



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

**Forty-Fifth Report
of Session 2019–21**

Drawing special attention to:

Health Protection (Coronavirus) (Wearing of Face Coverings in a Relevant Place and Restrictions: All Tiers) (England) (Amendment) Regulations 2021 (S.I. 2021/247)

School and Early Years Finance (England) Regulations 2021 (S.I. 2021/59)

Criminal Legal Aid (Remuneration) (Amendment) Regulations 2021 (S.I. 2021/80)

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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

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Instruments reported

At its meeting on 24 March 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 three 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. 2021/247: Reported for defective drafting and for requiring elucidation

Health Protection (Coronavirus) (Wearing of Face Coverings in a Relevant Place and Restrictions: All Tiers) (England) (Amendment) Regulations 2021

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

1.2 These Regulations, which are subject to the made affirmative resolution procedure: (a) make provision in relation to the wearing of face coverings in polling stations; and (b) require travellers intending to leave the common travel area to complete a travel declaration form and present it to relevant persons when directed to do so.

1.3 Regulation 2 amends the Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place) (England) Regulations 2020. Regulation 5 of the 2020 Regulations (enforcement of requirement to wear a face covering whilst entering or remaining within a relevant place) is amended by the insertion of new paragraph (7A), which states that the powers under regulation 5 may not be exercised in respect of a polling station “so as to prevent a voter who is otherwise entitled to vote at the polling station in any such election or referendum from doing so”. The Committee asked the Department of Health and Social Care to explain whether new regulation 5(7A) is intended to amount to an exemption for persons voting at a polling station from wearing masks. In a memorandum printed at Appendix 1, the Department asserts that regulation 5(7A) is not intended to amount to an exemption from wearing a face covering, and that the intended effect is that “if a person entitled to vote at that polling station ... refuses to wear a face covering, that person cannot be subject to the enforcement powers in regulation 5 ... until they have had an opportunity to vote”. By analogy with a similar provision elsewhere in election law, the Department asserts that “regulation 5(7A) does not prevent the voter being in breach of regulation 3(1), and therefore being subject to removal, a fine or other sanction after they have had the opportunity to vote”. The Committee remains unclear as to the effect of this provision. The Department’s explanation suggests that a person could be permitted to enter without a mask, allowed to vote, and then penalised for having failed to wear a mask on entry. The words of the inserted provision appear to the Committee to be capable of a range of meanings. A person might argue that the regulation 5 powers were being used to prevent them from voting if they were threatened with a penalty for entering without wearing a mask, irrespective of whether the penalty was to be imposed before or after they cast their vote. On the other hand, a returning officer could refuse entry to a person not wearing a mask and argue that this was not preventing them from voting at all provided that they complied with the requirement to wear a mask. The Department’s

interpretation is also possible, although, to say the least, no more intuitive than the others. If the intention is that penalties can be imposed but only after a person has cast their vote, that could and should have been expressed clearly and simply; and the **Committee accordingly reports regulation 2 for defective drafting.**

1.4 Paragraph 2A(4)(c) of Schedule 3A (inserted by regulation 3(7)(b)) exempts a person from completing a travel declaration form where that person is travelling to a destination in the common travel area and is “not travelling on to a final destination outside the common travel area”. The Committee asked the Department to explain how a relevant person will know whether this exemption applies and what evidence will need to be produced by a person to show that the exemption applies to them. In its memorandum, the Department explains that a relevant person would need to consider any representations made to them and any evidence that the person may wish to produce such as travel documents. The Committee understands that a person will be able to produce travel documents showing that they are travelling to a destination in the common travel area, but does not understand how the person will be able to prove a negative and produce evidence (other than their word) that they are not travelling on from that destination. The Committee doubts the enforceability of this provision in the light of the evidential difficulty identified, but is content to **report paragraph 2A(4)(c) of Schedule 3A (inserted by regulation 3(7)(b)) for requiring elucidation, partly provided by the Department’s memorandum.**

