House of Lords
House of Commons

Joint Committee on Statutory Instruments

Third Report of Session 2019

Drawing special attention to:

Civil Partnership (Opposite-sex Couples) Regulations 2019 **(Draft S.I.)**

Teachers' Pensions Schemes (Amendment) Regulations 2019 **(S.I. 2019/1134)**

Solicitors (Disciplinary Proceedings) Rules 2019 **(S.I. 2019/1185)**

Town and Country Planning (North Weald Airfield) (EU Exit) Special Development Order 2019 **(S.I. 2019/1228)**

Town and Country Planning (Waterbrook Ashford) (EU Exit) Special Development Order 2019 **(S.I. 2019/1230)**

Town and Country Planning (Car Park D Ebbsfleet International Station) (EU Exit) Special Development Order 2019 **(S.I. 2019/1231)**

Export Control (Sanctions) (Amendment) Order 2019 **(S.I. 2019/1236)**

Universal Credit (Childcare Costs and Minimum Income Floor (Amendment) Regulations 2019 **(S.I. 2019/1249)**

Universal Credit (Childcare Costs and Minimum Income Floor) (Amendment) Regulations (Northern Ireland) 2019 **(S.R. 2019/173)**

Isles of Scilly (Application of Water Legislation) Order 2019 **(S.I. 2019/1259)**

Ordered by the House of Lords to be printed 30 October 2019

Ordered by the House of Commons to be printed 30 October 2019

HL 13
HC 65-iii
Published on 1 November 2019
by authority of the House of Lords
and the House of Commons

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, relating to Public Business.

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 Liz Booth (Committee Assistant), Luanne Middleton (Commons Clerk), Christine Salmon Percival (Lords Clerk). Advisory Counsel: Klara Banaszak, Daniel Greenberg, and Vanessa MacNair (Commons); Nicholas Beach, James Cooper, 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 OAA. The telephone number for general inquiries is: 020 7219 2026; the Committee's email address is: jcsi@parliament.uk.

Contents

1 Instruments reported

At its meeting on 30 October 2019 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 ten 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 Draft S.I.: Reported for doubt as to whether a provision is *intra vires*

Civil Partnership (Opposite-sex Couples) Regulations 2019

1.1 **The Committee draws the special attention of both Houses to these draft Regulations on the ground that, if they are approved and made, there will be a doubt as to whether they would be *intra vires* in one respect.**

1.2 Section 2 of the Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019 ("the 2019 Act") requires the Secretary to State to make regulations amending the Civil Partnership Act 2004 so that opposite-sex couples are eligible to form civil partnerships. The Regulations must be in force by 31 December 2019.

1.3 Since the Marriage (Same Sex Couples) Act 2013 ("the 2013 Act") came into force, a same-sex couple who wish to formalise their relationship have the choice of marriage or civil partnership, while a civil partnership is not open to an opposite-sex couple: marriage is their only option. In its judgment in the case of *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development*[1] handed down last year, the Supreme Court held that this difference of treatment constituted unjustified discrimination on the grounds of sexual orientation and was accordingly incompatible with Article 14 of the European Convention on Human Rights ("ECHR").

1.4 These proposed Regulations would remedy that incompatibility by allowing opposite-sex couples to form civil partnerships.

1.5 Section 2(5)(b) of the 2019 Act allows the Secretary of State to restrict or bring to an end the right to convert a civil partnership into a marriage, which is conferred by section 9 of the 2013 Act. Regulation 37, which is made in purported exercise of that power, would prevent an opposite-sex couple who form a civil partnership from subsequently converting the partnership into a marriage. However, a same-sex couple in a civil partnership, whether formed before or after the Regulations come into force, will retain that conversion right.

1.6 The Committee is concerned that this difference of treatment between same-sex and opposite-sex civil partners may contravene section 6 of the Human Rights Act 1998. This provides that it is unlawful for a Minister to make secondary legislation which is incompatible with "a Convention right".

1 [2018] UKSC 32

1.7 One of the Convention rights is Article 14 of the ECHR:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

1.8 To have recourse to Article 14, the complained-of discrimination must "come within the ambit" of another Convention right. It is well-established that access to a civil partnership falls within the ambit of Article 8 which guarantees the right to respect for private and family life. In the view of the Committee, it is likely that access to a right to convert a civil partnership into a marriage also falls within the ambit of Article 8.

1.9 It is clear from case law that sexual orientation qualifies as a ground on which discrimination under Article 14 is forbidden. Accordingly, regulation 37 will be compatible with Article 14 (read with Article 8), and therefore with section 6 of the Human Rights Act 1998, only if the Government can show that the difference of treatment between opposite-sex couples and same-sex couples is objectively justified.

1.10 The Government's justification is set out in paragraphs 7.5 to 7.8 of the Explanatory Memorandum. These paragraphs explain that the Government: are considering the future of conversion rights in light of responses to a recent consultation exercise; believe that allowing opposite-sex couples to convert a civil partnership into a marriage while those responses are being considered would risk creating uncertainty and confusion about future rights; do not wish to introduce a new, potentially short-term conversion right which might subsequently be withdrawn in 2020; and regard it as highly unlikely in any event that an opposite-sex couples who form a civil partnership after the Regulations come into force would wish to convert the partnership into a marriage during that interim period.

1.11 The Committee does not find these arguments persuasive. Where the difference in treatment is based on sexual orientation, as is the case with regulation 37, the courts apply a strict scrutiny standard to the assessment of the asserted justification. This means that particularly convincing and weighty reasons are required to justify the discrimination.

1.12 The Supreme Court held in *Steinfeld and Keidan* that the need to have time to assemble sufficient information to allow a confident decision to be made about the future of civil partnerships could not be characterised as a legitimate aim capable of justifying the continuation of the difference in treatment between same-sex couples and different sex-couples.[2]

1.13 The Court also observed (in relation to the 2013 Act) that:

> "it was Parliament itself that brought about an inequality immediately on the coming into force of the Act, where none had previously existed. The redressing by the legislature of an imbalance which it has come to recognise is one thing; the creation of inequality quite another. To be allowed time to reflect on what should be done when one is considering how to deal with an evolving societal

2 Paragraph 42 of the judgment.

> attitude is reasonable and understandable. But to create a situation of inequality and then ask for the indulgence of time … as to how that inequality is to be cured is, to say the least, less obviously deserving of a margin of discretion."[3]

1.14 It light of these directly relevant findings by the United Kingdom's highest court, the Committee is sceptical as to whether the introduction of regulation 37, which will plainly discriminate on the ground of sexual orientation from the moment it is in force, can be justified on the ground that the Government might change the law at some point in the future, particularly given the strict scrutiny standard applied by the courts. Accordingly, the Committee has a real doubt as to whether it would be lawful, in the light of section 6 of the Human Rights Act 1998, for the Secretary to State to include regulation 37 in the proposed Regulations.

1.15 In the Committee's view, the appropriate way forward would be for the Government now to align the rights for same-sex and opposite-sex couples to convert a civil partnership into a marriage. Following the completion of its review, it would then be open to the Government to change those rights for both, for example by removing the possibility of conversion altogether.

