House of Lords
House of Commons

Joint Committee on Statutory Instruments

Forty-Sixth Report of Session 2019–21

Drawing special attention to:

Health Protection (Coronavirus, Restrictions) (Steps) (England) Regulations 2021 (**S.I. 2021/364**)

Single Use Carrier Bags Charges (England) (Amendment) Order 2021 (**Draft S.I.**)

Domestic Renewable Heat Incentive Scheme and Renewable Heat Incentive Scheme (Amendment) Regulations 2021 (**S.I. 2021/76**)

Heavy Commercial Vehicles in Kent (No. 3) (Amendment) Order 2021 (**S.I. 2021/109**)

Education (Student Fees, Awards and Support) (Amendment) Regulations 2021 (**S.I. 2021/127**)

Loans for Mortgage Interest (Amendment) Regulations 2021 (**S.I. 2021/131**)

Crown Court (Amendment) Rules (Northern Ireland) 2021 (**S.R. 2021/16**)

Ordered by the House of Lords to be printed 14 April 2021

Ordered by the House of Commons to be printed 14 April 2021

HL 265
HC 75-xlvi
Published on 16 April 2021
by authority of the House of Lords
and the House of Commons

Joint Committee on Statutory Instruments

Current membership

House of Lords

Baroness D'Souza (*Crossbench*)

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

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 14 April 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 seven 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. 2021/364: Reported for unusual or unexpected use of enabling powers, for defective drafting, for requiring elucidation and for failure to comply with proper legislative practice

Health Protection (Coronavirus, Restrictions) (Steps) (England) Regulations 2021

1.1 **The Committee draws the special attention of both Houses to these Regulations on the grounds that they make unusual or unexpected use of the enabling powers in two respects, are defectively drafted in nine respects, require elucidation in five respects and fail to comply with proper legislative practice in one respect.**

1.2 These Regulations, which are subject to the made affirmative procedure, impose restrictions on gatherings and businesses in England in response to the coronavirus pandemic.

1.3 Regulation 8(1) makes it a criminal offence to leave the country "without a reasonable excuse". There is a list of reasonable excuses set out in Schedule 5, but it is expressly inclusive and not exhaustive. The Committee asked the Department of Health and Social Care whether it is intended that a person is to be treated as having a reasonable excuse where they wish to take a holiday abroad (whether for the purpose of meeting other people who live or holiday abroad, in order to enjoy foreign weather or other conditions, or for other reasons) and they believe that having regard to their general well-being it is reasonable for them to take a foreign holiday. In a memorandum printed at Appendix 1, the Department asserts that "it is not intended that such a person is to be treated as having a reasonable excuse". The Department argues that this view "is supported by the indicative list of reasonable excuses at Schedule 5". It adds, however, that "as with any other reasonable excuse defence, it would ultimately be for the court to determine the question on the particular facts and circumstances of any given case before it". The Committee finds this unsatisfactory in the context of this criminal offence. There is nothing about the list of excuses set out in Schedule 5 that, in the Committee's opinion, makes it "indicative" of what is and is not to be treated as a reasonable excuse. For example, paragraph 7 of Schedule 5 identifies a particular class of business interest in connection with foreign property in relation to which it is expressly an excuse to leave the country: are the courts to draw from that the conclusion that any kind of business interest abroad can provide a reasonable excuse, or is there some reason why tending to a residential property lettings business is thought to be worthy of special treatment? Absence of a reasonable excuse is a tried and tested component of criminal offences, but it works only in contexts (such as regulatory provisions) where the nature of the offence clearly guides the courts as to the nature and extent of reasonable excuse as a limitation. In this context, the Committee believes that the Regulations could and should have provided a list of descriptions of classes of activity by reference to which the courts and other readers could have judged what was and was not intended to be reasonable; but neither Schedule 5 nor anything else in the Regulations does that, and the Committee finds nothing to support the Government's assertion that the person in the Committee's example would not be treated as having a reasonable excuse. In the end, a person wishing to leave the country for a reason which they believe is cognate to one of those listed in the Schedule but which does not fall within any of the precise cases described there will have no way of knowing whether they are or are not committing a criminal offence. The Committee does not believe that the enabling power was intended to be used to create offences which are so unpredictable in their application, **and accordingly reports regulation 8(1) for making an unusual or unexpected use of the enabling power**.

1.4 Paragraph 12 of Schedule 2 requires holiday accommodation to close during Step 2, subject to specified exceptions. Where those exceptions apply, paragraph 12(5) permits the continued provision of holiday accommodation in "separate and self-contained premises". Paragraph 12(6) defines what counts as separate and self-contained premises for this purpose by reference, in part, to occupation by members of the same household or linked households. The Committee wondered how the providers of holiday accommodation are expected to know with certainty whether or not people occupying their accommodation are linked householders, and whether the provider of accommodation could unwittingly commit a criminal offence where they were led to believe that households were linked on the basis of the submission of false evidence. In its memorandum, the Department asserts that it "would expect a provider of holiday accommodation to take reasonable steps to ascertain whether persons for whom holiday accommodation was booked were from the same household or linked households"; and it adds that a provider who is misled by the submission of false evidence "may well have a reasonable excuse for having breached the regulations but this will depend on the facts". The Committee does not believe that this gives a sufficient level of certainty and clarity for the providers of accommodation. It is not enough for the Department to "expect" certain steps to be taken. Providers of accommodation could have been made the subject of a statutory duty to carry out a verification process (as has been done, for example, in relation to international carriers); or the Regulations could have set out a procedure that providers of accommodation could choose to follow, compliance with which would provide protection from prosecution. In their present form, there is no compulsory or voluntary statutory process, and the evidential burden of proving linked households seems unlikely to be reasonably capable of being discharged on an ad hoc basis. The Committee is concerned that it is unreasonable to expect businesses to rely on the possibility that they "may well have" a reasonable excuse that may or may not be upheld by a court should they come to be prosecuted. The Committee does not believe that Parliament would have expected potential criminal liability to be conferred in terms of this lack of clarity and certainty, **and accordingly reports paragraph 12 of Schedule 2 for unexpected or unusual use of the enabling power**.

1.5 Regulation 2(1) defines "vulnerable person" as including "any person aged under 70 who has an underlying health condition, including (but not limited to) the conditions listed in paragraph (4)". That means that anybody who has "an underlying health condition" falls within the definition of "vulnerable person", which appeared to the Committee to be unlikely to have been the legislative intent, and it invited the Department to explain. In its memorandum, the Department asserts that the intention is "to capture persons who are likely to be susceptible to COVID-19 or its effects as well as persons who are otherwise likely to be vulnerable by virtue of requiring care or assistance". The Department explains that the list of conditions "is intentionally non-exhaustive as we do not have a complete picture at this stage". It asserts that the definition will be subject to an implicit limitation by reference to whether or not an "underlying health condition" would "render a person vulnerable within the ordinary meaning of that term". The Committee denies that "vulnerable" has a single natural language meaning sufficient to provide the necessary clarity and certainty in the context of regulations the breach of which is a criminal offence. If it did have a clear natural meaning, it would not have been necessary for the Department to seek to define "vulnerable person" at all. Even if it were implicit that in this context vulnerability includes vulnerability to COVID-19, the Committee finds it unsatisfactory that the Department asserts that the Government does not yet have a "clear picture" of the class of underlying conditions that make a person vulnerable to COVID-19, but expects the reader of the Regulations to know intuitively whether or not they themselves fall, or another person falls, within that class in order to determine whether or not they are breaching the regulations and thereby committing a criminal offence. This is clearly unsatisfactory in rule of law terms, **and the Committee accordingly reports the definition of "vulnerable person" in regulation 2(1) for defective drafting**.

1.6 Regulation 11 provides for a number of offences and penalties. The Committee noted that where a prohibition notice is given for an alleged contravention of a restriction under the Regulations, the person concerned is theoretically at risk of being prosecuted both for the original breach and for failure to comply with the prohibition notice. The Committee asked the Department whether in such a case it would be intended that the person could be charged both with an offence under regulation 11(1)(a) (contravention of restriction) and an offence under regulation 11(1)(d) (failure to comply with prohibition notice), and to explain how the principles of double jeopardy would apply (or not apply) in that case. In its memorandum, the Department asserts that "it is likely" that a person would be charged in respect of non-compliance with the prohibition order "being the latest offence", but admits that in principle both offences could be charged. It adds that a sentencing court might "take into account the level of connection between the two offences in sentencing" or that the decision might be made not to prosecute for both offences. It is common for statutory offences to overlap with the potential for prosecution for two offences in respect of the same conduct; but it is not common to have, as here, a substantive offence coupled with an additional offence of failing to comply with a regulatory order in respect of the substantive offence. Although the Committee does not believe this is inherently unlawful, the Committee is clear that there should be a transparent and accountable policy in relation to the prosecution of offences under the Regulations, particularly in relation to offences of breaching orders in respect of other offences, in order to guard against the dangers of double jeopardy. **The Committee accordingly reports regulation 11(1) for requiring elucidation**.