1.5 In connection with the same paragraph, the Committee also asked the Department to explain what time limit is envisaged by the words “travelling on” in paragraph 2A(4)(c) and, if the person has to be in transit, to explain why a definition similar to the definition of “transit passenger” in regulation 3(8) (inserted paragraph 5 of Schedule 4A) was not used in this context. In its memorandum, the Department explains that no specific time limit is envisaged and “travelling on” is intended to capture onward travel as part of a single journey and is intended to be slightly broader than the “transit” provisions, as a person may, for example, have to break their journey overnight for a connecting flight. The Department states that whether a person is “travelling on” is ultimately a matter of assessment by the relevant person based on individual circumstances. The Committee observes that the relevant person has been provided with no criteria on which to base that judgment (and nor have the courts been provided with criteria against which to review a relevant person’s decisions). Clear objective criteria should have been included in the regulations to clarify what circumstances may or may not amount to “travelling on”, **and in their absence the Committee reports paragraph 2A(4)(c) of Schedule 3A (inserted by regulation 3(7)(b)) for defective drafting.**

2 S.I. 2021/59: Reported for failure to comply with proper legislative practice and for unusual or unexpected use of enabling powers

School and Early Years Finance (England) Regulations 2021

2.1 **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 make unusual or unexpected use of the enabling power in two respects.**

2.2 These Regulations, which are subject to the negative resolution procedure, relate to local authorities’ education budgets for the financial year 2021–2022.

2.3 In two places the Regulations refer to the “2014 Document” which is defined in regulation 1(4). The footnote to the definition gives details of how to inspect the document at a specified address on request but does not take the usual step of providing a link to an electronic version. The Committee asked the Department for Education why an electronic link was not provided. In a memorandum printed at Appendix 2, the Department acknowledges the error and undertakes to correct it by way of correction slip. The Committee agrees that a correction slip would be appropriate. **The Committee accordingly reports regulation 1(4) for failure to comply with proper legislative practice, acknowledged by the Department.**

2.4 The Regulations also make changes to meetings of school forums. School forums are required to hold public meetings. During the pandemic, a temporary change was made to allow these meetings to be held remotely (S.I. 2020/540). This change is now made permanent. The Committee asked the Department to explain how members of the public who do not have access to digital and telephone systems will have access to public meetings held by school forums. In its memorandum, the Department explains that it will be made clear in guidance that school forums should provide support or alternative arrangements where a person cannot attend a remote meeting by telephone or online. As drafted, however, the legislation makes no provision for attendance by those without remote access; and the possibility of supplementary provision being made by way of recommendations in guidance (that may or may not be implemented in practice) is not a substitute for a legal right to attend. The Committee does not consider that Parliament can have intended permanently to discriminate against people without ready access to internet or telephonic communications in this way, **and accordingly reports regulation 35 for making unusual or unexpected use of the enabling power.**

2.5 Finally, the Regulations contain a list of items that may be removed from certain school budget shares (Part 6 of Schedule 2). The Committee noted that whilst the list included expenses in relation to “a woman on maternity leave or a person on adoption leave” it did not include expenses in relation to a person on paternity leave or shared parental leave. The Committee asked the Department to explain why. In its memorandum, the Department explains that it regrets the oversight and undertakes to address this in the instrument made for the 2022–2023 financial year. The Committee trusts the Department will neither operate the law, nor encourage anyone else to operate the law, in the form in which they wish it was made, rather than in the form in which it is made (see the Sixty-fifth Report of Session 2017–19 in relation to 2019/983); so until the amending instrument comes into force paternity leave and shared parental leave cannot lawfully be treated in the same way as maternity leave and adoption leave. Although the omission of paternity leave and shared parental leave does not amount to unlawful discrimination in this instance because the provision impacts on school budgets and not (directly) on individuals, the Committee does not believe that Parliament can have intended the Regulations to include maternity leave and adoption leave but to exclude paternity leave and shared parental leave (and indeed the Department admits that this was not the policy). **The Committee accordingly reports Part 6 of Schedule 2 for making unusual or unexpected use of the enabling power, acknowledged by the Department.**

3 S.I. 2021/80: Reported for failure to comply with proper legislative practice

Criminal Legal Aid (Remuneration) (Amendment) Regulations 2021

3.1 The Committee draws the special attention of both Houses to these Regulations on the ground that they fail to comply with proper legislative practice in one respect.

