House of Lords
House of Commons

Joint Committee on Statutory Instruments

# Fifteenth Report of Session 2021–22

## Drawing special attention to:

*Social Security (Scotland) Act 2018 (Disability Assistance for Children and Young People) (Consequential Modifications) Order 2021* **(S.I. 2021/786)**

*Family Procedure (Amendment No. 2) Rules 2021* **(S.I. 2021/875)**

*Meat Preparations (Amendment and Transitory Modification) (England) (EU Exit) (Amendment) (No. 2) Regulations 2021* **(S.I. 2021/972)**

*Infrastructure Planning (Prescribed Consultees and Interested Parties etc.) (Amendment) Regulations 2021* **(S.I. 2021/978)**

*Compulsory Electronic Monitoring Licence Condition (Amendment) Order 2021* **(S.I. 2021/999)**

*Immigration (Disposal of Property) (Amendment) Regulations 2021* **(S.I. 2021/1007)**

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## 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



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

#### Committee staff

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

#### Contacts

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# Contents

# Instruments reported

**At its meeting on 17 November 2021 the Committee scrutinised a number of instruments in accordance with Standing Orders. It was agreed that the special attention of both Houses should be drawn to six of those considered. The instruments and the grounds for reporting them are given below. The relevant departmental memoranda are published as appendices to this report.**

## 1 S.I. 2021/786: Reported for defective drafting

### *Social Security (Scotland) Act 2018 (Disability Assistance for Children and Young People) (Consequential Modifications) Order 2021*

1.1 **The Committee draws the special attention of both Houses to this Order on the ground that it is defectively drafted in one respect.**

1.2 This Order, which is subject to the negative resolution procedure, amends several pieces of social security legislation to reflect the introduction, by S.S.I. 2021/174, of "child disability payment" to replace disability living allowance for children residing in Scotland. The Committee asked the Office of the Secretary of State for Scotland to confirm that the amendment made by paragraph 2(e)(iii) of Schedule 6 is defective (the text "or (iiza)" is inserted so as to create the meaningless phrase "not satisfying either sub-paragraph (i), (ii) or (iia) has provided, or (iiza)"). In a memorandum printed at Appendix 1, the Department acknowledges the error and undertakes to correct it. **The Committee accordingly reports paragraph 2(e)(iii) of Schedule 6 for defective drafting, acknowledged by the Department.**

1.3 (The Department adds that it is taking steps to correct the error by correction slip. The Committee considers that this would be an inappropriate mechanism by which to correct an error of this kind (as reflected in the principles set out in its First Special Report of Session 2017–19: *Transparency and Accountability in Subordinate Legislation*). If the Department does not think the error is sufficiently significant to be amended by further legislation, it should be left in its present form for readers to draw their own conclusions.)

## 2 S.I. 2021/875: Reported for doubtful *vires* and for requiring elucidation

### *Family Procedure (Amendment No. 2) Rules 2021*

2.1 **The Committee draws the special attention of both Houses to these Rules on the grounds that there is a doubt as to whether they are *intra vires* in one respect and that they require elucidation in one respect.**

2.2 These Rules, which are subject to the negative resolution procedure, amend the Family Procedure Rules 2010. Rule 10 makes provision for the attendance at private hearings by a "duly authorised lawyer". The term is defined as a person who meets the criteria specified in Practice Direction 27B. The Committee asked the Ministry of Justice to explain why section 76(8) of the Courts Act 2003 was not cited in the preamble as that section provides that Family Procedure Rules may, instead of providing for any matter,

refer to provision made or to be made about that matter by directions. In a memorandum printed at Appendix 2, the Department confirms that section 76(8) should have been cited. As the completeness of citations in preambles goes to *vires* since the decision of the Court of Appeal in *Vibixa Ltd and Polestar Jowetts Ltd v Komori UK Lt*d [2006] EWCA Civ 536, **the Committee accordingly reports rule 10(d), in so far as it relates to "duly authorised lawyer", for doubt as to whether it is *intra vires*, acknowledged by the Department.**

