



House of Lords
House of Commons
Joint Committee
on Statutory Instruments

Twenty-Sixth Report of Session 2019–21

Drawing special attention to:

Criminal Procedure Rules 2020 (S.I. 2020/759)

*Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment)
(No. 5) Regulations 2020 (S.I. 2020/1029)*

*Ordered by the House of Lords
to be printed 14 October 2020*

*Ordered by the House of Commons
to be printed 14 October 2020*

**HL 150
HC 75-xxvi**

Published on 16 October 2020
by authority of the House of Lords
and the House of Commons

Joint Committee on Statutory Instruments

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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

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Instruments reported

At its meeting on 14 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 two 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. 2020/759: Reported for defective drafting and for requiring elucidation

Criminal Procedure Rules 2020

1.1 The Committee draws the special attention of both Houses to these Rules on the grounds that they are defectively drafted in three respects and that they require elucidation in three respects.

1.2 These Rules update and supersede the Criminal Procedure Rules 2015 (S.I. 2015/1490) and consolidate amendments made to the 2015 Rules over the past five years. One of the new amendments is to express time limits in business days rather than days, except where to do so would be incompatible with other legislation. A “business day” is defined in rule 2.2(1) as any day except Saturday, Sunday, Christmas Day, Boxing Day, Good Friday, Easter Monday or a bank holiday. Rule 44.2 deals with a declaration under section 14 or 16E of the Magistrates’ Courts Act 1980 that the defendant did not find out about the case until after the trial began. Rule 44.2(2)(a) requires the defendant to serve the declaration on the court officer “(i) not more than 15 business days after the date of finding out about the case; or (ii) with an explanation for the delay, if serving it more than 21 days after that date”. Sections 14 and 16E of the 1980 Act both require the declaration to be served within 21 days of the date the defendant found out about the case, but allow the court to extend that time limit if it takes the view that it was not reasonable to expect the defendant to serve the declaration within that time limit. It appeared to the Committee that if the 15-business-day period in rule 44.2(2)(a)(i) included a bank holiday, the procedural time limit in that rule would be longer than the statutory time limit in the 1980 Act. It asked the Ministry of Justice to explain whether, in such a case, the Rules are purporting to require the court to exercise its discretion to extend the statutory time limit so that it matches the procedural time limit.

1.3 In a memorandum printed at Appendix 1, the Department acknowledges that the procedural time limit in rule 44.2(2)(a)(i) is incorrect and misleading because it is incompatible with the statutory time limit, to which rule 44.2(2)(a)(ii) correctly refers. It asserts that the statutory time limit takes precedence, but that where a defendant serves a declaration out of time but within the 15-business-day time limit in reliance on rule 44.2(2)(a)(i), it is inconceivable that a court applying the overriding objective would not exercise its discretion to extend the time limit. That may be true, but the inconsistency is clearly undesirable, and the Committee notes that the Department undertakes to ask the Criminal Procedure Rule Committee to correct rule 44.2(2)(a)(i) in its next round of amendments, which is expected to take place in December. The Committee accordingly reports rule 44.2(2)(a)(i) for defective drafting, acknowledged by the Department.

1.4 In the 2015 Rules, Part 44 set out the procedure that applied if a court wished to apply to the Court of Justice of the European Union (“CJEU”) for a preliminary ruling on a matter of EU law. In anticipation of Part 44 becoming vacant on 31 December 2020 as a result of Brexit, rules that had been inserted into Part 24 but did not sit comfortably there were moved to Part 44 of these Rules. It appeared to the Committee that references in rule 44.2 to “the rules in this Part” applying, or the rules in this Part applying “except for rule 24.8 ... and rule 24.9”, were no longer appropriate as a consequence of that move. It asked the Department to explain. In its memorandum, the Department acknowledges that references to “the rules in this Part” should be to “the rules in Part 24” and undertakes to request amendments correcting these errors. The Committee accordingly reports rule 44.2(4)(b) and (c), (5)(c), and (6)(b) for defective drafting, acknowledged by the Department.

