House of Lords
House of Commons

Joint Committee on Statutory Instruments

Fifth Report of Session 2022–23

Drawing special attention to:

High Speed Rail (West Midlands-Crewe) (Qualifying Authorities) Regulations 2021 **(S.I. 2021/151)**

Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2022 **(S.I. 2022/466)**

Food Information (Amendment) (England) Regulations 2022 **(S.I. 2022/481)**

Health and Care Act 2022 (Commencement No. 1) Regulations 2022 **(S.I. 2022/515)**

Police, Crime, Sentencing and Courts Act 2022 (Commencement No. 1 and Transitional Provision) Regulations 2022 **(S.I. 2022/520)**

Ordered by the House of Lords to be printed 15 June 2022

Ordered by the House of Commons to be printed 15 June 2022

HL 22
HC 4-v
Published on 17 June 2022
by authority of the House of Lords
and the House of Commons

Joint Committee on Statutory Instruments

Current membership

House of Lords

Lord Beith (*Liberal Democrat*)

Lord Chartres (*Crossbench*)

Baroness D'Souza (*Crossbench*)

Baroness Gale (*Labour*)

Lord Haskel *(Labour)*

Baroness Newlove *(Conservative)*

Lord Smith of Hindhead *(Conservative)*

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*)

Richard Thomson MP *(Scottish National Party, Gordon)*

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

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 Sue Beeby (Committee Operations Officer), Liz Booth (Committee Operations Officer), Apostolos Kostoulas (Committee Operations Officer), Christine Salmon Percival (Lords Clerk), Hannah Stone (Commons 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 OAA. The telephone number for general inquiries is: 020 7219 7599; the Committee's email address is: jcsi@parliament.uk.

Contents

Instruments reported

At its meeting on 15 June 2022 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 five 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. 2021/151: Reported for unjustifiable delay in laying before Parliament

High Speed Rail (West Midlands-Crewe) (Qualifying Authorities) Regulations 2021

1.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that there was unjustifiable delay in laying them before Parliament.**

1.2 These Regulations, which are subject to the negative resolution procedure, specify the planning authorities which are qualifying authorities for the purposes of Schedule 17 to the High Speed Rail (West Midlands - Crewe) Act 2021. The Regulations were made on 11 February 2021, came into force the next day and were laid before Parliament, more than a year later, on 5 April 2022. Paragraph 3.2 of the Explanatory Memorandum explains that the long delay between the making and laying of this instrument "occurred mistakenly" and in a memorandum printed at Appendix 1, the Department for Transport declines to add to that explanation. The Committee refers to paragraphs 2.2 to 2.14 of its First Special Report of Session 2017–19, *Transparency and Accountability in Subordinate Legislation* which emphasised the importance of early laying as a core component of access to legislation. In the circumstances of this particular instrument, it is unlikely that any harm was caused by the delay, but clearly in other circumstances a delay of this kind could lead to significant injustice; the Committee trusts that the Department will be carrying out a rigorous exercise to ensure that this failure of process does not recur. **The Committee accordingly reports these Regulations for unjustifiable delay in laying before Parliament, acknowledged by the Department**.

2 S.I. 2022/466: Reported for defective drafting

Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2022

2.1 **The Committee draws the special attention of both Houses to this Order on the ground that it is defectively drafted in one respect.**

2.2 This Order, which is subject to the negative resolution procedure, makes amendments to the regulatory framework for funeral plan contracts as a result of the addition to the list of regulated activities of funeral plan providers entering into insurance or trust-backed funeral contracts. Firms that do not apply for, or achieve, Financial Conduct Authority (FCA) authorisation will need to wind down and exit the market and, if possible, transfer their funeral plan contracts to firms that have (or are about to have) FCA authorisation. Given difficulties in completing these transfers, article 2 allows, if certain conditions apply,