3.2 These Regulations, which are subject to the negative resolution procedure, correct two errors introduced by the Criminal Legal Aid (Remuneration) (Amendment) Regulations 2020 (S.I. 2020/903) in relation to the rates at which criminal defence advocates and litigators are paid for reviewing unused material. The Committee asked the Ministry of Justice to explain why, that being the case, these Regulations are not being issued free of charge to everyone known to have received the earlier defective instrument (as set out in paragraph 3.5.20 of Statutory Instrument Practice, 5th Ed.). In a memorandum printed at Appendix 3, the Department acknowledges and apologises for the omission. **The Committee accordingly reports these Regulations for failure to comply with proper legislative practice, acknowledged by the Department.**

Instruments not reported

At its meeting on 24 March 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

Instruments requiring affirmative approval

- S.I. 2021/279** Common Organisation of the Markets in Agricultural Products (Wine) (Amendment, etc.) Regulations 2021
- S.I. 2021/362** Public Health (Coronavirus) (Protection from Eviction) (England) (No. 2) (Amendment) Regulations 2021

Draft Instruments requiring affirmative approval

- Draft** Plant Health Etc. (Fees) (England) (Amendment) Regulations 2021
- Draft** Employment Rights Act 1996 (Protection from Detriment in Health and Safety Cases) (Amendment) Order 2021

Instruments subject to annulment

- S.I. 2021/135** Drivers' Hours and Tachographs (Amendment) Regulations 2021
- S.I. 2021/136** Official Controls and Phytosanitary Conditions (Amendment) Regulations 2021
- S.I. 2021/167** Health and Care Professions Council (Coronavirus) (Amendment) (No. 2) Rules Order of Council 2021
- S.I. 2021/168** Nutrition (Amendment) and Food for Specific Groups (Food for Special Medical Purposes for Infants, Infant Formula and Follow-on Formula) (Information and Compositional Requirements) (Amendment) Regulations 2021
- S.I. 2021/169** National Health Service (Charges and Pharmaceutical and Local Pharmaceutical Services) (Coronavirus) (Amendment) Regulations 2021
- S.I. 2021/170** Health and Care Professions Council (Registration and Fees) (Amendment) Rules Order of Council 2021
- S.I. 2021/174** Cumbria (Changes to Years of Elections) Order 2021
- S.I. 2021/175** North Yorkshire (Changes to Years of Elections) Order 2021
- S.I. 2021/176** Somerset (Change to Year of Election) Order 2021
- S.I. 2021/177** Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) (Amendment) Regulations 2021
- S.I. 2021/178** National Health Service (Charges for Drugs and Appliances) (Amendment) Regulations 2021

- S.I. 2021/179** Police and Crime Commissioner Elections (Returning Officers' Accounts) (Amendment) Regulations 2021
- S.I. 2021/186** Personal Injuries (NHS Charges) (Amounts) (Amendment) Regulations 2021
- S.I. 2021/204** School Discipline (Pupil Exclusions and Reviews) (England) (Coronavirus) (Amendment) Regulations 2021
- S.I. 2021/205** Mandatory Travel Concession (England) (Amendment) Regulations 2021
- S.I. 2021/234** Early Years Foundation Stage (Learning and Development Requirements) (Coronavirus) (Amendment) Order 2021
- S.I. 2021/310** Transfer of Functions (Speaker's Committee) Order 2021

Instruments not subject to parliamentary proceedings laid before Parliament

- S.I. 2021/142** Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions (Amendment) Order 2021

Appendix 1

S.I. 2021/247

Health Protection (Coronavirus) (Wearing of Face Coverings in a Relevant Place and Restrictions: All Tiers) (England) (Amendment) Regulations 2021

1. In its letter to the Department of 17 March 2021, the Committee requested a memorandum on the following points:

Explain:

(1) Whether new regulation 5(7A) inserted by regulation 2(2) is intended to amount to an exemption for persons voting at a polling station from wearing masks; (2) if it is, what is added by the words “who is otherwise entitled to vote”.

