



House of Lords
House of Commons
Joint Committee
on Statutory Instruments

**Fifteenth Report
of Session 2019–21**

Drawing special attention to:

Official Controls (Plant Health and Genetically Modified Organisms) (England) (Amendment) Regulations 2020 (S.I. 2020/381)

Town and Country Planning (Development Management Procedure, Listed Buildings and Environmental Impact Assessment) (England) (Coronavirus) (Amendment) Regulations 2020 (S.I. 2020/505)

Prison and Young Offender Institution (Coronavirus) (Amendment) (no. 2) Rules 2020 (S.I. 2020/508)

*Ordered by the House of Lords
to be printed 17 June 2020*

*Ordered by the House of Commons
to be printed 17 June 2020*

**HL 81
HC 75-xv**

Published on 19 June 2020
by authority of the House of Lords
and the House of Commons

Joint Committee on Statutory Instruments

Current membership

House of Lords

[Lord Colgrain](#) (*Conservative*)

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

[Lord Morris of Handsworth](#) (*Labour*)

[Baroness Newlove](#) (*Conservative*)

[Lord Rowe-Beddoe](#) (*Crossbench*)

[Baroness Scott of Needham Market](#) (*Liberal Democrat*)

[Lord Stirrup](#) (*Crossbench*)

House of Commons

[Jessica Morden MP](#) (*Labour, Newport East*) (Chair)

[Dr James Davies MP](#) (*Conservative, Vale of Clwyd*)

[Paul Holmes MP](#) (*Conservative, Eastleigh*)

[John Lamont MP](#) (*Conservative, Berwickshire, Roxburgh and Selkirk*)

[Sir Robert Syms MP](#) (*Conservative, Poole*)

[Owen Thompson MP](#) (*Scottish National Party, Midlothian*)

[Liz Twist MP](#) (*Labour, Blaydon*)

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

© Parliamentary Copyright House of Commons 2019. This publication may be reproduced under the terms of the Open Parliament Licence, which is published at www.parliament.uk/copyright.

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: Sarita Arthur-Crow, 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.

Contents

Instruments reported	3
1 S.I. 2020/381: Reported for defective drafting	3
Official Controls (Plant Health and Genetically Modified Organisms) (England) (Amendment) Regulations 2020	3
2 S.I. 2020/505: Reported for defective drafting	4
Town and Country Planning (Development Management Procedure, Listed Buildings and Environmental Impact Assessment) (England) (Coronavirus) (Amendment) Regulations 2020	4
3 S.I. 2020/508: Reported for doubtful vires	4
Prison and Young Offender Institution (Coronavirus) (Amendment) (no. 2) Rules 2020	4
Instruments not reported	6
Annex	6
Appendix 1	8
S.I. 2020/381	8
Official Controls (Plant Health and Genetically Modified Organisms) (England) (Amendment) Regulations 2020	8
Appendix 2	10
S.I. 2020/505	10
Town and Country Planning (Development Management Procedure, Listed Buildings and Environmental Impact Assessment) (England) (Coronavirus) (Amendment) Regulations 2020	10
Appendix 3	12
S.I. 2020/508	12
Prison and Young Offender Institution (Coronavirus) (Amendment) (no. 2) Rules 2020	12

Instruments reported

At its meeting on 17 June 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. 2020/381: Reported for defective drafting

Official Controls (Plant Health and Genetically Modified Organisms) (England) (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 two respects.**

1.2 These Regulations introduce measures relating to imports of certain plants and plant products to prevent the establishment or spread of certain harmful pests. Regulation 2(8) (inserted paragraph 5(1)) defines responsible operator as “responsible operator”, in relation to a consignment, means the operator who is responsible for that consignment”. The Committee asked the Department for Environment, Food and Rural Affairs to explain why the defined term “responsible operator” is not used in regulation 2(8) (inserted paragraphs 7(2) and (4), 8, 12(2) and (3)). In a memorandum printed at Appendix 1, the Department explains that “the defined term the ‘responsible operator’ is intended to provide a conveniently concise shorthand for ‘the operator who is responsible for a Schedule 1 consignment’, but the use of that shorthand would not have been apt in each case. The Department does not believe that it would have been appropriate to use the term “responsible operator” in new paragraphs 7(2) and (4), 8 and 12(3)”. The Department does not, however, offer any reason why the shorthand would not have been appropriate in each case. Consistency in drafting is an important principle in order to avoid confusion and facilitate legal certainty; in the absence of an explanation for the inconsistency, **the Committee reports regulation 2(8) for defective drafting.**

