House of Lords
House of Commons

Joint Committee on Statutory Instruments

Fifth Report of Session 2019–21

Drawing special attention to:

Police (Conduct) Regulations 2020 **(S.I. 2020/4)**

Countryside Stewardship (England) Regulations 2020 **(S.I. 2020/41)**

Education (Student Fees, Awards and Support etc.) (Amendment) (No.2) Regulations 2020 **(S.I. 2020/48)**

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Joint Committee on Statutory Instruments

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Lord Haskel *(Labour)*

Lord Morris of Handsworth (*Labour*)

Baroness Newlove *(Conservative)*

Lord Rowe-Beddoe (*Crossbench*)

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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, and Ché Diamond (Lords).

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Instruments reported

At its meeting on 11 March 2020 the Committee scrutinised a number of instruments in accordance with Standing Orders. It was agreed that the special attention of both Houses should be drawn to three of those considered. The instruments and the grounds for reporting them are given below. The relevant departmental memoranda, are published as appendices to this report.

1 S.I. 2020/4: Reported for defective drafting and for requiring elucidation

Police (Conduct) Regulations 2020

1.1 **The Committee draws the special attention of both Houses to these Regulations on the grounds that they are defectively drafted in three respects and that they require elucidation in two respects.**

1.2 These Regulations make provision about the disciplinary procedures that apply in relation to internal police conduct matters.

1.3 These Regulations ("the new Regulations") replace and revoke a series of earlier Regulations ("the old Regulations"). By virtue of regulation 4(1) and (6), the old Regulations continue to apply in relation to some allegations that came to light before 1 February 2020 ("pre-commencement allegations"). By virtue of regulation 4(1) and (2), the new Regulations apply in relation to police officers and former officers who left the police service on or after 15 December 2017. The Committee asked the Home Office whether the new Regulations or the old Regulations are intended to apply to pre-commencement allegations against a person who has ceased to be a police officer.

1.4 In a memorandum printed at Appendix 1, the Department asserts that regulation 4(6) prevents the new Regulations from applying in relation to pre-commencement allegations against both current and former police officers. But regulation 4(6) is expressed as a limitation only on regulation 4(1) (application of new Regulations to police officers), and not also as a limitation on regulation 4(2) (application to former officers). And regulation 4(1) does not apply to a person who has ceased to be a police officer. The Department's stated policy intention shows that both regulation 4(1) and (2) should have been expressly linked to paragraph (6). **The Committee accordingly reports regulation 4 for defective drafting.**

1.5 Regulation 15(3) sets out four preconditions for appointing a person to investigate an allegation of misconduct. They are expressed as an alternate list – with an "or" between the two final items – but it appeared to the Committee that they should operate in the same way as the list in regulation 12 of S.I. 2020/2, which has no such conjunction. The Committee therefore asked the Department to explain how it intended regulation 15(3) to operate. In its memorandum, the Department explains that a person must always satisfy the test in paragraph (a), but their appointment would nonetheless be prohibited if one or more of paragraphs (b) to (d) applies. So, although this provision is drafted differently from regulation 12 of S.I. 2020/2, it is intended to have the same effect. Consistency between different instruments doing precisely the same thing is always important to ensure clarity of application and consistency of interpretation, particularly here where the Committee feels both on SI.2020/2 and on these Regulations that the reader is not helped by the conflation of disjunctive and cumulative provisions in a single paragraph. **The Committee accordingly reports regulation 15(3) for defective drafting.**

1.6 Regulation 17 requires an investigator to give written notice of various matters within a specified time frame, as well as written terms of reference of the investigation, to an officer against whom a misconduct allegation has been made. The duty to provide written terms of reference is subject to a specific time limit set out in paragraph (3), which provides: "Where practicable, the investigator must give the officer concerned the written terms of reference … at the same time as written notice is given … or otherwise within a period of 5 working days". The Committee asked the Department to explain whether the words "where practicable" applies to both time limits in paragraph (3) and what time limit applies to the ongoing duty to provide terms of reference which had been withheld due to concerns about prejudice to an investigation where such concerns no longer apply. In its memorandum, the Department explains that the terms of reference should be provided at the same time as the written notice where practicable, and that where that is not practicable the five-day time limit applies; the Department notes that this construction is confirmed in guidance. The Department also confirms that there is no specific time limit relating to the ongoing duty to provide the terms of reference after it is concluded that concerns about prejudice to the investigation no longer apply, but that it intends to include a provision in guidance that this should be done as soon as practicable after that conclusion has been reached. **The Committee accordingly reports regulation 17(3) for requiring elucidation, provided by the Department's memorandum.**