(2) How a relevant person will know whether the exemption from completing a travel declaration form in paragraph 2A(4)(c) of Schedule 3A (inserted by regulation 3(7)(b)) applies i.e. that the person who is travelling to a destination in the common travel area is not travelling on to a final destination outside the common travel area;

(3) What evidence will need to be produced by a person to show that the exemption applies to them; and

(4) What time limit is envisaged by the words “travelling on” in paragraph 2A(4)(c), for example, does the person have to be in transit (and, if so, why a definition similar to the definition of “transit passenger” in regulation 3(8) (inserted paragraph 5 of Schedule 4A) was not used in this context)?

2. The Department’s response is as follows.

3. In relation to point (1), regulation 5(7A) is not intended to amount to an exemption from wearing a face covering as required by regulation 3 of the Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place) (England) Regulations 2020 (S.I. 2020/791). Rather, the intended effect of regulation 5(7A) is that, if a person entitled to vote at that polling station (or a child in that person’s care) refuses to wear a face covering, that person cannot be subject to the enforcement powers in regulation 5 of S.I. 2020/791 until they have had an opportunity to vote. This mirrors a provision in the Parliamentary elections rules, specifically rule 33(4) of Schedule 1 to the Representation of the People Act 1983 (“RPA”), which ensures that nobody is deprived of the right to vote, even when their misconduct is such that the presiding officer is entitled to remove them from the polling station. Regulation 5(7A) does not prevent the voter being in breach of regulation 3(1), and therefore being subject to removal, a fine or other sanction after they have had the opportunity to vote. The words “who is otherwise entitled to vote” are intended to put beyond doubt that the person in question has to be entitled to vote at that specific polling station in order to be protected by the limitation, under regulation 5(7A), on the power of the authorised person to remove or fine them. Again, this mirrors provision in the RPA.

4. In relation to points (2) and (3), the relevant person will need to consider all the circumstances when determining whether an exemption to the obligation, in paragraph 2A(1) of Schedule 3A, to carry a declaration form applies.

5. This would involve considering any representations made by the individual, and any evidence that the individual may wish to produce, such as travel documents (which the individual is likely to have readily available), or the details of the conveyance that they are “checking in” for. If the individual did not produce evidence, it would be a matter for the relevant person to determine whether, on the information available to them, the requirement in paragraph 2A(1) of Schedule 3A, as qualified by the exemption was engaged.

6. The above approach is consistent with the existing approach to the “stay at home” rules in paragraph 1 of Schedule 3A.

7. In relation to point (4), the term “travelling on” is intended to capture onward travel as part of a single journey, albeit potentially by multiple conveyances. It is intended to be slightly broader than the “transit” provisions, as an individual may, for example, have to break their journey overnight for a connecting flight, and therefore would not be travelling “directly” between ports (and indeed may need to leave a port for the night, only to return the next day). Whilst no specific time limit is intended, it is very unlikely that this would cover a situation where the period between the two elements of the journey was more than 24 hours. A key factor in determining whether an individual is “travelling on” would be the activities that they proposed to undertake between their arrival at the destination in question in the Common Travel Area, and their departure from it to another destination. This would indicate whether they were “travelling on” to a final destination, or had made a single journey within the Common Travel Area, followed by a separate, subsequent journey to a destination outside it. Activities that would indicate “travelling on” are wider than those that could be undertaken where an individual “travels directly” within the meaning of paragraph 5(2)(b)(ii) of Schedule 4A, for example (and hence “travelling on” is not the same as travelling “directly”), and would ultimately be a matter of assessment by the relevant person based on individual circumstances.

