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Joint Committee on Statutory Instruments

Rule of Law Themes from COVID-19 Regulations

First Special Report of Session 2021–22

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Joint Committee on Statutory Instruments

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Powers

The full constitution and powers of the Committee are set out in House of Commons Standing Order No. 151 and House of Lords Standing Order No. 74, 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.

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Summary

This Report sets out a number of recurring themes that arose in the Committee's consideration of statutory instruments addressing the COVID-19 pandemic.

The Committee's attitude to scrutinising emergency regulations has been to balance an understanding of the pressures on government with the need to maintain fundamental rule of law standards and principles.

In performing this function, the Committee has noted with satisfaction that the Government has frequently taken action in response to reports of the Committee. Overall there has appeared to be a spirit of mutual respect and collaboration in the Committee's dealings with the Government.

The Committee identified the following core issues.

The presumption against the sub-delegation of legislative power is a long-standing and important principle and the Committee was concerned that the pandemic should not become an opportunity to depart from it unnecessarily. The Committee believes that statutory instruments should not delegate legislative power unless expressly permitted to do so by the enabling power, and that enabling powers should not permit legislative sub-delegation as a matter of course.

In some cases offences underpinning enforcement of COVID-19 regulations were drafted with insufficient clarity, or in such a way as to appear irrational. The Committee is concerned that criminal offences should be drafted in a way that provides certainty and is not likely to diminish respect for the law.

The Committee supports the use of guidance and other forms of quasi legislation wherever appropriate, and notes that it is an effective tool for exerting influence rather than demanding compliance with hard-letter law. It is important that a clear distinction is made between guidance and requirements imposed by law. It is also important that guidance is not relied upon as a way of tightening up insufficiently certain provisions of legislation.

The timing of legislating for the pandemic has obviously imposed significant pressures on the Government. While recognising these pressures, the Committee continues to expect the Government to ensure that people are given as much notice of legislation as possible, and that drafts are published in advance where appropriate. It is also important to ensure that explanatory material describing the effect of legislation does so accurately.

Where emergency legislation makes significant changes on a temporary basis, those changes should not be made permanent without careful consideration. In particular, where legislation affects fundamental rights, those rights should not be quietly diluted under the cover of the pandemic response.

Introduction

1. From early in 2020 the Committee has been required to consider a large number of statutory instruments addressing different aspects of the COVID-19 pandemic.

2. It became apparent to the Committee early on, from its consideration of these instruments, that although they were made by different Departments using a range of powers delegated by various Acts, several common themes were emerging. Some of these themes appeared to raise rule of law issues that were of importance in a general context and not merely in relation to the particular instruments on which they arose.

3. The purpose of this Report is therefore to draw together, from the Committee's reports on individual COVID-19 instruments, matters which the Committee believes are of general and enduring significance in relation to the preservation and protection of the rule of law.

4. The Committee has appreciated throughout that, like any other civil emergency, the pandemic has placed enormous demands on the machinery of Government generally; and the Committee has been anxious not to add unnecessarily to the burdens on departments generally or on individual civil servants at this very difficult time. The Committee has tried accordingly to temper both the substance of its comments and its processes in a manner that recognises the enormity of the crisis with which the Government has been faced, and neither counsels unattainable and unreasonable perfection nor allows the best to become the enemy of the good.

5. Despite this, the Committee decided early on that the necessary constraints on the normal law-making processes for subordinate legislation during the pandemic made it all the more important for the Committee to continue to play its role in preserving fundamental rule of law standards in relation to delegated legislation.

6. The Committee has tried to balance these conflicting considerations so as to continue to perform Parliament's function of providing checks and balances in relation to the rule of law without becoming an inappropriate obstruction to or distraction from efficient and effective public administration.

7. This balance has been most pronounced, perhaps, in relation to timing. There were signs early in 2020 that the 21-day rule—according to which negative resolution instruments are generally expected to be laid and published at least 21 days before they come into force—was regarded as having been abrogated as a result of the pandemic in certain Government circles. The Committee took informal steps to make its view known that the rule was as important in principle as ever,[1] and that it was not for individual Ministers to decide when to set it aside. The Government responded informally in a helpful way which made it clear that Ministers recognised the continuing importance both of rules of this kind and of the Committee's role in supervising their operation. The Committee has continued to expect, and where necessary seek, explanations for individual decisions to depart from the 21-day convention, and although for the most part the Committee has been content with those explanations and has not reported the instruments to which they related, the Committee has not held back from reporting adversely in cases where it was not convinced that the

1 See: Joint Committee on Statutory Instruments, First Special Report of Session 2017–19, *Transparency and Accountability in Subordinate Legislation*, HC 1158, paras 2.15 to 2.23.

departure from convention was justified by the particular circumstances of the case.[2] The Committee believes that its approach to the 21-day rule in relation to urgent coronavirus instruments has shown that while maintaining the importance of the rule in principle the Committee has remained alive to the importance of not allowing the rule to stand in the way of effective emergency legislation.

8. This is but one example of a general spirit of cooperation which the Committee has found evident in its dealings with the Government throughout the course of the pandemic. When the Committee has had occasion to draw attention to unsatisfactory aspects of individual instruments, it has found that in many cases the Government has taken swift action to address them by way of an amending instrument. The Committee has been particularly appreciative of what amounts, in effect, to a collaboration between Government and Parliament in maintaining the rule of law standards on which the principles of a Parliamentary democracy depend.

9. This Report is therefore published in that same collaborative spirit, hoping that by drawing these themes together it will be of assistance to the Government in preparing future instruments, as well as being of use to other readers with an interest in rule of law matters.

10. This Report covers the following themes:

- sub-delegation;
- offences;
- use of guidance;
- timing of commencement, laying and publication; and
- temporary provisions.

2 See, in particular: Joint Committee on Statutory Instruments, *Twenty-Fourth Report of Session 2019–21*, HC 75-xxiv, in relation to S.I. 2020/790 and *Fortieth Report of Session 2019–21*, HC 75-xi, in relation to S.I.s 2020/1531 and 2020/1532.

Sub-delegation

11. At least since the 1932 Report of the Donoughmore Committee on Ministers' Powers it has been generally accepted that, as that Committee concluded, the delegation by Parliament of its legislative powers is a necessary part of the legislative process.[3] The use of delegated powers in primary legislation allows Parliament to focus on core policy frameworks and to leave detailed implementation to secondary legislation. There is, however, a general principle against sub-delegation as a result of which the courts apply a specific presumption against sub-delegation of legislative power.[4]

12. This presumption is rebuttable. Where there is a compelling justification, a delegated power in primary legislation may include a further delegation of power (a legislative sub-delegation); for example, allowing the secondary legislation to include a power for the Minister to confer a discretion on a person (including themselves), to specify matters in a public notice or to do anything that an Act of Parliament can do. In order to rebut the presumption, it needs to be clear from the enabling powers that sub-delegation is intended to be permitted.

13. Legislative sub-delegations effected by subordinate legislation generally allow provision to be made through guidance, determinations or other relatively informal documents, which do not as a rule attract any requirements or process for Parliamentary scrutiny.

Sub-delegation powers included in COVID-19 instruments

14. The Committee is concerned that sub-delegated powers have been included in coronavirus legislation in cases where Parliament has not (or not clearly) intended to confer legislative discretion.

15. In the 2019–21 Session the Committee reported an unusual number of provisions for doubt as to whether they were *intra vires* on the ground of unlawful sub-delegation. Examples of this included powers for the Minister:

- to make temporary changes to rules during a "coronavirus period" which could be extended in up to one month increments for three months or cut short;[5]
- to turn regulations on and off (through the use of exemption periods) by notice;[6]
- temporarily to release prisoners under a direction "framed by reference to whatever matters the Secretary of State considers appropriate;"[7]

3 Lord Chancellor's Department, *Committee on Ministers' Powers: Report*, Cm 4060, April 1932, para. 14. Internet Archive copy.

4 Daniel Greenberg, *Craies on Legislation*, 12th Edition, (London, 2020) paras. 3.5.1–3.5.4, and 19.1.22.6.

5 Joint Committee on Statutory Instruments, *Fifteenth Report of Session 2019–21*, HC 75-xv, in relation to S.I. 2020/508.

6 Joint Committee on Statutory Instruments, *Thirteenth Report of Session 2019–21*, HC 75-xiii, in relation to S.I. 2020/468 and *Seventeenth Report of Session 2019–21*, HC 75-xvii, in relation to S.I. 2020/567.

7 Joint Committee on Statutory Instruments, *Eleventh Report of Session 2019–21*, HC 75-xi, in relation to S.I. 2020/400.

