



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

Thirty-fourth Report of Session 2017–19

Drawing special attention to:

Marine Licensing (Application Fees) (Amendment) Regulations 2018
(S.I. 2018/850)

*Independent Educational Provision in England (Provision of Information)
and Non-Maintained Special Schools (England) and Independent School
Standards (Amendment) Regulations 2018 (S.I. 2018/901)*

*Local Government (Structural Changes) (General) (Amendment) Regulations
2018 (S.I. 2018/930)*

Social Security (Treatment of Arrears of Benefit) Regulations 2018
(S.I. 2018/932)

*Ordered by the House of Lords
to be printed 17 October 2018*

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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. 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

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Instruments reported

At its meeting on 17 October 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. 2018/850: Reported for requiring elucidation

Marine Licensing (Application Fees) (Amendment) Regulations 2018

1.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that they require elucidation in two respects.**

1.2 These Regulations amend the fee structure and fee rates for marine licence applications made under Part 4 of the Marine and Coastal Access Act 2009. The amendments include increasing the hourly fee rate for certain marine licence applications by 30 per cent and introducing a new travel fee. In the Explanatory Memorandum, the Department for Environment, Food and Rural Affairs assert that the increase is necessary to ensure that applicants meet all costs associated with the determination of a marine licence application.

1.3 The Committee asked the Department to summarise the objections made to the increases in the hourly fee rate and the new travel fee referred to in paragraph 8.2 of the Explanatory Memorandum and, in particular, to identify whether any consultees asserted that the new fees are above reasonable cost recovery rates.

1.4 In a memorandum printed at Appendix 1, the Department explains that a large majority of respondents did not object to the increase in hourly fee rate though a small number asserted that it was more than that charged for similar commercial activity or otherwise that the increase was too high. In relation to the new travel fee, the Department again explains that a large majority of respondents did not provide comments though some were concerned that travel should be undertaken in the most cost-effective manner. The Department notes that the Government has confirmed that the Marine Management Organisation (MMO) will agree all travel arrangements with applicants in advance and the MMO has committed to publish updated internal and external guidance to ensure that the circumstances in which travel costs are charged are clearly understood. **The Committee accordingly reports these Regulations for requiring the elucidation provided by the Department's memorandum.**

2 S.I. 2018/901: Reported for defective drafting

Independent Educational Provision in England (Provision of Information) and Non-Maintained Special Schools (England) and Independent School Standards (Amendment) 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 set out the information which independent schools must supply to the Secretary of State in an application for registration as an independent school, in an initial return and in annual returns. Paragraph 15(2)(b) of the Schedule defines “relevant year” for an annual return (other than the first annual return) for which certain information must be provided as:

“(i) the period of one year ending on the day before the date to which the return is made up; and

(ii) the two years immediately before that.”

2.3 The Committee asked the Department for Education to explain how paragraph 15(2)(b) of the Schedule is intended to work in the case of the second annual return. In a memorandum printed at Appendix 2, the Department explains that paragraph 15(2)(b) is intended to require schools to provide the relevant figure for each of the three years prior to the date of the return, including a nil return for years in which it did not operate. However, the Department acknowledges that there is a lacuna in the drafting. Where a school has been registered for less than three complete calendar years, it will not be possible for it to comply with the requirement in paragraph 15(2)(b)(ii) where it was in operation before registering as an independent school and, for example, does not have recorded data for that period.

2.4 The Department undertakes to address this by amending the Regulations at the next available opportunity and in the meantime will take no action where a school does not comply with the requirement in paragraph 15(2)(b) because it cannot. The Department also undertakes to include reference to this issue in guidance and an explanation of how schools are expected to deal with years in which they were not operating or required to register. **The Committee accordingly reports paragraph 15(2)(b) of the Schedule for defective drafting, acknowledged by the Department.**

3 S.I. 2018/930: Reported for defective drafting

Local Government (Structural Changes) (General) (Amendment) 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 two respects.

3.2 These Regulations continue the process of implementing changes to the structure of local government in England as set out in the Local Government and Public Involvement in Health Act 2007.

