



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

**Fourth Report
of Session 2017–19**

Drawing special attention to:

Deregulation Act 2015 (Growth Duty Guidance) Order 2017 (S.I. 2017/268)

Pension Protection Fund (Modification) (Amendment) Regulations 2017 (S.I. 2017/324)

Further Education Loans (Amendment) Regulations 2017 (S.I. 2017/336)

Insolvency (England and Wales) (Amendment) Rules 2017 (S.I. 2017/366)

Insolvency (England and Wales) Rules 2016 (Consequential Amendments and Savings) Rules 2017 (S.I. 2017/369)

Social Security (Miscellaneous Amendments No. 2) Regulations 2017 (S.I. 2017/373)

Social Security (Miscellaneous Amendments No. 3) Regulations 2017 (S.I. 2017/613)

Road Traffic Act 1988 (Motor Racing) (England) Regulations 2017; Deregulation Act 2015 (Birmingham City Council Act 1985) (Repeal) Regulations 2017 (S.I. 2017/390 and S.I. 2017/401)

Gangmasters and Labour Abuse Authority (Complaints and Misconduct) Regulations 2017 (S.I. 2017/521)

Care and Support (Charging and Assessment of Resources) (Amendment) Regulations 2017 (S.I. 2017/555)

Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (S.I. 2017/572)

Offshore Petroleum Production and Pipe-lines (Environmental Impact Assessment and other Miscellaneous Provisions) (Amendment) Regulations 2017 (S.I. 2017/582)

Folkestone Harbour Revision Order 2017 (S.I. 2017/601)

Criminal Justice (European Investigation Order) Regulations 2017 (S.I. 2017/730)

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Powers

The full constitution and powers of the Committee are set out in House of Commons Standing Order No. 151 and House of Lords Standing Order No. 73, available on the Internet via www.parliament.uk/jcsi.

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 Mike Winter (Commons Clerk), Jane White (Lords Clerk) and Liz Booth (Committee Assistant). Advisory Counsel: Daniel Greenberg, Peter Brooksbank, Philip Davies and Vanessa MacNair (Commons); James Cooper, Nicholas Beach and John Crane (Lords).

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Instruments reported

At its meeting on 29 November 2017 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 fourteen 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. 2017/268: Reported for failure to comply with proper legislative practice

Deregulation Act 2015 (Growth Duty Guidance) Order 2017

1.1 The Committee draws the special attention of both Houses to this Order on the ground that it fails to comply with proper legislative practice in one respect.

1.2 This Order brings in to force guidance issued by the Secretary of State under section 110(1) of the Deregulation Act 2015. The guidance relates to the duty under section 108 of that Act that a person exercising a regulatory function to which section 108 applies must, when exercising that function, have regard to the desirability of promoting economic growth.

1.3 The Committee asked the Department for Business, Energy and Industrial Strategy to explain why the Explanatory Note, while mentioning that the Growth Duty S. 110 Guidance is published on the gov.uk website, does not indicate where access may be obtained to a hard copy.

1.4 In a memorandum printed at Appendix 1, the Department acknowledges that the Explanatory Note should have indicated that a hard copy of the Guidance can be obtained by writing to the Better Regulation Executive, Department for Business, Energy and Industrial Strategy, 1 Victoria Street, London SW1H 0ET. The Department apologises for this oversight and will address it by way of correction slip. The Committee is grateful to the Department for this explanation and for undertaking to correct the omission which it agrees can properly be done by correction slip.

1.5 The Committee has repeatedly stressed its concern that documents given a significance by subordinate legislation should be available to citizens who do not have access (or ready access) to the internet and **accordingly reports the Order for failure to comply with proper legislative practice, acknowledged by the Department.**

2 S.I. 2017/324: Reported for defective drafting

Pension Protection Fund (Modification) (Amendment) Regulations 2017

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

2.2 These regulations principally relate to the introduction of an increased pension compensation cap for long service in the calculation of pension compensation payable by the Pension Protection Fund.

2.3 Regulation 1(1) states that the Regulations “come in to force on 6th April 2017”, and regulation 1(3) states that specified provisions “take effect from 6th April 2017”. The Committee asked the Department for Work and Pensions to explain the need for both propositions.

2.4 In a memorandum printed at Appendix 2, the Department asserts that since regulation 1(1) is about commencement and regulation 1(3) is about effect there is no duplication. The Committee is not convinced that there is a natural difference between coming into force and taking effect; but if there is a difference, the regulations fail to make clear what is intended. **The Committee accordingly reports regulation 1 for defective drafting.**

3 S.I. 2017/336: Reported for failure to comply with proper legislative practice

Further Education Loans (Amendment) Regulations 2017

3.1 **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.**

3.2 These regulations set out the maximum amount of loan available to a student for a designated course starting on or after 1st August 2017. The maximum loan amounts are determined by reference to guided learning hours (“GLH”) and in some cases by Learning Aim Reference (a unique number allocated by the Skills Funding Agency). The Explanatory Note states that the GLH and Learning Aim Reference of a further education course can be found on Ofqual’s Register of Qualifications (and gives the internet link) but goes on to state that Ofqual does not make available hard copies of the register as updated from time to time.

3.3 The Committee asked the Department for Education to explain why hard copies of Ofqual’s Register of Qualifications are not made available for inspection.

3.4 In a memorandum printed at Appendix 3, the Department acknowledges that it should have been made clear that hard copies of the Register are available from the Department on request. The Department undertakes to make this clear on the relevant government website and will consider arranging for a correction slip (which the Committee agrees would be appropriate).

3.5 The Committee repeats its concern that documents given a significance by subordinate legislation should be available to citizens who do not have access (or ready access) to the internet and **accordingly reports the Regulations for failure to comply with proper legislative practice, acknowledged by the Department.**

4 S.I. 2017/366: Reported for *doubtful vires* and for requiring elucidation

Insolvency (England and Wales) (Amendment) Rules 2017

4.1 The Committee draws the special attention of both Houses to these Rules on the grounds that they fail to address the Committee’s previous *vires* concern and that they require elucidation in one respect.

