



House of Lords
House of Commons
Joint Committee
on Statutory Instruments

**Eleventh Report
of Session 2019–21**

Drawing special attention to:

Civil Service (Other Crown Servants) Pension Scheme (Amendment) Regulations 2020 (S.I. 2020/225)

Statutory Parental Bereavement Pay (Administration) Regulations 2020 (S.I. 2020/246)

Working Time (Coronavirus) (Amendment) Regulations 2020 (S.I. 2020/365)

Social Security (Coronavirus) (Further Measures) Amendment Regulations 2020 (S.I. 2020/397)

Prison and Young Offender Institution (Coronavirus) (Amendment) Rules 2020 (S.I. 2020/400)

Tribunal Procedure (Coronavirus) (Amendment) Rules 2020 (S.I. 2020/416)

Criminal Procedure (Amendment no. 2) (Coronavirus) Rules 2020 (S.I. 2020/417)

Statutory Sick Pay (General) (Coronavirus Amendment) (no. 3) Regulations 2020 (S.I. 2020/427)

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Joint Committee on Statutory Instruments

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The full constitution and powers of the Committee are set out in [House of Commons Standing Order No. 151](#) and [House of Lords Standing Order No. 73](#), 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.

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Instruments reported

At its meeting on 13 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 eight 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. 2020/225: Reported for defective drafting

Civil Service (Other Crown Servants) Pension Scheme (Amendment) Regulations 2020

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

1.2 These Regulations amend legislation governing the Civil Service Pensions Scheme to make provision for member contributions rates for the scheme year beginning 1 April 2020. Regulation 1(2) provides that the Regulations come into force on that day, and the effect of sections 4(a) and 23(1) of the Interpretation Act 1978 is that they come into force at the beginning of that day. Regulation 3(c) purports to make an amendment by reference to a table headed “Scheme Year 1st April 2020 to 31st March 2021”. But that table is inserted by an instrument that comes into force on the same day and at the same time as these Regulations. Where enactments A and B both amend enactment C, with enactment B amending text inserted by enactment A and both amendments intended to take effect at the same time, proper drafting practice is for enactment B to be expressed as coming into force immediately after enactment A (so the inserted text is notionally commenced in time to be amended). The Committee asked the Cabinet Office to confirm that regulation 3(c) of these Regulations should for this reason have been expressed to come into force immediately after regulation 3 of S.I. 2020/224. In a memorandum printed at Appendix 1, the Department acknowledges the error. **The Committee accordingly reports regulation 1(2) for defective drafting, acknowledged by the Department.**

2 S.I. 2020/246: Reported for defective drafting

Statutory Parental Bereavement Pay (Administration) Regulations 2020

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

2.2 These Regulations implement a new statutory entitlement to parental bereavement pay. Where HMRC requires information to determine whether a person is entitled to the benefit, regulation 14(1) and (2)(b) imposes a duty on that person’s past or present “spouse, civil partner or partner” to provide such information. The Committee asked the Department for Business, Energy and Industrial Strategy to explain what is meant by “partner” in this context: the term is not defined in either regulation 14 or the interpretation provision (regulation 2). In a memorandum printed at Appendix 2, the Department asserts that “partner” is intentionally left undefined in these Regulations. It explains that HMRC officers are likely, in practice, to construe the term by reference to a

separate set of regulations which define the entitlement criteria for the benefit, as this is what happens for similar regulations made under the same enabling power; it asserts that the practice is “well understood and has operated smoothly for many years”.

2.3 The Committee is sympathetic to the Department’s desire to maintain consistency among instruments intended to operate in a broadly similar way; but the proper way to provide for cross-contextual consistency of interpretation is to replicate or apply the relevant definitions. Without that, HMRC officers will have no legal basis for insisting on cross-applying the definition; and without that, the expression “partner” is being used in a context in which it requires and could be given certainty, without that certainty being provided. Nor is the Committee persuaded by the suggestion that “partner” cannot or need not be defined in regulations because it is not defined in the enabling power: it is the purpose of subordinate legislation to add flesh to the bones of the parent Act; in this case the parent Act expressly provides for regulations to impose a duty on “persons of a description specified in the regulations”; and its list of descriptions of person which may be specified is indicative not exhaustive. For these reasons the Committee is clear that “partner” both could have and should have been defined **and accordingly reports regulation 14 for defective drafting.**

