



House of Lords
House of Commons

Joint Committee on Statutory
Instruments

Forty-Second Report of Session 2022–23

Drawing special attention to:

*Domestic Abuse Act 2021 (Commencement No. 1 and Saving Provisions)
Regulations 2021 (S.I. 2021/797)*

*Education (Student Finance) (Miscellaneous Amendments) Regulations 2023
(S.I. 2023/521)*

*National Health Service (Primary Dental Services) (Amendment) Regulations
2023 (S.I. 2023/554)*

*Ordered by the House of Lords
to be printed 28 June 2023*

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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 Sue Beeby (Committee Operations Officer), Ines Nizigama (Committee Operations Officer), Michael O’Leary (Committee Operations Manager), Christine Salmon Percival (Lords Clerk), Jonathan Whiffing (Commons Clerk). Advisory Counsel: Sarita Arthur-Crow, Klara Banaszak, Justin Leslie, Vanessa MacNair (Commons); Nicholas Beach, James Cooper, and Ché Diamond (Lords).

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Instruments reported

At its meeting on 28 June 2023 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 are given below. The relevant departmental memoranda are published as appendices to this report.

1 S.I. 2021/797: Reported for doubtful vires

Domestic Abuse Act 2021 (Commencement No. 1 and Saving Provisions) Regulations 2021

1.1 The Committee draws the special attention of both Houses to these Regulations on the ground that there is doubt as to whether they are *intra vires* in one respect.

1.2 These Regulations, which are not subject to any parliamentary procedure, commence provisions of the Domestic Abuse Act 2021, including section 78. Regulation 4(1) makes connected savings, namely that specified provisions of the Housing Act 1996 continue to have effect in some cases notwithstanding the commencement of section 78. Although section 86(1)(d) of the 2021 Act expressly confers power to make saving provision in connection with the coming into force of “any of sections 75 to 79”, it is not cited in the preamble. The Committee asked the Ministry of Justice to explain the omission.

1.3 In a memorandum printed at Appendix 1, the Department for Levelling Up, Housing and Communities (with which the policy responsibility lies) acknowledges that the preamble should have cited section 86(1), apologises for the error and undertakes to consider whether to take steps to correct it. As the Committee has noted before, on the basis that the preamble has the legal effect described by the Court of Appeal in *Vibixa Ltd v Komori UK Ltd* [2006] EWCA Civ 536, failure to include a necessary enabling power in the preamble may go to vires. **The Committee accordingly reports regulation 4(1) for doubt as to whether it is *intra vires*.**

2 S.I. 2023/521: Reported for defective drafting

Education (Student Finance) (Miscellaneous Amendments) Regulations 2023

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, which are subject to the negative resolution procedure, amend several instruments to make provision about student finance (implementing a temporary interest rate reduction, inserting a new formula for calculating fixed instalment rates, and correcting several errors). The preamble states that the Secretary of State and the Welsh Ministers make “these Regulations” (implying that both parties are making all the regulations in the instrument). The Committee observed, however, that some provisions apply only in relation to England or to English higher education providers—so would

be outwith the legislative competence of the Welsh Ministers—while some are made in reliance on powers that are exercised only by the Secretary of State. The Committee asked the Department for Education to explain the discrepancy.

2.3 In a memorandum printed at Appendix 2, the Department explains that it considered the context sufficient to clarify that, notwithstanding the broad statement in the preamble, the Welsh Ministers had made only those regulations that relate to Wales, and the Secretary of State, only those that relate to England. It notes that this approach is consistent with earlier related instruments. The Committee accepts that in this case the correct position can be construed from the context, but it remains of the view that the preamble should be an accurate statement about how and by whom the powers are being exercised. The Department undertakes to specify in future which powers are exercised by the Secretary of State in relation to England and which by the Welsh Ministers in relation to Wales. The Committee is grateful for this undertaking **and accordingly reports the preamble for defective drafting.**

