

HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

20th Report of Session 2019–21

Drawn to the special attention of the House:

Health Protection (Coronavirus, Wearing of Face Coverings on Public Transport) (England) Regulations 2020

Includes information paragraphs on:

6 instruments relating to COVID-19

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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

[Baroness Bakewell of Hardington Mandeville](#)

[Rt Hon. Lord Chartres](#)

[Rt Hon. Lord Cunningham of Felling](#)

[Viscount Hanworth](#)

[Lord Hodgson of Astley Abbotts](#) [Lord Lisvane](#)

(Chair)

[Lord Liddle](#)

[The Earl of Lindsay](#)

[Lord Sherbourne of Didsbury](#)

[Baroness Watkins of Tavistock](#)

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.

Twentieth Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Health Protection (Coronavirus, Wearing of Face Coverings on Public Transport) (England) Regulations 2020 (SI 2020/592)

Date made: 14 June 2020

Parliamentary procedure: made affirmative

*These Department for Transport (DfT) Regulations require all passengers on public transport in England to wear a face covering, subject to certain exemptions. Failure to do so when asked is an offence subject to a fine and non-compliant people can be refused carriage or removed from the vehicle. We have received a submission from Dr M. Reynolds expressing particular concern about how those with a disability may be treated under these provisions. We are once again critical of the timing of these Regulations which were laid after they had taken effect and too long after the initial announcement. **We commend the DfT's evidence-based approach but it appears to us that they need to find a better balance between their own processes and the information needs of external parties.***

These Regulations are drawn to the special attention of the House on the ground that they are politically or legally important or give rise to issues of public policy likely to be of interest to the House.

1. These Regulations have been laid by the Department for Transport (DfT) and are accompanied by an Explanatory Memorandum (EM). They require all passengers on public transport in England to wear a face covering, subject to certain exemptions. Failure to do so when asked is an offence subject to a fine and non-compliant people can be refused carriage or removed from the vehicle. We have received a submission from Dr M. Reynolds expressing particular concern about how those with a disability may be treated under these provisions.¹
2. The Secretary of State is required to review the need for these Regulations within six months of their coming into force, and the Regulations expire after 12 months.

Content

3. Regulation 3 states that no person may, without reasonable excuse, use a public transport service without wearing a face covering. A mask is not specified: “face covering” in the Regulations means “a covering of any type which covers a person’s nose and mouth”. Exemptions to those requirements set out in regulation 4 include transport staff, the emergency services, children under the age of 11 and those who cannot put on, wear or remove a face covering:
 - (a) because of any physical or mental illness or impairment, or disability (within the meaning of section 6 of the Equality Act 2010), or

¹ Published in full on [our webpage](#).

(b) without severe distress.

4. We asked why voluntary compliance was thought to be inadequate—paragraph 7.5 of the EM cites SAGE’s (Scientific Advisory Group for Emergencies) advice in relation to the London Underground system—and what evidence DfT had to indicate that legislation would achieve a higher level of compliance. DfT responded:

“Evidence from transport operators showed that use of face coverings was not high across their networks. For example, self-reported data from the Office of National Statistics (ONS) showed reported compliance with our existing recommendation to use face coverings at 45% (data collected 4–7 June), rising to 62% the following week (11–14 June). We have not set a target for compliance with the regulation—as there are a series of exemptions to the regulations—but we would expect to see significantly higher compliance via the ONS survey in coming data releases. We note that since the regulation was introduced reported compliance from transport operators is extremely high.”

Enforcement

5. The enforcement powers are quite strong: regulation 5 states that where a relevant person (that is, staff of the transport company or a police officer) considers that the passenger is not wearing a face covering, they may direct that person to wear such a covering; direct them to disembark from the relevant vehicle or deny them boarding. If passengers fail to comply with operators’ encouragement and instructions, without a legitimate exemption, these Regulations give the police and Transport for London enforcement officers new powers to issue a fixed penalty notice. A constable may also remove someone who refuses to comply from the relevant vehicle using reasonable force if necessary.
6. We asked what monitoring is being done to see whether these powers are being used appropriately. DfT replied:

“There are a range of powers available, but we have been clear in our guidance² and comm[unications] that using the stronger powers should be the last resort, after engaging passengers, explaining the importance of using face coverings and encouraging their use. We also suggest that operators should consider enabling compliance by making face coverings available, if they can, for example in vending machines. We note that operators, in particular TfL and on National Rail, have been handing out free coverings.