1.7 Regulation 33 provides that a misconduct pre-hearing must be in private, except for a list of persons who are expressly entitled to attend. The list does not include a person appointed under regulation 8(6) to advise the chair. The Committee asked the Department to explain whether it intended that such an adviser would therefore be barred from attending a misconduct pre-hearing. In its memorandum, the Department explains that this is not its intent, and that it considers that the adviser may attend alongside the chair by virtue of regulation 8(6). It notes that regulation 33(5) makes no express provision that the chair may attend, but that this is inferred. The Committee agrees that it is a matter of course that the chair must attend the hearing; but since the chair's adviser can have functions that extend beyond the hearing, it is not beyond doubt that the adviser is entitled to attend a private part of the process, and the provisions about attendance should not have assumed that the adviser was implicitly included. **The Committee accordingly reports regulation 33 for defective drafting.**

1.8 Regulation 42 sets out the various possible outcomes of misconduct proceedings. It allows the person in charge of the proceedings to impose any disciplinary action mentioned in relation to the relevant type of proceedings. For a misconduct hearing, the options are a written warning, a final written warning, reduction in rank, and dismissal without notice. It appeared to the Committee that while some of the outcomes were mutually exclusive, it would be possible to impose both a reduction in rank and a written warning or final written warning. It asked the Department whether that was its intent. In its memorandum, the Department explains that it intends that only one of the disciplinary actions can be imposed as an outcome, and that this is made clear in related guidance. **The Committee accordingly reports regulation 42 for requiring elucidation, provided by the Department's memorandum.**

2 S.I. 2020/41: Reported for doubtful *vires*

Countryside Stewardship (England) Regulations 2020

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

2.2 These Regulations establish a Countryside Stewardship scheme under which the Secretary of State may make grants for the management of land and the promotion of cooperation between land managers. The Committee asked the Department for Environment, Food and Rural Affairs to identify the vires for part (b) of the definition of "eligible person" and in regulations 8(a), 14(1) and 16(6)(b). In a memorandum printed at Appendix 2, the Department asserts that the general power under section 98(1) of the Environment Act 1995, to "make provision for and in connection with the making of grants" allows the Secretary of State to determine whether a person's business is viable for eligibility purposes. The Committee considers that including a "viability" criterion in part (b) of the definition of "eligible person" is conferring a discretionary function on the person applying it, and that a general power to "make provision" does not rebut the strong presumption against sub-delegation. The Committee believes that there is room to argue that the enabling power is expecting the subordinate instrument to refer to objective criteria rather than to an open discretion. **The Committee accordingly reports part (b) of the definition of "eligible person" for doubt as to whether it is *intra vires*.**

2.3 In relation to regulation 14(1), the Department asserts that the broad power under section 98(2)(d) of the 1995 Act, in so far as it is "in connection with" the recovery of sums paid by way of grant under regulation 13, is sufficient to enable the charging of interest on the sums to be recovered. The Committee does not agree that general words of this kind are sufficient to rebut the presumption against the imposition of charges, and **accordingly reports regulation 14(1) for doubt as to whether it is *intra vires*.**

2.4 In relation to regulation 16(6)(b), the Department again asserts that the broad powers under section 98(1) and section 98(2)(d), relating to the making of provisions "for and in connection with" the making of grants and the recovery of sums paid by way of grant respectively, are sufficient to enable a fee to be charged when an appeal is lodged in relation to a grant decision made by the Secretary of State. The Committee again does not agree that general words of this kind rebut the presumption against the imposition of charges, **and accordingly reports regulation 16(6)(b) for doubt as to whether it is *intra vires*.**

2.5 The Committee accepts the Department's explanation in relation to the vires for regulation 8(a) given that the Secretary of State's ability to specify the timing of the application relates to administrative efficiency.