1.3 The Committee also asked the Department to confirm that the references to “place(s)” in regulation 2(6) (inserted Table A3) should be references to “place” in reliance on section 6(c) of the Interpretation Act 1978 (which states that unless the contrary intention appears, words in the singular include the plural). In its memorandum, the Department asserts that in this context there was a potential contra-indication of section 6(c) that required express provision; again, however, it does not give any reason for the suggestion that the standard rules of singular including plural would have been thought to be contra-indicated (and it clearly did not think it was contra-indicated in other places in the instrument where the phrase “in a place of production” is clearly intended to include place or places—see, in particular footnote (1) to paragraph 1 in Table A3). (The Committee also notes that the drafting practice of UK legislation is to use “place or places” where it is necessary to include the plural expressly; the form “place(s)” which is found in less formal documents is not habitually used in legislation.) **The Committee accordingly reports regulation 2(6) for defective drafting.**

1.4 (The Committee also asked the Department to explain what the definition of “responsible operator” adds to the definition of “operator” (regulation 2(8) (inserted paragraph 5(1)) and the Department’s memorandum provides a helpful explanation.)

2 S.I. 2020/505: Reported for defective drafting

Town and Country Planning (Development Management Procedure, Listed Buildings and Environmental Impact Assessment) (England) (Coronavirus) (Amendment) 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 amend, on a temporary basis, certain requirements placed on local planning authorities and applicants for development where the authority or applicant is not able to comply with a particular requirement because it is not reasonably practicable to do so due to the coronavirus emergency. One of those requirements is to take reasonable steps to inform persons who are likely to have an interest in a planning application, of a website where information about that application may be found in circumstances where the physical means of notification of the application (for example, by a site notice) is not reasonably practicable. Persons likely to have an interest in the application is defined as including persons who live and work in, or otherwise “have a direct connection with” the area in which the proposed development is located (regulation 4 (inserted (7D)(a)), regulation 9(2) (inserted regulation(1F)(a)), regulation 10(3) (inserted regulation (2ZD) (a)), regulation 11 (inserted regulation (4ZD)(a)), regulation 15 (inserted regulation (15)(a) and (16)(b)), regulation 16 (inserted regulation 23A(3)(a)) and regulation 17(3) (inserted regulation 16(a)). The Committee asked the Ministry of Housing, Communities and Local Government to explain what sort of a connection, apart from living and working in the area, is envisaged and what is intended to be added by the qualification “direct”. In a memorandum printed at Appendix 2, the Department asserts that “direct” has its “ordinary dictionary meaning” in this context. The Committee does not agree that “direct” has any single dictionary definition: it is a term that is entirely contextual (see the range of examples cited in Stroud’s Judicial Dictionary, 9th Edition, pp.671–673); in this context there is no obvious meaning of the distinction between “direct” and “indirect” connections, and the legislation should have given some kind of indication as to the criteria to be applied, along the lines of the policy set out in paragraph 4 of the Department’s memorandum. **The Committee accordingly reports regulations 4, 9(2), 10(3), 11, 15, 16 and 17(3) for defective drafting.**

3 S.I. 2020/508: Reported for doubtful vires

Prison and Young Offender Institution (Coronavirus) (Amendment) (no. 2) Rules 2020

3.1 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.

3.2 These Rules temporarily amend the Prison Rules 1999 and the Young Offender Institution Rules 2000 to facilitate the effective running of those institutions during the