- to disapply certain prohibitions set out in the Competition Act 1998 during the "healthcare disruption period" which was to end on a date specified by the Secretary of State;[8]
- to modify secure training centre rules during a transmission control period so as to suspend the entitlement of young persons in those centres to visits at the Minister's discretion;[9]
- to specify by notice the manner in which required information from incoming passengers was to be provided.[10]

16. Departments have put forward the following arguments to justify their use of discretionary powers in secondary legislation where Parliament has not expressly conferred such discretion:

- that a broad general power allows for the exercise of discretion, and that, in particular, emergency reserve powers are intended to be construed widely;[11]
- that determining when legislation applies or turning legislation on or off, is an "administrative function" rather than a legislative function and therefore falls outside the presumption against sub-delegation;[12]
- that discretion is lawful if its exercise is permitted only for a limited time;[13]
- that modern contextual construction has overridden the presumption against sub-delegation.[14]

17. The Committee has consistently rejected the arguments set out in paragraph 16. The argument that a very broad power should be given a very broad construction cannot survive the 2016 decision of the Supreme Court in *Public Law Project*[15] where the court expressly approved the observation in *Craies on Legislation*[16] that "…the more general the words used by Parliament to delegate a power, the more likely it is that an exercise within the literal meaning of the words will nevertheless be outside the legislature's contemplation." This means that the wider the terms of the power the less likely it is that it permits anything that is contrary to any of the presumptions operated by the courts to control the development of delegated powers including, in particular, the presumption against sub-delegation.

8 Joint Committee on Statutory Instruments, *Twelfth Report of Session 2019–21*, HC 75-xii, in relation to S.I. 2020/435.

9 Joint Committee on Statutory Instruments, *Twenty-First Report of Session 2019–21*, HC 75-xxi, in relation to S.I. 2020/664.

10 Joint Committee on Statutory Instruments, *Seventeenth Report of Session 2019–21*, HC 75-xvii, in relation to S.I. 2020/567.

11 Joint Committee on Statutory Instruments, *Fifteenth Report of Session 2019–21*, HC 75-xv, in relation to S.I. 2020/508 and *Seventeenth Report of Session 2019–21*, HC 75-xvii, in relation to S.I. 2020/567.

12 Joint Committee on Statutory Instruments, *Eleventh Report of Session 2019–21*, HC 75-xi, in relation to S.I. 2020/400, *Twelfth Report of Session 2019–21*, HC 75-xiii, in relation to S.I. 2020/435, *Fifteenth Report of Session 2019–21*, HC 75-xv, in relation to S.I. 2020/508 and *Seventeenth Report of Session 2019–21*, HC 75-xvii, in relation to S.I. 2020/567.

13 Joint Committee on Statutory Instruments, *Fifteenth Report of Session 2019–21*, HC 75-xv, in relation to S.I. 2020/508.

14 Joint Committee on Statutory Instruments, *Thirteenth Report of Session 2019–21*, HC 75-xiii, in relation to S.I. 2020/468.

15 United Kingdom Supreme Court, 'Judgment: Public Law Project v Lord Chancellor', (13 July 2016), UKSC 39.

16 See Daniel Greenberg, *Craies on Legislation*, 12th Edition, (London, 2020), para 1.3.11.

18. The argument that the power to determine when legislation applies and to turn legislation on or off is administrative rather than legislative ignores the fact that the Minister is taking the power to determine what the law is from time to time. If a Minister makes a statutory instrument but reserves the power to turn it on and off informally, while the instrument is turned off it has no legal force, so the Minister by turning it on and off is perpetually making, revoking, and re-making the legislation itself. The discretion goes to the core effect of the legislation and cannot be characterised as merely administrative.

19. The argument that a discretion is more lawful if time limited again does not appear to be justified by any legal rationale. The consequences of a temporary measure may be just as serious as the consequences of a permanent measure and there is no reason in principle why Parliament would wish to exercise less control over powers that are exercised on a time-limited basis.

20. The Committee also strongly rejects the argument that the presumption against sub-delegation has been overtaken by modern judicial attitudes where the vires for the regulations does not permit sub-delegation. In a memorandum to the Committee[17] a Department argued that the presumption against sub-delegation was overridden by the "strongly adverse consequences" that would ensue as a result of the "inability of the Secretary of State to provide for the reasonable and proportionate response as set out in the Regulations". It claimed support for that proposition by reference to a dissenting judgment of Lord Briggs in the 2018 case *Project Blue Limited v Commissioners for Her Majesty's Revenue and Customs*[18] which according to the Department endorsed what it described as "a modern contextual approach to the construction of statutes, where regard is to be had to the consequences" which "represents a significant difference from earlier authorities in which sub-delegation was considered unlawful even if convenient and desirable". The Committee is clear that Lord Briggs says no such thing in his judgment in that case, and strongly rejects the suggestion that modern contextual construction has overridden the long-standing presumption against sub-delegation in favour of sub-delegation wherever "convenient and desirable".

The Committee's view on sub-delegation powers in COVID-19 instruments

21. The Committee is concerned that the coronavirus pandemic should not be taken as an opportunity to relax the principles of the rule of law, of which the presumption against sub-delegation in legislation is a key component.

22. That presumption is long-standing and strong, so where Parliament intends to confer legislative discretion it must do so by express words or (exceptionally) by necessary implication. General powers do not rebut the presumption, and it does not change if the discretion is only for a limited period. The wider the terms of a power, the more necessary it is to remember the constraints on apparently open powers applied by the courts (see paragraph 17 above).

17 Joint Committee on Statutory Instruments, *Thirteenth Report of Session 2019–21*, HC 75-xiii, in relation to S.I. 2020/468, memorandum from the Department.

18 United Kingdom Supreme Court, 'Judgment: Project Blue Limited v Commissioners for Her Majesty's Revenue and Customs', (13 June 2018), UKSC 30.

23. Where enabling powers do not expressly permit legislative sub-delegation, Departments should take care not to include provisions amounting to legislative sub-delegation in secondary legislation. The Committee is likely to report such instruments for doubt as to *vires*.

24. The Committee recognises the need for flexibility and the temptation to provide that flexibility by legislating through guidance, notice or other informal process. And there are many contexts in which exercising influence through soft-letter law such as statutory or voluntary guidance is preferable to seeking to control through hard-letter primary or subordinate legislation. But where control rather than influence is required, it can be achieved only through legislation enacted through a formal legislative process that provides certainty, transparency and accountability, albeit at the expense of a certain amount of flexibility.

25. To the extent that flexibility is required, it should not be necessary to resort to sub-delegation, lawful or unlawful, to achieve it. For example, instead of including powers to turn legislation on and off by notice or other informal process, the same effect could (and therefore should) be achieved by making regulations as and when required, commencing them by commencement provision in the ordinary way, revoking them when they are no longer required and re-making them if and when necessary.

26. The Committee's concerns in relation to unlawful sub-delegation would not be assuaged by increasing the number of enabling powers that expressly authorise sub-delegation by instruments made under them. Indeed, an increase in powers of that kind would increase the Committee's unease. The Committee recognises the need for delegated powers, but safeguards and balances are needed to preserve core principles of the rule of law and to ensure that Ministers do not undermine the supremacy and sovereignty of Parliament. Both unlawful sub-delegation and excessive powers of lawful sub-delegation dilute the authority of Parliament, by shielding exercises of legislative authority from the rigours of Parliamentary scrutiny.

27. Taking all these considerations together, the Committee is clear that enabling powers for subordinate legislation in primary legislation should include express powers of further sub-delegation only where justified by clear need; and those powers should be no broader than is justified in the context, should be subject to clear and express parameters and should make appropriate provision for safeguards.

28. The Committee notes with satisfaction that in a number of cases the Government appears to have accepted the Committee's view and removed unlawful sub-delegation provisions from regulations using an amending instrument.[19]

19 S.I.s 2020/821, 2020/933, 2020/1077.

Offences

29. The various tranches of coronavirus restrictions regulations have all been underpinned by provisions making breach of the regulations a criminal offence. The Committee identified two principal issues with the way these offences were drafted:

- lack of clarity; and
- irrationality.

