House of Lords
House of Commons

Joint Committee
on Statutory Instruments

Twelfth Report of Session 2019–21

Drawing special attention to:

Posted Workers (Agency Workers) Regulations 2020 **(S.I. 2020/384)**

Competition Act 1998 (Health Services for Patients in Wales) (Coronavirus) (Public Policy Exclusion) Order 2020 **(S.I. 2020/435)**

Adoption and Children (Coronavirus) (Amendment) Regulations 2020 **(S.I. 2020/445)**

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Joint Committee on Statutory Instruments

Current membership

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Lord Haskel *(Labour)*

Lord Morris of Handsworth (*Labour*)

Baroness Newlove *(Conservative)*

Lord Rowe-Beddoe (*Crossbench*)

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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

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

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Contents

Instruments reported

At its meeting on 20 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 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. 2020/384: Reported for defective drafting

Posted Workers (Agency Workers) 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 transpose the revised EU Posting of Workers Directive (Directive 2018/957/EU) into domestic law. The preamble states that the Secretary of State and Lord Chancellor are acting jointly in making the Regulations. It appeared to the Committee that joint exercise was not available in relation to the provisions made under section 2(2) of the European Communities Act 1972, as the European Communities Designation Order 2000 designates the Secretary of State alone in relation to measures relating to employment rights and duties. The Committee asked the Department for Business Energy and Industrial Strategy to explain. In a memorandum printed at Appendix 1, the Department acknowledges that the preamble should have asserted that the Secretary of State and the Lord Chancellor were acting jointly only in exercise of the powers conferred by section 18(8) and (9) of the Employment Tribunals Act 1996; and the Secretary of State alone was exercising the powers under section 2(2) of the European Communities Act 1972 in accordance with the designation. **The Committee accordingly reports the preamble for defective drafting, acknowledged by the Department.**

2 S.I. 2020/435: Reported for doubtful vires

Competition Act 1998 (Health Services for Patients in Wales) (Coronavirus) (Public Policy Exclusion) Order 2020

2.1 **The Committee draws the special attention of both Houses to this Order on the ground that there is doubt as to whether it is *intra vires* in one respect.**

2.2 This Order is made in response to the coronavirus public health emergency. It disapplies certain prohibitions set out in the Competition Act 1998 in order to permit independent healthcare providers to work together to support the NHS in Wales. This collaboration is only allowed during the "healthcare disruption period", which article 2 defines as beginning on 1 March 2020 and ending on a date specified by the Secretary of State under article 5(1). The Committee asked the Department for Business, Energy and Industrial Strategy to explain what powers are relied on to sub-delegate the decision as to the date on which the healthcare disruption period will end. In a memorandum printed at Appendix 2, the Department argues that "an emergency reserve power [of the kind relied on to make this Order] would have been intended to be construed widely and that it would

have been in the contemplation of Parliament that some small elements of discretion of an administrative kind should be left to the Secretary of State". It asserts that arriving at a reasonably held view that "there is no longer a significant disruption or a threat of significant disruption to the provision of health services to patients in Wales as a result of coronavirus" is a small element of discretion of an administrative kind. The Committee disagrees. The presumption against sub-delegation in legislation is long-standing and strong, so where Parliament intends to confer legislative discretion it must do so by express words or (exceptionally) by necessary implication. The decision as to the duration of the disruption to health services and whether it continues to justify the disapplication of antitrust laws goes to the heart of this instrument and cannot be categorised as merely administrative. **The Committee accordingly reports articles 2 and 5(1) on the ground that there is doubt as to whether they are *intra vires*.**