a funeral plan provider to be treated, for regulatory purposes, as if they were carrying out another provider's funeral plan contracts. One of those conditions is that a provider agrees to take responsibility for another provider's funeral plan contracts, the old provider has taken reasonable steps to secure the customer's consent to the proposed novation and the customer has neither provided consent nor objected "within a reasonable period" (article 2(2), inserted article 59(4)). The Committee asked HM Treasury to explain what is intended to constitute a "reasonable period" in these circumstances and how a person is expected to know what that reasonable period is. In a memorandum printed at Appendix 2 the Department explains that what amounts to a "reasonable period" in relation to a particular transfer will be fact-specific and identifies factors to be taken into account including the firm's method of communicating with the customer about the proposed transfer, the age, vulnerability and other personal circumstances of the customer and the urgency of the transfer. The Department also points to informal guidance issued by the FCA indicating that waiting for customer responses for 4 weeks after contacting them is likely to be a reasonable period in most cases. Given that the period forms part of a statutory test for, in effect, lawfulness of financial operations, for it to be determined by reference to an open concept of reasonableness makes it insufficiently certain to amount to clear and certain law. At the least, the criteria set out in informal guidance should have been articulated as criteria in the instrument, by which the courts could have determined compliance with the reasonableness test. **The Committee accordingly reports article 2(2) for defective drafting**.

3 S.I. 2022/481: Reported for defective drafting

Food Information (Amendment) (England) Regulations 2022

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

3.2 These Regulations, which are subject to the negative resolution procedure, revoke and restate the Food Information (Amendment) (England) Regulations 2019 to resolve the procedural point of whether the 2019 regulations should have been notified to the European Commission. Following the repeal of the European Communities Act 1972, the power to make ambulatory references is no longer available. However, paragraph 7.9 of the Explanatory Memorandum states that "the references made by this instrument to the retained version of FIC [Regulation (EU) No. 1169/2011] (which forms part of domestic law) may be interpreted dynamically without needing to rely on such a power". The Committee, (while understanding that references in this instrument to FIC are references to FIC as it stood on the date this instrument was made) was unsure whether the Department was referring in the quoted statement to changes made to FIC after the date this instrument was made. The Committee asked the Department for Environment, Food and Rural Affairs to explain what that statement means and, in particular, whether any provision in the Interpretation Act 1978 or in any other legislation results in the references to FIC in this instrument being ambulatory. In a memorandum printed at Appendix 3, the Department explains that the statement means that it is (in the Department's opinion) possible to interpret references to the retained version of FIC in regulations such as these made after IP completion day in a dynamic or ambulatory way without there being specific authority of the kind set out in paragraph 1A of Schedule 2 to the European Communities Act 1972 to support that interpretation. The Department cites authority for the references to FIC

in this instrument being references to the version of FIC on the date this instrument was made; and further asserts, but without citing authority, that "whether those references will further ambulate should the relevant provisions of retained FIC be amended, the Department considers that this is a matter which will need to be determined as a matter of construction in the circumstances of the particular case". If the intention is for these references to be ambulatory at all, the Department should have identified the provision of the Interpretation Act 1978 (or any other provision) on which it relies, and should have articulated criteria by reference to which the extent of the ambulation could be determined by the reader (each of the potentially relevant provisions of the 1978 Act being expressly limited in their application to express provision or necessary implication). As it stands, merely asserting that ambulation is intended to an unspecified extent and in reliance on unspecified authority leaves the instrument insufficiently clear. **The Committee accordingly reports these Regulations for defective drafting**.

4 S.I. 2022/515: Reported for failure to comply with proper legislative practice and for defective drafting

Health and Care Act 2022 (Commencement No. 1) Regulations 2022

4.1 **The Committee draws the special attention of both Houses to these Regulations on the grounds that they fail to comply with proper legislative practice in one respect and are defectively drafted in another respect.**

4.2 These Regulations, which are not subject to Parliamentary procedure, bring into force specified provisions of the Health and Care Act 2022 (which received Royal Assent on 28 April 2022). This commencement instrument was made on 6 May and brought the specified provisions of the Act into force on 9 May but the Act did not appear on the website of the Queen's printer until 13 May 2022. Having regard to the importance of ensuring that laws are made accessible to the public when they are brought into force because people who are affected by them will be presumed to know the law (a principle discussed at paragraphs 22 to 25 of the judgement in *ZL and VL v Secretary of State for the Home Department and Lord Chancellor's Department* [2003] EWCA Civ 25), the Committee asked the Department of Health and Social Care to explain why this instrument was made before the enabling Act was published. In a memorandum printed at Appendix 4, the Department explains that the National Archives confirmed that the Act was published as a PDF on legislation.gov.uk immediately upon receipt of the official copy from Parliament. The Department also explains that the commenced provisions only impact statutory bodies, though it acknowledges that the wider public need to be able to scrutinise the steps taken by public bodies and to access legislation for that purpose. The Department considers that, in the circumstances, the delay in the publication of the Act did not cause any prejudice. Be that as it may, the Committee stresses that it is fundamental to the rule of law that individuals affected by law in force should have access to it in an authoritative form. The Committee considers that when early commencement is required, Departments should take all possible steps to ensure that arrangements are made for early publication of the provisions being commenced. **The Committee accordingly reports these Regulations for failure to comply with proper legislative practice**.

