

HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

1st Report of Session 2019

Drawn to the special attention of the House:

School Teachers' Pay and Conditions (England) Order 2019

Correspondence:

Missing Defra statutory instruments

Ordered to be printed 15 October 2019 and published 17 October 2019

Published by the Authority of the House of Lords

HL Paper 3

Secondary Legislation Scrutiny Committee

The Committee's terms of reference, as amended on 11 July 2018, are set out on the website but are, broadly:

To report on draft instruments and memoranda laid before Parliament under sections 8, 9 and 23(1) of the European Withdrawal Act 2018.

And, to scrutinise –

- (a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;
- (b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in the terms of reference.

The Committee may also consider such other general matters relating to the effective scrutiny of secondary legislation as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

<u>Baroness Bakewell of Hardington Mandeville</u>	<u>Viscount Hanworth</u>	<u>The Earl of Lindsay</u>
<u>Rt Hon. Lord Chartres</u>	<u>Lord Hodgson of Astley Abbotts</u>	<u>Lord Lisvane</u>
<u>Rt Hon. Lord Cunningham of Felling</u>	(Chairman)	<u>Lord Sherbourne of Didsbury</u>
<u>Lord Faulkner of Worcester</u>	<u>Lord Kirkwood of Kirkhope</u>	<u>Baroness Watkins of Tavistock</u>

Registered interests

Information about interests of Committee Members can be found in the last Appendix to this report.

Publications

The Committee's Reports are published on the internet at <http://www.parliament.uk/seclegpublications>

Committee Staff

The staff of the Committee are Christine Salmon Percival (Clerk), Helen Gahir (Adviser), Philipp Mende (Adviser), Jane White (Adviser), Louise Andrews (Committee Assistant), Ben Dunleavy (Committee Assistant) and Paul Bristow (Specialist Adviser).

Further Information

Further information about the Committee is available at <https://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/>

The progress of statutory instruments can be followed at <https://beta.parliament.uk/find-a-statutory-instrument>

The National Archives publish statutory instruments with a plain English explanatory memorandum on the internet at <http://www.legislation.gov.uk/uksi>

Contacts

Any query about the Committee or its work, or opinions on any new item of secondary legislation, should be directed to the Clerk to the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW. The telephone number is 020 7219 8821 and the email address is hseclegscrutiny@parliament.uk.

First Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

School Teachers' Pay and Conditions (England) Order 2019

Date laid: 20 September 2019

Parliamentary procedure: negative

This Order has been laid by the Department for Education (DfE) and serves to introduce new pay and allowance ranges in the national pay framework for school teachers in maintained schools in England. The Explanatory Memorandum (EM) accompanying the Order notes that the Secretary of State accepted the School Teachers' Review Body's (STRB's) recommendation in full for a 2.75% uplift to the minima and maxima of all pay ranges and allowances. DfE notes that as this pay award is more than the Department assessed as affordable in its evidence to the STRB, it has invested a further £105 million into the existing Teachers' Pay Grant this financial year to bridge the gap.

The Department ran an eight-week consultation from 22 July to 13 September 2019 on the STRB's 29th report and the draft "School Teachers' Pay and Conditions Document 2019 and Guidance on School Teachers' Pay and Conditions". The EM notes that there were criticisms of the time taken to publish the STRB report and that the consultation ran largely over the school holiday period. DfE states that: "The government noted consultees' comments concerning the timing of the announcement and publication of the STRB report ... this was a result of the need to consider individual departmental pay awards within the context of the wider public sector pay policy. DfE officials are continuing to work with HMT to ensure the timetable next year allows for earlier publication of the response".

The Order is drawn to the special attention of the House on the ground that it gives rise to issues of public policy likely to be of interest to the House.

