



House of Lords
House of Commons
Joint Committee
on Statutory Instruments

**Twenty-Fifth Report
of Session 2019–21**

Drawing special attention to:

Statutory Sick Pay (General) (Coronavirus Amendment) (No. 6) Regulations 2020 (S.I. 2020/892)

Criminal Legal Aid (Remuneration) (Amendment) Regulations 2020 (S.I. 2020/903)

Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020 (S.I. 2020/952)

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Joint Committee on Statutory Instruments

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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

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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).

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Contents

Instruments reported	3
1 S.I. 2020/892: Reported for failure to comply with proper legislative practice	3
Statutory Sick Pay (General) (Coronavirus Amendment) (No. 6) Regulations 2020	3
2 S.I. 2020/903: Reported for requiring elucidation	3
Criminal Legal Aid (Remuneration) (Amendment) Regulations 2020	3
3 S.I. 2020/952: Reported for defective drafting	4
Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020	4
Instruments not reported	5
Annex	5
Appendix 1	8
S.I. 2020/892	8
Statutory Sick Pay (General) (Coronavirus Amendment) (No. 6) Regulations 2020	8
Appendix 2	9
S.I. 2020/903	9
Criminal Legal Aid (Remuneration) (Amendment) Regulations 2020	9
Appendix 3	10
S.I. 2020/952	10
Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020	10
Appendix 4	11
S.I. 2020/909	11
Adoption and Children (Coronavirus) (Amendment) (No.2) Regulations 2020	11

Instruments reported

At its meeting on 7 October 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. 2020/892: Reported for failure to comply with proper legislative practice

Statutory Sick Pay (General) (Coronavirus Amendment) (No. 6) Regulations 2020

1.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that they fail to comply with proper legislative practice in one respect.**

1.2 These Regulations extend the eligibility for statutory sick pay to people who are self-isolating prior to admittance to hospital for surgery. As regulation 2(3) corrects an error in previous regulations, the Committee asked the Department for Work and Pensions whether it had considered using the free issue procedure. In a memorandum printed at Appendix 1, the Department acknowledges that it should have agreed with the S.I. Registrar whether to provide free replacement copies in accordance with paragraph 4.7.6 of Statutory Instrument Practice (5th edition, November 2017) and that it should have stated in the Explanatory Memorandum whether the free issue procedure had been applied. **The Committee accordingly reports these Regulations for failure to comply with proper legislative practice.**

2 S.I. 2020/903: Reported for requiring elucidation

Criminal Legal Aid (Remuneration) (Amendment) Regulations 2020

2.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that they require elucidation in one respect.**

2.2 These Regulations make provision about the way in which advocates and litigators are paid for reviewing unused material disclosed to the defence under schemes through which criminal defence advocates and criminal litigators are paid for carrying out public funded work in the Crown Court. A fixed basic consideration fee is to be paid to advocates and litigators equivalent to 1.5 hours' work for up to three hours spent reviewing unused material, and an additional fee at an hourly rate will be paid where more than three hours is spent on the review. Regulation 4(11) (inserted paragraph 17A(2)) and regulation 5(3) (inserted paragraph 20A(2)) state that the fixed basic consideration fee will be paid "whether or not such consideration actually occurred" and the Committee asked the Ministry of Justice to explain. In a memorandum printed at Appendix 2, the Department explains that both schemes operate on a "swings and roundabouts" principle; fees paid are an average for a case of a particular type, whether or not the actual work involved was less than or more than the average. The Department goes on to explain that in the majority of cases, time spent reviewing unused material has not been adequately captured by these

schemes to date; practitioners are estimated to spend up to 1.5 hours reviewing unused material in 74% of cases and between 1.5 and 3 hours in 12% of cases. As a result of the swings and roundabouts principle the fixed basic consideration is also paid in a minority of cases where there has been no consideration of unused material and a fixed fee avoids the necessity for time-consuming small claims. **The Committee finds this explanation helpful and accordingly reports regulations 4(11) and 5(3) for requiring elucidation, provided by the Department’s memorandum.**

