



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

Thirty-second Report of Session 2017–19

Drawing special attention to:

Wildlife Licence Charges (England) Order 2018 (S.I. 2018/771)

*Motor Vehicles (Driving Licences) (Amendment) Regulations 2018
(S.I. 2018/784)*

*Airports (Noise-related Operating Restrictions) (England and Wales)
Regulations 2018 (S.I. 2018/785)*

*Court of Protection, Civil Proceedings and Magistrates' Courts Fees
(Amendment) Order 2018 (S.I. 2018/812)*

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Joint Committee on Statutory Instruments

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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.

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.

Committee staff

The current staff of the Committee are Jeanne Delebarre (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).

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Instruments reported

At its meeting on 12 September 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 four 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. 2018/771: Reported for unexpected use of the enabling power

Wildlife Licence Charges (England) Order 2018

1.1 The Committee draws the special attention of both Houses to this Order on the ground that it appears to make unexpected use of the enabling power.

1.2 This Order sets out a charging scheme for certain licences issued by Natural England relating to wildlife conservation. Article 4 sets out certain exemptions from charges, one of which is that the principal purpose of the project to which the licence relates is to maintain or improve the conservation of an historic property (article 4(1)(b)(iii)). Article 4(2) goes on to list what “historic property” includes but does not provide an exhaustive definition.

1.3 The Committee asked the Department for Environment, Food and Rural Affairs to explain the meaning of the term “historic” and, in particular, whether it is intended that a newly constructed place of worship should automatically be within the definition.

1.4 In a memorandum printed at Appendix 1, the Department asserts that “historic” does not depend on the property’s age and carries its natural meaning, that is, “of particular interest, importance or significance in history, or famous, or likely to become so.” The Department also confirms that it is intended that a newly constructed place of worship is within the definition of historic property.

1.5 The Committee accepts that “historic” can naturally be used to refer to a new building that is expected to become famous; but it seems counter-intuitive to include in that category any building by reason only of its being a place of worship. This seems a surprising result, and the Committee accordingly reports article 4(2) as being an unexpected use of the enabling power.

2 S.I. 2018/784: Reported for failure to comply with proper legislative practice

Motor Vehicles (Driving Licences) (Amendment) Regulations 2018

2.1 The Committee draws the special attention of both Houses to these Regulations on the ground that they fail to comply with proper legislative practice in one respect.

2.2 These Regulations provide that the holder of a category B licence may drive certain types of alternatively-fuelled vehicles which exceed the maximum authorised mass of

a category B vehicle provided that person has undertaken five hours of training on the driving of such vehicle with an instructor on the National Register of LGV instructors or the National Vocational Driving Instructors Register.

2.3 The Committee asked the Department for Transport to explain why the instrument does not give an address where a hard copy of the National Register of LGV instructors and the National Vocational Driving Instructors Register can be inspected free of charge.

2.4 In a memorandum printed at Appendix 2, the Department explains that it intends to amend the Explanatory Memorandum to provide contact details for a person within the Department to whom queries about inspecting hard copies of the Registers, free of charge, should be addressed.

2.5 The Committee is grateful for this response which reflects the importance which the Committee attaches to this issue of access to justice (see the First Special Report of Session 2017–19, Transparency and Accountability in Subordinate Legislation at paragraphs 4.5 to 4.8). In accordance with that Report, the Committee would expect to see the contact details in the Explanatory Note rather than the Explanatory Memorandum. **The Committee accordingly reports these Regulations for failure to comply with proper legislative practice, acknowledged by the Department.**

3 S.I. 2018/785: Reported for defective drafting

Airports (Noise-related Operating Restrictions) (England and Wales) Regulations 2018

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 These Regulations implement, in relation to England and Wales, the requirement to designate competent authorities for the purposes of Regulation (EU) No 598/2014 of the European Parliament and of the Council of 16th April 2014 on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Union airports within a Balanced Approach and repealing Directive 2002/30/EC.