4.2 These Rules amend provisions of the Insolvency (England and Wales) Rules 2016 (“the 2016 Rules”) which came in to force on 6 April 2017. The 2016 Rules were reported for defective drafting in seven respects and giving rise as to doubt, in one respect, as to whether they are intra *vires* (Committee’s Sixteenth Report of 2016–17 relating to S.I. 2016/1024).

4.3 The majority of the Committee’s concerns have been dealt with either in this instrument or via correction slip. However, the Committee asked the Department for Business, Energy and Industrial Strategy to explain whether the concern of the Committee set out in paragraphs 1.10 to 1.13 of the Sixteenth Report of Session 2016/17 relating to S.I. 2016/1024 had been addressed and, if not, why not. (The Committee’s concern in those paragraphs was that Rule 10.36 did not allow a debtor to make a hard copy application for bankruptcy (as opposed to an electronic application)).

4.4 In a memorandum printed at Appendix 4, the Department maintains the view, expressed in its memorandum to the Committee in relation to S.I. 2016/1024, that rule 10.36, as drafted, is intra *vires*. The Department acknowledges the concerns expressed by the Committee about the undesirability of assuming that all citizens have ready access to, or wish to use, electronic communication and about restricting the ability to use paper and post in such circumstances. The Department goes on to explain that the Insolvency Service has processes in place to assist those who do not have access to electronic communications. The Insolvency Service Enquiry Line provides an assisted digital service for such individuals. A member of the Enquiry Line team will work through the application over the phone with the applicant, record the answers on line, print off the completed form and send it to the applicant to print, sign and return. When the applicant returns the form the Enquiry Line official will submit the form online. The application is then dealt with by the Adjudicator who will write to the applicant if they do not have an email address.

4.5 The Committee is grateful for this explanation of the processes that are in place to assist those who do not have access to the internet. However, these processes are outside the legislation and the Committee’s earlier concerns remain. **The Committee accordingly continues to report the Rule 10.36(1) of the 2016 Rules, in so far as it fails to cover a possibility of a hard copy application, as giving rise as to doubt as to whether it is intra *vires*.**

4.6 Section 413(2) of the Insolvency Act 1986 requires the Lord Chancellor to consult the Insolvency Rules Committee before making (or amending) the insolvency rules. The Explanatory Memorandum to this instrument states that no formal consultation has been carried out but the preamble states that the Lord Chancellor has consulted the Insolvency Rules Committee. The Committee sought an explanation for the inconsistency.

4.7 The Department acknowledges and apologises for the error in the Explanatory Memorandum. The Insolvency Rules Committee was consulted before these Rules were made. The reference in the Explanatory Memorandum was to the fact that a formal consultation of business stakeholders and other interested parties did not take place and the Department apologises for any confusion caused. **The Committee accordingly reports the preamble to the Rules as requiring the elucidation provided by the Department.**

5 S.I. 2017/369: Reported for doubt as to whether they are *intra vires* and for defective drafting

Insolvency (England and Wales) Rules 2016 (Consequential Amendments and Savings) Rules 2017

5.1 **The Committee draws the special attention of both Houses to these Rules on the grounds that there is doubt as to whether they are *intra vires* in three related respects and that they are defectively drafted in seven respects.**

5.2 The Insolvency (England and Wales) Rules 2016 came in to force on 6 April 2017 and repeal and replace the Insolvency Rules 1986 (the “1986 Rules”). This instrument makes consequential amendments and savings provisions to various pieces of primary and secondary legislation that refer to the 1986 Rules, often to substitute reference to the Insolvency (England and Wales) Rules 2016 for the Insolvency Rules 1986.

5.3 The Committee asked the Department for Business, Energy and Industrial Strategy to explain the source of the power to include amendments to primary legislation.

5.4 In a memorandum printed at Appendix 5, the Department explains that the powers in sections 411(2)(b) and 412(2)(b) of the Insolvency Act 1986 (the “Act”) enable the making of incidental and supplemental provisions to the Rules. It asserts that the Act does not limit the exercise of these powers to provisions which amend secondary legislation. In this case, where there were three references to the Insolvency Rules 1986 in primary legislation, the Department considered that it would be legitimate to make these very small changes under the powers in sections 411 and 412 as being incidental on the making of the new Rules. The alternative would have been to leave users to rely on section 17(2) of the Interpretation Act 1978 (repeal and re-enactment). In the view of the Department, this would have been less clear from the perspective of users of the legislation.

5.5 The Committee agrees that the Department’s approach is clearer than relying on the Interpretation Act, but the enabling power is not sufficient to allow this approach and there is a strong presumption against subordinate legislation interfering with primary legislation. Where amendments are made to primary legislation (however minor) there must be express power to make those amendments. The power to make incidental and supplemental provision cannot be relied on for this purpose. **The Committee accordingly reports paragraphs 1, 2 and 3 of Schedule 1 for doubt as to whether they are *intra vires*.**

5.6 The instrument also contains a number of drafting errors and the Committee asked the Department to explain the reasons for the apparent errors. In the memorandum referred to above, the Department accepts that the seven matters raised are indeed drafting errors and apologises for those errors. The Committee is grateful to the Department for undertaking to take steps to ensure its processes for quality control of secondary legislation

are more rigorously applied in future. **The Committee accordingly reports Rule 3(a) and paragraphs 1, 2, 3(3)(a), 9, 11 and 12(3) for defective drafting, acknowledged by the Department.**

6 S.I. 2017/373 and S.I. 2017/613: Reported for requiring elucidation

Social Security (Miscellaneous Amendments No. 2) Regulations 2017: and Social Security (Miscellaneous Amendments No. 3) Regulations 2017

6.1 The Committee draws the special attention of both Houses to these Regulations on the ground that they require elucidation.