3 S.I. 2020/952: Reported for defective drafting

Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020

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

3.2 This Order provides that the witnessing of wills may take place by video conferencing or other visual transmission for the period beginning on 31 January 2020 and ending on 31 January 2022. The Explanatory Memorandum explains that the policy intent is that the legislation is not to apply to grants of probate made before this Order comes into force and is not to affect anything done pursuant to a grant of probate issued prior to the Order coming into force. However, in article 3, the words “prior to this Order coming into force” qualify only paragraph (b) (“anything done pursuant to a grant of probate”) and not paragraph (a) (“any grant of probate made”). The Committee asked the Ministry of Justice to explain. In a memorandum printed at Appendix 3, the Department explains that this was a formatting error and that its intention was for the words “prior to this order coming into force” to qualify both paragraphs (a) and (b) of article 3. The Department is considering how best to correct the error. **The Committee accordingly reports article 3 for defective drafting, acknowledged by the Department.**

Instruments not reported

At its meeting on 7 October 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.	Sanctions (EU Exit) (Consequential Provisions) (Amendment) Regulations 2020
Draft S.I.	Flags (Northern Ireland) (Amendment) (No. 2) Regulations 2020
Draft S.I.	Taking Account of Convictions (EU Exit) (Amendment) Regulations 2020
Draft S.I.	Communications Act (e-Commerce) (EU Exit) Regulations 2020
Draft S.I.	Bearer Certificates (Collective Investment Schemes) Regulations 2020
Draft S.I.	Higher Education (Fee Limits and Student Support) (England) (Coronavirus) (Revocation) Regulations 2020

Instruments requiring affirmative approval

S.I. 2020/951	Sanctions (EU Exit) (Miscellaneous Amendments) (No. 4) Regulations 2020
S.I. 2020/1019	Health Protection (Coronavirus, Restrictions) (Protected Areas and Linked Childcare Households) (Amendment) Regulations 2020
S.I. 2020/1021	Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place and on Public Transport) (England) (Amendment) (No. 2) Regulations 2020
S.I. 2020/1026	Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place and on Public Transport) (England) (Amendment) (No. 3) Regulations 2020
S.I. 2020/1028	Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place) (England) (Amendment) (No. 3) Regulations 2020
S.I. 2020/1031	Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020
S.I. 2020/1041	Health Protection (Coronavirus, Restrictions) (Protected Areas and Restriction on Businesses) (Amendment) Regulations 2020
S.I. 2020/1045	Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020
S.I. 2020/1046	Health Protection (Coronavirus, Restrictions) (Obligations of Undertakings) (England) (Amendment) Regulations 2020

Instruments subject to annulment

S.I. 2020/909*	Adoption and Children (Coronavirus) (Amendment) (No.2) Regulations 2020
S.I. 2020/950	Sanctions (EU Exit) (Miscellaneous Amendments) (No.3) Regulations 2020
S.I. 2020/973	Coronavirus (Retention of Fingerprints and DNA Profiles in the Interests of National Security) (No. 2) Regulations 2020
S.I. 2020/976	Income-related Benefits (Subsidy to Authorities) Amendment Order 2020
S.I. 2020/991	Money Laundering and Terrorist Financing (Amendment) (EU Exit) Regulations 2020
S.I. 2020/994	Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus) (England) (No. 2) Regulations 2020
S.I. 2020/998	Fertilisers and Ammonium Nitrate Material (Amendment) (EU Exit) Regulations 2020
S.I. 2020/1000	Merchant Shipping (Consequential Amendments) (EU Exit) Regulations 2020
S.I. 2020/1003	Employment Tribunals (Constitution and Rules of Procedure) (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2020
S.I. 2020/1013	Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 14) Regulations 2020
S.I. 2020/1014	Official Controls (Plant Health and Genetically Modified Organisms) (England) (Amendment) (No. 2) Regulations 2020
S.I. 2020/1020	School Teachers' Pay and Conditions (England) Order 2020
S.I. 2020/1030	Statutory Sick Pay (Coronavirus) (Funding of Employers' Liabilities) (Amendment) Regulations and the Statutory Sick Pay (Coronavirus) (Funding of Employers' Liabilities) (Northern Ireland) (Amendment) Regulations 2020
S.I. 2020/1033	Corporate Insolvency and Governance Act 2020 (Coronavirus) (Early Termination of Certain Temporary Provisions) Regulations 2020
S.I. 2020/1036	Cross-border Parcel Delivery Services (Amendment) (No.2) (EU Exit) Regulations 2020
S.I. 2020/1039	Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 15) Regulations 2020

