



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

Second Report of Session 2021–22

Drawing special attention to:

Tribunal Procedure (Amendment) Rules 2021 (S.I. 2021/322)

National Health Service (General Medical Services Contracts and Personal Medical Services Agreements) (Amendment) Regulations 2021 (S.I. 2021/331)

Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 11) Regulations 2021 (S.I. 2021/442)

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Joint Committee on Statutory Instruments

Current membership

House of Lords

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[Baroness Gale](#) (*Labour*)

[Lord Haskel](#) (*Labour*)

[Baroness Newlove](#) (*Conservative*)

[Lord Rowe-Beedoe](#) (*Crossbench*)

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Powers

The full constitution and powers of the Committee are set out in [House of Commons Standing Order No. 151](#) and [House of Lords Standing Order No. 73](#), relating to Public Business.

Remit

The Joint Committee on Statutory Instruments (JCSI) is appointed to consider statutory instruments made in exercise of powers granted by Act of Parliament. Instruments not laid before Parliament are included within the Committee's remit; but local instruments and instruments made by devolved administrations are not considered by JCSI unless they are required to be laid before Parliament.

The role of the JCSI, whose membership is drawn from both Houses of Parliament, is to assess the technical qualities of each instrument that falls within its remit and to decide whether to draw the special attention of each House to any instrument on one or more of the following grounds:

- i that it imposes, or sets the amount of, a charge on public revenue or that it requires payment for a licence, consent or service to be made to the Exchequer, a government department or a public or local authority, or sets the amount of the payment;
- ii that its parent legislation says that it cannot be challenged in the courts;
- iii that it appears to have retrospective effect without the express authority of the parent legislation;
- iv that there appears to have been unjustifiable delay in publishing it or laying it before Parliament;

- v that there appears to have been unjustifiable delay in sending a notification under the proviso to section 4(1) of the Statutory Instruments Act 1946, where the instrument has come into force before it has been laid;
- vi that there appears to be doubt about whether there is power to make it or that it appears to make an unusual or unexpected use of the power to make;
- vii that its form or meaning needs to be explained;
- viii that its drafting appears to be defective;
- ix any other ground which does not go to its merits or the policy behind it.

The Committee usually meets weekly when Parliament is sitting.

Publications

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The reports of the Committee are published by Order of both Houses. All publications of the Committee are on the Internet at www.parliament.uk/jcsi.

Committee staff

The current staff of the Committee are Sue Beeby (Committee Operations Officer), Apostolos Kostoulas (Committee Operations Officer), Luanne Middleton (Commons Clerk), Christine Salmon Percival (Lords Clerk). Advisory Counsel: Sarita Arthur-Crow, Klara Banaszak, Daniel Greenberg, and Vanessa MacNair (Commons); Nicholas Beach, James Cooper, and Ché Diamond (Lords).

Contacts

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Instruments reported

At its meeting on 19 May 2021 the Committee scrutinised a number of instruments in accordance with Standing Orders. It was agreed that the special attention of both Houses should be drawn to three of those considered. The instruments and the grounds for reporting them are given below. The relevant departmental memoranda are published as appendices to this report.

1 S.I. 2021/322: Reported for defective drafting

Tribunal Procedure (Amendment) Rules 2021

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

1.2 These Rules, which are subject to the negative resolution procedure, make amendments to procedural rules applicable in the First-tier Tribunal and Upper Tribunal. Rule 3(4) amends rule 17 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 to enable the Tribunal to dispose of an appeal administratively where the respondent has revoked or withdrawn the decision or act under appeal. Rule 10(4) of the 2009 Rules states that an application for a costs order may not be made later than 14 days after the date on which a Tribunal sends a notice under rule 17(5). These Rules amend rule 17(5) so that it refers to withdrawal only under the existing arrangements and not under the new disposal provision. The Committee therefore asked the Ministry of Justice to explain how the time constraint set out in rule 10(4) is intended to apply in relation to the new provision. In its memorandum, printed at Appendix 1, the Department accepts that there is an inadvertent omission in this respect, **and the Committee accordingly reports rule 3(4) for defective drafting, acknowledged by the Department.**

2 S.I. 2021/331: Reported for failure to comply with proper legislative practice and for defective drafting

National Health Service (General Medical Services Contracts and Personal Medical Services Agreements) (Amendment) Regulations 2021

2.1 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 and are defectively drafted in two respects.

2.2 These Regulations, which are subject to the negative resolution procedure, amend two instruments relating to medical services provided under a general medical services contract and a personal medical agreement.