1.7 Regulation 18 makes provision for the required prosecutions for offences under the regulations to be brought "by the Crown Prosecution Service or any person designated by the secretary of state". The Committee asked the Department to explain the circumstances in which it is proposed to allow persons designated by the Secretary of State to prosecute offences under the Regulations, to identify the class of person proposed to be designated, to explain why prosecution by the Crown Prosecution Service would not be appropriate, and to identify appropriate safeguards to be applied in the case of prosecutions by designated persons. Having prosecutions handled by a body with operational independence from Ministers is an important rule of law safeguards and the Committee was concerned to ensure that it was not being eroded inappropriately. The Department's memorandum is particularly helpful on this issue, and the Committee notes both that the circumstances for the deployment of alternative prosecution arrangements are clearly explained and that the Department offers the important guarantee that the Crown Prosecution Service will take conduct of all cases in which the accused pleads not guilty or objects to the single Justice procedure. **The Committee accordingly reports regulation 18 for requiring elucidation, provided by the Department's memorandum**.

1.8 Regulation 2(1) defines "charitable, benevolent or philanthropic institution" as including "a charity" as well as "an institution, other than a charity, established for charitable, benevolent or philanthropic purposes". The Committee was unsure what, if anything, would be caught by the second limb of the definition, having regard to the definition of "charity" in section 1 of the Charities Act 2011 (which has cross-contextual application), and asked the Department to explain. In its memorandum, the Department asserts that the second limb of the definition is intended to include "an institution which is established for purposes which may include charitable purposes but which are not limited to such purposes". The problem with including institutions whose purposes are not exclusively charitable but which are "benevolent or philanthropic" is that those words have an uncertain and potentially very wide meaning. A definition of this degree of lack of specificity will be appropriate in some contexts (and the Committee notes that it is used, for example, in section 47 of the Charities Act 2006) but it does not provide sufficient certainty or clarity in the context of regulations the breach of which amounts to a criminal offence. **The Committee accordingly reports the definition of "charitable, benevolent or philanthropic institution" in regulation 2(1) for defective drafting**.

1.9 Regulation 6(3)(b) requires organisers of gatherings when taking "the required precautions" to take into account "any guidance issued by the government". The Committee asked the Department whether the reference to "the government" was intended to be a reference to a Minister of the Crown or to have a wider meaning and, if so, how wide. In its memorandum, the Department asserts that the intention was to include "wider guidance issued by the government such as by a non-Ministerial government department". In the context of regulations the breach of which is a criminal offence, the Committee does not consider this to be sufficiently specific, either as a matter of stated intention or on the terms of the provision as drafted. A wide range of guidance has been issued in relation to COVID-19 by different public bodies, ranging from Ministers of the Crown, through the devolved authorities, to local authorities, the National Health Service and others. If there is a statutory duty to take guidance into account, failure to comply with which will result in a person having committed a criminal offence, it is necessary to identify with clarity and certainty the range of guidance included. The term used in the Regulations fails to provide that certainty or clarity **and the Committee accordingly reports regulation 6(3)(b) for defective drafting**.

1.10 A number of the exceptions in the regulations operate by reference to whether or not a person is an "elite sportsperson", which is defined in regulation 2(1) as "an individual who (a) derives a living from competing in a sport…". The Committee asked the Department whether the reference to deriving a living is intended to include people who have sources of income not related to competitive sport, and whether it is intended to include sponsorship and other sums paid to a person by reason of their status as a participant in sport but not directly arising from competition prizes or other earnings. In its memorandum, the Department asserts that the definition includes sportspersons “who participate in a sport and receive some form of payment as a result of doing so”, and that the reference to deriving a living “seeks to ensure that the beneficial treatment … applies only to people for whom participation in sport provides at least a reasonable income”; it adds that income not deriving directly from sports “may well be relevant”. In the context of regulations the breach of which is a criminal offence, the Committee does not consider that this definition provides sufficient clarity, and the references in the Department’s memorandum to “a reasonable income” and the possible relevance of indirect earnings accentuate the lack of clarity provided by this definition; **the Committee accordingly reports the definition of “elite sports person” for defective drafting**.

1.11 Regulation 2(1) defines “support group” as “a group or one to one support which is organised by a business, a charitable, benevolent or philanthropic institution or a public body to provide mutual aid, therapy or any other form of support to its members or those who attend its meetings…”. The Committee asked the Department to explain how the references to members and attendance at meetings are intended to apply in relation to one to one support. The explanation in the Department’s memorandum fails to clarify how a definition which focuses on attendances at meetings or membership is intended to work for the provision of one to one support. It would be surprising if qualification for one to one support were limited to members or persons who habitually attend meetings, as some of the people most likely to require one to one support (for example, the victims of domestic abuse mentioned in paragraph (a) of the definition) will be either disinclined or unable to attend meetings; but be that as it may, it is unclear how many meetings of a group a person would need to attend and with what regularity to count as one of the persons “who attend its meetings” so as to be able to benefit from one to one support. **For these reasons the Committee does not consider the definition of “support group” in regulation 2(1) satisfactory, and reports it for defective drafting**.

1.12 Regulation 2(1) defines “Crown interest” as including “any estate or interest held in right of the Prince and Steward of Scotland”. The Committee considered this a surprising addition to the definition in the context of regulations that expressly apply only in relation to England, and asked the Department to explain. In its memorandum, the Department asserts that the title of “Prince and Steward of Scotland” refers “to the Prince of Wales and constitutes part of the Prince of Wales’ titles when addressed in Scotland”. That rather underlines the Committee’s point that it is an inappropriate inclusion in an instrument that is expressly confined to matters relating to England. (The Committee also doubts that it adds anything to the reference to Duchy interest in the definition of “Crown land”, since it seems unlikely that references to Crown interest are intended to include property of the Prince of Wales accruing to him in his capacity as Prince and Steward of Scotland but situated in England.) Given the Department’s failure to identify, as requested by the Committee, any estates or interests that would be caught by this inclusion in the definition, the Committee is drawn to conclude that it is simply an error **and accordingly reports the definition of “Crown interest” in regulation 2(1) for defective drafting**.

1.13 Regulation 2(5)(d) defines activities undertaken “for referendum purposes”. The definition includes activities undertaken to promote or procure a particular outcome, and activities undertaken so as to prejudice “the prospect of another particular outcome” in relation to the referendum. The Committee could not attribute any particular meaning to the word “another” in the second limb of the definition and asked the Department to explain. In its memorandum, the Department accept that the word should have been omitted, **and the Committee accordingly reports regulation 2(5)(d) for defective drafting, acknowledged by the Department**.

1.14 The definition of “private dwelling” in regulation 2(5)(i)(ii) includes a list of exceptions that are to apply apart from “in regulation 5(2), or as otherwise specified”. The Committee asked the Department to identify provisions in which any of the items of the list are specified for that purpose. In its memorandum, the Department accepts that the words “or as otherwise specified” are superfluous, **and the Committee accordingly reports regulation 2(5)(i)(ii) for defective drafting, acknowledged by the Department**.

1.15 Regulation 14(3)(b)(iii) contains a phrase “any other place indoors” which makes no sense in the context. The Committee suspected that the phrase “in any other place” should have appeared instead of those words, and it asked the Department to confirm. In its memorandum, the Department confirms the Committee’s suspicion, **and the Committee accordingly reports regulation 14(3)(b)(iii) for defective drafting, acknowledged by the Department**.

1.16 Regulation 10(12) allows officers exercising certain enforcement powers to give “reasonable instructions”, with which it is a criminal offence to fail to comply. The Committee asked the Department to give examples of the kind of reasonable instructions that relevant persons might be expected to wish to give under that power. In its memorandum, the Department asserts that instructions may be “any reasonable instructions the relevant person considers to be necessary”, which clearly does not provide elucidation. But the Department adds an example that when exercising a power of dispersal an officer might “ask the individuals who are part of the gathering to leave in different directions”. The Committee does find this a helpful example, and draws from it the principle, which could helpfully have been articulated on the face of the Regulations, that instructions under this power are to be limited to ancillary matters required to give full effect to the primary statutory power that the person is exercising. **On that basis, the Committee reports regulation 10(12) as requiring elucidation, provided by the Department’s memorandum**.

