



House of Lords  
House of Commons  
Joint Committee on  
Statutory Instruments

---

**Thirtieth Report of  
Session 2017–19**

---

**Drawing special attention to:**

*Housing Administration (England and Wales) Rules 2018 (S.I. 2018/719)*

*Transmissible Spongiform Encephalopathies (England) Regulations 2018 (S.I. 2018/731)*

*Higher Education (Transparency Condition and Financial Support) (England) Regulations 2018 (Draft S.I.)*

*Ordered by the House of Lords  
to be printed 18 July 2018*

*Ordered by the House of Commons  
to be printed 18 July 2018*

**HL 176  
HC 542-xxx**

Published on 20 July 2018  
by authority of the House of Lords  
and the House of Commons

## Joint Committee on Statutory Instruments

### Current membership

#### House of Lords

[Baroness Bloomfield of Hinton Waldrist](#) (*Conservative*)

[Lord Lexden](#) (*Conservative*)

[Baroness Meacher](#) (*Crossbench*)

[Lord Morris of Handsworth](#) (*Labour*)

[Lord Rowe-Beedoe](#) (*Crossbench*)

[Lord Rowlands](#) (*Labour*)

[Baroness Scott of Needham Market](#) (*Liberal Democrat*)

#### House of Commons

[Derek Twigg MP](#) (*Labour, Halton*) (Chair)

[Dan Carden MP](#) (*Labour, Liverpool, Walton*)

[Vicky Foxcroft MP](#) (*Labour, Lewisham, Deptford*)

[Patrick Grady MP](#) (*Scottish National Party, Glasgow North*)

[John Lamont MP](#) (*Conservative, Berwickshire, Roxburgh and Selkirk*)

[Julia Lopez MP](#) (*Conservative, Hornchurch and Upminster*)

[Sir Robert Syms MP](#) (*Conservative, Poole*)

### Powers

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. 73, available on the Internet via [www.parliament.uk/jcsi](http://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 Order of both Houses. All publications of the Committee are on the Internet at [www.parliament.uk/jcsi](http://www.parliament.uk/jcsi).

#### **Committee staff**

The current staff of the Committee are Mike Winter (Commons Clerk), Jane White (Lords Clerk) and Liz Booth (Committee Assistant). Advisory Counsel: Daniel Greenberg, Klara Banaszak, Peter Brooksbank, Philip Davies and Vanessa MacNair (Commons); James Cooper, Nicholas Beach, John Crane and Ché Diamond (Lords).

#### **Contacts**

All correspondence should be addressed to the Clerk of the Joint Committee on Statutory Instruments, House of Commons, London, SW1A 0AA. The telephone number for general inquiries is: 020 7219 2026; the Committee's email address is: [jcsi@parliament.uk](mailto:jcsi@parliament.uk).



# Contents

---

<b>Instruments reported</b>	<b>3</b>
1 S.I. 2018/719: Reported for requiring elucidation and for defective drafting	3
Housing Administration (England and Wales) Rules 2018	3
2 S.I. 2018/731: Reported for defective drafting	4
Transmissible Spongiform Encephalopathies (England) Regulations 2018	4
3 Draft S.I. 2018: Reported for doubt as to whether they are <i>intra vires</i>	4
Higher Education (Transparency Condition and Financial Support) (England) Regulations 2018	4
<b>Instruments not reported</b>	<b>9</b>
<b>Annex</b>	<b>9</b>
<b>Appendix 1</b>	<b>10</b>
S.I. 2018/719	10
Housing Administration (England and Wales) Rules 2018	10
<b>Appendix 2</b>	<b>12</b>
S.I. 2018/731	12
Transmissible Spongiform Encephalopathies (England) Regulations 2018	12
<b>Appendix 3</b>	<b>13</b>
Draft S.I.	13
Higher Education (Transparency Condition and Financial Support) (England) Regulations 2018	13



# Instruments reported

---

At its meeting on 18 July 2018 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 three 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 S.I. 2018/719: Reported for requiring elucidation and for defective drafting

### *Housing Administration (England and Wales) Rules 2018*

1.1 **The Committee draws the special attention of both Houses to these Rules on the grounds that they require elucidation in one respect and are defectively drafted in one respect.**

1.2 These Rules set out the detailed procedures for the conduct of housing administration, a special administration regime which applies to private registered providers of social housing.