6.2 In each of the Regulations, the Northern Ireland Department for Communities concurred to the making of the Regulations on a date before the date they were made by H.M. Treasury. The Committee asked H.M. Treasury to explain how the Northern Ireland Department for Communities was able to concur in the making of the regulations before they were made.

6.3 In memoranda prepared by Her Majesty's Revenue and Customs on behalf of H.M. Treasury printed at Appendix 6 and Appendix 7, the Department appears to confirm that despite the dates, concurrence was given to the respective final texts. **On that basis, the Committee reports these Regulations as requiring the elucidation provided by the Department.**

7 S.I. 2017/390 and S.I. 2017/401: Reported for failure to comply with proper legislative practice

Road Traffic Act 1988 (Motor Racing) (England) Regulations 2017: and Deregulation Act 2015 (Birmingham City Council Act 1985) (Repeal) Regulations 2017

7.1 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.

7.2 The Road Traffic Act 1988 (Motor Racing) (England) Regulations 2017 authorise two motor sport governing bodies to issue permits to persons wishing to promote a race or trial of speed on a public way in England before making an application to a highway authority for a motor race order.

7.3 The Deregulation Act 2015 (Birmingham City Council Act 1985) (Repeal) Regulations 2017 repeal the Birmingham City Council Act 1985 which allows motor racing to take place on particular streets in Birmingham. This repeal follows shortly after the commencement of section 73 of the Deregulation Act 2015 which makes provision for highway authorities in England and Wales to issue motor race orders, allowing motor racing events to take place on public highways.

7.4 The Committee asked the Department for Transport to explain why the respective preambles do not recite that consultation has taken place in accordance with section 195(2) of the Road Traffic Act 1988 (in the case of the Road Traffic Act 1988 (Motor Racing) (England) Regulations 2017) and in accordance with section 75(8) of the Deregulation

Act 2015 (in the case of the Deregulation Act 2015 (Birmingham City Council Act 1985) (Repeal) Regulations 2017) as required by paragraph 3.11.28 of Statutory Instrument Practice 5th Edition May 2017 (previously paragraph 2.4.7 of 4th Edition).

7.5 In a memorandum printed at Appendix 8, the Department agrees that both instruments ought to have recited in the preamble the fact that consultation had taken place in accordance with section 195(2) of the Road Traffic Act 1988 and section 75(8) of the Deregulation Act 2015 respectively and apologises for these omissions. The Department explains that the Explanatory Memorandum makes clear that the required consultations were carried out before each of the Regulations was made and confirms that the statutory conditions for making each of the Regulations were complied with. The Department undertakes to take steps to ensure that the requirement to recite that consultation has taken place will be complied with in future. **On that basis, the Committee reports both Regulations for failure to comply with proper legislative practice, acknowledged by the Department.**

8 S.I. 2017/521: Reported for defective drafting

Gangmasters and Labour Abuse Authority (Complaints and Misconduct) Regulations 2017

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

8.2 Regulation 23 of this instrument deals with the procedure to be followed by the Chief Executive of the Gangmasters and Labour Abuse Authority on receipt by him of a complaint about the conduct of a labour abuse prevention officer. Paragraph (3) of regulation 23 contains material which has no apparent relevance to the remainder and in fact merely replicates footnote (a) on page 2 of the instrument explaining amendments that have been made to section 24 of the Police Reform Act 2002.

8.3 In a memorandum printed at Appendix 9, the Home Office states that the inclusion of this text was an error, which occurred during the validation process of the statutory instrument template on which instruments are now drafted. The Department sets out at paragraph 3 of its memorandum the text that should have been contained in paragraph (3).

8.4 The Department apologises for this error, and undertakes to correct it at the earliest opportunity. It goes on to say why in its view the omission in the meantime of the intended provision is unlikely to affect the proper operation of the instrument. The Committee agrees with the Department's view.

8.5 The Committee accordingly reports regulation 23(3) for defective drafting, acknowledged by the Department.

9 S.I. 2017/555: Reported for an unjustifiable breach of the 21-day rule

Care and Support (Charging and Assessment of Resources) (Amendment) Regulations 2017

9.1 The Committee draws the special attention of both Houses to these Regulations on the ground that there appears to have been an unjustifiable breach of the 21-day rule.

9.2 These Regulations were made on 8 April and laid before Parliament on 10 April. They also came into force on 10 April. They therefore contravene the 21-day rule: that a negative instrument should be laid at least 21 days before it is to come into force.

9.3 In section 3 of the Explanatory Memorandum laid with this instrument, the Department of Health explains with commendable candour that those affected by the instrument were expecting it to come into force on 10 April, but due to an oversight within the Department there was a failure to comply with the normal rules relating to the making and laying etc. of instruments. As a result of the error the Regulations were expressed to have been laid and come into force on the same day. The Department is investigating how the error occurred with a view to preventing any repetition. The Department has since advised the Committee's staff that it does not wish to add to what it said in the Explanatory Memorandum.

9.4 The Committee according reports these Regulations for an unjustifiable breach of the 21-day rule, acknowledged by the Department.

10 S.I. 2017/572: Reported for defective drafting

Infrastructure Planning (Environmental Impact Assessment) Regulations 2017

10.1 The Committee draws the special attention of both Houses to these Regulations on the ground that they are defectively drafted in seven related respects.

10.2 These regulations transpose changes made to EU Directive 2011/92/EU by EU Directive 2014/52/EU in relation to environmental impact assessment of certain developments which are given consent for development under the town and country planning laws of England and through the nationally significant infrastructure planning regime. Under regulations 16, 19, 20, 22 and 24, the applicant is required to certify compliance with the relevant requirements in the forms set out in Schedule 5 to the Regulations.

10.3 The Committee asked the Department for Communities and Local Government to explain why (1) all of the certificates in Schedule 5 contain the wording "Complete certificate to be received by the Secretary of State..." when the certifications in Certificate 2 and 3 are made to the Examining authority and the certifications in Certificates 4 and 5 are made to the relevant authority, and (2) certificates 2, 3 and 5 do not appear to cover the obligation to publish on a website.

