House of Lords
House of Commons

Joint Committee on Statutory Instruments

Thirty-Ninth Report of Session 2019–21

Drawing special attention to:

Civil, Criminal and Family Justice (Amendment) (EU Exit) Regulations 2020 (**S.I. 2020/1493**)

Tax Credits, Childcare Payments and Childcare (Extended Entitlement) (Coronavirus and Miscellaneous Amendments) Regulations 2020 (**S.I. 2020/1515**)

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Joint Committee on Statutory Instruments

Current membership

House of Lords

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Baroness Gale (*Labour*)

Lord Haskel *(Labour)*

Baroness Newlove *(Conservative)*

Lord Rowe-Beddoe (*Crossbench*)

Baroness Scott of Needham Market (*Liberal Democrat*)

Lord Smith of Hindhead (*Conservative*)

House of Commons

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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

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Instruments reported

At its meeting on 3 February 2021 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. 2020/1493: Reported for requiring elucidation

Civil, Criminal and Family Justice (Amendment) (EU Exit) Regulations 2020

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

1.2 This instrument, which is subject to the negative resolution procedure, amends a number of statutory instruments that made provision in relation to the United Kingdom's exit from the European Union.

1.3 The lists in regulations 5(2) and (3), 8(2) and 9(2) use internally inconsistent punctuation, with semicolons at the end of most sub-paragraphs, but a comma in sub-paragraphs that end with a conjunction. The Committee has commented on this issue before, noting a preference for legislation to comply with standard rules of punctuation (which would normally call for all equal items in a list to be separated by the same type of mark) and stressing the importance of consistency (*Fourth Report of Session 2019–21*—S.I. 2020/3). The Committee asked the Ministry of Justice to explain this usage and invited it to consult with the Government Legal Department's Statutory Instrument Drafting Hub before replying. In a memorandum printed at Appendix 1, the Department asserts that this is a question of drafting style and that although it produces internal inconsistency within provisions, the differentiation has been applied consistently within this instrument (both of which assertions the Committee accepts). The Department accepts that drafting practice in this respect is inconsistent throughout Government, and states that the Statutory Instrument Hub is considering issuing guidance to promote general consistency. The Committee hopes that guidance will indeed be issued, as inconsistency on a matter of this kind is distracting for readers, albeit that in this case it is difficult to imagine that it could create arguments as to meaning. The Committee further hopes that before the Government determines that the usage in this instrument should be adopted throughout the statute book it will consult a range of non-Government stakeholders who are regularly required to read legislation, and allow their views as to what they find most stylistically pleasing to determine the policy.

1.4 **In the meantime, the Committee reports the Regulations for requiring elucidation, provided by the Department's memorandum.**

2 S.I. 2020/1515: Reported for defective drafting

Tax Credits, Childcare Payments and Childcare (Extended Entitlement) (Coronavirus and Miscellaneous Amendments) 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 two respects.**

2.2 These Regulations, which are subject to the negative resolution procedure, amend instruments relating to tax credits, tax-free childcare and the entitlement to 30 hours of free childcare in response to the coronavirus emergency.

2.3 Regulation 3 amends the Tax Credits (Definition and Calculation of Income) Regulations 2002 (S.I. 2002/2006), which define what counts as income for the purposes of calculating tax credit entitlement. The amendments include adding three types of payment to the list of sums that are disregarded for the purpose of that calculation. Regulation 3(3)(d) adds:

> *"Any payment, made under the scheme known as the Covid Winter Grant Scheme in respect of England, or any other scheme established by the Northern Ireland Executive, the Scottish Government or the Welsh Government for the purpose of providing financial support to families and vulnerable individuals to assist with the cost of food and utilities over the same period."*

2.4 The Committee asked the Treasury what the words "over the same period" are intended to refer to and qualify. In a memorandum printed at Appendix 2, Her Majesty's Revenue and Customs (responding on behalf of the Treasury) acknowledge that the words were included in error. The Department suggests that the provision "can still be interpreted in line with the policy intention". Although the Committee agrees that such an interpretation is possible, it is not certain: the courts will apply the presumption of meaning, as a result of which they might conclude, for example, that the superfluous words are intended to mean that payments made under schemes established by the devolved governments may only be disregarded if those schemes cover the same period as the English scheme, which would not be consistent with the stated policy intention. **The Committee accordingly reports regulation 3(3)(d) for defective drafting, acknowledged by the Department.**