2.3 Section 79(1) of the Courts Act 2003 requires the Family Procedure Rule Committee to consult such persons as they consider appropriate before making Family Procedure Rules. As paragraph 10 of the Explanatory Memorandum states that consultation did not take place in relation to some of the amendments, the Committee asked the Department to explain why the statutory duty to consult was not complied with. In its memorandum, the Department asserts that section 79(1) gives the Family Procedure Rule Committee discretion sufficient to allow them to decide not to consult and supports the assertion by reference to Parliamentary statements. The Committee does not agree. Section 79(1) is a simple duty to consult, and the discretion relates only to the choice of whom to consult. Parliamentary statements to the contrary (whether in this precise context or in cognate contexts) cannot change the simple meaning of the legislative text. The Committee accepts that the Rule Committee might be excused from the duty in the unlikely case of it being impossible to identify an appropriate consultee, but not otherwise. Since, however, it appears from the Department's memorandum that a certain amount of informal consultation did in fact take place on this occasion, **the Committee is content to report the Rules for requiring elucidation, provided by the Department.**

## 3 S.I. 2021/972: Reported for requiring elucidation

### *Meat Preparations (Amendment and Transitory Modification) (England) (EU Exit) (Amendment) (No. 2) Regulations 2021*

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

3.2 These Regulations, which are subject to the negative resolution procedure, extend until 31 December 2021 the temporary removal of the requirement for meat preparations imported from the European Economic Area into England to be deep frozen. The enabling power is the same as was relied on in relation to S.I. 2020/1666 and which was reported by the Committee in its Forty-Fourth Report of Session 2019–21. In relation to that instrument, the Committee asked the Department for Environment, Food and Rural Affairs to explain the basis on which the enabling power was relied on, given that it provides for regulations to be made that "modify or revoke any retained direct minor EU legislation made under Article 8(4) of the Council Directive 2002/99/EC" and the amendment stemmed from Council Directive 94/65/EC. The Department explained the rationale and whilst the Committee accepted that the courts are likely to be forced to the conclusion advanced by the Department, the Committee stated that it would have been helpful to readers, in light of the complexities of this case, to have explained the chain of amendments by way of footnote to the instrument. In view of that report, the Committee asked the Department to explain why this instrument had not included the chain of amendments. In a memorandum printed at Appendix 3, the Department acknowledges that a more detailed footnote would be helpful and confirms that this will be included

when the power is next exercised. **The Committee accordingly reports the preamble for requiring elucidation, provided by the Department.**

## 4 S.I. 2021/978: Reported for failure to comply with proper legislative practice

### *Infrastructure Planning (Prescribed Consultees and Interested Parties etc.) (Amendment) Regulations 2021*

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

4.2 These Regulations, which are subject to the negative resolution procedure, amend four instruments to replace references to Public Health England with references to the United Kingdom Health Security Agency.

4.3 Regulation 1(3) provides that an amendment made by the Regulations has the same extent and application as the provision amended. Statutory Instrument Practice states that where "it is intended that the amendments should have the same application as the instrument being amended, nothing further need or should be said" (paragraph 3.13.6). The Committee therefore asked the Department for Levelling Up, Housing and Communities to explain, having regard to the need for consistency in legislative practice, the special circumstances in which it was thought necessary to include regulation 1(3).

4.4 In a memorandum printed at Appendix 4, the Department acknowledges that it was not necessary to include regulation 1(3), having regard to Statutory Instrument Practice. The Department explains that drafters have been encouraged since January 2021 to deal expressly with extent in every instrument and that having included the extent provision, it was considered helpful for non-lawyers to also address application. That may be so (and as a rule the Committee favours express provision about application where it is likely to be helpful), but the Committee expects the Government to follow its own published practice as set out in Statutory Instrument Practice consistently. (The Committee notes that the new practice of always inserting an extent provision is inconsistently applied across Departments, and even within this particular Department. Inconsistent practice can only give rise to confusion for readers and is to be deprecated.) **The Committee accordingly reports regulation 1(3) for failing to comply with proper legislative practice.**

## 5 S.I. 2021/999: Reported for defective drafting and for requiring elucidation

### *Compulsory Electronic Monitoring Licence Condition (Amendment) Order 2021*

5.1 **The Committee draws the special attention of both Houses to this Order on the grounds that it is defectively drafted in one respect and that it requires elucidation in another respect.**

5.2 This Order ("the amending Order"), which is subject to the negative resolution procedure, amends the scope and application of the Compulsory Electronic Monitoring

Licence Condition Order 2021 (S.I. 2021/330, "the original Order").