2.3 The Committee asked the Department of Health and Social Care to explain why this instrument could not have been made sooner in order to comply with the 21-day rule, particularly given that agreement was reached on the changes in February 2020 and the latest negotiation round was communicated to the primary care sector on 21 January 2021. In its memorandum, the Department explains that the breach was necessary due to “a government commitment made in Parliament during the passage of the Ministerial and

other Maternity Allowances Act 2021, immediately prior to the date that the instrument would have had to be laid in order to comply with the 21-day rule”. The Committee does not find this explanation satisfactory. Apart from anything else, the Bill received Royal Assent on 1 March and this instrument was only made and laid before Parliament on 17 March. The Committee explained the importance of compliance with the 21-day rule in its First Special Report of Session 2017–19 (*Transparency and Accountability in Subordinate Legislation*). Since the Department has not provided a clear explanation of why the rule could not have been complied with in this case, **the Committee reports these Regulations for failure to comply with proper legislative practice.**

2.4 Paragraph 2(3)(a) of Schedule 1 amends the definition of “additional services” found in regulation 3 of the National Health Service (General Medical Services Contracts) Regulations 2015 by removing all but one of the services listed. The Committee asked the Department to explain why the words “one or more of” were not also omitted from the words at the beginning of the definition. In its memorandum, the Department accepts that those words are redundant and should have been revoked. **The Committee accordingly reports paragraph 2(3)(a) of Schedule 1 for defective drafting, acknowledged by the Department.**

2.5 Paragraph 4 of Schedule 1 amends regulation 17 of the 2015 Regulations by removing paragraphs 12 to 15 of that regulation. As a reference to paragraph 12 remains in paragraph 1 of regulation 17, where it is stated that “essential services” include those specified in paragraph 12, the Committee asked the Department to explain. In its memorandum, printed at Appendix 2, the Department accepts that the reference should have been revoked **and the Committee accordingly reports paragraph 4 of Schedule 1 for defective drafting, acknowledged by the Department.**

3 S.I. 2021/442: Reported for defective drafting

Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 11) 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 two related respects.**

3.2 These Regulations, which are subject to the negative resolution procedure, introduce a system of mandatory workforce testing for international arrivals who are exempt from quarantine because they are travelling with a sectoral exemption. The definition of a workforce test in regulation 5 (inserted regulation 3C(6)(b)) is “a test which is provided or administered under the National Health Service Act 2006”. The Committee asked the Department of Health and Social Care to explain why this definition does not refer to it being a test for the detection of coronavirus nor give an indication of the type of test to be administered. In a memorandum printed at Appendix 3 the Department agrees that it would have been preferable for new regulation 3C(6)(b) to have expressly provided that “a workforce test” is a test for the detection of coronavirus but argues that other provisions of these regulations and the principal travel regulations being amended (S.I. 2020/568) imply that workforce tests are for the detection of coronavirus and can leave no reasonable doubt as to that conclusion. The Committee accepts that the courts would probably feel forced to imply some kind of limitation along these lines since the words used are so obviously

wider than the probable policy intent. But it is obviously important for legislation to be clearly intelligible without recourse to the courts wherever possible, and here there is no reason why the connection with COVID-19 should not have been clearly and simply stated in the definition. **The Committee accordingly reports regulation 5 for defective drafting, acknowledged by the Department.**

3.3 The Committee also asked the Department to explain how the effect of the definition of “workforce test” in new regulation 3D(14) is intended to differ from the definition in new regulation 3C(6)(b). In its memorandum, the Department confirms that no difference is intended and accepts that it would have been preferable for “workforce test” in new regulation 3D(14) to be defined by direct reference to regulation 3C(6)(b). Internal consistency of language is important, as the courts will presume that a change of language implies a change of meaning, and a single definition would have sufficed. **The Committee accordingly reports regulation 5 for defective drafting in another respect, acknowledged by the Department.**

Instruments not reported

At its meeting on 19 May 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. 2021/496 Myanmar (Sanctions) Regulations 2021

Draft Instruments requiring affirmative approval

Draft Justice and Security (Northern Ireland) Act 2007 (Extension of Duration of Non-jury Trial Provisions) Order 2021

Draft Payment and Electronic Money Institution Insolvency Regulations 2021

Draft Immigration (Collection, Use and Retention of Biometric Information and Related Amendments) Regulations 2021

Draft Immigration and Nationality (Fees) (Amendment) Order 2021

Draft Ecodesign for Energy-Related Products and Energy Information Regulations 2021

Draft British Nationality Act 1981 (Immigration Rules Appendix EU) (Amendment) Regulations 2021

