



House of Lords
House of Commons
Joint Committee
on Statutory Instruments

**Tenth Report
of Session 2019–21**

Drawing special attention to:

Animals (Scientific Procedures) Act 1986 (Fees) Order 2020 (S.I. 2020/236)

Legal Services Act 2007 (Designation as a Licensing Authority) Order 2020 (S.I. 2020/293)

First-tier Tribunal (Immigration and Asylum Chamber) Fees (Amendment) Order 2020 (S.I. 2020/314)

Abortion (Northern Ireland) Regulations 2020 (S.I. 2020/345)

National Health Service (Amendments Relating to the Provision of Primary Care Services During a Pandemic etc.) Regulations 2020 (S.I. 2020/351)

Investigatory Powers (Temporary Judicial Commissioners and Modification of Time Limits) Regulations 2020 (S.I. 2020/360)

Nursing and Midwifery Council (Emergency Procedures) (Amendment) Rules 2020 Order of Council 2020 (S.I. 2020/364)

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Joint Committee on Statutory Instruments

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[Lord Haskel](#) (*Labour*)

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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

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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).

Contacts

All correspondence should be addressed to the Clerk of the Joint Committee on Statutory Instruments, House of Commons, London SW1A 0AA. The telephone number for general inquiries is: 020 7219 2026; the Committee's email address is: jcsi@parliament.uk.

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Instruments reported

At its meeting on 6 May 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 seven 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. 2020/236: Reported for unjustifiable delay

Animals (Scientific Procedures) Act 1986 (Fees) Order 2020

1.1 The Committee draws the special attention of both Houses to this Order on the ground that there was unjustifiable delay in laying before Parliament.

1.2 This Order prescribes an increase of the licence fees payable under the Animals (Scientific Procedures) Act 1986. It was made on 12 February 2020 but not laid before Parliament until 6 March. (It comes into force on 6 April.) In the Explanatory Memorandum the Home Office explains that the long delay between the making and laying of this instrument was due to “administrative oversight”. On being invited by the Committee to amplify this explanation the Department acknowledges that this situation should not have occurred, apologises and states that measures have been put in place to prevent repetition. In its First Special Report of Session 2017–19, Transparency and Accountability in Subordinate Legislation at paragraph 2.8, the Committee observed that “laying before Parliament is not a meaningless formality, but an important part of access to justice and the rule of law ... [and] part of the required formal measures by which publicity is assured. ... Even if the instrument comes into force some months later after being made, Parliament and the general public are entitled to as much notice of the prospective law as the Government has itself, and the legal and practical effects of an instrument may be felt long before the date on which it comes into force.” Despite the present difficult circumstances, there is no reason why an instrument should not be laid as soon as being made. The Committee is grateful to the Department for acknowledging the seriousness of what occurred on this occasion and undertaking to avoid repetition, and will monitor the laying dates of Home Office instruments to confirm that the necessary lessons have been learned at Departmental level. **The Committee accordingly reports this Order for unjustifiable delay in laying before Parliament, acknowledged by the Department.**

2 S.I. 2020/293: Reported for requiring elucidation

Legal Services Act 2007 (Designation as a Licensing Authority) Order 2020

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

2.2 This Order designates the Institute of Chartered Accountants in England and Wales (“ICAEW”) as a licensing authority in relation to the administration of oaths. The procedure for making such a designation is set out in Schedule 10 to the Legal Services Act 2007: it requires, among other things, an application to the Legal Standards Board (“LSB”), a final

decision by the Lord Chancellor, and action within certain time limits. The Explanatory Memorandum to this Order states that the ICAEW applied in June 2016 to be designated in relation to five reserved legal activities (including the administration of oaths) and provides a link to “all referenced documents” on the LSB website; when the Committee considered this Order, these included a single decision notice from the Lord Chancellor, which was dated 21 September 2017 and recorded his decision “not to make the Orders at this time”. The Committee asked the Ministry of Justice to explain the basis on which this Order is made, given the decision of 21 September 2017. The Committee also asked the Department to explain the reason for the apparent delay in making this Order, given the date of the application. In a memorandum printed at Appendix 2, the Department explains that the Lord Chancellor’s decision was quashed in judicial review proceedings in so far as it concerned the administration of oaths, and a new decision notice was issued on 21 May 2019 in relation to that part of the application only. The Department asserts that as the second decision notice was issued in May 2019, there was no unreasonable delay. The Committee finds this explanation helpful and **accordingly reports this Order for requiring elucidation, provided by the Department’s memorandum.**