3 S.I. 2020/48: Reported for defective drafting

Education (Student Fees, Awards and Support etc.) (Amendment) (No.2) Regulations 2020

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

3.2 Regulation 4(3)(b)(i) (inserted regulation (2A)(c)) of this instrument provides that certain doctoral degree courses in Wales which have been specifically designated by that devolved authority are designated courses for the purpose of the Education (Postgraduate Doctoral Degree Loans and the Education (Student Loans) (Repayment) (Amendment) (No. 2) etc.) Regulations 2018. The effect of the designation is that funding may be provided to eligible students undertaking the course. One of the requirements for designation is that the course is "of between three and eight academic years duration". The Committee asked the Department for Education whether it is intended that a course of three years duration and a course of eight years duration is included. In a memorandum printed at Appendix 3, the Department confirm that it is so intended and acknowledge the lack of clarity. The Department undertakes to amend the Regulations at the next available opportunity. **The Committee accordingly reports regulation 4(3)(b)(i) for defective drafting, acknowledged by the Department.**

Instruments not reported

At its meeting on 11 March 2020 the Committee considered the instruments set out in the Annex to this Report, none of which were required to be reported to both Houses.

Annex

Draft instruments requiring affirmative approval

Draft S.I.	Human Tissue (Permitted Material: Exceptions) (England) Regulations 2020
Draft S.I.	Local Elections (Northern Ireland) (Amendment) Order 2020
Draft S.I.	Automatic Enrolment (Earnings Trigger and Qualifying Earnings Band) Order 2020
Draft S.I.	Parental Bereavement Leave and Pay (Consequential Amendments to Subordinate Legislation) Regulations 2020

Instruments subject to annulment

S.I. 2020/124	Local Government (Structural Changes) (Further Financial Provisions and Amendment) (Amendment) Regulations 2020
S.I. 2020/133	Council Tax and Non-Domestic Rating (Demand Notices) (England) (Amendment) Regulations 2020
S.I. 2020/135	Family Procedure (Amendment) Rules 2020
S.I. 2020/137	First-tier Tribunal and Upper Tribunal (Chambers) (Amendment) Order 2020
S.I. 2020/138	Personal Injuries (NHS Charges) (Amounts) (Amendment) Regulations 2020
S.I. 2020/146	Energy Act 2004 (Assistance for Areas with High Distribution Costs) (Amendment) Order 2020
S.I. 2020/169	Proscribed Organisations (Name Change) Order 2020
S.I. 2020/170	Greater Manchester (Light Rapid Transit System) (Exemptions) (Amendment) Order 2020

Instrument not subject to Parliamentary proceedings laid before Parliament

S.I. 2020/150	Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions (Amendment) Order 2020

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. 2020/134	Police and Crime Commissioner Elections (Designation of Local Authorities) Order 2020
S.I. 2020/136	Police and Crime Commissioner Elections (Designation of Police Area Returning Officers) Order 2020
S.I. 2020/152	Universal Credit (Work-Related Requirements) In Work Pilot Scheme (Extension) Order 2020
S.I. 2020/159	Council of Europe Convention on Cinematographic Coproduction (revised) Order 2020

Appendix 1

S.I. 2020/4

Police (Conduct) Regulations 2020

1. By letter dated 26 February 2020, the Joint Committee on Statutory Instruments has requested a memorandum on the following points:

> *(1) In relation to the conditions listed in regulation 15(3), explain whether it is intended that condition (a) is intended to apply in every case or only if none of conditions (b) to (d) applies, and how effect is given to that intention.*
>
> *(2) In relation to regulation 4(2), explain:*
>
> a) *whether these Regulations are intended apply to pre-commencement allegations against ex-police officers in circumstances other than those set out in regulation 4(8);*
>
> b) *if so, what authority is relied on to give such retrospective effect;*
>
> c) *if not, which procedures are intended to apply and how effect is given to that intention.*
>
> *(3) Explain:*
>
> a) *whether the words "where practicable" in regulation 17(3) apply to both time limits in that paragraph, such that if neither period is practicable no time limit applies; and*
>
> b) *what time limit applies to the duty to provide terms of reference in circumstances where they had been withheld on the basis of paragraph (6)(b) and that paragraph later ceases to apply after the 5-working-day time limit has expired.*
>
> *(4) Explain whether regulation 33(5) and (6) is intended to bar a person appointed under regulation 8(6) from attending a misconduct pre-hearing.*
>
> *(5) Explain whether it is intended that under regulation 42(1), a reduction in rank could be imposed at the same time as a written warning or final written warning.*

2. In response to point (1), it is intended that the condition in regulation 15(3)(a) applies in every case such that a person can never be appointed to investigate a matter if they do not have the necessary level of knowledge, skills and experience to plan and manage the investigation. Paragraphs (a) to (d) of regulation 15(3) are not intended to be cumulative or fully alternative. If a person has an appropriate level of knowledge, skills and experience to plan and manage the investigation and so satisfies the test in paragraph (a), the prohibition on that person's appointment nevertheless still applies if one or more of paragraphs (b), (c) and (d) applies in relation to that person. More than one of paragraphs (b), (c) and (d) may apply in relation to a person but only one of those paragraphs needs to be satisfied for the prohibition to apply (or none of them if the person does not satisfy the test in paragraph (a)).