1.16 **The Committee therefore reports regulation 37 of the draft Regulations on the ground that there appears to be doubt as to whether it would be *intra vires*.**

2 S.I. 2019/1134: Reported for failure to comply with proper legislative practice and for doubt as to whether they are *intra vires*

Teachers' Pensions Schemes (Amendment) Regulations 2019

2.1 **The Committee draws the special attention of both Houses to these Regulations on the grounds that they fail to comply with proper legislative practice in one respect and that there is doubt as to whether they are *intra vires* in one respect.**

2.2 Regulation 17 of this instrument amends Schedule 7 to the Teachers' Pensions Regulations 2010, which sets out criteria for entitlement to a lifetime retirement pension. The amendment to paragraph 3 replaces one criterion (that a person applied for ill-health retirement benefits before leaving excluded employment) with another (that they applied before ending a period of non-pensionable sick leave, non-pensionable family leave or a career break). In paragraph 7.13 of its Explanatory Memorandum, the Department for Education stated that this change was made to "revise and extend the list of circumstances in which an application for ill-health retirement can be accepted on the more generous in-service terms". Given the definition of "excluded employment", however, it was not clear to the Committee how the new criterion extended the list of circumstances referred to, rather than simply replacing one with another. The Committee asked the Department to explain.

2.3 In a memorandum printed at Appendix 1, the Department admits that rather than revising and extending eligibility for more generous benefits, the amendment in fact corrects an error inserted by the Teachers' Pensions Schemes (Miscellaneous Amendments) Regulations 2017. The Department admits that from 2017 onwards, the pension scheme

3 Paragraph 36 of the judgment.

was administered in line with the intended policy rather than the legislative reality, and asserts that in this case no one was denied a benefit in practice to which they were entitled in law, as they would inevitably have failed to meet other key criteria; it adds that in any event the discrepancy is regularised with retrospective effect. The Committee is concerned that this explanation reveals another instance of a Government Department (albeit unwittingly in this case) implementing the law that it wishes it had made and not the law that it actually made (see the Committee's comments on S.I. 2019/980 in its *Sixty-fifth Report of Session 2017–19*). That apart, the Department failed to explain the purpose and effect of the amendment clearly in the explanatory materials, and the **Committee accordingly reports regulation 17(a) for failure to comply with proper legislative practice**.

2.4 Regulation 33 of this instrument amends the Teachers (Compensation for Redundancy and Premature Retirement) Regulations 2015 by changing the way in which compensation is calculated for an adult survivor of a member of the Teachers' Pension Scheme. In paragraph 7.19 of the Explanatory Memorandum, the Department states that the amendment is "to provide a correction to the interpretation of the value of the long term rate of compensation". It was not clear to the Committee what fault was being corrected, or whether the amendment would result in an increase or decrease to the value of the benefit. The Committee therefore asked the Department to explain. In its memorandum, the Department explains that here, too, the "fault" is not a technical defect, but simply that the original legislation did not match the policy intent (which the Department asserts had always been in line with the amendment rather than the original provision).

2.5 The Department states that it had not noticed that its legislation did not match its policy, and so the scheme had been implemented according to the policy since 1 April 2015. Yet another instance of a Government Department implementing the law that it wishes it had made and not the law that it actually made; and again, the position is "regularised" with retrospective effect.

2.6 The Department notes that the amendment does not affect the notional annual compensation rate. In the absence of further clarifying information as to the amendment's practical effect on the value of the benefit, it is unclear whether it will increase or reduce the amount of compensation to which an adult survivor is entitled. If the amendment reduces the entitlement to compensation, it could fall within the category of "retrospective provision that has serious adverse effects in relation to the pension payable to or in respect of members of the scheme" under section 23 of the Public Service Pensions Act 2013. As such, it would require the consent of persons likely to be affected. There is no evidence that such consent was obtained. In the Committee's view this omission is not resolved by the fact that such persons may not in fact have received the compensation to which they were entitled under the original provision, as the amendment would deny them a right to challenge any underpayment. **The Committee accordingly reports regulation 33 for doubt as to whether it is *intra vires*.**

3 S.I. 2019/1185: Reported for requiring elucidation and for defective drafting

Solicitors (Disciplinary Proceedings) Rules 2019

3.1 **The Committee draws these Rules to the attention of both Houses on the grounds that they require elucidation in four respects and are defectively drafted in three respects.**

3.2 This instrument updates the Rules that apply to proceedings in the Solicitors Disciplinary Tribunal, including by incorporating existing practice directions, standard directions and guidance directly into the Rules, for the stated purpose of promoting transparency and accessibility. The Committee was concerned that despite this intention, the effect and purpose of some of the rules were not clear. It therefore asked the Tribunal:

- to confirm whether the person who considers an application for adjournment under rule 23 is also the person who determines that application;
- to explain by reference to examples: what constitutes "appropriate directions" by a clerk in relation to a non-compliance hearing under rule 20(3), and what, if any, "variation of directions" may be made by a clerk under rule 8(6)(c);
- to explain whether it is intended that a clerk is under an obligation to include in standard directions all such dates listed in rule 20(2) as are known to be relevant to the application in question; and
- to confirm whether the cross-reference in rule 14(1) should be to paragraph (5) of that rule rather than paragraph (4).

3.3 In a memorandum printed at Appendix 2, the Tribunal confirms the position in rule 23, provides the examples requested in relation to rules 20(3) and 8(6)(c), and explains how rule 20(2) will work in practice. **The Committee accordingly reports these rules for requiring elucidation, provided by the Tribunal's memorandum.**

3.4 The Tribunal also confirms that the cross-reference in rule 14(1) should be to rule 14(5). **The Committee accordingly reports rule 14(1) for defective drafting, acknowledged by the Tribunal.**

3.5 A number of the rules used the word "will" in a way that appeared to the Committee to suggest that they might have been intended to impose an obligation. The Committee therefore asked the Tribunal to explain what "will" is intended to mean in each of the rules in which it features and how effect is given to that intention, having regard to the Committee's previous comments on the matter and in particular its *First Special Report of Session 2013–14, Excluding the inert from secondary legislation*. For ease of reference, the Committee's key observations in that Special Report were that "'may' always implies discretion; 'must' always implies an obligation; 'shall' … can either imply an obligation or futurity (depending on context and therefore is accepted by us as implying an obligation when used in legislation); and 'will' always implies futurity." In its memorandum, the Tribunal has provided a helpful table explaining its intention in each case. The Committee remains concerned that the use of "will" in rules 4(2), 5, 20(3), 26(2), 26(3), 40(4), 41(4) and 43(4) does not achieve the stated intention, which appears to be the imposition of a

legally enforceable duty. Use of the auxiliary "will" does not make this clear. At the least, when used in contrast with "must" elsewhere in the same document, it creates uncertainty about the basis for a complaint of non-compliance – whether it is an irregularity that renders proceedings void or a failure to exercise a discretion in the anticipated way. The Committee draws the Tribunal's attention to its *Twenty-fourth Report of Session 2013–14* for further detail, and **accordingly reports rules 4(2), 5, 20(3), 26(2), 26(3), 40(4), 41(4) and 43(4) for defective drafting.**