3 S.I. 2020/365: Reported for unjustifiable delay

Working Time (Coronavirus) (Amendment) Regulations 2020

3.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that there was unjustifiable delay in sending the notification under the proviso to section 4(1) of the Statutory Instruments Act 1946.**

3.2 These Regulations allow workers to carry their holiday entitlement into the following two leave years where it is not reasonably practicable to take holiday due to the coronavirus public health emergency. This instrument came into force on the day 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 a memorandum printed at Appendix 3, the Department explains that the required notifications were not sent in time due to an oversight, but have now been sent. **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.**

4 S.I. 2020/397: Reported for defective drafting

Social Security (Coronavirus) (Further Measures) Amendment 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 These Regulations are made in response to the coronavirus public health emergency. Regulation 2 amends an earlier instrument to change the date on which certain determinations of local housing allowance take effect. In the original provision that date is expressed by reference to three defined terms; regulation 2(2)(a) amends the provision so that none of the terms is now relied upon, but regulation 2(2)(b) omits just two of the definitions. The Committee asked the Department for Work and Pensions to explain why it did not also omit the third (“relevant Monday”). In a memorandum printed at Appendix 4, the Department explains that even where the amendment made by regulation 2 applies, the third definition remains necessary for the operation of another article of the amended instrument. That being the case, however, the definition of “tax year” ought also to have been retained as it is needed to construe the definition of “relevant Monday”. **The Committee accordingly reports regulation 2(2)(b) for defective drafting, acknowledged by the Department.**

5 S.I. 2020/400: Reported for doubtful vires

Prison and Young Offender Institution (Coronavirus) (Amendment) Rules 2020

5.1 **The Committee draws the special attention of both Houses to these Rules on the ground that there is doubt as to whether they are intra vires in two related respects.**

5.2 These Rules allow the temporary release of prisoners as part of the arrangements for addressing the coronavirus public health emergency. Rule 2(2) (inserted rule 9A(4)) and rule 3(2) (inserted rule 5A(4)) allow the Secretary of State to temporarily release prisoners during the transmission control period under a direction “framed by reference to whatever matters the Secretary of State considers appropriate”. The Committee asked the Ministry of Justice to identify the vires for this delegation of power. In a memorandum printed at Appendix 5, the Department notes the breadth of the enabling power (section 47 of the Prison Act 1947) which allows the Secretary of State to make any form of rule about temporary release of prisoners. The Department asserts that the discretion conferred by the inserted provisions is limited to the statutory purposes set out in the amending rule—controlling the incidence or transmission of coronavirus or facilitating the most appropriate deployment of resources in prisons in England and Wales. On that basis, the Department argues that the direction-making power is merely administrative, and does not amount to a sub-delegation of legislative power. The Committee disagrees. The Secretary of State’s discretion as conferred by the inserted provisions is wide and could be used in a range of ways to change the legislative effect of the rules. This is a delegation of legislative power that, because of the operation of the presumption against sub-delegation, requires express enabling power. **The Committee accordingly reports rules 2(2) and 3(2) for doubt as to whether they are intra vires.**

6 S.I. 2020/416: Reported for requiring elucidation

Tribunal Procedure (Coronavirus) (Amendment) Rules 2020

6.1 **The Committee draws the special attention of both Houses to these Rules on the ground that they require elucidation in one respect.**