5.3 Article 1(3)(a) of the amending Order provides that it applies to:

> *any person released on licence before this Order comes into force only insofar as during the period before this Order comes into force such person was required to reside on licence within a specified area listed in paragraphs 1 to 6 of Schedule 1 to [the original Order].*

5.4 The Committee asked the Ministry of Justice to explain when "the period before this Order comes into force" is intended to begin, and whether it is intended that the residency condition must be fulfilled for the whole of that period or only immediately before commencement. In a memorandum printed at Appendix 5, the Department asserts that article 1(3)(a) is only intended to apply where a person was required to have an electronic monitoring ("EM") condition included in their licence immediately before commencement of the amending Order. It asserts that the period within the scope of article 1(3)(a) is between the commencement dates of the original Order and the commencement date of the amending Order, i.e., between 12 April and 29 September 2021. The Committee notes the Department's intent, but the amending Order does not achieve it by the open reference in article 1(3)(a) to "the period before this Order comes into force" (albeit that a court might feel forced to resolve the doubt in favour of the Department's asserted policy). **The Committee accordingly reports article 1(3)(a) for defective drafting.**

5.5 Under article 2 of the original Order, the requirement to have an Electronic Monitoring condition included in a person's licence only applied if they were required to reside on licence at an address in a "specified area", which was originally defined as comprising six counties. If the person moved out of the specified area, the Electronic Monitoring condition would be lifted. Article 3 of the amending Order adds 13 counties to the definition of "specified area". It follows that as a result of the amendment, a person could be subject to an Electronic Monitoring condition for longer where they move to one of the 13 newly specified areas. The Committee asked the Department what proportionality assessment had been carried out in relation to the impact on the that person's rights under Article 7 of the European Convention on Human Rights of extending the duration of the compulsory Electronic Monitoring condition. In its memorandum, the Department explains that it does not consider Article 7 to be engaged as the condition has no punitive function, and the changes made by this Order are a change to the administration of the existing sentence rather than an additional or new penalty. **The Committee accordingly reports article 3 as requiring elucidation, provided in the Department's memorandum.**

## 6 S.I. 2021/1007: Reported for defective drafting

### *Immigration (Disposal of Property) (Amendment) Regulations 2021*

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

6.2 These Regulations, which are subject to the negative resolution procedure, amend the Immigration (Disposal of Property) Regulations 2008 (S.I. 2008/786) to add to the ways in which property acquired in the context of immigration enforcement may be disposed of when keeping it would be unreasonably expensive or inconvenient. In addition to

being sold, such property may now be destroyed or donated to "charities or other not-for-profit bodies" (as inserted by regulation 2). The Committee asked the Home Office to explain where "not-for-profit bodies" is defined for the purposes of these Regulations. In a memorandum printed at Appendix 6, the Department asserts that it is clear within the context of the instrument, and without further definition, that not-for-profit bodies "are organisations that are not charities, whose purpose is not to make a profit, and which have a public purpose". The Committee notes that not-for-profit or cognate expressions are used in different ways in different places in primary and subordinate legislation, and it cannot be taken for granted that any particular one of the possible definitions is sufficiently natural or intuitive to be regarded as the default meaning (in particular, there is nothing about the expression that necessarily implies a limitation to bodies with a public purpose). On that basis, a definition is always required, unless the complete meaning is beyond doubt in the context. **The Committee accordingly reports regulation 2 for defective drafting.**

# Instruments not reported

**At its meeting on 17 November 2021 the Committee considered the instruments set out in the Annex to this Report, none of which was required to be reported to both Houses.**

# Annex

## Instruments requiring affirmative approval

| | |
|---|---|
| **S.I. 2021/1218** | Money Laundering and Terrorist Financing (Amendment) (No. 3) (High-Risk Countries) Regulations 2021 |