3 S.I. 2023/554: Reported for purporting to have retrospective effect without express authority

National Health Service (Primary Dental Services) (Amendment) Regulations 2023

3.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that they purport to have retrospective effect where the parent statute confers no express authority so to provide.**

3.2 These Regulations, which are subject to the negative resolution procedure, allow NHS England unilaterally to vary contracts with dental or orthodontic services providers where they underperform over several consecutive years. Under new paragraph 61A(4) (b) of Schedule 3 (inserted by regulations 2(2)(b) and 3(2)(b) into S.I. 2005/3361 and S.I. 2005/3373 respectively), this is done by means of a rebasing notice that specifies a rebasing date from which the variation takes effect, “which may be any date from 1st April in the financial year in which the rebasing notice is served on the contractor”. This appeared to the Committee to allow contracts to be varied with retrospective effect, where a notice served after 1 April specifies an earlier rebasing date. The Committee asked the Department of Health and Social Care what power is relied on to achieve this element of retrospectivity.

3.3 In a memorandum printed at Appendix 3, the Department explains that it relies on the general powers cited in the preamble. It notes that the regulations amended by this instrument already provide for contracts to be varied by agreement between the parties, “including by reference to a past date”, and explains how such a variation could lead to a degree of retrospection. It appears to assert that it is no different in principle to confer a power on NHS England to vary contracts unilaterally with retrospective effect.

3.4 The Committee disagrees. It is a presumption of statutory construction that a power to make subordinate legislation does not confer the power to make provision having retrospective effect unless it does so expressly. In the Committee’s view, this rule must extend to subordinate legislation conferring power on a person to amend a contract unilaterally and retrospectively to the contractor’s disadvantage. The general enabling

provisions cited by the Department are insufficient to authorise such retrospective provision (it is precisely what the rule is designed to prevent – *see Secretary of State for Energy and Climate Change v Friends of the Earth* [2012] EWCA Civ 28 at [43]). This is particularly important given that the power is designed to be used only where the parties have been unable to agree a variation. The statutory rule does not, of course, prevent the parties to a commercial contract agreeing to vary it in a way that creates a retrospective effect, a position recognised at common law and reflected in paragraph 61 of Schedule 3. The Committee notes, too, that while paragraph 60 of Schedule 3 allows NHS England to vary a contract unilaterally in some circumstances, it expressly provides that the variation may take effect only after it has been notified to the contractor. **The Committee accordingly reports regulations 2(2)(b) and 3(2)(b) for purporting to have retrospective effect without express authority.**

Instruments not reported

At its meeting on 28 June 2023 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. Numbers	S.I. Title
S.I. 2023/616	Republic of Belarus (Sanctions) (EU Exit) (Amendment) Regulations 2023

Draft instruments requiring affirmative approval

S.I. Numbers	S.I. Title
Draft	Official Statistics Order 2023
Draft	Police Act 1997 (Criminal Record Certificates: Relevant Matter) (Amendment) (England and Wales) Order 2023

Instruments subject to annulment

S.I. Numbers	S.I. Title
S.I. 2023/558	Higher Education (Registration Fees) (England) (Amendment) Regulations 2023
S.I. 2023/576	National Health Service Pension Scheme (Member Contributions) (Amendment) Regulations 2023
S.I. 2023/577	Carbon Accounting (Determination of Excess UK Assigned Amount Units) Regulations 2023
S.I. 2023/601	Common Procurement Vocabulary (Amendment) Regulations 2023
S.I. 2023/634	National Health Service (Liabilities to Third Parties Scheme) (England) (Amendment) Regulations 2023
S.I. 2023/649	Policing Protocol Order 2023

Draft instruments subject to annulment

S.I. Numbers	S.I. Title
Draft	Cheltenham (Electoral Changes) Order 2023
Draft	Epping Forest (Electoral Changes) Order 2023

Instruments not subject to Parliamentary proceedings laid before Parliament

S.I. Numbers	S.I. Title
S.I. 2023/605	National Savings (Amendment) Regulations 2023