1.5 The Committee also asked the Department to explain how the court would deal with a referral to the CJEU between these Rules coming into force and 31 December 2020, given that the relevant rules (formerly in Part 44) have been omitted. In its memorandum, the Department explains that if such a case were to arise, the court would follow the procedure set out in paragraphs IX 44A.1 to 7 of the Criminal Practice Directions 2015 [2015] EWCA Crim 1567 (as amended). The Committee accordingly reports these Rules for requiring elucidation, provided in the Department’s memorandum.

1.6 The Committee asked the Department to confirm whether in rule 33.59(5)(a), the reference to section 31B of the Bankruptcy (Scotland) Act 1985 should be to section 82 of the Bankruptcy (Scotland) Act 2016. In its memorandum, the Department confirms that it should and undertakes to request a correcting amendment. The Committee accordingly reports rule 33.59(5)(a) for defective drafting, acknowledged by the Department.

1.7 The Committee asked the Department to confirm whether rule 47.31(1) and the accompanying note should refer to an application to a District Judge (Magistrates’ Courts) as well as to a Circuit judge. In its memorandum, the Department asserts that it should not. It argues that the amendment by which the reference to a District Judge (Magistrates’ Courts) was inserted into paragraph 11 of Schedule 5 to the Terrorism Act 2000 (to which rule 47.31 relates) has not been brought into force: the amendment relies on both section 65 of and Schedule 4 to the Courts Act 2003, and only section 65 has been expressly commenced (by article 3(u) of S.I. 2005/910). The Committee observes that there is some doubt as to whether the courts would construe article 3(u) literally so as to commence only section 65, or purposively so as also to commence Schedule 4—without which the commencement of section 65 has no meaningful effect. (It notes that there is inconsistency in treatment of Schedule 4 as between different commercial and official publishers.) The Committee considers this uncertainty as to a matter of criminal judicial jurisdiction seriously undesirable; but it does not fall to the Committee to express a view as to the meaning of the commencement provisions, and for present purposes the Committee accordingly only reports rule 47.31(1) for requiring elucidation.

1.8 The Committee asked the Department to confirm whether rule 47.32 should include an “exploitation proceeds investigation” among the types of investigation listed in that rule (reflecting the list in section 352 of the Proceeds of Crime Act 2002). In its memorandum, the Department asserts that it should not. It explains that in relation to exploitation proceeds orders and investigations, it is the High Court rather than the Crown Court which has jurisdiction, under section 155 of the Coroners and Justice Act 2002 and section 343 of the Proceeds of Crime Act 2002, and the power to issue a search

and seizure warrant in relation to an exploitation proceeds investigation (to which rule 47.32 refers) is a power conferred on a High Court judge. As neither the High Court nor a High Court judge constitutes a “criminal court” for this purpose, the Criminal Procedure Rules do not apply in relation to this type of warrant. The Department undertakes to ask the Criminal Procedure Rule Committee to consider adding a note to the relevant rule to explain the statutory complexity in this case. The Committee accordingly reports rule 47.32 for requiring elucidation, provided by the Department’s memorandum.

2 S.I. 2020/1029: Reported for defective drafting

Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 5) Regulations 2020

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

2.2 These Regulations were made under the procedure in section 45R of the Public Health (Control of Disease) Act 1984 under which affirmative procedure regulations may be made without a draft having been laid before, and approved by a resolution of, each House of Parliament where the Secretary of State is of the opinion that, by reason of urgency, it is necessary to do so.

2.3 The Regulations make changes to restrictions and requirements imposed by other instruments in response to the threat to public health which is posed by coronavirus. Those changes include the removal of restrictions and requirements relating to the operation of businesses in specified areas (Leicester, Bolton, the North of England and the North East and North West of England). Provisions in those instruments which made it an offence (a “business closure offence”) to contravene those restrictions and requirements are also removed.

2.4 However, regulation 9 (transitional and savings provisions) provides for the amended instruments to continue in force as they had effect immediately before those amendments were made (so without the amendments) in relation to a “business closure offence” that was committed before 05:00 am on 24 September 2020 (the point in time at which those amendments came into force).