4.3 The Committee also asked the Department to confirm that the enabling powers cited in the preamble should refer to section 186(6) and (7) rather than section 189(6)

and (7) of the Health and Care Act 2022. In its memorandum the Department gives that confirmation. The Committee surmises that the mistake was made as a result of the fact that the Department was not working from the final version of the enabling Act. The Department is considering how to rectify this error; contrary to the Department's suggestion, the Committee does not consider that this error can be corrected by correction slip. It is not surprising that this kind of error will arise when commencing an Act that has not yet been printed, and the result can only compound the consequent confusion for citizens and the risk of possible injustice. **The Committee accordingly reports the preamble for defective drafting**.

5 S.I. 2022/520: Reported for failure to comply with proper legislative practice and for defective drafting

Police, Crime, Sentencing and Courts Act 2022 (Commencement No. 1 and Transitional Provision) Regulations 2022

5.1 **The Committee draws the special attention of both Houses to these Regulations on the grounds that they fail to comply with proper legislative practice in one respect and are defectively drafted in two related respects.**

5.2 These Regulations, which are not subject to Parliamentary procedure, bring into force specified provisions of the Police, Crime, Sentencing and Courts Act 2022 (which received Royal Assent on 28 April 2022). This commencement instrument was made on 9 May but the Act did not appear on the website of the Queen's printer until 11 May 2022. Having regard to the importance of ensuring that laws are made accessible to the public because people who are affected by them will be presumed to know the law (a principle discussed at paragraphs 22 to 25 of the judgement in *ZL and VL v Secretary of State for the Home Department and Lord Chancellor's Department* [2003] EWCA Civ 25), the Committee asked the Home Office to explain why this commencement instrument was made before the enabling Act was published. In a memorandum printed at Appendix 4, the Department explains that it was vital to commence certain provisions as soon as possible and states that only one of the provisions (namely the increase in the maximum penalty for the offence of wilful obstruction of a highway) materially impacted on the public but does not explain what caused the delay in publication. The Department also indicates that the Regulations were drafted using a proof of the enabling Act rather than the final version. The Committee stresses that it is fundamental to the rule of law that individuals affected by law should have access to it in an authoritative form. The Committee considers that when early commencement is required, Departments should take all possible steps to ensure that arrangements are made for early publication of the provisions being commenced. **The Committee accordingly reports these Regulations for failure to comply with proper legislative practice**.

5.3 The Committee also asked the Department to explain why regulation 5(i) commences section 73(6) and regulation 5(j) commences section 73(7), when those sections do not appear in the 2022 Act. In its memorandum the Department explains that these references should be to section 73(4) and 73(5) instead and that the mistake occurred because these references were incorrectly numbered in the proof of the Act. The Committee notes that such pitfalls seem likely when working with a proof of the Act. The Department

undertakes to prepare an amending instrument as soon as possible to rectify these errors. **The Committee accordingly reports regulation 5(i) and 5(j) for defective drafting, acknowledged by the Department**.

Instruments not reported

At its meeting on 15 June 2022 the Committee considered the instruments set out in the Annex to this Report, none of which was required to be reported to both Houses.