6.2 These Rules make temporary changes to various rules which apply in the First-tier Tribunal and Upper Tribunal as part of the emergency measures to address the coronavirus public health emergency. In particular, the temporary rules: (a) allow a tribunal (without the parties' consent) to dispose of proceedings without a hearing in certain circumstances; and (b) allow a tribunal to direct that a remote hearing is to be held in private solely on the basis of lack of technology. The Committee asked the Ministry of Justice to explain what steps are being taken to ensure that these temporary changes are consistent with the overarching requirement in section 22(4)(b) of the Tribunals, Courts and Enforcement Act 2007 that the tribunal system be accessible and fair. In a memorandum printed at Appendix 6, the Department states that the temporary rules are subject to additional safeguards when a hearing (or a public hearing) is not reasonably practicable: in particular, a decision disposing of proceedings without a hearing can only be made where it is in the interests of justice to do so and the matter is urgent; and a direction to hold a remote hearing in private can only be made where such a direction is necessary to secure the proper administration of justice. The Department explains that HM Courts and Tribunal Service is making significant efforts to allow proceedings to proceed remotely and for those hearings to be accessible to the public, and that those efforts are expected to minimise the instances in which a Tribunal will rely on these temporary rules. **The Committee accordingly reports these Rules for elucidation, provided by the Department's memorandum.**

7 S.I. 2020/417: Reported for defective drafting

Criminal Procedure (Amendment no. 2) (Coronavirus) Rules 2020

7.1 **The Committee draws the special attention of both Houses to these Rules on the ground that they are defectively drafted in two respects.**

7.2 These Rules make temporary amendments to the Criminal Procedure Rules 2015 to remove inconsistencies with the modifications to legislation made by the Coronavirus Act 2020. Rules 2 and 3 set out when each rule in the instrument ceases to have effect but omits rules 6(d) and 6(e). The Committee asked the Ministry of Justice to explain when those rules cease to have effect and to clarify whether the reference in rule 3 to rule 6(c) should be a reference to rule 6(e). In a memorandum printed at Appendix 7, the Department confirms that rule 2 should have included references to rules 6(c) and (d) and that the reference in rule 3, to rule 6(c) should be to rule 6(e). The Department explains that it is about to revoke and replace the Criminal Procedure Rules 2015 and undertakes to correct these errors in the replacement Rules. **The Committee accordingly reports rules 2 and 3 for defective drafting, acknowledged by the Department.**

8 S.I. 2020/427: Reported for defective drafting

Statutory Sick Pay (General) (Coronavirus Amendment) (no. 3) Regulations 2020

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

8.2 These Regulations are made in response to the coronavirus public health emergency. Regulation 2 (inserted paragraph (5A)) provides for a person to be eligible for statutory sick pay if they are “defined in public health guidance as extremely vulnerable and at very high risk of severe illness from coronavirus because of an underlying health condition” and have been advised to follow shielding measures. The Committee asked the Department for Work and Pensions to explain whether it is intended that a person may fall within that definition even if the relevant guidance does not explicitly use the expression “extremely vulnerable” (the English and Welsh guidance does; the Scottish guidance does not). In a memorandum printed at Appendix 8 the Department argues that regulation 2 can be taken to be satisfied without the expression “extremely vulnerable” being used. The Committee accepts that the inter-relationship between the Regulations and the guidance creates inevitable challenges; but using the expression “defined in public health guidance as extremely vulnerable” gives rise to a clear expectation that the guidance will define a class by reference to the expression “extremely vulnerable”. Since the Department asserts that this was not intended, regulation 2 fails to convey the policy intention and **the Committee accordingly reports regulation 2 for defective drafting.**

Instruments not reported

At its meeting on 13 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 instrument requiring affirmative approval

Draft S.I. Water Industry (Specified Infrastructure Projects) (English Undertakers) (Amendment) Regulations 2020

Instrument requiring affirmative approval

S.I. 2020/475 Direct Payments to Farmers (Crop Diversification Derogation) (England) Regulations 2020

Instruments subject to annulment

S.I. 2020/450 Maternity Allowance, Statutory Maternity Pay, Statutory Paternity Pay, Statutory Adoption Pay, Statutory Shared Parental Pay and Statutory Parental Bereavement Pay (Normal Weekly Earnings etc.) (Coronavirus) (Amendment) Regulations 2020

S.I. 2020/456 State Pension Credit (Coronavirus) (Electronic Claims) (Amendment) Regulations 2020

S.I. 2020/460 Harbours and Highways (Environmental Impact Assessment) (Amendment) (EU Exit) Regulations 2020

S.I. 2020/464 Education (School Teachers' Qualifications and Induction Arrangements) (England) (Coronavirus) (Amendment) Regulations 2020