Background

1. The Department for Education (DfE) has laid this Order alongside an Explanatory Memorandum (EM). DfE notes that this Order is made annually and serves to introduce new pay and allowance ranges in the national pay framework for school teachers in maintained schools in England.
2. The Order makes provision for the remuneration and conditions of employment of school teachers to be determined by reference to the provisions set out in section 2 of the "School Teachers' Pay and Conditions Document 2019 and Guidance on School Teachers' Pay and Conditions" ("the Document").¹ The Document applies to teachers employed in local authority maintained schools in England. Previous Documents have applied to teachers in England and Wales. The EM notes, however, that "... from

¹ Department for Education, School teachers' pay and conditions document 2019 and guidance on school teachers' pay and conditions (September 2019): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/832634/School_teachers_pay_and_conditions_2019.pdf [accessed 23 September 2019].

30th September 2018, the Welsh Ministers, rather than the Secretary of State, have had devolved competence to make provision for teachers in Wales”.² Paragraph 7.2 of the EM notes that the Welsh Ministers will be making their own separate 2019 Order shortly which will cover teachers in Wales.

3. At paragraph 7.6 of the EM the Department notes that, historically, the Government have always laid the pay order by 10 August (with the exception of 2018) to enable the pay award and any other changes to the Document to come into effect from 1st September (the date on which, historically, teachers’ pay awards have always come into effect). DfE goes on to state that:

“However, like last year, as it was necessary to consider the teachers’ pay award in the context of the wider public sector pay process and awards and provide a meaningful (8 week) consultation with schools and consultees, the pay order will come into force on 11th October 2019 and its provisions will have effect retrospectively from 1st September 2019. These are the same principles that were in place for the 2018 pay award.”³

School Teachers’ Pay and Conditions Document 2019 and Guidance on School Teachers’ Pay and Conditions (“the Document”)

4. The EM notes that section 1 of the Document summarises the changes to pay and conditions and associated guidance since the 2018 Order and other relevant information about the Document. Section 2 of the Document is laid out in seven parts and two annexes. Parts 2 to 6 set out how pay and allowances for the various categories of teacher are to be determined. Part 7 sets out conditions of employment for the various categories of teacher that will have effect as terms of their contracts of employment. The Annexes to section 2 of the Document set out the performance standards for teachers and interpretation matters. Section 3 of the Document is statutory guidance to accompany the provisions in section 2 and replaces the previous section 3.

School Teachers’ Review Body’s (STRB’s) 29th Report⁴

5. The Department notes at paragraph 7.4 of the EM that on 21 November 2018 the Secretary of State asked the STRB to consider application of the 2019 pay award for teachers, within the context of the pay award focusing on the Government’s flexible approach to public sector pay and teacher recruitment and retention challenges. DfE states that the STRB were asked to consider:

“... how the pay award can best utilise the flexibility within the Government’s pay policy to address areas of skill shortage, while remaining within the bounds of affordability across the school system as a whole. In particular, you will want to consider how the pay award can best encourage high quality entrants to join the profession and support their progression within the workforce.”⁵

6. Section 121 of the Education Act 2002 requires the STRB to consult various representative bodies in addition to the Secretary of State before reporting on a matter referred to them. The EM notes at paragraph 7.5 that on 22

2 EM, para 2.2.

3 EM, paragraph 7.6.

4 School Teachers’ Review Body, School Teachers’ Review Body 29th Report - 2019 (July 2019): <https://www.gov.uk/government/publications/school-teachers-review-body-29th-report-2019> [accessed 23 September 2019].

5 EM, paragraph 7.4.

July 2019, following submission of evidence from the Secretary of State and the representative bodies, the Government laid before Parliament the STRB's 29th Report, and its proposed response to that report.⁶ The STRB recommended a 2.75% uplift to the minima and maxima of all pay ranges and allowances in the national pay framework.