1.17 Regulations 21(2) and 23(4) contain transitional provisions saving the validity of things done before the expiry or revocation of particular regulations. The Committee asked the Department to explain what those provisions are intended to add to, or detract from, the operation of section 16 of the Interpretation Act 1978, and to explain why express savings are included in regulations 21 and 23 but not in regulation 22. The Department’s memorandum does not provide a substantive explanation of this point beyond the suggestion that these provisions were included “for avoidance of doubt”. As the Committee has said before, random partial replication of provisions of the Interpretation Act creates doubt rather than avoiding it. It is bad legislative practice to make provision that expressly overlaps with the 1978 Act without being able to explain why it is necessary and how it is intended to sit alongside that Act. On the question of consistency, the Department accepts that the regulations “could have been” made consistent and undertakes to “take this into consideration” in future drafting. **The Committee accordingly reports regulations 21, 22 and 23 for failure to comply with proper legislative practice**.

1.18 Paragraph 10 of Schedule 1 provides exceptions from closures and restrictions in respect of certain business and other premises in Step 1. Paragraph 10(1)(a)(i) allows, inter alia, the provision of essential voluntary services. The Committee wondered whether that would cover the use of premises for the provision of COVID-19 vaccinations and, if it would, what else was intended to be included by the provision at paragraph 10(1)(j). In its memorandum, the Department confirms that paragraph 10(1)(a) is intended to cover the use of premises for vaccinations amongst other things, and suggests that paragraph 10(1)(j) could cover a wider range of activities relating to COVID-19. The Committee finds the explanation helpful **and accordingly reports paragraph 10 of Schedule 1 for requiring elucidation, provided by the Department's memorandum**.

1.19 Paragraph 4 of Schedule 3 sets out exceptions to the prohibition of indoor gatherings in Step 3. Paragraph 4(9)(c) makes the lawfulness of gatherings for marriages and civil partnerships in certain circumstances dependent on whether or not it is "reasonably practicable" for the gathering to take place in another specified way. The Committee asked the Department whether questions of costs are capable of being taken into account for determining what is practicable. In its memorandum, the Department asserts that the intention of the reference to reasonable practicability was to catch cases of illness, but it accepts that it could include other matters including questions of costs. The Committee finds that acceptance helpful, **and accordingly reports paragraph 4(9) of Schedule 3 for requiring elucidation, provided by the Department's memorandum**.

2 Draft S.I.: Reported for unusual or unexpected use of enabling powers

Single Use Carrier Bags Charges (England) (Amendment) Order 2021

2.1 **The Committee draws the special attention of both Houses to this Order on the grounds that it makes unusual or unexpected use of the enabling power in one respect**.

2.2 This Order will have the effect of making significant changes to the requirements imposed on sellers of goods with respect to single use carrier bag charges. The requirement to charge for a single use bag will no longer be limited to large retailers with over 250 employees. Also, the amount that must be charged will increase from 5p to 10p. A seller who does not comply with these requirements is subject to enforcement measures which include financial penalties.

2.3 Article 1(2) provides for the Order to come into force on the day after the day on which it is made so that there will be less than 24 hours between the new requirements becoming law and those subject to the requirements having to be in a position to be able to comply with them. In its 1st Report of Session 2014–15, the Committee expressed the view that it would usually be unreasonable for the legislator to provide for changes of the law, which impose new requirements on persons, to come into force on the day after that on which the instrument is made, since it does not give those affected a reasonable chance to adapt. This is particularly so where failure to comply with the new requirements would put the person at risk of a sanction. As noted by the Committee in its Report, if an instrument comes into force on the day after it is made, it is likely to be before the instrument has even been printed or published. Accordingly, the Committee asked the

Department for Environment, Food and Rural Affairs to explain why it considers that in this case coming into force on the day after making will allow sufficient time for those affected to comply with the new requirements introduced by the Order.

2.4 In a memorandum printed at Appendix 2, the Department refers to the fact that the Government made clear that the new requirements would come into force in April 2021 in its response, published in August 2020, to a consultation held from December 2018 to February 2019. The Department states that this announcement was widely publicised in the national press, and therefore that businesses will be aware of the Government's intention to make the changes. The Department does not expect businesses to wait until after the instrument has been made before taking any steps needed to adapt to the changes required, particularly now that the instrument has been laid in draft. The Department adds that it has recently written to stakeholders to inform them when the Order is likely to come into force, and that it will share with trade associations an advance version of guidance that will be published online, and that this draft guidance will include the expected coming into force date.

2.5 The Committee does not consider that the matters outlined in the memorandum are sufficient to overcome the lack of notice given to those affected as a result of the Order coming into force on the day after it is made. None of the steps taken will allow those affected to know for certain when the Order will come into force. The August 2020 response to the consultation refers to commencement in April 2021, without specifying a particular date. With the more recent steps taken or proposed to be taken, the Department is providing the date when "it is likely" or it is "expected" that the Order will come into force. It will only be once the Order is made that those affected will be able to know for certain what that date is. Nor does it seem to the Committee that the Department is entitled to assume that, because of the uncertainty, affected businesses will act to comply with the new requirements before the Order is made and there is a definite date from which the requirements will apply. **The Committee accordingly reports article 1(2) for making unusual or unexpected use of the enabling power**.

3 S.I. 2021/76: Reported for defective drafting

Domestic Renewable Heat Incentive Scheme and Renewable Heat Incentive Scheme (Amendment) Regulations 2021

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

3.2 These Regulations, which are subject to the negative resolution procedure, make amendments to two statutory instruments relating to the Domestic and Non-Domestic Renewable Heat Incentive schemes. Regulation 1(2)(b)(vi) stipulates the commencement date for "regulation 27 (amendment of regulation 55A)". As regulation 27 does not make amendments to regulation 55A of the Renewable Heat Incentive Scheme Regulations 2018, the Committee asked the Department to explain which is correct, the regulation number or the parenthetical description. In a memorandum printed at Appendix 3, the Department states it is the parenthetical description that is correct and proposes to liaise with the SI Registrar regarding the possibility of a correction slip. The Committee considers that a correction slip in this case would not be appropriate: given that the reader is not to know whether it is the parenthetical description or the provision number that is intended, this would amount to a change of substance of a kind that the Committee noted as not being appropriate for change by correction slip in its First Special Report of Session 2017–19—*Transparency and Accountability in Subordinate Legislation*. **The Committee accordingly reports regulation 1(2)(b)(vi) for defective drafting, acknowledged by the Department**.

4 S.I. 2021/109: Reported for unjustifiable delay

Heavy Commercial Vehicles in Kent (No. 3) (Amendment) Order 2021

4.1 **The Committee draws the special attention of both Houses to this Order on the ground that there was unjustifiable delay in laying it before Parliament**.

4.2 This Order, which is subject to the negative resolution procedure, regulates the movement of cross-Channel lorries in Kent. The instrument was made on 20 January 2021 and laid before Parliament on 1 February 2021. The Committee asked the Department for Transport to explain the reason for the delay between the making of the instrument and laying it before Parliament. In a memorandum printed at Appendix 4, the Department explains that, although the Order was originally published and laid on 21st January (as S.I. 2021/62), the published version did not reflect the version that was signed by the Minister. As soon as the error was noticed, the Department contacted the National Archives and arranged for the incorrect version of the Order to be withdrawn. The corrected version of the Order was then registered and published with a new number and laid before Parliament. The Committee refers to paragraphs 2.2 to 2.14 of its First Special Report of Session 2017–19—*Transparency and Accountability in Subordinate Legislation* which emphasised the importance of early laying as a core component of access to legislation and therefore of the rule of law. As expressed in that Report, administrative errors are not an excuse for late laying, and the situation described in the Department's memorandum was particularly undesirable in this case, as it meant that for a number of days the public were on notice that an instrument had been made but were not able to access an accurate text. **The Committee accordingly reports regulation 1(2)(b)(vi) for defective drafting, acknowledged by the Department**.

5 S.I. 2021/127: Reported for requiring elucidation

Education (Student Fees, Awards and Support) (Amendment) Regulations 2021

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

5.2 These Regulations, which are subject to the negative resolution procedure, amend several sets of regulations to make changes to eligibility for student financial support to reflect the fact that the UK is no longer an EU member state. The Committee asked the Department for Education to explain the difference in meaning between "the day on which the first term of the first academic year actually begins" and "the first day of the first academic year of the course" (paragraphs (1)(d) and (e) of new regulations 8A and 9A (as the case may be) in regulations 25(8), 35(8), 57(8), 61(9) and 67(8)). In a memorandum printed at Appendix 5, the Department helpfully clarifies the difference in intended meaning. **The Committee accordingly reports new regulations 8A and 9A for requiring elucidation, provided by the Department's memorandum**.

5.3 (There was a further drafting issue raised by the Committee and the Department confirmed that the instrument was correct as drafted).