3 S.I. 2020/445: Reported for requiring elucidation and for defective drafting

Adoption and Children (Coronavirus) (Amendment) Regulations 2020

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

3.2 These Regulations are made in response to the coronavirus public health emergency. They make temporary amendments to ten instruments relating to children's social care by (according to the Explanatory Memorandum) "relaxing some administrative and procedural obligations to support delivery of children's services but maintaining appropriate safeguards". Regulations 3(2) and 11(3) add a qualification of "reasonable endeavours" in order to amend duties on those in charge of residential family centres and children's homes. The Committee asked the Department for Education to explain what difference that qualification makes, having regard to the principles of administrative law that apply reasonableness as a test of compliance with open-ended duties. In a memorandum printed at Appendix 3, the Department helpfully explains its intentions as to the effect of that qualification. **The Committee accordingly reports regulations 3(2) and 11(3) for requiring elucidation, provided by the Department's memorandum.**

3.3 Regulation 3(2) amends regulation 10(1) of the Residential Family Centres Regulations 2002 by adding a qualification of "reasonable endeavours" to the opening words of that provision. The Committee asked the Department to explain that change particularly in relation to health and welfare, which the explanatory materials did not address. In its memorandum, the Department explains that the policy intent is that if, having used "reasonable endeavours" to discharge the duty to ensure that a residential family centre is conducted so as to promote and make proper provision for the health and welfare of the residents, the person in charge "was unable to comply with that duty fully or in part", that person would not be in breach of the regulations. Adding reasonable endeavours as an express test probably adds little or nothing to the implicit test of reasonableness applied by administrative law to the application of the original duties; but given the Department's view of the effect of adding these words, the Committee finds it surprising that the change, which according to the Department amounts to a diminution of social care responsibilities

at a time of crisis, was omitted from the explanations in the explanatory materials. **The Committee accordingly reports regulation 3(2) for requiring elucidation, provided by the Department's memorandum.**

3.4 Regulation 4 amends the Adoption Agencies Regulations 2005 by, among other things, relaxing aspects of the pre-assessment process. That process requires the adoption agency to carry out police checks (regulation 25) and obtain other pre-assessment information (regulation 26(b) and (e)) about a prospective adopter. Normally, the agency is obliged to take this information into account when deciding whether a person is suitable to adopt. Regulation 4(7) and (8) of this instrument purports to relax that obligation by making regulation 26(b) and (e) subject to a new provision which allows the agency to make its decision "even if the information requested under regulation 25 and 26(b) has yet to be obtained". The Committee asked the Department to explain why regulation 26(b) and (e), but not regulation 25, is subject to the new provision, while the new provision applies in relation to regulations 25 and 26(b), but not 26(e). In its memorandum, the Department acknowledges that these are errors: its intent is that the agency may make its decision even if the information requested under all three provisions (regulation 25, 26(b) and 26(e)) has yet to be obtained. **The Committee accordingly reports regulation 4(7) and (8) for defective drafting, acknowledged by the Department.**

3.5 (The Department proposes that as the amendments are only temporary, it will not correct the errors but liaise with Ofsted, which it expects "to take a pragmatic approach". The Committee refers the Department to its comments on S.I. 2019/983 in its Sixty-fifth Report of Session 2017–19 and trusts that the Department will neither operate the law, nor encourage anyone else to operate the law, in the form in which they wish they had made it, rather than in the form in which they did make it.)

3.6 Regulations 18 and 19 provide for savings in relation to the Care Planning, Placement and Case Review (England) Regulations 2010. Where a child was placed with a foster parent under regulation 19 or 23 of the 2010 Regulations while the temporary amendments made by this instrument were in place, the responsible authority may proceed or the placement has effect "as if the amendments made by these Regulations remain in force". The Committee asked the Department to explain whether regulations 18 and 19 are intended to save all the amendments made by this instrument to the 2010 Regulations, or only the amendments made to regulations 19 and 23 of the 2010 Regulations. In its memorandum, the Department explains that the former is intended, to avoid a local authority "finding itself with little or no time to comply with the original provisions when the amendments expire on 25th September". The Committee is not clear why this concern is relevant to amendments that have effect indefinitely; but it notes the Department's clarification and **accordingly reports regulations 18 and 19 for requiring elucidation, provided by the Department's memorandum.**