Lack of clarity

30. The Committee reported a number of provisions where the terms of the restrictions had not been cast with sufficient clarity. Isolation regulations, for example, required people to stay in a "suitable place", without objective criteria on the face of the regulations setting out how the suitability of accommodation was to be determined.[20] It would have been possible to articulate factors of that kind; and in their absence it will have been difficult or impossible for a significant number of people to know whether or not they were isolating in a manner that protected them from criminal liability.[21]

31. Many of the restrictions took the form of prohibitions against doing certain things "without reasonable excuse".[22] In many contexts it is acceptable in rule of law terms for lack of reasonable excuse to be a component of an offence, as the regulatory or other context provides sufficient guidance to the courts and other readers as to the intended parameters of what is reasonable. That has not, however, been the case in relation to all of the coronavirus restrictions regulations: for example, the prohibition against leaving the UK "without reasonable excuse", coupled with an expressly non-exhaustive list in a Schedule of specific examples of reasonable foreign travel, left the courts and other readers without guidance as to how far general well-being and other factors might be applied to establish a reasonable excuse outside, but arguably cognate to, the scheduled list of examples. Again, it would have been possible for the regulations to include a list of indicative factors that would have balanced a reasonable degree of clarity and certainty against the necessary flexibility.

32. In the regulations that implemented the Government's plan for the gradual lifting of coronavirus restrictions, an exception was made to the prohibition on providing holiday accommodation where the accommodation was in "separate and self-contained premises", which was defined in part by reference to occupation by members of the same household or linked households.[23] The Department asserted 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".[24] This did not give a sufficient level of certainty and clarity for the providers of accommodation. Providers of accommodation could have been made the subject of a statutory duty to carry out a verification process (as had been done, for example, in

20 S.I. 2020/568.
21 Joint Committee on Statutory Instruments, *Seventeenth Report of Session 2019–21*, HC 75-xvii, in relation to S.I. 2020/568
22 For example, S.I.s 2020/750, 2020/1045, 2020/1375 and 2021/364.
23 S.I. 2021/364.
24 Joint Committee on Statutory Instruments, *Forty-Sixth Report of Session 2019–21*, HC 75-xlvi, in relation to S.I. 2020/364, memorandum from the Department.

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 the way the offence was drafted, there was no compulsory or voluntary statutory process, and the evidential burden of proving linked households seemed unlikely to be reasonably capable of being discharged on an ad hoc basis. Parliament could not have expected potential criminal liability to be conferred in terms of this lack of clarity and certainty.

33. Those same regulations also defined a "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)". The Department contended that the list of underlying health conditions "is intentionally non-exhaustive as we do not have a complete picture at this stage".[25] It is an unsatisfactory position in rule of law terms for the Government to not have had a "clear picture" of the class of underlying conditions that made a person vulnerable to COVID-19, but to expect the reader of regulations to know intuitively whether or not they themselves, or another person, fell within that class in order to determine whether or not they were breaching the regulations and thereby committing a criminal offence.

Irrationality

34. In a different category of cases, restrictions underpinned by criminal offences have been defined with sufficient precision to provide certainty, but in terms that make it difficult to identify any rational purpose behind the precision. For example, it is difficult for businesses and customers to have respect for a law that prohibits off-licences from selling alcohol at certain times, but expressly permits them to remain open for the purposes of delivery and collection of orders placed remotely, without specifying any kind of minimum delay between order and collection.[26] The enacting Department publicly admitted that it would be entirely lawful for an off-licence to remain open, for customers to go in, browse and select the alcohol they wish to purchase, to leave the shop, to telephone to the counter from immediately outside the door and place an order, and to re-enter the shop and buy the alcohol.[27] It is the apparent irrationality of such precise provisions that make them dangerous in rule of law terms, particularly in contexts where a breach of the regulations is a criminal offence, as they inevitably tend to diminish respect for the criminal law.

35. Another obvious avoidance opportunity was in Regulations which introduced requirements for operators of commercial transport services to ensure that passengers travelling to England from outside the common travel area completed a Passenger Locator Form and possessed notification of a negative test result.[28] An operator who failed to ensure that a passenger had completed a Passenger Locator Form committed an offence. It was a defence for an operator to show that it had recorded a unique passenger reference number for the relevant passenger before that passenger boarded the relevant service. A unique passenger reference number is a number received by the passenger from the Home Office on completion of the Passenger Locator Form. The Department recognised that falsification of this number in the correct format was possible as there was no requirement

25 As above.

26 S.I. 2020/1183.

27 Joint Committee on Statutory Instruments, *Thirty-Second Report of Session 2019–21*, HC 75-xxxii, in relation to S.I. 2020/1183, memorandum from the Department.

28 S.I. 2021/38.

to verify the reference number.[29] It is difficult to understand the logic of creating an offence that can be committed by the operator subject to a defence that a passenger gave them a number, if that number can be a complete fabrication. This kind of obvious avoidance opportunity has significant potential for diminishing respect for the law.

The Committee's view on lack of clarity and irrationality in criminal offences

36. Where criminal offences are created, the terms of the restrictions must be cast with sufficient clarity and certainty to enable readers to determine in advance whether particular kinds of activity will or will not incur criminal liability. This is a fundamental requirement of the rule of law.

37. In addition to clarity and certainty, it is important for criminal offences not to be cast in such a way as to create easy avoidance opportunities or to create an apparently irrational line between the criminal offence and a lawful act.

38. The Committee again emphasises its appreciation of the immense difficulties facing those who prepared regulations to address the pandemic at great speed and presumably under very considerable pressure. And the Committee accepts that as a result, emergency regulations will sometimes take an approach that is not ideal in general, but that is justifiable or inevitable in the circumstances. That degree of latitude cannot, however, be allowed to extend to the criminal law. Where regulations are enforced ultimately through criminal liability, their approach must be as rigorous and fair as in any other aspects of the criminal law.

29 Joint Committee on Statutory Instruments, *Forty-Fourth Report of Session 2019–21*, HC xliv, in relation to S.I. 2021/38, memorandum from the Department.

Guidance and law

39. In relation to the Government's use of guidance drafted to explain the coronavirus laws to the public, the Committee has noticed two main issues:

- blurring the distinction between the law and guidance; and
- purporting to use guidance to amplify legislation.

Blurring the distinction between the law and guidance

40. The Committee is concerned that guidance has been used in the context of the pandemic response in a way that appears to attempt to impose more severe restrictions than are imposed by law, by presenting the guidance to the public as if it were law that compelled compliance. For example, regulations made in early 2021 to impose severe restrictions on movement in all areas of England (i.e. a national lockdown) prohibited people from leaving their home without reasonable excuse and listed some, but not all, of the excuses that would be considered reasonable.[30] But the guidance went beyond what was in the regulations. It directed people to limit exercise to once a day, not to "travel outside your local area"—which was defined as "avoiding travelling outside of your village, town or the part of a city where you live"—to maintain a set distance from people not in their household or support bubble, and to leave home to shop only for "basic necessities".[31] None of these restrictions was included in the regulations and they were not legally enforceable.

41. Many readers will not readily appreciate the distinction in rule of law terms between provisions of regulations and paragraphs in Government guidance; and a statement such as "the law will be updated to reflect these new rules"[32] is likely to add to the confusion by suggesting exact correspondence between the "rules" (which are not in fact rules but guidance) and the law.

42. The Committee is also concerned that there appears to have been an unwillingness to distinguish between the wishes of Government expressed informally or in guidance and the requirements of the law, which has been a feature of the Government's response to the coronavirus pandemic despite this issue having been raised by parliamentary Committees at various stages in 2020 and 2021.[33]

30 S.I. 2021/8, which amended S.I. 2020/1374.

31 Cabinet Office, "Guidance - National Lockdown: Stay at Home", published 4 January 2021 and updated 5 January 2021 (accessed 6 January). [Original link www.gov.uk/guidance/national-lockdown-stay-at-home was updated to Coronavirus: how to stay safe and help prevent the spread—GOV.UK (www.gov.uk). Last updated 19 July 2021.]

32 As above.

33 The Government stated in December 2020 that it "continues to review guidance online and ensure that it is up to date, and accessible so the public are able to interpret it correctly. This includes ensuring that guidance clearly distinguishes between Government advice and what measures people are legally required to follow" (Department of Health and Social Care, "The Government's Response to the Joint Committee on Human Rights Report: The Government's Response to COVID-19: Human Rights Implications", CP 335, December 2020, para. 2). However, guidance published on 4 January 2021 did not make the distinction clear. Table A of the Annex contains examples. In House of Lords Secondary Legislation Scrutiny Committee, Thirteenth Report of Session 2019–21, HL 57, published in May 2020, the Secondary Legislation Scrutiny Committee also drew attention to the disparity between guidance and law. The Committee published correspondence with the Secretary of State for Health and Social Care in which he states that "it is the Regulations and not the guidance which are legally enforceable although the guidance is an important way for the public to understand how best to limit the spread of coronavirus".