6 S.I. 2021/131: Reported for failure to comply with proper legislative practice

Loans for Mortgage Interest (Amendment) Regulations 2021

6.1 **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**.

6.2 These Regulations, which are subject to the negative resolution procedure, enable anyone with an outstanding Support for Mortgage Interest loan to "port" their loan to a new property rather than repay it upon the sale of their home. They also make minor drafting amendments to existing regulations to correct drafting errors with respect to domestic violence (regulation 2(6)) and cold weather payments (regulation 3). The Committee asked the Department for Work and Pensions to explain whether it has complied with paragraph 4.7.6 of Statutory Instrument Practice and consulted the S.I. Registrar whether to provide free replacement copies of the instrument. In a memorandum printed at Appendix 6, the Department accepts that it should have consulted the S.I. Registrar on this issue before making these Regulations and confirms that it has now done so with a view to refunding people who have bought copies of the relevant Regulations. **The Committee accordingly reports these Regulations for failure to comply with proper legislative practice, acknowledged by the Department**.

7 S.R. 2021/16: Reported for failure to comply with proper legislative practice, for defective drafting and for requiring elucidation

Crown Court (Amendment) Rules (Northern Ireland) 2021

7.1 **The Committee draws the special attention of both Houses to these Rules on the grounds that they fail to comply with proper legislative practice in two respects, are defectively drafted in one respect and require elucidation in two respects**.

7.2 These Rules, which are subject to the negative resolution procedure, amend the Crown Court Rules (Northern Ireland) 1979 ("the Crown Court Rules", S.R. 1979/90).

7.3 Rule 2 restores provisions relating to giving evidence by telephone in criminal proceedings in foreign courts, which were erroneously revoked by the Criminal Procedure (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/908). 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 7, the Department acknowledges the error and undertakes to correct it. **The Committee accordingly reports these Regulations for failure to comply with proper legislative practice, acknowledged by the Department**.

7.4 Under section 53A of the Judicature (Northern Ireland) Act 1978, the relevant authority (in this case, the Lord Chancellor) must "allow or disallow" the rules previously made by the Committee under section 52(1); this being, of course, a common requirement in relation to rules of court. The allowance statement purports to be signed "by the authority of the Lord Chancellor" by Alex Chalk MP in his capacity as a Parliamentary Under Secretary of State in the Ministry of Justice. The Committee asked the Ministry of Justice to explain how a junior Minister of that Ministry came to sign a statement on behalf of the Lord Chancellor. The Committee drew the Department's attention to the limitations on the *Carltona* principle, which were articulated by Hodgson J in *R. v Secretary of State for Trade, Ex p. Chris International Foods Limited* (Case CO/1020/82, 4 March 1983, QBD) and discussed in relation to S.I. 2015/1953 in the Committee's Fourteenth Report of Session 2015–16. Based on those principles, the Committee suggested that Mr Chalk must have been signing in a capacity as a junior Minister to the Lord Chancellor. The Committee notes that this is by no means the first occasion on which a junior Minister in the Ministry of Justice has purported to sign an instrument, or an allowance or similar statement, on behalf of the Lord Chancellor; and the Committee wanted to take this opportunity to establish the *Carltona* link and to have it regularised on the face of these instruments. In its memorandum, however, the Department denies that Mr Chalk has any Ministerial relationship with the Lord Chancellor and asserts that he was signing in his capacity as Parliamentary Under Secretary of State in the Ministry of Justice. The Department does not, however, address the issue that the Committee raises of the cross-departmental application of the *Carltona* doctrine. The Committee draws attention to the following passage from *Craies on Legislation*, 12th Edition, D Greenberg, at 12.4.5: "The question arises from time to time whether a Minister in another Department, or an official of a Minister in another Department, is a proper *Carltona* delegate of statutory powers. What is clear is that where a power vests in one Minister he is not entitled simply to transfer it informally to another Minister." When changes to the nature of the office of Lord Chancellor were made by Part 2 of the Constitutional Reform Act 2005, the original intention was that the office of Lord Chancellor would eventually be allowed to lapse, its responsibilities being divided between the new Lord Speaker, the existing senior judiciary, and government departments including a new Ministry of Justice accruing around a new Secretary of State (see the Secretary of State for Justice Order 2007 (S.I. 2007/2128)). A number of residual functions continued to vest in the office of Lord Chancellor, however, and over time it became clear that rather than being allowed to diminish incrementally towards extinction, the office was being allowed to acquire new statutory functions, with a distinction becoming gradually apparent between the general tenor of the functions vesting in the Secretary of State for Justice and those remaining with or being assigned to the Lord Chancellor. (In general, both offices being held by the same person, the capacity in which the office-holder acts in relation to any particular matter will be apparent from the circumstances.) For whatever reason, the Government chose to retain the Lord Chancellor as an active office; as a result and although the old Lord Chancellor's Department was described as being abolished, as a matter of constitutional law any civil servants or junior Ministers assigned to the Lord Chancellor to assist in the performance of the duties of that office will amount to a government department and will acquire the ability to act as *Carltona* agents for the Lord Chancellor. The Department's response to the Committee's questioning on this point appears to suggest that the Government is simply assuming that officials and junior Ministers of the Ministry of Justice can be deployed informally as *Carltona* delegates of the Lord Chancellor on an ad hoc basis. As the Chris International Foods decision shows, however, that is not a safe assumption. When the decision was taken to create a Ministry of Justice and to diminish the role of the Lord Chancellor, the Government altered the machinery of government arrangements, and it cannot simply ignore those alterations from time to time for the sake of convenience. Whether a particular official or Minister can act for the Lord Chancellor on a cross-departmental basis is a matter that requires to be tested, and justified, on a case-by-case basis having regard to the nature of the functions concerned. Where the distinction between the two offices and departments is inconvenient to the Government, it is of course always open to it to adjust the balance formally using a Transfer of Functions Order under the Ministers of the Crown Act 1975; or, as in this case where the relevant senior offices are held by the same person, it should be a simple matter to have the junior Ministers formally appointed in a dual capacity (through the standard use of non-remunerated joint offices so as not to exhaust the limits in paragraph 2 of Part 5 of Schedule V to the Ministerial and other Salaries Act 1975); but the Government cannot simply purport to reassign functions between the Lord Chancellor and the Ministry of Justice informally. Since the Department denies that Mr Chalk was acting in a capacity as a junior Minister of the Lord Chancellor, and since the Department has not offered any justification for a cross-departmental Carltona agency in this case, there must be a doubt as to whether these Rules have been properly allowed in accordance with the statutory requirement, a defect which would go not towards vires but to validity. **The Committee accordingly reports these Rules for failure to comply with proper legislative practice**.

7.5 The Schedule to this instrument inserts into the Crown Court Rules a new Part VIIIB (comprising new rules 62N to 62R) that governs applications for orders for access to electronic data under the Crime (Overseas Production Orders) Act 2019. Under section 4 of that Act, a judge may only make an overseas production order if satisfied that *"(a) there are reasonable grounds for believing that an indictable offence has been committed and* <u>proceedings in respect of the offence have been instituted or</u> *the offence is being investigated, or (b) the order is sought for the purposes of a terrorist investigation"* (emphasis added). New rule 62O(2)(c) requires the affidavit supporting any application for an overseas production order to "briefly describe the investigation for the purposes of which the electronic data is sought". The Committee asked the Department to explain how this rule is intended to operate in relation to proceedings already instituted. In its memorandum, the Department explains that even where proceedings have been instituted, this type of application is expected to relate to an investigation (for example, where an investigation is continuing by direction of a prosecutor after the decision to prosecute). **The Committee accordingly reports new rule 62O(2)(c) as requiring elucidation, provided in the Department's memorandum**.

7.6 The Committee asked the Department to explain why rules 62O(3) and 62P(3)(c) place no time limit on service of documents, in contrast to the requirements for documents to be notified to specified parties "as soon as practicable" in rule 62O(4) and "as soon as reasonably practicable" in rule 62O(5). In its memorandum, the Department explains that these mirror equivalent provisions in the Criminal Procedure Rules 2020, which do not create time limits for service, and that "it was not considered that there were any Northern Ireland-specific reasons to depart from the established procedure in England and Wales".

The Committee accepts the Department's general approach of maintaining procedural equivalence in the operation of primary legislation across UK jurisdictions, with the caveat that this approach should not result in defects in one jurisdiction being replicated in others. The Committee finds it surprising that no specific time limit should be imposed for an act as important as service of the documents that form the basis for the proceedings, particularly where time limits are imposed elsewhere. Noting, however, that the practical effect of the safeguard in rule 62Q(3) is that an application cannot be determined unless it has been served on the respondent, **the Committee is content to report rules 62O(3) and 62P(3)(c) as requiring elucidation, provided in the Department's memorandum**.

