



House of Lords
House of Commons
Joint Committee
on Statutory Instruments

Thirtieth Report of Session 2019–21

Drawing special attention to:

Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium, High and Very High) (England) (Amendment) Regulations 2020 (S.I. 2020/1154)

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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

The current staff of the Committee are Sue Beeby (Committee Operations Officer), Apostolos Kostoulas (Committee Operations Officer), 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. 2020/1154: Reported for failure to comply with proper legislative practice and for defective drafting	3
Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium, High and Very High) (England) (Amendment) Regulations 2020	3
Instruments not reported	5
Annex	5
Appendix 1	7
S.I. 2020/1154	7
Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium, High and Very High) (England) (Amendment) Regulations 2020	7

Instruments reported

At its meeting on 11 November 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 one of those considered. The instrument and the grounds for reporting it are given below. The relevant departmental memorandum is published as an appendix to this report.

1 S.I. 2020/1154: Reported for failure to comply with proper legislative practice and for defective drafting

Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium, High and Very High) (England) (Amendment) Regulations 2020

1.1 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 other respect.

1.2 These Regulations amend the three-tier COVID-19 regulations that applied in England at the time.

1.3 Regulation 4(6)(e) inserts new paragraphs 3 and 4 into Schedule 2A to the Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020 (S.I. 2020/1105). The commencement arrangements for the two new paragraphs are different. Because they are inserted by a single paragraph, regulation 1(2)(d) has to use an unwieldy formula to commence them at different times (“regulation 4(6)(e), for the purpose of inserting paragraph 4 into Schedule 2A of the Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020”). It would have been simpler to have each new paragraph inserted by a separate sub-paragraph of regulation 4(6) (which is already subdivided) and commenced independently. The Committee put the point to the Department of Health and Social Care. In a memorandum printed at Appendix 1, the Department accepts that this would have been possible but asserts that the drafting of the differential commencement of those paragraphs is equally effective. The Committee agrees that the two methods are equally effective as a matter of law; but requiring provisions to be commenced differentially for different purposes is less clear for the reader than simply commencing different provisions on different days. Given the innate complexity of regulations such as these which are amending other regulations, it is good legislative practice to keep them as simple as possible. **The Committee accordingly reports regulation 4(6)(e) for failure to comply with proper legislative practice.**

1.4 Regulation 3(4) is a saving provision that, in effect, provides that the removal of certain prohibited activities from a list does not prevent the post-removal prosecution of offences committed before removal. That would be true without the saving provision, because of section 16 of the Interpretation Act 1978. The Committee asked the Department to justify the saving provision. In its memorandum, the Department acknowledges that the saving provision is unnecessary, but argues that it adds “clarity on the face of the Regulations”. Unnecessary provisions rarely add clarity, but they inevitably create confusion (at least) where inserted inconsistently. That has happened here, as the Department failed to insert

a similar saving for the amendments made by regulation 4(6)(b)(iii), an omission which the Department acknowledges; **accordingly the Committee reports regulations 3(4) and 4(6)(b)(ii) for defective drafting, acknowledged by the Department.**

Instruments not reported

At its meeting on 11 November 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

Instruments requiring affirmative approval

S.I. 2020/1155	Heavy Commercial Vehicles in Kent (No. 2) (Amendment) Order 2020
S.I. 2020/1189	Health Protection (Coronavirus, Local COVID-19 Alert Level) (High) (England) (Amendment) (No. 2) Regulations 2020
S.I. 2020/1192	Health Protection (Coronavirus, Local COVID-19 Alert Level) (High) (England) (Amendment) (No. 3) Regulations 2020

Draft Instruments requiring affirmative approval

Draft S.I.	Business and Planning Act 2020 (London Spatial Development Strategy) (Coronavirus) (Amendment) Regulations 2020
Draft S.I.	Import of, and Trade in, Animals and Animal Products (Miscellaneous Amendments) (EU Exit) Regulations 2020
Draft S.I.	Waste and Environmental Permitting etc. (Legislative Functions and Amendment etc.) (EU Exit) Regulations 2020
Draft S.I.	Human Medicines (Amendment etc.) (EU Exit) Regulations 2020
Draft S.I.	Animal Welfare and Invasive Non-native Species (Amendment etc.) (EU Exit) Regulations 2020
Draft S.I.	Customs Safety, Security and Economic Operators Registration and Identification (Amendment etc.) (EU Exit) Regulations 2020
Draft S.I.	European Union Withdrawal (Consequential Modifications) (EU Exit) Regulations 2020
Draft S.I.	Agricultural Products, Food and Drink (Amendment etc.) (EU Exit) Regulations 2020
Draft S.I.	Common Fisheries Policy (Amendment etc.) (EU Exit) (No. 2) Regulations 2020
Draft S.I.	Heavy Commercial Vehicles in Kent (No. 1) (Amendment) Order 2020
Draft S.I.	Immigration (Leave to Enter and Remain) (Amendment) (EU Exit) Order 2020
Draft S.I.	Law Enforcement and Security (Amendment) (EU Exit) Regulations 2020