Instruments not reported

At its meeting on 20 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

Drafts instrument requiring affirmative approval

Draft S.I.	Financial Services (Miscellaneous Amendments) (EU Exit) Regulations 2020
Draft S.I.	National Minimum Wage (Offshore Employment) (Amendment) Order 2020
Draft S.I.	Northern Ireland Banknote (Designation of Authorised Bank) Regulations 2020

Instrument requiring affirmative approval

S.I. 2020/503	Abortion (Northern Ireland) (No. 2) Regulations 2020

Instruments subject to annulment

S.I. 2020/483	Scottish National Investment Bank Act 2020 (Consequential Provision) Order 2020
S.I. 2020/490	Victims' Payments (Amendment) Regulations 2020

Appendix 1

S.I. 2020/384

Posted Workers (Agency Workers) Regulations 2020

1. Thank you for drawing to our attention the second paragraph of the Preamble of The Posted Workers (Agency Workers) Regulations 2020, which states:

> *"The Secretary of State and the Lord Chancellor, acting jointly, in exercise of the powers conferred by section 18(8) and (9) of the Employment Tribunals Act 1996 and section 2(2) of the European Communities Act 1972, make the following Regulations."*

2. The Secretary of State and the Lord Chancellor are acting jointly in exercise of the powers conferred by section 18(8) and (9) of the Employment Tribunals Act 1996; and the Secretary of State is exercising powers under section 2(2) of the European Communities Act 1972 in accordance with the designation for the purposes of section 2(2) of the European Communities Act 1972 as set out in the first paragraph of the Preamble.

3. The Department acknowledges that the paragraph cited by the JCSI should have been clearer that the Secretary of State and the Lord Chancellor are acting jointly in relation to the exercise of the powers conferred by section 18(8) and (9) only, and apologises for this oversight.

Department for Business, Energy and Industrial Strategy

5 May 2020

Appendix 2

S.I. 2020/435

Competition Act 1998 (Health Services for Patients in Wales) (Coronavirus) (Public Policy Exclusion) Order 2020

1. By a letter dated 6th May 2020, the Committee requested a Memorandum on the following point:

> *In relation to articles 2 and 5(1), explain what powers are relied on to sub-delegate the decision as to the date on which the healthcare disruption period is to end.*

2. The power in paragraph 7(1) and (2) of Schedule 3 to the Competition Act 1998 allows the Secretary of State to exclude "any agreement of a particular description" from the application of the Chapter I prohibition and to "make provision for the exclusion of the agreement or agreements to which the order applies, or of such of them as may be specified, only in specified circumstances".

3. Article 4 of the Order provides that agreements which relate to a qualifying activity are excluded from the Chapter I prohibition and the definition of qualifying activities in article 3 of the Order specifies that it is only activities occurring during the healthcare disruption period which qualify for the exclusion. In the view of the Department, providing that only agreements which relate to qualifying activities occurring while there is disruption to health services is part of specifying the circumstances in which the agreements are to be excluded.

4. The Order requires the Secretary of State to publish a notice when he believes there is no longer a significant disruption or a threat of significant disruption to the provision of health services to patients in Wales as a result of coronavirus. This does determine when the healthcare disruption period is to end, but the Order defines the circumstances in which the Secretary of State is to publish the notice and any discretion the Secretary of State has will be constrained by the fact that his belief must be reasonably held. The giving of the notice is therefore a mechanism determined by the Order for ensuring that the exclusion applies to agreements only whilst specified circumstances relating to a disruption to health services prevail.

5. The power in paragraph 7 is intended to deal effectively with circumstances where exceptional and compelling reasons of public policy give rise to a need for an exclusion of key elements of competition law. The Department submits that an emergency reserve power of this kind would have been intended to be construed widely and that it would have been in the contemplation of Parliament that some small elements of discretion of an administrative kind should be left to the Secretary of State.

