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House of Commons
Joint Committee on
Statutory Instruments

Forty-Fourth Report of Session 2022–23

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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).

Contacts

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Instruments reported

At its meeting on 12 July 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 two 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 Draft S.I.: Reported for defective drafting

Building Safety (Leaseholder Protections etc.) (England) (Amendment) Regulations 2023

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, which are subject to the affirmative resolution procedure, amend the Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022 (“the 2022 Regulations”). The 2022 Regulations make provision about the recovery by landlords of the costs of remedying defects, where they are unable to recover those costs from tenants as a result of the leaseholder protections conferred by Schedule 8 to the Building Safety Act 2022 (“the 2022 Act”).

1.3 Regulation 5(9) inserts a new paragraph (9) into regulation 3 of the 2022 Regulations. That paragraph provides that, where two or more landlords are liable for the remediation costs by virtue of the 2022 Act, the landlord entitled to recover those costs must give a notice under regulation 3(3) to a least one landlord which meets the “responsible for” criteria in paragraph 2(3) of Schedule 8 to the 2022 Act. Those criteria relate to persons who are responsible for the defect giving rise to the remediation costs.

1.4 No provision is made in the Regulations about the consequences where the landlord fails to give notice in accordance with the requirement imposed by regulation 3(9) of the 2022 Regulations. In a memorandum printed at Appendix 1, the Department for Levelling Up, Housing and Communities explains that it does not intend there to be any consequences for a landlord who fails to comply with the requirement. Instead, the reason for imposing the requirement is to ensure that a person meeting the “responsible for” criteria is always notified and may always be subject to recovery action, but without requiring the landlord to recover from that person. The Committee is not persuaded by this reasoning. The policy of ensuring that a person meeting the “responsible for” criteria is always notified will only be achieved, if the requirement to give notice imposed by regulation 3(9) is effective. In the view of the Committee, a legal obligation cannot be effective if a person on whom it is imposed can ignore it with impunity, because the obligation is not capable of being enforced. **The Committee accordingly reports regulation 5(9) for defective drafting in so far as it relates to the insertion of new regulation 3(9) of the 2022 Regulations.**

2 S.I. 2023/571: Reported for defective drafting

School Discipline (Pupil Exclusions and Reviews) (England) (Amendment and Transitional Provision) 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 seven respects.**

2.2 These Regulations, which are subject to the negative resolution procedure, make amendments to the procedures relating to pupil exclusions from maintained schools, pupil referral units and Academies in England. In this context, “the responsible body” is the governing body for a maintained school, the management committee for a pupil referral unit and the proprietor for an Academy (section 51A(10) of the Education Act 2002 (as modified by regulation 21(5) of S.I. 2012/1033)). On this basis, the Committee asked the Department for Education to confirm whether the references to “governing body” in provisions relating to pupil referral units (regulation 9(4), inserted paragraphs (3D) and (3G)) and provisions relating to Academies (regulation 12(4), inserted paragraphs (3D) and (3G)) are correct. In a memorandum printed at Appendix 2, the Department confirms that the references in regulation 9(4) should be to “management committee” and the references in regulation 12(4) should be to “proprietor”. The Department also gave the following required confirmations: that the reference to “governing body” in a provision relating to review panels (regulation 14(4)(c), inserted sub-paragraph (4E)) should be to “arranging authority” and that the cross references to paragraph (4)(a) in regulation 16(2) and paragraph (4)(b) in regulation 16(3) should be to paragraphs (a) and (b) of the definition of “scrutiny” in regulation 15. The Department undertakes to make an amending instrument as soon as possible. **The Committee accordingly reports regulations 9(4), 12(4), 14(4), 16(2) and 16(3) for defective drafting, acknowledged by the Department.**

Instruments not reported

At its meeting on 12 July 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. 2023/713	Russia (Sanctions) (EU Exit) (Amendment) (No. 3) Regulations 2023

Draft instruments requiring affirmative approval

S.I. Numbers	S.I. Title
Draft	Environmental Permitting (England and Wales) (Amendment) Regulations 2023
Draft	Human Medicines (Amendment Relating to Original Pack Dispensing) (England and Wales and Scotland) Regulations 2023
Draft	Postal Packets (Miscellaneous Amendments) Regulations 2023

Instruments subject to annulment

S.I. Numbers	S.I. Title
S.I. 2023/664	Scotland Act 2016 (Social Security) (Disability Living Allowance) (Amendment) Regulations 2023
S.I. 2023/689	Feed Additives (Form of Provisional Authorisations) (Cobalt (II) Compounds) (England) Regulations 2023
S.I. 2023/695	Export Control (Amendment) Regulations 2023

Appendix 1: Memorandum from the Department for Levelling Up, Housing and Communities

Draft S.I.