Draft Conformity Assessment (Mutual Recognition Agreements) and Weights and Measures (Intoxicating Liquor) (Amendment) Regulations 2021

Instruments subject to annulment

S.I. 2021/421 Industrial Training Levy (Construction Industry Training Board) Order 2021

S.I. 2021/440 Marriage and Civil Partnership (Conversion of Civil Partnership and Fees) (Amendment) Regulations 2021

S.I. 2021/446 National College for Advanced Transport and Infrastructure (Designated Institution in Further Education and Revocations) Order 2021

S.I. 2021/453 Official Controls (Exemptions from Controls at Border Control Posts) (Amendment) Regulations 2021

S.I. 2021/456 Social Security (Claims and Payments) (Amendment) Regulations 2021

S.I. 2021/458 Scarborough Borough Council (Removal of Pilotage Functions) Order 2021

S.I. 2021/459 Magistrates' Courts (Amendment) Rules 2021

S.I. 2021/462	Civil Proceedings and Gender Recognition Application Fees (Amendment) Order 2021
S.I. 2021/463	Solvency 2 (Credit Risk Adjustment) Regulations 2021
S.I. 2021/465	Supervision of Accounts and Reports (Prescribed Body) and Companies (Defective Accounts and Reports) (Authorised Person) Order 2021
S.I. 2021/497	Criminal Legal Aid (Remuneration) (Amendment) (No. 2) Regulations 2021
S.I. 2021/505	Family Court (Composition and Distribution of Business) (Amendment) Rules 2021
S.I. 2021/508	Vaccine Damage Payments (Specified Disease) (Amendment) Order 2021
S.I. 2021/510	Electricity (Individual Exemption from the Requirement for a Generation Licence) (Kype Muir Extension Wind Farm) Order 2021

Instruments not subject to parliamentary proceedings not laid before Parliament

S.I. 2021/464	Firearms (Amendment) Rules 2021
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Appendix 1

S.I. 2021/322

Tribunal Procedure (Amendment) Rules 2021

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

In relation to rule 3(4), explain how rule 10(4) of S.I. 2009/1976 is intended to apply in cases of deemed withdrawal under new rule 17(6) (noting that the reference in rule 10(4)(b) to notice under rule 17(5) will not catch deemed withdrawals).

2. The Department is grateful to the Committee for raising this point, which has highlighted an omission to consider the interaction between rule 10(4) of S.I. 2009/1976 (wasted or unreasonable costs order may not be made later than 14 days after the Tribunal sends a decision notice fully disposing of all issues in the proceedings or a notice under rule 17(5) that a withdrawal which ends the proceedings has taken effect) and the amendment made to rule 17 to introduce provision for deemed withdrawals mirroring that for explicit withdrawals. The effect of the drafting as matters stand is that the time limit for making a wasted or unreasonable costs order will not apply where the proceedings were ended by deemed withdrawal rather than explicit withdrawal. The Department does not consider this to have been the intention, and will propose to the Tribunal Procedure Rule Committee that an appropriate amendment be made to rule 10(4) of S.I. 2009/1976, so that a deemed withdrawal is caught and an application for a wasted or unreasonable costs order under rule 10(1) cannot be made later than 14 days after the Tribunal has sent notice (under rule 17(8)) that the proceedings have been treated as withdrawn (under rule 17(6)).

Ministry of Justice

4 May 2021

Appendix 2

S.I. 2021/331

National Health Service (General Medical Services Contracts and Personal Medical Services Agreements) (Amendment) Regulations 2021

1. In its letter to the Department of 28 April 2021, the Committee requested a memorandum on the following points:

“1. Explain why this instrument could not have been made sooner in order to comply with the 21-day rule, particularly given that agreement was reached on the changes in February 2020 and the latest negotiation round was communicated to the primary care sector on 21 January 2021.

2. In relation to paragraph 2(3)(a) of Schedule 1, confirm that the words “one or more of” in the amended regulation are redundant and should have been revoked.

3. In relation to paragraph 4 of Schedule 1, explain why regulation 17(1) of the National Health Service (General Medical Services Contracts) Regulations 2015 still refers to paragraph 12.”

2. The Department’s response is as follows.

3. In relation to point (1), the Department apologises for non-compliance with the 21-day rule. This was necessary because of a government commitment made in Parliament during the passage of the Ministerial and other Maternity Allowances Act 2021, immediately prior to the date that the instrument would have had to be laid in order to comply with the 21-day rule. The commitment related to considering the use of gendered language in forthcoming legislation. Further consideration of the draft wording in this instrument was therefore necessary in order to meet the commitment. The instrument was laid immediately after the conclusion of that exercise. This was an example of the government considering individual instances of drafting on a case-by-case basis as they arise, ahead of the conclusion of the wider review that is under way. As the instrument had to come into force on 1 April 2021 (for the reasons set out in the Explanatory Memorandum), the Department regrets that it was not possible to comply with the 21-day rule.