6. This must have been the basis for the approach in the Competition Act 1998 (Public Policy Exclusion) Order 2012 (SI 2012/710). Under article 3 of that Order a qualifying protocol for the purposes of the exclusion under that Order is an agreement which provides that it can only be activated by a decision of the Secretary of State that there is a fuel supply disruption; and provides that it will only remain activated for the duration of the fuel supply disruption.

7. In the view of the Department the giving of the notice under article 5 of the Order and ending the healthcare disruption period in this way falls within the powers in paragraph 7(1) and (2) of Schedule 3 to the Competition Act 1998.

Department for Business, Energy and Industrial Strategy

11 May 2020

Appendix 3

S.I. 2020/445

Adoption and Children (Coronavirus) (Amendment) Regulations 2020

1. In its letter to the Department for Education of 6th May 2020, the Joint Committee requested a memorandum on the following points:

> *(1) Explain what difference adding a qualification of "reasonable endeavours" makes to the duties in the provisions amended by regulations 3(2) and 11(3), having regard to the principles of administrative law that apply reasonableness as a test of compliance with open-ended duties.*
>
> *(2) In relation to regulation 3(2), explain whether the amendment to regulation 10(1)(a) in particular achieves the desired policy intent, and if so, why neither the Explanatory Notes nor the Explanatory Memorandum to this instrument clearly set out the effect of and reasons for that amendment.*
>
> *(3) In relation to the amendments made by regulation 4(7) and (8), explain why regulation 26(b) and (e), but not regulation 25, is subject to regulation 27(1A), while regulation 27(1A) applies in relation to regulations 25 and 26(b), but not 26(e).*
>
> *(4) Explain whether regulations 18 and 19 are intended to save all the amendments made by this instrument to the 2010 Regulations, or only the amendments made to regulations 19 and 23 of the 2010 Regulations, and how effect is given to that intention.*

2. This memorandum has been prepared by the Department for Education

> (*1) Explain what difference adding a qualification of "reasonable endeavours" makes to the duties in the provisions amended by regulations 3(2) and 11(3), having regard to the principles of administrative law that apply reasonableness as a test of compliance with open-ended duties.*

3. The purpose of the amendments in regulations 3(2) and 11(3) was to provide flexibility to registered persons in respect of residential family centres and children's homes in complying with the relevant duties.

4. We agree with the committee that open-ended duties are subject to the general principle that reasonableness would be applied to a test of compliance with such a duty.

5. In relation to the amendment in regulation 11(3) the amendment provides flexibility for providers to use reasonable endeavours to ensure children make measurable progress towards achieving their educational potential. Looked-after children and young people are expected to attend educational provision, where it is appropriate for them to do so. Decisions on attendance will be based on finely balanced discussions between the education provider, the parent/carer, and others, including social workers, local authorities, and other relevant professionals where applicable. Any decision needs to consider the balance of risk to the child, including health vulnerabilities, family circumstances and the child

or young person's assessed special educational needs. This amendment is in recognition that some vulnerable children may not be attending their school. Staff in children's homes should continue to try and find alternative and creative ways to engage children in their education and learning.

6. Although many of the duties in regulation 8(2) of the Children's Homes (England) Regulations 2015 are open-ended some of them are more specific than others—for example regulation 8(2)(vi) which provides that the registered person shall maintain regular contact with each child's education and training provider, including engaging with the provider and the placing authority to support the child's education and training and to maximise the child's achievement. Despite the general principle of reasonableness you have raised, following discussions with stakeholders we believed it to be sensible to amend the duty to include 'reasonable endeavours' to ensure that providers would not be penalised for not fully complying with the more specific duties as set out.

7. In relation to the amendment in regulation 3(2) the amendment was in recognition that, for a temporary period, providers may experience difficulties in accessing appropriate specialist staff and provisions to fully provide for the needs of all residents. Registered providers should be able to demonstrate what reasonable endeavours they have made to continue to promote and make proper provision for the health and welfare of residents. We accept that the duty being amended is open-ended and that it was not strictly necessary to qualify the duty in this way given the general principle that reasonableness will be inferred.