10.4 In a memorandum printed at Appendix 10, the Department acknowledges these errors and undertakes to arrange for the certificates to be amended. **The Committee accordingly reports the certificates in Schedule 5 for defective drafting, acknowledged by the Department.**

11 S.I. 2017/582: Reported for failure to comply with normal legislative practice

Offshore Petroleum Production and Pipe-lines (Environmental Impact Assessment and other Miscellaneous Provisions) (Amendment) Regulations 2017

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

11.2 These Regulations implement the provisions of Directive 2014/52/EU on the assessment of the effects of certain public and private projects on the environment as it applies to certain offshore hydrocarbon related developments including pipe-lines, onshore pipe-line projects, and to pipe-line works by a public gas transporter, and to oil, gas or chemical pipe-lines on land.

11.3 Consent of H.M. Treasury is required in order to use the powers in section 56 of the Finance Act 1973 to make regulation 19 of the Regulations. The preamble recites that the regulations are made with the consent of the Treasury but the signature does not indicate that the Treasury has consented. The Department for Business Energy and Industrial Strategy was asked to explain the inconsistency.

11.4 In a memorandum printed at Appendix 11, the Department confirms that consent was given by H.M. Treasury. The Department asserts that there is no absolute requirement that consent must be established by signature but acknowledges that failure to obtain these signatures was an oversight for which it apologises and undertakes to obtain the Lords Commissioners' signatures for future uses of the section 56 power. **The Committee accordingly reports the Regulations for failure to comply with normal legislative practice, acknowledged by the Department.**

12 S.I. 2017/601: Reported for defective drafting

Folkestone Harbour Revision Order 2017

12.1 **The Committee draws the special attention of both Houses to this Order on the ground that it is defectively drafted in three identical respects.**

12.2 Articles 12(2), 14(2) and 15(2) create offences which are punishable on summary conviction by a fine not exceeding the statutory maximum and on conviction on indictment by a fine.

12.3 In a memorandum printed at Appendix 12, the Department for Transport states that the inclusion of references to the statutory maximum was a drafting error and that the

italicised words should have been omitted. **The Committee accordingly reports articles 12(2), 14(2) and 15(2) for defective drafting, acknowledged by the Department for Transport.**

12.4 The Committee notes, however, that the power to make this instrument had been delegated to the Marine Management Organisation and was not exercisable by the Department. It is therefore surprised that the reply to the Committee’s question came from the Department and not from that Organisation, and trusts that satisfactory arrangements have been made between the two to ensure that statutory instruments are properly prepared.

13 S.I. 2017/730: Reported for requiring elucidation

Criminal Justice (European Investigation Order) Regulations 2017

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

13.2 These Regulations give effect to Directive 2014/41/EU of the European Parliament and of the Council regarding the European Investigation Order (“the Directive”). Regulation 59 designates the Directive as an EU mutual assistance instrument for the purposes of section 10 of the Investigatory Powers Act 2016 (“the 2016 Act”) enabling the UK to make or give effect to European investigation orders relating to the interception of telecommunications.

13.3 Section 10 of the Investigatory Powers Act 2016 is not yet in force. The Committee asked the Home Office to explain why regulation 59 purports to be made in exercise of the powers conferred by section 10(3) of the Investigatory Powers Act 2016 at a time when it is not yet in force; and if reliance is placed on section 13 of the Interpretation Act 1978 (anticipatory exercise of powers) to explain the justification for that reliance.

13.4 In a memorandum printed at Appendix 13, the Department confirms that reliance is placed on section 13(1)(b) in relation to regulation 59 of the Regulations. The Department confirms that (as explained below) reliance on section 13 was considered necessary for the purpose of giving full effect to section 10 at the time it comes into force.

13.5 The Department explains that the reference to “EU mutual assistance instrument” in section 10 was included with the Directive in mind, being an EU instrument which creates obligations in relation to cross-border requests for the interception of communications. It is necessary for the designation to be in place at the time the regime created by the 2016 Act comes into force for the UK to continue to be able fulfil its obligations under the Directive. Currently these obligations are fulfilled through the Regulation of Investigatory Powers Act 2000 (as amended by the Regulations), which expressly refers to the Directive in sections 1(4B)(b) and section 20. Those provisions will cease to have effect on the entry into force of section 10 of the 2016 Act.

13.6 The Committee is satisfied with this explanation and accordingly reports the Regulations for requiring the elucidation provided by the Department.

Instruments not reported

At its meeting on 29 November 2017 the Committee considered the Instruments set out in the Annex to this Report, none of which were required to be reported to both Houses.

Annex

Draft instruments requiring affirmative approval

Draft S.I. Policing and Crime Act 2017 (Maritime Enforcement Powers: Code of Practice) Regulations 2017

Instruments subject to annulment

S.I. 2017/972 Republic of Mali (European Union Financial Sanctions) Regulations 2017

S.I. 2017/977 Agricultural Holdings (Units of Production) (England) Order 2017

S.I. 2017/985 Criminal Justice (Sentencing) (Licence Conditions) (Amendment) Order 2017

S.I. 2017/1015 Social Security (Miscellaneous Amendments No. 4) Regulations 2017

S.I. 2017/1016 Social Security (Information-sharing in relation to Welfare Services etc.) (Amendment) Regulations 2017

S.I. 2017/1019 Criminal Legal Aid (Remuneration) (Amendment) Regulations 2017

S.I. 2017/1036 Mental Health Act 1983 (Places of Safety) Regulations 2017

S.I. 2017/1037 Judicial Appointments and Discipline (Amendment and Addition of Offices) Order 2017

S.I. 2017/1038 Mental Health Act 2007 (Commencement No. 12 and Transitional Provisions) Order 2017

S.I. 2017/1039 Mental Health Review Tribunal for Wales (Amendment and constitution of tribunals) Rules 2017