## Draft Instruments requiring affirmative approval

| | |
|---|---|
| **Draft** | Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) (No.2) Regulations 2021 |
| **Draft** | Coronavirus Act 2020 (Early Expiry) (No. 2) Regulations 2021 |
| **Draft** | Network and Information Systems (EU Exit) (Amendment) Regulations 2021 |
| **Draft** | Electric Vehicles (Smart Charge Points) Regulations 2021 |
| **Draft** | Financial Services Act 2021 (Prudential Regulation of Credit Institutions and Investment Firms) (Consequential Amendments and Miscellaneous Provisions) Regulations 2021 |
| **Draft** | Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2021 |
| **Draft** | Regulatory Enforcement and Sanctions Act 2008 (Amendment to Schedule 3) (England) Order 2021 |
| **Draft** | International Organization for Marine Aids to Navigation (Legal Capacities) Order 2022 |
| **Draft** | Terrorism Prevention and Investigation Measures Act 2011 (Continuation) Order 2021 |
| **Draft** | Merchant Shipping (Control and Management of Ships' Ballast Water and Sediments) Order 2022 |
| **Draft** | Renewable Transport Fuel Obligations (Amendment) Order 2021 |
| **Draft** | Consumer Scotland Act 2020 (Consequential Provisions and Modifications) Order 2022 |

## Instruments subject to annulment

**S.I. 2021/754**[1] Pensions Regulator (Information Gathering Powers and Modification) Regulations 2021

**S.I. 2021/991** Domestic Abuse Support (Relevant Accommodation and Housing Benefit and Universal Credit Sanctuary Schemes) (Amendment) Regulations 2021

**S.I. 2021/1041** Democratic Republic of the Congo (Sanctions) (EU Exit) (Amendment) Regulations 2021

**S.I. 2021/1045** Allocation of Housing and Homelessness (Eligibility) (England) and Persons subject to Immigration Control (Housing Authority Accommodation and Homelessness) (Amendment) Regulations 2021

**S.I. 2021/1046** Financial Services and Markets Act 2000 (Prudential Regulation of FCA Investment Firms) (Definitions for the purposes of Part 9C) Regulations 2021

**S.I. 2021/1101** School Teachers' Pay and Conditions (England) Order 2021

**S.I. 2021/1106** Drivers' Hours and Tachographs (Temporary Exceptions) (No. 3) Regulations 2021

**S.I. 2021/1155** Health Protection (Coronavirus, International Travel and Operator Liability) (England) (Amendment) (No. 15) Regulations 2021

**S.I. 2021/1207** Drivers' Hours and Tachographs (Temporary Exceptions) (No. 4) Regulations 2021

## Instruments not subject to parliamentary proceedings not laid before Parliament

**S.I. 2021/1079** Finance (No. 2) Act 2017, Sections 60 and 61 and Schedule 14 (Digital Reporting and Record-Keeping) (Appointed Day) Regulations 2021

**S.I. 2021/1088** Social Security (Switzerland) Order 2021

1 The Committee asked for a memorandum on this instrument and a satisfactory response was received. The memorandum is printed at Appendix 7.

# Appendix 1

## S.I. 2021/786

### *Social Security (Scotland) Act 2018 (Disability Assistance for Children and Young People) (Consequential Modifications) Order 2021.*

1. By a letter dated on 27 October 2021, the Committee asked for a memorandum on the following point:

> *In relation to Schedule 6, paragraph 2(e)(iii), confirm that "or (iiza)" should have been inserted in such a way as to result in the phrase "not satisfying either sub-paragraph (i), (ii), (iia) or (iiza)" rather than the phrase "not satisfying either sub-paragraph (i), (ii) or (iia) has provided, or (iiza)".*

2. The response from the Northern Ireland Executive, Department for Communities, who drafted the provision, is set out below:

3. We confirm that paragraph 2(e)(iii) of Schedule 6 to S.I. 2021/786 inserts the new words in the wrong place and is consequently defectively drafted. We are grateful to the Committee for pointing this out and we apologise for making the error. The Office of the Secretary of State for Scotland is in the process of contacting the National Archives about using a correction slip to correct the error.

**Scotland Office**

**2 November 2021**

# Appendix 2

## S.I. 2021/875

### *Family Procedure (Amendment No. 2) Rules 2021*

1. By a letter dated 27 October 2021, the Committee sought a memorandum on the following points:

> *1. Explain why section 76(8) of the Courts Act 2003 is not cited in the preamble, having regard to rule 10(d).*
>
> *2. Explain the basis on which it was thought lawful and proper to dispense with the requirement to consult (having noted the explanation contained in paragraph 10 of the Explanatory Memorandum).*