43. Tables A and B of the Annex contain further examples of where the distinction between advice and legal requirement has not been made.[34]

44. In one case, that distinction was blurred in the instrument itself. Travel regulations required operators of commercial passenger transport services to provide specified information to outbound passengers, including the statements "you can only travel for essential reasons" and "you can only travel internationally from England for legally permitted reasons. This does not include holidays."[35] These statements, however, acted as a gloss on the legislation rather than being an accurate summary of it: there had never been a prohibition on travel (or leaving home) for reasons that were not "essential"—they only needed to be "reasonable". Even when the Government legislated on 22 March to restrict international travel it did so by reference to a non-exhaustive list of reasonable excuses, so to say that foreign holidays were "effectively prohibited" was a gloss on the regulations rather than a statement of the law. A statement of the law in a prescribed statutory form must be an accurate reflection of the law as it is. A statement that purports to reflect what the law is, but in fact represents what the Government would like the law to be, is dangerously misleading; and it is troubling that the Department considered that meticulous accuracy in stating the effect of the law "would not have assisted public understanding".[36]

The Committee's view on the distinction between law and guidance

45. The rule of law requires a clear distinction to be made between non-statutory guidance and requirements imposed by law. Whereas non-statutory guidance may influence, the law requires compliance. Law-enforcement officials and other public authorities have neither the duty nor the right to apply or enforce guidance as if it were the law.

46. In the context of the pandemic, where regulations came into force with little or no time to prepare for the new restrictions and where new regulations were made relatively frequently, it was even more important for the guidance to clearly delineate between what was mere advice and what was a legal requirement. The Committee agrees with the Government's statement that the public must be able to interpret guidance correctly[37] and invites Departments to consistently ensure this in future.

47. As mentioned in paragraph 24, the Committee supports the use of guidance in many contexts. Influencing sectoral behaviour through quasi-legislation will very often be more effective than attempting to control through primary or subordinate legislation. That will be particularly the case where the guidance or other quasi-legislation is based on extensive consultation and therefore represents best practice of the sector concerned. But where control is thought necessary, it must be achieved through legislation and not be brought through the back door by way of quasi-legislation presented as if it were actual legislation, or indeed by presenting a misleading gloss on other legislation within a new instrument.

34 Specific text cited in these Tables may no longer be accessible due to the practice, throughout the pandemic, of updating online guidance without maintaining access to earlier versions. The Committee commented on this practice in its *Thirty-Eighth Report of Session 2019–21*, HC 75-xxxviii, in relation to S.I. 2021/8 and its *Fortieth Report of Session 2019–21*, HC 75-xl, in relation to S.I. 2020/1568. For the Committee's views on accessibility issues relating to legislation more generally, see its First Special Report of Session 2017–19, *Transparency and Accountability in Subordinate Legislation*, HC 1158, at paragraph 4.

35 S.I. 2021/252.

36 Joint Committee on Statutory Instruments, *Forty-Seventh Report of Session 2019–21*, HC 75-xlvii, in relation to S.I. 2021/252, memorandum from the Department.

37 See footnote 33, above.

Purporting to use guidance to amplify legislation

48. Another issue the Committee has noted is the practice of attempting to rely on guidance to tighten up wording that is insufficiently clear in the legislation itself. This is not a new issue, but it has taken place relatively often during the coronavirus pandemic. There have been several examples.

49. Regulations creating international travel restrictions identified acceptable places for self-isolation. The list included "other suitable place". The Committee reported this for defective drafting and commented that legal certainty requires that when duties are imposed on people, they are given enough information to be able to satisfy themselves that they are complying. In simply specifying "other suitable place", there were neither express criteria for determining suitability nor sufficient implicit indications of what is intended for compliance (or, indeed, non-compliance) with this duty to be reasonably capable of being demonstrated.[38] When amending Regulations were made, the Department stated that it would "review its guidance with a view to considering appropriate clarification."[39] The Department later acknowledged that there was no enabling power to issue guidance of this kind and that any guidance would therefore not have legislative effect, leaving the construction of the term "suitable" as a matter for the courts, notwithstanding the Department's views as expressed in guidance. Nor would public authorities be required to take the guidance into account on ordinary public law principles. Non-statutory guidance issued by the Government of its own motion has neither legislative status nor authority as a matter of administrative law. (It may have some legal effects, for example as evidence of reasonable behaviour for contractual or other legal purposes, particularly if founded on consultation of a kind that makes it evidence of sectoral best practice; but that is a separate matter.)[40] Non-statutory guidance cannot be used to fill gaps in the law, which must be sufficiently clear and certain on its face to enable the individuals to whom it applies to be able to comply with it. The expression "suitable place" is simply not sufficiently clear for legislative purposes, and purporting to supplement it with guidance is not a sufficient answer.

50. Regulations providing local authorities with new enforcement powers relating to coronavirus restrictions referred to "essential infrastructure" without defining the term. The Department asserted that the meaning was obvious but suggested that guidance issued in the context of other coronavirus regulations would elucidate if required. However, the Department had no power to dictate the meaning informally by reference to guidance or otherwise. The principles set out in the guidance to which the Department referred should have been distilled into statutory criteria in the Regulations by reference to which readers, including but not limited to local authority officers, would know with a reasonable degree of practical certainty when the powers under the Regulations could or could not be exercised.[41]

51. In relation to regulations imposing restrictions on gatherings and on businesses in England, the Department considered that a requirement to take precautions was implicit

38 Joint Committee on Statutory Instruments, *Seventeenth Report of Session 2019–21*, HC 75-xvii, in relation to S.I. 2020/568.

39 Explanatory Memorandum to S.I. 2020/691, paragraph 3.3.

40 Joint Committee on Statutory Instruments, *Twenty-Second Report of Session 2019–21*, HC 75-xxii, in relation to S.I. 2020/691, memorandum from the Department.

41 Joint Committee on Statutory Instruments, *Thirty-Sixth Report of Session 2019–21*, HC 75-xxxvi, in relation to S.I. 2020/1375.

and referred to guidance on "COVID secure locations". The Committee did not agree that the requirements of the guidance had been incorporated into the regulation, so if that had been desired, it should have been expressly provided for (whether by reference to the guidance or otherwise).[42]

52. In the context of international travel restrictions and setting the criteria for when a person may leave self-isolation if they have tested negative for coronavirus, regulations specified that a provider must follow "appropriate standard operating procedures". The Department asserted that guidance on standards could be used to determine the criteria for "appropriate standard operating procedures". The Committee's view was that, in light of the enabling powers, the guidance could have been expressly referred to in the Regulations and that this would have given the reader authoritative elucidation of the meaning of "appropriate". As drafted, the Regulations were unclear and it was not lawful for the Department to deploy the guidance, purely informally, to tighten up the otherwise loose language of the legislation.[43]

53. Regulations about statutory sick pay provided that a person was eligible if they were "defined in public health guidance as extremely vulnerable and at very high risk of severe illness from coronavirus because of an underlying health condition" and had been advised to follow shielding measures. The Department asserted that the regulation could be read in a purposive way even if the relevant guidance did not explicitly use the expression "extremely vulnerable". The Committee reported that using the expression "defined in public health guidance as extremely vulnerable" gives rise to a clear expectation that the guidance will define a class by reference to the expression "extremely vulnerable".[44] This example illustrates that where the enabling power allows for cross-reference to be made to guidance and the legislation cross-refers to guidance for elucidation, care should be taken to ensure tight correspondence between the legislation and the guidance.

54. Other regulations made permanent what had been a temporary change enabling schools forums to hold public meetings remotely. The Department proposed to make clear in guidance that schools forums should provide support or alternative arrangements where a person could not attend a remote meeting by telephone or online. As drafted, however, the legislation made no provision for attendance by those without remote access, and the possibility of supplementary provision being made by way of recommendation in guidance (that may or may not be implemented in practice) was not a substitute for a legal right to attend.[45]

The Committee's view on the purported use of guidance to amplify legislation

55. A key element of the rule of law is for legislation to be clear. Where legislation has been drafted so as to leave gaps in the law or areas of uncertainty, guidance (and particularly non-statutory guidance) cannot be used to fill those gaps as if it were the law itself.

42 Joint Committee on Statutory Instruments, *Thirty-Sixth Report of Session 2019–21*, HC 75-xxxvi, in relation to S.I. 2020/1374.

43 Joint Committee on Statutory Instruments, *Thirty-Sixth Report of Session 2019–21*, HC 75-xxxvi, in relation to S.I. 2020/1337.

44 Joint Committee on Statutory Instruments, *Eleventh Report of Session 2019–21*, HC 75-xi, in relation to S.I. 2020/427.

45 Joint Committee on Statutory Instruments, *Forty-Fifth Report of Session 2019–21*, HC 75-xlv, in relation to S.I. 2021/59.

