



House of Lords  
House of Commons  
Joint Committee on  
Statutory Instruments

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# **Rule of Law Themes from COVID-19 Regulations: Government Response to the Committee's First Special Report**

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**Second Special Report of  
Session 2021–22**

*Ordered by the House of Commons  
to be printed 20 October 2021*

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**HC 774  
HL 82**

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and the House of Commons

## Joint Committee on Statutory Instruments

### Current membership

#### House of Lords

[Baroness D'Souza](#) (*Crossbench*)

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

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

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

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

[Baroness Scott of Needham Market](#) (*Liberal Democrat*)

[Lord Smith of Hindhead](#) (*Conservative*)

#### House of Commons

[Jessica Morden MP](#) (*Labour, Newport East*) (Chair)

[Dr James Davies MP](#) (*Conservative, Vale of Clwyd*)

[Paul Holmes MP](#) (*Conservative, Eastleigh*)

[John Lamont MP](#) (*Conservative, Berwickshire, Roxburgh and Selkirk*)

[Sir Robert Syms MP](#) (*Conservative, Poole*)

[Richard Thomson MP](#) (*Scottish National Party, Gordon*)

[Liz Twist MP](#) (*Labour, Blaydon*)

### Powers

The full constitution and powers of the Committee are set out in [House of Commons Standing Order No. 151](#) and [House of Lords Standing Order No. 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**

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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](http://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 0AA. The telephone number for general inquiries is: 020 7219 7599; the Committee's email address is: [jcsi@parliament.uk](mailto:jcsi@parliament.uk).



# Second Special Report

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On 23 July 2021 the Committee published its First Special Report: [Rule of Law Themes from COVID-19 Regulations](#) (HL 57 / HC 600). The response from the Government was received on 21 September 2021. The response is appended below.

## Appendix: Government Response: Letter to Chair of JCSI from the Leader of the House of Commons

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Thank you for your letter of 23 July informing me of your Committee's First Special Report of 2021–22, *Rule of Law Themes from COVID-19 Regulations*. The Government welcomes your important reflections on legislation in response to the pandemic. First, thank you for the cooperative approach your Committee has taken throughout the pandemic. As you say in your report, the exceptional times we have been living through has put enormous pressure on the Government and its civil servants. I am grateful to your Committee for continuing to carry out your effective parliamentary scrutiny of secondary legislation without unnecessarily obstructing the efficient and effective public administration during this emergency.

The Government will reflect in detail on the five themes raised within your report but I will acknowledge each of these themes you have raised in this letter.

### **Sub-delegation powers included in COVID-19 instruments**

The exceptional times of the pandemic have given rise to the need for exceptional legislation, however, I agree that this should not become an opportunity to relax the principles of the rule of law and depart from the presumption against the sub-delegation of legislative power. As you mention in your report, this is a long-standing and important principle and one that the Government will continue to consider in its approach to legislation. In preparing all our legislation relating to COVID-19 we have been conscious of the rule of law and the need to act within the relevant powers available.

### **Clarity in criminal offences**

Throughout the pandemic, the Government has had to introduce offences to underpin the enforcement regime of COVID-19 regulations. This has often taken place at great speed, in response to the evolving nature of the virus. Careful consideration was given to the drafting of regulations, taking into account the necessarily wide set of potential exceptional circumstances in which it would not be reasonable for someone to comply with the restrictions in question. This meant that it was considered that exhaustive lists were not always workable. To support enforcement bodies throughout the pandemic, the Government has been in constant contact to ensure that laws are clearly understood by those enforcing them.

## Guidance and the law

I appreciate the Committee's acknowledgement of the need for flexibility in approach, and that providing flexibility via guidance has been necessary. The Government has evolved its approach to communicating changes in policy and worked to clarify the distinction between law and guidance to the public. Clear guidance is now the main tool for guiding behaviour following the lifting of most legal restrictions at step 4.

## Timing

As the report acknowledges, one of the most significant challenges of legislating for COVID-19 has been, and remains, legislating quickly. The uncertain situation around the virus itself, the resultant difficulties in decision-making around the policy response and the constantly evolving scientific advice, continues to challenge the Government's approach to legislating in response to the pandemic. Significant risks remain, particularly from Variants of Concern which could escape vaccines and complex judgements will still be needed. The Government may need to continue to take measures to help manage the virus during periods of higher risk, such as winter and the continued use of the made affirmative procedure will enable the Government to introduce necessary measures in line with the most up to date advice available. However, in line with the previous commitment, where provisions introduced will be of national significance, these would be debated in Parliament before coming into force wherever possible.

## Temporary provisions

Throughout the pandemic careful consideration has been given and will continue to be given, to reviewing temporary provisions and whether they are still required. To assess continually the proportionality of measures and scrutinise all temporary provisions, statutory review periods and sunset dates were built into most regulations from the outset. This ensured that their application is time limited and proportional to the needs of tackling the pandemic. As restrictions relax we continue to assess the proportionality of the temporary provisions still in force as we seek to reduce the number of temporary provisions.

Thank you again for your continued work in providing checks and balances for Parliament throughout the pandemic and for the important points raised in your report.