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. Numbers	S.I. Title
S.I. 2020/1662	European Union (Future Relationship) Act 2020 (Commencement No. 1) Regulations 2020
S.I. 2023/573	Police, Crime, Sentencing and Courts Act 2022 (Commencement No. 7) Regulations 2023
S.I. 2023/620	Mobile Homes (Pitch Fees) (Prescribed Form) (England) Regulations 2023
S.I. 2023/621	Armed Forces Act 2021 (Commencement No. 6) Regulations 2023
S.I. 2023/661	Free Zone (Customs Site No. 2 Solent) Designation Order 2023

Appendix 1: Memorandum from the Ministry of Justice

S.I. 2021/797

Domestic Abuse Act 2021 (Commencement No. 1 and Saving Provisions) Regulations 2021

1) The Committee has asked the Ministry of Justice for a memorandum on the following point:

Explain why section 86(1) is not cited as an enabling power, given that regulation 4(1) makes saving provision in connection with the coming into force of section 78.

2) The policy responsibility for this provision lies with the Department for Levelling Up, Housing and Communities. We have therefore consulted with them, and they have provided the following response:

The Department acknowledges that the preamble to the Regulations should have cited section 86(1) of the Domestic Abuse Act 2021 as the enabling power for the savings provision in regulation 4(1). The Department apologises to the Committee for this error and will consider whether there are any steps it may wish to take in respect of the omission.

Ministry of Justice

20 June 2023

Appendix 2: Memorandum from the Department for Education

S.I. 2023/521

Education (Student Finance) (Miscellaneous Amendments) Regulations 2023

1) The Committee has asked the Department for Education for a memorandum on the following point(s):

Given that, as set out in regulation 4, regulations 5 and 7 apply in relation to England only and regulation 6 applies in relation to English higher education providers, and given that some provisions are made using powers cited in the preamble as having been exercised only by the Secretary of State, explain why the preamble states that the Welsh Ministers make “these Regulations” rather than only the regulations that apply in relation to Wales.

2) As the Committee notes, the preamble to this instrument does not specify which regulations are made by the Secretary of State and which are made by the Welsh Ministers, although it does make clear which powers are exercised by each of those persons. The footnotes to the preamble also explain that the relevant functions of the Secretary of State were transferred to the National Assembly for Wales and subsequently to the Welsh Ministers “in relation to Wales” and “as regards Wales”. Further, the application provision in regulation 4 specifies which regulations apply in relation to England only. We judged that this approach provided clarity about the extent to which the regulations were made by the Welsh Ministers.

3) We also took this approach to the preamble for consistency with the preambles to earlier amendments to the Education (Student Loans) (Repayment) Regulations 2009 (S.I. 2009/470). For example, most recently the preambles to the Education (Student Loans) (Repayment) (Amendment) Regulations 2021 (S.I. 2021/191) and the Education (Student Loans) (Repayment) (Amendment) (No.4) Regulations 2022 (S.I. 2022/1335) both state that the Welsh Ministers make “these Regulations” although the instruments include provision made by the Secretary of State under powers not exercisable by the Welsh Ministers.

4) If the Committee considers it necessary for the preamble to specify which powers are exercised (or which regulations are made) by the Secretary of State and the Welsh Ministers in relation to England and Wales respectively, we will ensure that future instruments adopt that approach.

Department for Education

20 June 2023

Appendix 3: Memorandum from the Department of Health and Social Care

S.I. 2023/554

National Health Service (Primary Dental Services) (Amendment) Regulations 2023

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

Explain what power is relied on to allow NHS England to rebase a contract with retrospective effect under new regulation 61A(4)(b), as inserted by regulations 2(2)(b) and 3(2)(b).

2) The key powers relied on are sections 104(2) and 109(3) of the National Health Service Act 2006 (the 2006 Act) which enable regulations to provide for the variation of contracts and other arrangements for NHS dental services, and section 272(7) and (8) (general powers).