coronavirus emergency. The temporary changes apply during the “coronavirus period” which is the transmission control period (defined in the Coronavirus Act 2020) and the transition period. The transition period is the period of three months starting on the date on which the transmission control period ends but can be extended by the Secretary of State by declaration in up to one month increments for a further three months up to a total of six months or can be cut short (paragraph 3 of Schedule 1 (inserted rule 2A) and paragraph 3 of Schedule 2 (inserted rule 2A)). The temporary rules cease to have effect on 25 March 2022 in any event. The Committee asked the Ministry of Justice to identify the *vires* for these provisions. In a memorandum printed at Appendix 3, the Department asserts that new rules 2A in both the Prison Rules 1999 and Young Offender Institution Rules 2000 are examples of administrative sub-delegation which is impliedly authorised under the breadth of the enabling power (section 47(1) of the Prison Act 1952). The Department distinguishes this instance of sub-delegation from other instances of sub-delegation in subordinate legislation on the grounds that the power to extend the “transition period” is very limited; there is a defined end to the period and a limited three-month period within which the Secretary of State’s discretion can be exercised. The Committee disagrees. Turning legislation on and off is a legislative function even if only for a limited period. 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 transition period and whether it continues to justify the temporary rule changes goes to the heart of this instrument and cannot be categorised as merely administrative. **The Committee accordingly reports paragraph 3 of Schedule 1 and paragraph 3 of Schedule 2 on the ground that there is doubt as to whether they are *intra vires*.**

Instruments not reported

At its meeting on 17 June 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.	Contracts for Difference (Electricity Supplier Obligations) (Amendment) (Coronavirus) Regulations 2020
Draft S.I.	Direct Payments Ceilings Regulations 2020
Draft S.I.	Electricity Capacity (Amendment etc.) (Coronavirus) Regulations 2020
Draft S.I.	Higher Education (Fee Limits and Student Support) (England) (Coronavirus) Regulations 2020
Draft S.I.	Enterprise Act 2002 (EU Foreign Direct Investment) (Modifications) Regulations 2020
Draft S.I.	Northern Ireland Act 1998 (Section 75—Designation of Public Authority) Order 2020
Draft S.I.	Port Examination Codes of Practice and National Security Determinations Guidance Regulations 2020
Draft S.I.	Terrorism Act 2000 (Video Recording with Sound of Interviews and Associated Code of Practice) (Northern Ireland) Order 2020

Instruments subject to annulment

S.I. 2020/533	European Communities (Designation) Order 2020
S.I. 2020/546	Police (Amendment) Regulations 2020
S.I. 2020/548	Civil Enforcement of Parking Contraventions (England) General (Amendment) Regulations 2020
S.I. 2020/551	Direct Payments Penalty Simplification (England) Regulations 2020
S.I. 2020/559	Misuse of Drugs (Amendment) (England, Wales and Scotland) Regulations 2020
S.I. 2020/562	Prosecution of Offences Act 1985 (Specified Proceedings) (Amendment) Order 2020
S.I. 2020/563	Energy Efficiency (Building Renovation and Reporting) (Amendment) Regulations 2020
S.I. 2020/566	Human Fertilisation and Embryology (Statutory Storage Period for Embryos and Gametes) (Coronavirus) Regulations 2020
S.I. 2020/569	Electricity (Individual Exemption from the Requirement for a Supply Licence) (E.ON UK CHP Limited) (England) Order 2020

Instruments not subject to Parliamentary proceedings not laid before Parliament

- S.I. 2020/549** Wireless Telegraphy (Exemption and Amendment) (Amendment) Regulations 2020
- S.I. 2020/565** Mobile Homes Act 2013 (Commencement No. 2) (England) Order 2020

Appendix 1

S.I. 2020/381

Official Controls (Plant Health and Genetically Modified Organisms) (England) (Amendment) Regulations 2020

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

(1) Explain who the definition of “responsible operator” is intended to cover and in particular what the definition adds to the definition of “operator” (regulation 2(8) (inserted paragraph 5(1)).

(2) Explain why the defined term “responsible operator” is not used in regulation 2(8) (inserted paragraphs 7(2) and (4), 8, 12(2) and (3)).

(3) Confirm that the references to “place(s)” in regulation 2(6) (inserted Table A3) should be references to “place” in reliance on section 6(c) of the Interpretation Act 1978.

2. The term “operator” is defined in the alternative as the importer or the importer’s agent. The term “responsible operator” is defined as the particular person who, of these two persons, takes responsibility in any particular case for presenting a consignment for official controls under new Part 3 of Schedule 1.

3. The defined term the “responsible operator” is intended to provide a conveniently concise shorthand for “the operator who is responsible for a Schedule 1 consignment”, but the use of that shorthand would not have been apt in each case. The Department does not believe that it would have been appropriate to use the term “responsible operator” in new paragraphs 7(2) and (4), 8 and 12(3).