Draft Instruments subject to annulment

Draft S.I.	London Borough of Hammersmith & Fulham (Electoral Changes) Order 2020
Draft S.I.	London Borough of Lewisham (Electoral Changes) Order 2020

* The Committee asked for a memorandum on this instrument and a satisfactory response was received. The memorandum is published at Appendix 4 to this Report.

Draft S.I. London Borough of Sutton (Electoral Changes) Order 2020

Appendix 1

S.I. 2020/892

Statutory Sick Pay (General) (Coronavirus Amendment) (No. 6) Regulations 2020

1. In its letter to the Department dated 23rd September 2020, the Committee requested a memorandum on the following point:

“Given regulation 2(3) corrects an error, did the Department consider using the free issue procedure?”

2. The Department’s response to the Committee’s point is set out below.

3. These Regulations introduce new amending provisions at the same time as correcting a defective Statutory Instrument. The Department acknowledges that it should have agreed with the S.I. Registrar whether or not to provide free replacement copies, in accordance with paragraph 4.7.6 of Statutory Instrument Practice. Also, the Department acknowledges that it should have stated in the Explanatory Memorandum whether the free issue procedure had been applied.

4. The Department apologises for both of these omissions.

Department for Work and Pensions

29 September 2020

Appendix 2

S.I. 2020/903

Criminal Legal Aid (Remuneration) (Amendment) Regulations 2020

1. The Committee asked:

Explain why the fees referred to in regulation 4(11) (inserted paragraph 17A(2)) and regulation 5(3) (inserted paragraph 20A(2)) are payable in respect of consideration of unused material “whether or not such consideration has actually occurred”?

2. The main schemes for payment of services provided by legal aid practitioners for work undertaken in relation to Crown Court cases are the Advocates Graduated Fee Scheme[†] (LGFS) and the Litigators Graduated Fee Scheme[‡] (AGFS).
3. Both fee schemes operate on the basis of proxies for complexity (eg offence type, trial length and volume of evidence) to produce an overall graduated fee for a case. The schemes operate on a “swings and roundabouts” principle meaning the fees paid are an average for a case of a particular type, whether or not the actual work involved was less than or more than the average. In the majority of cases (65%), reviewing unused material is a necessary part of case preparation that has not necessarily been adequately captured by the graduated fee schemes in the past. For this reason, we have included this “basic consideration fee” for unused material in cases on indictment in the Crown Court where a graduated fee is payable.
4. Practitioners are estimated to spend up to 1.5 hours reviewing unused material in 74% of cases and between 1.5 and 3 hours in 12% of cases.
5. The basic consideration fixed fee also allows for the minority of cases where there has been no consideration of unused material because of the swings and roundabouts principle, set out above, and the fact that the majority of cases have at least some unused material.
6. The fixed fee is also intended to avoid the necessity for small claims, which would require practitioners to provide evidence of up to 3 hours work, which would be disproportionate for both practitioners and the Legal Aid Agency.

Ministry of Justice

29 September 2020

† Schedule 1 of the Criminal Legal Aid (Remuneration) Regulations 2013 No. 435

‡ Schedule 2 of the Criminal Legal Aid (Remuneration) Regulations 2013 No. 435

Appendix 3

S.I. 2020/952

Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020

1. On 24 September 2020, the Committee requested that the Ministry of Justice submit a memorandum relating to the above instrument to explain whether it is intended that the words “*prior to this order coming into force*” are intended to qualify only paragraph (b) of article 3.
2. The Department is grateful for the Committee’s consideration of the instrument and confirms that its intention was for the words “prior to this order coming into force”, which appear after a comma, to qualify both paragraphs (a) and (b) of article 3. The formatting error which resulted in this text appearing on the same line as paragraph (b) arose during the final validation stage of the SI-making process after the usual internal checking procedures had taken place.
3. The Department is considering how best to correct the formatting error and has already brought it to the attention of colleagues in the Department in the hope that this will avoid a similar error arising in the future.