Annex

Instruments requiring affirmative approval

S.I. Number	S.I. Title
S.I. 2022/554	Abortion (Northern Ireland) Regulations 2022

Draft instruments requiring affirmative approval

S.I. Number	S.I. Title
Draft	Local Government (Exclusion of Non-commercial Considerations) (England) Order 2022
Draft	Local Authority and Combined Authority Elections (Nomination of Candidates) (Amendment) (England) Regulations 2022
Draft	Occupational Pension Schemes (Governance and Registration) (Amendment) Regulations 2022
Draft	Plant Health etc. (Miscellaneous Fees) (Amendment) (England) Regulations 2022

Instruments subject to annulment

S.I. Number	S.I. Title
S.I. 2022/521	Homelessness (Suitability of Accommodation) (Amendment) (England) Order 2022
S.I. 2022/524	Immigration (Passenger Transit Visa) (Amendment) Order 2022
S.I. 2022/535	Protection of Wrecks (Designation and Amendment) (England) Order 2022
S.I. 2022/540	Civil and Family Proceedings Fees (Amendment) Order 2022
S.I. 2022/543	Food and Feed (Fukushima Restrictions) (Revocation) (England) Regulations 2022
S.I. 2022/547	Fire Safety (England) Regulations 2022
S.I. 2022/559	Misuse of Drugs (Amendment) (Revocation) (England, Wales and Scotland) Regulations 2022
S.I. 2022/562	Special Measures in Civil Proceedings (Specified Offences) Regulations 2022
S.I. 2022/567	Prohibition of Cross-Examination in Person (Fees of Court-Appointed Qualified Legal Representatives) Regulations 2022
S.I. 2022/578	Leasehold Reform (Ground Rent) (Business Lease Notices) Regulations 2022
S.I. 2022/592	Green Gas Support Scheme (Amendment) Regulations 2022

Draft instruments subject to annulment

S.I. Number	S.I. Title
Draft	Derbyshire Dales (Electoral Changes) Order 2022
Draft	Mansfield (Electoral Changes) Order 2022
Draft	Oldham (Electoral Changes) Order 2022

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. Number	S.I. Title
S.I. 2022/554	Fire Safety Act 2021 (Commencement) (England) Regulations 2022

Appendix 1: Memorandum from the Department for Transport

S.I. 2021/151

High Speed Rail (West Midlands-Crewe) (Qualifying Authorities) Regulations 2021

1. The Committee has asked the Department for Transport for a memorandum on the following point:

> *Does the Department have anything to add to its explanation (in paragraph 3 of the Explanatory Memorandum) for the long delay between the making and laying of this instrument?*

2. The Department is grateful to the Committee for the opportunity to expand on its Explanatory Memorandum but, on reflection, feels it does not have anything to add.

3. The Department again expresses regret for the oversight that caused the long delay between the making and laying of this instrument.

Department for Transport

31 May 2022

Appendix 2: Memorandum from HM Treasury

S.I. 2022/466

Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2022

1. The Committee has asked HM Treasury for a memorandum on the following point:

> *In article 2 (inserted article 59(4)(c)), explain what is intended to constitute a "reasonable period" in these circumstances and how a person is expected to know what that reasonable period is.*

2. Under article 59 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (S.I. 2001/544) ("the RAO") as amended by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2021 (S.I. 2021/90) ("the 2021 Order"), firms will require authorisation from the Financial Conduct Authority ("FCA") to carry on the regulated activities of entering into and carrying out funeral plan contracts after 29 July 2022. For completeness, pursuant to article 5 (inserting article 1A in the 2021 Order), some firms will be able to continue carrying out existing funeral plan contracts without FCA authorisation until 31 October 2022, but they will not be able to enter into any new contracts after 29 July.

3. Certain firms that are not seeking or that do not achieve FCA authorisation by the relevant deadline will therefore need to exit the market, by winding down and where possible transferring their funeral plan contracts to firms that have obtained (or expect to obtain) FCA authorisation.

4. However, HM Treasury became aware through engagement with the FCA that it was likely to be either impossible or impractical for many firms to complete transfers using the available legal mechanisms (principally novation) before the date on which they become subject to regulation. Novation requires the express consent of the customer whose contract is being transferred to a new firm, which the firm seeking to transfer the contract may not always be able to obtain (e.g. customer contact details may be outdated or a customer may simply ignore correspondence from the firm).

5. In these circumstances, from 29 July (or 31 October, as applicable) the (unauthorised) transferor firm would remain the person treated as carrying out the contract under article 59 of the RAO, instead of the authorised firm that had agreed to take over the contract. This raised concerns of customer detriment, as the customer's contract with the unauthorised firm could be frustrated as a result, leaving them without a funeral plan.