S.I. 2017/1047 Water Abstraction (Transitional Provisions) Regulations 2017

S.I. 2017/1050 Environmental Offences (Fixed Penalties) (England) Regulations 2017

S.I. 2017/1056 National Health Service (Primary Dental Services and General Ophthalmic Services) (Amendment) Regulations 2017

Draft Instruments subject to negative procedure

- Draft S.I.** Blackburn with Darwen (Electoral Changes) Order 2017
- Draft S.I.** Bolsover (Electoral Changes) Order 2017
- Draft S.I.** North East Derbyshire (Electoral Changes) Order 2017

Instruments not subject to Parliamentary proceedings not laid before Parliament

- S.I. 2017/966** General Dental Council (Continuing Professional Development) (Dentists and Dental Care Professionals) Rules Order of Council 2017
- S.I. 2017/970** Finance Act 2016, Section 166 (Appointed Day) Regulations 2017
- S.I. 2017/976** Crime and Courts Act 2013 (Commencement No. 15, Transitional and Savings Provisions) (Amendment) Order 2017
- S.I. 2017/980** Inspectors of Education, Children’s Services and Skills (No. 3) Order 2017
- S.I. 2017/984** Policing and Crime Act (Financial Sanctions) (Overseas Territories) Order 2017
- S.I. 2017/992** Designation of Schools Having a Religious Character (Independent Schools) (England) (No. 2) Order 2017
- S.I. 2017/1017** Policing and Crime Act 2017 (Commencement No. 4 and Saving Provisions) Regulations 2017
- S.I. 2017/1052** Housing and Planning Act 2016 (Commencement No. 6) Regulations 2017
- S.I. 2017/1063** Communications Act 2003 (Commencement No. 5) Order 2017

Appendix 1

S.I. 2017/268

Deregulation Act 2015 (Growth Duty Guidance) Order 2017

1. In a letter dated 17 November 2017 the Committee requested the Department for Business, Energy Industrial Strategy for a memorandum on the following point:

Explain why the Explanatory Note, while mentioning that the Growth Duty S. 110 Guidance is published on the gov.uk website, does not indicate where access may be obtained to a hard copy.

2. The Department acknowledges that the explanatory notes should have indicated that a hard copy of the Guidance can be obtained by writing to the Better Regulation Executive, Department for Business, Energy and Industrial Strategy, 1 Victoria Street, London SW1H 0ET. The Department apologises for this oversight and will address it by way of correction slip.

Department for Business, Energy and Industrial Strategy

20 November 2017

Appendix 2

S.I. 2017/324

Pension Protection Fund (Modification) (Amendment) Regulations 2017

1. In its letter to the Department of 17th November 2017, the Committee requested a memorandum on the following point:

Explain the need for including both the second half of paragraph (1), and paragraph (3), of regulation 1 which appear duplicatory.

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

3. The intention behind regulation 1(3) is to help the reader by completing the picture. Regulation 1(2) gives the Regulations effect from a certain date for certain purposes. Regulation 1(3) then tells the reader when the Regulations have effect for all other purposes. It helps the reader to understand the position given that regulation 1(2) only applies for some purposes, meaning that the reader does not have to rely on implication to determine when the Regulations have effect for all other purposes.

4. The Department does not believe that this is technically duplication because regulation 1(1) and (3) are about different things: regulation 1(1) is about commencement; regulation 1(3) is about effect.

5. If, however, the Committee considers that regulation 1(3) is unnecessary or that it duplicates the second half of regulation 1(1), then the Department undertakes to remove it as soon as a suitable opportunity arises.

Department for Work and Pensions

22 November 2017

Appendix 3

S.I. 2017/336

Further Education Loans (Amendment) Regulations 2017

1. The Committee has asked for a Memorandum from the Department for Education as follows:

Explain why hard copies of Ofqual's Register of Qualifications are not made available for inspection.

2. The Department is grateful to the Committee for drawing attention to this matter. We agree that it should have been made clear that hard copies are available from the Department on request. We will make this clear on the relevant government website and will explore with the SI Registrar whether it is appropriate to revise the Explanatory Note by way of a correction slip.

3. We will ensure that in future we draft in accordance with Statutory Instrument Practice in this respect.

Department for Education

22 November 2017

Appendix 4

S.I. 2017/366

Insolvency (England and Wales) (Amendment) Rules 2017

1. The Committee requested a memorandum from the Department on the following questions in connection with the above Rules:

(1) Explain whether the concern of the Committee relating to S.I. 2016/1024 set out in paragraphs 1.10 to 1.13 of the Sixteenth Report of Session 2016/17 has been addressed and, if not, why not.

(2) Explain the apparent inconsistency between paragraph 8.1 of the Explanatory Memorandum and the preamble and, if consultation has not taken place, why it was concluded the Department had power to approve the Rules.

2. On the first question, in its Sixteenth Report of the 2016/17 Session, the Committee drew the special attention of both Houses to the Insolvency (England and Wales) Rules 2016 on a number of grounds. These included the wording of rule 10.36 of those Rules, which is discussed in paragraphs 1.10 to 1.13 of the Report. The Committee was concerned that rule 10.36 did not allow a debtor to make a hard copy application for bankruptcy (as opposed to an electronic application) and expressed doubts that this approach was *intra vires*.

3. The Department maintains the view, expressed in its memorandum to the Committee at the time, that rule 10.36, as drafted, is *intra vires*. The Department respectfully acknowledges the concerns expressed by the Committee about the undesirability of assuming that all citizens have ready access to, or wish to use, electronic communication and about restricting the ability to use paper and post in such circumstances. The Insolvency Service has processes in place to assist those who do not have access to electronic communications. The Insolvency Service Enquiry Line provides an assisted digital service for such individuals. A member of the Enquiry Line team will work through the application over the phone with the applicant, record the answers on line, print off the completed form and send it to the applicant to print, sign and return. When the applicant returns the form the Enquiry Line official will submit the form online. The application is then dealt with by the Adjudicator who will write to the applicant if they do not have an email address.

