



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

Eighth Report of Session 2013-14

Drawing special attention to:

*Firefighters' Pension Scheme (Amendment) (No. 2) (England) Order
2013 (S.I. 2013/1392)*

*Ordered by the House of Lords to be printed
17 July 2013*

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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 Sarah Petit (*Commons Clerk*), Jane White (*Lords Clerk*) and Liz Booth (*Committee Assistant*). Advisory Counsel: Peter Davis, Peter Brooksbank, Philip Davies and Daniel Greenberg (*Commons*); Nicholas Beach and Peter Milledge (*Lords*).

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Instruments reported

At its meeting on 17 July 2013 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 one of those considered. The Instrument and the grounds for reporting it is given below. The relevant Departmental memorandum is published as an appendix to this report.

S.I. 2013/1392: Reported for doubtful *vires*

Firefighters' Pension Scheme (Amendment) (No. 2) (England) Order 2013 (S.I. 2013/1392)

1.1 The Committee draws the special attention of both Houses to this Order on the ground that there appears to be a doubt as to whether it is *intra vires*.

1.2 The Order amends the Firefighters' Pension Scheme 1992 set out in Schedule 2 to the Firemen's Pension Scheme Order 1992 (S.I. 1992/129). The Order is made under section 26 of the Fire Services Act 1947, and under section 12 of the Superannuation Act 1972 as applied by section 16(3) of that Act to orders under section 26.

1.3 Article 1(2) of the Order reads as follows:

“(2) This Order shall come into force on 1st July 2013, but the amendment made by article 2 and—

(a) paragraph 12(c) of the Schedule (which relates to rule K4 - withdrawal of pension whilst employed by a fire and rescue authority) shall have effect from 25th September 2009;

(b) sub-paragraphs (ii), (iii) and (iv) of paragraph 2(f) of the Schedule (which relates to rule B5B - additional pension benefit: long service increment); and

(c) paragraph 2(g) of the Schedule (which substitutes for rule B5C (additional pension benefit: continual professional development) rule B5C(additional pension benefit)) so far as it relates to the increase of the additional pension benefit under paragraph (3) and the definitions of “beginning date” and “following relevant tax year” in paragraph (6) of rule B5C,

shall have effect from 11th April 2011.”

1.4 The Committee notes that the presentation of this provision has the incongruity that there are provisions under the same indenting hierarchy that do not have the same effect as each other. That infelicity, as the Committee sees it, could readily have been avoided by more conventional use of paragraphing. This observation is made in passing and, taken alone, would not have caused the Committee to query the provision.

1.5 More significantly, however, article 1(2), by providing for paragraph 12(c) of the Schedule to the Order to have effect from 25 September 2009 and for paragraph 2(f)(ii), (iii) and (iv) (and, to a specified extent, paragraph (g)) of the Schedule to have effect from

11 April 2011, makes retroactive provision capable of causing disadvantage to those affected. Paragraph 12(c) of the Schedule makes provision for the withdrawal of the whole or part of a pension for any period during which the person entitled to it is employed by a fire and rescue authority. Paragraph 2(f)(ii), (iii) and (iv) and (g) provides for increases in pensions to be in line with changes in the Consumer Prices Index rather than the Retail Prices Index. Given the retroaction and the potential for disadvantage, the Committee asked the Department for Communities and Local Government to explain the authority for the inclusion of article 1(2).

1.6 In a memorandum printed at the Appendix, the Department correctly points out that subsection (1) of section 12 of the Superannuation Act 1972 (as applied by section 16(3)) provides that an order may be framed so as to have effect as from a date earlier than the making of the order. But because the provisions referred to in article 1(2) cover pensions in payment, and pensions which may become payable in respect of persons who have ceased to be in service or died, before the provisions came into operation, the right to include them depends on subsection (2) of section 12. Under that subsection provision covering such pensions may be made but subject to subsection (4) of that section. As the Department accepts, subsection (4) provides that any persons who are placed in a worse position by such provisions must be given the opportunity to elect that the provisions should not apply to them, subject to subsection (4A). (Subsection (4A) limits the effect of an election in the case of someone still in service, or who subsequently returns to service.)

1.7 The Department acknowledges that, while section 12(1) and (2) would permit the provisions mentioned in article 1(2) to be included (with retrospective effect) if subsection (4) of that section were complied with, compliance with that subsection requires the provision of a right for those who (when the provisions came into operation) were pensioners, prospective pensioners who had ceased to be in employment or persons benefiting in respect of members who had died to elect that the provisions should not apply to them where they would be put in a worse position by the provisions. No such right was included. The Department states that it intends to make a further order conferring a right of election in such cases to remedy the defect. The Committee is grateful for that but would just observe that, in determining which of the amendments made by the Order need to have a right of election built into them, the Department should have regard to the fact that subsections (2) and (4) of section 12 (as qualified by subsection (4A)) appear to cover any changes affecting pensioners, prospective pensioners who have ceased to be in employment and persons benefiting in respect of members who have died, before their commencement, whether or not they operate retroactively.

1.8 The Committee accordingly reports the Order on the ground, acknowledged in principle by the Department, that there appears to be a doubt as to whether it is *intra vires*.

