House of Lords
House of Commons

Joint Committee
on Statutory Instruments

Thirty-Third Report of Session 2019–21

Drawing special attention to:

National Health Service (Charges and Pharmaceutical and Local Pharmaceutical Services) (Amendment) Regulations 2020 (**S.I. 2020/1126**)

Health Protection (Notification) (Amendment) (Coronavirus) Regulations 2020 (**S.I. 2020/1175**)

Wireless Telegraphy (Licence Award) Regulations 2020 (**S.I. 2020/1199**)

Public Health (Coronavirus) (Protection from Eviction and Taking Control of Goods) (England) Regulations 2020 (**S.I. 2020/1290**)

Ordered by the House of Lords
to be printed 2 December 2020

Ordered by the House of Commons
to be printed 2 December 2020

HL 187
HC 75-xxxiii
Published on 4 December 2020
by authority of the House of Lords
and the House of Commons

Joint Committee on Statutory Instruments

Current membership

House of Lords

Lord Colgrain *(Conservative)*

Lord Haskel *(Labour)*

Baroness Gale (*Labour*)

Baroness Newlove *(Conservative)*

Lord Rowe-Beddoe (*Crossbench*)

Baroness Scott of Needham Market (*Liberal Democrat*)

Lord Stirrup *(Crossbench)*

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*)

Owen Thompson MP *(Scottish National Party, Midlothian)*

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), 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).

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 2 December 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 four 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. 2020/1126: Reported for defective drafting

National Health Service (Charges and Pharmaceutical and Local Pharmaceutical Services) (Amendment) Regulations 2020

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

1.2 These Regulations introduce changes relating to new services and service updates for community pharmacies as part of the Community Pharmacy Contractual Framework deal. They also introduce changes relating to the coronavirus pandemic.

1.3 Regulation 14 amends paragraph 28 of Schedule 4 to the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 (S.I. 2013/349) so that in four places the words "for the promotion of healthy living" and "the promotion of healthy living" are inserted after the words "clinical governance" and "an appropriate environment in which to receive health care". The Committee asked the Department of Health and Social Care to explain how the inserted phrase follows from the words before it. In a memorandum printed at Appendix 1, the Department offers an explanation, but not one that satisfies the Committee that the inserted phrase has a sufficiently clear meaning in the context. **The Committee accordingly reports regulation 14 for defective drafting**.

1.4 (The Department's memorandum also confirms the intended parameters of an amendment made by regulation 10 to paragraph 11 of Schedule 4 to the 2013 Regulations, in response to a question raised by the Committee about an apparent inconsistency with the Explanatory Memorandum to the Regulations.)

2 S.I. 2020/1175: Reported for defective drafting

Health Protection (Notification) (Amendment) (Coronavirus) Regulations 2020

2.1 **The Committee draws the attention of both Houses to these Regulations on the ground that they are defectively drafted in three respects**.

2.2 This instrument amends the Health Protection (Notification) Regulations 2010 (S.I. 2010/659) as they relate to tests for influenza virus and SARS-CoV-2.

2.3 Under regulation 4 of the 2010 Regulations, the operator of a diagnostic laboratory must notify Public Health England where a human sample tests positive for a "causative agent", such as influenza virus or SARS-CoV-2. Regulation 3(d)(iii) of this instrument (inserted sub-paragraph (l)) requires notification of a positive test result for SARS-

CoV-2 to include a person's telephone number and email address. Regulation 4 (inserted regulation 4A) imposes similar notification requirements on test providers that are not diagnostic laboratories, but it requires a telephone number and email address to be included in notifications for both positive and indeterminate SARS-CoV-2 test results. The Committee asked the Department of Health and Social Care to explain the discrepancy. In a memorandum printed at Appendix 2, the Department acknowledges that regulation 3(d)(iii) ought to have inserted the same requirement for indeterminate SARS-CoV-2 test results notified by diagnostic laboratories and undertakes to correct the error at the earliest opportunity. **The Committee accordingly reports regulation 3(d)(iii) for defective drafting, acknowledged by the Department**.

2.4 Regulation 5 of this instrument amends regulation 7 of the 2010 Regulations with the effect that a test provider other than a diagnostic laboratory may use electronic communications to notify PHE of any test result—whether positive, negative, indeterminate or void—for influenza virus or SARS-CoV-2. A diagnostic laboratory, however, may only use electronic communications to notify PHE of a positive or indeterminate SARS-CoV-2 test result or a positive influenza test result. The Committee asked the Department to explain the discrepancy. In its memorandum, the Department acknowledges that it ought to have made the same provision for diagnostic laboratories as for other test providers and undertakes to correct the error at the earliest opportunity. **The Committee accordingly reports regulation 5 for defective drafting, acknowledged by the Department**.