3 S.I. 2020/314: Reported for defective drafting

First-tier Tribunal (Immigration and Asylum Chamber) Fees (Amendment) Order 2020

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

3.2 This Order introduces a means-tested scheme to the First-tier Tribunal (Immigration and Asylum Chamber) for remission of fees for appellants who are in the United Kingdom when they bring the appeal. Paragraph 15(1) of the new Schedule (inserted by article 2(4)) states “An application for remission of a fee must be made at the time when the fee would otherwise be payable.” Paragraph 15(3) states “Where an application for remission of a fee is made on or before the date on which the fee is payable, the date for payment of the fee is disappplied.” The Committee asked the Ministry of Justice to explain this inconsistency. In a memorandum printed at Appendix 3, the Department acknowledges the apparent inconsistency but states that the drafting accurately reflects the Department’s policy that an application for remission should be submitted at the time the fee becomes payable. The Department goes on to say that as a matter of “operational pragmatism” it is also willing to accept remission applications which are submitted earlier and that accordingly paragraph 15(3) provides that an application which is submitted earlier than paragraph 15(1) requires will nonetheless also lead to a suspension of the payment deadline. As a matter of legislative practice this is unacceptable: the public is entitled to expect legislation to be drafted in clear and unambiguous propositions. Either it is a legal requirement to apply for remission at the time when the fee would be payable, or one can also apply before. If the policy is to require application at the due date ordinarily, but to permit early application in exceptional circumstances, that should have been stated and the legislation should have set criteria for determining exceptionality in the context. Paragraphs 15(1) and (3) are simply inconsistent. **The Committee accordingly reports paragraph 15 of the new Schedule (inserted by article 2(4)) for defective drafting.**

4 S.I. 2020/345: Reported for defective drafting

Abortion (Northern Ireland) Regulations 2020

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

4.2 Regulation 10(1) requires a registered medical professional who terminates a pregnancy to give the Chief Medical Officer of the Department for Health in Northern Ireland notice of the termination, together with the other information specified in the Schedule to the Regulations. Paragraph 7 of the Schedule requires the information to include the certified grounds for terminating the pregnancy and also, in specified cases, medical information about the mother or the fetus. Paragraph 7(c), which requires information about fetal abnormalities, is expressed to apply “in a case falling within regulation 8”. The reference to regulation 8 appears to be incorrect because that regulation relates to places where treatment for terminations may be carried out. Accordingly, the Committee asked the Northern Ireland Office to explain the reference to regulation 8 in paragraph 7(c) and whether there are any other errors in the references to regulations in that paragraph.

4.3 In a memorandum printed at Appendix 4, the Department acknowledges the following cross-referencing errors in paragraph 7 of the Schedule:

- a) in sub-paragraph (a), the reference to regulations 5 and 6 should be to regulations 4 and 5;
- b) in sub-paragraph (b), the reference to regulation 7 should be to regulation 6; and
- c) in sub-paragraph(c), the reference to regulation 8 should be to regulation 7.

4.4 The Department states that the Regulations will be corrected when a suitable opportunity arises. The lack of urgency to make the necessary changes appears to be based on a belief that those required to provide the information, because they are provided with notification forms, will provide the information that would have been required had paragraph 7 been correctly drafted and that they will not be misled as to what data to provide. The Committee does not consider this provides a good reason for a delay in making the necessary changes to the Regulations. In the view of the Committee, it is not appropriate, where a statutory duty is imposed on a person backed by a criminal offence (as is the case here), to rely on that person doing something other than what the legislation requires because the provision is defectively drafted. The Committee considers that the Department should make the changes at the earliest available opportunity. **The Committee accordingly reports paragraph 7 of the Schedule for defective drafting, acknowledged by the Department.**

5 S.I. 2020/351: Reported for defective drafting

National Health Service (Amendments Relating to the Provision of Primary Care Services During a Pandemic etc.) Regulations 2020

5.1 The Committee draws the special attention of both Houses to these Regulations on the grounds that they are defectively drafted in two respects.

