



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

Nineteenth Report of Session 2021–22

Drawing special attention to:

*Health Protection (Coronavirus, Wearing of Face Coverings) (England)
Regulations 2021 (S.I. 2021/1340)*

*Ordered by the House of Lords
to be printed 15 December 2021*

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Joint Committee on Statutory Instruments

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

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

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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.

Committee staff

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

Contacts

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Instruments reported

At its meeting on 15 December 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 one of those considered. The instrument and the grounds for reporting it is given below. The relevant departmental memorandum is published as an appendix to this report.

1 S.I. 2021/1340: Reported for unusual and unexpected use of enabling powers and for defective drafting

Health Protection (Coronavirus, Wearing of Face Coverings) (England) Regulations 2021

1.1 The Committee draws the special attention of both Houses to these Regulations on the grounds that they make unusual and unexpected use of the enabling power in three respects (two of which are related) and that they are defectively drafted in one respect.

1.2 These Regulations, which are subject to the made affirmative resolution procedure, as part of the public health response to COVID-19, require people in England to wear face coverings indoors in a number of places including certain shops, shopping centres, banks, transport hubs, and when using public transport services, subject to exceptions.

1.3 Regulation 3(1) requires people to wear face coverings in specified circumstances. Regulation 3(5) disapplies that requirement “in relation to any premises for which it is disapplied in a direction made by the Secretary of State under regulation 8”. Regulation 8 allows the Secretary of State to issue a disapplication direction “for the purposes of a research programme concerned with the provision of an appropriate public health response to the incidence and spread of coronavirus in England”. The Committee asked the Department of Health and Social Care to identify the power relied on by the Secretary of State to subdelegate the power to decide by informal direction which premises the criminal prohibition applies to. In a memorandum printed as an Appendix, the Department relies on provisions which allow the Regulations to enable the imposition of a restriction or requirement “by virtue of a decision taken by the appropriate Minister, a local authority or other person” and on provisions allowing the conferring of functions on local authorities and “other persons”. The Committee is not convinced that, despite its breadth, these powers were intended to permit this degree of delegation, which involves the Government giving itself powers to disapply the law entirely informally (as discussed in the Committee’s Seventeenth Report of Session 2019–21 in relation to S.I. 2020/567). A similar result could have been achieved by including a disapplication provision in the instrument itself, operating by reference to research programmes falling within an objectively defined set of criteria (which could have included an authorisation or certification by the Secretary of State or another authority). **The Committee accordingly reports regulation 3(1) for making an unusual and unexpected use of the enabling power.**

1.4 Regulation 10 makes it an offence (*inter alia*) to contravene the requirements of regulation 6. Regulation 6 requires a responsible person in respect of public transport vehicles to display certain notices and to take other measures to provide information. The

regulation defines “responsible person” as “a person responsible for carrying on a business in any place or providing public transport services where a person is required to wear a face covering under these Regulations”. It seemed to the Committee that more than one person could fall within that definition in respect of a particular public transport vehicle, so it asked the Department to explain how it is intended that liability will attach to specific persons in respect of any particular contravention. In its memorandum the Department asserts that “it is intended that liability for failure to display a notice, or to take other measures, as required by regulation 6(1), will attach to the person who can be said to be responsible for carrying on the business or for providing the public transport service in question. This will be a question of fact in any particular case: if there is more than one person in this category, each of them will potentially have committed the offence.” The Committee considers the terms “responsible for” and “providing” are unhelpfully vague and open in the context of the imposition of criminal liability in these circumstances. The class of potentially criminally liable person should be drawn sufficiently precisely for a person involved in the provision or management of public transport services to know the extent of their potential liability. On the basis that Parliament cannot have intended the net of criminal liability to be cast so widely and so vaguely, **the Committee reports regulation 10 for making an unusual and unexpected use of the enabling power.**

1.5 Unlike other offences in the Regulations, the offence of contravening regulation 6 is not subject to a defence of having a reasonable excuse. The Committee asked the Department to explain the omission. In its memorandum the Department acknowledges that the failure to subject this offence to a reasonable excuse qualification was “the result of an oversight”, and apologises to the Committee. Particularly given the breadth of the potential class of persons criminally liable as discussed in the previous paragraph, it is unacceptable to have what purports to be strict liability without a reasonable excuse defence. The Committee trusts that the Department will make the necessary amendments as quickly as possible, and not leave this unacceptably wide criminal provision on the statute book for longer than can be avoided. On the basis that Parliament cannot have intended a strict liability offence of this kind, without a defence of reasonable excuse, that can be committed by every person who can be described as “responsible for carrying on a business” or “providing” public transport services, **the Committee reports regulation 10 for making an unusual and unexpected use of the enabling power, in this added respect, acknowledged by the Department.**

1.6 Regulation 15(1) provides that the Regulations expire at the end of 20th December 2021. Regulation 15(2) provides that expiry “does not affect the validity of anything done pursuant to these Regulations before they expire”. That would be the effect anyway by virtue of section 16(1) and (2) of the Interpretation Act 1978, so the Committee asked the Department to justify the inclusion of regulation 15(2). In its memorandum the Department acknowledges that regulation 15(2) was unnecessary. The Committee is grateful for the acknowledgment, **and accordingly reports regulation 15(2) for defective drafting, acknowledged by the Department.**