3) Contracts can already be varied by agreement with the contractor, including by reference to a past date – paragraph 61 of Schedule 3 to the National Health Service (General Dental Services Contracts) Regulations 2005, and paragraph 61 of Schedule 3 to the National Health Service (Personal Dental Services Agreements) Regulations 2005.

4) The effect of new paragraph 61A(4)(b), as inserted into those Schedules, is to permit such variation by NHS England without the agreement of the contractor.

5) Currently, where a contractor requests, and the commissioner agrees to, a rebasing (whether temporary or permanent) the resulting contract can be varied at any time in the financial year. This has the effect of reducing a contractor's monthly payment and the associated required activity. Activity delivered from 1st April in the financial year in which the rebasing was agreed contributes to contract reconciliation, at the revised level, at the end of the financial year. Therefore, existing processes already accommodate a degree of retrospection as described below.

6) The significance of NHS England being able to rebase the contract with reference to a past date in the current financial year is therefore merely that that date is the point from which the contractor's delivery of the rebased activity in that financial year is measured. Further, as mentioned above, this can already happen under the current process and the Department does not consider this to involve retrospection in the usual sense.

7) The extent to which there is retrospection is as follows. If the profile of payments for a contractor began a financial year on one premise (e.g. that the contractor will do £120,000 of activity per year and will be paid £10,000 per month on account); and if that premise is "rebased" (e.g. with the recognition that the contracted activity is on course to be £60,000 per annum), then the monthly payments will be adjusted (down from £10,000 in this example). The effect on the contractor is that prospective monthly payments (from

the date of rebasing) are lowered, along with the required activity, so that the contractor is not overcompensated. This also means that the contractor is less likely to be required to repay funds at the end of the year.

8) Thus the variation merely involves aligning the contractual terms with the factual reality of the situation so that the contract reflects the actual activity of the contractor (based on their performance in the three previous financial years) rather than the activity they are contracted to perform but are not, in fact, performing. This would be in circumstances where the underperformance is consistent and persistent and the contractor is aware of that underperformance, has been given notice (via a breach notice under paragraph 61A(3) and performance conversations as part of formal yearly and half-year reviews) and NHS England is unable to agree a permanent variation with the contractor under paragraph 61(3). Rebasing would therefore be a measure of last resort and would not come as a surprise to the contractor. There is scope for NHS England and the contractor to agree a variation on terms more agreeable to both.

9) Further, if, during the financial year in which rebasing would have occurred, the contractor's performance has improved, NHE England has discretion not to rebase.

10) But, assuming that the persistent underperformance is ongoing (which is the more likely scenario in these circumstances) the amendment ensures that NHS England does not need to resort to the undesirable alternative of terminating the contract nor wait until the end of the financial year (or the contractor's agreement) to deploy payments withheld (from monthly payments on account - which NHSE England can already withhold in situations of underperformance) in order to secure dental services from an alternative contractor. This ensures that NHS England can continue to discharge its duty, under section 99 of the 2006 Act, to secure the provision of primary dental services.

11) In exercising its discretion on whether to rebase or not NHS England must act reasonably and take all relevant factors into account.

12) For the reasons above the Department did not consider that explicit language over and above the enabling power in sections 104(2) and 109(3) of the 2006 Act was required.

Department of Health and Social Care

20 June 2023

Formal minutes

Wednesday 28 June 2023

Virtual Meeting

Members present

Jessica Morden, in the Chair

Lord Beith

Lord Chartres

Baroness D’Souza

Peter Grant

Gareth Johnson

Damien Moore

Maggie Throup

Lord Sahota

Baroness Sater

Lord Smith of Hindhead

Report consideration

Draft Report (Forty-Second 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 3.4 read and agreed to.

Annex agreed to.

Papers were appended to the Report as Appendices 1 to 3.

Resolved, That the Report be the Forty-Second 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 5 July at 3.40 p.m.