1.3 Paragraph 4.3 of the Explanatory Memorandum states that that these Rules mirror as far as possible the Insolvency (England and Wales) Rules 2016 and paragraph 10.3 states that it is expected that these provisions will be used very infrequently. The Committee asked the Ministry of Housing, Communities and Local Government to explain why it was decided to produce lengthy stand-alone Rules instead of using the application and modification technique.

1.4 In a memorandum printed at Appendix 1, the Department explains that, while it would have been possible to use the application and modification technique, it considered that it would be of greater assistance to and clearer for users (registered providers in housing administration, their creditors and insolvency practitioners) to produce a stand-alone housing administration regime, particularly given that these Rules would be used infrequently. The Department also assert that stand-alone rules reduce the risk that unknowingly a practitioner might not be alerted to diverging from the usual Rules. The Department point out that this approach is frequently used for special administration regimes (such as the Postal Administration Rules 2013 (S.I. 2013/3208) and the Energy Administration Rules 2015 (S.I. 2015/2483)). **The Committee accordingly reports these Regulations for requiring the elucidation provided by the Department.**

1.5 The Committee also asked the Department to explain why Rule 2.11 does not make provision to reflect the possibility of the appointment of more than two housing administrators in accordance with section 101(4) of the Housing and Planning Act 2016 and Rule 2.3(5)(e). The Department's memorandum does not answer the question. **The Committee accordingly reports Rule 2.11 for defective drafting.**

1.6 (The Committee also asked a question in relation to Rule 4.41(2)(a) which the Department's memorandum helpfully answers).

## 2 S.I. 2018/731: Reported for defective drafting

### ***Transmissible Spongiform Encephalopathies (England) Regulations 2018***

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

2.2 These Regulations amend arrangements for administering and enforcing Council Regulation (EC) No. 999/2001 of the European Parliament and the Council, as amended (the EU TSE Regulation) which lays down rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies.

2.3 Paragraph 9(1) of Schedule 2 states “The Secretary of State must approve laboratories to test samples taken under if satisfied that the laboratory...” The Committee asked the Department of Environment, Food and Rural Affairs to explain what wording is intended to follow “under” in the introductory sentence to paragraph 9(1).

2.4 In a memorandum printed at Appendix 2, the Department explains that the words “these Regulations” should follow the word “under” and undertakes to make the amendment at the earliest opportunity. **The Committee accordingly reports paragraph 9(1) of Schedule 2 for defective drafting, acknowledged by the Department.**

## 3 Draft S.I. 2018: Reported for doubt as to whether they are *intra vires*

### ***Higher Education (Transparency Condition and Financial Support) (England) Regulations 2018***

**3.1 The Committee draws the special attention of both Houses to these Regulations on the ground that there is doubt as to whether they are *intra vires* in one respect.**

3.2 These Regulations are made under the Higher Education and Research Act 2017 (“the 2017 Act”). Part 1 of that Act establishes the Office for Students (“the OfS”) as the independent regulator of higher education in England and requires the OfS to establish and maintain a register of English higher education providers.

3.3 Under section 9 of the 2017 Act, the OfS must ensure that the ongoing registration conditions of each registered higher education provider of a prescribed description include a “transparency condition”. “Prescribed” means prescribed by regulations made by the Secretary of State. The purpose of regulation 4 of the draft Regulations is to prescribe, for the purposes of section 9, those providers whose ongoing registration conditions must include a “transparency condition”.

3.4 A “transparency condition” requires a provider to provide to the OfS, and publish, such information about the following matters as the OfS requests:

- the number of applications for admission to higher education courses that the provider has received,
- the number of offers made by the provider in relation to those applications,

- the number of those offers that were accepted,
- the number of students who accepted those offers that completed their course,
- the number of students who attained a particular degree or other award on completion of their course, and
- a breakdown of the numbers referred to above by gender, ethnicity and socio-economic background of applicants and students.

3.5 Under section 39 of the 2017 Act, the OfS may make grants, loans or other payments to a registered higher education provider of a description prescribed by regulations made by the Secretary of State. The purpose of regulation 5 of the draft Regulations is to prescribe, for the purposes of section 39, those providers to which the OfS may make grants, loans or other payments.

3.6 In regulations 4 and 5, the relevant providers are prescribed solely by reference to the proposed names for parts of the (as yet, unwritten) register of English higher education providers which the OfS is required by section 3 of the 2017 Act to establish and maintain.

3.7 Under regulation 4, the providers which are to be subject to a transparency condition are those registered in the ‘Approved’ and ‘Approved (fee cap)’ parts of the register.

3.8 Under regulation 5, the providers which may receive financial support from the OfS are those registered in the ‘Approved (fee cap)’ part of the register.