Building Safety (Leaseholder Protections etc.) (England) (Amendment) Regulations 2023

1. The Committee has asked the Department for Education for a memorandum on the following points:

(1) Regulation 5(9) inserts a new regulation 3(9) into SI 2022/859. Explain the consequences of a failure to comply with the requirement imposed by regulation 3(9).

(2) The following impose new requirements:

- regulation 6(10A) of S.I. 2022/859 inserted by regulation 8(4);
- regulation 6(1)(e) of S.I. 2022/711 inserted by regulation 11(2);
- regulation 6(9) of S.I. 2022/711 inserted by regulation 11(8).

In each case there is a time limit for compliance which is triggered by the happening of an event. But, unlike the amendments made by regulations 5, 6 and 7, there are no transitional provisions which disapply the requirement where the event took place before the coming into force of the Regulations. Explain the reasons for the difference in approach.

Question (1)

2. Regulation 3 of SI 2022/859 is concerned with the recovery of amounts as between landlords where, as a consequence of paragraph (2) of Schedule 8 to the Building Safety Act 2022, no service charge is payable under a lease of premises in certain buildings for certain costs relating to certain defects if the landlord under the lease or any superior landlord on 14 February 2022 was responsible for the defect or was associated with a person who was responsible for the defect.

3. Regulation 3 of SI 2022/859 provides that a landlord (L) who has paid or is liable to pay costs relating to certain defects (the remediation amount) which L is unable to recover from the qualifying leaseholders through the service charge as a consequence of paragraph 2 of Schedule 8 to the Buildings Safety Act 2022 may recover the remediation amount from the responsible landlord, that is the person who was the landlord or superior landlord on 14 February 2022 and who was responsible for the defect concerned or was associated with a person who was responsible.

4. Regulation 3 sets out the process that L must follow to recover the costs from the responsible landlord. That recovery process starts with L giving a notice to the responsible landlord or landlords under regulation 3(3). L can only recover costs from a responsible landlord who has been served with a notice.

5. Regulation 3(9) of SI 2022/859 (inserted by regulation 5(9)) provides that, where more than one landlord is liable for remediation costs under the Act (that is to say under regulation 3(2), 4(2), and 5(2)), L must give a notice under paragraph (3) to any landlord which fulfils the “responsible for” criteria in paragraph 2(3) of Schedule 8 to the Building Safety Act 2022, and can then choose to give a notice to a landlord who was liable under any other provision.

6. The intention is not that there should be any consequences for L of not complying with the requirement imposed by regulation 3(9) but that a landlord who was the developer or is connected with the developer should always be notified and may always be pursued, without requiring L to pursue that landlord and leaving it open to L to pursue another landlord who is liable, for example by meeting the contribution condition (under paragraph 3 of Schedule 8 to the Building Safety Act 2022).

Question (2)

7. The reason for the different approach taken in these regulations is that the amendments made by regulations 5, 6, and 7 are to a process and where this process has begun but not concluded before the amendments come into force, there has to be certainty that the commenced process will continue; by contrast the new requirements in regulation 6(10A) of SI 2022/859, and regulations 6(1)(e) and 6(9) of SI 2022/711 apply prospectively to events which happen after the coming into force of the regulations, and do not apply to events which took place before the coming into force of the regulations; therefore no transitional provision is required.

8. Regulation 6(10A) of SI 2022/859, inserted by regulation 8(4), provides that within one week of receiving a leaseholder deed of certificate, the current landlord must provide a copy of the certificate to any RMC, RTM company or named manager in relation to the building to which the certificate relates. The consequences of failing to comply with this requirement are set out in regulation 6(10B).

9. Regulation 6(1)(e) of SI 2022/711, inserted by regulation 11(2), creates an additional circumstance in which a current landlord must provide a certificate to a leaseholder, that is within four weeks of the current landlord becoming aware of a new leaseholder deed of certificate that complies with two conditions. The consequences of failing to comply with this requirement are set out at regulation 6(7).

10. Regulation 6(9) of SI 2022/711, inserted by regulation 11(8), requires a current landlord to provide to certain specified persons a copy of a landlord’s certificate within one week of providing the certificate to a leaseholder. The consequences of a failure to comply are set out at regulation 6(10).

