

HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

19th Report of Session 2019–21

COVID-19 legislation: obstacles to Parliamentary scrutiny

Drawn to the special attention of the House:

Draft Code of Practice for Online Services on Age Appropriate Design

Includes information paragraphs on:

3 instruments relating to COVID-19

Draft Northern Ireland Act 1998 (Section 75 — Designation of Public Authority) Order 2020

Draft Port Examination Codes of Practice and National Security Determinations Guidance Regulations 2020

Draft Surrender of Offensive Weapons (Compensation) Regulations 2020

Ordered to be printed 23 June 2020 and published 25 June 2020

Published by the Authority of the House of Lords

HL Paper 84

Secondary Legislation Scrutiny Committee

The Committee's terms of reference, as amended on 11 July 2018, are set out on the website but are, broadly:

To report on draft instruments and memoranda laid before Parliament under sections 8, 9 and 23(1) of the European Union (Withdrawal) Act 2018.

And, to scrutinise –

- (a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;
- (b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in the terms of reference.

The Committee may also consider such other general matters relating to the effective scrutiny of secondary legislation as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

<u>Baroness Bakewell of Hardington Mandeville</u>	<u>Lord Hodgson of Astley Abbotts</u>	<u>Lord Lisvane</u>
<u>Rt Hon. Lord Chartres</u>	(Chair)	<u>Lord Sherbourne of Didsbury</u>
<u>Rt Hon. Lord Cunningham of Felling</u>	<u>Lord Liddle</u>	<u>Baroness Watkins of Tavistock</u>
<u>Viscount Hanworth</u>	<u>The Earl of Lindsay</u>	-

Registered interests

Information about interests of Committee Members can be found in the last Appendix to this report.

Publications

The Committee's Reports are published on the internet at <http://www.parliament.uk/seclegpublications>

Committee Staff

The staff of the Committee are Christine Salmon Percival (Clerk), Philipp Mende (Adviser), Jane White (Adviser), Louise Andrews (Committee Assistant) and Ben Dunleavy (Committee Assistant).

Further Information

Further information about the Committee is available at <https://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/>

The progress of statutory instruments can be followed at <https://statutoryinstruments.parliament.uk/>

The National Archives publish statutory instruments with a plain English explanatory memorandum on the internet at <http://www.legislation.gov.uk/uksi>

Contacts

Any query about the Committee or its work, or opinions on any new item of secondary legislation, should be directed to the Clerk to the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW. The telephone number is 020 7219 8821 and the email address is hseclegscrutiny@parliament.uk.

Nineteenth Report

COVID-19 LEGISLATION: OBSTACLES TO PARLIAMENTARY SCRUTINY

1. While we appreciate that the pandemic has given rise to a need to take urgent action, we would like to draw attention to two concerns about procedural aspects of the COVID-19 legislation which bear on the effectiveness of Parliamentary scrutiny.
2. First, we would urge the Government to ensure that the legislation follows on more closely from any announcement that they have made: the announcement that face masks would become mandatory on public transport was made on 4 June, the Regulations were laid before Parliament on 15 June — the day that the provision came into effect — thus denying Parliament the opportunity to scrutinise the detail before its implementation. Also, even a short gap between regulations being laid and their coming into effect would better enable those affected to prepare, having seen the law's actual detailed requirements (rather than just the headline announcement). While we fully understand the need for legislation to take immediate effect when imposing lockdown measures to protect public health, the justification is less strong when relaxations are being contemplated and such regulations should not, if at all possible, be laid at the last minute.
3. Second, we are aware that a number of COVID-19 instruments enable powers that can be switched on or off according to current infection levels, or are subject to review every 21 or 28 days: it would assist the House and the Committee if the Explanatory Memorandum in such cases included **specific** information about how and where the outcome of any review is to be promulgated and how Parliament is to be informed of any change of status. **We expect Government departments to ensure that in future this information is always provided.**

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft Code of Practice for Online Services on Age Appropriate Design

Date laid: 11 June 2020

Parliamentary procedure: negative

This draft Code sets out standards of age appropriate design that online services need to implement to ensure they safeguard and process children’s personal data appropriately and fairly. The House may wish to explore the need for a 12-month transition period, how the draft Code fits into the wider Government strategy on tackling online harm, and how it may impact on industry.

The draft Code is drawn to the special attention of the House on the ground that it gives rise to issues of public policy likely to be of interest to the House.

4. The Department for Digital, Culture, Media and Sport (DCMS) has laid this draft Code (“the Code”) before Parliament under the negative procedure, with an Explanatory Memorandum (EM). The Code has been prepared by the Information Commissioner and specifies 15 standards of age appropriate design that providers of online service providers need to implement to ensure their services safeguard children’s personal data appropriately and process children’s personal data fairly. The Code applies to all online services which are likely to be accessed by children in the UK, including apps, programmes, connected toys and devices, search engines, social media platforms, streaming services, online games, news or educational websites and websites offering other goods or services online.