5.2 These Regulations are made in response to the Covid-19 emergency. They amend terms governing primary care services provided to the NHS in England; the amendments are drafted broadly so that they may also be triggered in relation to any future pandemic.

5.3 Regulations 16 and 21 amend provisions that enable patients to book appointments directly by NHS 111: as a result of the amendments, patients will also be able to book appointments using a service “accessed via NHS 111”. The Committee asked the Department of Health and Social Care to explain whether it intends that relevant cross-references to direct booking by NHS 111 should also apply to booking using a service “accessed via NHS 111”. In a memorandum printed at Appendix 5, the Department acknowledges that this is its intent and undertakes to correct the relevant cross-references when a suitable opportunity arises. The Committee welcomes the Department’s undertaking and **accordingly reports regulations 16 and 21 for defective drafting, acknowledged by the Department.**

5.4 Throughout these Regulations, the event that triggers amendment of the relevant terms of service is an announcement made by the NHS Commissioning Board with the agreement of the Secretary of State. The Committee asked the Department whether the formula “may make an announcement” used in regulations 14 and 19 is intended to have a different meaning from the formula “has made an announcement” used in regulations 15 and 20 (and elsewhere in the Regulations). In its memorandum, the Department acknowledges that it should have used the latter formula consistently as no difference of meaning was intended, and it undertakes to correct the error. **The Committee accordingly reports regulations 14 and 19 for defective drafting, acknowledged by the Department.**

6 S.I. 2020/360: Reported for failure to comply with proper legislative practice and for unjustifiable delay

Investigatory Powers (Temporary Judicial Commissioners and Modification of Time Limits) Regulations 2020

6.1 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 was unjustifiable delay in sending the notification under the proviso to section 4(1) of the Statutory Instruments Act 1946.

6.2 These Regulations ensure that warrants can continue to be approved by Judicial Commissioners under the Investigatory Powers Act 2016 during the coronavirus pandemic. Regulation 1(2) states that the Regulations come into force “on the day after they are made” whereas paragraph 3.1 of the Explanatory Memorandum states that the instrument commences “the day after the day on which it is laid”. The Committee asked the Home Office to explain the inconsistency. In a memorandum printed at Appendix 6, the Department confirms that the Explanatory Memorandum was incorrect and undertakes to lay a revised version. For obvious reasons it is important that the Explanatory Memorandum to an instrument (which may be what some citizens rely on in order to understand the change in the law) is consistent with the provisions of the instrument. **The Committee accordingly reports the Explanatory Memorandum for failure to comply with proper legislative practice, acknowledged by the Department.**

6.3 The combined effect of regulation 1(2) and sections 4(a) and 23(1) of the Interpretation Act 1978 means that this instrument came into force before it was laid before Parliament. The proviso to section 4(1) of the Statutory Instruments Act 1946 provides that if it is essential that an instrument comes into operation before copies can be laid, notification must be sent to the Speaker of the House of Commons and the Speaker of the House of Lords drawing attention to that fact and explaining why such copies were not laid before the instrument came into operation. The Committee asked the Department to confirm whether these notifications were sent. In its memorandum, the Department explains that the notification requirement was overlooked due to the urgent need to ensure the resilience of the investigatory powers warrant process. The Department undertakes to send the required notifications and to make reference to such notifications in the revised Explanatory Memorandum. **The Committee accordingly reports these Regulations for unjustifiable delay in sending the notification under the proviso to section 4(1) of the Statutory Instruments Act 1946, acknowledged by the Department.**

7 S.I. 2020/364: Reported for defective drafting and for doubtful vires

Nursing and Midwifery Council (Emergency Procedures) (Amendment) Rules 2020 Order of Council 2020