3.9 Significantly, the OfS has wide discretion under section 3 as to (a) how it divides the register into parts, (b) the names it gives to those parts and (c) the part in which a provider is registered. Although it is expected that the OfS will divide the register into different parts representing different categories of registration – including parts called ‘Approved’ and ‘Approved (fee cap)’ – there is nothing in the 2017 Act which requires them to do this nor is there anything in that Act which sets out what those terms mean.

3.10 Consequently, the effect of regulations 4 and 5 depends on how the OfS chooses to divide and name parts of the register, and what the OfS decides qualifies providers to be registered in the different parts.

3.11 Regulations 4 and 5 appear to confer legislative functions on the OfS in a way that amounts to sub-delegation of a kind that requires express enabling power. The Committee therefore asked the Department for Education to identify the *vires* for these provisions.

3.12 The Department has produced a Memorandum in response, printed at Appendix 3. Paragraph 10 of that Memorandum states-

*“The Department recognises that prescribing, via these regulations, a description of provider that rests on an underlying determination made by the OfS regarding its registration category is capable of amounting to sub-delegation”.*

3.13 The Department argues that this is permitted by section 119(5)(d) of the 2017 Act which provides that regulations under the Act may-

*“include provision framed by reference to matters determined or published by the OfS (whether before or after the regulations are made)”.*

3.14 The Committee considers that there is doubt as to whether section 119(5)(d) authorises the sub-delegation inherent in regulations 4 and 5. The presumption against sub-delegation is a strong one, for obvious rule of law reasons, and does not appear to be rebutted clearly in this case.

3.15 As explained in Craies on Legislation (10th Edition), paragraph 3.5.1-

*“As a general rule the person on whom a power to legislate is conferred cannot use that power to confer a further power to legislate. But Parliament can, of course, provide for departures from this rule by express power to sub-delegate.”*

3.16 Although section 119(5)(d) allows regulations to include provision framed by reference to matters determined by the OfS, that is not the same as allowing the Secretary of State to delegate to the OfS any element of the powers conferred on him by sections 9 and 39 of the 2017 Act, let alone to confer a very broad discretion on the OfS. The Department’s interpretation of section 119(5)(d) would allow the nature of the powers conferred by sections 9 and 39 to be fundamentally altered.

3.17 If Parliament had intended this, the Committee would have expected the 2017 Act to contain far more explicit authorisation.<sup>1</sup> Section 119(5)(d) may instead be seen as granting powers which are ancillary to the principal powers granted by provisions such as those in sections 9 and 39, not as permitting an alteration in the nature, or a substantive extension, of those powers. In its judgment in *R (on the application of The Public Law Project) v Lord Chancellor* ([2016] UKSC 39), the Supreme Court referred (in paragraph 36) to comparable powers in section 41 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 in the following terms-

*“Section 41 is clearly intended to grant ancillary powers to those powers which are, as it were, primarily granted by provisions such as section 9: it is not intended to permit an alteration in the nature, or a substantive extension, of those powers”.*

3.18 Further, the Committee considers that section 119(5)(d) should be read as being subject to the implied restriction that any provision in regulations that is framed by reference to matters determined by the OfS must sufficiently describe the matters determined to make the nature and effect of the determination made by the OfS clear on the face of the regulations.

---

1 For an example of explicit authorisation of sub-delegation, see paragraph 3 of Schedule 3 of the Health Act 1999, which provides that the power to make an Order under section 60 of that Act, “may be exercised so as to make provision for the delegation of functions, including provision conferring power to make, confirm or approve subordinate legislation.”

### 3.19 This test is not met by the draft Regulations:

- simply setting out the names of the parts of the register in which the relevant providers are entered gives no indication of the matters which have been determined by the OfS as qualifying a particular provider to be entered into the particular part of the register. The names are capable of relating to an almost limitless range of scenarios, and therefore indicate nothing about the nature or effect of the determination made by the OfS;
- this problem is exacerbated by the fact that there is nothing in section 3 of the 2017 Act to require the OfS to establish the register with parts having these names. Therefore, it is possible, if the OfS decides not to use the names referred to in the draft Regulations for parts of the register, that the regulations would fail to provide any description of providers to whom a transparency condition would apply or to whom financial support may be provided; and
- a further problem is the fact that the OfS could decide to change over time the matters which qualify a provider for entry into a particular named part of the register. Therefore, not only is it unclear what the nature and effect of the determination made by the OfS is, but also the nature and effect of the determination could change over time without any change being made to the regulations themselves.