Context

5. While a statutory requirement, the Code is set in the wider context of the Government’s strategy to tackle online harm, as outlined in the Online Harms White Paper from April 2019.¹ In October last year, DCMS announced that it would drop plans for a specific age verification system for online pornography and instead bring forward “wider online harms proposals” and draft legislation.² In response to a recent oral question by Lord Clement-Jones about children’s exposure to harmful online content during the lockdown, the DCMS Minister stated that “new online harms legislation will be ready in this Session”.³

Purpose of the Code

6. Under section 123(1) of the Data Protection Act 2018 (“the DPA”), the Information Commissioner is required to prepare a Code to support compliance with the DPA and the general principles of the General Data Protection Regulation (“the GDPR”) to ensure online services safeguard children’s personal data appropriately. According to DCMS, the Code supports compliance with those general principles by outlining specific

1 Department for Digital, Culture, Media and Sport, *Online Harms White Paper* (8 April 2019): <https://www.gov.uk/government/consultations/online-harms-white-paper> [accessed 17 June 2020].

2 HC Deb, 16 October 2019, [HCWS13](#).

3 HL Deb, 11 June 2020, [cols 1838-1840](#).

protections that providers need to build into their online services if these are likely to be accessed by children. In particular, the Code sets out practical measures and safeguards to ensure processing under the GDPR can be considered ‘fair’ in the context of online risks to children.

7. DCMS says that the Code incorporates the key principle from the United Nations Convention on the Rights of the Child that the best interests of the child should be a primary consideration in all actions concerning children — as reflected in the first of the Code’s 15 standards —, and that the Code “aims to respect the rights and duties of parents, and the child’s evolving capacity to make their own choices”.
8. According to DCMS, the Code’s standards are not intended as technical standards, but as a “set of technology-neutral design principles and practical privacy features”, with a focus on “providing default settings which ensure that children have the best possible access to online services whilst minimising data collection and use”. The Code explains in detail what the standards mean, why they are important and how they can be implemented. The Code draws on key minimum standards identified by DCMS in relation to: default privacy settings; data minimisation standards; the presentation and language of terms and conditions and privacy notices; uses of geolocation technology, automated and semi-automated profiling; transparency of paid-for activity such as product placement and marketing; the sharing and resale of data; the strategies used to encourage extended user engagement, user reporting and resolution processes and systems; the ability to understand and activate a child’s right to erasure, rectification and restriction of data; and the ability to access advice from independent, specialist advocates on all data rights.

Consultation

9. The Information Commissioner’s Office (ICO) held a call for evidence in 2018⁴ to develop the Code and a public consultation in 2019,⁵ which received 97 and 446 responses respectively. The ICO also commissioned research to understand the views of children and their parents on the areas that the Government suggested should be covered by the Code.⁶ DCMS says that during the call for evidence, child online safety organisations and some parts of industry expressed strong support for the proposals while some respondents raised concerns about the Code being too prescriptive, discouraging innovation and increasing costs by forcing particular solutions. There were also concerns about the international nature of online service provision, the difficulties of monitoring compliance and the challenges of age verification and obtaining parental consent. DCMS says that while most respondents to the consultation supported the aims and ambition of the Code in protecting the personal data of children, online service providers and others suggested that more could be done to ensure the Code is risk-based and proportionate. They expressed concern that the Code may go beyond the ICO’s regulatory remit for data protection and result in regulatory

4 Information Commissioner’s Office (ICO), *ICO’s call for evidence – Age appropriate design code: summary of responses*: <https://ico.org.uk/media/about-the-ico/consultations/2614764/20190108-aadc-summary-of-responses-with-ico-comment.pdf> [accessed 17 June 2020].

5 ICO, *Responses to the consultation on age appropriate design: a code of practice for online services*: <https://ico.org.uk/about-the-ico/responses-to-the-consultation-on-age-appropriate-design/> [accessed 17 June 2020].

6 ICO, *Towards a better digital future — Informing the Age Appropriate Design Code*: <https://ico.org.uk/media/about-the-ico/consultations/2614763/ico-rr-report-0703.pdf> [accessed 17 June 2020].

overlap, duplication or potential inconsistency, and that it could overburden services which are heavily regulated already.