56. Where the enabling power permits, guidance can be expressly referred to in legislation to provide elucidation on meaning. Care should be taken in such situations to ensure that there is tight correspondence between the legislation and guidance. However, where the enabling power does not permit it, Departments cannot add to the law by referring informally to guidance. Such guidance has not undergone parliamentary scrutiny and has no place in amplifying the law.

57. The Committee notes with approval that Departments have in some cases acknowledged that loose or otherwise defective wording cannot be rectified in guidance and should instead be rectified through amending legislation.[46]

58. The Committee emphasises that it is not opposed to the use of guidance and other forms of quasi-legislation where appropriate, and where, in particular, the aim is to exercise influence through soft-letter law rather than to control through hard-letter law. But it is essential that the distinction between law and guidance is clear, and that both police officers and others responsible for enforcement as well as those who are required to comply know with clarity and certainty where the law ends and the advisory function of guidance begins.

46 In S.I. 2020/1166, the Department amended S.I. 2018/1106, S.I. 2018/1107 and S.I. 2018/1108. The Department had in 2018 acknowledged that wording within the regulations could be misconstrued and undertook "to address this in guidance" (Joint Committee on Statutory Instruments, *Fortieth Report of Session 2017–19*, HC 542-xl). In S.I. 2020/1203, the Department amended S.I. 2018/599. The Committee had reported S.I. 2018/599 in its Twenty-Sixth Report of Session 2017–19 for defective drafting as the Committee commented that it would have been possible to include provision about the length and nature of absence that triggers suspension of payments of student support (Joint Committee on Statutory Instruments, *Twenty-Sixth Report of Session 2017–19*, HC 542-xxvi). The Committee stated that, as a matter of principle, legislation should not use expressions that go beyond the intended policy, and then attempt to narrow them through guidance or advice (in the absence of express enabling power to operate in that way).

Timing

59. It is only to be expected that the pandemic has required legislation to be made and brought into force at speed, as the Government has been forced to respond to the fast-changing facts on the ground and to take proactive steps to prevent damage from escalating further. This is reflected in the fact that as of 5 July 2021, of the 461 coronavirus instruments laid before Parliament: 87 were made using the urgent made affirmative procedure under section 45R of the Public Health (Control of Disease) Act 1984; 188 (of 327 coronavirus instruments made using the negative procedure) breached the convention that an instrument should not come into force until at least 21 days after being laid; and 54 came into force before being laid, triggering the requirement under section 4 of the Statutory Instruments Act 1946 to notify the Speaker and the Lord Speaker of the early commencement and why it was necessary.[47] Moreover, several of the made affirmative instruments were revoked before they had even been debated.[48]

60. It is not surprising, in this context, that issues have arisen as regards the timing of the making, laying, publication, and coming into force of coronavirus regulations. In particular, the Committee has reported regulations for having been published with so little notice that confusion arose about when they came into force, or for having come into force before they were laid before Parliament. Issues have also arisen in relation to provisions that were intended to be a temporary part of the pandemic response, where Departments have relied on the fleeting nature of provisions to justify sub-standard drafting, or where they have quietly made temporary changes permanent.

Timing of commencement, laying and publication

61. The Committee is concerned that a trend has developed, since the first coronavirus legislation was made in March 2020, of legislation being made, published and brought into force with almost no time either for Parliament to scrutinise it or for the public to prepare for it. This was only to be expected in the early days of the pandemic (for example, see paragraph 7). But the Committee has observed with mounting unease that better knowledge of the virus and its impact has not been reflected in decreased reliance on last-minute legislation. Some examples are particularly egregious.

Lack of notice and confusion about commencement

62. Coronavirus restrictions regulations were made and brought into force urgently on the morning of Sunday 20 December 2020 to impose a new, higher tier of restrictions across London and the South East of England (including closing all non-essential retail and making it an offence to leave the affected boroughs without reasonable excuse) and to limit Christmas gatherings across the rest of England.[49]

63. In a 4pm press conference the day before, the Prime Minister said the measures "will take effect from tomorrow morning".[50] That announcement was widely reported on 19

47 Hansard Society, *Coronavirus Statutory Instruments Dashboard*, (accessed 21:30, 2 July 2021).

48 See for example S.I.s 2020/787, 2020/898 and 2020/935.

49 S.I. 2020/1611.

50 Prime Minister's Office, 10 Downing Street and the Rt Hon Boris Johnson MP, "*Prime Minister's statement on coronavirus (COVID-19): 19 December 2020*", 19 December 2020. On being asked a question by the BBC which referred to the measures coming into force at midnight, the Prime Minister did not correct the statement, either immediately or by way of clarification afterwards.

December as meaning that the new restrictions would become law at midnight.[51] Even the Minister for Digital and Culture repeated the claim, posting on her constituency website that "From 00:01 on Sunday 20 December 2020 Gosport Borough moved to Tier 4".[52]

64. Contrary to the media reports, these Regulations had been signed at 6am, were published at 6:47:44am, and came into force at 7am on 20 December.[53] Although the difference between assumed and actual commencement was only a few hours and might therefore appear relatively trivial, the practical consequences were likely to be significant, in particular for those who, at the time of the announcement, were either in the affected areas and wanted to leave or lived in them and wanted to get home.

65. The confusion arose because the imminent changes were announced before anyone had sight of the legislation itself—even in draft—and it was brought into force with almost no notice. And here, the lack of notice was exacerbated by the confusion among the media as to the timing of the change. This kind of confusion has been alarmingly common during the pandemic: Table C of the Annex provides additional examples.

66. Confusion about timing has also arisen from inconsistency between the instrument and its explanatory materials.[54] Regulations were expressed to commence "the day after the day on which [the Regulations] are made" while the Explanatory Memorandum laid with the Regulations stated that they would commence on "the day after the day on which [the instrument] is laid". The Department attributed the error to the urgency with which it had had to act, but the Committee considers that this highlights again the importance of ensuring consistency across the ways that changes to legislation are communicated to those who are affected by them—particularly where the changes are made quickly and with little notice. It is especially unsatisfactory in the current context for errors to arise in the materials that members of the public are more likely to rely on, such as the explanatory materials and, as noted above, the related guidance.

Coming into force before being laid

67. As a general rule, under section 4 of the Statutory Instruments Act 1946, where an instrument must be laid before Parliament after it has been made, it must be laid before

51 "From midnight, a new tier four will be introduced in areas including London, Kent, Essex and Bedfordshire" ("*Covid-19: Christmas rules tightened for England, Scotland and Wales*", BBC News, 20 December 2020); "Tier 4 restrictions will come into force from midnight tonight" ("*Christmas CANCELLED: Boris stops 5-day rule break for Britons as mutant strain explodes*", Express, 19 December 2020 at 16:24, updated at 19:59); "…the measures will come into force from midnight TONIGHT" ("*Coronavirus LIVE: Christmas Bubbles reduced as London, Scotland and Wales put in Tier 4*", LBC, 19 December 2020 at 14:41, updated 20 December 2020 at 6:34); "The Prime Minister announced on Saturday that many of the areas which were in Tier 3 would be moving to Tier 4 from midnight tonight" ("*The full list of Tier 4 rules under new coronavirus restrictions in England*", SurreyLive, 19 December 2020 at 18:42, updated at 18:49); "The areas in the new Tier 4 from tonight at midnight" ("*JINGLE HELL Fury as Boris Johnson 'sacrifices' family Christmas for 20m with Tier 4 lockdown and bubbles axed*", The Sun, 19 December 2020 at 16:41, updated 20 December 2020 at 1:47); "The number of coronavirus deaths in the UK has soared to 534 as parts of the country will be plunged into Tier 4 at midnight" ("*UK coronavirus deaths rise by 534 as new tier 4 announced*", Independent, 19 December 2020 at 17:21).

52 Caroline Dinenage MP, Tier 4 Update, 20 December 2020, (accessed 29 December 2020). [This version is no longer available; version as at 20 July 2021 here: Tier 4 Update]

53 Joint Committee on Statutory Instruments, *Thirty-sixth Report of Session 2019–21*, HC 75-xxxvi, in relation to S.I. 2020/1611.

54 Joint Committee on Statutory Instruments, *Tenth Report of Session 2019–21*, HC 75-x, in relation to S.I. 2020/360.

it comes into force. The 1946 Act does recognise that, exceptionally, circumstances will require an instrument to come into force before laying.[55] But during the pandemic, what the 1946 Act envisages as exceptional has become commonplace.