6. Article 2 of this instrument therefore inserts new provisions in article 59 of the RAO, to enable a funeral plan contract to be treated, in certain circumstances specified in new paragraphs (3) to (5), as if it has been transferred from one funeral plan firm to another for regulatory purposes. The provisions are designed to ensure that, if two firms ("A" and "B") have agreed that A will sell a contract to B, and B intends to replace A as funeral plan provider for the customer under that contract, but it is not reasonably practicable for the

contract to be legally transferred to B by novation, assignment or operation of law, then for the purposes of FCA regulation B still will be deemed to be carrying out A's funeral plan contract. This is intended to mitigate the consumer risk mentioned above. If B did not have FCA authorisation in these circumstances, B would be committing an authorisation offence under section 19 of the Financial Services and Markets Act 2000. However, HM Treasury foresees that the provision will only be used by firms where it is clear that B is, or is about to become, an authorised funeral plan provider, such that its operation will not affect whether or not a firm is at risk of FCA enforcement action in relation to the plans transferred.

7. The circumstances in article 59(4) of the RAO are essentially that a transfer by novation has been attempted, but could not be achieved in a reasonable timeframe. The provision requires that A has taken reasonable steps to secure the customer's written consent to the transfer to B, but the customer has not responded to A's communications nor objected to the transfer within a "reasonable period".

8. HM Treasury acknowledges that including this concept necessarily requires a judgement to be made as to whether a period of time is reasonable or not. However, what amounts to a "reasonable period" in relation to a particular transfer will be very fact specific. HM Treasury identified several factors that this may depend on, such as the firm's method of communicating with the customer about the proposed contract transfer, what was requested of the customer, and how easy (or difficult) it may be for the customer to understand the correspondence and respond to it – which could vary according to customer characteristics like age and vulnerability. Another factor may be whether there is, in the customers' interests, genuine urgency to complete the transfer of funeral plans for regulatory purposes by 29 July or 31 October (as the case may be). As the relevant date approaches, there may well be such urgency because A's contract with the customer will be frustrated if not successfully transferred to B, leaving the customer without a funeral plan. In these time constraints, it is likely that a "reasonable period" will be shorter than in a non-urgent case such as the commercial sale of contracts between FCA-authorised providers. In a commercial sale between regulated firms, one might expect customers to be given more time to respond to correspondence.

9. In that context, it was not possible to specify a period of time in article 59(4)(c) which would be suitable for all firms that may seek to rely on the provision at different times. HM Treasury considered that it would not be appropriate nor desirable to apply a general rule to all firms, or to set a minimum period, as this would necessarily be arbitrary and a firm may have good reason to expect customer responses within a shorter or longer period than other firms. In addition, HM Treasury took the view that, as the regulator responsible for supervising funeral plan firms and overseeing their transition into regulation, the FCA would be better placed to issue guidance about the meaning of "reasonable period" if it deemed such guidance to be necessary.

10. In practice, any firm intending to rely on the new provisions in article 59 RAO will need to notify the FCA, confirming that they consider the relevant conditions to be met (see article 59(3)(e)). In relation to the condition in article 59(4)(c), HM Treasury is aware that that FCA has communicated its expectations of what amounts to a "reasonable period" to all potentially affected funeral plan firms. This means firms that have applied for FCA authorisation to carry out and/or enter into funeral plan contracts, and either are waiting for a decision from the FCA or have withdrawn their application. The FCA e-mailed these

firms on 22 April 2022 to confirm that, whilst it is for the Courts to interpret legislation, it considers that waiting for customer responses for a period of 4 weeks after contacting them is likely to be reasonable in most cases. However, HM Treasury notes that this is only intended to serve as a general indication of the minimum standards the FCA expects, and that it does not constitute formal guidance.

11. Ultimately, HM Treasury considered it necessary, and proportionate in light of the potential consumer harm being addressed, to provide flexibility by relying on firms' ability to interpret "reasonable period" in accordance with the amount of time that appears to them to be a reasonable for their customers to respond to correspondence, taking into account all the relevant circumstances such as the customers' personal circumstances (if known), how they have been contacted and the content of the correspondence.