3.3 Regulation 3(4) modifies the community right to challenge under Part 5 of the Localism Act 2011 to reflect the creation of and transition to single-tier councils. The modifications apply in specific circumstances and require a reference to an authority to be read as a reference to the single-tier council. There are exceptions where the modifications do not apply. The Committee asked the Ministry of Housing, Communities and Local Government to clarify the intended meaning of “relevant authority” in those excepted provisions, having regard to the fact that the modifications are expressed to operate on the definition of “relevant authority”.

3.4 In a memorandum printed at Appendix 3, the Department states that in sections 81(1)(a) and 82(1) to (3) “relevant authority” is intended to continue to have the original meaning in the unmodified primary legislation and to mean the predecessor council, to which the expression of interest was submitted. The Committee does not agree with the Department’s assertion that this intention is clear. The original definition did not refer to the predecessor council and the application of the modifications to the definition means that there is no longer a clear result when searching for the meaning of “relevant authority”, particularly in relation to section 82. **The Committee accordingly reports regulation 3(4) for defective drafting.**

3.5 Regulation 4(3) amends regulation 10 of the Local Government (Structural Changes) (Transfer of Functions, Property, Rights and Liabilities) Regulations 2008 to allow a proportion—rather than the entirety—of a predecessor council’s financial reserves to be held on trust for successor councils.

3.6 In regulation 10, beneficiaries of the trust, which also have decision-making powers relating to its distribution, are referred to as “the successor councils concerned”, a term which is defined for the purposes of regulation 10. The amendments refer simply to “the successor councils”, and the Committee asked the Department to clarify whether the expression is intended to have the same meaning as the defined term “the successor councils concerned”. In a memorandum printed at Appendix 3, the Department confirms that it does. Given the Department’s confirmed intention, the defined term should have been used, and the **Committee accordingly reports regulation 4(3) for defective drafting on this additional ground.**

4 S.I. 2018/932: Reported for requiring elucidation

Social Security (Treatment of Arrears of Benefit) Regulations 2018

4.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that they require elucidation in two respects.**

4.2 These Regulations make provision about the circumstances in which payment of arrears of child benefit will be disregarded in calculations relating to income-related benefits and Universal Credit.

4.3 Regulation 8 amends the Universal Credit (Transitional Provisions) Regulations 2014 by inserting new regulation 10A, which provides that arrears payments of £5,000 or more will be disregarded from the calculation of the claimant’s capital in certain circumstances. The Committee asked the Department for Work and Pensions to clarify what periods of time were meant by the phrases “during the current award” and “during an award of an existing benefit”.

4.4 In a memorandum printed at Appendix 4, the Department explained that this refers in each case to the period of time during which the claimant is entitled to an award of the relevant benefit, in accordance with the legislation governing that benefit (e.g. by meeting the basic and financial conditions specified in sections 4 and 5 of the Welfare Reform Act 2012). That period of time starts at the point the award of the benefit is made and ends when the award of the benefit terminates. Although the expression does not appear to

be used generally in this sense in the Regulations and is not immediately intuitive, the Committee accepts that the meaning asserted by the Department is likely to be the only one that can be attributed to the expression in this context.

4.5 The Committee also asked the Department to explain the circumstances in which a payment to which new regulation 10A(2) applies would, but for that paragraph, fall to be taken into account in calculating a claimant's capital.

4.6 In its memorandum, the Department clarified that regulation 10A(2) creates an exception to the general rule for disregarding capital in calculating Universal Credit entitlement, which is set out in regulation 48 of and paragraph 18 of Schedule 10 to the Universal Credit Regulations 2013. Whereas payments of arrears of benefit are normally disregarded for only 12 months from the date of payment, regulation 10A(2) provides that where certain conditions are met, such payments may be disregarded until the end of a claimant's entitlement to Universal Credit even where that is later than 12 months after the date of payment. The Committee notes the Department's explanation.

4.7 The Committee accordingly reports regulation 8 as requiring elucidation on the two matters set out in the Department's memorandum.