7.1 **The Committee draws the special attention of both Houses to this Order on the grounds that it is defectively drafted in one respect and there is doubt as to whether it is intra vires in two respects.**

7.2 This Order is made in response to the Covid-19 emergency. It amends several provisions relating to the operating procedures of the Nursing and Midwifery Council (“NMC”). Rule 2 provides that the amendments come into effect and cease to have effect when the Secretary of State advises the Registrar of specified matters. The Committee asked the Department of Health and Social Care to explain what powers are relied on to sub-delegate those decisions to the Secretary of State, and how people affected by amendments in this instrument will know when the Secretary of State has advised the Registrar of the matters in question.

7.3 In a memorandum printed at Appendix 7, the Department asserts that there is no sub-delegation because “Rule 2 provides a condition for triggering the switching on and off of the modifications made by the instrument. That condition is by reference to an external event which is entirely unrelated to the making of the instrument itself, namely the issuing of a notification by the Secretary of State under article 9A of the [Nursing and Midwifery Order 2001] (as inserted by the Coronavirus Act 2020), as regards the occurrence or ending of an emergency or the expiry of section 2 of, and Schedule 1 to, the Coronavirus Act 2020”. It may be that the policy intention was for these Rules to lapse when the Secretary of State advises the Registrar under article 9A(7) of the 2001 Order that the emergency is over, but that is not what rule 2 achieves: it provides for the amendments to lapse when the Secretary of State advises the Registrar under rule 2. That could be at the same time as the advice under rule 9A(7), but it could be at a different time. As the instrument is drafted, therefore, rule 2 sub-delegates to the Secretary of State the power to end its effect, without express cover in the enabling power, **and the Committee accordingly reports rule 2 on the ground that there is a doubt as to whether it is intra vires.**

7.4 In its memorandum the Department also explains that administrative steps have already been taken for the NMC and other affected parties to be made aware that the amendments have come into effect; it presumes similar steps will be taken for the same parties to be made aware that the amendments have ceased to have effect. The Committee is not persuaded that a presumption as to what administrative steps the Secretary of State and the NMC are likely to take provides the degree of certainty that legislation requires, **and accordingly reports rule 2 for defective drafting.**

7.5 Rule 5(2) amends rules relating to the quorum and composition of the NMC's Practice Committees (i.e., the Investigating Committee and the Fitness to Practice Committee). The Committee asked the Department to clarify which enabling powers are relied on to make this rule. In its memorandum, the Department states that it relies on articles 26(3) and 32(1) of the Nursing and Midwifery Order 2001, which provide for the NMC to make rules as to the procedure to be followed by each of those Committees. The Department acknowledges that it ought also to have cited paragraph 17(1) of Schedule 1 to the 2001 Order, which provides expressly for the NMC to make rules as to the Committees' quorum and composition; it undertakes to correct the error when a suitable opportunity arises. The Committee welcomes this undertaking. As it has noted before, since the decision of the Court of Appeal in *Vibixa Ltd v Komori UK Ltd* [2006] EWCA Civ 536, failure to cite a necessary enabling power in the preamble renders a provision ultra vires. **Accordingly, the Committee reports this Order on the ground that the omission from the preamble, acknowledged by the Department, gives rise to a doubt as to whether rule 5(2) is intra vires.**

Instruments not reported

At its meeting on 6 May 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. Investigatory Powers (Communications Data) (Relevant Public Authorities and Designated Senior Officers) Regulations 2020

Instrument requiring affirmative approval

S.I. 2020/447 Health Protection (Coronavirus, Restrictions) (England) (Amendment) Regulations 2020

Instruments subject to annulment

S.I. 2020/426 Local Government (Coronavirus) (Structural Changes) (Consequential Amendments) (England) Regulations 2020

S.I. 2020/430 Civil Aviation (Aerial Advertising) (Amendment) Regulations 2020

S.I. 2020/432 Football Spectators (2020 UEFA European Championship Control Period) (Coronavirus) (Revocation) Order 2020

S.I. 2020/433 Safeguarding Vulnerable Groups Act 2006 (Regulated Activities) (Coronavirus) Order 2020