4. New paragraph 7(2) and (4) specifically refers to “a Schedule 1 consignment” to make it clear that these provisions apply where the operator who is responsible for the consignment knows that the consignment is a Schedule 1 consignment and is intending to present the consignment on that basis. New paragraph 12(3) similarly refers to “a Schedule 1 consignment”, and here this phrase is qualified by a relative clause “which is detained pursuant to this paragraph”, so again the Department does not consider that it would have been possible to refer to “the responsible operator” in this context.

5. As regards new paragraph 8, the phrase “the operator responsible for that consignment” refers back to the reference earlier in the sentence to the particular consignment that has arrived at the border control post. To achieve that backwards reference to the consignment in question, the phrase could alternatively have been expressed as “the person who, in relation to that consignment, is the responsible operator”, but the Department considered that that would be unnecessarily cumbersome and would appear tautologous in view of the way in which “responsible operator” is defined.

6. Any official statement to be provided by the national plant protection organisation for the purposes of items 2 and 3 of new Table A3 requires the national plant protection organisation to confirm that the “plants have been grown in a place of production”. The intention of the official statement is to obtain confirmation that the plants in the consignment have been grown in a place of production that meets the specified requirements, and not that all of the plants in the consignment have been grown in the same place of production. In this specific context, the Department believes that it is possible that a reference to “the written details of the place of production”, rather than to “the written details of the place(s) of production” would have resulted in the national plant protection organisation concluding that the official statement actually required all of the plants in the consignment to have been grown in the same place of production. The Department wished to avoid the risk of giving that impression, and therefore did not consider it appropriate to rely on section 6(c) of the Interpretation Act 1978.

Department for Environment, Food and Rural Affairs

9 June 2020

Appendix 2

S.I. 2020/505

Town and Country Planning (Development Management Procedure, Listed Buildings and Environmental Impact Assessment) (England) (Coronavirus) (Amendment) Regulations 2020

1. The Committee has requested MHCLG to submit a memorandum on the following point:

In regulation 4 (inserted (7D)(a), regulation 9(2) (inserted (1F)(a), regulation 10(3) (inserted (2ZD)(a), regulation 11 (inserted (4ZD)(a), regulation 15 (inserted (15)(a) and (16)(b), regulation 16 (inserted 23A(3)(a) and regulation 17(30) (inserted 16(a)) explain (1) what sort of a connection, apart from living and working in the area, is envisaged and (2) what is intended to be added by the qualification “direct”.

2. The above identified provisions concern the requirement in the amended legislation to take reasonable steps to inform persons who are likely to have an interest in a planning application, of a website where information about that application may be found in circumstances where the physical means of notification of the application (for example, by a site notice) is not reasonably practicable for reasons connected to coronavirus.

3. The provisions stipulate that persons who are likely to have an interest in an application must include persons who live or work in, or otherwise have a direct connection with, the area in which the proposed development is located.

4. It is envisaged that the words “or otherwise have a direct connection with...” would encompass the following kinds of person depending on the facts and circumstances of a proposed planning application—

i) developers or owners of land adjacent to, or nearby, a site/area in which the proposed development is located. Such persons may be based/living and working elsewhere but would nonetheless be interested in knowing about a proposed planning application in proximity to their development/land, which may have implications for them. They may have seen a site notice or neighbour notice on an ad hoc visit but would potentially miss a planning application notification altogether if it is not given by that method.

ii) interest groups with a specific interest in land, conservation or heritage matters: it is envisaged that some interest groups may not have a geographic connection to a site/area which is the subject of a planning application, but they would nevertheless have a connection by virtue of a development that impacts on their particular subject/field (for example, badgers, wildlife conservation, heritage preservation). These kinds of interest groups are likely to be well known to planning authorities given the local context.

(iii) Neighbouring communities/amenity benefit: persons who live/work in a neighbouring community that use and rely on facilities/amenities in the area/vicinity in which the proposed development is located have a connection to that area. (see description of example below).

5. The term ‘direct connection’ will take its ordinary dictionary meaning namely a connection to an area which is direct, and not indirect. The qualification “direct” is intended to narrow somewhat the scope of this provision so that it does not encompass all persons with any connection to the area in which the proposed development is located. Local authorities should consider, having regard to all the facts, circumstances and context of the case, who is covered by the term.