7.7 The Committee also asked the Department to explain why rule 62P(3)(c), which imposes a requirement for service, is made subject to rule 62Q(7)(c) (which is nothing to do with service, but grants the court a discretion to consider applications orally instead of in writing) rather than to rule 62Q(7)(b) (which grants the court a discretion to waive requirements for service). In its memorandum the Department asserts that this rule "may benefit from elucidation". The Committee does not accept that this is a matter for elucidation—it is a simple error and as such requires correction. **The Committee accordingly reports rule 62P(3)(c) for defective drafting**.

7.8 (There were other matters raised by the Committee on which the memorandum provides helpful elucidation.)

Instruments not reported

At its meeting on 14 April 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. 2021/375	Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2021

Draft Instruments requiring affirmative approval

Draft	Civil Liability Act 2018 (Financial Conduct Authority) (Whiplash) Regulations 2021
Draft	Combined Heat and Power Quality Assurance (Temporary Modifications) Regulations 2021
Draft	Air Quality (Legislative Functions) (Amendment) Regulations 2021
Draft	Electricity Trading (Development of Technical Procedures) (Day-Ahead Market Timeframe) Regulations 2021
Draft	Food and Feed Safety (Miscellaneous Amendments and Transitional Provisions) Regulations 2021
Draft	Mobile Homes (Requirement for Manager of Site to be Fit and Proper Person) (England) (Amendment) Regulations 2021
Draft	Proceeds of Crime Act 2002 (Cash Searches: Code of Practice) Order 2021
Draft	Proceeds of Crime Act 2002 (Investigative Powers of Prosecutors: Code of Practice) Order 2021
Draft	Proceeds of Crime Act 2002 (Investigations: Code of Practice) Order 2021
Draft	Proceeds of Crime Act 2002 (Recovery of Listed Assets: Code of Practice) Regulations 2021
Draft	Proceeds of Crime Act 2002 (Search, Seizure and Detention of Property: Code of Practice) (Northern Ireland) Order 2021

Instruments subject to annulment

S.I. 2021/183	High Speed Rail (West Midlands—Crewe) (Fees for Requests for Planning Approval) Regulations 2021
S.I. 2021/185	Airports Slot Allocation (Alleviation of Usage Requirements) Regulations 2021
S.I. 2021/187	Official Controls and Phytosanitary Conditions (Amendment) (No. 2) Regulations 2021

S.I. 2021/188	Housing Benefit (Persons who have attained the qualifying age for state pension credit) (Amendment) Regulations 2021
S.I. 2021/189	Carbon Accounting (Provision for 2019) Regulations 2021
S.I. 2021/191	Education (Student Loans) (Repayment) (Amendment) Regulations 2021
S.I. 2021/196	Civil Procedure (Amendment No. 2) Rules 2021
S.I. 2021/206	Oil and Gas Authority (Levy and Fees) Regulations 2021
S.I. 2021/211	Approved Country Lists (Animals and Animal Products) (Amendment) Regulations 2021
S.I. 2021/212	Housing (Shared Ownership Leases) (Exclusion from Leasehold Reform Act 1967 and Rent Act 1977) (England) Regulations 2021
S.I. 2021/214	Occupational and Personal Pension Schemes (General Levy) (Amendment) Regulations 2021
S.I. 2021/228	Universal Credit (Childcare in Wales) (Amendment) Regulations 2021
S.I. 2021/230	Social Security (Claims and Payments, Employment and Support Allowance, Personal Independence Payment and Universal Credit) (Telephone and Video Assessment) (Amendment) Regulations 2021
S.I. 2021/236	Wildlife and Countryside Act 1981 (Variation of Schedule 9) (England) Order 2021
S.I. 2021/263	Accounts and Audit (Amendment) Regulations 2021
S.I. 2021/268	Education (Student Support) (Coronavirus) (Amendment) Regulations 2021
S.I. 2021/269	Immigration and Nationality (Fees) (Amendment) Regulations 2021
S.I. 2021/280	Merchant Shipping (Light Dues) (Amendment) Regulations 2021
S.I. 2021/281	Cyber (Sanctions) (Overseas Territories) Order 2020

S.I. 2021/281 was incorrectly listed for this meeting and was not considered. See the 47th report for the correctly titled instrument.

Instruments not subject to parliamentary proceedings laid before Parliament

S.I. 2021/208	Employment Rights (Increase of Limits) Order 2021

Instruments not subject to parliamentary proceedings not laid before Parliament

S.I. 2021/245	Annual Tax on Enveloped Dwellings (Indexation of Annual Chargeable Amounts) Order 2021

Appendix 1

S.I. 2021/364

Health Protection (Coronavirus, Restrictions) (Steps) (England) Regulations 2021

1. In its letter to the Department of 24 March 2021, the Committee requested a memorandum on the following points:

> *(1) In relation to the definition of "charitable, benevolent or philanthropic institution" in regulation 2(1), and having regard to the definition of "charity" in section 1 of the Charities Act 2011, describe the class of institution which is intended to be caught which are not charities but which are established for charitable purposes.*
>
> *(2) In relation to the definition of "Crown interest", and having regard to the extent and application provisions of regulation 1(3), identify the estates or interests "held in right of the Prince and Steward of Scotland" which are included in the definition.*
>
> *(3) In relation to paragraph (a) of the definition of "elite sportsperson" explain the intended breadth of the phrase "derives a living from" including, in particular, whether it is intended to catch people who have sources of income not related to competitive sport, and whether it is intended to include sponsorship and other sums paid to a person by reason of their status as a participant in sports but not directly arising from competition prizes or other earnings.*
>
> *(4) In the definition of "sportsground" explain the meaning of the phrase "elite sports training or competition".*
>
> *(5) In relation to the definition of "support group", explain how the references to "members" and "those who attend its meetings" are intended to apply in relation to "one to one support" and, in so far as those expressions do not apply to "one to one support", explain how the definition is intended to work in relation to that kind of support.*
>
> *(6) In relation to paragraph (b) of the definition of "vulnerable person", and having regard to the fact that the reference to regulation 2(4) is expressly inclusive and not exhaustive, explain whether there are intended to be any limitations on the health conditions that can be treated as "underlying health conditions" in order for a person to qualify as a "vulnerable person" under the regulations and, if that is the intention, explain how those limitations are derived.*
>
> *(7) In relation to the definition of activities undertaken "for referendum purposes" in regulation 2(5)(d): (a) if paragraphs (i) and (ii) are disjunctive because it is intended that a person can satisfy the definition by either promoting an outcome or prejudicing an outcome, explain the intended*

meaning of the word "another" in paragraph (ii); and (b) if the word "another" suggests that any campaigning incorporates an element of both limbs of the definition, why was paragraph (ii) thought necessary?

(8) In relation to the definition of "private dwelling" in regulation 2(5)(i)(ii), explain the import of the words "or as otherwise specified" and, in particular, identify provisions of the Regulations in which any of the places listed in paragraphs (aa) to (ff) are specified as intended to be included within references to a "private dwelling".

(9) In relation to regulation 6(3)(b), explain whether "issued by the government" is intended to refer to guidance issued by or on behalf of a Minister of the Crown and, if it is intended to have a wider meaning, identify the intended additional breadth.

(10) In relation to regulation 8(1): (A) Is it intended that a person is to be treated as having a reasonable excuse where they wish to take a holiday abroad (whether for the purpose of meeting other people who live or holiday abroad, in order to enjoy foreign weather or other conditions, or for other reasons) and they believe that having regard to their general well-being it is reasonable for them to take a foreign holiday? (B) If it is intended that such a person is not to be treated as having a reasonable excuse, explain, given that the list of excuses in Schedule 5 is expressly inclusive and not exhaustive, how effect is given to that intention.

(11) In relation to regulation 10(12), give examples of the kind of "reasonable instructions" that relevant persons are expected to wish to give when exercising the powers listed in that subparagraph.

(12) In relation to regulation 11(1):(a) where a person is given a prohibition notice for alleged contravention of a Step 1 restriction under regulation 10(7), is it intended that the person could be charged both with an offence under regulation 11(1)(a) and an offence under regulation 11(1)(d); and (b) explain how the principles of double jeopardy would apply (or not apply) in that case.

(13) In relation to regulation 14(3)(b)(iii) confirm that the phrase "any other place indoors" should be "in any other place".

(14) In relation to regulation 18: (a) explain the circumstances in which it is proposed to allow persons designated by the Secretary of State to prosecute offences under the Regulations; (b) identify the class of person proposed to be designated; (c) explain why prosecution by the Crown Prosecution Service would not be appropriate; and (d) identify appropriate safeguards to be applied in the case of prosecutions by designated persons.