2. The Department is grateful for the Committee's consideration of this instrument and responds as set out below.

**First point**

3. The failure to cite section 76(8) of the Courts Act 2003 (Family Procedure Rules may, instead of providing for any matter, refer to provision made or to be made about that matter by directions) is an oversight arising from the way in which the rule changes provided for by rule 10 of this instrument came about. The rule changes were piloted over an extended period before being assessed as appropriate for inclusion in the Family Procedure Rules on a permanent basis. The pilot provisions were set out in a Practice Direction made pursuant to rule 36.2 of the Family Procedure Rules 2010 (Practice Direction 36J). The rule changes as piloted were assessed as having worked well and not needing adjustment, and so the exercise of making the changes permanent was initially simply one of reproducing in this instrument the piloted changes. In the pilot Practice Direction, the meaning of a "duly authorised lawyer" was provided for by way of modifications to rules. However, in the course of preparing this instrument it was concluded that that term would be better defined in a Practice Direction (Practice Direction 27B), as this will, for example, enable amendments to be made more readily if the means of qualifying as a lawyer change in future. When this change of drafting approach was taken, unfortunately the need to cite section 76(8) was not flagged appropriately. The Department apologies for this oversight.

**Second point**

4. The Department would, with respect, not characterise decisions about the manner of fulfilment of the duty in section 79(1)(a) of the Courts Act 2003 as dispensing with the requirement to consult, for two reasons. The first is that the duty in section 79(1)(a) is in the Department's view to be construed, like the duty in section 2(6)(a) of the Civil Procedure Act 1997 which it precisely mirrors, not as imposing a requirement to consult some person or persons in every case before making any rule or amendment to a rule, but (as explained in relation to section 2(6)(a) of the 1997 Act in the Department's memorandum published as Appendix 2 to the Committee's 18th Report of Session 2019–21) as allowing for the Family Procedure Rule Committee (FPRC) to decide that it is appropriate not to consult in an individual case, as well as to determine, where the FPRC considers that this

is appropriate, who should be consulted and the manner in which consultation should be undertaken. The Explanatory Memorandum may be misleading in its description of consultation in this respect, as it deals only with formal consultation, rather than the informal consultation frequently undertaken by the FPRC, as by the Civil Procedure Rule Committee and explained in the Department's memorandum referred to above.

5. Section 63 of the Domestic Abuse Act 2021, to which the amendments in rules 3 to 6 of this instrument give effect, requires rules to be made to specific effect and leaves little room for drafting discretion. In those circumstances, it was not considered that there was a need for any formal consultation on the rule amendments so required to be made, and the Explanatory Memorandum is correct in stating that; however, views external to the FPRC were sought in the sort of informal process described in the Department's memorandum referred to above, and in particular the lead family judge for domestic abuse attended the meetings of the FPRC at which section 63 and the rule amendments required for its implementation were discussed, specifically to inform the FPRC's discussion and decisions on them. Her Majesty's Courts and Tribunals Service also contributed views, including on the minor and technical amendments made by this instrument to rule 29.6 of the Family Procedure Rules. The Department considers that the duty imposed on the FPRC by section 79(1)(a) of the Courts Act 2003 was fulfilled, but apologies for the potentially misleading nature of the Explanatory Memorandum in this regard.

**Ministry of Justice**

**1 November 2021**

# Appendix 3

## S.I. 2021/972

### *Meat Preparations (Amendment and Transitory Modification) (England) (EU Exit) (Amendment) (No. 2) Regulations 2021*

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

> *Explain why the Department has not included the chain of amendments that show how it is possible to rely on the cited enabling power (in light of the Committee's Forty-Fourth Report of Session 2019–21 in relation to S.I. 2020/1666).*

2. The Committee, in its Forty-Fourth Report of Session 2019–21, acknowledged that the courts would be likely to accept the position on the power used in paragraph 11A(1) of Schedule 2 to the Trade in Animals and Related Products Regulations 2011 (S.I. 2011/1197) as set out in the Department's memorandum in response to the Committee's request on S.I. 2020/1666. That was the first instrument to be made under this power.

3. The Committee further noted that a footnote further explaining the power would have been helpful to readers. The Department had not understood this as requiring such a footnote to be provided when the power was next exercised. However, the Department acknowledges that a more detailed footnote would be helpful, and will include this when the power is next exercised.

**Department for Environment, Food and Rural Affairs**

**2 November 2021**

# Appendix 4

## S.I. 2021/978

### *Infrastructure Planning (Prescribed Consultees and Interested Parties etc.) (Amendment) Regulations 2021*

1. The Committee requested a memorandum on the following point:

> *Having regard to the need for consistency in legislative practice and having regard to paragraph 3.13.6 of Statutory Instrument Practice, explain the special circumstances in which it was thought necessary to include regulation 1(3).*

2. Regulation 1(3) states that an amendment made by the Regulations has the same extent and application as the provision amended.