Ministry of Justice

28 September 2020

Appendix 4

S.I. 2020/909

Adoption and Children (Coronavirus) (Amendment) (No.2) Regulations 2020

1. In its letter to the Department for Education of 23rd September 2020, the Joint Committee requested a memorandum on the following point:

Identify the vires for the sub-delegation in regulation 2(2) (inserted (4B)(a)), regulation 4(2) (inserted (1B)(a)) and regulation 4(3)(c) (inserted (5)(a)).

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

3. S.I 2020/909 made amendments to 6 sets of Regulations in order to assist the children’s social care sector during the coronavirus pandemic. The S.I ceases to have effect on the 31st March 2021.

4. Regulation 2(2) inserted a new regulation (4B)(a) into regulation 28 of the Residential Family Centres Regulations 2002 (the 2002 Regulations), regulation 4(2) inserted a new regulation (1B)(a) into the Care Planning, Placement and Case Review (England) Regulations 2010 (the 2010 Regulations) and regulation 4(3)(c) inserted new regulation (5) (a) into regulation 48 of the 2010 Regulations.

5. The amendments provide that, where it would be contrary to any guidance relating to the incidence or transmission of coronavirus published by Public Health England or the Secretary of State for Health and Social Care, or not reasonably practicable for a reason relating to the incidence or transmission of coronavirus, the visits in question may be carried out by telephone, video-link or other electronic means.

6. There is no obligation on the person carrying out the visit to make use of the amendments as the amendments say that the visits ‘may’ be carried out by telephone etc. The guidance is simply a matter to be taken into account when deciding whether to exercise the power.

7. The vires for the amendments are those set out in the S.I, and in particular sections 22(1), (2)(a) to (d) of the Care Standards Act 2000 (the 2000 Act) for the amendments to the 2002 Regulations and sections 22C(11) and 23ZA(4)(b) of the Children Act 1989 (1989 Act) for the amendments to the 2010 Regulations. These provisions provide broad regulation making powers in relation to establishments and agencies regulated under the 2000 Act and care planning requirements for children looked after by local authorities under the 1989 Act. A similar argument was advanced in relation to the Nursing and Midwifery Council (Emergency Procedures) (Amendment) Rules 2020 Order of Council 2020—dealt with in the following report: https://publications.parliament.uk/pa/jt5801/jtselect/jtstatin/58/5803.htm#_idTextAnchor017

8. It is the Department’s view that the provisions in question do not constitute sub-delegation because the guidance referred to in the provisions from Public Health England (PHE) and the Secretary of State for the Department for Health and Social Care (SoS) is

guidance which is independent of the provisions. The Guidance referred to is Guidance related to the incidence and transmission of Coronavirus which is not related to the visits dealt with under the S.I.

9. The guidance contemplated by the provisions is referred to in the Explanatory Memorandum (paragraph 7.8) and the Guidance issued by the Department[§], namely Guidance in the event of lockdown, self-isolation, or Public Health England and Government social distancing advice due to coronavirus (COVID-19).

10. The regulations in question provide for circumstances during which interviews, and visits may be carried out remotely. One of the circumstances in question is that interviewing or visiting face-to-face would be contrary to any Guidance relating to the incidence or transmission of coronavirus published by PHE or the SoS, documents which are entirely unrelated to the interview/visits themselves being carried out under the Regulations. In issuing any Guidance related to the incidence and transmission of Coronavirus PHE and the SoS are not specifically making a decision as to whether those visiting under the 2002 or 2010 Regulations should visit under the amended provisions or not. The Department is therefore of the view that there is a sufficient degree of independence between the issuing of the Guidance and the decision with regards to visiting under the 2002 and 2010 Regulations for this not to be a case of sub-delegation.

Department for Education

September 2020

[§] <https://www.gov.uk/government/publications/coronavirus-covid-19-guidance-for-childrens-social-care-services/provisional-guidance-on-extended-regulations>