The regulation is clear that directing someone to leave a vehicle, or forcibly removing them, should only be done where it is necessary and proportionate.

We are also ensuring that we get regular updates and consistent data from the police and TfL on their enforcement activity.”

2 Department for Transport, ‘Coronavirus (COVID-19): safer transport guidance for operators’ (updated 29 June 2020): <https://www.gov.uk/government/publications/coronavirus-covid-19-safer-transport-guidance-for-operators/coronavirus-covid-19-safer-transport-guidance-for-operators#face-coverings> [accessed 24 June 2020].

7. Dr Reynolds' submission asked what is being done to prevent public "vigilantes" seeking to eject those who are not wearing masks—as the public will not be subject to the same guidelines as transport staff. DfT replied:

“Our guidance is clear that exemptions (in some cases referred to as a ‘reasonable excuse’ in the regulations) apply to the requirement on health, disability and age grounds. This is now included in all DfT campaign materials on face coverings, and we have been clear with operators they should amplify this message too. As with all other behavioural rules on transport (e.g. the alcohol ban on TfL) we do not expect the public to take the rules into their own hands, but will monitor any instances of this closely.”

Disability

8. We note that DfT guidance reminds staff that not all disabilities are visible:

“Where a passenger seeks to rely on an exemption from the requirement to wear a face covering, those seeking to enforce the requirement should take a proportionate approach to the evidence they require in support of that reliance. By way of example, it is not envisaged that people relying on an age, health or disability related exemption will routinely be required to produce any written evidence in support of their reliance.”

9. We asked whether any consultation was conducted with those organisations who represent people with disabilities about their ability to comply. DfT responded that they had consulted the Department's disabled persons transport advisory committee (DPTAC) and made significant changes both to the guidance and the drafting of the regulations as a result.

Timing

10. These Regulations follow the made affirmative procedure, which allows them to be brought into effect immediately and allows 28 days for them to be approved retrospectively by Parliament. The announcement was made at the Daily Briefing on 4 June, but the instrument was not laid before Parliament until after it had come into effect on 15 June. We asked why the Regulations were not laid earlier, DfT replied:

“After the policy was announced, we were keen to engage operators and devolved authorities on what implementation would mean for them. The announcement of the intention allowed us to do this in a more open way. We were also keen to get the drafting of the regulation right, and did not want to rush any of the related checks and processes to ensure we were able to do that.”

11. While sympathetic to DfT's motives, it is usually regarded as best practice to conduct such consultation before a policy is announced. Also, as we commented in our 19th report,³ laying the Regulations in this way not only deprived Parliament of the ability to scrutinise them before they came into effect but also prevented those affected being able to prepare after seeing the detailed requirements of the law rather than just the headline announcement. Even a short gap before implementation would have enabled this. **We commend the DfT's evidence-based approach but it appears to us**

3 ‘COVID-19 legislation: obstacles to Parliamentary scrutiny’, [19th Report](#), Session 2019–21 (HL Paper 84).

that they need to find a better balance between their own processes and the information needs of external parties.

INSTRUMENTS RELATED TO COVID-19

12. One instrument relating to the COVID-19 pandemic, the Health Protection (Coronavirus, Wearing of Face Coverings on Public Transport) (England) Regulations 2020 (SI 2020/592), is drawn to the special attention of the House in this report (see pages 1 to 4 above).

Changes to business practice and regulation

Draft Modifications to the Standard Conditions of the Electricity and Gas Supply Licences, the Smart Meter Communication Licences, the Smart Energy Code, the Uniform Network Code and the Balancing and Settlement (Code Smart Meters No. [3] of 2020)