(15) In relation to regulations 21, 22 and 23(4): (a) explain what paragraph 21(2) is intended to add to, or detract from, the operation of section 16 of the Interpretation Act 1978; (b) explain why it was not thought necessary to include similar provision regulation 22; and (c) explain what regulation 23(4) achieves that would not have been achieved by a combination of silence and the 1978 Act?

(16) In relation to paragraph 10 of Schedule 1, is sub-paragraph (1)(a) intended to cover the use of premises for the provision of COVID-19 vaccinations and, if so, what is sub-paragraph (1)(j) intended to cover?

(17) In relation to paragraph 12(6) of Schedule 2, given that the test is set out as an objective one: (a) by reference to what evidence is it intended that providers of holiday accommodation should satisfy themselves as to whether people are members of the same or linked householders; and (b) in a case where the provider of the accommodation is misled by the submission of false evidence, does the provider have a defence to a charge of breaching the Regulations and, if not, why not?

(18) In relation to paragraph 4(9)(c) of Schedule 3, is it intended that questions of cost are capable of being taken into account for determining what is practicable?

2. The Department's response to the Committee's points is as follows.

3. In relation to point (1), the definition of "charitable, benevolent or philanthropic institution" in regulation 2(1) was intended to catch an institution which is established for purposes which may include charitable purposes but which are not limited to such purposes, the definition of "charity" in section 1 of the Charities Act 2011 being limited to an institution which is established for charitable purposes only (and which falls to be subject to the control of the High Court). In particular, the definition in regulation 2(1) was intended to catch religious bodies, including those operating places of worship, and unincorporated community groups and associations.

4. In relation to point (2), the title of "Prince and Steward of Scotland" refers to the Prince of Wales and constitutes part of the Prince of Wales's titles when addressed in Scotland. The definition of "Crown interest" therefore includes the interests of the Prince of Wales (which, by virtue of regulation 1(3), would be limited to such interests in England).

5. In relation to point (3), paragraph (a) of the definition of "elite sportsperson" refers to "an individual who … derives a living from competing in a sport". This form of words, present across secondary legislation relating to COVID-19 since its introduction in the Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 3) Regulations 2020 (S.I. 2020/558), identifies a class of sportspersons who participate in a sport and receive some form of payment as a result of doing so. In requiring that the payment must be sufficient for such a person to "derive a living" from their activities (rather than setting a precise monetary figure), the definition seeks to ensure that the beneficial treatment (in the form of exceptions from the restrictions in the Regulations) applies only to people for whom participation in sport provides at least a reasonable income. The intention is that any source of income which is not a consequence of a person competing in a sport is irrelevant for the purposes of this definition, but that sponsorship and other sums paid to a person by reason of the person competing in sports may well be relevant.

6. In relation to point (4), in the definition of "sportsground", the phrase "elite sports training or competition" means training or competition undertaken by elite sportspersons.

7. In relation to point (5), the intention is that one to one support could be organised by an institution of the kind referred to in the definition of "support group" (for example

a business) for (or between) any of the institution's members, or any person(s) who attend(s) the institution's meetings; this would be in order to "provide aid" (generally) to its members or to those who attend its meetings. In other words, the aid or help would be being provided to the totality of the institution's members or, more widely, to those who attend its meetings. The definition would capture, for example, one to one sessions between two individuals receiving the aid (i.e. mutual support between members/those who attend meetings organised by the institution in question).

8. In relation to point (6), the term "vulnerable person" is intended to capture persons who are likely to be susceptible to COVID-19 or its effects as well as persons who are otherwise likely to be vulnerable by virtue of requiring care or assistance. The health conditions in regulation 2(4) are those that are known to particularly increase vulnerability to COVID-19, however the list is intentionally non-exhaustive as we do not have a complete picture at this stage. In the circumstances, the limitations on the health conditions that would constitute "underlying health conditions" would be those that do not render a person vulnerable within the ordinary meaning of that term.

9. In relation to point (7), we confirm that regulation 2(5)(d)(i) and (ii) is disjunctive because it is intended that a person can satisfy the definition of activities undertaken "for referendum purposes" by either promoting an outcome or prejudicing an outcome. The word "another" in paragraph (ii), was intended to refer to an outcome other than one favoured by the person undertaking the activities however we accept that this could have been better expressed by simply referring to "a particular outcome" rather than "another particular outcome".

10. In relation to point (8), we confirm that the words "or as otherwise specified" are superfluous as there are no provisions in which the places listed in paragraphs (aa) to (ff) are specified as intended to be included within references to a "private dwelling". The Department apologises to the Committee for this error.

11. In relation to point (9), "issued by the government" is intended to refer to guidance issued by, or on behalf of, a Minister of the Crown and also wider guidance issued by the government such as by a non-Ministerial government department.

12. In relation to point (10), it is not intended that such a person is to be treated as having a reasonable excuse. We consider that this view is supported by the indicative list of reasonable excuses at Schedule 5. However, as with any other reasonable excuse defence, it would ultimately be for the court to determine the question on the particular facts and circumstances of any given case before it.

13. In relation to point (11), a relevant person, including a police officer, when exercising the powers referred to in regulation 10(12), may give the person concerned any reasonable instructions the relevant person considers to be necessary. An example would be, when exercising the power under regulation 10(7) to direct a gathering to disperse, to ask the individuals who are part of the gathering to leave in different directions.

14. In relation to point (12), the intention is that in the circumstances set out it is likely that a person would be charged in respect of an offence under regulation 11(1)(d), being the latest offence, however in theory it would be possible for a person to be issued with a prohibition notice whilst charged with an offence under regulation 11(1)(a), with failure to comply with the prohibition notice resulting in a further charge. There are two separate

offences. The first is failing to meet a legal requirement, the second is failing to comply with a notice. A sentencing court may take into account the level of connection between the two offences in sentencing or a decision may be made not to proceed with both.

15. In relation to point (13), the Department confirms that in regulation 14(3)(b)(iii) the phrase "any other place indoors" should be "in any other place" and apologises to the Committee for this error.

16. In relation to point (14), regulation 18 provides for proceedings under the Regulations to be brought by the Crown Prosecution Service (the CPS) or any other person designated by the Secretary of State. Similar provision was included in regulation 13 of the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 (S.I. 2020/1374) (the Tiers Regulations) and in the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (S.I. 2020/350) (the original Regulations). Designations were made under the Tiers Regulations (on 8 February 2021—attached) and the original Regulations (on 16 June 2020[1]) to enable additional parties to carry out prosecutions for offences under those Regulations. The effect of these designations was carried over under these Regulations (regulation 23(3) as read, with the Tiers Regulations and, in relation to the designation of 16 June 2020, the Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 (S.I. 2020/684) and the original Regulations) to apply in relation to offences under these Regulations. It is not envisaged that any further designations will need to be made under regulation 18 of these Regulations.

17. The designation under the Tiers Regulations applies in circumstances where a person has been issued with a fixed penalty notice and proceedings may be brought under the Tiers Regulations.

18. The following persons have been designated under the Tiers Regulations: (i) the chief constable of a police force in England maintained under section 2 of the Police Act 1996; (ii) the Commissioner of Police of the Metropolis; (iii) the Commissioner of Police for the City of London; (iv) the chief constable of the British Transport Police Force and (v) the chief constable of the Ministry of Defence Police.

19. The following persons have been designated under the original Regulations: (i) the Chief Executive Officer of the ACRO Criminal Records Office; (ii) a district council; (iii) a county council; (iv) a London borough council; (v) the Common Council of the City of London in its capacity as a local authority; and (vi) the Council of the Isles of Scilly.

20. The designation of persons, in addition to the CPS, who may bring proceedings helps to ensure that offences under the Regulations relating to COVID-19 are dealt with swiftly and efficiently. There have been a high number of fixed penalty notices which have been issued but not paid under the Regulations and this would represent a significant workload for the CPS (with consequent delays) if no other persons were able to bring proceedings.

21. The relevant proceedings are dealt with under the "single justice procedure" provided for by section 16A of the Magistrates Court Act 1980. Under this procedure, the court deals directly with those cases where the accused pleads guilty in writing or does not respond or engage with the single justice procedure notice which is served upon them.

1 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/897632/Designations_under_the_Health_Protection__Coronavirus_Restrictions___England__Regulations_2020.pdf

However, by way of safeguard, the CPS will take conduct of all cases where the accused pleads not guilty or indicates that they do not consent to the single justice procedure; and the individual must then attend court and in due course have a trial.

22. In relation to point (15), regulations 21(2) and 23(4) were included for avoidance of doubt and, in the case of regulation 21(2), for consistency with other regulations relating to COVID-19 such as regulation 16 of the Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020 (S.I. 2020/1045). We accept that provision similar to that in regulation 21(2) could have been included in relation to regulation 22 and will take this into consideration in our future drafting.