S.I. 2020/434 Safety of Sports Grounds (Designation) (Amendment) (No. 2) Order 2020

S.I. 2020/444 Early Years Foundation Stage (Learning and Development and Welfare Requirements) (Coronavirus) (Amendment) Regulations 2020

S.I. 2020/446 School Admissions (England) (Coronavirus) (Appeals Arrangements) (Amendment) Regulations 2020

S.I. 2020/448 Offshore Petroleum Production and Pipe-lines (Assessment of Environmental Effects) (Coronavirus) (Amendment) Regulations 2020

Appendix 1

S.I. 2020/236

Animals (Scientific Procedures) Act 1986 (Fees) Order 2020

1. At its meeting on 22nd April 2020, the Committee requested a memorandum on the following point:

“(1) Is there anything that the Department would like to add to its explanation for the long delay between the making and laying of this instrument?”

2. The Department has nothing further to add to the explanation in the Explanatory Memorandum. Administrative oversight caused the delay between making and laying of this instrument. The Department acknowledges that this error should not have occurred and wishes to apologise to the Committee for the error. Measures have been put in place to prevent similar incidents in future.

Home Office

28 April 2020

Appendix 2

S.I. 2020/293

Legal Services Act 2007 (Designation as a Licensing Authority) Order 2020

1. On 22 April 2020, the Committee requested that the Ministry of Justice submit a memorandum on the following points:

“Please explain:

1. The basis on which this Order is made, given that in the notice dated 21 September 2017 the Lord Chancellor stated that his decision, in relation to the recommendation to designate the Institute in relation to reserved legal activities including the administration of oaths, was “not to make the Orders at this time”; and

2. The reason for the apparent delay in making this Order, given that the application to which it relates was made on 20 July 2016.”

2. The Department is grateful for the Committee’s consideration of this instrument, and responds as set out below.

3. The Lord Chancellor has a power under paragraph 15(1)(a) of Schedule 10 to the Legal Services Act 2007 to make an order designating an approved regulator as a licensing authority in relation to a reserved legal activity.¹ Such designations can only be made on a recommendation by the Legal Services Board (LSB).

4. In July 2016 the Institute of Chartered Accountants in England and Wales (the Institute) applied to the LSB for a recommendation that it be designated as an approved regulator and licensing authority in respect of all five of the reserved legal activities for which it was not already a regulator². On 23 June 2017 the LSB wrote to the Lord Chancellor formally recommending that the Institute be designated as an approved regulator and licensing authority with respect to all the reserved legal activities. The Committee is correct to note that in a decision notice dated 21 September 2017 the then Lord Chancellor refused to make the relevant Orders.

5. The Lord Chancellor’s decision as set out in the notice of 21 September 2017 was, however, subsequently subject to judicial review proceedings³ brought by the Institute. Whilst the Court largely dismissed the Institute’s challenge, it quashed the Lord Chancellor’s decision “in so far (but only in so far) as it concerned the administration of oaths” and remitted it to the Lord Chancellor for reconsideration.

1 Such an order can only be made once the Lord Chancellor has first made an order designating the body as an approved regulator in relation to that same activity (paragraph 15(3) of Schedule 10 to the Legal Services Act 2007).

2 The application was initially submitted to the LSB on 20 July 2016 but it was subsequently modified.

3 The Institute of Chartered Accountants in England And Wales, R (On the Application Of) v The Lord Chancellor and Secretary of State for Justice [2019] EWHC 461 (Admin).

6. As per the Court’s decision, the then Lord Chancellor considered again the Institute’s application and set out in a notice dated 21 May 2019 his decision to make the Orders designating the Institute as an approved regulator and licensing authority for the reserved legal activity of the administration of oaths.

7. As the decision to make the Order was made in May 2019, we do not consider that there has been an unreasonable delay in making this Order.