S.I. 2020/469 National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) (Amendment) Regulations 2020

S.I. 2020/471 Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020

S.I. 2020/472 Criminal Legal Aid (Coronavirus, Remuneration) (Amendment) Regulations 2020

S.I. 2020/480 Financial Services and Markets Act 2000 (Regulated Activities) (Coronavirus) (Amendment) Order 2020

Instrument not subject to Parliamentary proceedings not laid before Parliament

S.I. 2020/462 Solicitors (Disciplinary Proceedings) (Amendment) Rules 2020

Appendix 1

S.I. 2020/225

Civil Service (Other Crown Servants) Pension Scheme (Amendment) Regulations 2020

1. In a letter dated 22nd April 2020, the Joint Committee on Statutory Instruments (the “Committee”) sought confirmation that regulation 3(c) of the Civil Service (Other Crown Servants) Pension Scheme (Amendment) Regulations 2020 (the “Regulations”) should have been expressed as coming into force immediately after regulation 3 of S.I. 2020/224; the Public Service (Civil Servants and Others) Pensions (Amendment) Regulations 2020 (the “Alpha Amendment Regulations”).
2. The Cabinet Office is grateful to the Committee for pointing this out and agrees that it would have been a drafting improvement to include provision to the effect that regulation 3(c) of the Regulations came into force immediately after regulation 3 of the Alpha Amendment Regulations.
3. The intention of bringing both regulation 3(c) of the Regulations and regulation of the Alpha Amendment Regulations into force at the same time (i.e. midnight on 1st April 2020) was to ensure that the revised annualised rates of pensionable earnings bands took effect simultaneously for both civil servants and other crown servants. The regulations establishing the pension scheme for other crown servants are by analogy to the regulations establishing the pension scheme for civil servants (“Alpha”), and it is preferable, wherever possible, that both sets of regulations synchronise seamlessly where they interact and that the interaction is as transparent as possible for the reader.
4. The Cabinet Office is of the view that the drafting is unlikely to cause any confusion or complication as a matter of legal interpretation or in practice. There is only one possible order in which the two instruments can take effect without rendering one of them redundant; and this order is the same order that a reader would intuitively adopt.
5. In more detail, unless the amendment made by the Alpha Amendment Regulations is taken to have effect first, the amendment made by the Regulations could have no possible legal meaning, as the table in regulation 134 of the Public Service (Civil Servants and Others) Pensions Regulations 2014 (S.I. 2014/1964) (“the 2014 Regulations”) on which that amendment is premised would not exist in law at the moment the Regulations took effect. The result would be to render the Regulations legally meaningless. The Cabinet Office is of the view that such an arbitrary interpretation so contrary to the obvious intent of the legislator (who made both instruments on the same day) would most likely be dismissed out of hand by a reader of the instrument, and would be very unlikely to be upheld by a court. This is especially so given that regulation 10 of the Civil Service (Other Crown Servants) Pension Scheme Regulations 2016 (“the 2016 Regulations”) consists of a series of modifications to the 2014 Regulations: this underscores the point that the only possible coherent legislative intent is that the Regulations should operate derivatively with respect to the 2014 Regulations and the Alpha Amendment Regulations.

6. That intent is consistent with the fact that the other crown servants pension scheme is expressly a “by-analogy” scheme that operates as if the provisions of Alpha applied, subject to certain modifications (see paragraph 9(1) of the 2016 Regulations).

7. Nevertheless, the Cabinet Office recognise that the drafting could have been improved by making the above sequencing explicit on the face of the Regulations, rather than leaving it to the necessary implication of legislative intent.

8. The Cabinet Office trusts that this memorandum is helpful to the Committee and would once again thank the Committee for bringing the matter to the department’s attention for inclusion in future instruments of this kind.

Cabinet Office

29 April 2020

Appendix 2

S.I. 2020/246

Statutory Parental Bereavement Pay (Administration) Regulations 2020

1. In its letter to the Department for Business, Energy and Industrial Strategy of 22 April 2020, the Joint Committee requested a memorandum on the following point:

“Explain what is meant by “partner” in regulation 14(2)(b).”