HM Treasury

31 May 2022

Appendix 3: Memorandum from the Department for Environment, Food and Rural Affairs

S.I. 2021/481

Food Information (Amendment) (England) Regulations 2022

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

> *Having regard to the statement in paragraph 7.9 of the Explanatory Memorandum that references made by this instrument to the retained version of FIC "may be interpreted dynamically without needing to rely on [the power to make ambulatory references to EU instruments]", explain (1) what that statement means and (2) in particular, whether any provision in the Interpretation Act 1978 or in any other legislation results in those references being ambulatory.*

2. As regards the first question, the statement means that it is possible to interpret references to the retained version of FIC in an instrument such as these Regulations made after IP completion day in a dynamic or ambulatory way without there being a specific authority to support that interpretation (of the kind set out in paragraph 1A of Schedule 2 to the European Communities Act 1972).

3. As regards the second question, the Department considers that the references made by this instrument to retained FIC are to be interpreted as including references to retained FIC as it stood at the date on which this instrument was made, by virtue of section 20(2) of the Interpretation Act 1978 as read with section 23ZA. On the issue of whether those references will further ambulate should the relevant provisions of retained FIC be amended, the Department considers that this is a matter which will need to be determined as a matter of construction in the circumstances of the particular case.

Department for Environment, Food and Rural Affairs

31 May 2022

Appendix 4: Memorandum from the Department of Health and Social Care

S.I. 2022/515

Health and Care Act 2022 (Commencement No. 1) Regulations 2022

1. The Committee has asked the Department of Health and Social Care for a memorandum on the following points:

> *(1) Having regard to the importance of ensuring that laws are made accessible to the public when they are brought into force because people who are affected by them will be presumed to know the law (a principle discussed at paragraphs 22 to 25 of the judgement in ZL and VL v Secretary of State for the Home Department and Lord Chancellor's Department [2003] EWCA Civ 25), explain why this commencement order was made on 6 May 2022 before the enabling Act appeared on the website of the Queen's printer on 13 May 2022 (even though the Act received Royal Assent on 28 April 2022).*
>
> *(2) Confirm that the enabling powers should refer to section 186(6) and (7) rather than section 189(6) and (7) of the Health and Care Act 2022.*

2. The Department's response is as follows.

3. In relation to point (1), the Bill achieved Royal Assent on 28th April 2022 and was published as an Act on 13th May. The publication of the Act was not within the Department's control, and the National Archives have confirmed that the Act was published as PDF on legislation.gov.uk immediately upon receipt of the official copy from Parliament, but that there was a delay in that occurring due to the large number of Acts receiving Royal Assent at the end of the last session.

4. The Health and Care Act 2022 builds on steps that the National Health Service (NHS) has been taking over a number of years to develop integrated care systems and create a single body to carry out the functions of Monitor, the NHS Trust Development Authority (TDA) and the National Health Service Commissioning Board, also known as NHS England (NHSE), including provision for the establishment of integrated care boards (ICBs), which to some extent puts existing practices on a statutory footing. Ministers indicated to Parliament via a Written Ministerial Statement[1] on 5th January 2022 that our intention has been to establish ICBs from 1st July 2022, subject to the passage of the legislation, and NHSE communicated this in their annual planning guidance published on 24th December 2021.

5. The Department decided to commence the relevant sections of the Act on 9th May in order to allow NHSE to carry out, during May and June, the preparatory activities which are operationally essential to establish ICBs, and to facilitate the transfer of functions from Monitor and TDA to NHSE (the Act envisaging the commencement of those provisions together), on 1st July, having discussed this timescale with NHSE. As part of this, NHSE

1 Written statements - Written questions, answers and statements - UK Parliament

issued the list of initial areas for which ICBs are to be established on 9th May, followed by publication of guidance to clinical commissioning groups (CCGs) on preparing ICB constitutions[2] on 13th May.

6. Thus the instrument was limited to commencing the provisions of the Act relevant to the preparatory steps for the creation of ICBs on 1st July and to facilitate the transfer of staff, property and liabilities from TDA and Monitor to NHSE on 1st July. In and of themselves, the commenced provisions only impact on statutory bodies such as CCGs and NHSE, rather than on the general public. All the materially affected stakeholders including CCGs, TDA and Monitor were aware of these proposals as the Department and NHSE have been planning for these changes since the Bill was introduced in June 2021, and draft guidance and plans were published by NHSE throughout 2021 and 2022. NHSE has been actively engaging with these stakeholders in developing ICB constitutions and in the preparatory work for establishment of ICBs, so the commencement of the relevant provisions reflects the expectations of local systems.