Ministry of Justice

28 April 2020

Appendix 3

S.I. 2020/314

First-tier Tribunal (Immigration and Asylum Chamber) Fees (Amendment) Order 2020

1. On 22 April 2020, the Committee requested that the Ministry of Justice submit a memorandum on the following point:

“Please explain the apparent inconsistency between paragraphs 15(1) and (3) of the new Schedule (inserted by article 2(4)) in relation to when the application must be made.”

2. The Department is grateful for the Committee’s consideration of this instrument, and responds as set out below.

3. The Department acknowledges that there might be thought to be an inconsistency between paragraph 15(1), which provides that “An application for remission of a fee must be made at the time when the fee would otherwise be payable”, whereas paragraph 15(3) provides that “Where an application for remission of a fee is made on or before the date on which a fee is payable, the date for payment of the fee is disapplied” (emphasis added), but the drafting accurately reflects the Department’s policy. It is identical to the drafting of S.I. 2013/2302, which implemented the same policy in various other court and tribunal jurisdictions.

4. The Department’s policy is that an application for remission should be submitted at the time the fee becomes payable. In most instances a fee becomes payable at the point that some other documents (such as a new claim, appeal, or application) are sent to the court or tribunal. Requiring the application for remission to be made at the time that the fee becomes payable results in the application being sent alongside the other documents, which allows staff to deal with the matter more efficiently. It is for this reason that paragraph 15(1) provides that an application must be made at that time.

5. However, as a matter of operational pragmatism, the Department is also willing to accept remission applications which are submitted earlier, since requiring the submission of a second application would lead to greater inefficiency. Accordingly, paragraph 15(3) provides that an application which is submitted earlier than paragraph 15(1) requires will nonetheless also lead to a suspension of the payment deadline.

Ministry of Justice

27 April 2020

Appendix 4

S.I. 2020/345

Abortion (Northern Ireland) Regulations 2020

1. In its letter to the Department of 29th April 2020, the Committee requested a memorandum on the following point:

Explain whether the reference to regulation 8 in paragraph 7(c) of the Schedule is correct, or whether (because it relates to fetal abnormalities) it should have been a reference to regulation 7 instead. If it is a mistake, are there errors in any of the other cross-references in paragraph 7 and, if so, what should those references be to?

2. The Department's response to the Committee's point is outlined below
3. The reference to regulation 8 in paragraph 7(c) of the Schedule is not correct. As the Committee suggests, it should have been a reference to regulation 7. The other cross-references in paragraph 7 are also incorrect.
4. The intention of paragraph 7 of the Schedule is to require additional information to the grounds certified for terminating the pregnancy to be supplied in the notification in respect of terminations carried out in accordance with regulation 4 (Risk to physical or mental health where pregnancy not exceeding 24 weeks), regulation 5 (Immediate necessity), regulation 6 (Risk to life or grave permanent injury to physical or mental health of pregnant woman) and regulation 7 (Severe fetal impairment or fatal fetal abnormality).
5. In relation to terminations carried out in accordance with regulation 4 and 5, the intention was to request the main medical conditions of the woman concerned, and in relation to regulation 6 whether or not there was a risk to the woman's mental health and if not, her main medical conditions.
6. The cross references in paragraph 7(a) should have therefore been to regulation 4 or 5, and in paragraph 7(b) to regulation 6.
7. Some medical professionals in Northern Ireland have started providing interim abortion services through existing sexual and reproductive health services in the Belfast, Northern and Western Trust areas. The clinicians providing services in Northern Ireland have been provided with notification forms to complete, and understand what information to record. We do not perceive that there is a risk therefore that the data that is intended to be collated will not be provided as a result of the error in cross references or that medical professionals in Northern Ireland will be unclear as to what data to provide.
8. The Department apologises for this error in the drafting of paragraph 7 of the schedule to the Regulations. The Regulations will be corrected when a suitable opportunity arises.

Northern Ireland Office

4 May 2020

Appendix 5

S.I. 2020/351

National Health Service (Amendments Relating to the Provision of Primary Care Services During a Pandemic etc.) Regulations 2020

1. In its letter to the Department of 22 April 2020, the Committee requested a memorandum on the following points:

(1) In relation to regulations 16(a) and 21(a), explain whether it is intended that, in the instruments amended by those regulations, cross-references to direct booking by NHS 111 (e.g. the obligation to configure computer systems to allow it and to monitor the booking system for appointments booked in this way) also apply to booking via a service accessed via NHS 111, and if so, how effect is given to that intention.