3.6 Rule 31 requires the Tribunal to be notified if any witness or respondent requires the assistance of an interpreter to participate in a hearing. The Committee asked the Tribunal to explain why it did not provide for circumstances where the applicant requires such assistance. In its memorandum, the Tribunal gives a number of reasons why such provision was not felt to be required. The Committee finds none of them persuasive. In particular, the need for advance notification of such requirements for the purposes of time estimates and logistical arrangements must apply equally to interpreters for the applicant as to those for the respondent and witnesses. Nor does it help that the applicant in the vast majority of cases is the Solicitors Regulation Authority, rarely uses interpreters and is aware of the requirements: the Rules ought to be transparent for all applicants and in all cases. **The Committee accordingly reports rule 31 for defective drafting.**

4 S.I. 2019/1228; S.I. 2019/1230 and S.I. 2019/1231: Reported for failure to comply with proper legislative practice, defective drafting and for requiring elucidation

Town and Country Planning (North Weald Airfield) (EU Exit) Special Development Order 2019

Town and Country Planning (Waterbrook Ashford) (EU Exit) Special Development Order 2019

Town and Country Planning (Car Park D Ebbsfleet International Station) (EU Exit) Special Development Order 2019

4.1 **The Committee draws the special attention of both Houses to these three Orders on the ground that each Order fails to comply with proper legislative practice in two respects and is defectively drafted in one respect and that S.I.s 2019/1228 and 2019/1231 require elucidation in one respect.**

4.2 These Special Development Orders grant planning permission for the use of three separate sites for stationing and processing of vehicles and the installation of temporary structures ancillary to this use. The Committee asked the Ministry of Housing, Communities and Local Government to explain where the construction management plan and operational management plan referred to in the instrument are available. In a memorandum printed at Appendix 3, the Department argues that as the rules in the plans are purely operational and administrative and that addressing non-compliance with the terms and conditions of the planning permission rests with the Secretary of State it is not necessary to make these documents publicly available; and it adds that they include sensitive information. The Committee's view is that where legislation operates

by reference to another document, it is an indispensable requirement of access to justice and the rule of law that readers of the legislation should be told how they can access hard and electronic copies of the external document. (See the *Committee's First Special Report of Session 2017–19, Transparency and Accountability in Subordinate Legislation at paragraphs 4.5 to 4.8*). Sensitive information that cannot properly be made public should therefore not be contained in a document by reference to which legislation operates: a separate document should be compiled containing any sensitive information (and, of course, it is open to legislation to operate by reference to the existence of sensitive and confidential documents, where they are not implicitly incorporated into the legislation itself). **The Committee accordingly reports all three Orders for failure to comply with proper legislative practice.**

4.3 The Committee also asked the Department to explain why an address has not been given for where a hard copy of the European Agreement concerning the International Carriage of Dangerous Goods by Road published in 2019 (defined in article 2) can be viewed free of charge. In its memorandum, the Department apologises for not giving this address and undertakes to rectify this in the near future. The Committee is of the view that this rectification can properly be done by correction slip. **The Committee accordingly reports article 2 of all three Orders for failure to comply with proper legislative practice, acknowledged by the Department.**

4.4 In relation to article 4 of each Order, the Committee asked the Department to explain the meaning of "site official". From the Department's memorandum, it appears that the intention is to refer to a person designated or authorised by the operator of a site. That could have been expressed simply in the legislation in any one of a number of standard ways, and it should have been expressed to make the legislative intent reasonably clear and certain. **The Committee accordingly reports article 4 for defective drafting.**

4.5 In relation to S.I. 2019/1228, the Committee asked the Department whether the definition of "hard standing" in article 2, is referring to "pre-existing hard standing" only or whether it is intended to include any temporary hard standing installed on the land. In its memorandum, the Department explains that there are no proposals for any temporary hard standing to be installed at the North Weald site and confirms that the definition is referring to pre-existing hard standing only and resurfaced hard standing. **The Committee accordingly reports article 2 of this Order for requiring elucidation, provided by the Department's memorandum.**

4.6 In relation to S.I. 2019/1231, the Committee asked the Department to explain why a definition of "hard standing" is not included in this instrument (in contrast to S.I. 2019/1228 and S.I. 2019/1230). In its memorandum, the Department explain that it was not necessary to define this term as the site in Ebbsfleet is already entirely made up of permanent hard standing. **The Committee accordingly reports article 2 of this Order for requiring elucidation, provided by the Department's memorandum.**

5 S.I. 2019/1236: Reported for requiring elucidation

Export Control (Sanctions) (Amendment) Order 2019

5.1 **The Committee draws the special attention of both Houses to this Order on the ground that it requires elucidation in one respect.**

5.2 This Order amends a number of instruments that implement EU sanctions regulations in domestic law, including the Export Control (North Korea Sanctions) Order 2018. Article 6 amends the 2018 Order by substituting "contravention" for "circumvention" in two places. It was not clear to the Committee why the substitution was necessary, so it asked the Department for International Trade to explain. In a memorandum printed at Appendix 4, the Department explains that its standard practice, in ensuring that there are domestic penalties to enforce EU prohibitions, is to distinguish between principal offences relating to direct contravention of trade sanctions on the one hand, and two types of supplementary offences on the other: those which have the effect of circumventing a trade sanction, and those which enable or facilitate the direct contravention of a trade sanction. The 2018 Order as originally drafted did not accurately reflect the Department's standard practice and was therefore inconsistent with comparable sanctions offence regimes. **The Committee accordingly reports article 6 for requiring elucidation, provided by the Department's memorandum.**

6 S.I. 2019/1249 and S.R. 2019/173: Reported for failure to comply with proper legislative practice

Universal Credit (Childcare Costs and Minimum Income Floor (Amendment) Regulations 2019

Universal Credit (Childcare Costs and Minimum Income Floor) (Amendment) Regulations (Northern Ireland) 2019

6.1 **The Committee draws the special attention of both Houses to both sets of Regulations on the ground that each set of Regulations fails to comply with proper legislative practice in one respect.**

6.2 Both sets of Regulations amend existing universal credit regulations. The Committee asked the Department for Work and Pensions to confirm whether the Department consulted the SI Registrar about whether to provide free replacement copies of the instrument, given that regulation 3 of each instrument seeks only to clarify existing legislation. In a memorandum printed at Appendix 5, the Department acknowledges that it considered the provision of free replacement copies but concluded that they did not need to be provided. It appears to the Committee that this conclusion was based in part on the fact that the instruments contain other provisions which do not require free replacement copies to be issued. The Committee is aware that if a new instrument corrects an error but also implements a good deal of additional policy, it can be tempting for Departments not to follow the free issue process. However, it is probably right that purchasers of the original instrument should be given the corrected version without charge (see the *Committee's First Special Report of Session 2017–19, Transparency and Accountability in Subordinate Legislation at paragraphs 3.16 to 3.25*). **The Committee accordingly reports each set of Regulations for failure to comply with proper legislative practice.**

7 S.I. 2019/1259: Reported for defective drafting

Isles of Scilly (Application of Water Legislation) Order 2019

7.1 **The Committee draws the special attention of both Houses to this Order on the ground that it is defectively drafted in one respect.**