2. There is no definition of the term ‘partner’ in this instrument. The Department did consider whether a specific definition ought to be provided but concluded that, on balance, it was preferable not to. Section 10 of the Employment Act 2002 allows for regulations which enable an HMRC officer to require persons of a specified description to provide information or documents reasonably required by the officer for the purposes of ascertaining whether statutory parental bereavement pay is or was payable to any person. The list of persons who may be prescribed includes (in addition to the person who is claiming, or has claimed, statutory parental bereavement pay) “any person who is, or has been, the spouse or partner of such a person”.

3. The powers in section 10 have been exercised previously in the following instruments: the Statutory Paternity Pay and Statutory Adoption Pay (Administration) Regulations 2002/2820; the Statutory Paternity Pay (Adoption) and Statutory Adoption Pay (Adoptions from Overseas) (Administration) Regulations 2003/1192; the Additional Statutory Paternity Pay (Birth, Adoption and Adoptions from Overseas) (Administration) Regulations 2010/154; and the Statutory Shared Parental Pay (Administration) Regulations 2014/2929. In all but one of these instruments the relevant regulation is regulation 14(2)(b), the exception being S.I.2003/1192 (which applies S.I. 2002/2820 with modifications). In each case, that regulation is drafted in the same terms as regulation 14(2)(b) of S.I. 2020/246.

4. The policy intent is to ensure that HMRC officers have the same powers they already enjoy, and exercise, in relation to existing statutory family pay rights. This reflects a broader policy consideration in the drafting across the 2020 suite of regulations which implemented the new right to statutory parental bereavement leave and pay, which was to minimise the familiarisation burdens of new regulation on employers, employees and their advisors. Consequently, the Department attempted to adopt an approach as consistent as possible with the existing legal framework for family statutory pay. In practice when relying on these powers, HMRC officers interpret ‘partner’ in the same way as it is defined in the relevant regulations which define entitlement criteria (for example, regulation 2(1) of the Statutory Shared Parental Pay Regulations 2014). That practice is well understood and has operated smoothly for many years.

5. Further, regulation 14(2)(b) repeats the terminology used in section 10(2)(b) of the Employment Act 2002. There is no definition in that Act of ‘partner’.

6. Consequently, the Department considered that adopting the same drafting approach as had been taken historically was preferable, as this avoided inadvertently creating inconsistencies between the meaning of the term in S.I. 2020/246 and in those regulations previously made pursuant to the same power.

Department for Business, Energy and Industrial Strategy

4 May 2020

Appendix 3

S.I. 2020/365

Working Time (Coronavirus) (Amendment) Regulations 2020

1. By a letter dated 22nd April 2020, the Committee requested a Memorandum on the following point:

Confirm whether the requirements of section 4(1) of the Statutory Instruments Act 1946 were complied with.

2. The Department apologises that one requirement of section 4(1) was not complied with. This is explained at paragraph 7 below.

3. For convenience, Section 4(1) of the Statutory Instruments Act 1946 is set out below:

Where by this Act or any Act passed after the commencement of this Act any statutory instrument is required to be laid before Parliament after being made, a copy of the instrument shall be laid before each House of Parliament and, subject as hereinafter provided, shall be so laid before the instrument comes into operation:

Provided that if it is essential that any such instrument should come into operation before copies thereof can be so laid as aforesaid, the instrument may be made so as to come into operation before it has been so laid; and where any statutory instrument comes into operation before it is laid before Parliament, notification shall forthwith be sent to the Speaker of the House of Commons and the Speaker of the House of Lords drawing attention to the fact that copies of the instrument have yet to be laid before Parliament and explaining why such copies were not so laid before the instrument came into operation.

4. This instrument was made at 9.00 pm on 26th March 2020 and came into force immediately after being made. It was laid before Parliament at 2.00 pm on 27th March 2020.