4. Turning to the Committee's second question, the Department acknowledges and apologises for an error in the Explanatory Memorandum. The Insolvency Rules Committee was consulted before these Rules were made. The reference in the Explanatory Memorandum was to the fact that a formal consultation of business stakeholders and other interested parties did not take place and the Department apologises for any confusion caused.

Department for Business, Energy and Industrial Strategy

21 November 2017

Appendix 5

S.I. 2017/369

Insolvency (England and Wales) Rules 2016 (Consequential Amendments and Savings) Rules 2017

1. The Committee has requested a memorandum from the Department in relation to the following questions concerning the above Rules:

(1) Explain the source of the power to include amendments of primary legislation.

(2) Explain the reasons for the following apparent errors:

- a) in rule 3(a) the omission of “Rules” before 2001;*
- b) the reference in paragraph 1 of Schedule 2 to regulation 1(1) of the Cross-Border Insolvency Regulations 2006 (which does not appear to include a reference to Insolvency Rules);*
- c) “Solicitor’s”, rather than “Solicitors” in paragraph 2 of Schedule 2;*
- d) “12.62”, rather than “12.61”, in paragraph 3(3)(a) of Schedule 2;*
- e) “of” rather than “as” in the heading above paragraph 9 of Schedule 2;*
- f) “2.12”, rather than “2.132” in paragraph 11 of Schedule 2; and*
- g) “12.49” rather than “12.59” in paragraph 12(3) of Schedule 2.*

2. On the Committee’s first question, the powers in sections 411(2)(b) and 412(2)(b) of the Insolvency Act 1986 enable the making of incidental and supplemental provisions to the Rules. The Act does not limit the exercise of these powers to provisions which amend secondary legislation: unlike current practice where Acts clearly delimit powers to amend primary legislation (if any) from powers to amend secondary legislation. In this case, where there were three references to the Insolvency Rules 1986 in primary legislation, the Department considered that it would be legitimate to make these very small changes under the powers in ss. 411 and 412 as being incidental on the making of the new Rules. The alternative would have been to leave users to rely on section 17(2) of the Interpretation Act 1978 (repeal and re-enactment). This would have been less clear from the perspective of users of the legislation.

3. The Department accepts that all the matters raised in the Committee’s second question are indeed drafting errors and apologises for these. The Department will ensure these errors are corrected and will take steps to ensure its processes for quality control of secondary legislation (which clearly should have prevented these errors) are more rigorously applied.

Department for Business, Energy and Industrial Strategy

21 November 2017

Appendix 6

S.I. 2017/373

Social Security (Miscellaneous Amendments No. 2) Regulations 2017

1. In its letter to Her Majesty's Revenue and Customs of 17 November 2017, the Joint Committee requested a memorandum on the following point:

Explain how the Northern Ireland Department for Communities was able to concur in the making of the Regulations three days before they were made by the Treasury.

2. This memorandum has been prepared by Her Majesty's Revenue and Customs on behalf of H.M. Treasury.

3. These regulations were made by the Treasury in exercise of the powers conferred by sections 4A(1), (3) and (4), 175(4) and paragraph 8(1)(q) of Schedule 1 to the Social Security Contributions and Benefits Act 1992 (SSCBA) and the equivalent provisions of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 (SSCB(NI)A). Section 4A(8) of the SSCBA provides that regulations under this section shall be made by the Treasury with the concurrence of the Secretary of State. Section 4A(8) of the SSCB(NI) A provides that regulations under this section shall be made by the Treasury with the concurrence of the Department.

4. Before making the regulations, the concurrence of the Northern Ireland Department for Communities and the Secretary of State was obtained. Those consents were obtained on 10 March 2017 and 13 March 2017 respectively.

5. We consider that concurrence here means agreement and that once the agreement has been obtained (as it was here on 10 and 13 March 2017) that agreement continues (unless withdrawn) to the making (here on 13 March 2017). Neither SSCBA nor SSCB(NI) A provide for the timing of concurrence. It would be logistically difficult, if not impossible, for the agreement of the Northern Ireland Department for Communities and the Secretary of State to be obtained at the same time. However, we do not consider that it is essential for both concurrence and the making of the regulations to take place simultaneously, merely that agreement is obtained to the making, as it was here three days before the regulations were made.

Her Majesty's Revenue and Customs

21 November 2017

Appendix 7

S.I. 2017/613

Social Security (Miscellaneous Amendments No. 3) Regulations 2017

1. In its letter to Her Majesty's Revenue and Customs of 17 November 2017, the Joint Committee requested a memorandum on the following point:

Explain how the Northern Ireland Department for Communities was able to concur in the making of the Regulations one day before they were made by the Treasury.

2. This memorandum has been prepared by Her Majesty's Revenue and Customs on behalf of H.M. Treasury.

3. These regulations were made by the Treasury in exercise of the powers conferred by sections 4A(1) and (3) to the Social Security Contributions and Benefits Act 1992 (SSCBA) and the equivalent provisions of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 (SSCB(NI)A). Section 4A(8) of the SSCBA provides that regulations under this section shall be made by the Treasury with the concurrence of the Secretary of State. Section 4A(8) of the SSCB(NI)A provides that regulations under this section shall be made by the Treasury with the concurrence of the Department.

4. Before making the regulations, the concurrence of the Northern Ireland Department for Communities and the Secretary of State was obtained. Those consents were obtained on 25 April 2017 and 26 April 2017 respectively.

5. We consider that concurrence here means agreement and that once the agreement has been obtained (as it was here on 25 and 26 April 2017) that agreement continues (unless withdrawn) to the making (here on 26 April 2017). Neither SSCBA nor SSCB(NI) A provide for the timing of concurrence. It would be logistically difficult, if not impossible, for the agreement of the Northern Ireland Department for Communities and the Secretary of State to be obtained at the same time. However, we do not consider that it is essential for both concurrence and the making of the regulations to take place simultaneously, merely that agreement is obtained to the making, as it was here one day before the regulations were made.