(2) Explain whether the phrase “circumstances where ... the Board may with the agreement of the Secretary of State make an announcement” in regulations 14 and 19 (inserted regulation 3A(1)) is intended to have a different meaning from the phrase “circumstances [where] ... the Board with the agreement of the Secretary of State has made an announcement” in regulations 15 and 20 (inserted regulation 32A(1)).

2. The Department’s response is as follows.

3. In response to point (1), the Department confirms that that was the intention and recognises that, as well as amending paragraph 11B(1) of Schedule 3 to the National Health Service (General Medical Services Contracts) Regulations 2015, consequential amendments should have been made to paragraph 11B(3) so that the obligations in subparagraph (3) also applied to bookings via a service accessed, or which might be accessed, via NHS 111. Similarly, when amending paragraph 16B(1) of Schedule 2 to the National Health Service (Personal Medical Services Agreements) Regulations 2015, consequential amendments should have been made to paragraph 16B(3) so that the obligations in subparagraph (3) also applied to bookings via a service accessed, or which might be accessed, via NHS 111. We apologise for these errors and will make further amendments to these paragraphs as soon as a suitable opportunity arises.

4. In response to point (2), the Department recognises that the amendments made by regulations 14 and 19 should have followed the “has made an announcement” formula used elsewhere in the Regulations. We apologise for these errors and, again, will make further amendments as soon as a suitable opportunity arises. No difference of meaning was intended.

Department of Health and Social Care

28 April 2020

Appendix 6

S.I. 2020/360

Investigatory Powers (Temporary Judicial Commissioners and Modification of Time Limits) Regulations 2020

1. At its meeting on 22nd April 2020, the Committee requested a memorandum on the following point:

“(1) Explain the inconsistency between regulation 1(2) and paragraph 3.1 of the Explanatory Memorandum.

“(2) Given the combined effect of regulation 1(2) and sections 4(a) and 23(1) of the Interpretation Act 1978, explain whether the requirements of section 4(1) of the Statutory Instruments Act 1946 were complied with.”

2. Regulation 1(2) provided that these “Regulations come into force on the day after they are made”. The Explanatory Memorandum stated that the “instrument will commence on the day after the day on which it is laid”. The Regulations were in fact laid the day after they were made and so the Explanatory Memorandum was incorrect to state what it did. The error was caused by a late change in the wording of regulation 1(2) from “laid” to “made” and the corresponding change was not made to the Explanatory Memorandum. These Regulations were produced very urgently in order to allow the Investigatory Powers Commissioner to appoint additional Judicial Commissioners and so to ensure the national security-critical warrant process would not be brought to a halt by the coronavirus. As a measure of that urgency, the Commissioner had written to the Home Secretary on the morning that the Regulations were signed, as he was required to do by S22(1) and S23(1) of the Coronavirus Act 2020, which itself only received Royal Assent the previous day. Nevertheless, the Department acknowledges that this error in the Explanatory Memorandum should not have occurred and is grateful for the Committee pointing it out. The Department will be laying an amended Explanatory Memorandum and has included a revised draft with this response to the Committee.

3. The Department is grateful again to the Committee for raising this issue relating to section 4(1) of the Statutory Instruments Act 1946 and will be writing to the Speaker of the House of Commons and the Speaker of the House of Lords to apologise for not drawing their attention, in accordance with that section, to the fact that the Regulations came into force before they were laid in Parliament. This issue will be mentioned in the revised Explanatory Memorandum to be laid by the Department. Copies of the letters are included with this response to the Committee. The Department had intended that the Regulations should be laid before they came into force, but in the rush of drafting, checking and getting the Regulations to the Minister in his constituency home for signature, this was not achieved. Furthermore, there was considerable urgency to have the Regulations come into effect in order to prevent the warrant process from coming to a halt if no Judicial Commissioners had been available to consider warrants and approve them. There was a real possibility of this happening, hence the speed at which the Regulations were produced and the need to commence them very quickly.