23. In relation to point (16), we confirm that paragraph 10(1)(a)(i) was intended to cover the use of premises for the provision of COVID-19 vaccinations (as well as for other essential or urgent services such as the provision of treatment centres, or other essential public services that need to be put in place to respond to an emergency, such as flooding—and not necessarily restricted to the response to COVID-19). Paragraph 10(1)(j) was intended to cover the use of theatres, conference centres and exhibition halls for wider activities such as testing options for, and methods of, controlling the spread of disease (which may not involve the provision of a service to the public), specifically in response to COVID-19.

24. In relation to point (17), we would expect a provider of holiday accommodation to take reasonable steps to ascertain whether persons for whom holiday accommodation was booked were from the same household or linked households such as seeking confirmation of this prior to taking bookings, and potentially asking for evidence such as proof of address. A person commits an offence under the Regulations if they breach a restriction without reasonable excuse. If a provider of holiday accommodation has taken reasonable steps as mentioned above and is misled by the submission of false evidence, then the provider may well have a reasonable excuse for having breached the Regulations but this will depend on the facts.

25. In relation to point (18), paragraph 4(9) of Schedule 3 was intended to cover gatherings for the purposes of weddings or civil partnerships where one member of the couple is seriously ill and unlikely to recover. The reference to "reasonably practicable" was intended to catch cases where one member of the couple could not leave the home due to illness, although it could potentially also catch other cases, for example where a wedding (in accordance with paragraph 4(8)) would not be affordable (or where a venue for a gathering in accordance with that paragraph was unavailable) in the time available afforded to the couple.

Department of Health and Social Care

30 March 2021

Appendix 2

Draft S.I.

Single Use Carrier Bags Charges (England) (Amendment) Order 2021

1. The Committee has asked the Department for Environment, Food and Rural Affairs for a memorandum on the following point:

> *Under article 1(2), the Order comes into force on the day after the day on which it is made. Explain why it is considered this will allow sufficient time for those affected to comply with the new requirements introduced by the Order*

2. Clause 1(2) of the draft instrument provides that its provisions come into force on the day after the day on which the instrument is made. In the Government's view this is appropriate because:

2.1 A policy consultation was held from 27 December 2018 to 22 February 2019, and the Government published its response in August 2020. The response stated the Government's intention to extend the obligation to charge for a single-use carrier bag from just large retailers (>250 employees) to all retailers and to increase the minimum charge to 10p (although many retailers already charge more than the mandatory 5 pence). The response also made clear that the extension and increase of the charge would enter into force in April 2021.

2.2 This announcement was widely publicised in the national press, and Defra considers it reasonable to assume that businesses are aware of the Government's intention to bring these changes into force in April 2021.

2.3 In light of the Government's clear statement of its intention to legislate, Defra does not expect that businesses will wait until after the instrument has been made before taking any steps needed to adapt to the changes required. Defra envisages that many businesses will have already done so or will do so following the publication of the draft instrument.

2.4 Defra has recently written to stakeholders (e.g. retailers and trade associations) to inform them of the changes being made by the Order and when it is likely to come into force.

2.5 Defra will also share an advance version of guidance that will be published online once the draft instrument has passed parliamentary scrutiny directly with trade associations (e.g. the British Retail Consortium and the Association of Small Shopkeepers). This draft guidance will explain the changes being made and the expected coming into force date (30 April subject to Parliamentary approval of the draft instrument being obtained before that date). In terms of timing, the draft guidance will be shared within a reasonable period (at least 21 days) ahead of the expected coming into force date.

3. Taking all these matters into account the Government considers the commencement provision to be appropriate, having regard also to the public interest in the provisions in the draft instrument coming into force without delay.

Department for Environment, Food and Rural Affairs

30 March 2021

Appendix 3

S.I. 2021/76

Domestic Renewable Heat Incentive Scheme and Renewable Heat Incentive Scheme (Amendment) Regulations 2021

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

> *In relation to regulation 1(2)(b)(vi), explain which is correct, the regulation number or the parenthetical description.*

2. It is the parenthetical description which is correct. We are most grateful to the JCSI for pointing out this error and are urgently considering how to remedy it, including liaising with the SI Registrar on the possibility of a correction slip as we believe the intention is clear.

Department for Business, Energy and Industrial Strategy

23 March 2021

Appendix 4

S.I. 2021/109

Heavy Commercial Vehicles in Kent (No. 3) (Amendment) Order 2021

1. By a letter dated 17th March 2021 the Committee asked for a memorandum on the following point:

> *Give further details (in addition to the explanation in the rubric) of the reasons for the delay between the making and laying of this instrument.*

2. Although the Order referred to above was signed on 20th January and originally published and laid on 21st January, a subsequent check of the published version revealed that it differed very slightly from the version that had been signed, in that some words introducing an amendment appeared to have been accidentally deleted. The Department believes that this probably occurred, entirely unintentionally, during the electronic process of submitting the order for publication and laying.

3. As soon as the error was noticed, the Department contacted the National Archives and arranged for the incorrect version of the Order to be withdrawn. Arrangements were also made to withdraw the incorrect version that had been laid before parliament. The matter was brought to the attention of the Minister and letters were sent to the Speaker of the House of Commons, copied to the Chair of the Joint Committee on Statutory Instruments, and to the Lord Speaker, copied to the Chair of the Secondary Legislation Scrutiny Committee, on 1st February, explaining what had happened.

4. The corrected version of the Order was then registered and published with a new number and laid before Parliament. Copies of the corrected Order were issued free of charge to known recipients of the original version.

5. Although these steps were taken as quickly as possible once the discrepancy had been identified, the Department accepts that there was a consequential delay between the Order being made and the correct version being laid before Parliament. The Department apologises to the Committee for the error and will endeavour to ensure that similar administrative mistakes do not happen again.

Department for Transport

23 March 2021

Appendix 5

S.I. 2021/127

Education (Student Fees, Awards and Support) (Amendment) Regulations 2021

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

> *(1) In regulations 25(8), 35(8), 57(8), 61(9) and 67(8) (paragraphs (1)(d) and (e) of new regulations 8A and 9A (as the case may be)), explain the difference in meaning between "the day on which the first term of the first academic year actually begins" and "the first day of the first academic year of the course".*
>
> *(2) Given, as stated in paragraph 7.12 of the Explanatory Memorandum, that UK nationals and their family members living in Gibraltar will continue to be eligible for home fee status and for tuition fee support if starting courses before 1 January 2028, explain whether:*
>
> *(i) Regulation 28(a) (inserted paragraph (1B)) should include a reference to paragraph 9E; and*
>
> *(ii) Regulation 59(c) (inserted paragraph (6)) should include a reference to paragraph 10E.*

2. This memorandum has been prepared by the Department for Education. The Department's response to the Committee's points is as follows.

3. In relation to the first point, the use of these two different phrases in paragraphs 1(d) and (e) of the new paragraphs 8A and 9A (as the case may be) replicates the existing drafting in paragraphs 8 and 9 respectively. This gives effect to the policy intention of retaining existing rights under those paragraphs only for the limited cohort identified in paragraph 1(c) of the new paragraphs. This achieves consistency by using language which has an established meaning and appears elsewhere in the various instruments amended.

4. As the Committee will be aware, in each provision identified, "the first day of the first academic year of the course" is to be construed in accordance with the definition of "academic year" in the appropriate regulations amended by S.I 2021/127.[2]

5. In each case, "academic year" is defined as "the period of twelve months beginning on 1st January, 1st April, 1st July or 1st September of the calendar year in which the academic year of the course in question begins according to whether that academic year begins on or after 1st January and before 1st April, on or after 1st April and before 1st July, on or after 1st July and before 1st August, or on or after 1st August and on or before 31st December, respectively". So for the purposes of the various Regulations, an academic year is deemed to start on one of four dates in the calendar year, depending on when in the academic year the particular course in question actually begins.

2 See for example regulation 2 (interpretation) of the Education (Student Support) Regulations 2011 (S.I. 2011/1986).

6. The phrase “the day on which the first term of the first academic year actually begins” is used in the existing Regulations and has an established meaning. It can be any date in the calendar year and will vary between courses and providers.

7. Accordingly, for the purposes of paragraph 1(d) of those new paragraphs 8A and 9A, “the day on which the first term of the first academic year actually begins” may be earlier or later than the first day of the first academic year of the course. For example, although the first day of the first academic year of a course may be 1st September, the course may not start until later in September or indeed it may have started earlier, in August.