3.3 Regulation 6 requires airport operators to provide a competent authority with such information as the authority may require to enable it to carry out its functions under the 2014 Regulation. There is no sanction for failure to comply with this obligation and the Committee asked the Department for Transport to explain.

3.4 In a memorandum printed at Appendix 3, the Department explains that as with regulation 13 of the Aerodromes (Noise Restrictions) (Rules and Procedures) Regulations 2003 (S.I. 2003/1742) which regulation 6 of this instrument replaces, no specific sanction is provided for failure to comply with regulation 6. The Department asserts that an application for an injunction (pursuant to general legal and equitable principles) can be made to enforce the statutory duty which regulation 6 places on the airport operator.

3.5 The Department goes on to explain that in practice regulation 13 of the 2003 Regulations has operated effectively for many years because it is generally in an airport

operator's best interests to maintain a good relationship with the competent authority and information relevant to noise-related operating restrictions is also required under other regimes as detailed in the Department's memorandum.

3.6 It is an important principle of legislative drafting that every provision purporting to impose an obligation should be enforceable by way of a sanction or other identifiable consequence. The Committee does not agree that, as a general principle, an injunction is a satisfactory remedy in these circumstances. The fact that airport operators may have general reasons for wishing to cooperate with competent authorities is not a sufficient substitute for a clear legal route for enforcement of a statutory duty (although a specific prospect of regulatory consequences might be). **The Committee accordingly reports regulation 6 for defective drafting.**

4 S.I. 2018/812: Reported for reducing fees

Court of Protection, Civil Proceedings and Magistrates' Courts Fees (Amendment) Order 2018

4.1 **The Committee draws the special attention of both Houses to this Order on the ground that it reduces fees.**

4.2 This Order reduces certain fees payable in civil and insolvency proceedings and proceedings in the Court of Protection.

4.3 In the Explanatory Memorandum (to which the Department adds no further information in its memorandum printed at Appendix 4), the Ministry of Justice explains that most of the fees subject to this instrument were last amended in April 2014 via the Civil Proceedings Fee (Amendment) Order 2014 (S.I. 2014/874) and the Magistrates' Courts Fees (Amendment) Order 2014 (S.I. 2014/875). They were part of wider reforms to the fees charged for civil and family proceedings which had the aim of bringing civil and family fees closer to a full cost recovery level. A review by the Department of fees against the cost of the service has now identified that some of those fees were inadvertently set above full cost recovery levels. This Order corrects the position. The current fees charged in the Court of Protection were set in 2007 on the basis that they were below the full cost of those proceedings. The review of the unit costs of fees has also confirmed that certain of those fees are above cost and those fees are also reduced to full cost recovery levels by this Order.

4.4 The Department will be establishing a refund scheme for those who have been overcharged.

4.5 The Committee has looked at a number of recent instruments which increased fees, sometimes by large multiples, for the stated purpose of cost recovery. The Committee therefore notes with satisfaction that the Department has monitored the effect of increased fees and taken necessary action in this instrument to reduce them to meet the originally stated intention. The Committee hopes that other Departments that have increased fees are undertaking the same kind of post-legislative scrutiny for the same purpose. **The Committee accordingly reports the Order as being worthy of the Houses' attention for the reasons given.**

Instruments not reported

At its meeting on 12 September 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 instruments requiring affirmative approval