3.20 The Committee would contrast the provision made in the draft Regulations with the following example of provision which section 119(5)(d) could reasonably be considered to have been intended by Parliament to allow. The OfS is responsible under section 25 of the 2017 Act for devising a ratings scheme for providers with different levels of ratings. The Secretary of State has power under Schedule 2 to decide which level of the ratings scheme devised by the OfS constitutes a “high level quality rating”. This sets the level which must be reached by a provider for the fee limit to be set at its highest amount. In the Committee’s view, this arrangement clearly contemplates that regulations made by the Secretary of State under Schedule 2, read with section 119(5)(d), may include provision framed by reference to matters determined by the OfS.

3.21 Sections 9 and 39 of the 2017 Act confer distinct functions on the OfS and on the Secretary of State respectively. The functions conferred on the OfS under section 9 include:

- a duty to ensure that the ongoing registration conditions of prescribed providers include a transparency condition; and
- a discretion to request from providers which are subject to a transparency condition, and to publish, information about numbers of applications for admission to courses, offers made and accepted, etc.

3.22 The function under section 9 of prescribing in regulations providers to whom a transparency condition must apply is conferred on the Secretary of State, not the OfS. Parliament has, moreover, required that the exercise of this function is subject to affirmative procedure scrutiny.

3.23 In its 10th Report of Session 2016–17,<sup>2</sup> the House of Lords Delegated Powers and Regulatory Reform Committee (“the DPRRC”) noted the significance of this regulation-making power and recommended that the affirmative procedure should apply to it-

*“Regulations under [section 9] are fundamental to the scope of [section 9] because they define the registered higher education providers to whom the transparency condition applies”.*

3.24 The functions conferred on the OfS under section 39 include:

- making grants, loans or other payments to “eligible providers”; and
- making grants, loans or other payments to any person in respect of expenditure incurred by them for the purposes of the provision of services in connection with the provision of education by “eligible providers” receiving grants, loans or other payments from the OfS.

3.25 Section 39 also specifies that it is a matter for the Secretary of State, not the OfS, to determine by regulations which providers are “eligible providers” and thus which providers may receive financial support - and the 2017 Act requires that this determination is subject to the affirmative procedure.

3.26 In its 10th Report of Session 2016–17, the DPRRC noted the significance of this regulation-making power too, and recommended that the affirmative procedure should apply-

*“We consider the power conferred by [section 39(1)] to be significant because it will have the effect of determining the kinds of registered higher education providers who are to be entitled to public funding”.*

3.27 The Department argues that, read with section 119(5)(d), there is clear authorisation for the Secretary of State to delegate the powers in sections 9 and 39 to the OfS. The Committee disagrees and, as indicated above, considers that there is doubt as to whether Parliament envisaged that powers conferred on the Secretary of State by those sections would in fact be exercised by the OfS. The Committee has not seen anything in the Delegated Powers Memoranda or in the debates on the Bill which makes it clear that this was contemplated.

3.28 The Committee is unclear how Parliament can be expected to scrutinise and approve regulations made by the Secretary of State under the affirmative procedure where the real decision-making contemplated by the enabling powers is to be done by the OfS when it comes to prepare the register under section 3, instead of by the Secretary of State in regulations, and could in any event be changed by the OfS at any time without scrutiny by Parliament. The Committee understands, moreover, that the register may not be finalised or published by the time that Parliament is expected to approve the draft Regulations.

**3.29 Accordingly, the Committee reports regulations 4 and 5 for doubt as to whether they are *intra vires* because the sub-delegations of legislative power to the OfS are not clearly authorised by the 2017 Act.**

## Instruments not reported

---

At its meeting on 18 July 2018 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 instrument requiring affirmative approval

**Draft S.I.**            Business Contract Terms (Assignment of Receivables) Regulations 2018

### Instruments subject to annulment

**S.I. 2018/786**        Financial Services and Markets Act 2000 (Prospectus and Markets in Financial Instruments) Regulations 2018

**S.I. 2018/794**        Childcare (Disqualification) and Childcare (Early Years Provision Free of Charge) (Extended Entitlement) (Amendment) Regulations 2018