Department of Health and Social Care

23 March 2021

Appendix 2

S.I. 2021/59

School and Early Years Finance (England) Regulations 2021

1. In its letter to the Department for Education of 10 March 2021, the Joint Committee requested a memorandum on the following points:

(1) In relation to regulation 1(4), explain why the electronic location of the “2014 Document” is not referenced in the footnote, particularly as the definition of “Early Years Foundation Stage Profile” includes a reference to the 2014 Document.

(2) In relation to regulation 35, explain how members of the public who do not have access to digital and telephone systems will have access to public meetings held by school forums.

(3) Explain why the list contained in Part 6 of Schedule 2 to these Regulations does not include expenditure on making payments to, or in providing a temporary replacement for, a person who is on paternity leave or on shared parental leave.

2. This memorandum has been prepared by the Department for Education.

(1) In relation to regulation 1(4), explain why the electronic location of the “2014 Document” is not referenced in the footnote, particularly as the definition of “Early Years Foundation Stage Profile” includes a reference to the 2014 Document.

3. The Department is grateful to the Committee for highlighting this oversight and will look to correct this by way of a correction slip. The 2014 Document can be found here: [Stat guidance template \(foundationyears.org.uk\)](https://www.foundationyears.org.uk/stat-guidance-template).

(2) In relation to regulation 35, explain how members of the public who do not have access to digital and telephone systems will have access to public meetings held by school forums.

4. Regulation 35 amends the Schools Forums (England) (Coronavirus) (Amendment) Regulations 2020 (SI 2020/540) to make permanent provisions that clarify that schools forums can hold public meetings remotely. The option to hold schools forum meetings by remote means will, in general, make it easier for members of the public to attend such meetings, through video conferencing or telephone conferencing. The Department accepts that where a schools forum decides to hold a public meeting accessed by remote means only, a small number of people might not be able to access meetings through telephone or video conferencing. The Department is in the process of updating its guidance, [Schools Forum Operational and Good Practice Guide](https://www.gov.uk/government/publications/schools-forums-operational-and-good-practice-guide-2015), (www.gov.uk/government/publications/schools-forums-operational-and-good-practice-guide-2015) and will make it clear in this guidance that where a member of the public wishes to attend a schools forum meeting that is held by remote means only, and is not able to join by telephone or online, the forum should look to provide support or alternative arrangements so that the person can attend the meeting.

(3) Explain why the list contained in Part 6 of Schedule 2 to these Regulations does not include expenditure on making payments to, or in providing a temporary replacement for, a person who is on paternity leave or on shared parental leave.

5. We are grateful to the Committee for drawing the Department's attention to the oversight in paragraph 42 relating to persons on paternity leave or shared parental leave. The Department re-makes the School and Early Years Finance (England) Regulations in full annually. To a large degree, the Regulations make the same provisions as in the previous year, although there are some substantive amendments to reflect changes to the policy. Part 6 of Schedule 2 to these Regulations lists items that may be deducted by the local authority from maintained schools' budget shares to determine the individual schools budget (the individual schools budget is the funding that goes to schools and early years providers). The Department did not make substantive changes to this Part this year. Paragraph 42 should have been updated when the public policy in this area changed. The Department regrets this oversight and we will ensure that this point is addressed in the Regulations for the 2022–23 financial year.

Department for Education

16 March 2021

Appendix 3

S.I. 2021/80

Criminal Legal Aid (Remuneration) (Amendment) Regulations 2021

1. In consideration of the above instrument, the Committee requested a memorandum on the following point:

Explain why the free-issue procedure was not used, given that this instrument corrects two errors introduced into S.I. 2013/435 by S.I. 2020/903 (as stated in paragraph 2 of the Explanatory Memorandum).

2. The Ministry of Justice acknowledges that the free-issue procedure should have been used in relation to this instrument, given that it was made solely to correct two errors introduced by S.I. 2020/903.

3. The Ministry apologises for this omission.

Ministry of Justice

16 March 2021