2.5 One of the amended instruments is the Health Protection (Coronavirus, Restrictions) (North East and North West of England) Regulations 2020 (SI 2020/1010). The amendments made to that instrument include the removal of regulations 3, 4 and 5. Regulation 3 required certain businesses to close and regulations 4 and 5 imposed restrictions on the opening hours of certain businesses and on the service of food and drink for consumption on certain premises. The provision in that instrument which made it an offence to contravene a restriction or requirement under regulation 3, 4 or 5 is also removed.

2.6 Regulation 9 of SI 2020/1029 provides for SI 2020/1010 to continue in force as it had effect immediately before those amendments were made in relation to a “business closure offence” of contravening a restriction under regulation 4 or 5 of those Regulations that was committed before 05:00 am on 24 September 2020. However, regulation 9 makes no such provision in relation to an offence of contravening a requirement under regulation 3 of those Regulations.

2.7 The Committee asked the Department for Health and Social Care to explain. In a memorandum (printed at Appendix 2), the Department acknowledges that provision should have been made in relation to contravention of a requirement under regulation 3 but this was omitted in error. The Committee notes that the Department has acted speedily to make an amendment to address this in paragraph 5 of Schedule 3 to the Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020 (SI 2020/1103). That amendment came into force on 14 October 2020.

2.8 The Committee accordingly reports regulation 9 for defective drafting, acknowledged by the Department.

Instruments not reported

At its meeting on 14 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.	Tobacco Products and Nicotine Inhaling Products (Amendment) (EU Exit) Regulations 2020
Draft S.I.	Nutrition (Amendment etc.) (EU Exit) Regulations 2020
Draft S.I.	State Aid (Revocations and Amendments) (EU Exit) Regulations 2020
Draft S.I.	Reciprocal and Cross-Border Healthcare (Amendment etc.) (EU Exit) Regulations 2020
Draft S.I.	Jurisdiction, Judgments and Applicable Law (Amendment) (EU Exit) Regulations 2020
Draft S.I.	Competition (Amendment etc.) (EU Exit) Regulations 2020
Draft S.I.	Education (Exemption from School and Further Education Institutions Inspections) (England) (Amendment) Regulations 2020
Draft S.I.	Agriculture (Payments) (Amendment, etc) (EU Exit) Regulations 2020
Draft S.I.	Common Organisation of the Markets in Agricultural Products (Producer Organisations and Wine) (Amendment etc.) (EU Exit) Regulations 2020
Draft S.I.	Timber and Timber Products and FLEGT (Amendment) (EU Exit) Regulations 2020

Instruments requiring affirmative approval

S.I. 2020/1074	Health Protection (Coronavirus, Restrictions) (North of England and North East and North West of England etc.) (Amendment) Regulations 2020
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Instruments subject to annulment

S.I. 2020/942	Transfer of Functions (Secretary of State for Foreign, Commonwealth and Development Affairs) Order 2020
S.I. 2020/975	Return of Cultural Objects (Revocation) (EU Exit) (Amendment) Regulations 2020
S.I. 2020/980	Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 13) Regulations 2020
S.I. 2020/1051	Town and Country Planning (Pre-application Consultation) Order 2020

- S.I. 2020/1062** Audiovisual Media Services Regulations 2020
- S.I. 2020/1063** Safety of Sports Grounds (Designation) (Amendment) (England) (No. 4) Order 2020
- S.I. 2020/1065** Social Security Contributions (Disregarded Payments) (Coronavirus) (England) Regulations 2020

Appendix 1

S.I. 2020/759

Criminal Procedure Rules 2020

1. The Committee has requested a memorandum on the following points:

(1) In a case where, as a result of a bank holiday, the 21-day time limit set by sections 14(1)(b) and 16E(3)(c) of the Magistrates' Courts Act 1980 ends before the 15-business-day time limit set by rule 44.2(2)(a)(i), explain—

(a) whether these Rules are purporting to require the court to exercise its discretion, under section 14(3) or section 16E(5), to extend the statutory time limit so that it matches the procedural time limit in rule 44.2(2)(a)(i);

(b) if they are, what enabling power is relied on; and

(c) if they are not, what is the effect of the mismatch between the statutory and procedural time limits.