7. DfE notes at paragraph 7.8 of the EM that the Government's view was that it was imperative to increase the competitiveness of the pay framework in the wider graduate and labour market and support schools to help attract and retain good teachers and leaders. The Secretary of State therefore accepted the STRB's recommendation in full for a 2.75% uplift to the minima and maxima of all pay ranges and allowances. The Department notes that the flexible performance-based pay system will provide schools with the option to give teachers and leaders a higher pay rise where appropriate to their local context and budget. We asked the Department for background information about the flexible performance-based pay system (see Appendix 1 for all questions and responses) and were told:

“Essentially, while the Department determines the minima and maxima of the teacher and headteacher pay ranges and the annual pay uplift to those ranges, (via recommendations from the STRB), how individual schools choose to reward their teachers within those ranges is entirely up to them. All pay progression is now linked directly to performance and, as long as schools pay within the minima and maxima of the pay ranges, they are free to make progression of whatever amount suits them and which they can afford.”⁷

8. Paragraph 7.9 of the EM notes that because this pay award is more than the Department assessed as affordable in its evidence to the STRB, it has invested a further £105 million into the existing Teachers' Pay Grant this financial year. In answer to our questions about the additional funding (see Appendix 1), the Department told us that: “We are funding the difference between the 2.75% pay award and the 2% we have assessed schools can, on average, afford at a national level.”
9. The STRB's 29th Report notes that the Department could not meet the STRB's original deadline for initial written representations and evidence. The 29th Report states that the STRB then extended the deadline for all consultees, which “... had an impact on the timescale for the rest of the pay round and meant that our report was submitted to the Government on a later date than we had originally planned”.⁸ We asked the Department why it had been unable to meet the STRB's original deadline. The DfE reply notes that this related to securing cross-government clearance on their evidence (see Appendix 1 for full questions and responses). The Department also told us that it had received the STRB's 29th Report on 23 May 2019.

Formal consultation

10. The EM states that on 22 July 2019, the Secretary of State invited consultees who contributed to the STRB process to comment on the STRB's 29th Report and the revised draft Document during an eight-week statutory consultation process (which ran from 22 July to 13 September 2019).

6 HC Deb, 22 July 2019, [HCWS1766](#) [Commons written ministerial statement].

7 Response provided by DfE on 8 October 2019.

8 STRB's [29th Report](#), page 4, para 1.16.

11. Section 10 of the EM provides detailed information about the consultation process and responses received.
12. The EM notes that the Association of School and College Leaders, the National Association of Head Teachers, NEU, and Voice produced a joint response, as well as providing individual responses. Amongst other points raised, DfE notes that: “... the unions were also critical of the time taken to publish the STRB report and that the subsequent consultation ran largely over the school holiday period.” Paragraph 10.10 of the EM also notes (amongst other points) that the National Association of Schoolmasters Union of Woman Teachers, who were not part of the joint union response, were critical of the delay in publishing the STRB report and the consultation over the school holiday period.
13. We asked the Department why it had run the consultation over the school holiday period. DfE’s response stated that:

“Given HMT’s desire to ensure that the teachers pay award settlement was considered within the context of the whole public sector pay settlement process (and individual public sector review body reports to different timetables), the resultant cross-government discussions meant that we only received final clearance to announce the teachers’ pay award on 22nd July. Historically teachers pay awards normally come into effect on 1st September and we could, as in previous years, have run a very short consultation in order to ensure we met that deadline, particularly as we were accepting all of the pay recommendations in full. However, having spoken to a number of key stakeholders about the forthcoming consultation process, who told us they would prefer a longer consultation period, even if that meant missing the 1st September implementation date, we decided therefore to have an 8-week consultation and give consultees the maximum amount of time to discuss and prepare responses. Inevitably this meant running the consultation over the summer holiday but also into the new school term period as well.”⁹

Conclusion

14. We remind the House that in 2018 we drew the School Teachers Pay and Conditions Order 2018 (SI 2018/998) to its attention, commenting that we had no doubt that the scheduling of the formal consultation to coincide with school summer holidays would have presented the interested parties with significant difficulties in formulating and presenting their views.¹⁰ In 2017 we drew the School Teachers Pay and Conditions Order 2017 (SI 2017/811) to the attention of the House commenting on the length of the consultation period and the timing thereof.¹¹ **The Committee notes that the Department carried out a longer consultation period than it did in 2018 and 2017; however, we also note the criticisms voiced by the unions about the timing of this consultation. The Committee is disappointed that the 2019 consultation was largely run over the school holiday period.**
15. **The Order is drawn to the special attention of the House on the ground that it gives rise to issues of public policy likely to be of interest to the House.**

⁹ Response provided by DfE on 4 October 2019.