3. As the Committee will be aware, since January 2021, SI drafters within the Government Legal Department have been encouraged to deal expressly with extent in every SI, even where it can be inferred. This change of approach has been adopted because not including an extent provision in cases where extent can be inferred is likely to be unclear and unhelpful to users in most cases. For example, user testing by The National Archives proves that significant numbers of lay users use legislation.gov, and that it is not only a legal database used by lawyers. The user testing also establishes that lay users do not in many cases have the knowledge or skills to infer extent in the absence of an express extent provision.

4. This approach is not entirely new. In practice, many SIs already adopt the recommended approach, and it has been the practice of Parliamentary Counsel to take the approach in comparable instances of primary legislation for some time. Overall, it was considered sensible to adopt a standard approach, for the sake of consistency generally across primary and secondary legislation, and to help users in specific cases. The Department has accordingly followed the recommended approach on extent in this case.

5. Having included the extent provision, the Department considered that it would be helpful to the reader also to address application. While the application provision is legally correct and, we consider, helpful, the Department acknowledges that the reference to application in regulation 1(3) was not necessary having regard to paragraph 3.13.6 of Statutory Instrument Practice.

**Department for Levelling Up, Housing and Communities**

**1 November 2021**

# Appendix 5

## S.I. 2021/999

### *Compulsory Electronic Monitoring Licence Condition (Amendment) Order 2021*

1. Following consideration of the Compulsory Electronic Monitoring Licence Condition (Amendment) Order 2021 by the Committee at its meeting on 27 October 2021, the Committee requested that the Ministry of Justice submit a memorandum on the following points:

> *1. In relation to article 1(3)(a), explain—*
>
> *(a) when "the period before this Order comes into force" is intended to begin; and*
>
> *(b) whether it is intended that the condition of being required to reside on licence within one of the six specified areas must be fulfilled for the whole of that period or whether the intention is that the condition is satisfied so long as the requirement applied immediately before commencement.*
>
> *2. Explain what power is relied on to make the Order apply retrospectively to persons who fall within article 1(3)(a).*
>
> *3. Explain what proportionality assessment was carried out in relation to the impact on the Article 7 rights of persons who fall within article 1(3)(a) of extending the list of specified areas, and thereby potentially extending the duration of the electronic monitoring condition as described in paragraph 6.4 of the Explanatory Memorandum.*

2. The Department is grateful for the Committee's consideration of this instrument and responds as set out below.

3. **In relation to the first point:** Article 1(3)(a) is intended to apply only to those persons who were required to have an electronic monitoring ("EM") condition included in their licence in accordance with the terms of the Compulsory Electronic Monitoring Licence Condition Order 2021 S.I. 2021/330 ("the Earlier Order") and only to the extent they were required to have that EM condition included in their licence immediately before commencement of the present Order.

4. Under the Earlier Order if, with the consent of their probation officer, a person changed address and moved out of one of the six specified areas then the compulsory EM condition was no longer required to be included in their licence. But if the person changed address and moved within one of the six specified areas the compulsory EM condition remained. The effect of the present Order is to add additional specified areas. In addition it provides through article 1(3)(a) that if immediately before the present Order came into force a person was subject to a mandatory EM condition because they resided in one of the six specified areas then, after the present Order came into force, changes address and moves to one of the new areas listed in the present Order then an EM condition remains

compulsory, in the same way as if that person had moved within one of the original six specified areas.

5. Accordingly, as regards paragraph (a) of the first point, the intended scope of "the period before this Order comes into force" is the period between the date the Earlier Order came into force and the date the present Order came into force.

6. As regards paragraph (b) of the first point, that period is only relevant insofar as the person is required to have an EM condition included in their licence immediately before commencement of the present Order; in particular, that immediately before commencement they are required to reside on licence in one of the six specified areas.

7. We acknowledge that on the face of it article 1(3)(a) appears to apply to any person released on licence at any period before the present Order comes into force who has been required to reside on licence within one of the six specified areas for any period of time. However, the present Order has to be read with the instrument it is amending, the Earlier Order. The effect is that that the scope of persons who by virtue of article 1(3)(a) will, as a matter of law, be required to have the EM condition included in their licence, will only be those subject to the Earlier Order, and only to the extent that they were required to have that condition in their licence immediately before the date the present Order came into force and whom now reside in an area specified in the present Order.