8. In relation to the second point, regulations 28(a) and 59(c) are correct as drafted. The policy is as set out in the fourth bullet point of paragraph 7.12 of the Explanatory Memorandum. UK nationals and their family members living in Gibraltar (and the other groups mentioned in paragraphs 9E and 10E respectively) continue to be eligible for home fee status, without time limit, under the Education (Fees and Awards) (England) Regulations 2007 and the Higher Education (Fee Limit Condition) (England) Regulations 2017. They will also continue to be eligible for tuition fee support under the Education (Student Support) Regulations 2011 (and support under other applicable student finance legislation) but that eligibility is limited to courses beginning before 1 January 2028. If starting before that date, as the Committee notes, they will continue to be eligible for both home fee status and for tuition fee support (and support under other applicable student finance legislation).

9. Regulation 4(1) of the Education (Fees and Awards) (England) Regulations 2007 (inserted by regulation 28(a) of S.I. 2021/127) and regulation 4(4) of the Higher Education (Fee Limit Condition) (England) Regulations 2017 (inserted by regulation 59(c)) specify the eligibility categories that entitle a person to home fee status. Regulations 4(1B) and 4(6) respectively specify the new eligibility categories which will cease to apply in relation to courses beginning on or after 1 January 2028.

10. Regulation 4(1B) refers to paragraphs 8A and 9B, as for those cohorts eligibility for home fee status will end in relation to courses starting on or after 1 January 2028 as per the third bullet point in paragraph 7.12 of the Explanatory Memorandum. Similarly, regulation 4(6) of the 2017 Regulations refers to paragraphs 9A and 10B. Including a reference to paragraphs 9E and 10E (as the case may be) would have the effect, contrary to the policy intention, of removing persons in those categories (resident in Gibraltar) from eligibility for home fee status at that point. Accordingly, the drafting is correct.

Department for Education

23 March 2021

Appendix 6

S.I. 2021/131

Loans for Mortgage Interest (Amendment) Regulations 2021

1. In its letter to the Department dated 17th March 2021, the Committee requested a memorandum on the following point:

> *"Given that the amendments made by regulations 2(6) and 3 are made to correct drafting errors and accurately reflect the policy intent, explain whether the Department has complied with paragraph 4.7.6 of Statutory Instrument Practice and consulted the S.I. Registrar whether or not to provide free replacement copies."*

2. The Department's response to the Committee's point is set out below.

3. The Department acknowledges it should have consulted the S.I. Registrar on this issue before making these Regulations, and apologises for not doing so. We have now contacted the S.I. Registrar in relation to refunding people who have bought copies of the relevant Regulations.

Department for Work and Pensions

23 March 2021

Appendix 7

S.R. 2021/16

Crown Court (Amendment) Rules (Northern Ireland) 2021

1. The Committee has requested a memorandum on the following points:

> *(1) Explain why the free-issue procedure was not used, given that this instrument corrects errors made by the Criminal Procedure (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/908; see paragraphs 2.3 and 7.8 of the Explanatory Memorandum).*
>
> *(2) Having regard to the principles set down by Hodgson J in R. v Secretary of State for Trade, Ex p. Chris International Foods Limited (Case CO/1020/82, Friday 4 March 1983 QBD), and noted in relation to S.I. 2015/1953 in the Committee's Fourteenth Report of Session 2015–16, confirm that despite being designated Parliamentary Under Secretary of State to the Minister of Justice, Mr Chalk signed the allowance of these Rules in his capacity as Parliamentary Under Secretary of State to the Lord Chancellor.*
>
> *(3) In a case where an overseas production order is sought in relation to proceedings already instituted, rather than to an offence that is being investigated or a terrorist investigation, explain how the requirement in rule 62O(2)(c) to "briefly describe the investigation for the purposes of which the electronic data is sought" is intended to operate.*
>
> *(4) In relation to rules 62O(3) to (5) and 62P(3)(c), explain—*
>
> a) *why rules 62O(3) and 62P(3)(c) place no time limit on service, in contrast to the requirements for documents to be notified to specified parties "as soon as practicable" in rule 62O(4) and "as soon as reasonably practicable" in rule 62O(5);*
>
> b) *the intended difference in meaning between "as soon as practicable" and "as soon as reasonably practicable" and the reason for that difference;*
>
> c) *what is meant by "if applicable" in rule 62P(3)(c) (by reference to examples, and by contrast with rule 62O(3)); and*
>
> d) *why rule 62P(3)(c) (requirement for service) is subject to rule 62Q(7)(c) (discretion for court to consider applications orally instead of in writing) and not rule 62Q(7)(b) (discretion for court to waive requirements for service).*

Question 1

2. It was an oversight not to use the free-issue procedure. The Department of Justice, Northern Ireland has made enquiries with the Statutory Publications Office and the National Archives regarding remedial actions and will request that any purchasers of the original instrument are identified and issued with a refund. The Committee may also

wish to note that analogous correcting amendments to magistrates' courts rules have been made by the Magistrates' Courts (Amendment) Rules (Northern Ireland) 2021, again not using the free-issue procedure. The Department will also undertake the same arrangements in respect of this instrument.

Question 2

3. Under section 53A of the Judicature (Northern Ireland) Act 1978, the relevant authority (in this case, the Lord Chancellor) must "allow or disallow" the rules previously made by the Committee under section 52(1). The purpose of the signature of these rules is to indicate the Lord Chancellor's "allowance" of them. This is why the words "signed by the authority of the Lord Chancellor" were included ahead of the signature of Minister Chalk "allowing" the rules on behalf of the Lord Chancellor. (The Lord Chancellor was unavailable.) Minister Chalk's title is correctly stated as "the Parliamentary Under Secretary of State, the Ministry of Justice"; there is no such role as "the Parliamentary Under Secretary of State to the Lord Chancellor".

Questions 3 and 4—General Note:

4. The rules contained in the Schedule to The Crown Court (Amendment) Rules (Northern Ireland) 2021 make equivalent provision to, and where appropriate mirror, section 10 (Orders for Access to Electronic Data under the Crime (Overseas Production Orders) Act 2019) of Part 47 (Investigation Orders and Warrants) of the Criminal Procedure Rules 2020, S.I. 2020/759. What is now section 10 of Part 47 was inserted into the then Criminal Procedure Rules 2015, S.I. 2015/1490, by the Criminal Procedure (Amendment No. 2) Rules 2019, S.I. 2019/1119 (listed in the Annex to the Committee's 68th Report of session 2017–19, published 6th September 2019). This approach maintains, wherever possible and appropriate, procedural equivalence in the operation of applicable primary legislation across the relevant UK jurisdictions.

Question 3

5. Rule 62O(2)(c) mirrors rule 47.65(3)(f) of the Criminal Procedure Rules 2020. It is anticipated that an application for an overseas production order may be made after proceedings have been instituted, for example, where an investigation is continuing by direction of a prosecutor after the decision to prosecute or as a result of developments in proceedings prior to trial. The application will contain a brief description of this on-going investigation.

Question 4(a)

6. Rules 62O(3) makes provision equivalent to rules 47.65(1)(e) and (f) of the Criminal Procedure Rules 2020. Rule 62P(3)(c) makes provision equivalent to rule 47.66(3)(b) of the Criminal Procedure Rules 2020. Rules 62O(3) and 62P(3)(c) are to be read in conjunction with rule 62Q(3) which closely follows rule 47.64(3) of the Criminal Procedure Rules 2020. No time limit for service is prescribed by the Criminal Procedure Rules 2020 and it was not considered that there were any Northern Ireland-specific reasons to depart from the established procedure in England and Wales. It is anticipated that in the normal course of events service will be simultaneous with the giving of notice to the chief clerk.

Question 4(b)

7. The intended difference in meaning between 'as soon as practicable' and 'as soon as reasonably practicable' relates to the strictness of the requirement. Usage in this context is based upon the definition in Stroud's Judicial Dictionary, 10th Edition, which, in the entry relating to 'practicable', states, "Where the drafter of a statute uses "practicable" rather than "reasonably practicable", he is taken to intend a stricter requirement (Nikonos v Governor of Brixton Prison [2005] EWHC Admin 2405 at [21])." In rules 62O(4) and 62P(3), it was considered that the context merited a stricter requirement whereas in rule 62O(5), the context was not considered to merit a stricter requirement.

Question 4(c)

8. Rule 62P(3)(c) closely follows rule 47.66(3)(b)(ii) of the Criminal Procedure Rules 2020. The words 'if applicable' in rule 62P(3)(c) reflect the potential position whereby the application to vary or revoke the original order is made by the respondent to the original application for an order. In such circumstances, service upon the respondent would not be applicable.

Question 4(d)

9. It is accepted that this rule may benefit from elucidation and steps will be taken to seek to have the wording rectified in the next available instrument.

Ministry of Justice

18 March 2021