4. In relation to point (2), the Department accepts that the words “one or more of” are redundant and should have been revoked. The Department will revoke these words at the next appropriate opportunity.

5. In relation to point (3), the Department accepts that regulation 17(1) should not continue to refer to paragraph 12, and confirms that the reference will be revoked at the next appropriate opportunity.

6. The Department apologises to the Committee for the above errors.

Department of Health and Social Care

4 May 2021

Appendix 3

S.I. 2021/442

Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 11) Regulations 2021

1. In its letter to the Department of 28 April 2021, the Committee requested a memorandum on the following point:

Explain why the definition of “a workforce test” in regulation 5 (inserted regulation 3C(6)(b)) does not refer to it being a test for the detection of coronavirus nor give an indication of the type of test to be administered; and (b) how the effect of the definition of “workforce test” in new regulation 3D(14) is intended to differ from the definition in new regulation 3C(6)(b).

2. The Department’s response is as follows.

3. The Department agrees that it would have been preferable for new regulation 3C(6)(b) to have expressly provided that “a workforce test” is a test for the detection of coronavirus. However, in the Department’s view, there can be no reasonable doubt that that is the effect of that provision. The provisions governing workforce tests, namely new regulation 3C and new Schedule 2D are inserted (by regulations 5 and 11 of the instrument) into the Health Protection (Coronavirus, International Travel) (England) Regulations (S.I. 2020/568) (the “Principal Regulations”), an instrument that relates exclusively to coronavirus.

4. The consequences of workforce test results, as set out in new Schedule 2D, also imply that workforce tests are tests for the detection of coronavirus. Where a test generates a positive result, or where an individual fails to take a workforce test, they must self-isolate in accordance with the Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020 (S.I. 2020/1045) (paragraphs 3(1)(b) and 2(2) of Schedule 2D, respectively). Again, that instrument relates solely to coronavirus and, in particular, the self-isolation requirements imposed by that instrument are triggered only where an individual is notified of a positive test result for coronavirus or is a notified close contact of such a person.

5. Further, paragraph 3(1)(a) of new Schedule 2D provides that where a workforce test is positive, a confirmatory test must be taken which “complies with the requirements for a day 2 test specified in paragraph 6 of Schedule 2C”. Paragraph 6 of Schedule 2C provides (in relation to private providers) that a day 2 test is a “...test for the detection of coronavirus”. If the function of a confirmatory test is to detect coronavirus, then the original test must necessarily have been for the detection of the same virus.

6. In relation to the question of why the definition of “workforce test” in regulation 5 does not indicate the type of test to be administered, by virtue of new regulation 3C(6)(b), workforce tests must be provided or administered under the National Health Service Act 2006. It is the policy of the Department not to specify further standards, such as regulatory standards, for coronavirus tests provided by the National Health Service. Thus, for example, the standards for day 2 tests set out in paragraphs 6(2) and 7 of Schedule 2C apply to private but not public providers.

7. The Committee asks how the effect of the definition of “workforce test” in new regulation 3D(14) is intended to differ from the definition of that term in new regulation 3C(6)(b). The Department confirms that no difference is intended.
8. Regulation 3D(14) provides that a workforce test “has the same meaning as in Schedule 2D”, and the definition of workforce test in paragraph 1 of Schedule 2D provides that a workforce test means “any of the categories of workforce test described in regulation 3C(6)”. This includes, at regulation 3C(6)(b), “a workforce test”.
9. However the Department accepts that it would have been preferable for “workforce test” in new regulation 3D(14) to be defined by direct reference to regulation 3C(6)(b).
10. The Department intends to consolidate the Principal Regulations along with other regulations relating to coronavirus and international travel in a new instrument. The Department will consider addressing the above points in that instrument.

Department of Health and Social Care

4 May 2021

Formal Minutes

Wednesday 19 May 2021

Virtual Meeting

Members present:

Jessica Morden (*in the Chair*)

Dr James Davies	Baroness Newlove
Baroness Gale	Lord Rowe-Beddoe
Lord Haskel	Baroness Scott of Needham Market
John Lamont	Lord Smith of Hindhead

Draft Report, proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 3.3 read and agreed to.

Annex agreed to.

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

Resolved, That the Report be the Second Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Ordered, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

[Adjourned till Wednesday 26 May at 3.40 p.m.]