7.2 Regulation 4 of this Order applies the Water Industry Act 1991 to the Isles of Scilly with certain modifications, including the creation of a grace period during which the new water and sewerage undertaker will not have to meet statutory deadlines, in order that needed improvements may first be made to the relevant infrastructure. The grace period ends on 1 April 2025. Under the 1991 Act, a sewerage undertaker may propose (or refuse) to make a declaration to the effect that it will adopt a sewer from a future date (section 102). An aggrieved person may appeal the sewerage undertaker's decision, but the appeal must be issued within a two-month time limit (section 105). These provisions will apply to the Isles of Scilly from 1 November 2019. Regulation 4(9) modifies section 105 so that no appeal may be made before 1 April 2025, but it does not alter the two-month time limit. The Committee asked the Department for Environment, Food and Rural Affairs to explain what rights of due process are available to a person who, but for the modification, would have issued an appeal before 1 April 2025, but is prevented from doing so on or after 1 April 2025 because the two-month time limit has expired. In a memorandum printed at Appendix 6, the Department acknowledges that regulation 4(9) does not achieve its policy intent and undertakes to correct the error by 1 April 2020. **The Committee accordingly reports regulation 4(9) for defective drafting, acknowledged by the Department.**

Instruments not reported

At its meeting on 30 October 2019 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

Instrument requiring affirmative approval

S.I. 2019/1364 Northern Ireland (Extension of Period for Executive Formation) (No. 2) Regulations 2019

Instruments subject to annulment

S.I. 2019/1304 Merchant Shipping (Marine Equipment) (Amendment) (UK and US Mutual Recognition Agreement) (EU Exit) Regulations 2019

S.I. 2019/1305 Pilotage Act 1987 (Amendment) Regulations 2019

S.I. 2019/1327 Patents (Isle of Man) (Amendment) (EU Exit) Order 2019

S.I. 2019/1341 Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2019

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. 2019/1318 Crime (Overseas Production Orders) Act 2019 (Commencement No. 1) Regulations 2019

S.I. 2019/1348 Finance Act 2019, Schedule 18 (VAT Groups: Eligibility) (Appointed Day) Regulations 2019

Appendix 1

S.I. 2019/1134

Teachers' Pensions Schemes (Amendment) Regulations 2019

1. In its letter to the Department for Education of 3 October 2019, the Joint Committee requested a memorandum on the following points:

> *(1) In relation to the amendment made by regulation 17(a), and having regard to the statement in the Explanatory Memorandum that it is intended to revise and extend the list of circumstances in which an application for ill-health retirement can be accepted on the more generous in-service terms—*
>
> *a) confirm that there are no classes of person who would have been caught by the "excluded employment" criterion and who are not caught by the replacement criteria, and*
>
> *b) give examples of classes of person caught by the new criteria and not by the old.*

2. The intention of regulation 17(a) was to correct an error made by the Teachers' Pensions Schemes (Miscellaneous Amendments) Regulations 2017 (SI 2017/1084) by replacing the reference to "excluded employment" in paragraph 3 of Schedule 7 to the Teachers' Pensions Regulations 2010 ("the 2010 Regulations") with different wording as it described the wrong category of people. The Department acknowledges that the Explanatory Memorandum could have made this clearer instead of referring to an intention to "revise and extend".

3. Regulation 7 of SI 2017/1084 substituted a new paragraph 3 of Schedule 7 but in doing so did not identify the right class of person in paragraph 3(3)(a). That paragraph referred to a person making an application for ill-health benefits "before leaving excluded employment" whereas the reference should have been to a person making an application "before ending a period of non-pensionable sick leave, non-pensionable family leave or a career break."

4. The two categories do not overlap. The meaning of excluded employment is set out in regulation 7(12) of the 2010 Regulations and essentially covers people who elect for their employment not to be pensionable, and those in certain specified employment prior to 1 September 2010 whose employment does not count as pensionable under the Regulations. It was not the intention to afford these people access to these rights.

5. In practice, those administering the pension scheme on behalf of the Department processed applications in line with the policy that was in existence before the amendment made by SI 2017/1084: that policy covered the correct categories of person and didn't include those in excluded employment. The policy remained the same after the amendment. The administrator and the Department did not notice until a later date the Regulations now no longer aligned with the policy.

6. Furthermore, although those in excluded employment were wrongly included in paragraph 3(3)(a), such persons could not fulfil the other requirements relating to in-service applications (see paragraph 3(2) and (6)) as they refer to the applicant "leaving pensionable employment" and those person were not in pensionable employment.

7. Therefore, in answer to the Committee's question (a), there is arguably a class of person who would have been caught by the excluded employment criterion but not by the replacement criteria, namely all those in "excluded employment". However, such persons don't meet the other requirements for in-service applications and no applications have been processed on an in-service basis for those in excluded employment either before or after the amendments made in 2017.

8. In answer to the Committee's question (b) "excluded employment" covers, for example, a person who elects for his employment not to be pensionable (i.e. he or she opts out of the scheme). Also in answer to the Committee's question (b), the persons caught by the new criteria but not by the old are those identified in the replacement criteria, namely people ending a period of non-pensionable sick leave, non-pensionable family leave or a career break. For example, a person is on non-pensionable sick leave if they are on unpaid sick leave. Those persons don't fall within the category of "excluded employment".

9. People who fulfil the new criteria are entitled under paragraph 3 of Schedule 7 to make an in-service application and receive, if their application is successful, in-service benefits (either enhanced or unenhanced); those in excluded employment can only make out-of-service applications and receive unenhanced benefits.

> *(2) In relation to regulation 33, by reference to examples demonstrate—*
>
> *a) the nature of the fault in the regulations that is being corrected; and*
>
> *b) the parameters of the resultant change in the notional annual compensation rate to which a member of an existing scheme with a normal pension age of 65 is entitled.*

10. In answer to the Committee's question (a), regulation 33 amends regulation 23 of the Teachers (Compensation for Redundancy and Premature Retirement) Regulations 2015 ("the PRC Regulations 2015") to correct wording relating to the calculation of compensation under Part 5 (Discretionary Compensation for Premature Retirement) of those Regulations for the adult survivor of a member of the Teachers' Pension Scheme ("TPS") in cases where the member was in receipt of compensation under those Regulations before death.

11. Part 5 of the PRC Regulations 2015 sets out arrangements covering a situation where an employer of a member of the TPS has, as part of a financial settlement terminating the member's employment, decided to finance discretionary compensation in circumstances where the employer has agreed to premature retirement. Part 5 involves "crediting" the member with more service than they have actually built up in the TPS – this financial benefit is paid by way of regular compensation payments under the PRC Regulations 2015.

12. If the member dies while receiving the compensation and leaving an adult survivor, that survivor in turn can receive compensation under the PRC Regulations 2015. The policy is that this compensation is calculated via a number of steps, the first being to

identify the rate of compensation the member was receiving at the date of their death. In line with provisions in regulations 15 (interpretation of this part) and 23 (adult compensation), the following further steps are taken. A "notional annual compensation rate" (see regulation 15) is arrived at by taking the rate of compensation received by the member at their death and removing any adjustments/reductions that had been applied to it while the member was alive. That notional annual compensation rate is combined with provisions in regulation 23 to arrive at the rate of long-term compensation or "adult compensation" that the adult survivor is entitled to.

13. Regulation 23 wrongly provided in sub-paragraphs (b) and (c) (sub-paragraph (a) was correctly drafted and was in line with the policy) that in a case where the adult was a survivor of a member of the existing scheme (i.e. the final salary scheme governed by the 2010 Regulations) and where the member had a normal pension age of 65 or was a transition member or a member of the 2015 scheme (i.e. the career average scheme governed by the Teachers' Pension Scheme Regulations 2014), compensation was to be calculated as set out in those sub-paragraphs. The result was that the adult survivor would be entitled to compensation calculated on the same basis as that used to provide a pension to the survivor under the final salary or career average sections of the Teachers' Pension Scheme. That approach was not in line with the policy intention.