Next steps, enforcement and impact

10. The Information Commissioner will issue the Code once the parliamentary process has been completed. There will be a transitional period of 12 months to give the sector time to prepare for the implementation of the Code. **The House may wish to question the Minister on the length of the transition period, given that children will continue to be particularly vulnerable during this period.**
11. The ICO says that it will carry out proactive audits and consider complaints about non-conformance and that enforcement will be in line with its Regulatory Action Policy⁷ which sets out a “proportionate and risk-based approach”. The ICO’s tools include assessment notices, warnings, reprimands, enforcement notices and penalty notices.
12. According to DCMS, the ICO is developing a support package for industry to assist the sector’s compliance with the Code, having surveyed relevant businesses between February and March 2020 about the type of support they would welcome during the transition period. The EM includes a set of Frequently Asked Questions setting out how the Code will impact on the news media which makes clear that the ICO is not a content regulator and that the focus of the Code therefore is on the use of personal data to personalise content feeds, rather than regulating the content itself. The ICO will review the efficacy of the Code one year after it has come into force.
13. The EM states that the ICO is preparing an assessment of the economic impact of the Code to inform the support package that will be made available, and that this assessment will be published before the Code has completed the parliamentary process. **Given that concerns were raised about the potential burden on industry during consultation, the Committee is disappointed that this assessment was not published when the Code was laid before Parliament, to inform the Committee’s consideration of the Code.**

Conclusion

14. This draft Code sets out standards of age appropriate design that online services need to implement to ensure they safeguard and process children’s personal data appropriately and fairly. The House may wish to explore the need for a 12-month transition period, how the draft Code fits into the wider Government strategy on online harm, and how it may impact on industry. **The draft Code is drawn to the special attention of the House on the ground that it gives rise to issues of public policy likely to be of interest to the House.**

⁷ ICO, *Regulatory Action Policy*: <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf> [accessed 23 June 2020].

INSTRUMENTS RELATING TO COVID-19

Restrictions on businesses and public gatherings

Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 4) Regulations 2020 (SI 2020/588)

15. These Regulations further amend the original lockdown Regulations⁸ to ease certain restrictions. Some provisions came into force at 00.01 am on 13 June 2020, including the amendment to regulation 5, allowing individual prayer in places of worship, and the amendment to regulations 6 and 7, to enable those who have formed a bubble with a linked household to stay there overnight and to gather together for compassionate visits including at birth or end of life. The rest came into force at 00.01 am on 15 June 2020, in particular provisions to allow for the reopening of non-essential retail, betting shops, auction houses, drive-in cinemas, the outdoor areas of zoos, safari parks, aquariums and outdoor visitor attractions at farms, and certain shops at botanical gardens, heritage sites and landmarks.

Changes to business regulation and practice

Direct Payments to Farmers (Inspections) (Coronavirus) (England) Regulations 2020 (SI 2020/575)

16. This instrument reduces the rate of on-the-spot inspections and control checks which the Rural Payments Agency (RPA) will carry out for the different elements of the Direct Payments scheme in England in the 2020 claim year. It also enables the RPA to substitute physical on-farm checks with alternative means such as satellite imagery or remote sensing. The Department for Environment, Food and Rural Affairs says that the changes are needed to address the difficulties arising from restrictions on movement during the pandemic and that they are similar to derogations introduced by the EU for Member States.

Law and order

Civil Procedure (Amendment No. 2) (Coronavirus) Rules 2020 (SI 2020/582)

17. Given the public health need for people to isolate at home and to prevent homelessness, Practice Direction 51Z ('PD51Z')⁹ was introduced on a pilot basis on 27 March to protect renters and homeowners from eviction. The stay imposed by PD51Z expires on 25 June; this instrument extends the moratorium for a further eight weeks until 22 August 2020. The extended stay on possession proceedings will have an impact on landlords: there are usually around 11,500 new possession cases each month. However, the new rule provides that a claim may be still be brought even though for the purposes of the application of the Civil Procedure Rules 1998 time does not run and the court is not required to give any notice until this period expires. In the meantime, a working group composed of government agencies, the

8 Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 ([SI 2020/350](#)) The amended Restrictions Regulations will still expire at the end of six months from 26 March 2020 (the day on which they came into force).

9 Ministry of Justice, 'PRACTICE DIRECTION 51Z: STAY OF POSSESSION PROCEEDINGS, CORONAVIRUS' (11 June 2020): <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51z-stay-of-possession-proceedings,-coronavirus> [accessed 18 June 2020]. PD 51z was considered and confirmed by the Court of Appeal in the case of *Arkin v Marshall* (2020) EWCA Civ 620.

judiciary, legal representatives, and members of the advice sector is aiming to put appropriate arrangements in place for the resumption of proceedings on 24 August and to make sure that all parties are properly protected when the moratorium ends.

INSTRUMENTS OF INTEREST

Draft Northern Ireland Act 1998 (Section 75 — Designation of Public Authority) Order 2020

18. As part of its withdrawal from the EU, the UK has made agreements with both the EU and the European Economic Area/European Free Trade Association states to guarantee the rights of their citizens living in the UK and Gibraltar after Brexit. The role of the Independent Monitoring Authority for the Citizens' Rights Agreements (IMA) is to assist in protecting those rights by monitoring the UK's implementation and application of those agreements. The IMA will be a UK-wide non-departmental public body and will be fully operational from the end of the transition period (31 December 2020). The IMA's role will include carrying out functions relating to Northern Ireland. This instrument therefore ensures that the IMA is covered by the statutory equality duties, applicable to any public authority carrying out functions in Northern Ireland, set out in Section 75 of the Northern Ireland Act 1998.