3. In response to point (2), pre-commencement allegations (being allegations which came to the attention of a local policing body or a chief officer of police before 1 February 2020) are not within the scope of these Regulations. That is set out in regulation 4(6). Rather, as set out in regulation 3(2)(a), such allegations continue to fall under the regulations and provisions set out in regulation 3(1) of these Regulations. The only exception to this is where the Director General of the Independent Office for Police Conduct (i) determines, under section 13B of the Police Reform Act 2002, that a complaint or matter is to be re-investigated, or (ii) makes a direction under section 28A(1) or (4) of that Act in relation to a matter on or after 1 February 2020. That is set out in regulation 4(7) of the Regulations.

4. Regulation 4(2) and (8) deals specifically with the application of these Regulations to allegations relating to former officers. These provisions must be read in the context of the wider provisions on application of the Regulations, set out above. Regulation 4(8) sets restrictions on which allegations against former officers can be dealt with under these Regulations. Regulation 4(2) read with regulation 4(8)(a) requires that, in accordance with section 29(7)(a) of the Policing and Crime Act 2017, the officer (in respect of whom the allegation was made) must have ceased to be a police officer on or after 15 December 2017. Regulation 4(8)(b) prevents disciplinary proceedings being brought in respect of an allegation against a former officer where such proceedings would not be the first proceedings to be taken in respect of the conduct, except where they result from a re-investigation of the allegation that begins within 12 months of the date on which the former officer ceased to be a police officer.

5. In response to point (3):

a) In regulation 17(3), 'where practicable' is intended to relate to the first time limit, such that, where it is practicable, the written terms of reference or the written notice to be given under regulation 17(2) must be given to the officer at the same time as the written notice under regulation 17(1). 'Otherwise', (where it is not practicable to do so) the written terms of reference or the written notice to be given under regulation 17(2) must be given within 5 working days beginning with the first working day after the day on which the written notice under regulation 17(1) was given to the officer. This is confirmed in paragraph 7.39(a) of the Home Office Guidance "Conduct, Efficiency and Effectiveness, Statutory Guidance on Professional Standards, Performance and Integrity in Policing' available here.

b) Regulation 17(2) requires the terms of reference to be given to the officer subject to the harm test and except where regulation 17(6) applies. Regulation 17(6) applies for 'so long as the investigator considers that' giving the terms of reference might prejudice the (or any other) investigation. In such a case, the obligation in regulation 17(2) applies when the investigator no longer considers that the giving of the terms of reference will cause such prejudice. There is no express time limit for this written into these Regulations but, because of the nature of the mandatory obligation in regulation 17(2), it is intended that the terms of reference be given to the officer as soon as practicable after the investigator has concluded that to do so would no longer cause prejudice. The current draft of statutory guidance does not make this point expressly but we propose to include such provision in that guidance when it is next revised.

6. In response to point (4), a person may be appointed under regulation 8(6) to advise the person conducting or chairing the misconduct proceedings, accelerated misconduct hearing or appeal meeting. This adviser may attend the misconduct pre-hearing alongside the Chair and it is not intended that regulation 33(5) and (6) bar them from doing so. The attendance at misconduct proceedings of the adviser appointed under regulation 8(6) is not expressly referred to throughout these Regulations; for example, regulations 38–40, which deal with attendance at a misconduct hearing, make no mention of the adviser. That is because it is considered that the adviser may attend alongside the Chair by virtue of regulation 8(6). Therefore, it was not thought necessary to specify the adviser in the list of persons attending the pre-hearing in regulation 33(5). Regulation 33(5) makes no mention of the Chair yet the Chair can attend and, by virtue of regulation 8(6), it is thought that the adviser can too.