(2) Confirm that in rule 44.2, the references to “the rules in this Part” in paragraphs (4)(b) and (c), (5)(c), and (6)(b), and the exceptions for rules 24.8 and 24.9 in paragraphs (4)(c) and (6)(b), are no longer correct.

(3) Explain how the court would deal with a referral to the Court of Justice of the European Union if such a referral were required, given that the relevant rules (formerly in Part 44) have been omitted (in contrast to other rules that deal with procedure arising from EU law and remain in force, e.g. rules 18.24(2) and (3), 18.25(3), 30.10, 31.9, 31.10, 39.8, 47.59–47.61 and 49.12–49.17).

(4) In relation to rules 22.4 and 22.5—

(a) confirm whether section 43(3) of the Youth Justice and Criminal Evidence Act 1999 is relied on as an enabling power; and

(b) if so, explain why it is not cited in the preamble.

(5) Confirm whether the reference in rule 33.59(5)(a) should be to section 82 of the Bankruptcy (Scotland) Act 2016 rather than to section 31B of the Bankruptcy (Scotland) Act 1985.

(6) Confirm whether rule 47.31 and the accompanying note should refer to an application to a District Judge (Magistrates' Courts) as well as to a Circuit judge.

(7) Confirm whether the list in rule 47.32(2)(a) – and other paragraphs of that rule and its note as appropriate – should also include “an exploitation proceeds investigation”.

Question 1

2. The reference to 21 days in rule 44.2(2)(a)(ii) is correct. The reference to 15 business days in rule 44.2(2)(a)(i) is incompatible with the statutory provisions cited in the note to the rule; incompatible with the assertion in the Explanatory Note to the instrument that “Time limits to which the Rules refer but which are set by other legislation remain unchanged”; and is an error. The effect is that where the statutory time limit expires before the expiry of 15 business days then the statutory time limit takes precedence. Where a defendant serves a statutory declaration out of time but still within 15 business days of his or her declared discovery of the case, and especially where he or she had relied upon the terms of rule 44.2(2)(a)(i), then in practice it is inconceivable that a court applying the overriding objective in Part 1 of the Criminal Procedure Rules would not exercise the discretion conferred by section 14(3) or section 16E(5) of the Magistrates’ Courts Act 1980, as the case may be; but the error is misleading nonetheless.

Question 2

3. The reference in rule 44.2(4)(b) to “the rules in this Part” should read “the rules in Part 24 (Trial and sentence in a magistrates’ court)”. The references to “the rules in this Part” in rules 44.2(4)(c)(iii), 44.2(5)(c)(i) and 44.2(6)(b) each should read “the rules in Part 24”. These are errors. Paragraphs (4), (5) and (6) of rule 44.2 otherwise are correct.

Question 3

4. If between 5th October and 31st December, 2020, a court in which the Criminal Procedure Rules apply wished to request the Court of Justice of the European Union to give a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union then that court would follow the procedure set out in paragraphs IX 44A.1 to 7 of the Criminal Practice Directions 2015, [2015] EWCA Crim 1567 (as amended).^{*} However, such requests by such courts have long been discouraged. In *Henn and Darby v D.P.P.* [1981] A.C. 580 Lord Diplock observed (in relation to Crown Court trial, but declaring a general principle), “it can seldom be a proper exercise of the presiding judge’s discretion to seek a preliminary ruling before the facts of the alleged offence have been ascertained, with the result that the proceedings will be held up for nine months or more in order that at the end of the trial he may give to the jury an accurate instruction as to the relevant law, if the evidence turns out in the event to be as was anticipated at the time the reference was made—which may not always be the case. It is generally better ... that the question be decided by him in the first instance and reviewed thereafter if necessary through the hierarchy of the national courts.”