11. Regulations 5, 6, and 7 amend regulations 3, 4, and 5 respectively of SI 2022/859 which make provision for the recovery of amounts as between landlords under various paragraphs of Schedule 8 to the Building Safety Act 2022. In each case, the recovery

process is begun by the giving of a notice, and in each case a transitional provision (in regulation 5(2), 6(2), and 7(2)) applies so that changes made to the recovery process do not apply in respect of a notice given before the date on which the regulation comes into force.

12. These transitional provisions are necessary because, in each case, there will be instances where, on the date the SI comes into force, the process of recovery will be in train following the giving of a notice before that date. Without the transitional provisions, the person applying for remediation costs would find themselves in a process which would not work in relation to the notice that they had given under the old regime. The transitional provisions provide certainty as to which process applies.

13. By contrast, the changes made by regulations 8(4), 11(2), and 11(8) do not change a process which a person affected by the regulations will be following on the date on which the new regulations will come into force. They set a deadline for compliance with a new prospective duty which itself only has effect on the day that the regulations come into force and therefore do not apply in relation to any action which occurred before the coming into force date; the deadline for compliance can only apply in relation to a trigger that happens after the regulations come into force.

14. In the case of the duty in regulation 6(10A): the duty to provide a copy of the certificate in question to the specified persons only applies after the regulation comes into force and the deadline for compliance only applies to that duty once it is in force. If the current landlord received the leaseholder deed of certificate before the date on which the regulations come into force, there is no duty to provide a copy of that certificate and therefore no time limit for compliance and so no consequence for failure to comply at all or within the deadline.

15. In the case of the duty in regulation 6(1)(e): the duty to provide a certificate in this new circumstance only applies after the regulation comes into force. So, where the current landlord becomes aware of a new leaseholder deed of certificate in the circumstances described in regulation 6(1)(3) before the regulations come into force, the duty under 6(1)(e) does not apply to that event, so neither the duty nor the time limit for complying applies.

16. In the case of the duty in regulation 6(9): the duty to provide a copy of the landlord's certificate to the specified person only applies where the current landlord has provided a certificate to the leaseholder; the duty can only apply once the regulation is in force, and therefore neither the duty nor the deadline can apply before the SI comes into force.

17. For these reasons, the Department does not agree that transitional provisions are required in relation to the regulations referred to in question (2). In short, the new time limits introduced by these amendments do not apply to an existing duty but to a new duty created by the amendments; as the new duty applies only after the amending regulations come into force so the time limit for compliance also only applies to a trigger event which occurs after the amending regulations come into force.

Department for Levelling Up, Housing and Communities

4 July 2023

Appendix 2: Memorandum from the Department for Education

S.I. 2023/571

School Discipline (Pupil Exclusions and Reviews) (England) (Amendment and Transitional Provision) Regulations 2023

1. The Committee has asked the Department for Education for a memorandum on the following points:

1. Confirm whether the references to “governing body” in regulation 9(4) (inserted paragraphs (3D) and (3G)), regulation 12(4) (inserted paragraphs (3D) and (3G)) and regulation 14(4)(c) (inserted sub-paragraph (4E)) are correct.

2. Confirm whether the cross references to paragraph (4)(a) in regulation 16(2) and paragraph (4)(b) in regulation 16(3) are correct.

2. The Department is grateful to the Committee for raising these points. The references mentioned are not correct.

3. Specifically:

- a) the references to “governing body” in regulation 9(4) should instead refer to “management committee”;
- b) the references to “governing body” in regulation 12(4) should instead refer to “proprietor”;
- c) the reference to “governing body” in regulation 14(4)(c) should instead refer to “arranging authority”;
- d) the reference to paragraph 4(a) in regulation 16(2) should refer to paragraph (a) of the definition of “scrutiny” in regulation 15;
- e) the reference to paragraph 4(b) in regulations 16(3) should refer to paragraph (b) of that definition.

4. The Department apologises for these errors and intends to make an appropriate amending instrument as soon as possible.

Department for Education

3 July 2023

Formal Minutes

Wednesday 12 July 2023

Virtual meeting

Members present

Jessica Morden, in the Chair

Lord Beith

Lord Chartres

Baroness D’Souza

Peter Grant

Damien Moore

Lord Sahota

Baroness Sater

Lord Smith of Hindhead

Report consideration

Draft Report (*Forty-Fourth 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 2.2 read and agreed to.

Annex agreed to.

Papers were appended to the Report as Appendices 1 to 2.

Resolved, That the Report be the Forty-Fourth 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 19 July at 3.40 p.m.