¹⁰ [41st Report](#), Session 2017–19 (HL Paper 190).

¹¹ [5th Report](#), Session 2017–19 (HL Paper 20).

CORRESPONDENCE

Missing Defra statutory instruments

16. On 9 September 2019 we wrote to the Permanent Secretary of the Department for Environment, Food and Rural Affairs (Defra) to ask about six statutory instruments which were considered by the Committee, when they were laid initially before Parliament as proposed negative instruments, but were then not sent to the Committee for regular scrutiny when they were laid under the negative procedure in December 2018. The Department also failed to send the six instruments to the Joint Committee on Statutory Instruments. In her response of 10 October, the Permanent Secretary apologises for the oversight and explains that the Department has carried out a review of its internal processes since the oversight and has made a series of improvements to ensure robust arrangements for delivering its statutory instruments to Parliament. The correspondence is published at Appendix 2.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Instruments subject to annulment

- SI 2019/1270 International Driving Permits (Fees) (EU Exit) (Revocation) Regulations 2019
- SI 2019/1272 Fisheries, Aquaculture and Marine (Functions Exercisable in or as Regards Scotland) (Amendment) (EU Exit) (No. 2) Regulations 2019
- SI 2019/1284 Sea Fishing (Miscellaneous Amendments) Regulations 2019
- SI 2019/1285 Environmental Damage (Prevention and Remediation) (England) (Amendment) Regulations 2019
- SI 2019/1288 Humane Trapping Standards (England and Wales) Regulations 2019
- SI 2019/1289 Spirit Drinks and Scotch Whisky (Amendment) Regulations 2019
- SI 2019/1290 Pesticides (Amendment) Regulations 2019
- SI 2019/1293 Healthcare (European Economic Area and Switzerland Arrangements) (EU Exit) Regulations 2019

Treaties subject to scrutiny under the Constitutional Reform and Governance Act 2010

- CP 150 Protocol to the Convention concerning the Construction and Operation of a European X-Ray Free-Electron Laser Facility on the Accession of the UK

APPENDIX 1: SCHOOL TEACHERS' PAY AND CONDITIONS (ENGLAND) ORDER 2019

Additional Information from the Department for Education

Q1: The Explanatory Memorandum (EM) states at paragraph 10.2 that on 22 July 2019 the Secretary of State invited consultees who contributed to the School Teachers' Review Body (STRB) process to comment on the STRB's 29th report and the revised draft Document. Paragraph 10.10 of the EM notes that the NASUWT were critical of the delay in publishing the STRB report and the consultation over the school holiday period. Paragraph 10.6 of the EM notes that "The unions were also critical of the time taken to publish the STRB report and that the subsequent consultation ran largely over the school holiday period". Why was the consultation run over the school holiday period?

A1: Given HMT's desire to ensure that the teachers pay award settlement was considered within the context of the whole public sector pay settlement process (and individual public sector review body reports to different timetables), the resultant cross-government discussions meant that we only received final clearance to announce the teachers' pay award on 22nd July. Historically teachers pay awards normally come into effect on 1st September and we could, as in previous years, have run a very short consultation in order to ensure we met that deadline, particularly as we were accepting all of the pay recommendations in full. However, having spoken to a number of key stakeholders about the forthcoming consultation process, who told us they would prefer a longer consultation period, even if that meant missing the 1st September implementation date, we decided therefore to have an 8 week consultation and give consultees the maximum amount of time to discuss and prepare responses. Inevitably this meant running the consultation over the summer holiday but also into the new school term period as well.