5. In the view of the Department it was essential that the instrument come into force before copies could be laid. Many employers align their leave year to the financial year, which ended on 31 March 2020. The Department was concerned that workers whose leave year was to end on that date did not lose holiday that they did not take due to the coronavirus situation. Without this instrument, workers whose leave year expired with untaken holiday would be likely to lose that entitlement if they did not take it. The Department wished to act urgently to avoid the risk that employers with a leave year ending 31 March 2020 might either risk failing to comply with the law by refusing to allow their workers to take holiday, or risk compromising their response to the coronavirus situation as their workers were on leave and so unavailable to work. The instrument allowed workers to carry their holiday into the following two leave years, providing flexibility for employers where needed. Further explanation on this issue (although in the context of the 21 day convention rather than section 4) is included in section 3 of the Explanatory Memorandum to the instrument.

6. Against that background the Department considered it essential to act urgently to provide certainty as to that flexibility as early as possible. Although, in the event, it proved possible to lay the instrument on 27th March 2020, the Department was concerned that there might be an unexpected delay in the process of laying, especially in view of uncertainties caused by the coronavirus situation, and that a delay in the instrument coming into force might realise the risks referred to in paragraph 5 above.

7. Unfortunately, due to an oversight, the Department failed to send forthwith the notification required by section 4 to the Speaker of the House of Commons and the Speaker of the House of Lords. The Department apologises for this. The Department has now written to each of the Speakers to explain its reasoning for not laying before the instrument came into force and to apologise for its omission to do so earlier.

8. The Department endeavours to plan the making and laying of statutory instruments in a systematic way and will review its procedures to seek to mitigate the chance of a similar omission to comply with section 4 occurring in the future.

Department for Business, Energy and Industrial Strategy

4 May 2020

Appendix 4

S.I. 2020/397

Social Security (Coronavirus) (Further Measures) Amendment Regulations 2020

1. In its letter to the Department dated 29th April 2020 (received by the Department on 30th April), the Committee requested a memorandum on the following point:

“Explain why regulation 2(2)(b) does not omit the definition of “the relevant Monday”.”

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

3. Article 4 of the Rent Officers (Universal Credit Functions) Order 2013 (S.I. 2013/382) provides that rent officers are, on a specified day, to determine the local housing allowance for specified categories of accommodation in each “broad rental market area”. These areas are determined under article 3 of that Order and have effect for substantive purposes from the “relevant Monday” (the relevant Monday being defined in article 4(4) as the first Monday in the first tax year that commences following the day on which the determination is made).

4. A decision was made that the determinations of the local housing allowance of 31st March 2020 were to take effect for the universal credit assessment periods that ended on or after 6th April 2020. Regulation 2(2) of the Social Security (Coronavirus) (Further Measures) Amendment Regulations 2020 (S.I. 2020/397) gave effect to this policy by providing that article 4 was to have effect as if a new paragraph (3) were substituted in article 4.

5. Within article 4, the expression “relevant Monday” only appears in paragraph (3) and is not used in the substituted paragraph (3). However, it is cross-referred to in article 3 and the cross-reference is still relevant to article 4 as modified by the Regulations in issue, as it affects when determinations of the broad rental market area have effect. It was therefore decided that the definition of “relevant Monday” was still needed and so should not be omitted.

6. The Department accepts that, as the definition of “relevant Monday” needed to be retained, the definition of “tax year” could also have been retained because “tax year” appears in the definition of “relevant Monday”. However, the Department believes that the temporary modification works in practice. In particular, it is clear what a “tax year” means in this context even in the absence of a definition.

Department for Work and Pensions

5th May 2020

Appendix 5

S.I. 2020/400

Prison and Young Offender Institution (Coronavirus) (Amendment) Rules 2020

1. Following consideration of the Prison and Young Offender Institution (Coronavirus) (Amendment) Rules 2020 by the Committee at its meeting on 29 April 2020, the Committee requested that the Ministry of Justice submit a memorandum on the following point:

Identify the vires for the sub-delegation in regulation 2(2) (inserted rule 9A(4)) and in regulation 3(2) (inserted rule 5A(4)).