2.5 The Committee also asked the Department to confirm that in regulation 4, inserted regulation 4A(7)–(10) should be numbered 4A(6)–(9), and that both cross-references in what is now regulation 4A(7) should be to paragraph (5). In its memorandum, the Department acknowledges the errors and undertakes to correct them at the earliest opportunity. **The Committee accordingly reports regulation 4 (inserted regulation 4A) for defective drafting, acknowledged by the Department**.

3 S.I. 2020/1199: Reported for defective drafting

Wireless Telegraphy (Licence Award) Regulations 2020

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

3.2 These Regulations are drafted by Ofcom and set out the procedure that will govern the award of wireless telegraphy licences at specified frequencies. Regulation 18(1) provides:

> *(1) Before the first principal stage round OFCOM shall—*
>
> *(a) determine for each bidder; and*
>
> *(b) notify to each bidder an overall bid constraint.*

3.3 The Committee asked Ofcom to confirm that the words "an overall bid constraint" in sub-paragraph (b) are intended also to apply to sub-paragraph (a), and should therefore form a separate line after sub-paragraph (b). In a memorandum printed at Appendix 3, Ofcom acknowledges the error, and **the Committee accordingly reports regulation 18(1) for defective drafting, acknowledged by the Department**.

4 S.I. 2020/1290: Reported for requiring elucidation and for defective drafting

Public Health (Coronavirus) (Protection from Eviction and Taking Control of Goods) (England) Regulations 2020

4.1 **The Committee draws the special attention of both Houses to these Regulations on the grounds that they require elucidation in one respect and are defectively drafted in another respect**.

4.2 These Regulations prevent the enforcement of evictions against residential tenants for a certain period and prevent the use of the taking control of goods procedure inside homes while the national health protection regulations are in force.

4.3 Regulation 2(1) prevents a person from attending a dwelling house for the purposes of executing certain writs or warrants or delivering an eviction notice. Paragraphs (2), (3) and (5) of regulation 2 contain exceptions to that basic prohibition where "the court is satisfied" as to certain matters. The Committee asked the Ministry of Justice to explain how, and at what point in the proceedings, the court will certify satisfaction of the matters specified in regulation 2(2), (3) and (5). In a memorandum printed at Appendix 4, the Department helpfully explains the guidance that has been promulgated within the court service for this purpose. **The Committee accordingly reports regulation 2 for elucidation, provided by the Department's memorandum**.

4.4 Regulation 4(3) is a saving provision which states that the expiry of these Regulations "does not affect the validity of anything done or not done pursuant to these Regulations before they expire." 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 and to explain the meaning of the phrase the "validity … of anything not done". In its memorandum, the Department acknowledges that this saving provision probably adds nothing to the Interpretation Act 1978 and is therefore probably unnecessary and explains its inclusion only by reference to another instrument in which something similar was included. There will be contexts in which it is both meaningful and desirable, or even necessary, to make provision replicating a provision of the Interpretation Act that may have been, or may be thought to have been, contra-indicated in the context. The Department identifies no such desirability or necessity in this case; and the Committee repeats its frequent observation that unnecessary provisions rarely add clarity but regularly cause confusion and should therefore be avoided. In relation to the phrase the "validity of anything … not done", the Department explains that the reference "was intended to avoid argument that a decision not to enter a property or take other steps towards execution of a writ or warrant on account of the restrictions in the instrument might be able to be impugned as not being something "done" under the instrument." The Committee does not understand in what sense a decision not to enter a property might be "impugned" or how it could be attacked as "invalid". It might be necessary to extend the permitted timeframe for the performance of an action which was omitted by reason of the Regulations; and it might be necessary to indemnify against some kind of penalty for inaction that was referable to the Regulations; but preserving the "validity" of something not done achieves neither these aims nor any other aim and is simply not a meaningful legislative proposition. **The Committee accordingly reports regulation 4(3) for defective drafting**.

Instruments not reported

At its meeting on 2 December 2020 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. 2020/1309 Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020

S.I. 2020/1326 Health Protection (Coronavirus, Restrictions) (England) (No. 4) (Amendment) (No. 2) Regulations 2020

Draft Instruments requiring affirmative approval

Draft S.I. Antique Firearms Regulations 2020

Instruments subject to annulment

S.I. 2020/1129 Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 19) Regulations 2020

S.I. 2020/1203 Education (Student Fees, Awards and Support etc.) (Amendment) (No. 3) Regulations 2020

S.I. 2020/1247 Statutory Auditors and Third Country Auditors (Amendment) (EU Exit) (No. 2) Regulations 2020

S.I. 2020/1274 Financial Services (Gibraltar) (Amendment) (EU Exit) Regulations 2020

S.I. 2020/1275 Payment Services and Electronic Money (Amendment) Regulations 2020