13. These draft modifications further develop the regulatory framework to support the roll-out and operation of smart meters in Great Britain. The Department for Business, Energy and Industrial Strategy (BEIS) says that under the current regulatory framework, electricity and gas suppliers have an obligation to take ‘all reasonable steps’ to install smart meters in all homes and small businesses in Great Britain by 31 December 2020. As of 31 March 2020, there were 21.5 million smart and advanced meters, covering 39% of all homes and small businesses. According to BEIS, the pandemic has had a significant impact on the way energy suppliers operate and, in line with Government and Ofgem pandemic guidance, almost only emergency smart meter installations have been carried out since mid-March 2020. BEIS says as it wants “to provide certainty on the regulatory framework so that the rollout can regain its momentum as soon as possible”. These draft modifications, amongst other changes, therefore extend the ‘all reasonable steps’ obligation by six months, to 30 June 2021, to take account of the current disruption during the pandemic. The draft modifications also create a new four-year framework for the period from 1 July 2021 to 30 June 2025, to apply after the ‘all reasonable steps’ obligation ends. The new framework will require energy suppliers to meet annual meter installation targets which aim for market-wide rollout subject to an annual tolerance level. The Secretary of State will set out the annual tolerance level or methodology following consultation in the autumn.

General Osteopathic Council (Coronavirus) (Amendment) Rules Order of Council 2020 (SI 2020/596)

14. This instrument allows the General Osteopathic Council (GOsC) to adapt its current operating procedures to respond to the COVID-19 emergency and **will be a permanent change** to align with its broader aim on better use of technology. Instead of using registered post, the instrument will allow the GOsC to contact registrants by email when a fitness to practise or professional conduct allegation is made against them or in connection with their registration or fees.

Law and order

Taking Control of Goods and Certification of Enforcement Agents (Amendment) (Coronavirus) Regulations 2020 (SI 2020/614)

15. This instrument further extends the temporary delay on the seizure of goods and property set out in the Taking Control of Goods and Certification of Enforcement Agents (Amendment) (Coronavirus) Regulations 2020

(SI 2020/451).⁴ That instrument increased the minimum amount of net unpaid rent that must be outstanding before commercial rent arrears recovery (CRAR) may take place from seven days to 90 days; this instrument further increases it to 189 days' rent. Secondly, this instrument prescribes 23 August 2020 as the date on which the various temporary provisions expire: for example, the automatic renewal of enforcement notices and of enforcement agents' certificates. Appointing a specific date aims to prevent the English and Welsh restrictions becoming dislocated. Setting 23 August as the date on which restrictions end on bailiffs taking control of goods on the highway or at residential premises also brings the provisions in line with Civil Procedure Rule Practice Direction 51Z which ends the stay on possession proceedings across England and Wales on the same date.⁵

Delayed or revoked legislation

Draft Representation of the People (Electoral Registers Publication Date) Regulations 2020

16. The annual canvass period in England, Wales and Scotland typically runs from 1 July to 1 December, at which point Electoral Registration Officers (EROs) are required by law to publish a revised electoral register for their area. These Regulations move the date by which an ERO must publish the revised parliamentary electoral register (in England, Wales and Scotland) and the local government electoral register (in England) following the 2020 annual canvass, from 1 December 2020 to 1 February 2021. This is to allow EROs an additional two months to complete the 2020 canvass in recognition of the impact the COVID-19 pandemic has had on local authorities.

Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus) (England) Regulations 2020 (SI 2020/602)

17. This instrument extends the moratorium during which landlords of commercial properties may not evict tenants due to non-payment of rent, by three months until 30 September 2020. The Ministry of Housing, Communities and Local Government (MHCLG) says that the current three-month moratorium, introduced by the Coronavirus Act 2020, will end on 30 June 2020 and that there is a high risk that without the extension businesses that would otherwise be viable would be unable to pay their rent and be evicted, particularly as some sectors will not be able to re-open by 30 June and will continue to have reduced or no income due to the restrictions that were imposed to prevent the spread of coronavirus. MHCLG emphasises that the moratorium is not a rent holiday and that tenants remain liable for payment of any rent arrears. MHCLG has worked with the sector to develop a Code of Practice⁶ which is to help ensure that the impact of the moratorium is mitigated and landlords are treated fairly, for example by encouraging businesses that can pay rent to do so. MHCLG also says that the Government have been working with lenders to ensure that flexibility

⁴ [13th Report](#), Session 2019-21 (HL Paper 57).