Draft S.I.	Armed Forces (Terms of Service) (Amendments Relating to Flexible Working) Regulations 2018
Draft S.I.	Companies (Directors' Report) and Limited Liability Partnerships (Energy and Carbon Report) Regulations 2018
Draft S.I.	Building Societies Legislation (Amendment) (EU Exit) Regulations 2018
Draft S.I.	Department for Transport (Fees) (Amendment) (EU Exit) Regulations 2018
Draft S.I.	Electricity and Gas (Energy Company Obligation) Order 2018
Draft S.I.	Cambridgeshire and Peterborough Combined Authority (Adult Education Functions) Order 2018
Draft S.I.	Civil Aviation (Insurance) (Amendment) (EU Exit) Regulations 2018
Draft S.I.	European Union (Withdrawal) Act 2018 (Consequential Amendments) Regulations 2018
Draft S.I.	Greater Manchester Combined Authority (Adult Education Functions) Order 2018
Draft S.I.	Liverpool City Region Combined Authority (Adult Education Functions) Order 2018
Draft S.I.	Merchant Shipping (Monitoring, Reporting and Verification of Carbon Dioxide Emissions) (Amendment) (EU Exit) Regulations 2018
Draft S.I.	Tees Valley Combined Authority (Adult Education Functions) Order 2018
Draft S.I.	West Midlands Combined Authority (Adult Education Functions) Order 2018
Draft S.I.	West of England Combined Authority (Adult Education Functions) Order 2018
Draft S.I.	Armed Forces (Specified Aviation and Marine Functions) Regulations 2018
Draft S.I.	Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018

Instruments subject to annulment

S.I. 2018/841	CRC Energy Efficiency Scheme (Revocation and Savings) Order 2018
S.I. 2018/858	Financial Market Infrastructure Administration (Designation of VocaLink) Order 2018
S.I. 2018/861	Republic of Maldives (Asset-Freezing) Regulations 2018
S.I. 2018/875	Immigration and Nationality (Fees) (Amendment) (EU Exit) Regulations 2018
S.I. 2018/894	Export Control (Burma Sanctions) (No. 2) Order 2018
S.I. 2018/908	Food and Rural Affairs (Miscellaneous Revocations) Regulations 2018
S.I. 2018/915	Home Loss Payments (Prescribed Amounts) (England) Regulations 2018
S.I. 2018/927	Hartpury College (Transfer to the Higher Education Sector) Order 2018
S.I. 2018/933	School Teachers' Incentive Payments (England) Order 2018

Draft Instruments subject to negative procedure

Draft S.I.	Dartford (Electoral Changes) Order 2018
Draft S.I.	North Devon (Electoral Changes) Order 2018
Draft S.I.	Redcar and Cleveland (Electoral Changes) Order 2018

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. 2018/859	Code of Practice for the Welfare of Laying Hens and Pullets (Appointed Day and Revocation) (England) Order 2018
S.I. 2018/873	Investigatory Powers Act 2016 (Commencement No. 7 and Transitional and Saving Provisions) Regulations 2018
S.I. 2018/881	Welfare Reform Act 2012 (Commencement No. 17, 19, 22, 23 and 24 and Transitional and Transitory Provisions (Modification) (No. 2)) Order 2018

Appendix 1

S.I. 2018/771

Wildlife Licence Charges (England) Order 2018

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

(1) Given that Article 4(2) is inclusive and not exclusive, how old does a property have to be before becoming historic?

(2) Is it intended that a newly constructed place of worship should be within the definition of historic property?

2. In response to the first point, the use of the word “historic” carries its natural meaning, i.e. of particular interest, importance or significance in history, or famous, or likely to become so. Whether or not a property is “historic” does not depend on its age (in contrast to something which is “historical” (i.e. pertaining to history)). This meaning is specifically reflected in the definition of “historic property” in section 13(8) of the Historic Environment Scotland Act 2014 as “a heritable property which is of historical, archaeological, architectural or cultural significance or interest”. We consider this definition articulates the ordinary meaning of the phrase in a slightly fuller way, by specifying particular types of importance or interest. We also consider that, in the absence of such a definition specifying particular types of importance or interest, the meaning can be expressed more succinctly as suggested above, and that the phrase does not require definition in order to have that meaning.

3. In response to the second point, it is intended that a newly constructed place of worship is within the definition of an historic property.

Department for Environment, Food and Rural Affairs

23 July 2018

Appendix 2

S.I. 2018/784

Motor Vehicles (Driving Licences) (Amendment) Regulations 2018

1. By a letter dated 18th July 2018, the Joint Committee on Statutory Instruments requested a memorandum on the following point:

Explain why the instrument does not give an address where a hard copy of the National Register of LGV instructors and the National Vocational Driving Instructors Register can be inspected free of charge.