S.I. 2020/1278 Yemen (Sanctions) (EU Exit) (No. 2) Regulations 2020

S.I. 2020/1292 Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 24) Regulations 2020

S.I. 2020/1294 Seeds (Amendment etc.) (EU Exit) Regulations 2020

S.I. 2020/1296 Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) (Amendment) Regulations 2020

S.I. 2020/1301 Financial Services and Economic and Monetary Policy (Consequential Amendments) (EU Exit) Regulations 2020

Instruments not subject to parliamentary proceedings not laid before Parliament

S.I. 2020/1257 Anguilla Constitution (Amendment) Order 2020

S.I. 2020/1263 Burundi (Sanctions) (Overseas Territories) Order 2020

S.I. 2020/1264 Burma (Sanctions) (Overseas Territories) Order 2020

S.I. 2020/1266 Guinea (Sanctions) (Overseas Territories) Order 2020

S.I. 2020/1267 Chemical Weapons (Sanctions) (Overseas Territories) Order 2020

S.I. 2020/1279 Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Commencement) Regulations 2020

Appendix 1

S.I. 2020/1126

National Health Service (Charges and Pharmaceutical and Local Pharmaceutical Services) (Amendment) Regulations 2020

1. In its letter to the Department of 18 November 2020, the Committee requested a memorandum on the following points:

> *(1) In relation to the phrase inserted by regulation 14(2), (3), (4)(a) and (4)(e), explain how it follows from the words before it.*
>
> *(2) Paragraph 11(1) of Schedule 4 to the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 as amended by regulation 10 requires a pharmacist to give details of alternative pharmacies only "if requested to do so by any person"; is that intended?*

2. The Department's response is as follows.

3. In response to point (1), the first three of the amendments made by regulation 14 that the Committee has highlighted extend the scope of the "acceptable system" required by paragraph 28 of Schedule 4 to the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 ("the 2013 Regulations"), so that in addition to being an acceptable system of clinical governance it also has to be an acceptable system for the promotion of healthy living.

4. The need for the clinical governance arrangements, and now for the promotion of healthy living arrangements, to be part of an "acceptable system" is not directly referenced in the title of the paragraph, but is to be inferred from paragraph 28(1) and (2) of Schedule 4.

5. Paragraph 28(2) of Schedule 4 then lists the components of the "acceptable system", and the fourth amendment highlighted by the Committee is of particular relevance to the promotion of healthy living, i.e. the premises standards programme.

6. The policy context for these amendments is outlined in paragraph 2.3 and the first bullet point of paragraph 7.2 of the Explanatory Memorandum. As it says in paragraph 2.3, community pharmacies are required to adhere to the ethos of Healthy Living Pharmacies. This carries with it staff training obligations, and certain health promotion materials have to be made available at the pharmacy premises—in the case of a pharmacy that provides services face to face rather than under distance selling arrangements. Pharmacies that are exclusively distance selling pharmacies have to set up health promotion zones on their websites (the new paragraph 28C of Schedule 4).

7. The Department would accept that, rather than modifying paragraph 28 of Schedule 4, it could have made separate provision for having an acceptable system for the promotion of healthy living. However, as we would hope is apparent from the fourth amendment highlighted by the Committee, it would, in practice, be difficult to separate out what made

a pharmacy an appropriate environment in which to receive health care from what made it an appropriate environment for the promotion of healthy living. When would advice and support in relation to cessation of smoking, for example, be one and not the other?

8. In response to point (2), the Department can confirm that the Committee's understanding of the amendment made to paragraph 11 of Schedule 4 to the 2013 Regulations is correct. Pharmacy staff do not have to volunteer information about other pharmacies, who may be commercial rivals (or part of the same chain), but do have to provide the information if asked. However, if the patient needs a prescription to be dispensed via the Electronic Prescription Service, and the Service is temporarily unavailable at the pharmacy, paragraph 9(2A) of Schedule 4, as amended by regulation 8(a) of S.I. 2020/1126, provides a fuller list of the pharmacy's responsibilities in that situation.

Department of Health and Social Care

24 November 2020

Appendix 2

S.I. 2020/1175

Health Protection (Notification) (Amendment) (Coronavirus) Regulations 2020

1. In its letter to the Department of Health and Social Care of 18 November 2020, the Committee requested a memorandum on the following points:

> *1. In regulation 4, confirm that inserted regulation 4A(7)–(10) should be numbered 4A(6)–(9), and that both cross-references in what is now regulation 4A(7) should be to paragraph (5).*
>
> *2. Explain why regulation 4 (inserted regulation 4A(5)(a)(viii) and (ix)) requires a test provider to include a telephone number and an email address when notifying PHE that a SARS-CoV-2 test result is either positive or indeterminate, but regulation 3(d)(iii) (inserted sub-paragraph (l)) requires a diagnostic laboratory to include that information only when a SARS-CoV-2 test result is positive.*
>
> *3. Explain why regulation 5 amends regulation 7 of the 2010 Regulations to allow test providers to use electronic communications to send notification of any SARS-CoV-2 and influenza test results under new regulation 4A(3), but does not make corresponding provision for diagnostic laboratories to use electronic communications to send notification of negative or void SARS-CoV-2 test results or indeterminate, negative or void influenza test results under new regulation 4(1A).*

2. In response to point (1), the Department confirms that this is the case. The Department will seek to rectify this at the earliest opportunity.