Question 4

5. No, it is not relied upon. Section 43(3) of the Youth Justice and Criminal Evidence Act 1999 confers no more extensive enabling powers than does section 69 of the Courts Act 2003.

Question 5

6. Yes, it should. This is an error.

^{*} The relevant Criminal Practice Directions are published, among other places, at: <http://www.justice.gov.uk/courts/procedure-rules/criminal/rulesmenu-2015#Anchor10>.

Question 6

7. No, they should not. The insertion into paragraph 11(1) of Schedule 5 to the Terrorism Act 2000 of a reference to a District Judge (Magistrates' Courts) would be effected by paragraph 9(a) of Schedule 4 to the Courts Act 2003. That Schedule is introduced by subsection (1) of section 65 of the 2003 Act. Section 65 was brought into force on 1st April, 2005, by article 3(u) of the Courts Act 2003 (Commencement No. 10) Order 2005, S.I. 2005/910. However, no provision of that or any other commencement order yet has brought into force Schedule 4 to the 2003 Act. Contrast with article 3(u) of S.I. 2005/910 the discrete provisions for the commencement of section 109(1), (2) and (3) and Schedules 8, 9 and 10 of the 2003 Act made by article 3(y), (z), (aa) and (bb) of that commencement order.

Question 7

8. No, it should not. The power to make an exploitation proceeds order under section 155 of the Coroners and Justice Act 2009 is conferred on the High Court in England and Wales. Consistently with that provision, by section 343(1) and (3) of the Proceeds of Crime Act 2002 only a judge of the High Court may issue a search and seizure warrant under section 352 of that Act in relation to an application for the purposes of an exploitation proceeds investigation. Neither the High Court (save in relation to its jurisdiction under the Extradition Act 2003), nor a judge of the High Court, constitutes a “criminal court” within the meaning of section 68 of the Courts Act 2003 and hence, by section 69, a court in which the Criminal Procedure Rules apply. Section 352(8) of the 2002 Act allows the Rules to govern procedure on an application under that section to an individual judge exercising a jurisdiction possessed by reason of that judge's appointment to exercise the jurisdiction of the Crown Court. The subsection is not apt to extend the legislative competence of the Criminal Procedure Rules to proceedings before a High Court judge acting by reason of his or her appointment as such. Nor would such an expansive interpretation of that subsection be consistent with the legislative scheme of the 2002 and 2009 Acts, read together, by which matters appertaining to exploitation proceeds orders and investigations are assigned not to the Crown Court and its judges but to the High Court and to the judges of that court: by contrast with matters appertaining to confiscation, money laundering, detained cash, detained property, frozen funds and external investigations.

9. The penultimate paragraph of the note to rule 47.4 alludes to the corresponding statutory complexity in relation to the orders listed in that rule but there is no note to comparable effect to rule 47.24, in which there is listed section 352 of the 2002 Act. The Criminal Procedure Rule Committee will be asked to consider adding such a note.

Correction of errors

10. The errors to which paragraphs 2, 3 and 6 above refer are deeply regretted. The Criminal Procedure Rule Committee will be asked to make amendments correcting those errors, and some others identified since publication of the Criminal Procedure Rules 2020 which the Joint Committee generously has not advertised, when the Rule Committee next amends those Rules; in December, as presently anticipated.

Ministry of Justice

6 October 2020

Appendix 2

S.I. 2020/1029

Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 5) Regulations 2020

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

Explain why the savings made by regulation 9 in relation to offences committed before the Regulations came into force do not include a saving in respect of an offence of contravening a requirement under regulation 3 of the Health Protection (Coronavirus, Restrictions) (North East and North West of England) Regulations 2020 (SI 2020/1010).

2. This is an error, for which the Department apologises. The savings made by regulation 9 should have included a reference to regulation 3 of S.I. 2020/1010, in addition to the references to regulations 4 and 5 of that instrument. The Department has made an amendment to address this in Schedule 3 to the Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020 (S.I. 2020/1103).

Department of Health and Social Care

13 October 2020