7. The wider public also, of course, need to be able to scrutinise the steps taken by public bodies to ensure that they are lawful, and thus need to be able to access legislation under which such steps are taken. But we consider that, in the circumstances, the short delay in the publication of the Act did not cause any prejudice to this.

8. The Department therefore considers that the commencement exercise was done in a manner consistent with the principle that the law should be accessible to those affected by it.

9. In relation to point (2), the Department confirms that the enabling powers should refer to section 186(6) and (7) rather than section 189(6) and (7) of the Health and Care Act 2022. The Department is in the process of discussing with the S.I. Registrar as to whether it is appropriate to rectify the error by correction slip (as we consider the error to be small scale, obvious - since the parent Act does not contain a section numbered 189 - and the text and location of the correction to also be obvious since section 186 is the only commencement power in the Act).

10. The Department apologises to the Committee for the error.

Department of Health and Social Care

31 May 2022

2 B1551--Guidance-to-Clinical-Commissioning-Groups-on-the-preparation-of-Integrated-Care-Board-constitutions.pdf (england.nhs.uk)

Appendix 5: Memorandum from the Home Office

S.I. 2022/520

Police, Crime, Sentencing and Courts Act 2022 (Commencement No. 1 and Transitional Provision) Regulations 2022

1. The Committee has asked the Home Office for a memorandum on the following points:

> *(1) Having regard to the importance of ensuring that laws are made accessible to the public because people who are affected by them will be presumed to know the law (a principle discussed at paragraphs 22 to 25 of the judgement in ZL and VL v Secretary of State for the Home Department and Lord Chancellor's Department [2003] EWCA Civ 25), explain why this commencement order was made on 9 May 2022 before the enabling Act appeared on the website of the Queen's printer on 11 May 2022 (even though the Act received Royal Assent on 28 April 2022).*
>
> *(2) Explain why regulation 5(i) refers to section 73(6) of the Act and regulation 5(j) refers to section 73(7) of the Act, when those sections do not appear in the Act.*

2. The Police, Crime, Sentencing and Courts Act 2022 (Commencement No. 1 and Transitional Provision) Regulations 2022 ("the Regulations") bring into force two provisions of the enabling Act on 12 May 2022. One of these provisions was section 80 (wilful obstruction of a highway), early commencement of which had been sought in response to tactics recently employed by Just Stop Oil. It was thought vital to commence this provision as soon as possible to help prevent further disruption from the group. It was therefore necessary, having regard to the importance of ensuring that laws are made accessible to the public, and in order to ensure timely publication, to make the Regulations as soon as possible following Royal Assent.

3. Only one of these provisions, namely the increase in the maximum penalty for the offence of wilful obstruction of a highway (as referred to above), materially impacted on the public. Additionally, the Home Office wrote to several protest and civil rights groups to notify them of the change in law. This has been amplified by some groups on social media.

4. As it was important that the Regulations were made before 12 May 2022 given the need for certain provisions to come into force on that date, the Regulations were drafted using the proof of the enabling Act. As noted, the enabling Act was not available on the website of the Queen's printer until 11 May 2022 and the proof was the only version available to work from.

5. The regulations were accordingly made before the enabling Act appeared on the website of the Queen's printer. While regrettable, the Home Office considers that this was unavoidable under the circumstances.

6. Unfortunately, the subsections in section 73 were incorrectly numbered in the proof of the Act, which resulted in the inclusion of the references to section 73(6) and 73(7) of the Act at regulation 5(i) and (j). These references should be to section 73(4) and 73(5).

7. We apologise for this error, and will prepare an amending instrument as soon as possible to rectify it before those provisions come into force on 28 June.

Home Office

31 May 2022

Formal Minutes

Wednesday 15 June 2022

Virtual meeting

Members present

Jessica Morden, in the Chair

Lord Beith

Lord Chartres

Dr James Davies

Baroness Gale

Lord Haskel

John Lamont

Baroness Newlove

Lord Smith of Hindhead

Baroness d'Souza

Richard Thomson

Report consideration

Draft Report (*Fifth Report*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 5.3 read and agreed to.

Annex agreed to.

Papers were appended to the Report as Appendices 1 to 5.

Resolved, That the Report be the Fifth Report of the Committee to both Houses.

Ordered, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

Adjournment

Adjourned till Wednesday 22 June at 3.40 p.m.