2.5 Regulation 4 amends the Childcare Payments (Eligibility) Regulations 2015 (S.I. 2015/448); regulation 5 amends the Childcare (Early Years Provision Free of Charge) (Extended Entitlement) Regulations 2016 (S.I. 2016/1257). Entitlement in both cases depends on a person being in "qualifying paid work". Regulations 4(3) and 5(3) accordingly expand "qualifying paid work" to cover circumstances in which a person in paid work does not meet the income thresholds due to coronavirus, but they are receiving or eligible for payments made under a coronavirus support scheme. Where a person has made a claim, inserted paragraph (c)(ii) requires that they are "reasonably anticipating receiving payments". Where a person intends to make a claim, paragraph (c)(iii) requires that they have "the reasonable expectation of the claim being agreed". The Committee asked the Department to explain the intended difference in meaning between these requirements. In its memorandum, the Department explains that no difference in meaning was intended and accepts that consistent language should therefore have been used. The Department adds that in this case the inconsistency cannot cause confusion, but the Committee is less sure on that point than the Department. The presumption that change of language indicates change of meaning and the ingenuity of lawyers combined could conceivably attach significance to the different natural meanings of "expectation" and "anticipation" in this context. Be that is it may, the Department does not dissent from the proposition that consistency of language to reflect consistency of meaning is a core principle of legislative drafting, and **the Committee accordingly reports regulations 4(3) and 5(3) for defective drafting, acknowledged by the Department.**

Instruments not reported

At its meeting on 3 February 2021 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

Draft Instruments requiring affirmative approval

Draft S.I.	Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) (Amendment) Order 2021
Draft S.I.	Automatic Enrolment (Earnings Trigger and Qualifying Earnings Band) Order 2021
Draft S.I.	Electricity Supplier Payments (Amendment) Regulations 2021
Draft S.I.	Northamptonshire (Structural Changes) (Supplementary Provision and Amendment) Order 2021

Instruments subject to annulment

S.I. 2020/1372	The Immigration (Citizens' Rights etc.) (EU Exit) Regulations 2020
S.I. 2020/1595	Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 29) Regulations 2020

Instruments not subject to parliamentary proceedings not laid before Parliament

S.I. 2020/1565	Local Audit and Accountability Act 2014 (Commencement No. 7, Transitional Provisions and Savings) (Amendment) Order 2020
S.I. 2020/1641	Value Added Tax and Excise Duties (Appointed Day) (EU Exit) Regulations 2020

Appendix 1

S.I. 2020/1493

Civil, Criminal and Family Justice (Amendment) (EU Exit) Regulations 2020

1. On 20 January 2021, the Committee requested that the Ministry of Justice submit a memorandum on the following points:

> *"Explain why the lists in regulations 5(2) and (3), 8(2) and 9(2) use inconsistent punctuation (i.e. semicolons at the end of most sub-paragraphs, but a comma in a sub-paragraph that ends with a conjunction). (The Committee invites the Department to consult with the SI Hub before submitting its memorandum.)"*

2. The Department is grateful for the Committee's consideration of this instrument, and responds as set out below.

3. The Committee is correct to note that in regulations 5(2) and (3), 8(2) and 9(2), each of the sub-paragraphs end with a semi-colon with the exception of those that include a conjunction ("and"); these provisions use a comma before the conjunctions.

4. The Ministry of Justice is aware that departments take differing approaches with respect to this issue, with some preferring to maintain the use of semi-colons after all sub-paragraphs, including those that end with a conjunction. It is the Department's view that this is a question of drafting style, and the approach adopted in this particular instrument has been applied consistently throughout.

5. More generally, the GLD SI Hub is considering whether to issue guidance about this issue in order to promote consistency across SI drafting within the Government Legal Department.

Ministry of Justice

26 January 2021

Appendix 2

S.I. 2020/1515

Tax Credits, Childcare Payments and Childcare (Extended Entitlement) (Coronavirus and Miscellaneous Amendments) Regulations 2020

1. In its letter to HM Treasury of 20th January 2021, the Joint Committee requested a memorandum on the following points:

> *(1) In regulation 3(3)(d), inserted entry 40, explain what the words "over the same period" are intended to refer to and qualify.*
>
> *(2) In relation to regulations 4(3) and 5(3), inserted sub-paragraph (c), explain the intended difference in meaning between "reasonably anticipating receiving payments under a coronavirus support scheme" and having "the reasonable expectation of the claim [that is intended to be made under a coronavirus support scheme] being agreed".*

2. This memorandum has been prepared by Her Majesty's Revenue and Customs on behalf of HM Treasury.

3. The purpose of the insertion of entry 40 is to ensure that payments under the Covid Winter Grant scheme and similar schemes established by the devolved administrations are disregarded for the purposes of calculating a person's income when determining eligibility for tax credits. We acknowledge that the words "over the same period" were included in error, but we consider that in context the provision can still be interpreted in line with the policy intention. Thank you for drawing this to our attention.

4. The purpose of regulations 4(3)(c) and 5(3)(c) are to provide a further category of eligibility in relation to those persons affected adversely by coronavirus. Sub-paragraph (ii) concerns the circumstances where a person has made a claim under a coronavirus scheme and has not yet received any payment, but reasonably believes that they will be paid. Sub-paragraph (iii) addresses the situation where a person has not yet made a claim under a coronavirus scheme, but who intends to do so with the reasonable belief that they will be paid. We accept that 'anticipate' and 'expect' have the same meaning and it would have been preferable to phrase the two provision in the same way, however we do not anticipate any confusion arising from using the different terms in this context.

Her Majesty's Revenue and Customs

26 January 2021