68. As noted above, of the 461 coronavirus instruments laid before Parliament by 5 July 2021, more than one in nine were made to come into force before being laid.[56] These have included the collection of instruments placing restrictions on international travel as it affects England[57] (at least ten of which were made to come into force before being laid) and instruments imposing various types of restrictions on individuals and businesses.[58]

69. It is of course a matter for the Department in question to assess the urgency of each legislative change on a case-by-case basis and to act as it sees fit. And in a public health emergency, where immediate action can have life-or-death consequences, it is entirely reasonable for legislation to be made and brought into force at speed. The Committee has no doubt that this is precisely the type of situation that Parliament envisaged when it enacted section 4 of the Statutory Instruments Act 1946 and notes that there are several examples of regulations being made in the middle of the night, or on a Saturday or Sunday—reflecting the urgency of the situation.

70. But the Committee is nonetheless troubled at the number of instruments made and brought into force with such urgency. It notes that in several cases, instruments were made on a Friday, came into force at some time during the weekend, and were laid the following Monday;[59] or were made on a sitting day, came into force at midnight, and were laid the following day.[60] The Department does not indicate what time these instruments were made, but the Committee notes with approval that there are several examples of the Department making a concerted effort to lay an instrument within hours of it being made and therefore before it came into force.[61] This is, in the Committee's view, the correct approach in a context like the present one, where the situation continues to evolve far beyond the initial emergency.[62]

71. This is particularly true where the policy being implemented was published before the legislation itself. The Committee has on two occasions queried why regulations made to implement aspects of the Government's roadmap, published on 22 February,[63] could not have been made in sufficient time so as not to come into force before being laid.[64]

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55 See Joint Committee on Statutory Instruments, First Special Report of Session 2017–19, *Transparency and Accountability in Subordinate Legislation*, HC 1158, at paragraphs 2.24 to 2.28.

56 54 out of 461 laid instruments, of which 429 were made negatives or made affirmatives (and 30 were draft affirmatives which could not be made until after being approved by a resolution of each House). Hansard Society, *Coronavirus Statutory Instruments Dashboard*, (accessed 21:30, 2 July 2021).

57 S.I. 2020/568 and amending instruments.

58 See, for example, S.I. 2020/327 (made at 2pm on Saturday 21 March and in force immediately; required the closure of businesses selling food and drink); S.I. 2020/350 (made at 1pm on 26 March and in force immediately; the first "lockdown" Regulations); S.I. 2020/592 (made Sunday 14 June and in force from midnight; required face coverings to be worn on public transport); S.I. 2020/1611 (made at 6am on Sunday 20 December and in force at 7am; imposed a new "tier 4" lockdown across the whole of England).

59 See for example S.I.s 2020/754, 2020/1041, 2020/1192, 2021/252.

60 See for example S.I.s 2020/643, 2020/710, 2020/935, 2020/943, 2020/1012.

61 See for example S.I.s 2020/685, 2020/691, 2020/822, 2020/828, 2021/38, 2021/150, 2021/166, 2021/247.

62 Joint Committee on Statutory Instruments, *Forty-Seventh Report of Session 2019–21*, HC 75-xlxii, in relation to S.I. 2021/252.

63 Cabinet Office, "*Covid-19 Response—Spring 2021 (Roadmap)*", 22 February 2021.

64 Joint Committee on Statutory Instruments, *Forty-Seventh Report of Session 2019–21*, HC 75-xlxii, in relation to S.I. 2021/252 and *Fifth Report of Session 2021–22*, HC 56-v, in relation to S.I. 2021/585.

One instrument implemented the policy relating to travel declaration forms.[65] The other moved to the penultimate step for the lifting of lockdown restrictions in England – on the date set out in the roadmap, and confirmed by the Prime Minister the preceding week.[66] Both instruments were made on Friday, came into force at midnight on Monday, and were laid before Parliament later Monday morning. The Government justified its actions on the basis that while the policy had been known ahead of time, neither instrument could be made until various other steps had been taken: in the first case, the making of a separate instrument implementing a different aspect of the policy; in the second case, the collection and analysis of the latest data to inform both the policy decision and the detail of the legislation.

72. As the Committee has noted in several of its reports, it has sympathy with the considerable difficulties of ensuring that all necessary information is collated, and steps have been taken, to inform and enable Covid regulatory policy. It is nonetheless concerned that the Government continues to use an approach normally justified by urgency to make predictable legislation, and to commence it on days that were known in advance. In such cases, it must be reasonably possible for the Government to collaborate across Departments and take sufficient early action to ensure that, when final decisions are made and pre-conditions satisfied, an instrument can be made in time to avoid pre-laying commencement.

73. The Committee also noticed that some of the instruments brought into force before being laid make what appear to be relatively small amendments to earlier instruments that were themselves laid before being brought into force.[67] In an environment where every legislative action taken during the pandemic feels significant, the Committee suggests that care should be taken to distinguish between legislation that is truly urgent, and so needs exceptionally to be brought into force before being laid, and legislation that, despite being part of the fast-paced response to an extraordinary challenge, could survive a few hours' delay in commencement to allow for proper notice.

The Committee's view on the timing of commencement, laying and publication

74. The Committee recognises that the pandemic continues to put extreme pressure on the Government and that it will sometimes be impossible to apply the usual standards of legislative practice. But the Committee expects the Government to ensure that people are given as much notice as possible even in those circumstances, and particularly where the legislation in question has such intrusive effects on people's lives or where it criminalises behaviour that is usually perfectly ordinary.

75. Where usual conventions as to notice—such as the 21-day rule—cannot be upheld, the Government should do as much as it practicably can to ensure that those who are affected by legislation have the greatest amount of notice that circumstances allow. As the Committee has said, it is inherently and obviously undesirable in rule of law terms for law

65 S.I. 2021/252.

66 S.I. 2021/585.

67 See for example S.I. 2020/754, which reduced the "protected area" in which the restrictions imposed by S.I. 2020/685 applied: although S.I. 2020/685 had a more important effect on a wider area, the Department managed to lay it only four hours after it was made, and nine hours before it came into force. It is not clear why the relatively more minor instrument was considered more urgent. The same is true of S.I. 2020/930 (which amended S.I. 2020/822) and S.I. 2020/931 (which amended S.I. 2020/828).

to come into force before its text is available to the public who are bound to comply with it.[68] Even a few hours' delay is to be deprecated where it can reasonably be avoided. The Committee expects the Government to make every effort to avoid such a situation.

76. Some of the confusion would have been avoided if the Government had published draft instruments even before all the details had been finally settled. Where much of the policy has been determined and the remaining details are relatively trivial, it would help the public significantly to have advance notice of the expected content of regulations through the publication of a draft. Although it is a judgment call on the facts of each case, in many instances the advantages of the clarity and certainty provided by a draft would outweigh any inconvenience of the need to highlight any changes to that content when the instrument is actually made.

77. Many members of the public may rely less on the legislation itself than on other things—the explanatory materials that are published alongside the legislation, the Government guidance that explains it to the public and the media reports of what it does—to understand changes in the law and what is required of them. It is clearly unsatisfactory for there to be inconsistencies between the legislation and these more accessible glosses. That being the case, the Government should make special efforts to ensure that its communications to the House, the media and the public are clear and accurate.

Temporary provisions

78. The legislative response to the pandemic has included numerous changes intended to be temporary. Of the 321 coronavirus-related instruments that had been laid before Parliament by 10 March 2021, 97 included a specific sunset provision. Of those, 15 were revoked (some being replaced with updated provisions) and nine lapsed as originally intended. Some effectively remain in force, however, because the change has been made permanent.[69]

79. The fact that provisions are temporary has been used in some cases to justify sub-standard drafting practices. Saving provisions included in one instrument because its effects were temporary were acknowledged by the Department as probably adding nothing to the effect of section 16 of the Interpretation Act 1978, making them superfluous and therefore potentially confusing.[70] Another instrument made England-only amendments to an Order that applies in relation to England and Wales, without making it clear on the face of the amended Order that there were in fact parallel texts. A reader would only be aware that the amendments were restricted to England by looking back at the amending instrument. This added another layer to the already complex structure of coronavirus legislation. But the Department justified its approach by asserting that the scope for confusion was limited because the amendments were temporary.[71]

68 Joint Committee on Statutory Instruments, *Forty-Seventh Report of Session 2019–21*, HC 75-xlxii, in relation to S.I. 2021/252.

69 S.I.s 2020/540, 2020/734 and 2020/764.

70 Joint Committee on Statutory Instruments, *Thirty-Third Report of Session 2019–21*, HC 75-xxxiii, in relation to S.I. 2020/1290, memorandum from the Department. The Committee accepts that in this case, as the use of such saving provisions has become standard across similar coronavirus-related instruments, it is arguable that changing the practice now could result in unintended differences of meaning to be inferred across instruments.