3. In response to point (2), this was an oversight. It is the Department's intention to amend inserted sub-paragraph (l) (of regulation 4(2) of the 2010 Regulations) at the earliest opportunity to require a diagnostic laboratory to additionally provide a telephone number and an email address (insofar as that information is known) when notifying PHE that a SARS-CoV-2 test result is indeterminate.

4. In response to point (3), this was an oversight. Regulation 7 of the 2010 Regulations should have been additionally amended to permit diagnostic laboratories to use electronic communications to send notification of test results under new regulation 4(1A). It is the Department's intention to amend regulation 7 to that effect at the earliest opportunity.

5. The Department apologises for the above errors and is grateful to the Committee for bringing them to its attention.

Department of Health and Social Care

24 November 2020

Appendix 3

S.I. 2020/1199

Wireless Telegraphy (Licence Award) Regulations 2020

1. The Committee has asked Ofcom to submita memorandum on the following point:

> *Confirm that, in regulation 18(1), the words "an overall bid constraint" should apply to both paragraphs (a) and (b), not just to paragraph (b).*

2. For ease of reference, regulation 18(1)of the statutory instrument reads as follows:

> "18.—(1) Before the first principal stage round OFCOM shall—
>
> (a)determine for each bidder; and
>
> (b)notify to each bidder an overall bid constraint."

3. Ofcom confirms that the Committee's understanding is correct and the words "an overall bid constraint" should apply to both paragraphs (a) and (b) of regulation 18(1).

Ofcom

24 November 2020

Appendix 4

S.I. 2020/1290

Public Health (Coronavirus) (Protection from Eviction and Taking Control of Goods) (England) Regulations 2020

1. On 18 November 2020, the Committee requested that the Ministry of Justice submit a memorandum relating to the above instrument asking the Ministry of Justice, to explain:

> *"1. Explain how, and at what point in the proceedings, the court will certify satisfaction of the matters specified in regulation 2(2), (3) and (5).*
>
> *2. In relation to regulation 4(3) explain*
>
> *a) what it adds to section 16(1) and (2) of the Interpretation Act 1978, and*
>
> *b) what the phrase "does not affect the validity of anything … not done pursuant to these Regulations" is intended to mean."*

2. The Department is grateful for the Committee's consideration of this instrument and sets out below its answers to the matters raised.

3. In relation to the Committee's question 1, the judiciary have agreed guidance as to how courts will approach the question of its satisfaction. The process is as follows:

> i. New possession orders: from now until 11 January 2021, when making an order for possession the court will record in the order if it is satisfied that the order falls within one of the exemptions (specifying which regulation). This includes the exemption for pre-Covid rent arrears, although in this instance the claimant will need to provide a detailed calculation of rent arrears showing precisely how they meet the definition in the exemption.
>
> ii. Where an exemption is not identified on the order (including orders made prior to 17 November: the claimant should make an application by filing an N244 application under Part 23 of the Civil Procedure Rules, requesting the Court "to declare itself satisfied of the following matter set out at [specify which paragraph of Regulation 2], namely [specify the matter]". This should be 'on notice'. The application should be sent to the court that made with the original possession order.

4. No fee is payable for the application described above, as the Lord Chancellor has exercised his discretionary power to remit fees due to the exceptional circumstances engendered by the pandemic, which has led to the necessity to prevent evictions taking place, except in the most serious circumstances, for reasons of public health.

5. The court will then seek to list the application for hearing on the next possession day with time available, having regard to the possession proceedings listing priorities issued by the Master of the Rolls.

6. In relation to the Committee's question 2, it is acknowledged by the Department that section 16 of the IA 1978 may well cover the aim of ensuring that expiry of the instrument will not render invalid that which was validly done under the instrument while it was in force. The Department was, however, conscious of the presence of a similar provision in regulation 23(2) of the Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020 (S.I. 2020/1200), to which this instrument refers, and wished to avoid an inference adverse to anything done under this instrument being drawn from absence of such a provision in this instrument. The additional reference to something "not done" under this instrument was intended to avoid argument that a decision not to enter a property or take other steps towards execution of a writ or warrant on account of the restrictions in the instrument might be able to be impugned as not being something "done" under the instrument.

Ministry of Justice

23 November 2020