2. The Department is grateful for the Committee's consideration of this instrument.
3. The SI was made pursuant to section 47 of the Prison Act 1952, amending the Prison Rules 1999 and the Young Offender Institution Rules 2000. Section 47(1) is broadly drafted: the Secretary of State may make rules for the regulation and management of prisons, remand centres, young offender institutions, secure training centres or secure colleges, and for the classification, treatment, employment, discipline and control of persons required to be detained therein. Section 47(5) provides specifically that such rules can include rules for the temporary release of prisoners. That power is equally widely drawn.
4. The Department do not consider that rule 9A(4) or rule 5A(4) is legislative sub-delegation. The rules are conferring by instrument a power on someone (here the maker of the instrument) to administer the application of a general rule in the instrument. Therefore, matters which may be specified in a direction made under paragraph (4) are considered to be an "administrative sub-delegation" for which the terms of the enabling power is sufficiently expressed in general terms to allow.
5. A direction under each rule can only be made for the statutory purposes set out in the rule—see (2)(b) (i) *for the purpose of preventing, protecting against, delaying or otherwise controlling the incidence or transmission of coronavirus; or (ii) for the facilitation of the most appropriate deployment of personnel and resources in, or in connection with, prisons in England and Wales*. A direction for temporary release within the parameters of the rule is not sub-delegation of the power to temporarily release, but the administrative application of the power in the most proportionate and appropriate way to fulfil the purpose of the rule. For example, it may be necessary to release prisoners from one prison, or prisons in a certain area, or prisons of a certain category, to alleviate issues in relation to coronavirus. The direction is merely a device for formalising constraints and is a mechanism of self-limitation and ensuring consistency across the prison estate. It ensures political control and accountability for a decision that effects public and judicial confidence in the justice system.
6. The power in section 47 allows the Secretary of State to make any form of rule about temporary release, of a much broader nature than Rule 9 or Rule 9A—for example, Rule 5 of the Secure Training Centres Rules 1998. It is, therefore, the Department's view that the

power to make directions under the new rules allows them to be operated proportionately within the purposes of the rule and that the breadth of section 47(1), and 47(5), permits administrative sub-delegation of this nature.

7. There is precedent in the Prison Rules 1999 of administrative sub-delegation. For example (sub-delegation in *italics*):

- Rule 7 provides for classification of prisoners in accordance with directions of the Secretary of State, *having regard to their age, temperament and record and with a view to maintaining good order and facilitating training and, in the case of convicted prisoners, of furthering the purpose of their training and treatment as provided by rule 3.*
- Rule 35(7) *provides the Secretary of State may give directions, either generally or in relation to any visit or class of visits,* concerning the day and times when prisoners may be visited.
- Rule 35A provides that the Secretary of State may give directions to any governor concerning the interception in a prison of any communication by any prisoner or class of ... subject to any directions given by the Secretary of State, the governor *may make arrangements for any communication by a prisoner or class of prisoners to be intercepted in a prison by an officer...*

8. If the Committee requires any further explanation or clarification the Department would be pleased to assist further.

Ministry of Justice

5 May 2020

Appendix 6

S.I. 2020/416

Tribunal Procedure (Coronavirus) (Amendment) Rules 2020

1. On 29 April 2020, the Committee requested that the Ministry of Justice submit a memorandum on the following point:

“What steps are being taken to ensure that the temporary rules (inserted into various Tribunal Procedure Rules by this instrument) that a tribunal:

(1) can (without the parties’ consent) dispose of proceedings without a hearing in certain circumstances; and

(2) may direct that a remote hearing is to be held in private solely on the basis of lack of technology (see paragraph 7.8 of the Explanatory Memorandum)

are consistent with the overarching requirement in section 22(4)(b) of the Tribunals, Courts and Enforcement Act 2007 that the tribunal system is accessible and fair.”

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

3. The powers in the temporary rules are explicitly designed as fall-back options which are only to be exercised when it is not reasonably practicable to hold a hearing, or having that hearing be accessible by the public. Her Majesty’s Courts and Tribunals Service has been making—and continues to make—significant efforts to allow hearings to proceed remotely, and for those hearings to be accessible to the public. Those efforts should help to minimise the instances in which the Tribunal may need to rely on the powers in the temporary rules.