14. Therefore, this was the fault in the regulations that was corrected by the Department's amending instrument. The amendment provides that in the cases described above, the compensation paid to the adult survivor is 37.5% of the notional annual compensation rate applicable to the deceased member as calculated in accordance with regulation 15 as set out above.

15. By way of an example, taking the case of a transition member of the 2015 scheme, the calculation of the adult compensation of the member's survivor under the Regulations before our amending instrument would be as follows. The member's compensation at death would be subject to regulation 15 to arrive at the notional annual compensation rate. But instead of receiving 37.5% of the notional annual compensation rate as intended under the policy, the Regulations provided that the survivor would receive 37.5% of the value of the *member's* pension (which is the same calculation that is used to calculate the survivor pension under the 2015 scheme and doesn't relate to the PRC Regulations 2015). The amending instrument makes sure that the 37.5% figure is applied to the notional annual compensation rate which is in line with the policy.

16. As regards the Committee's question (b) about the parameters of the resultant change in the notional annual compensation rate to which a member of an existing scheme with a normal pension age is entitled, there is no change in that rate. The amending regulation does not affect the notional annual compensation rate for the reasons explained above. What it does change is the long-term compensation /adult compensation payable to the adult survivor.

17. The amendments took effect retrospectively on the date that the PRC Regulations 2015 came into force. These compensation payments are very infrequently made and are financed by the employer (not by the TPS) and either administered by the employer or by the TPS on behalf of the employer, if requested. The scheme administrator carries out the calculations required to be made when the employer wants to provide compensation under the Regulations. The Department provided guidance to the scheme administrator

following the making of the PRC Regulations 2015 in line with the policy intention – the Department had not noticed that the regulations did not match the policy and therefore the administrator carried out the calculations in line with the policy not the regulations.

(3) Given that regulations E27 and E28 have been revoked, clarify the circumstances in which they are to be read with the modifications in regulation 34(2) and (3).

18. The Teachers' Pensions Regulations 1997 (SI 1997/3001) ("the 1997 Regulations") contained the provisions of the final salary section of the TPS pension scheme as do the successor regulations (the 2010 Regulations). Schedule 13 to the 2010 Regulations makes saving and transitional provisions in relation to regulations E27 and E28 and means that the 1997 Regulations are still relevant, in appropriate circumstances, in the determination of benefits under the final salary arrangements.

19. Regulations E27 and E28 contain provisions relating to the relevant service of a member of the scheme to be taken into account when determining the pension of a survivor of the deceased member, and details of how the pension is to be calculated. The circumstances in which regulations E27 and E28 of the 1997 Regulations are to be read with the modifications in regulation 34(2) and (3) of the amending instrument are where a member entered into a civil partnership and died prior to 1 September 2010 (the date that the 2010 Regulations came into force and revoked the 1997 Regulations) leaving a surviving civil partner.

20. The surviving civil partner of such a deceased teacher would (absent the modification to regulations E27 and E28 of the 1997 Regulations made by regulation 34) only have been entitled to a survivor pension under the 1997 Regulations based on the deceased teacher's service after 5th April 1988. As those provisions are now to be read, the calculation of entitlement is to be made taking account of any service of the deceased member prior to 5th April 1988 as is the case in the corresponding provisions in the 2010 Regulations amended by our amending instrument. Therefore, those survivors who have been receiving a pension calculated in line with the less generous provisions in the 1997 Regulations will have their pensions revised and increased now that E27 and 28 are to be read with the modifications described above.

21. This memorandum has been prepared by Department for Education.

Department for Education

16 October 2019

Appendix 2

S.I. 2019/1185

Solicitors (Disciplinary Proceedings) Rules 2019

1. The Committee has asked a number of questions about the rules and the responses of the Tribunal are set out below.

> *(1) Confirm whether the person who considers an application for adjournment under regulation 23 is also the person who determines that application.*

2. Confirmed. Under Rule 23(2) the person considering and determining the application would either be a clerk or single solicitor member. Under Rule 23(3) a panel of three Members of the Tribunal would consider and determine the application.

> *(2) Explain by reference to examples:*
>
> *a) what constitutes "appropriate directions" by a clerk in relation to a non-compliance hearing under rule 20(3);*

3. The purpose of a non-compliance hearing under rule 20(3) is to try to secure the non-engaging parties' co-operation in the proceedings and to seek to identify the reason for non-compliance. These hearings are triggered by one or more parties not complying with a direction that the Tribunal has made. The most frequent reason such a hearing is held is that a respondent has not filed an Answer to the allegations made by the applicant or any supporting documentation. In such circumstances example directions that may be made are:

i) The Respondent having failed to comply with Standard Directions 3 and 4 dated [ ] by the due date of [ ] is directed to comply by no later than 4.00 p.m. on [ ]. If he fails to comply with this direction, the matter will be listed before the Tribunal at [ ] for a Case Management Hearing.

ii) The time for the Applicant, if so advised, to file at the Tribunal and serve on the Respondent a Reply to the Respondent's Answer and any further documents not included in the Rule 5 Statement or files and served in support of the Answer or the Reply and on which it relies shall be extended to 4.00 p.m. on [ ].

iii) Costs of this hearing, if any, are reserved to the next hearing.

4. Directions made at non-compliance hearings fundamentally concern "housekeeping" issues to try to ensure that the timetable for the case is effective and that the proceedings can be concluded efficiently.

> *b) what, if any, "variation of directions" may be made by a clerk under rule 8(6)(c).*

5. This rule envisages that a clerk may vary the timescale for compliance with a direction. For example, a respondent is normally directed to file and serve an Answer to the allegations and any documentation 28 days after service of the proceedings.

Frequently the respondent will request an extension of this timescale and the applicant will have no objection to the extension sought as it would not impact on the timetable for the proceedings. The clerk will then vary the date that the respondent needs to file and serve their Answer and documentation and amend any subsequent dates for filing and serving other evidence.

(3) In relation to rule 14:

a) confirm whether the cross-reference in paragraph (1) should be to paragraph (5) rather than (4)

6. The cross-reference should be to paragraph (5) rather than (4).

b) clarify whether a supplementary statement must be made using a prescribed form.

7. A supplementary statement is not required to be made using a prescribed form. A supplementary statement is an additional statement of additional facts or matters in existing proceedings rather than a new application. The prescribed form referred to in Rule 12 is the application for the commencement of the proceedings.

(4) Having regard to the Committee's previous comments on the use of the word "will", and in particular the Committee's **First Special Report of Session 2013–14, Excluding the inert from secondary legislation***, explain what that word is intended to mean in each of the rules in which it features and how effect is given to that intention.*

8. The Tribunal regrets to say that it was not cognisant of the Special Report when the rules were drafted. Had it been so then it is likely that it would have taken a different approach to the drafting of some of the rules. The Tribunal was conscious, when drafting the rules, of avoiding the term "shall", in accordance with the Office of Parliamentary Counsel Drafting Guidance. In many cases in the Rules, the word "must" has been used, in line with the Special Report, but there were some instances where it was considered appropriate to use "will".