Her Majesty's Revenue and Customs

21 November 2017

Appendix 8

S.I. 2017/390 and S.I. 2017/401

Road Traffic Act 1988 (Motor Racing) (England) Regulations 2017

Deregulation Act 2015 (Birmingham City Council Act 1985) (Repeal) Regulations 2017

1. The Committee has requested a memorandum on the following points in respect of the instruments outlined above:

Given the reference to consultation in paragraph 8.1 of the Explanatory Memorandum, explain why the preamble does not recite that consultation has taken place in accordance with section 195(2) of the Road Traffic Act 1988, as required by paragraph 3.11.28 of Statutory Instrument Practice 5th Edition May 2017. (Previously paragraph 2.4.7 of 4th Edition)

Given the reference to consultation in paragraph 8.1 of the Explanatory Memorandum, explain why the preamble does not recite that consultation has taken place in accordance with section 75(8) of the Deregulation Act 2015, as required by paragraph 3.11.28 of Statutory Instrument Practice 5th Edition May 2017. (Previously paragraph 2.4.7 of 4th Edition)

Response

2. The Department is grateful to the Committee for making this point, and agrees that both instruments ought to have recited the fact that consultation had taken place in accordance with section 195(2) of the Road Traffic Act 1988 and section 75(8) of the Deregulation Act 2015. The Department apologises for these omissions.

3. As the Explanatory Memorandum makes clear, the required consultation was carried out before the Regulations were made and, therefore, that there was no failure to comply with the statutory conditions for making these Regulations. However, the Department will take steps to ensure that the requirement to recite that consultation has taken place will not be omitted in future.

Department for Transport

21 November 2017

Appendix 9

S.I. 2017/521

Gangmasters and Labour Abuse Authority (Complaints and Misconduct) Regulations 2017

1. This memorandum is submitted in response to a query from the Joint Committee on Statutory Instruments to the Home Office on 17 November 2017. The Committee asked:

Explain the purpose of including regulation 23(3), which merely replicates footnote (a) on page 2 of this instrument. Should anything else have appeared here instead?

2. The inclusion of regulation 23(3) is an error. As the Committee points out, this paragraph merely replicates an earlier footnote.

3. Regulation 23(3) should read:

Subject to regulations 24 and 25 (disapplication of the requirements of these Regulations), the Chief Executive must determine whether or not the complaint is suitable for being subjected to local resolution.

4. The erroneous substitution of that text with what is regulation 23(3) occurred during the validation process, which took place after the instrument had gone through our quality assurance process. Regretfully, it was not picked up in the final read through, after validation.

5. We are grateful to the Committee for bringing this error to our attention and we will take steps to rectify it by amending the instrument at the earliest opportunity to substitute regulation 23(3).

6. In the short term, until the instrument is amended, we take the view that the instrument as drafted can work, for the following reasons.

7. First, we note that regulation 23(4) begins “If the Chief Executive determines that the complaint is suitable for being subjected to local resolution, the Chief Executive must ...” and regulation 23(5) begins “If the Chief Executive determines that the complaint is not so suitable, the Chief Executive must ...”. We believe that it can be implied from those provisions that there is an obligation on the Chief Executive to determine whether a complaint is suitable for local resolution (in cases where regulation 23 applies), despite the absence of a provision which sets out expressly that that obligation exists.

8. Second, as to the interaction between regulation 23, on one hand, and regulations 24 and 25 (disapplication of the Regulations), on the other, we take the view that, despite the absence of words in regulation 23 expressly stating that the Chief Executive’s duty to make a determination on local resolution is subject to regulations 24 and 25, the clear implication (from regulation 24(1)) is that, if the Chief Executive disapplies the Regulations, the obligation to make a determination on local resolution falls away. In this

regard, we note that regulation 24(1) begins “If, in a case in which regulation 23 applies, ...” and ends “the Chief Executive may handle the complaint in whatever manner (if any) that the Chief Executive thinks fit”.

Home Office

21 November 2017

Appendix 10

S.I. 2017/572

Infrastructure Planning (Environmental Impact Assessment) Regulations 2017

1. The Committee has requested a memorandum on the following points:

Explain why

(1) all of the certificates in Schedule 5 contain the wording “Complete certificate to be received by the Secretary of State...” when the certifications in Certificate 2 and 3 are made to the Examining authority and the certifications in Certificates 4 and 5 are made to the relevant authority, and

(2) certificates 2, 3 and 5 do not appear to cover the obligation to publish on a website.

2. The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (“the Regulations”) were mainly a consolidation of the 2009 Regulations with the same name, but the Department accepts if there were errors in those Regulations they should have been corrected in the 2017 version.

3. Certificate 2 – under regulation 19(6)(i) of the Regulations the applicant must certify to the Examining Authority in the form set out in certificate 2 in Schedule 5 that the applicant has complied with the requirements of regulation 19(6)(b) to (h). On point (1), we accept that the instruction in the certificate for it to be sent to the Secretary of State might be confusing. In practice the administrative staff supporting the Examining Authority are civil servants working for a Departmental Executive Agency, namely the Planning Inspectorate (PINS). On point (2) we accept that the certificate should refer to the notice’s publication on the Secretary of State’s website (maintained on his behalf by PINS). On both points we will arrange for the certificate to be amended.

4. Certificate 3 – under regulation 20(3)(h)(iii) of the Regulations the applicant must certify to the Examining Authority in the form set out in certificate 3 in Schedule 5 that the applicant has complied with the requirements of regulation 20(3)(b) to (g). On point (1), we accept that the instruction in the certificate for it to be sent to the Secretary of State might be confusing. In practice the administrative staff supporting the Examining Authority are civil servants working for a Departmental Executive Agency namely the

Planning Inspectorate (PINS). On point (2) we accept that the certificate should refer to the notice’s publication on the Secretary of State’s website (maintained on his behalf by PINS). On both points we will arrange for the certificate to be amended.