⁵ See Civil Procedure (Amendment No. 2) (Coronavirus) Rules 2020 ([SI 2020/582](#)) in our [19th Report](#), Session 2019-21 (HL Paper 84) and Ministry of Justice, 'PRACTICE DIRECTION 51Z: STAY OF POSSESSION PROCEEDINGS, CORONAVIRUS': <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51z-stay-of-possession-proceedings.-coronavirus> [accessed 24 June 2020].

⁶ See Ministry of Housing, Communities & Local Government *Code of practice for the commercial property sector* (19 June 2020): <https://www.gov.uk/government/publications/code-of-practice-for-the-commercial-property-sector> [accessed 24 June 2020].

is being shown to commercial landlords and that programmes that support business lending through grants and government-backed loans are available to landlords in distress. According to MHCLG, the Code of Practice sets out a range of options that landlords and tenants may consider when coming to an agreement, including rent deferrals, rent reductions across a portfolio and sharing of losses while businesses were unable to operate.

Public services

Education (Pupil Information) (England) (Coronavirus) (Amendment) Regulations 2020 (SI 2020/599)

18. This instrument relieves head teachers of maintained schools of their obligations to include in their annual report to parents or adult pupils for the school year 2019/20 information on a pupil's attendance in that school year and certain information connected to assessment and attainment at Key Stages 1 and 2. According to the Department for Education (DfE), the temporary changes address the impact of the pandemic on pupils' attendance in the current school year in line with wider changes that the Department has made to ensure that there is flexibility in the school attendance system during the pandemic,⁷ as well as the lack of assessment information following the cancellation of statutory assessments at Key Stages 1 and 2.⁸ DfE emphasises that head teachers will still be required to provide information on pupils' progress and achievements in annual reports so that parents will continue to receive information about their children's education, and that the changes do not prevent staff at schools from raising any concerns they may have about a pupil's attendance with the child's parents. DfE will issue updated guidance to support schools in producing this year's reports.

7 See: Education (Pupil Registration) (England) (Coronavirus) (Amendment) Regulations 2020 ([SI 2020/544](#)), [17th Report](#), Session 2019-21 (HL Paper 73).

8 See: Education (National Curriculum) (Key Stages 1 and 2 Assessment Arrangements) (England) (Coronavirus) (Amendment) Order 2020 ([SI 2020/436](#)). The instrument was not subject to parliamentary procedure.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft instruments subject to affirmative approval

Immigration (Persons Designated under Sanctions Regulations) (EU Exit) Regulations 2020
 Industrial Training Levy (Engineering Construction Industry Training Board) Order 2020
 INSPIRE (Amendment) (EU Exit) Regulations 2020
 Representation of the People (Electoral Registers Publication Date) Regulations 2020

Made instruments subject to affirmative approval

SI 2020/590 Sanctions (EU Exit) (Miscellaneous Amendment) (No.2) Regulations 2020
 SI 2020/597 Cyber (Sanctions) (EU Exit) Regulations 2020

Draft instruments subject to annulment

London Borough of Islington (Electoral Changes) Order 2020
 Draft Modifications to the Standard Conditions of the Electricity and Gas Supply Licences, the Smart Meter Communication Licences, the Smart Energy Code, the Uniform Network Code and the Balancing and Settlement (Code Smart Meters No. [3] of 2020)

Instruments subject to annulment

SI 2020/580 Representation of the People (Form of Canvass) (Northern Ireland) Regulations 2020
 SI 2020/591 Sanctions (EU Exit) (Miscellaneous Amendment) Regulations 2020
 SI 2020/596 General Osteopathic Council (Coronavirus) (Amendment) Rules Order of Council 2020
 SI 2020/599 Education (Pupil Information) (England) (Coronavirus) (Amendment) Regulations 2020
 SI 2020/600 Social Fund and Social Security (Claims and Payments) (Amendment) Regulations 2020
 Si 2020/602 Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus) (England) Regulations 2020
 SI 2020/603 Environment (Amendment etc.) (EU Exit) (Amendment) (England and Wales) Regulations 2020
 SI 2020/609 Online Intermediation Services Regulations 2020
 SI 2020/614 Taking Control of Goods and Certification of Enforcement Agents (Amendment) (Coronavirus) Regulations 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 30 June 2020, Members declared no interests.

Attendance:

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