Draft Port Examination Codes of Practice and National Security Determinations Guidance Regulations 2020

19. The instrument brings into force three codes of practice regarding national security functions carried out at UK ports and the Northern Ireland border. They reflect changes made by the Counter-Terrorism and Border Security Act 2019:
- *Examining Officers and Review Officers under Schedule 3 to the Counter-Terrorism and Border Security Act 2019* is a new code which relates to the training and conduct of officers who stop, question, search and detain persons to determine whether they are or have been engaged in hostile activity. These powers were introduced in response to the Salisbury attack in March 2018 (Annex C of the Code includes further information on what types of hostile activity are of concern).
 - *Examining Officers and Review Officers under Schedule 7 to the Terrorism Act 2000* revises the existing Code on the training and conduct of officers who stop, question, search and detain persons to determine whether they are or have been engaged in terrorism.
 - *Protection of Freedoms Act 2012 Guidance on the making or renewing of national security determinations allowing the retention of biometric data* is also a revision which notes that, although the retention period has recently been extended to five years, shorter retention periods should be considered. It also allows for a determination to be made by any Chief Officer of a police force not just the Chief Officer of the particular force.

Draft Surrender of Offensive Weapons (Compensation) Regulations 2020

20. These Regulations set out arrangements for the payment of compensation to the lawful owners of certain offensive weapons which will be prohibited when sections 43, 44, 46, 47, 54 and 55 of the Offensive Weapons Act 2019 ("the 2019 Act") come into force. In particular, those sections add zombie

knives, cyclone knives, rapid firing rifles and bump stocks¹⁰ to the list of banned weapons. The 2019 Act also amends section 141 of the Criminal Justice Act 1988 to make it an offence to possess offensive weapons in private.¹¹ The Home Office's implementation plans have been delayed by the COVID-19 outbreak, but the intention is to provide Parliament with drafts of the scheme's supporting documents (e.g. guidance and claim form) in due course. When the compensation scheme goes live later this year there will be a publicity campaign, particularly in the trade press, with information on how to surrender items and make a claim on the firearms webpage.¹² Once the surrender period has been completed, the Minister for Policing and Crime will make a Commencement Order bringing the prohibitions on possession into force. **The House may wish to ask the Minister for more detail about the intended timetable.**

10 A "bump stock" replaces a rifle's standard stock, enabling it to fire bullets more rapidly and to perform like an automatic weapon.

11 The weapons to which that section applies are set out in the Criminal Justice Act 1988 (Offensive Weapons) Order 1988 ([SI 1988/2019](#)) as amended.

12 Home Office, 'Firearms' (Last updated 2 October 2019): <https://www.gov.uk/government/collections/firearms> [accessed 17 June 2020].

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft instruments subject to affirmative approval

Enterprise Act 2002 (EU Foreign Direct Investment) (Modifications) Regulations 2020

NHS Counter Fraud Authority (Establishment, Constitution, and Staff and Other Transfer Provisions) (Amendment) Order 2020

Northern Ireland Act 1998 (Section 75 – Designation of Public Authority) Order 2020

Port Examination Codes of Practice and National Security Determinations Guidance Regulations 2020

Surrender of Offensive Weapons (Compensation) Regulations 2020

Terrorism Act 2000 (Video Recording with Sound of Interviews and Associated Code of Practice) (Northern Ireland) Order 2020

Instruments subject to affirmative approval

SI 2020/588 Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 4) Regulations 2020

Instruments subject to annulment

SI 2020/572 Export Control (Somalia) (Amendment) Order 2020

SI 2020/575 Direct Payments to Farmers (Inspections) (Coronavirus) (England) Regulations 2020

SI 2020/576 Direct Payments to Farmers (Amendment) Regulations 2020

SI 2020/579 Vegetable Plant Material and Seed (Miscellaneous Amendments) Regulations 2020

SI 2020/582 Civil Procedure (Amendment No. 2) (Coronavirus) Rules 2020

APPENDIX 1: INTERESTS AND ATTENDANCE

Committee Members' registered interests may be examined in the online Register of Lords' Interests at <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests>. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 23 June 2020, Members declared no interests.

Attendance:

The meeting was attended by Baroness Bakewell of Hardington Mandeville, Lord Chartres, Lord Cunningham of Felling, Viscount Hanworth, Lord Liddle, the Earl of Lindsay, Lord Lisvane, Lord Sherbourne of Didsbury and Baroness Watkins of Tavistock.