Draft S.I.	Aquatic Animal Health and Alien Species in Aquaculture, Animals, and Marketing of Seed, Plant and Propagating Material (Legislative Functions and Miscellaneous Provisions) (Amendment) (EU Exit) Regulations 2020
Draft S.I.	Official Controls (Animals, Feed and Food, Plant Health etc.) (Amendment) (EU Exit) Regulations 2020
Draft S.I.	Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020
Draft S.I.	Veterinary Medicines and Residues (Amendment) (EU Exit) Regulations 2020

Instruments subject to annulment

S.I. 2020/1125	Human Medicines (Coronavirus and Influenza) (Amendment) Regulations 2020
S.I. 2020/1132	Air Quality (Amendment) (Northern Ireland Protocol) (EU Exit) Regulations 2020
S.I. 2020/1135	M25 Motorway (Junction 5) (50 Miles Per Hour Speed Limit) Regulations 2020
S.I. 2020/1136	M1 Motorway (Junction 2) (50 Miles Per Hour Speed Limit) Regulations 2020
S.I. 2020/1138	Universal Credit (Earned Income) Amendment Regulations 2020
S.I. 2020/1141	British Nationality (General) (Amendment) Regulations 2020
S.I. 2020/1142	Air Quality (Amendment) (Northern Ireland Protocol) (EU Exit) (Revocation) Regulations 2020
S.I. 2020/1152	National Health Service (Charges to Overseas Visitors) (Amendment) (No.3) Regulations 2020
S.I. 2020/1156	Social Security (Coronavirus) (Prisoners) Amendment Regulations 2020

Draft Instruments subject to annulment

Draft S.I.	London Borough of Merton (Electoral Changes) Order 2020
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Instruments not subject to parliamentary proceedings not laid before Parliament

S.I. 2020/1151	Pollution Prevention and Control (Designation of Directives) (Offshore) Order 2020
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Appendix 1

S.I. 2020/1154

Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium, High and Very High) (England) (Amendment) Regulations 2020

1. In its letter to the Department of Health and Social Care of 4 November 2020, the Committee requested a memorandum on the following points:

1. Given the differential commencement of new paragraph 3 and new paragraph 4 of Schedule 2A to the Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020, explain why they are not inserted by separate paragraphs of regulation 4 of these Regulations.

2. Explain: (a) what effect is achieved by regulation 3(4) that would not be achieved by a combination of section 16 of the Interpretation Act 1978 and silence; and (b) why that effect is not equally required in relation to the amendments made by regulation 4(6)(b)(iii).

2. As a preliminary point, these Regulations (“the principal Regulations”) are now spent as the provisions affected by them have been revoked by regulation 25 of S.I. 2020/1200 (“the National Lockdown Regulations”). This includes paragraphs 3 and 4 of Schedule 2A to the Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020 (“the Very High Regulations”) which is the subject of point (1) of the Committee’s request.

3. In response to point (1), the Department acknowledges that paragraphs 3 and 4 of Schedule 2A to the Very High Regulations could have been inserted by separate paragraphs of regulation 4 of the principal Regulations, but considers that the drafting of the differential commencement of those paragraphs is an equally effective way of achieving the intended objective. The Department notes that there is precedent for differentially commenced provisions to be inserted by a single provision (for example, article 5(b) of S.I. 2018/623 amends article 23(3) of the Air Navigation Order 2016 to insert references to various articles; article 1 provides for article 5(b) to come into force on 30 November 2019 for the purposes of inserting two of those references and otherwise on 30 July 2018).

4. In response to point (2)(a), the Department acknowledges that the effect of regulation 3(4) could have been achieved by a combination of section 16 of the Interpretation Act 1978 and silence, however regulation 3(4) was enacted for consistency with other Coronavirus instruments, including, for example, paragraph 7 of Schedule 3 to S.I. 2020/1103, and to provide clarity on the face of the Regulations in question.

5. In response to point 2(b), the inconsistency between regulation 3(4) and regulation 4(6)(b)(iii) of the principal Regulations was an oversight for which the Department apologises. However, as mentioned in paragraph 1 above, regulation 4(6)(b)(iii) is spent (along with the rest of the principal Regulations) in any event.

Department of Health and Social Care

6 November 2020