9. The table at the end of this memorandum sets out the Tribunal's response for each instance where the word "will" is used.

(5) Explain whether it is intended that the clerk is under an obligation to include in the standard directions all such dates listed in rule 20(2) as are known to be relevant to the application, and how effect is given to that intention.

10. When a case has been certified as showing a case to answer, the case is issued by the Tribunal's Administrative Office and standard directions are made by a clerk. The standard directions include all such dates listed in rule 20(2) that are relevant to the application. The Tribunal utilises a number of standard directions templates for different types of cases. The Tribunal identifies a hearing date for the application which is included in these directions. The dates for compliance with other directions are then calculated and included in the standard directions which are drawn up and sent to the parties.

11. Rule 20(2) was based on the Tribunal's Practice Direction Number 6 (introduced in 2013) which introduced the standard directions to ensure robust case management of proceedings before the Tribunal.

> *(6) Explain why regulation 31 does not provide for circumstances where the applicant requires the assistance of an interpreter to participate in a hearing.*

12. Rule 31 provides for "any witness or respondent" who requires the assistance of an interpreter to notify the Tribunal when sending the list of witnesses. It does not mean that an applicant cannot make use of an interpreter's services.

13. The Tribunal does not arrange interpreters and does not pay for them either. The relevant party would arrange the interpreter. The reasons the Tribunal needs notification in advance are the potential impact on time estimates, to ensure that all parties are aware of the requirements relating to interpreters and to enable any logistical arrangements to be made in the courtroom.

14. All parties to a case (including the applicant) are required to complete a certificate of readiness. That document includes the following questions:

- Do you require an interpreter at the final hearing? Yes/No; if Yes:
- On which dates will the interpreter be required?
- Have you made your own arrangement for an interpreter to attend the hearing?
- If you have not made your own arrangements, have you asked the Applicant to make arrangements for an interpreter to attend the hearing?

15. That document also contains the statement "Please note the Tribunal will not arrange for an interpreter to attend the hearing on your behalf."

16. Apart from the fact that the applicant will receive the certificate of readiness, one reason that the Tribunal thought it unnecessary for the applicant to notify the Tribunal about the use of interpreters is that in the vast majority of the Tribunal's cases, the applicant is the Solicitors Regulation Authority, who very rarely use interpreters and who are fully cognisant of the requirements relating to interpreters and the logistical arrangements.

Solicitors Disciplinary Tribunal

21 October 2019

Question (4): Comments on the use of the word "will" in the rules		
Rule No. and heading	**Extract**	**(a) Intended meaning and (b) how the Tribunal considers that effect is given to that intention**
4(2) The overriding objective	"The Tribunal **will** seek to give effect to the overriding objective when it—"	(a) An obligation (b) The use of "when" and the following words provides the context, in terms of time, when the obligation arises.

5 Standard of proof	"The standard of proof that **will** be applied to proceedings considered under these Rules is the standard applicable in civil proceedings."	(a) An obligation (b) The description of the circumstances in which the standard will be applied (i.e. in proceedings considered under the rules) provides the context which gives the intended effect.
7 President and Vice Presidents	"….and **will** only be eligible for re-election as President if he or she has not previously been re-elected as President."	(a) A qualification (b) The use of "if" provides the context which gives the intended effect
14(5) Supplementary statements	"The applicant **will not** be permitted to send a supplementary statement without leave of the Tribunal—"	(a) A prohibition (b) The qualification (without leave) provides the context which gives the intended effect. In this instance, the Tribunal recognises that alternative wording, such as "A supplementary statement will not be considered by the Tribunal without its leave if—" could have been used. However, it considers that the wording used achieves the intended effect. The intended meaning is given effect because it applies in the context of ongoing proceedings.
20(2)(f) Standard directions	"(2) The standard directions may specify— (f) the date on which any case management hearing **will** take place;	The Tribunal assumes that there is no need to comment in this instance but will do so of course if that assumption is incorrect.
20(3) Standard directions	"If a party fails to comply with the standard directions, any other direction or any of these Rules, the matter may be listed for a non-compliance hearing before a clerk, who **will** make appropriate directions, which may …."	(a) An obligation (b) The context here is that a non-compliance hearing will have been listed due to the failure to comply. It is because of that failure that directions would always be given at the hearing, and for that reason the Tribunal considers that the intended effect is achieved.

23(2) Adjournments	"An application for an adjournment made more than 21 days before the hearing date **will** be considered by a clerk or a single solicitor member on the papers."	(a) An obligation (b) The context makes it plain that applications to which this paragraph applies will be considered by a clerk or single solicitor, and that it will be done on the papers. The Tribunal also considers that the wording implies that consideration will be given to the application before the hearing date.
23(3) Adjournments	"An application for an adjournment made 21 days or less before the hearing date **will** be considered by the panel listed to sit on the substantive hearing on the papers unless it is in the interests of justice for the matter to be dealt with at an oral hearing.	(a) An obligation (b) In this instance, the Tribunal considers that the intended meaning is given effect because the rule applies to applications made in the context of ongoing proceedings, and the "unless" provides further helpful context. The Tribunal also considers that the wording implies that consideration will be given to the application before the hearing date.
26(2) Disclosure and discovery	"Any order made by the Tribunal **will** only apply to material that is in the possession or under the control of a party."	(a) A requirement to ensure orders are drafted a certain way (b) In this instance the Tribunal recognises that alternative wording, such as "only applies", could have been used. However, it considers that the intended meaning is given effect because the context here is that the order will have been made by the Tribunal, and the disclosure order itself will make clear, if necessary, that it only applies to material in the possession and control of the party.

26(3) Disclosure and discovery	"An order made under paragraph (1) **will not** oblige the parties to produce any material which they would be entitled to refuse to produce in proceedings in any court in England and Wales"	(a) A requirement to ensure orders are drafted a certain way (b) In this case the Tribunal recognises that alternative wording, such as "must not" could have been used. However, it considers that the intended meaning is given effect because the order will have been made and it will say that no material of the type described will be required to be produced.
32(1) Previous findings of record	"A conviction for a criminal offence in the United Kingdom may be proved by the production of a certified copy of the certificate of conviction relating to the offence and proof of a conviction **will** constitute evidence that the person in question was guilty of the offence."	(a) A statement of the position (b) In this case, the Tribunal recognises that alternative wording, such as "is evidence" could have been used. However, it considers that the intended effect is given effect because the certified copy will have been produced in the context of existing proceedings.
32(1) Previous findings of record	"The findings of fact upon which that conviction was based **will** be admissible as conclusive proof of those facts save in exceptional circumstances."	(a) A statement of the position (b) In this case, the Tribunal recognises that alternative wording, such as "is admissible" could have been used. However, it considers that the intended meaning is given effect because the conviction will have been secured, this case, the provision applies in the context of ongoing proceedings and the condition relating to exceptional circumstances also provides further helpful context.
34(1) Publication of cause lists	"A cause list **will** be published on the Tribunal's website before the case is due to be heard."	(a) A requirement (b) The context here ("before the case is due to be heard") gives effect to the intended meaning, providing certainty about when the list must be published. Also the rule applies in the context of specific ongoing proceedings rather than it being a general rule.