71 Joint Committee on Statutory Instruments, *Forty-First Report of Session 2019–21*, HC 75-xli, in relation to the Draft Mayoral and Police and Crime Commissioner Elections (Coronavirus, Nomination of Candidates) (Amendment) Order 2021, memorandum from the Department.

80. In other cases, which are not surprising in the context, temporary provisions have been used to remove requirements for things to be done in person, including visits to assess children in care,[72] fitness to practice hearings,[73] and farm inspections.[74] It is this type of change that the Government has made permanent in at least three cases that relate to the accessibility of planning documents and public meetings.

81. It is a common feature of the planning process that documents must be made available for public inspection free of charge. This is part of the consultation that must inform all planning decisions and an important way in which individuals likely to be affected by the proposed development can see the details of what is proposed. This requirement was temporarily suspended in July 2020 in relation to both environmental impact assessments and infrastructure planning.[75] In December it was made permanent.[76] Instead of ensuring that physical documents—including environmental reports and the draft plans to which they relate and documents, plans and maps relating to infrastructure planning applications—are available for inspection by the public at reasonable times and free of charge, responsible authorities are now only required by law to provide free of charge a website address, a telephone number for enquiries and documents by email when requested. They must also provide hard copies by post if requested, but they are expressly permitted to make this subject to "a reasonable charge".

82. The Department admitted that it could not give an idea of the typical costs of producing hard copies and that documentation can often exceed several thousand pages (often tens of thousands) of various sizes. It suggested various ways in which the planning authorities could make the documents more easily accessible to people with limited incomes or without access to the internet or an easy way to read the documents online, and pointed to guidance exhorting them to do so, but it conceded that these were all discretionary.[77] No public consultation was held in relation to either change, and in both cases the Department referred to the fact that these measures had been in place since July 2020—without acknowledging the context in which they were introduced.[78]

83. Similarly with schools forums, which are required by law to hold public meetings at least quarterly. Temporary measures were put in place in May 2020 to allow schools forums that could not meet in person to do so entirely remotely, with the meetings being "public" if the public could access them through remote means.[79] Those measures were due to expire on 1 April 2021, but instead they were made permanent[80] on the basis of feedback from local authorities, which said that holding meetings remotely "had made the arrangement of meetings easier".[81] There was no public consultation.[82] The Department

72 S.I. 2020/445.
73 S.I.s 2020/1325, 2021/26 and 2021/27.
74 S.I. 2020/575.
75 S.I.s 2020/734 and 2020/764.
76 S.I.s 2020/1531 and 2020/1534.
77 Joint Committee on Statutory Instruments, *Fortieth Report of Session 2019–21*, HC 75-xl, in relation to S.I.s 2020/1531 and 2020/1534.
78 Explanatory Memorandum to S.I. 2020/1531, paragraph 10.1; Explanatory Memorandum to S.I. 2020/1534, paragraph 10.1.
79 S.I. 2020/540.
80 S.I. 2021/59.
81 Explanatory Memorandum to S.I. 2021/59, paragraph 7.17.
82 As above, paragraph 10.1.

conceded that this would make it more difficult for people without access to telephone or videoconferencing systems to take part in such meetings.[83] And as noted in paragraph 54, it proposed to address the matter by updating its guidance.

The Committee's view on temporary provisions

84. The temporary nature of changes made by emergency legislation should not be relied on to justify failure to legislate to a proper standard. The fact that the changes are temporary and limited makes it all the more important for their effects to be immediately clear and accessible, particularly given that they are often introduced with little notice and no formal consultation, and in some cases quickly amended or replaced.

85. The effects of the legislation made in response to the pandemic, taken as a whole and rapidly shifting, have been difficult even for experienced lawyers and practitioners to follow. The Government should make every effort to ensure that it provides as much clarity as possible, including by avoiding superfluous provisions that create the potential for confusion and by not creating parallel texts unless there is a specific need to do so.

86. The Committee is also concerned at the process by which some pandemic provisions have been kept on the statute book. As temporary measures, both the changes and the way in which were introduced were—at least arguably—a proportionate response to a public health emergency in which physical proximity was especially risky. In the absence of that public health risk, however, the factors that underpinned the temporary measures change dramatically.

87. Instead of public safety, the measures appear to be driven by the convenience of and cost to the public authority. No public consultation on retaining the measures—which might have led to a different outcome—was undertaken before the changes were made permanent (which was done while the strictest restrictions on movement and gathering were still in effect). And there is no legal obligation on the authorities in question to mitigate the effects of the new process on people without access to the necessary technology.

88. The effect is that the Government has quietly removed a non-discretionary right for individuals to inspect without charge (or to receive without having to pay large sums for) hard copies of documents that are central to a proposed development that might seriously affect their community, or for parents to attend a meeting of a schools forum the proceedings of which can have a significant effect on their children's education. These are two aspects of the fundamental right of public access to and participation in decision-making.

89. The Committee is clear that fundamental rights should not be quietly diluted under the cover of the pandemic response.

83 Joint Committee on Statutory Instruments, *Forty-Fifth Report of Session 2019–21*, HC 75-xlv, in relation to S.I. 2021/59, memorandum from the Department.

Annex

The tables below illustrate how the distinction between non-statutory guidance and law, or between statements about the law and its actual provisions, has been blurred during the coronavirus pandemic. (The examples are illustrative only and are not an exhaustive list.)

Table A. Government guidance

No.	Guidance	Comment
1.	"You should follow this guidance immediately. This is the law."[84]	Although "the law" is hyperlinked, the reasonable reader would consider that the text that followed reflected the legislation. As seen in this Annex, this was not always the case.
2.	In relation to exercise: "This should be limited to once per day, and you should not travel outside your local area."[85]	These two stipulations were not reflected in the legislation.
3.	"If you do leave home for a permitted reason, you should always stay local—unless it is necessary to go further, for example to go to work. Stay local means stay in the village, town, or part of the city where you live."[86]	There was no requirement always to stay local or that a person could not leave the village, town or part of the city where they live.
4.	"You should follow this guidance immediately. The law will be updated to reflect these new rules."[87]	The wording of the guidance informed the reader that the guidance and the law would be aligned. This was not the case.
5.	"You may leave the home to: shop for basic necessities, for you or a vulnerable person""[88]	There was no express reference in the legislation to shopping for "basic necessities", and the Government conceded that this was non-statutory advice or guidance and not legally enforceable.[89] Earlier guidance also referred to shopping for "basic necessities" (as seen below) and there were reports of the police seeking to inspect shopping trolleys.[90]

84 Cabinet Office, "Guidance - National Lockdown: Stay at Home", published 4 January 2021 and updated 6 January 2021 (accessed 6 January). [Original link www.gov.uk/guidance/national-lockdown-stay-at-home was updated to Coronavirus: how to stay safe and help prevent the spread—GOV.UK (www.gov.uk). Last updated 19 July 2021.]

85 As above.

86 As above.

87 Cabinet Office, "Guidance - National Lockdown: Stay at Home", published 4 January 2021 and updated 5 January 2021 (accessed 6 January). [Original link www.gov.uk/guidance/national-lockdown-stay-at-home was updated to Coronavirus: how to stay safe and help prevent the spread—GOV.UK (www.gov.uk). Last updated 19 July 2021.]

88 Cabinet Office, "Guidance—National Lockdown: Stay at Home", published 4 January 2021 and updated 6 January 2021 (accessed 6 January). [Original link www.gov.uk/guidance/national-lockdown-stay-at-home was updated to Coronavirus: how to stay safe and help prevent the spread—GOV.UK (www.gov.uk). Last updated 19 July 2021.]

89 Joint Committee on Statutory Instruments, *Thirty-Eighth Report of Session 2019–21*, HC 75-xxxviii, in relation to S.I. 2021/8.

90 "*Coronavirus: Police warn people will be fined for travelling to beauty spots over Easter bank holiday*", Independent, 9 April 2020.

6.	"The list of reasons you can leave your home and area include, but are not limited to: […] buying goods or services that you need, but this should be within your local area wherever possible"[91]	There was no requirement to stay within the local area when buying goods or services.
7.	"You should only leave or be away from your home for very limited purposes: • shopping for basic necessities, for example food and medicine, which must be as infrequent as possible • one form of exercise a day […]"[92]	There was no requirement for shopping to be as infrequent as possible. As mentioned above, there was no requirement for exercise to be limited to only one form of exercise per day.
8.	From 31 July 2020 "you should follow these rules". "The government will sign new regulations to make these changes legally enforceable." The "government will pass new laws to enforce the changes" and the "police will be able to take action against those that break these rules".[93]	In this first sentence "rules" refers to guidance as the law was not in force on 31 July 2020. In the same piece of guidance, the word "rules" is used to refer to law. The above illustrates the confused use of words such as "rules". Further examples are found in Table B.