Instruments not reported

At its meeting on 17 July 2013 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.	Armed Forces (Alcohol Limits for Prescribed Safety-Critical Duties) Regulations 2013
Draft S.I.	National Health Service (Licence Exemptions, etc.) Regulations 2013
Draft S.I.	Health and Social Care Act 2012 (Consequential Amendments) (No. 2) Order 2013
Draft S.I.	Jobseeker's Allowance (Domestic Violence) (Amendment) Regulations 2013
Draft S.I.	Court of Appeal (Recording and Broadcasting) Order 2013
Draft S.I.	Police and Criminal Evidence Act 1984 (Amendment: Qualifying Offences) Order 2013
Draft S.I.	European Parliamentary Elections (Amendment) Regulations 2013

○ The Explanatory Memorandum laid with the Criminal Procedure Rules 2013 (S.I. 2013/1554) contains the co-ordinated response for rules of court, covering the use of 'will' as an auxiliary verb, anticipated in paragraph 10 the Committee's First Special Report of Session 2013-14. While the Committee has no point to raise on the Criminal Procedure Rules 2013 themselves, the validity of any arguments relating to any other rules of court, whether set out in full in an accompanying explanatory memorandum or incorporated by reference to the current one, will fall to be considered by the Committee once those other rules of court are laid.

Instruments subject to annulment

S.I. 2013/1505	Mobile Homes (Pitch Fees) (Prescribed Form) (England) Regulations 2013
S.I. 2013/1509	Social Fund Winter Fuel Payment (Amendment) Regulations 2013
S.I. 2013/1510	Social Security (Persons Required to Provide Information) Regulations 2013
S.I. 2013/1512	Health and Safety (Miscellaneous Revocations and Amendments) Regulations 2013
S.I. 2013/1544	Rent Officers (Housing Benefit and Universal Credit Functions) (Amendment) Order 2013

- S.I. 2013/1553** Lawrence Sheriff School (Pupil Premium Admissions Priority) Order 2013
- S.I. 2013/1554** Criminal Procedure Rules 2013
- S.I. 2013/1562** Serious Organised Crime and Police Act 2005 (Designated Sites under Section 128) (Amendment) Order 2013
- S.I. 2013/1565** Fixed Penalty Offences Order 2013
- S.I. 2013/1568** Football Spectators (Seating) Order 2013
- S.I. 2013/1569** Fixed Penalty (Amendment) Order 2013
- S.I. 2013/1570** Electricity Generating Stations (Variation of Consents) (England and Wales) Regulations 2013
- S.I. 2013/1572** Education (Designated Institutions) (England) Order 2013
- S.I. 2013/1575** Property Misdescriptions Act 1991 (Repeal) Order 2013
- S.I. 2013/1579** Penalties for Disorderly Behaviour (Amount of Penalty) (Amendment) (No. 2) Order 2013
- S.I. 2013/1598** Evidence Through Television Links (England and Wales) Order 2013

Instruments not subject to Parliamentary proceedings not laid before Parliament

- S.I. 2013/1511** Welfare Reform Act 2012 (Commencement No. 11 and Transitional and Transitory Provisions and Commencement No. 9 and Transitional and Transitory Provisions (Amendment)) Order 2013
- S.I. 2013/1513** Education (National Curriculum) (Key Stages 1 and 2 Assessment Arrangements) (England) (Amendment) Order 2013
- S.I. 2013/1518** Public Service Pensions Act 2013 (Commencement No. 1) Order 2013

Appendix

S.I. 2013/1392: memorandum from the Department for Communities and Local Government

<i>Firefighters' Pension Scheme (Amendment) (No. 2) (England) Order 2013 (S.I. 2013/1392)</i>
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1. The Committee has requested a memorandum on the following point:

Explain the authority for the inclusion of article 1(2).

2. Article 1(2) provides that the amendment in paragraph 12(c) of the Schedule (which relates to rule K4- withdrawal of pension whilst employed by a fire and rescue authority) should have effect from 25th September 2009.
3. Article 1(2) also provides that the further amendments should have effect from 11th April 2011. These amendments are those in sub-paragraphs (ii), (iii) and (iv) of paragraph 2(f) of the Schedule (which relates to rule B5B- additional pension benefit: long service increment) and paragraph 2(g) of the Schedule (which substitutes for rule B5C (additional pension benefit: continual professional development) rule B5C(additional pension benefit)) so far as it relates to the increase of the additional pension benefit under paragraph (3) and the definitions of “beginning date” and “following relevant tax year” in paragraph (6) of rule B5C.
4. The power relied on for making these amendments was section 12 of the Superannuation Act 1972 as applied by section 16(3) of that Act. Subsection (1) of section 12 confers a power to make retrospective provision. However subsection (2) only enables retrospective provision to be made in respect of pensions which are in payment or may become payable to persons who have ceased to serve in pensionable employment (whether or not they have subsequently recommenced any such service) or who have died. This is subject to subsection (4) which requires that a person who is placed in a worse position by an amendment which is made in exercise of the power in subsection (2) to be able to elect that the amending provisions should not apply to them. Subsection (4A) limits the effect of the election where the person who made it is serving in an employment to which the orders governing the pension apply or if he subsequently recommences such an employment so that the election only has effect to the extent that the pension accrues or has accrued by virtue of service or pension contributions rendered before the last cessation of employment prior to the coming into force of the order.
5. The Department acknowledges that in the case of the amendment to rule K4 and those amendments to rules B5B and B5C which have retrospective effect, a right should have been provided by the order for those who had ceased to be in

employment or, for those benefitting in respect of members who had died, to elect that that the amendments should not apply to them where those amendments would place those persons in a worse position.

6. The Department intends to make a further order providing a right for such persons to be able to elect that the amendment should not apply to them if those retrospective amendments placed them in a worse position. The right of election will only apply to those who would have been able to elect if a right to elect had been provided in the order on 1st July.
7. The right to elect will apply to all members affected by the retrospective operation of the amendment to K4. There may be some circumstances where they may choose to accept the detrimental aspect of the retrospective provisions if in their case those effects are counter-balanced by other benefits.

Department for Communities and Local Government
9 July 2013