8. The Regulations are also used by OFSTED when they inspect establishments and agencies and amending them in this way enables and puts the onus on registered persons to explain to Ofsted that, although they might not have been able to fully comply with the duty in the regulation, they have used reasonable endeavours when attempting to do so. This would then be a matter for OFSTED to consider as part of its assessment as to compliance with the Regulations and makes it clear to registered persons and OFSTED that such flexibility is permitted.

> (*2) In relation to regulation 3(2), explain whether the amendment to regulation 10(1)(a) in particular achieves the desired policy intent, and if so, why neither the Explanatory Notes nor the Explanatory Memorandum to this instrument clearly set out the effect of and reasons for that amendment.*

9. In our view the amendment to regulation 10(1)(a) does achieve the desired policy effect. Under the amended provision the registered person has to use 'reasonable endeavours' to ensure that the centre is conducted as to promote and make proper provision for the health and welfare of the residents. If, having used reasonable endeavours to discharge the duty, the registered person was unable to comply with the duty fully or in part, they would not be in breach of the regulation. As stated above the regulation would also be used by Ofsted as part of any inspection. This is what is wanted as a matter of policy.

10. The EN to the Regulations does not refer explicitly to every amendment being made by the instrument and does not explicitly refer to the amendment being made by regulation 3(2). The intention here was for the EN to summarise the changes being made as referring to all of them would have been very unwieldy given the number of changes being made in

the instrument. On reflection it might have been better to have made it clear that not all the amendments being made were being explicitly explained in the EN or to have included some specific wording in relation to this particular amendment.

11. Despite the fact that this amendment is not specifically mentioned in the EN we do not think this will cause any issues with users as the sector are aware of the changes made by these Regulations. In addition, the EM refers to this amendment in paragraph 7.32 although we acknowledge that it could have been clearer as to the effect and reasons for the amendment.

> (*3) In relation to the amendments made by regulation 4(7) and (8), explain why regulation 26(b) and (e), but not regulation 25, is subject to regulation 27(1A), while regulation 27(1A) applies in relation to regulations 25 and 26(b), but not 26(e).*

12. The amendments to regulation 26 and the inclusion of new regulation 27(1A) were intended to provide that an adoption agency (AA) may make a pre-assessment decision under regulation 27 before the pre-assessment information required by regulations 25, 26(b) and 26(e) has been obtained although we acknowledge that the drafting is unclear.

13. With regards to the question of the inclusion of the words "subject to regulation 27(1A)" in regulations 26(b) and (e) but not in regulation 25. The inclusion of the wording in regulations 26(b) and (e) was intended to assist the reader but, on reflection, we think it would have been better not to include the wording at all (we think that it is probably not necessary) or at least to have included it in regulation 25 as well for clarity

14. The inclusion of the amendment to regulation 26(e) occurred late in the process at the request of the sector and so the failure to refer to it in regulation 27(1A) is an oversight. The intention behind the planned amendment was made clear to the sector at the time the amendments were being prepared and we can continue to explain to them that our intention had been to include a reference to 26(e) in the new regulation 27(1A). We can also liaise with Ofsted about this and would expect them to take a pragmatic approach to any adoption agency that proceeds on the basis of the policy intention.

15. As the amendments are due to expire on 25th September we do not consider that it is necessary to make an amendment to the Regulations at this stage to add reference to regulation 26(e) into new regulation 27(1A) but we will keep this under review alongside the Regulations themselves.

> (*4) Explain whether regulations 18 and 19 are intended to save all the amendments made by this instrument to the 2010 Regulations, or only the amendments made to regulations 19 and 23 of the 2010 Regulations, and how effect is given to that intention.*

16. The savings provision is intended to provide that, where a child has been placed under regulation 19 or 23 of the 2010 Regulations during the relevant period, the 2010 Regulations continue to apply to the placement as if all the amendments made to the 2010 Regulations remain in force.

17. Without the savings provision a local authority could find themselves with little or no time to comply with the original provisions when the amendments expire on 25th September.

Department for Education

12th May 2020