91 Cabinet Office, "Guidance - National Lockdown: Stay at Home", published 4 January 2021 and updated 6 January 2021 (accessed 6 January). [Original link www.gov.uk/guidance/national-lockdown-stay-at-home was updated to Coronavirus: how to stay safe and help prevent the spread—GOV.UK (www.gov.uk). Last updated 19 July 2021.]

92 Cabinet Office, "*Guidance: Staying at home and away from others (social distancing)*", published 23 March, updated 1 May 2020 and withdrawn 11 May 2020.

93 Department of Health and Social Care, "Guidance: North of England: local restrictions", (published 31 July 2020 and updated 1 August 2020 (accessed 4 August 2020). [Original link www.gov.uk/guidance/national-lockdown-stay-at-home was updated to Coronavirus: how to stay safe and help prevent the spread - GOV.UK (www.gov.uk). Last updated 19 July 2021.]

Table B. Statements about restrictions

No.	Statement	Comment
1.	The Prime Minister's address to the nation on 23 March 2020:[94] "That is why people will only be allowed to leave their home for the following very limited purposes: • shopping for basic necessities, as infrequently as possible • one form of exercise a day—for example a run, walk or cycle—alone or with members of your household; • any medical need, to provide care or to help a vulnerable person; and • travelling to and from work, but only where this is absolutely necessary and cannot be done from home. That's all—these are the only reasons you should leave your home." "If you don't follow the rules the police will have the powers to enforce them, including through fines and dispersing gatherings." To ensure compliance with the Government's instruction to stay at home, we will immediately: close all shops selling non-essential goods […]	Limiting shopping to basic necessities was not in the legislation, nor was the restriction to shop as infrequently as possible. The limiting of exercise to one form of exercise a day was not in the legislation. The four categories stipulated were significantly narrower than those set out in the legislation. Here the word "rules" is used to refer to the law. The word "instruction" here is referring to the advice to stay at home: as seen in Table C it was not a legal requirement at that time.
2.	The Secretary of State for Health and Social Care in an interview: "We're recommending against all but essential travel both to and from and within Leicester, and as we saw during the peak, the vast majority of people will abide by these rules. Of course, we will take further action including putting in place laws if that is necessary, but I very much hope it won't be."[95]	Here, although the words "abide by" are used, "rules" refers to guidance and not law, as seen by the statement that laws may be put in place if the guidance does not have the desired effect.

94 Prime Minister's Office, 10 Downing Street and The Rt Hon Boris Johnson MP, "Prime Minister's statement on coronavirus (COVID-19): 23 March 2020", 23 March 2020.

95 "Coronavirus: Law will be changed as COVID-19 spike forces Leicester back into lockdown", Sky News, 30 June 2020.

Table C. Statements about commencement

No.	Timeline	Comment
1.	**The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (S.I. 2020/350)** The Prime Minister stated in his address to the nation on 23 March 2020: "From this evening I must give the British people a very simple instruction—you must stay at home."[96]	The instruction was said to apply from the evening of 23 March 2020, however, the legislation only came into force on 26 March 2020.
2.	**The Health Protection (Coronavirus, Restrictions) (Leicester) Regulations 2020 (S.I. 2020/685)** The Secretary of State made a statement in Parliament on 29 June 2020: "Having taken clinical advice on the actions necessary, and discussed them with the local team in Leicester, and Leicestershire, we have made some difficult but important decisions. We have decided that from tomorrow non-essential retail will have to close and, as children have been particularly impacted by this outbreak, schools will also need to close from Thursday, although they will stay open for vulnerable children and children of critical workers, as they have done throughout. ... "The hon. Gentleman rightly asked about the powers that will underpin the decisions that I have taken. They will be brought forward with a statutory instrument very shortly, and I commit to keeping the House updated on the two-week review of whether we can lift some of the measures."[98]	The Secretary of State for Health and Social Care stated that compliance was expected from 30 June 2020 ("from tomorrow"), when the Regulations only came into force on 4 July 2020. The expectation of compliance from 30 June was repeated by the police and the local authority.[97]

96 Prime Minister's Office, 10 Downing Street and The Rt Hon Boris Johnson MP, "Prime Minister's statement on coronavirus (COVID-19): 23 March 2020", 23 March 2020.

97 Leicester City Council published on their website on 29 June 2020 the statement that "shops that were allowed to open on 15 June will have to close again from tomorrow (30 June)." (Leicester City Council, "Lockdown restrictions in Leicester to be extended for at least two weeks", 29 June 2020). The Council also tweeted on 29 June 2020 that "Non-essential shops will close tomorrow". This was re-tweeted on the same day by the Chief Constable of Leicester, Leicestershire and Rutland.

98 HC Deb, 29 June 2020, col 115 [House of Commons Chamber].

No.	Timeline	Comment
3.	**The Health Protection (Coronavirus, Restrictions on Gatherings) (North of England) Regulations 2020 (S.I. 2020/828)** The Secretary of State for Health and Social Care tweeted on 30 July 2020 at 21:16 that "we need to take immediate action" and "from midnight tonight, people from different households will not be allowed to meet each other indoors in these areas".[99] The Prime Minister announced on 31 July 2020: "Last night the Health Secretary announced new restrictions on household contact in the North West—specifically Greater Manchester, and parts of East Lancashire and West Yorkshire."[100] The Government issued guidance on 31 July 2020 saying that from 31 July 2020 "you should follow these rules…The government will sign new regulations to make these changes legally enforceable." The guidance added that the "government will pass new laws to enforce the changes" and that the "police will be able to take action against those that break these rules".[101] The Department of Health and Social Care posted the following on 31 July 2020: "Due to a rise of #COVID19 cases in Greater Manchester, East Lancashire and West Yorkshire, new restrictions on gatherings have been introduced. Households in these regions MUST NOT: Invite others to their homes…[102]	Whilst Ministerial statements and guidance stated that rules and restrictions needed to be followed, they were not law until five days later: the law imposing the restrictions was only made on 4 August 2020 and came into force on 5 August 2020. Expected compliance from midnight on 30 July 2020 was repeated by police and local authorities.[103]

99 https://twitter.com/MattHancock/status/1288931858856710150?s=20.

100 Prime Minister's Office, 10 Downing Street and The Rt Hon Boris Johnson MP, "Prime Minister's statement on coronavirus (COVID-19): 31 July 2020", 31 July 2020.

101 Department of Health and Social Care, "Guidance: North of England: local restrictions", (published 31 July 2020 and updated 1 August 2020 (accessed 4 August 2020). [Original link www.gov.uk/guidance/national-lockdown-stay-at-home was updated to Coronavirus: how to stay safe and help prevent the spread—GOV.UK (www.gov.uk). Last updated 19 July 2021.]

102 https://twitter.com/DHSCgovuk/status/1289078370588930048?s=20

103 Derbyshire Constabulary posted on their website on 31 July 2020 that "Yesterday new restrictions were introduced for a number of areas in the north of England" (Derbyshire Constabulary, "New restrictions introduced for parts of northern England bordering Derbyshire", 31 July 2020). Kirklees Council posted on their website that "Late last night, the government announced new restrictions for 4 million people in the North of England, including everyone in Kirklees. […] These restrictions are in force now" (Kirklees Together, "New Restrictions In Kirklees—Useful Information", (accessed 3 August 2020). Pendle Borough Council posted on their website that "On 31 July, new regulations came into force in Pendle. They are law, and you can be fined if you don't follow them" (Pendle Borough Council, Coronavirus rules just for Pendle, 31 July 2020) [Link no longer available; version as at 20 July 2021 here: Coronavirus rules for Pendle | COVID-19 Support for individuals | Pendle Borough Council].

Formal Minutes

Wednesday 21 July 2021

Virtual meeting

Members present:

Jessica Morden (*in the Chair*)

Baroness D'Souza	Baroness Newlove
Dr James Davies	Lord Rowe-Beddoe
Baroness Gale	Baroness Scott of Needham Market
Lord Haskel	Lord Smith of Hindhead
Paul Holmes	Richard Thomson
John Lamont	

Draft Report (*Rule of Law Themes from COVID-19 Regulations*), proposed by the Chair, brought up and read.

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

Paragraphs 1 to 89 read and agreed to.

Annex and Summary agreed to.

Resolved, That the Report be the First Special Report of the Committee to both Houses.

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

[Adjourned to a day and time to be fixed by the Chair.