35(3) Public or private hearings	"If there is no objection to the application from any of the parties, the Tribunal **will** consider the application on the papers unless it considers that it is in the interests of justice for the application to be considered at an oral hearing"	(a) A requirement (b) The context gives effect to the intended meaning and provides certainty because the requirement to consider the application on the papers is conditional on there being no objections unless it is considered to be in the interests of justice for the application to be heard at an oral hearing. Also the rule applies in the context of specific ongoing proceedings rather than it being a general rule.
35(4) Public or private hearings	"If the Tribunal decides that the application made under paragraph (2) is to be considered at an oral hearing, that hearing **will** take place in private unless the Tribunal directs otherwise."	(a) A requirement (b) The context gives effect to the intended meaning and provides certainty because the requirement is conditional on a decision that there will be an oral hearing and on the Tribunal not directing otherwise. Also the rule applies in the context of specific ongoing proceedings rather than it being a general rule.
39(1) Recording of the hearing	"All hearings of the Tribunal **will** be electronically audio-recorded"	(a) A requirement (b) In this case, the Tribunal considers that alternative wording, such as "must" could have been used. However, the Tribunal considers that the intended meaning is given effect because there is no uncertainty about there being a requirement which applies to all future hearings from the date on which the rules come into force.
39(3) Recording of the hearing	"Where a hearing is held in private, a copy of the electronic recording may only be disclosed to the parties and only on the provision of an undertaking that the recording or any transcript of the hearing or any part of it **will not** be made public"	(a) A description (b) The intended meaning is given effect because here "will" is used in the context of the contents of an undertaking.

40(4) Decisions	"Decisions on applications made during the course of a substantive hearing **will** be announced in a public session and the written reasons **will** be contained in the judgment issued at the conclusion of the proceedings."	(a) Requirements (b) In this case, the Tribunal recognises that alternative wording, such as "must" could have been used in both cases. However, the Tribunal considers that the intended meaning is given effect given that the rule applies in the context of ongoing proceedings.
41(3) Sanction	"The respondent **will** be entitled to make submissions by way of mitigation, including character references, in respect of the sanction, if any, to be imposed by the Tribunal."	(a) A statement of the position implying a requirement on the Tribunal to entertain the submissions (b) In this case the Tribunal recognises that alternative wording, such as "is" could have been used. However, the Tribunal considers that the intended meaning is given effect because it applies in the context of ongoing proceedings.
41(4) Sanction	"The Tribunal **will** have regard to its guidance on sanctions in force at the time when determining the appropriate sanction"	(a) A requirement (b) In this case, the Tribunal recognises that alternative wording, such as "must" could have been used. However, the Tribunal considers that the intended meaning is given effect because it applies in the context of ongoing proceedings.
43 (4) Costs	"The Tribunal **will** first decide whether to make an order for costs and **will** identify the paying party. When deciding whether to make an order for costs, against which party, and for what amount, the Tribunal **will** consider all relevant matters including the following—"	(a) Requirements (b) The Tribunal recognises that alternative wording, such as "must" could have been used in all 3 instances. However, the Tribunal considers that the intended meaning is given effect because it applies in the context of ongoing proceedings.

44(2) Sending and service of documents	"Subject to paragraph (3), if a party specifies an email address for the electronic delivery of documents the Tribunal and other parties **will** be entitled to serve (and service **will** be deemed to be effective) documents by electronic means to that email address, unless the party states in writing that service should not be effected by those means."	(a) An entitlement in the first case and a statement of the position in the second. (b) In this case, the Tribunal accepts that alternative wording, such as "are" could have been used in the first case and "is" in the second. However, the Tribunal considers that the intended meaning is given effect because it applies in the context of ongoing proceedings and (in the second instance) because of the "unless" condition).
44(5) Sending and service of documents	"The Tribunal **will** proceed on the basis that the address, including an email address, provided by a party or its representative is and remains the address to which documents should be sent or delivered until receiving written notification to the contrary by that party or representative."	(a) A requirement (b) The Tribunal considers that intended meaning is given effect because the rule applies in the context of ongoing proceedings.
51 Transitional provisions	"These Rules do not apply to proceedings in respect of which an Application is made before the date on which these Rules come into force and those proceedings **will** be subject to the Solicitors (Disciplinary Proceedings) Rules 2007 as if they had not been revoked."	(a) A statement of the position (b) The Tribunal considers that the intended meaning is given effect because the rule applies in the context of specific ongoing proceedings.

Appendix 3

S.I. 2019/1228; S.I. 2019/1230 and S.I. 2019/1231

Town and Country Planning (North Weald Airfield) (EU Exit) Special Development Order 2019

Town and Country Planning (Waterbrook Ashford) (EU Exit) Special Development Order 2019

Town and Country Planning (Car Park D Ebbsfleet International Station) (EU Exit) Special Development Order 2019

1. The Committee requested a memorandum on five points in relation to the above Orders.

2. In relation to all three S.I.s:

> *Other than a copy of the OMP being kept on the land at all times, explain where the CMP and the OMP are available?*
>
> *Explain why an address has not been given where a hard copy of the ADR can be viewed free of charge?*
>
> *What is the meaning of "site official" (used in article 4)? Natural meaning, site official would be a person authorised to be there by the site operator. It is a government operated site.*

In relation to S.I. 2019/1228:

> *Explain whether the definition of "hard standing" in article 2, is referring to "pre-existing hard standing" only or whether it is intended to include any temporary hard standing installed on the land.*

And in relation to S.I. 2019/1231:

> *Explain why a definition of "hard standing" is not included in this instrument (compare article 2 of S.I.s 2019/1228 and 2019/1230).*

3. *Availability of CMP and OMP documents* – the Secretary of State is responsible for addressing non-compliance with the conditions and limitations of the planning permission granted under these three Special Development Orders. The CMP contains high level technical detail in relation to the construction on the site (mainly to ensure a safe construction site). In addition, the OMP contains local details on the operation of the site (including sensitive information relating to site security). Copies of the relevant sections of the OMP will be provided to those working on the site and the site rules will be provided to each driver upon their arrival. As the rules are purely operational and administrative, and addressing non-compliance with the terms and conditions of the planning permission rests with the Secretary of State, we do not consider it is necessary to make these documents publicly available. The documents have been prepared following

engagement with key stakeholders, including the relevant fire and rescue and police authorities, Kent and Essex Resilience Forums, highways authorities, Health and Safety Executive, local planning authorities and statutory environmental bodies.

4. *Availability of the ADR* – the European Agreement concerning the International Carriage of Dangerous Goods by Road published in 2019 (ADR) is made available for inspection during office hours at Planning Department, MHCLG, 2 Marsham Street, London, SW1P 4DF. We apologise for not noting this point and will amend this in the near future.

5. *Meaning of site official* – we consider the term "site official" takes its common English meaning. Each site will have a secure perimeter and other security measures to ensure only authorised persons and vehicles can access the site, and the site operator will ensure the identity of site officials is obvious to drivers. The OMP will provide for site entrances, and the route to the parking areas, to be strictly controlled by site officials who will direct drivers to allocated parking.