Instruments not reported

At its meeting on 17 October 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. Child Support (Miscellaneous Amendments) Regulations 2018
- Draft S.I. International Road Transport Permits (EU Exit) Regulations 2018

Instruments subject to annulment

- S.I. 2018/964 Rural Development Programme (Transfer) (England) Regulations 2018
- S.I. 2018/966 Simple Pressure Vessels, Electrical Equipment and Pressure Equipment (Miscellaneous Amendments) (Northern Ireland) Regulations 2018
- S.I. 2018/967 Electricity (Individual Exemptions from the Requirement for a Generation Licence) (England and Wales) Order 2018
- S.I. 2018/970 Police, Fire and Crime Commissioner for North Yorkshire (Fire and Rescue Authority) Order 2018
- S.I. 2018/980 Scotland Act 2016, Wales Act 2017 and Onshore Petroleum (Consequential, Transitional and Saving Provisions and Model Clauses) Regulations 2018
- S.I. 2018/998 School Teachers' Pay and Conditions Order 2018
- S.I. 2018/1004 Vehicle Drivers (Certificates of Professional Competence) (Amendment) (EU Exit) Regulations 2018
- S.I. 2018/1011 European Communities (Designation Orders) (Revocation) (EU Exit) Regulations 2018
- S.I. 2018/1012 European Union (Definition of Treaties Orders) (Revocation) (EU Exit) Regulations 2018

Instruments not subject to Parliamentary proceedings not laid before Parliament

- S.I. 2018/931 Finance Act 2018, Section 14 and Schedules 4 and 5 (Commencement) Regulations 2018
- S.I. 2018/965 Pension Schemes Act 2017 (Commencement No. 2) Regulations 2018
- S.I. 2018/1002 NHS Foundation Trusts (Trust Funds: Appointment of Trustees) Revocation Order 2018
- S.I. 2018/1003 Financial Guidance and Claims Act 2018 (Commencement No. 2) Regulations 2018
- S.I. 2018/1029 Financial Guidance and Claims Act 2018 (Commencement No. 3 and Transitory Provisions (Modification)) Regulations 2018

Appendix 1

S.I. 2018/850

Marine Licensing (Application Fees) (Amendment) Regulations 2018

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

Summarise the objections made to the increases in the hourly fee rate and the new travel fee referred to in paragraph 8.2 of the Explanatory Memorandum and, in particular, identify whether any consultees asserted that the new fees are above reasonable cost recovery rates.

2. There were 76 responses to the consultation. The “Summary of responses and Government response” dated June 2018¹ (the Government response) summarises the comments made by respondents. The section entitled “Question C: Do you have any views on the proposed changes to the fees structure for marine licence applications and the proposed level of fees for Band 2 and Band 3 applications?” summarises the comments made in relation to the new hourly fee rate and the new travel fee. There were 61 responses to this question.

Hourly Rate

3. 19 respondents of the 61 who replied to this question made no comment in relation to the increase in the hourly rate.

4. Eight respondents out of 61 commented that they understood the need to increase the hourly rate to ensure that fees reflect the actual cost of determining a licence application.

5. 12 respondents out of 61 strongly objected to the proposed increase in the fee rate from £94 per hour to £122 per hour.

- a) Four respondents commented that the revised hourly rate is comparable to or in excess of that charged for similar commercial activity, with one respondent commenting that the Marine Management Organisation (MMO) is over-valuing staff time.
- b) Two respondents commented that the 30% increase in the fee rate would be well above the rate of inflation.
- c) The other five respondents provided more general comments about the scale of the increase and suggested that it was too high.

6. The remaining respondents who replied to this question made comments in relation to issues other than the level of the increase in the hourly rate.

1 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725898/marine-licensing-fees-consult-sum-resp.pdf

Travel Fee

7. 13 respondents of the 61 who replied to this question provided comments on the new travel fee. (Comments on the hourly rate element of the travel fee are summarised in the “Hourly Rate” section above.)

- a) Two respondents were concerned about the lack of a cap on travel expenses.
- b) Four respondents raised concerns about paying for staff time whilst they were travelling to meetings, especially where this time was not being used to work on the relevant application.
- c) Five respondents commented that they would expect the MMO to travel in the most cost-effective manner possible, and provide the applicant with information on travel costs.
- d) One respondent commented that travel should be charged at a discounted rate, and one respondent commented that this change would alter the way in which he/she engaged with the MMO.

8. The Department notes that the Government response confirmed that the MMO will offer travel as a final option and that the MMO will agree all travel arrangements with applicants in advance. The MMO also committed to publish updated internal and external guidance to ensure that the circumstances in which travel costs are charged are clearly understood.