Instruments not reported

At its meeting on 15 December 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. 2021/1382	Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) (Amendment) (No. 5) Regulations 2021
S.I. 2021/1400	Health Protection (Coronavirus, Wearing of Face Coverings) (England) (Amendment) Regulations 2021
S.I. 2021/1415	Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) (Amendment) (No. 6) Regulations 2021

Draft Instruments requiring affirmative approval

Draft	Motor Vehicles (Driving Licences) (Amendment) Regulations 2022
Draft	Small Business, Enterprise and Employment Act 2015 and Pubs Code etc. (Amendment) Regulations 2021
Draft	Train Driving Licences and Certificates (Amendment) Regulations 2022

Instruments subject to annulment

S.I. 2021/1271	Products Containing Meat etc. (England) (Amendment) Regulations 2021
S.I. 2021/1279	Prison and Young Offender Institution (Amendment) Rules 2021

Draft Instruments subject to annulment

Draft	London Borough of Barking and Dagenham (Electoral Changes) Order 2021
Draft	St Helens (Electoral Changes) Order 2021
Draft	Royal Borough of Greenwich (Electoral Changes) Order 2021
Draft	London Borough of Lambeth (Electoral Changes) Order 2022

Instruments not subject to parliamentary proceedings not laid before Parliament

S.I. 2021/1274 Environment Act 2021 (Commencement No. 1) Regulations 2021

Appendix 1

S.I. 2021/1340

Health Protection (Coronavirus, Wearing of Face Coverings) (England) Regulations 2021

1. The Committee has asked the Department for a memorandum on the following points:

1. In relation to the criminal offence created by regulation 10(1) in respect of contravention of the requirements of regulation 6:

(a) explain how it is intended that liability will attach to specific persons falling within the definition of “responsible person” in respect of any particular contravention, and how effect is given to that intention; and

(b) explain why the offence is not subject to a reasonable excuse qualification as are other offences under the Regulations.

2. Identify the power relied on by the Secretary of State in regulation 3(5) to subdelegate to the Secretary of State the power to decide by informal direction which premises the criminal prohibition applies to.

3. Justify the inclusion of regulation 15(2).

2. The Department’s response is as follows.

3. **In relation to point 1(a)**, the requirement in regulation 6(1), and the offence in regulation 10(1), are taken from the Health Protection (Coronavirus, Restrictions) (Obligations of Undertakings) (England) Regulations 2020 (S.I.2020/1008), regulation 2A (inserted into those Regulations by S.I. 2020/1046) and regulation 3. It is intended that liability for failure to display a notice, or to take other measures, as required by regulation 6(1), will attach to the person who can be said to be responsible for carrying on the business or for providing the public transport service in question. This will be a question of fact in any particular case: if there is more than one person in this category, each of them will potentially have committed the offence.

4. **In relation to point 1(b)**, the failure to subject this offence to a reasonable excuse qualification is the result of an oversight, and we apologise to the Committee for this oversight.

5. **In relation to point 2**, the power for the Secretary of State to disapply the requirement to wear a face covering in particular premises was previously set out in regulation 9 of the Health Protection (Coronavirus, Restrictions) (Steps) (England) Regulations 2021 (S.I. 2021/364), since revoked by S.I. 2021/848.

6. The powers relied on are sections 45C, 45D and 45F of the Public Health (Control of Disease) Act 1984. Section 45C(1) is a broad power and we consider its language to be apt to cover provision designed to test whether specified premises pose unacceptable public health risks with or without certain degrees of restriction. The power, in regulation 8,

enabling the Secretary of State to disapply, by direction, the requirement under regulation 3(1) or 6(1) in relation to particular premises may only be exercised for the purposes of a research programme concerned with the provision of an appropriate health response. We consider this to be in accordance with the broad power in section 45C(1).

7. Section 45C(3)(c) enables regulations to impose, or enable the imposition of, restrictions or requirements in relation to persons, places or things. Section 45D(5)(a) provides that “*regulations “enable the imposition of a restriction or requirement” if the restriction or requirement is imposed by virtue of a decision taken under the regulations by the appropriate Minister, a local authority or other person*”. Thus, the power envisages decisions being taken under regulations and this would include a decision not to impose a restriction or a requirement.

8. Section 45F(2) provides that regulations may confer functions on local authorities and other persons. We consider this can include the Secretary of State.

9. **In relation to point 3**, regulation 15(2) was intended as a saving provision in relation to the expiry of the Regulations. However, we acknowledge this was unnecessary in light of section 16 of the Interpretation Act 1978 and in accordance with the Committee’s 46th Report of the 2019–21 Session, and apologise for this error.

10. We thank the Committee for flagging the above issues and will consider appropriate action to deal with the issues identified in point 1(a), point 1(b) and point 3.

Department of Health and Social Care

7 December 2021

Formal Minutes

Wednesday 15 December 2021

Virtual meeting

Members present:

Jessica Morden (*in the Chair*)

Dr James Davies	Paul Holmes
Baroness D’Souza	John Lamont
Baroness Gale	Baroness Newlove
Lord Haskel	Baroness Scott of Needham Market

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 1.6 read and agreed to.

Annex agreed to.

A Paper was appended to the Report.

Resolved, That the Report be the Nineteenth 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 12 January at 3.40 p.m.]