Home Office

28 April 2020

Appendix 7

S.I. 2020/364

Nursing and Midwifery Council (Emergency Procedures) (Amendment) Rules 2020 Order of Council 2020

1. In its letter to the Department of 22 April 2020, the Committee requested a memorandum on the following points:

(1) In relation to rule 2, explain—

(a) What powers are relied on to sub-delegate the setting of the times at which the amendments made by this instrument come into effect and cease to have effect; and

(b) How anyone affected by the amendments made by this instrument will know whether the Secretary of State has advised the Registrar of the matters under article 9A(1)(a) of the 2001 Order (the Nursing and Midwifery Order 2001, S.I. 2002/253) or that the emergency notified under that article has ended.

(2) Clarify which enabling powers are relied on to make rule 5(2).

2. The Department's response is as follows.

3. In response to point (1)(a), the Department, and the Nursing and Midwifery Council (NMC) which made the instrument, are of the view that there is no sub-delegation involved. The instrument itself comes into force on a fixed date. Rule 2 provides a condition for triggering the switching on and off of the modifications made by the instrument. That condition is by reference to an external event which is entirely unrelated to the making of the instrument itself, namely the issuing of a notification by the Secretary of State under article 9A of the 2001 Order (as inserted by the Coronavirus Act 2020), as regards the occurrence or ending of an emergency or the expiry of section 2 of, and Schedule 1 to, the Coronavirus Act 2020. An article 9A notification is made for a different purpose to that of triggering the modifications made by the instrument (an article 9A notification is concerned with triggering the emergency registration of nurses, midwives and nursing associates under the 2001 Order, whereas this instrument is concerned with changes to the NMC's Practice Committees' processes). In issuing the article 9A notification, therefore, the Secretary of State is not specifically making the decision whether to activate the effect of the rules in the instrument. The Department and NMC are therefore of the view that there is a sufficient degree of independence between the issuing of the article 9A notification and the coming into effect of the changes made by the rules for this not to be a case of sub-delegation.

4. In response to point (1)(b):

- i) The Secretary of State has advised the Registrar of the matters under article 9A(1)(a) of the 2001 Order. The Secretary of State has also notified the NMC of this. The NMC has published new emergency guidance for those

affected by, and using, its processes and updated the consolidated versions of the legislation on its website. Within these documents the NMC made it clear that the changes made by this instrument would apply until the circumstances notified under article 9A of the 2001 Order ceased to exist (or that article ceased to apply in accordance with the relevant provisions of the Coronavirus Act 2020).

- ii) Similarly, the Secretary of State would notify the NMC when he has notified the Registrar that the circumstances notified under article 9A of the 2001 Order have ceased to exist. The NMC would then inform those affected that the changes made by this instrument cease to have effect, and what the practical effects of this will be. It would also withdraw its emergency guidance and update the consolidated versions of the legislation on its website.

5. In response to point (2), the amendments made in rule 5(2) are concerned with the set-up of the NMC’s “Practice Committees” (the Investigating Committee and the Fitness to Practise Committee). The powers relied on for the amendments are:

- i) article 26(3) of the 2001 Order, which provides that the Council shall make rules, “as to the procedure to be followed by the Investigating Committee in an investigation carried out under this article”, on the basis that holding a meeting and setting out who is eligible to sit on the Investigating Committee is part of the investigation process;
- ii) article 32(1) of the 2001 Order, which provides that the Council shall make rules, “as to the procedure to be followed by the Fitness to Practise Committee in considering any allegation...”, again on the basis that holding a meeting and setting out who is eligible to sit on the Fitness to Practise Committee is part of the consideration process.

6. However, the Department acknowledges that paragraph 17(1) of Schedule 1 (power to make provision with regard to the constitution of each Practice Committee) to the 2001 Order should also have been cited as the enabling power for the amendments made in rule 5(2). The Department apologises to the Committee for this error and will address this in a future instrument when a suitable opportunity arises.

Department of Health and Social Care

28 April 2020