8. **In relation to the second point:** We do not consider the Order applies retrospectively, as it does not change whether a person released from prison before it comes into force is required to have an EM condition compulsorily included in their licence or the terms pursuant to which, up to the date the present Order comes into force, that condition will remain in their licence. That is to be determined by the unamended parts of the Earlier Order.

9. For those persons required by the Earlier Order to have the EM condition included in their licence immediately before the present Order came into force, the present Order prospectively changes the terms pursuant to which such EM condition will remain in their licence. It does this chiefly by expanding the number of specified areas the person may be required to reside on licence and still have the EM condition included.

10. **In relation to the third point:** We do not consider Article 7 ECHR is engaged by the present Order or the Earlier Order. Licence conditions have no punitive function but rather are imposed to protect the public or to promote rehabilitation. The changes to the circumstances of when the compulsory licence condition may be imposed is more appropriately cast as a change to the execution of the penalty, or the administration of the sentence. The penalty is the custodial sentence set by the court and licence conditions are tools used by the Secretary of State for the management of offenders on licence in the community as part of the administration of the sentence. As a licence condition is an execution or enforcement component of the sentence which has been handed down by the court, they are not an additional or new penalty being imposed retrospectively for the purposes of Article 7. There is an established body of case-law to that effect: *Uttley v UK* (Application No. 3694/03), *Csoszanski v Sweden* (Application No. 22318/02), *M v Germany* (Application No. 19359/04), *Hogben v United Kingdom* (Application No. 11653/85, 3 March 1986); *Del Rio Prada v Spain* (Application No. 42750/09, 21 October 2013), *Abedin v the United Kingdom* (Application No. 54026/16).

11. Further, the maximum duration the EM condition may be included in a licence in accordance with the (amended) Earlier Order remains unchanged by the present Order.

12. If the Committee requires any further explanation or clarification the Department would be pleased to assist further.

**Ministry of Justice**

**2 November 2021**

# Appendix 6

## S.I. 2021/1007

### *Immigration (Disposal of Property) (Amendment) Regulations 2021*

1. In its letter of 27 October 2021 to the Department, the Joint Committee on Statutory Instruments has asked for a memorandum on the following point on S.I. 2021/1007:

> *Explain where "not-for-profit bodies" is defined for the purposes of these Regulations.*

2. Regulation 2(d) inserts a new 2A regulation into the Immigration (Disposal of Property) Regulations 2008 which allows property to be disposed of inter alia by way of donation to charities or other not-for-profit bodies. The term "not-for-profit bodies" is not defined in S.I. 2021/1007 or in the UK Borders Act 2007. It is the Home Office's view that the term "not-for-profit bodies" is clear within the context of S.I. 2021/1007 without further definition. The relevant regulation states that "not-for-profit bodies" are an alternative to charities such that it is clear that "not-for-profit bodies" are organisations that are not charities, whose purpose is not to make a profit, and which have a public purpose.

3. The Nationality and Borders Bill (NBB) contains a clause (28PA(12)(d)) Power to seize and dispose of ships etc.) which similarly provides for the disposal of property by way of donation to not-for-profit bodies. The intention in S.I. 2021/1007 is to closely align these two disposal powers. The term "not for profit body" is also not defined in the NBB. For completeness, the Home Office notes that clause 28PA(12)(d) could be amended during its passage through Parliament and as such, despite the intention to align the two disposal powers, the power to donate property in the NBB if/when enacted may ultimately differ from that contained in S.I. 2021/1007.