2. In its First Special Report of Session 2017 - 19 on “Transparency and Accountability in Subordinate Legislation”, the Committee set out its view that availability details should be given for both hard copy and electronic versions of documents referred to in subordinate legislation.

3. The Department recognises the importance of the availability of hard copy documents for those who do not have access to the internet and the Department has already taken steps to remind its drafting lawyers of the importance the Committee attaches to the accessibility of relevant documents, and will remind them again.

4. The Department intends to amend the Explanatory Memorandum for the Motor Vehicles (Driving Licences) (Amendment) Regulations 2018 to provide contact details for a person within the Department to whom queries about inspecting hard copies of the Registers, free of charge, at the Department’s address in Horseferry Road should be addressed.

Department for Transport

24 July 2018

Appendix 3

S.I. 2018/785

Airports (Noise-related Operating Restrictions) (England and Wales) Regulations 2018

1. By a letter dated 18th July 2018, the Joint Committee on Statutory Instruments requested a memorandum on the following point:

What is the sanction for failure to comply with regulation 6?

2. As with regulation 13 of the Aerodromes (Noise Restrictions) (Rules and Procedures) Regulations 2003 (S.I. 2003/1742) which regulation 6 of the present instrument replaces, no specific sanction is provided for failure to comply with regulation 6. This leaves the possibility of an application for an injunction, pursuant to general legal and equitable principles, to enforce the statutory duty which regulation 6 places on the airport operator.

3. In practice regulation 13 of the 2003 Regulations has operated effectively for many years without the need to consider making such an application (or the question of who would be the appropriate applicant in such a case). This may be in part because it is generally in an airport operator's best interests to maintain a good relationship with the competent authority and to comply with any request for information, and in part because information relevant to noise-related operating restrictions is also required under a number of other regimes as explained below.

4. In relation to Heathrow, Gatwick and Stansted Airports, which are designated airports under section 80 of the Civil Aviation Act 1982, the Secretary of State has powers under section 78(8) of that Act to require the manager of the airport to measure noise in the vicinity of the airport and to make reports to the Secretary of State with respect to the noise measured. Failure to make such reports is an offence under section 78(9).

5. In relation to other airports, noise-related operating restrictions are usually introduced in the context of an application for planning permission or development consent for the development of the airport. As a result, relevant information is generally required through the application process, or subsequently through the use of powers to enforce planning obligations and requirements.

6. Further information is available through the airport noise maps which are required by the Environmental Noise (England) Regulations 2006 (S.I. 2006/2238) or the Environmental Noise (Wales) Regulations 2006 (S.I. 2006/2629). Regulations 26 and 27 of these Regulations include specific enforcement powers for the Secretary of State or Welsh Assembly.

7. Given this background, the Government does not consider it necessary to introduce an additional specific sanction for breach of regulation 6 at this stage, when none has been available since 2003. However the Department will of course keep this issue under careful review, in particular if any evidence emerges that a further specific sanction is required.

Department for Transport

24 July 2018

Appendix 4

S.I. 2018/812

Court of Protection, Civil Proceedings and Magistrates' Courts Fees (Amendment) Order 2018

1. On 18 July 2018, the Committee requested that the Ministry of Justice submit a memorandum on the following point in respect of the Court of Protection, Civil Proceedings and Magistrates' Courts Fees (Amendment) Order 2018 (S.I. 2018/812):

The Committee notes, with approval, the Department's explanation of why it is decreasing certain fees payable in proceedings in the Court of Protection, insolvency proceedings and civil proceedings. The Department is invited to submit any further information it wishes to add (if any).

2. We are grateful to the Committee for providing the Department with the opportunity to submit further information. On this occasion, we confirm that we do not wish to do so.

Ministry of Justice

24 July 2018