6. For example, we consider people may have a direct connection with an area in which a proposed development is located due to amenity benefit. Neighbouring communities—where persons who live/work in one area rely on another area to access a hospital/medical centre, sports facility, library, heritage site, religious building or other inter-community facility. Such neighbouring communities should be made aware of proposed planning applications which impact amenities or facilities they use and rely on, in circumstances where usual methods of notification do not apply. However, having a loose or indirect connection to an area would not trigger the provisions. For example, a person who (i) has a historical connection to an area, (ii) is simply an occasional visitor to an area, or (iii) commutes through an area. To require a planning authority to have to notify such persons would be unmanageable and disproportionate for that authority.

Ministry of Housing, Communities and Local Government

9 June 2020

Appendix 3

S.I. 2020/508

Prison and Young Offender Institution (Coronavirus) (Amendment) (no. 2) Rules 2020

1. The Committee has requested a memorandum on the following point for the above instrument (‘the SI’):

Having regard to the Committee’s Twelfth Report of Session 2019–21 in relation to S.I. 2020/435, identify the vires for paragraph 3 of Schedule 1 (inserted rule 2A) and paragraph 3 of Schedule 2 (inserted rule 2A).

2. The SI was made in response to the risks associated with outbreaks of COVID-19 (coronavirus) in prisons and the necessity to implement a restricted regime to manage the effects of coronavirus. The SI modifies the Prison Rules 1999 and the Young Offender Institution Rules 2000 (“YOI Rules”) during a “coronavirus period”. A “coronavirus period” is the period of time of a “transmission control period”, as defined in paragraph 5 of Schedule 21 of the Coronavirus Act 2020, and a “transition period” is defined in a new rule 2A to the Prison Rules and YOI Rules. The transmission control period in the 2020 Act ends when the Secretary of State for Health revokes the declaration he has made under paragraph 4 of Schedule 21.

3. The purpose of the “transition period” is to reflect the fact that advice from public health authorities may differ for prisons compared to advice for the community. The Secretary of State for Health will take a decision to end the transmission control period in accordance with paragraph 4 of Schedule 21 to the 2020 Act. But at that point advice on the management of coronavirus in detention settings may differ. Additionally, the additional time the provision allows will help facilitate the practical challenge of moving from more restrictive prison regimes operating in accordance with the amended Rules back to regimes that operate in accordance with the prior Rules.

4. The SI was made pursuant to section 47 of the Prison Act 1952, amending the Prison Rules 1999 and YOI Rules 2000. Section 47(1) is broadly drafted. It provides that 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.

5. It is the Department’s view that rules 2A in both the Prison and YOI Rules are examples of administrative sub-delegation. Rules 2A set out the clear limits of the power of the Secretary of State’s discretion to extend the “transition period”. The “transition period” will automatically apply for 3 months. The Secretary of State may extend the “transition period” beyond 3 months, up to a month at a time, only if it is considered necessary as a result of the effects of coronavirus on prisoners or prisons. Subsequent extensions can be made but rule 2A(4) expressly provides that the total period of the transition period cannot exceed 6 months. In addition, all declarations of an extension must be published. The drafting of the “transition period” with a limited element of discretion enables a

practical solution to the potentially changing impact coronavirus has on prisoner and prisons. It enables the period for which the amended Rules will be in force to be extended on a monthly, weekly or potentially day by day basis such that the transition period can come to an end as soon as it is no longer necessary for the amended Rules (and the more restricted prison regime they permit) to apply.

6. The Department notes the Committee's Twelfth Report of Session 2019–21 in relation to S.I. 2020/435. It is the Department's view that the SI can be distinguished from S.I. 2020/435 because the power to extend the "transition period" is very limited. There is a clear defined end to the "transition period" and a short and limited 3 month period within which the Secretary of State's direction can be exercised. Further, Rule 1 of the SI provides that the SI ceases to have effect on 25th March 2022 in any event. So the new Rules 2A do not provide anything more than a limited practical opportunity for the Secretary of State to regulate where within a 3 month period the new Rules will cease to apply. Therefore, it is the Department's view that this is sensible administrative sub-delegation which is impliedly authorised in the enabling power of section 47. It is the Department's view that the breadth of section 47(1) permits administrative sub-delegation of this nature.

Ministry of Justice

8 June 2020