Department for Environment, Food and Rural Affairs

18 September 2018

Appendix 2

S.I. 2018/901

Independent Educational Provision in England (Provision of Information) and Non-Maintained Special Schools (England) and Independent School Standards (Amendment) Regulations 2018

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

Explain how paragraph 15(2)(b) of the Schedule is intended to work in the case of the second annual return.

2. The Department is grateful to the Committee for its question.
3. Paragraph 15(2)(b) is intended to require schools to provide the relevant figure for each of the three years prior to the date of the return. It requires a school which has not been in operation for the full three years prior to the date of its second annual return to provide figures for the years in which it did not operate. The school can comply with that obligation by providing a nil return for those years.
4. However where a school has been registered for less than three complete calendar years, there may be limited circumstances in which it will not be possible for it to comply with the requirement in paragraph 15(2)(b)(ii) because:
 - a) the school was in operation before it registered as an independent school; but
 - b) it does not have data for that period (for example because it was not recorded or because the current proprietor does not have access to it).

This is an unintended lacuna in the drafting which the Department will address by amending the regulations at the next available opportunity.

5. In the meantime, we anticipate that the situation described in paragraph 4 will apply to a very small number of schools. Schools cannot, of course, be expected to provide information that they do not have, and consequently the Department will not take action where a school does not comply with the requirement in paragraph 15(2)(b) of the Schedule because it cannot. Therefore, although regulation 7 of this instrument gives the Secretary of State the power to remove a school from the register for failing to comply with the requirements in the instrument, he will not do so in relation to a school which cannot provide numbers for all of the previous three years for the reasons set out above.
6. The Department will include reference to this issue in guidance and an explanation of how schools are expected to deal with years in which they were not operating or required to register.

Department for Education

18 September 2018

Appendix 3

S.I. 2018/930

Local Government (Structural Changes) (General) (Amendment) Regulations 2018

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

(1) Where regulation 3(4) modifies Chapter 2 of Part 5 of the Localism Act 2011, given that the reference to an authority in the definition of “relevant authority” has effect as if it were a reference to a single tier council, explain what “relevant authority” is intended to mean in the sections that are exempt from that modification (i.e. sections 81(1)(a), 82(1) to (3) and 84(6)).

(2) Explain whether “the successor councils” in the amending provision is intended to mean the same thing as “the successor councils concerned” as defined by regulation 10(4).

2. In relation to the Committee’s first question, “relevant authority” in sections 81(1)(a) and 82(1) to (3) is intended to mean the predecessor council, which is the relevant authority to which the expression of interest will have been submitted before the reorganisation date, and is to remain responsible for specifying periods during which expressions of interest may be submitted and for publishing details of such specifications. The intention of the modification of section 84(6) (made by new regulation 10A(3)(c)(ii)) is that the reference to “relevant authority” in the context of receiving an expression of interest is intended to mean the predecessor council who will receive the expression of interest before the reorganisation date and “relevant authority” in the context of notification to a relevant body of when the authority expects to notify that body of its decision is intended to mean the single tier council which will make the decision after the reorganisation date.

3. The department considers that it is clear that, in sections 81(1)(a) and 82(1) to (3), “relevant authority” continues to have the original meaning in the unmodified primary legislation and is intended to mean the council to which the expression of interest is submitted and that the modification to section 84(6) is clear as to the meaning of “relevant authority” in the different contexts set out in new regulation 10A(3)(c)(ii).

4. In relation to the Committee’s second question, “the successor councils” in the provision amending regulation 10 of S.I. 2008/2176 is intended to mean the same thing as “the successor councils concerned” as defined by regulation 10(4).

5. The department considers that the meaning of “successor council” is clear from the definition in regulation 2 of S.I. 2008/2176 and, in light of this and the definition of “financial reserves” in regulation 6(1), that a reader is unlikely to take another meaning from that intended by the amendment to regulation 10.

Ministry of Housing, Communities and Local Government

18 September 2018

Appendix 4

S.I. 2018/932

Social Security (Treatment of Arrears of Benefit) Regulations 2018

1. In its letter to the Department of 12th September 2018, the Committee requested a memorandum on the following points:

(1) Explain what periods of time are intended to be meant by “the current award” and “an award of an existing benefit” in regulation 8 (new regulation 10A(1)(a)).

(2) Explain the circumstances in which a payment to which new regulation 10A(2) applies would, but for that paragraph, fall to be taken into account in calculating capital.