**S.I. 2018/795**        Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2018

**S.I. 2018/801**        Immigration (European Economic Area) (Amendment) Regulations 2018

**S.I. 2018/803**        Civil Legal Aid (Procedure, Remuneration and Statutory Charge) (Amendment) Regulations 2018

### Instrument not subject to Parliamentary proceedings laid before Parliament

**S.I. 2018/807**        Offshore Installations (Safety Zones) Order 2018

### Instruments not subject to Parliamentary proceedings not laid before Parliament

**S.I. 2018/805**        Housing and Planning Act 2016 (Commencement No. 9 and Transitional and Saving Provisions) Regulations 2018

**S.I. 2018/808**        European Union (Withdrawal) Act 2018 (Commencement and Transitional Provisions) Regulations 2018

**S.I. 2018/817**        Investigatory Powers Act 2016 (Commencement No. 6) Regulations 2018

# Appendix 1

---

## S.I. 2018/719

### ***Housing Administration (England and Wales) Rules 2018***

1. The Committee has requested a memorandum on the following points:

*(1) Given that these Rules mirror as far as possible the Insolvency (England and Wales) Rules 2016 (paragraph 4.3 of the Explanatory Memorandum) and it is expected that these provisions will be used very infrequently (paragraph 10.3 of the Explanatory Memorandum), explain why it was decided to produce lengthy stand-alone Rules instead of using the application and modification technique.*

*(2) Given that section 101(4) of the Housing and Planning Act 2016, when it comes into force, envisages the appointment of two or more housing administrators (as does Rule 2.3(5)(e)), explain why Rule 2.11 does not make provision for the appointment of more than one housing administrators.*

*(3) In relation to Rule 4.41(2)(a), explain how the decision as to whether to appeal to a High Court Judge sitting in a district registry or to an Insolvency and Companies Court Judge should be made and given effect.*

2. In relation to the Committee's first question, the Department considered that it would be of greater assistance to both registered providers in housing administration, their creditors, and to Insolvency Practitioners to produce a separate regime which applies where the registered provider is in housing administration. The Department acknowledges that it would have been possible to use the application and modification technique, but considers that would have led to a result which is less clear for users of the legislation, particularly bearing in mind that they will be using these Rules infrequently. The special administration regime is quite different to "regular" administration; we considered being stand-alone reduced the risk that unknowingly a Practitioner might not be alerted to diverging from the usual Rules. It is not solely Insolvency Practitioners who will need to use the Rules; creditors and the members of the registered provider (as well as its officers) will need to know the rights and obligations which the Rules give them. While practitioners are used to working with the usual Rules, creditors and officers/members will likely not be. This approach is frequently used for special administration regimes (such as the Postal Administration Rules 2013 (S.I. 2013/3208) and the Energy Administration Rules 2015 (S.I. 2015/2483)).

3. The Committee's second question asks about the appointment of more than one housing administrator. The court's power to appoint more than one housing administrator derives from the interaction between section 101(1) of the Housing and Planning Act and Rule 2.3. Rule 2.3 sets out the required contents of an application for housing administration, which include matters relating to the appointment of more than one housing administrator. The court then has the power under section 101(1) to make the order (or make the other orders, including dismissing the application, set out in that section). The Department does not consider that any other provision is needed to set out

the court's power to appoint more than one housing administrator as it considers it is clear from this interaction. Rule 2.11 does not need to make this provision as it does not itself give the court power to make an order, but sets out what step the court should take, it having made an order.

4. In relation to the Committee's third question, Rule 4.41(3) applies Schedule 10 to the Insolvency (England and Wales) Rules 2016 to Rules 4.41(2)(a). This sets out to which judge and court an appeal should be made to. For example, an appeal from a district judge in Chesterfield should be made to the Leeds District Registry, and an appeal from a district judge in Colchester should be made to the Registrar in Bankruptcy (now renamed the Insolvency and Companies Court Judge, as set out in the relevant footnote to the definition of Insolvency and Companies Court Judge).

**Ministry of Housing, Communities and Local Government**

**9 July 2018**

## Appendix 2

---

### S.I. 2018/731

#### ***Transmissible Spongiform Encephalopathies (England) Regulations 2018***

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

*Explain what wording is intended to follow “under” in the introductory sentence to paragraph 9(1) of Schedule 2.*

2. The Department notes that the two words that should have followed the word “under” were “these Regulations” so that the paragraph would have read:

#### **Approval of TSE testing laboratories**

9.—(1) The Secretary of State must approve laboratories to test samples taken under these Regulations if satisfied that the laboratory—

- (a) will carry out the testing in accordance with Chapter C of Annex 10, and
- (b) has adequate quality control procedures in place, which include being able to accurately identify the correct identification of the samples and notification of test results.