Q2: Please can you provide some background information on what the Teachers Pay Grant (TPG) is and how it operates in relation to the 2019 pay award?

A2: The TPG was first announced in July 2018 to support schools' with the costs of the 2018 teacher pay award. The grant is allocated on a per-pupil basis for mainstream schools and per place for special schools as the simplest way of calculating school level allocations. The grant provides funding directly to all state funded primary and secondary schools, 16-19 schools, and maintained nursery schools (as with other funding, maintained schools will receive funding via the local authority (LA), whereas academies will receive this directly from the ESFA). Last September we published grant rates of £187m in 2018-19 and £321 million in 2019-20. However, for the September 2019 pay award, as the STRB recommendation of 2.75% was 0.75% over our published assessment that a 2% increase in per teacher pay is affordable nationally to schools in 2019-20, we are providing an additional £105 million of funding in 2019-20 through the grant, taking the total in 2019-20 to £426 million.

Q3: In the STRB's 29th Report on page 4 (paragraph 1.16) it states that: "We invited consultees to submit their initial written representations and evidence by 16th January 2019. In early January, officials from the Department informed us that they would not be able to meet this deadline. We therefore decided to extend the deadline for all consultees to 30th January. This had an impact on the timescale for the rest of the pay round and meant that our report was submitted to the Government on a later date than we had originally planned ..."

Q3(i): Why was the Department unable to meet the 16 January deadline?

A3(i): To secure cross government clearance on our evidence.

Q3(ii): When did the DfE receive the STRB's 29th Report?

A3(ii): We received the report late afternoon, 23rd May 2019

Q3(iii): Was this date later than when the equivalent report by the STRB was received by DfE in 2018?

A3(iii): We received the 2018 report on 19 May 2018

Q4: Please could you provide some background information about the flexible performance-based pay system referred to in paragraph 7.8 of the Explanatory Memorandum?

A4: Essentially, while the Department determines the minima and maxima of the teacher and headteacher pay ranges and the annual pay uplift to those ranges, (via recommendations from the STRB), how individual schools choose to reward their teachers within those ranges is entirely up to them. All pay progression is now linked directly to performance and, as long as schools pay within the minima and maxima of the pay ranges, they are free to make progression of whatever amount suits them and which they can afford.

Q5(i): With reference to paragraphs 7.8 and 7.9 of the Explanatory Memorandum (EM)—is the additional £105 million (that the DfE has invested into the existing Teachers' Pay Grant this financial year) to bridge the gap between the 2% that the Department assessed as affordable in its evidence to the STRB and the 2.75% uplift to the minima and maxima of all pay ranges and allowances that the STRB recommended?

A5(i): Yes.

Q5(ii): Does the £105 million equate to the 0.75% difference between these two percentages?

A5(ii): We are funding the difference between the 2.75% pay award and the 2% we have assessed schools can, on average, afford at a national level.

Q6: Paragraph 7.4 of the EM states that the STRB were asked to consider 'how the pay award can best utilise the flexibility within the Government's pay policy to address areas of skill shortage, while remaining within the bounds of affordability across the school system as a whole'—does the DfE consider skills shortages by geographical area as well as subject area?

A6: It does, though the main focus is directed on shortage subjects and areas of disadvantage.

15 October 2019 (Answers to questions 1–2 provided on 4 October 2019; answers to questions 3–4 provided on 8 October 2019)

APPENDIX 2: CORRESPONDENCE ON MISSING DEFRA STATUTORY INSTRUMENTS

Letter from Lord Hodgson of Astley Abbotts, Chairman of the Secondary Legislation Scrutiny Committee, to Tamara Finkelstein, Permanent Secretary at the Department for Environment, Food and Rural Affairs

I am writing to you about the following six statutory instruments (SIs) which were made and laid before Parliament at the end of 2018 without being sent to the Secondary Legislation Scrutiny Committee's (SLSC) for scrutiny:

- Persistent Organic Pollutants (Amendment) (EU Exit) Regulations 2018 (SI 2018/1405)
- Exotic Disease (Amendment) (England) (EU Exit) Regulations 2018 (SI 2018/1406)
- Air Quality (Miscellaneous Amendment and Revocation of Retained Direct EU Legislation) (EU Exit) Regulations 2018 (SI 2018/1407)
- Trade in Endangered Species of Wild Fauna and Flora (Amendment) (EU Exit) Regulations 2018 (SI 2018/1408)
- Equine Identification (England) (Amendment) (EU Exit) Regulations 2018 (SI 2018/1409)
- Exotic Disease (Amendment etc.) (EU Exit) Regulations 2018 SI 2018/1410

All six SIs were laid initially before Parliament under the European Union (Withdrawal) Act 2018 as proposed negative instruments. The Committee considered them as part of its sifting function, agreeing with the proposed negative procedure. The SIs were then laid before Parliament under the negative procedure for regular scrutiny on 21 December 2018, the first day of the Christmas Recess. It appears, however, that neither the SLSC nor the Joint Committee on Statutory Instruments (JCSI), which assesses the technical quality of relevant statutory instruments, received copies of the SIs. This meant that neither of the Committees was able to carry out its regular scrutiny function on behalf of Parliament with regard to these six SIs.

We have raised the issue of SIs not being sent to the SLSC before. In our Second Interim Report, which we published before we became aware of the six missing SIs, we highlighted that the Department had failed to send other SIs to the Committee for scrutiny. The Committee was able to consider those SIs because our Secretariat identified the oversight at the time and obtained copies from the Department. In a letter to the Committee, Lord Gardiner of Kimble apologised for the omission and said that steps were being taken to ensure that it would not happen again.

We remain concerned that the Department continues to face challenges with some key processes in relation to secondary legislation. It would be helpful for the Committee to be given assurance that measures are now in place to prevent recurrence. Should an omission happen again, the Committee may invite the Department to give oral evidence on its management of secondary legislation.

I would be grateful if you could reply to this letter by 7 October.

9 September 2019

Letter from Tamara Finkelstein to Lord Hodgson of Astley Abbots

I am writing in response to your letter of 9 September 2019 regarding six negative statutory instruments (SIs) laid by the Department for Environment Food and Rural Affairs (Defra) in December 2018 without copies being sent to the Secondary Legislation Scrutiny Committee (SLSC) or the Joint Committee on Statutory Instruments (JCSI).

Thank you for bringing this issue to our attention. I hope you can accept my sincere apologies, on behalf of the department, that copies of these SIs were not provided to the SLSC. We are incredibly grateful for the work of the SLSC and JCSI in scrutinising legislation on behalf of Parliament and Whitehall.

I note that Lord Gardiner wrote to Lord Trefgarne on 15 March 2019 regarding a delay in printed copies of SIs being made available to your clerks for scrutiny. In line with assurances provided in his letter, our Secondary Legislation Unit has undertaken a review of our internal processes and made a series of improvements to ensure that robust arrangements are now in place for delivering our SIs. I note that the incident regarding the six missing SIs specified in your letter occurred at the end of 2018 and was prior to our review taking place. As a priority, I will be taking a keen interest to ensure that all our future SIs are subject to proper scrutiny and challenge.

I would be more than happy to discuss this with you further to reassure you of my intent if that would be helpful.

10 October 2019

APPENDIX 3: INTERESTS AND ATTENDANCE

Committee Members' registered interests may be examined in the online Register of Lords' Interests at <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests>. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 15 October 2019, Members declared no interests.

Attendance:

The meeting was attended by Lord Cunningham of Felling, Lord Faulkner of Worcester, Viscount Hanworth, Lord Hodgson of Astley Abbots, The Earl of Lindsay, Lord Lisvane, Lord Sherbourne of Didsbury and Baroness Watkins of Tavistock.