5. Certificate 4 – under regulation 22(2)(c) of the Regulations the applicant must certify to the relevant authority in the form set out in certificate 4 in Schedule 5 that the applicant has complied with the requirements of regulation 22(3). On point (1), we accept that the instruction in the certificate for it to be sent to the Secretary of State should refer to the relevant authority. We will arrange for the certificate to be amended.

6. Certificate 5 – under regulation 24(3)(h) of the Regulations the applicant must certify to the relevant authority in the form set out in certificate 5 in Schedule 5 that the applicant has complied with the requirements of regulation 24(3)(b) to (g). On point (1), we accept that the instruction in the certificate for it to be sent to the Secretary of State should refer to the relevant authority. On point (2) we accept that the certificate should refer to the notice’s publication on the relevant authority’s website. On both points we will arrange for the certificate to be amended.

Department for Communities and Local Government

22 November 2017

Appendix 11

S.I. 2017/582

Offshore Petroleum Production and Pipe-lines (Environmental Impact Assessment and other Miscellaneous Provisions) (Amendment) Regulations 2017

1. The Committee, by letter (sent by email) dated 17th November 2017 asked the Department to submit a memorandum to explain the following point:

Explain the inconsistency between the preamble which recites that consent of the Treasury is required and the signature which does not indicate that the Treasury has consented.

2. The preamble to SI 2017/582 (“the Regulations”) refers to consent having been obtained by the Treasury in order to use the powers in section 56 of the Finance Act 1973 to make regulation 19 of the Regulations. Consent was indeed given by the Treasury - please see attached the email chain showing this.

3. It is the Department’s view that there is no absolute requirement that consent must be established by signature and that consent can be demonstrated in other ways. The e-mail correspondence is in the Department’s view sufficient evidence of Treasury consent.

4. That said, we acknowledge that the Committee would have expected the Regulations to contain the signatures of two of the Lords Commissioners of Her Majesty’s Treasury.

Our failure to obtain these signatures was an oversight for which we apologise, and we will do our best to obtain the Lords Commissioners' signatures for future uses of the section 56 power.

Department for Business, Energy and Industrial Strategy

21 November 2017

Appendix 12

S.I. 2017/601

Folkestone Harbour Revision Order 2017

1. By letter dated 17th November 2017, the Joint Committee on Statutory Instruments has requested a Memorandum on the following point:

Explain the inclusion of a reference to the statutory maximum in articles 12(2), 14(2) and 15(2), in the light of the provision made by section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

2. The Department acknowledges that this is a drafting error and that the three articles referred to in the Committee's letter should have omitted the words "not exceeding the statutory maximum".

3. The instrument was made under section 14 of the Harbours Act 1964, on the application of Folkestone Harbour Limited. The power to make orders under section 14 has been delegated to the Marine Management Organisation under the Harbours Act (Delegation of Functions) Order 2010 (S.I.2010/674); section 42(4)(b) of the Harbours Act 1964 provides that the power is no longer exercisable by the Department while the delegation is in force.

4. The Department regrets the error and will consider urgently with the Marine Management Organisation how it can be corrected.

Department for Transport

21 November 2017

Appendix 13

S.I. 2017/730

Criminal Justice (European Investigation Order) Regulations 2017

1. By its letter dated 17 November 2011, the Committee requests that the Home Office explain:

- a) *why the Criminal Justice (European Investigation Order) Regulations 2017 (“the Regulations”) purport to be made in exercise of the powers conferred by section 10(3) of the Investigatory Powers Act 2016 (“the 2016 Act”) at a time when it is not yet in force; and*
- b) *if reliance is placed on section 13 of the Interpretation Act 1978 (“the 1978 Act”), the justification for that reliance.*

2. This memorandum is submitted in response to that request.

3. As the Committee notes, section 10(3) of the Investigatory Powers Act 2016 is not yet in force. The Home Office confirms that reliance is placed on section 13(1)(b) of the 1978 Act in relation to regulation 59 of the Regulations. Under that regulation, the power conferred by section 10(3) of the 2016 Act is being exercised in order to designate Directive 2014/41/EU of the European Parliament and of the Council regarding the European Investigation Order (“the Directive”) as a “EU mutual assistance instrument” for the purposes of that section and for other key provisions in that Act. The Home Office further confirms that reliance on section 13 of the 1978 Act in order to make this designation prior to the entry into force of the 2016 Act was considered necessary and expedient for the purpose of giving full effect to section 10 and other relevant provisions of that Act at the time it comes into force. This is for the reasons set out below.

4. Part 1 of Chapter 2 of the 2016 Act enables the Secretary of State to issue a “mutual assistance warrant” for one of two purposes. The first is to serve as a basis for a request to a foreign State for assistance in intercepting communications. The second is in order to give effect to a similar request made of the UK by a foreign State. Under the Act, a mutual assistance warrant can only be issued where there are appropriate international arrangements in place between the UK and the foreign State involved, governing the making of such requests. These arrangements can take the form of an “EU mutual assistance instrument”, which is defined in section 10(3) of the Act to include certain EU instruments designated by regulations made by the Secretary of State. It is therefore only once a particular instrument has been designated (in this case the Directive) that it falls within the definition of “EU mutual assistance instrument”. Only then can a mutual assistance warrant be issued for the purpose of making or giving effect to requests for assistance under that instrument.

5. The reference to “EU mutual assistance instrument” in section 10 was included with the Directive in mind, being an EU instrument which creates obligations in relation to cross-border requests for the interception of communications. It is necessary for the designation to be in place at the time the regime created by the 2016 Act comes into force for the UK to continue to be able fulfil its obligations under the Directive. Currently these

obligations are fulfilled through the Regulation of Investigatory Powers Act 2000 (as amended by the Regulations), which expressly refers to the Directive in sections 1(4B)(b) and section 20. Those provisions will cease to have effect on the entry into force of section 10 of the 2016 Act.

Home Office

21 November 2017