7. In response to point (5), regulation 42(1)(a) provides that the person conducting or chairing misconduct proceedings may, subject to certain provisions, impose any disciplinary action mentioned in paragraph (2) or (3) as appropriate. Paragraph (3) relates to misconduct hearings (as opposed to meetings) and lists both a reduction in rank and a (final) written warning. It is intended that only one of the disciplinary actions in regulation 42(3) can be imposed as an outcome to a misconduct hearing. This is made clear in paragraphs 11.122 and 11.123 of the Home Office Guidance "Conduct, Efficiency and Effectiveness, Statutory Guidance on Professional Standards, Performance and Integrity in Policing' available here.

8. We hope that this Memorandum assists the Committee and we are, of course, happy to provide any further assistance that the Committee requires.

Home Office

3 March 2020

Appendix 2

S.I. 2020/41

Countryside Stewardship (England) Regulations 2020

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

> *Identify the vires for part (b) of the definition of "eligible person", regulation 8(a), regulation 14(1) and regulation 16(6)(b).*

2. The Department considers that the broad powers to "make provision for and in connection with" the making of grants under section 98(1) of the Environment Act 1995 and to "make provision for and in connection with the recovery of any sums paid by way of grants" under section 98(2)(d) of that Act enable the Secretary of State to make the provisions queried by the Committee.

3. In relation to part (b) of the definition of "eligible person" the Department considers that it is within the vires under section 98(1), to "make provision for and in connection with the making of grants", for the Secretary of State to determine whether or not a person's business is viable for eligibility purposes. The Countryside Stewardship scheme sets out provisions to be met by a person entering into a grant agreement with the Secretary of State in two respects. Firstly, eligibility conditions must be met before the Secretary of State considers entering into a grant agreement and secondly, conditions relating to the grant itself must be met once an agreement has been entered into. The Department's position is that from the point of view of value for money the Secretary of State should be satisfied that a person's business is viable before entering into a grant agreement. The Department takes the view that the power in section 98(1) is sufficient to enable the inclusion of this provision.

4. In relation to regulation 8(a) and the timing of applications the Department considers that the power in section 98(1) also provides sufficient vires to make provision in respect of the process for applying for grant monies for the purposes of administrative efficiency. For an annual grant scheme such as the Countryside Stewardship scheme it is necessary to make provisions in respect of the timing for submission of applications for the sake of administering, verifying and paying grants efficiently.

5. In relation to regulation 14(1) the Department considers that the broad power under section 98(2)(d), in so far as it is "in connection with" the recovery of sums paid by way of grant under regulation 13, is sufficient for the provision as made. The Department acknowledges that specific wording enabling the charging of interest would have been clearer, but takes the position that a lack of more specific wording does not prohibit the inclusion of this provision given the breadth of the power.

6. In relation to regulation 16(6)(b) the Department again considers that the broad powers under section 98(1) and section 98(2)(d), relating to the making of provisions "for and in connection with" the making of grants and the recovery of sums paid by way of grants respectively, are sufficient for the provision as made. The Department's view is that an appeal procedure would have been envisaged by Parliament in respect of decisions made

by the Secretary of State in relation to making grants. Any such procedure would need to include provision in respect of a process for administering appeals, and it is reasonable for a contribution to be made in connection with the costs of the appeal process. The fee is reimbursed in the event of a successful appeal.

Department for Environment, Food and Rural Affairs

2 March 2020

Appendix 3

S.I. 2020/48

Education (Student Fees, Awards and Support etc.) (Amendment) (No.2) Regulations 2020

1. In its letter to the Department for Education of 26 February 2020, the Joint Committee requested a memorandum on the following point:

> *In regulation 4(3)(b)(i) (inserted regulation (2A)(c)), is it intended that a course of "between three and eight academic years duration" includes a course of three years duration and a course of eight years duration?*

2. Thank you for drawing the matter to our attention.

3. The Department for Education can confirm that a course of three academic years duration and a course of eight academic years duration were intended to be included in the above formulation. The relevant provision, introducing course designation for Welsh doctoral degree courses, was drafted in order to mirror the existing drafting at regulation 4(1)(a) of the Education (Postgraduate Doctoral Degree Loans and the Education (Student Loans) (Repayment) (Amendment) (No. 2) etc.) Regulations 2018, which applies to English doctoral degree courses.

4. The Department accepts that whether courses of three and eight academic years duration are included in each provision is not entirely clear, and undertakes to introduce the necessary clarity in both of them at the next available opportunity. The relevant regulations are normally updated annually, and are due to be further amended later this year.

Department for Education

2 March 2020