3. The Department regrets the mistake that occurred during final checks.

4. The Department will amend the instrument to insert the missing words “these Regulations” at the earliest opportunity.

**Department for Environment, Food and Rural Affairs**

**10 July 2018**

## Appendix 3

---

### Draft S.I.

#### ***Higher Education (Transparency Condition and Financial Support) (England) Regulations 2018***

1. In its letter to the Department of Education of 4 July 2018, the Joint Committee requested a memorandum on the following point:

*Identify the vires for regulations 4 and 5.*

2. This memorandum has been prepared by the Department for Education. The Department is grateful to the Committee for the opportunity to provide an explanation in respect of the above.

3. The Department understands that the Joint Committee’s request specifically relates to whether it is legitimate for these regulations to prescribe a description of a registered higher education provider by reference to that provider’s registration category.

4. The Department’s view is that sections 9, 39 and section 119(5)(d) of the Higher Education and Research Act 2017 (HERA) provide the necessary *vires*. In particular, the latter expressly permits provisions in any regulations made under that Act to be framed by reference to matters determined or published by the OfS. That encompasses the making of regulations which prescribe, for the purposes of provisions under HERA (including sections 9 and 39), descriptions of provider by reference to their category of registration, since that is a matter determined by the OfS.

5. The Department’s view is that, properly considered, section 119(5)(d) makes helpful specific provision as to how regulation-making powers in HERA may legitimately be exercised. It provides specifically that regulations made under HERA may “include provision framed by reference to matters determined or published by the OfS (whether before or after the regulations are made)”. In the Department’s view there are two potential questions as to *vires*. First, whether section 119(5)(d) applies to regulations made under sections 9 and 39. Second, if it does apply, whether that section is able to authorise registered higher education providers to be prescribed by reference to their registration category.

6. On the first point the Department considers that section 119(5)(d) does apply to the powers to prescribe in sections 9 and 39. In its view, section 119(5)(d) is not fenced off from the specific powers in sections 9 and 39. Instead, section 119(5)(d) is of general effect and applies to any and all regulations-making powers provided by HERA.

7. Regarding that general effect, the Department considers it significant that there is no restriction in section 119(5)(d) regarding the regulation-making powers to which it applies. In its view this establishes that Parliament intended that section 119(5)(d) should apply in relation to any such powers under HERA, including sections 9 and 39. This is emphasized further by section 119(6) which states that nothing in HERA is to be regarded as affecting the generality of section 119(5). The fact that the power in s119(5)(d) is not

located or replicated specifically in section 9 or 39 in no way affects the availability of that power when making regulations under those sections: the generality of the provision makes such replication or emphasis unnecessary.

8. On the second point the Department’s view is that the language in section 119(5)(d) and section 3(2) of HERA, taken together, permits regulations to prescribe a description of provider on the basis of its registration category.

9. Section 3(2) states that the OfS may divide the register into different parts representing “such different categories of registration as the OfS may determine”. As above, section 119(5)(d) creates a clear and (in the Department’s view) deliberate cross-reference to this provision when stating that regulations under HERA may include provision “framed by reference to matters determined or published by the OfS” (emphasis added). If the division of the register into different categories is a matter that is either determined or published by the OfS – and section 3(2) says expressly that it is – then the Department’s view is that section 119(5)(d) necessarily authorises a reference to that category in regulations which prescribe a description of provider. It may be of further interest to the Joint Committee that the Office of the Parliamentary Counsel has confirmed that the reference in section 119(5)(d) to matters determined by the OfS was included to enable regulations to make provision framed by reference to any matter determined by the OfS, including matters determined under section 3(2). The wording would therefore, in their view, be apt to cover the sort of provision contemplated by regulations 4 and 5.

10. The Department recognises that prescribing, via these regulations, a description of provider that rests on an underlying determination made by the OfS regarding its registration category is capable of amounting to sub-delegation. However, it follows from the Department’s analysis in paragraph 9 that any such sub-delegation has been authorised by Parliament when HERA was passed and is, consequently, lawful. Further, such an effect is consistent with the purpose and effect of the wider statutory scheme which is to ensure that the regulatory requirements for any provider registered, from time to time, in a particular category of the register are both clear and apply consistently across that category.

11. In light of the above, the Department is of the view that section 119(5)(d) provides the *vires* for the reference in regulations 4 and 5 of this instrument to the registration category in which a higher education provider is registered. We hope that the Committee finds this memorandum helpful and the Department is, of course, happy to provide any further assistance that the Committee requires.

**Department for Education**

**10 July 2018**