to make regulations to give the IPCC oversight of certain persons who are scheduled to transfer from HMRC to the UKBA on 5th August 2009.
- 3.2 The Department and HMRC had to agree on a date for the transfer of personnel while the 2009 Act was being prepared. This date was settled on, balancing the likely bill timetable and the beginning of summer recess against the imperative of transfer at the earliest opportunity on getting Royal Assent.
- 3.3 The regulations could not be made therefore until that section was commenced on 21st July 2009 (the same day as the 2009 Act received Royal Assent). The Department takes the view that it is essential that there is independent oversight of those persons transferring from HMRC to UKBA. Therefore, given the date of transfer of staff, and the desire to secure IPCC oversight of those persons from the date of transfer, the Department takes the view that it reasonable to breach the 21 day rule.

4. Legislative Context

- 4.1 The IPCC was established under Part 2 of the Police Reform Act 2002.
- 4.2 Section 41 of the Police and Justice Act 2006 allows the Secretary of State to make regulations to give the IPCC oversight over immigration officers and officials of the Secretary of State exercising enforcement functions. As a result of this legislation, the Independent Police Complaints Commission (Immigration and Asylum Enforcement Functions) Regulations 2008 (S.I. 2008/212) were made to confer functions on the IPCC in relation to immigration officers and officials of the Secretary of State exercising certain specified enforcement functions in relation to immigration and asylum.
- 4.3 Parliament legislated to secure the transfer of certain customs functions from HMRC to the Secretary of State. The 2009 Act provided the required powers to facilitate the transfer of these functions from HMRC to the Secretary of State, and which will be exercised by persons in UKBA. Section 30 of that Act amends section 41 of the Police and Justice Act 2006 to give the Secretary of State power to make regulations to enable the IPCC continue to have oversight over HMRC personnel transferring from HMRC to UKBA. The IPCC currently has oversight over those persons under the Revenue and Customs (Complaints and Misconduct) Regulations 2005 (S.I. 2005/3311, as amended by S.I. 2006/1748).

5. Territorial Extent and Application

- 5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

The Parliamentary Under-Secretary of State for Crime Reduction, Alan Campbell, MP has made the following statement regarding Human Rights:

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- *What is being done and why*

- 7.1 Historically whilst immigration officers and some officials of the Secretary of State had police-like enforcement powers (for instance they were given the power of arrest in the Immigration Act 1971) they worked alongside and in tandem with police officers who would ordinarily take the lead in using those powers. In recent years however, working practices have changed and in response to this the Government decided that if such powers are to be exercised by immigration officers and officials routinely and independently from the police, levels of oversight similar to those in place for the police would be required.

- 7.2 The Department made S.I. 2008/212 to secure the IPCC's remit over serious complaints, and conduct matters relating to the use of specified enforcement functions by immigration officers and officials of the Secretary of State exercising immigration or asylum functions. Prior to making regulations under these powers the Government undertook a full public consultation on the details of the proposed oversight. The Independent Police Complaints Commission Oversight of Border and Immigration Agency Incidents and Complaints – Consultation Paper was published in July 2007. An Analysis of Responses and Policy Statement were subsequently published in February 2008 and laid in the Parliamentary libraries. The documents were also published on the UKBA website (<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/ipccconsultation/>).
- 7.3 Similarly the Government acknowledged the need for oversight of HMRC's investigation into all cases of alleged serious misconduct in light of a recommendation from the Butterfield report of 2003. Lord Butterfield's review (published at http://www.hm-treasury.gov.uk/butterfield03_report_index.htm) followed the collapse of a number of high profile fraud and drug prosecution cases which lead to HMRC staff being subject to allegations of serious professional misconduct.
- 7.4 As a result of this, HMRC made S.I. 2005/3311 to establish independent oversight of the exercise of powers by HMRC officers by the IPCC. In bringing forward this oversight HMRC undertook consultation with the IPCC, Home Office, Association of Chief Police Officers, and Cabinet Office.
- 7.5 On 25 July 2007 the Prime Minister announced the Government's decision to integrate the vital work of the Border and Immigration Agency, Customs and UKvisas overseas and at the main points of entry to the UK and establish a unified border force. Subsequently the Government brought forward enabling legislation (the 2009 Act) to facilitate the transfer of staff and functions and to provide a power to maintain the IPCC's remit over all these functions in England and Wales.
- 7.6 These regulations provide a single, coherent scheme for IPCC oversight of UKBA personnel exercising immigration, asylum and customs functions.

- ***Consolidation***

- 7.7 These regulations revoke S.I. 2008/212 and replace those regulations with a single, coherent scheme for IPCC oversight of UKBA immigration, asylum and customs functions.

8. Consultation outcome

- 8.1 Section 7 above sets out details of previous consultation on the issue of introducing IPCC oversight over: (a) immigration and asylum matters; and (b) customs and revenue matters.
- 8.2 The Government's plans to create the UKBA were subjected to parliamentary scrutiny during the passage of the 2009 Act. In addition Government officials have undertaken short focussed consultation on these regulations with HMRC, the IPCC

and relevant staff unions on the minor changes these regulations bring. A full public consultation is not deemed necessary as the regulations essentially reinstate existing IPCC oversight following machinery of Government changes.

- 8.3 The consultees are content with the minor changes these regulations bring.

9. Guidance

- 9.1 Internal UKBA guidance is being updated to reflect the IPCC's continuing oversight over the HMRC personnel that will transfer to UKBA on 5th August 2009 and to take account of the other minor changes these regulations bring.

- 9.2 Guidance for UKBA customers is not necessary as complaints from members of the public will be dealt with in the same way as before under the new arrangements. However, UKBA will update leaflets, its website and other information sources so that customers know that UKBA now deal with custom matters, and that complaints about persons carrying out customs functions can now be made to UKBA.

10. Impact

- 10.1 There will be no impact on business, charities or voluntary bodies.
- 10.2 The impact on the public sector is limited to the UKBA, the IPCC and the police. The regulations provide a power for the IPCC to require police forces to carry out investigations into UKBA complaints, conduct matters under its management or supervision, or at the request of UKBA. There has always been a role for the police under the 2008 Regulations.
- 10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

- 11.1 The legislation does not apply to small business.

12. Monitoring & review

- 12.1 These regulations should secure that the IPCC has the necessary powers to oversee the most serious complaints, and conduct matters relating to UKBA staff.
- 12.2 Officials from UKBA and the IPCC regularly engage in dialogue and meet to discuss matters related to the IPCC's oversight. Periodically the Department will review discussions held regarding these regulations and will consider whether it would be advantageous to make any modifications.

13. Contact

Claire Jones at the United Kingdom Border Agency (Tel: 0161 261 1106 or email: Claire.jones13@homeoffice.gsi.gov.uk) can answer any queries regarding the instrument.