2. The Department’s response to the Committee’s points is set out below.

Point (1)

3. New regulation 10A of the Universal Credit (Transitional Provisions) Regulations 2014 (the “TP Regs”) provides that when determining a claimant’s award of universal credit (“UC”) certain arrears of benefit are to be disregarded from the calculation of the claimant’s capital beyond the general 12 month rule (specified in regulation 48 of, and paragraph 18 of Schedule 10 to, the Universal Credit Regulations 2013, “the UC Regs”) where this relates to official error.

4. Under regulation 10A(1), this extended disregard will apply if certain conditions are met. Regulation 10A(1)(a) specifies a condition regarding the timing of payment of arrears. This condition will be met if the payment is either “received during the current award” (regulation 10A(1)(a)(i)) or “received during an award of an existing benefit or state pension credit and the claimant became entitled to the current award within one month of the date of termination of the earlier award” (regulation 10A(1)(a)(ii)).

5. As to the meaning of a payment received “during the current award”, the Department considers that the regulations are clear that a payment is “during” an award of UC if it is received at any point after the UC award begins and before the UC award terminates. This is the natural meaning of the word “during”.

6. A claimant’s UC award will terminate if the claimant is no longer entitled to UC. This will occur if a claimant no longer meets the basic conditions and financial conditions specified in sections 4 and 5 of the Welfare Reform Act 2012, if the claimant is excluded from entitlement for any reason (for example, if they are a prisoner—regulation 19(1) of the UC Regs), or if the claimant’s entitlement is terminated (for example, for failure to provide information or evidence regarding their claim—regulation 47(1) of the Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013). If a claimant’s UC award is terminated they are no longer entitled to UC so there is no award during which to make a payment.

7. The Department notes that the Welfare Reform Act 2012 includes a number of provisions about making awards of UC. For example, section 1(2) states that “UC may... be awarded to”. The UC Regs refer to the duration of UC awards. For example, regulation 21(3C)(a) states: “...the claimant was previously entitled to an award of UC the last day of which fell within the 6 months preceding the date on which the claim is made”.

8. As such, the Department considers that the legislation is sufficiently clear in its explanation that the period of time during which a payment of arrears can be received starts at the point an award is made, and ends when the UC award terminates.

9. The same approach applies in respect of a payment received “during an award of existing benefit or state pension credit”. A payment is “during” an award of an existing benefit (defined in regulation 2(1) of the TP Regs) or state pension credit if it is received at any point after the existing benefit/pension credit award begins and before that award is terminated.

Point (2)

10. Regulation 48 of, and paragraph 18 of Schedule 10 to, the UC Regs set out the general rule for disregarding arrears of benefit in UC. This rule provides that arrears will be disregarded for a 12 month period from receipt. New regulation 10A(2) applies a special rule for the disregard of arrears, which takes precedence over the general rule, if the conditions in regulation 10A(1) are met. This provides that the disregard will apply until the termination of the UC award (if later than 12 months from receipt of the arrears).

11. The phrase “notwithstanding anything in the Universal Credit Regulations” in regulation 10A(2) refers to the general rule. The Department did not include an express reference to those provisions as the Department considered the special rule sufficiently clear without it. The Department also ensured the Explanatory Note explained the effect of new regulation 10A(2) to help readers. This states: “There is currently no provision [in the UC Regs] for the payment to be disregarded for a longer period if it is paid out for official error. The amendment to the UC (TP) Regulations provides for the longer disregard to apply until the termination of the UC award where...”.

12. Further, the Department notes that the approach taken in regulation 10A(2) to disapplying anything in the UC Regs, expressed as “notwithstanding anything in the Universal Credit Regulations”, is consistent with other uses of this phrase in the TP Regs (and in other social security legislation). For example, regulation 8A(b) of the TP Regs states the following: “Where an award of housing benefit terminates under regulation 8... if a claim for universal credit is made because the claimant moves to new accommodation... then, notwithstanding anything in the Housing Benefit Regulations 2006, housing benefit is paid directly to the claimant.”

13. The Department hopes the above information sufficiently clarifies the points raised by the Committee. The Department would be happy to provide further information about new regulation 10A if it would be helpful.

Department for Work and Pensions

18 September 2018