6. *Definition of hard standing in S.I. 2019/1228* – the definition of "hard standing" used in article 2 of the Order refers to the existing and new hard standing and including roads. At North Weald the site includes part of an unused, hard surfaced, taxiway of the airport, and a gravelled area. Prior to the making of the Order this taxiway and gravelled area were used as a road / parking area. We have provided in the Order for the gravelled area next to the existing taxiway to be resurfaced as hard standing. The definition of hard standing in article 2 includes pre-existing hard standing and this new hard standing. There are no proposals for any temporary hardstanding to be installed at North Weald and so there was no need to reference this in the definition.

7. *Hard standing in S.I. 2019/1231* – the site in Ebbsfleet is already entirely made up of permanent hard standing and therefore it was not necessary to define this term as it will take its common English meaning. This contrasts with the other two sites (in Ashford and North Weald) which contain a mixture of hard standing (including roads with hard standing surfaces) and undeveloped land, and where some new hard standing was proposed.

Ministry of Housing, Communities and Local Government

22 October 2019

Appendix 4

S.I. 2019/1236

Export Control (Sanctions) (Amendment) Order 2019

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

> *In relation to the amendments made by paragraph 6(a) and (c) of the Schedule, explain why "contravention" is substituted for "circumvention" in relation to enabling or facilitating the breach of a prohibition, but not in relation to breaching a prohibition directly.*

2. Contravention and circumvention are different concepts and dealt with in different parts of the Export Control (North Korea Sanctions) Order 2018 ("**North Korea Order**")). Penalties for directly contravening trade sanctions prohibitions in Council Regulation (EU) 2017/1509 are set out articles 5 to 19 of the North Korea Order. So, in terms, the principal 'contravention offences' in the North Korea Order are established separately from the provisions in article 20 of the North Korea Order which are amended by paragraph 6(a) and (c) of the Schedule to this instrument. Article 20 of the North Korea Order deals with circumvention and secondary offences.

3. The offences in articles 20(1)(a) and 20(3)(a) of the North Korea Order are specifically designed to enforce the prohibition in Article 52 of Council Regulation (EU) 2017/1509. Article 52 prohibits the circumvention of the other prohibitions in that EU Regulation. The requirement to prohibit circumvention is frequently found in the EU sanctions acquis on sanctions as well as under Article 52 of EU Regulation 2017/1509.

4. The 'enabling and facilitating offences' in articles 20(1)(b) and 20(3)(b) are supplemental to and separate from the principal offences relating to contravention under articles 5 to 19 of the North Korea Order.

5. The existence of two types of supplementary offence in the North Korea Order (as amended) – i.e. the existence of the 'enabling and facilitating offences' and 'circumvention offences' - reflects the Department's standard practice in giving effect to the EU requirement to ensure there are domestic penalties to enforce EU prohibitions.

6. The references to "circumvention" in articles 20(1)(b) and 20(3)(b) of the original North Korea Order were inconsistent with the Department's standard practice and so inconsistent with comparable offence regimes in other statutory instruments. As an example of provision which is consistent with the newly amended North Korea Order, please see article 6(1)(b) of the Export Control (Venezuela Sanctions) Order 2019. This inconsistency in the original North Korea Order was an unwanted feature in that instrument.

7. This instrument brings these offences into line with the approach in other sanctions instruments.

Department for International Trade

22 October 2019

Appendix 5

S.I. 2019/1249

Universal Credit (Childcare Costs and Minimum Income Floor (Amendment) Regulations 2019

1. In its letter to the Department of 16th October 2019, the Committee requested a memorandum on the following point:

> *Given that regulation 3 seeks only to clarify the existing legislation, confirm whether the Department consulted the SI Registrar about whether or not to provide free replacement copies of the instrument.*

2. The Department's response to the Committee's point is set out below.

3. An express reference in the relevant provision of the Universal Credit Regulations 2013 was lost as a result of previous amendments made in 2014. The Department decided that the better view was that an amendment was needed to restore the original reference. The Department acknowledges that it was therefore appropriate to at least consider the provision of free replacement copies, which it did.

4. The instrument contains other provisions that amend the Universal Credit Regulations 2013 and which would definitely not require free replacement copies to be issued.

5. It was ultimately the Department's view that free replacement copies of the instrument did not need to be provided.

6. The Department did not consult the SI Registrar and acknowledges, in hindsight, that consulting them would have been appropriate. If required, the Department will now provide free replacement copies of the instrument.

Department for Work and Pensions

22 October 2019

Appendix 6

S.R. 2019/173

Universal Credit (Childcare Costs and Minimum Income Floor) (Amendment) Regulations (Northern Ireland) 2019

1. In its letter to the Department of 16th October 2019, the Committee requested a memorandum on the following point:

> *Given that regulation 3 seeks only to clarify the existing legislation, confirm whether the Department consulted the SI Registrar about whether or not to provide free replacement copies of the instrument.*

2. The Department's response to the Committee's point is set out below.

3. As the Department was amending the equivalent provision in Great Britain to restore an express reference previously lost from the relevant Regulations, it was decided that the better view was that a similar amendment was needed to the Universal Credit Regulations (Northern Ireland) 2016. The Department acknowledges that it was therefore appropriate to at least consider the provision of free replacement copies, which it did.

4. The instrument contains other provisions that amend the Universal Credit Regulations (Northern Ireland) 2016 and which would definitely not require free replacement copies to be issued.

5. It was ultimately the Department's view that free replacement copies of the instrument did not need to be provided.

6. The Department did not consult the SI Registrar and acknowledges, in hindsight, that consulting them would have been appropriate. If required, the Department will now provide free replacement copies of the instrument.

Department for Work and Pensions

22 October 2019

Appendix 7

S.I. 2019/1259

Isles of Scilly (Application of Water Legislation) Order 2019

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

> *(1) In relation to regulation 4(7), clarify the type of application to which new subsection (2A) is intended to refer.*
>
> *(2) Explain what rights of due process are available to a person who, but for the new provision inserted by regulation 4(9), would have issued an appeal before 1 April 2025, but is prevented from issuing that appeal on or after 1 April 2025 because the two-month time limit in section 105(3) has expired.*

2. In relation to point (1), section 51B was substituted by section 10(3) of the Water Act 2014 (c. 21). The new subsection (2A) is intended to refer to applications by a person or the water undertaker to the Authority for an order under subsection (4) of section 51B (as substituted in 2014).

3. In relation to point (2), the Department's policy intent is to delay the circumstances in which a sewerage undertaker is under a duty to adopt any sewer, lateral drain or sewerage disposal works until 1 April 2025. After 1 April 2025, the relevant sewerage infrastructure on the Isles of Scilly will have been upgraded so that connections to the sewerage network can be made after that date, in accordance with the provisions of the Water Industry Act 1991. Regulation 4(9) does not achieve this result in the manner the Department intends. The Department is due to make further secondary legislation relating to the application of English water legislation to the Isles of Scilly in early 2020. As part of that further legislation, which is intended to come into force on 1 April 2020, the Department will ensure that provisions are included to achieve the policy intent, including omitting regulation 4(9) of S.I. 2019/1259.

4. While regulation 4 of S.I. 2019/1259 will come into force on 1 November 2019, the appointment of a water and sewerage undertaker on the Isles of Scilly will not take effect until 1 April 2020. In practice, therefore, there will be no person capable of making a declaration under section 102, and therefore no prospect of any appeals under section 105(1) taking place, between regulation 4 coming into force and 1 April 2020, when the Department will have corrected this error.

Department for Environment, Food and Rural Affairs

22 October 2019