4. The Committee may wish to note that the term "not-for-profit bodies" (which also appears as not-for-profit organisations in legislation) appears in various legislation, but there is no consistent precedent as to whether the term is defined. In some instances the term is not defined, for example section 82(2)(b) of the Immigration and Asylum Act 1999 which refers to "*…in the course of a business carried on (whether or not for profit) by him or by another person*" and section 141(2) of the Water Industry Act 1991 which refers to:

> *"For the purposes of this Chapter any land or premises used or intended for use (in whole or in part and whether or not for profit)—*
>
> *(a) for agricultural or horticultural purposes or for the purposes of fish farming; or*
>
> *(b) for scientific research or experiment"*

5. In other legislation "not-for-profit body" is defined, such as in section 151 of the Communications Act 2003, where it is defined as:

> *"not for profit body" means a body which, by virtue of its constitution or any enactment—"*

*(a) is required (after payment of outgoings) to apply the whole of its income, and any capital which it expends, for charitable or public purposes; and*

*(b) is prohibited from directly or indirectly distributing amongst its members any part of its assets (otherwise than for charitable or public purposes);"*

6. A similar example can be found in section 207 of the Legal Services Act 2007:

*"not for profit body" means a body which, by or by virtue of its constitution or any enactment—*

*(a) is required (after payment of outgoings) to apply the whole of its income, and any capital which it expends, for charitable or public purposes, and*

*(b) is prohibited from directly or indirectly distributing amongst its members any part of its assets (otherwise than for charitable or public purposes);"*

**Home Office**

**2 November 2021**

# Appendix 7

## S.I. 2021/754

### *Pensions Regulator (Information Gathering Powers and Modification) Regulations 2021*

1. In its letter to the Department dated 27th October 2021, the Committee requested a memorandum on the following point:

> *In relation to regulation 3(1)(a), explain how the requirement for an interview notice to contain "the details" of the interviewee will achieve the effect, as set out in paragraph 7.2 of the Explanatory Memorandum, that the notice will include either the details itemised in that paragraph or sufficient information to make it clear who is being called for an interview.*

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

3. Section 72A (interviews) of the Pensions Act 2004 (c. 35) ("the 2004 Act"), was inserted into the 2004 Act by section 110 of the Pension Schemes Act 2021 (c. 1). It provides that the Pensions Regulator may, by notice in writing, require any person to whom section 72(2) of the 2004 Act applies to attend before the Pensions Regulator, at a time and place specified in the notice, to answer questions and provide explanations on one or more matters specified in the notice. Section 72(1) (provision of information) of the 2004 Act enables the Regulator by notice in writing to require any person to whom subsection (2) applies to produce documents or information. Subsection (2) of section 72 therefore sets out the categories of persons to whom both provisions apply. It includes, for example, a trustee or manager of a pension scheme or a professional adviser in relation to a scheme.

4. For a notice requiring a person to attend for interview to be effective for the purposes of section 72A of the 2004 Act it must contain details which enable the person required to attend to be identified. In addition section 72A(1) requires that a notice must specify the time and place of the interview and the matters on which the person will be required to answer questions and provide explanations. Section 72A(2) of the 2004 Act provides that a notice under subsection (1) requiring a person to attend for interview must contain such other information as may be prescribed. There is no such further requirement in relation to notices issued under section 72(1) of the 2004 Act.

5. The information prescribed for the purposes of section 72A(2) is set out in regulation 3(1) of the Pensions Regulator (Information Gathering Powers and Modification) Regulations 2021 (S.I. 2021/754). It includes matters such as details of how the interview process will be conducted and the interviewee's right to be represented. Regulation 3(1)(a) provides that the notice must contain: "the details of the person required to attend the interview with the Regulator".

6. The wording in regulation 3(1)(a) is used because the Pensions Regulator may have different identity information in different cases, for example it may not always have an individual's home address as well as that person's business address (or vice versa). There may also be cases where there is more than one person at an address or exercising a function in relation to a scheme with the same name. The details that are required in relation to an

individual may therefore not always be the same in each case. The intention in the use of this wording is to enable a notice to be issued in situations such as those described, and ensure that the notice contains details to make it clear who is being called for interview.

7. The Department therefore considers that the drafting in regulation 3(1)(a) properly reflects the polity intention. Paragraph 7.2 of the Explanatory Memorandum says: "The information set out in the notice will include details, for example, name, address and job title, to make it clear who is being called for an interview.". The Department considers that this properly explains the effect of regulation 3(1)(a) and provides examples of the type of information that may be included as the details.

**Department for Work and Pensions**

**2 November 2021**

# Formal Minutes

## Wednesday 17 November 2021

Virtual meeting

Members present:

Jessica Morden *(in the Chair)*

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

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

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

Paragraphs 1.1 to 6.2 read and agreed to.

Annex agreed to.

Papers were appended to the Report as Appendices 1 to 7.

*Resolved*, That the Report be the Fifteenth 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 till Wednesday 24 November at 3.40 p.m.