4. Even when a hearing (or a public hearing) is not reasonably practicable, the temporary rules are subject to additional safeguards. A decision under the temporary rules disposing of proceedings without a hearing can only be made where it is in the interests of justice to do so and the matter is urgent. A direction under the temporary rules to hold a remote hearing in private can only be made where such a direction is necessary to secure the proper administration of justice.

5. Use of the powers in the temporary rules is also subject to the overriding objective contained in each set of Tribunal Procedure Rules, which is “to deal with cases fairly and justly”. The Tribunal must seek to give effect to that overriding objective when considering whether and how to exercise those powers.

6. It is the Department’s view that the combination of these factors secures the compatibility of the temporary rules with the statutory objective in section 22(4)(b).

Ministry of Justice

5th May 2020

Appendix 7

S.I. 2020/417

Criminal Procedure (Amendment no. 2) (Coronavirus) Rules 2020

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

(1) When do rules 6(d) and 6(e) cease to have effect?

(2) In rule 3, should the reference to rule 6(c) be a reference to rule 6(e)?

Question 1

2. They do not. Rule 2 of this instrument should have read, “Rules 5, 6(a), (b), (c) and (d), 7, 8, 9, 10, 11, 13 and 14 cease to have effect when section 53 (and Schedule 23), section 54 (and Schedule 24) and section 55 (and Schedule 25) of the Coronavirus Act 2020 expire.”

Question 2

3. Yes, it should. Rule 3 of this instrument should have read, “Rules 6(e) and 12 cease to have effect when paragraph 6 of Schedule 8 to the Coronavirus Act 2020 expires.”

4. These errors are deeply regretted. The Criminal Procedure Rule Committee is about to revoke and replace the Criminal Procedure Rules 2015 as announced in successive Explanatory Memoranda, most recently at paragraph 9.1 of the Memorandum laid before Parliament with this present statutory instrument. The errors will be superseded and corrected by that fresh instrument.

Ministry of Justice

5th May 2020

Appendix 8

S.I. 2020/427

Statutory Sick Pay (General) (Coronavirus Amendment) (no. 3) Regulations 2020

1. In its letter to the Department dated 29th April 2020 (received by the Department on 30th April), the Committee requested a memorandum on the following point:

“Explain whether it is intended that a person may be defined as “extremely vulnerable and at very high risk of severe illness from coronavirus” for the purposes of these Regulations even if the relevant public health guidance does not expressly use the phrase “extremely vulnerable” (see, for example, the current guidance by the Scottish Ministers), and how effect is given to that intention.”

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

3. The Regulations refer to extreme vulnerability, but they also refer to people at very high risk of serious illness who have been sent a notification under the guidance advising them to shield. The purpose of the Regulations is to refer to the people at highest risk who have been sent a letter about shielding. The guidance on shielding has a section about people with “highest risk of severe illness”. It says “If you are in this group you will receive a letter from the Chief Medical Officer”. Those people are those with the highest risk in the guidance: <https://www.gov.scot/publications/covid-shielding/pages/highest-risk-classification/> and are those intended to be covered by the Regulations.

4. As the Committee will appreciate, the guidance is not legislation and has not been drafted as such. For example, whilst it is true that the guidance on coronavirus provided by the Scottish Ministers on www.gov.scot does not expressly use the phrase “extremely vulnerable”, it links to guidance on shielding provided by NHS Inform, which does use that term. In addition, the Regulations extend to Great Britain, but there is guidance produced across Great Britain by three different administrations. In these circumstances, the Department considers that the legislation should be interpreted in a purposive way and that it works well applying such an interpretation.

5. By way of a more technical drafting point, we did not place quotation marks around “extremely vulnerable” in paragraph 5A(a). We would have done so if we were intending to refer to an exact definition in the guidance, rather than adopting a purposive approach.

6. Finally, we would note that if the Regulations were interpreted literally, no-one in Scotland could benefit from falling within paragraph 5A. That would defeat the purpose of the Regulations. The Department considers that a Court would not interpret the Regulations that way given the clear purposive intention of the drafting and given that it would deprive claimants in need of the benefit of paragraph 5A, which they are clearly intended to have.

Department for Work and Pensions

5th May 2020