



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

**Forty-fourth Report
of Session 2017–19**

Drawing special attention to:

*Electronic Communications (Universal Service) (Broadband) Regulations 2018
(S.I. 2018/1231)*

*Branded Health Service Medicines (Costs) (Amendment) Regulations 2018
(S.I. 2018/1255)*

*Registration of Births, Deaths, Marriages and Civil Partnerships (Fees)
(Amendment) and Multilingual Standard Forms Regulations 2018
(S.I. 2018/1268)*

*Dover (Electoral Changes) Order 2019; Reigate and Banstead (Electoral
Changes) Order 2019; Runnymede (Electoral Changes) Order 2019
(Draft S.I.s)*

*Ordered by the House of Lords
to be printed 16 January 2018*

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Joint Committee on Statutory Instruments

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

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Instruments reported

At its meeting on 16 January 2019 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. 2018/1231: Reported for failure to conform to proper drafting practice

Electronic Communications (Universal Service) (Broadband) Regulations 2018

1.1 The Committee draws the special attention of both Houses to these Regulations on the ground that they do not conform to proper drafting practice in one respect.

1.2 These Regulations set out the procedure that Ofcom is required to follow when designating persons as universal service providers. The words “shall” and “must” are used interchangeably throughout, in most cases appearing to impose obligations. The Committee asked Ofcom to confirm whether they are intended to have the same meaning in this instrument and to explain the basis on which their different use is determined. In a memorandum printed at Appendix 1, Ofcom confirms that both “shall” and “must” are intended to impose an obligation everywhere they appear, except where “shall” is used in regulations 1 and 4(3). As the Committee noted in its thirty-seventh and fortieth reports of Session 2017–19, it is an important principle of statutory interpretation that a change in language implies a change in meaning. The drafter of an instrument should ensure consistency of language within the instrument. The Committee also draws attention to its comments on the meanings of “shall” and “must” in its First Special Report of Session 2013–14. **The Committee accordingly reports these Regulations for failing to conform to proper drafting practice, acknowledged by the Department.**

2 S.I. 2018/1255: Reported for defective drafting

Branded Health Service Medicines (Costs) (Amendment) Regulations 2018

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 amend the Branded Health Service Medicines (Costs) Regulations 2018 (“the Costs Regulations”) which provide for a statutory scheme for the purposes of requiring specified manufacturers and suppliers who supply certain medicines to the National Health Service to pay to the Secretary of State an amount calculated by reference to the net sales income.

2.3 Regulation 2(3)(d) inserts new paragraph 3(5A) in to the Costs Regulations. Paragraph 3(5A) states that the payment percentage of 7.8% is applicable to the net sales income received for items of presentation supplied under certain contracts entered into on or after 1 April 2018 but before 1 January 2019. The Committee asked the Department of

Health and Social Care to explain what “to which a payment percentage is determined in accordance with regulation 3(5A)” in regulation 2(5)(a) (inserted paragraph (fa)) is intended to mean. In a memorandum printed at Appendix 2, the Department explain their intention and admit that the intention is not as clear as it should be from the present text. The Department proposes that the word “to” should be replaced with the word “for” here and in three further regulations, and proposes to rectify this by correction slip. The Committee notes the Department’s acceptance that the present wording is insufficiently clear and believes that the replacement of “to” with “for” may not on its own be adequate to resolve the problem. The Department should also review the use of the indefinite article and the wording “determined in accordance with” in the phrase concerned. The Committee is not satisfied that a correction slip would be appropriate. Having regard to the principles set out by the Committee in Section 3 of its First Special Report of Session 2017–19 (Transparency and Accountability in Subordinate Legislation), the Committee is clear that an amending instrument will be required to effect the clarification that the Department accepts is required. **The Committee accordingly reports regulation 2(5)(a) for defective drafting, acknowledged in part by the Department.**

2.4 The Committee also asked the Department to explain why regulation 2(5)(b) qualifies regulation 21(1)(n) of the Costs Regulations and not regulation 21(1)(o). In its memorandum, the Department helpfully explains why regulation 21(1)(o) does not need the qualification.

3 S.I. 2018/1268: Reported for defective drafting and for requiring elucidation

Registration of Births, Deaths, Marriages and Civil Partnerships (Fees) (Amendment) and Multilingual Standard Forms Regulations 2018

3.1 The Committee draws the special attention of both Houses to these Regulations on the grounds that they are defectively drafted in three respects and require elucidation in one respect.

3.2 These Regulations amend the Registration of Births, Deaths, Marriages and Civil Partnerships (Fees) Regulations 2016 (the “Fees Regulations”), which set the fees charged by the Registrar General for services provided in relation to records of those events.

3.3 New regulation 3C, inserted by regulation 5, provides for documents to be sent using a premium postal service and sets out the fees that apply: “the Registrar General may, on request and upon payment of the applicable fee, provide the document by premium postal service and the applicable fee is—on a working day a fee of £7.25; on a Saturday a fee of £19.25; oversees a fee of £12.00”. The Committee asked the Home Office to explain the intended meaning of the words “on a working day” and “on a Saturday”. In a memorandum printed at Appendix 3, the Department states that these references are to the Royal Mail delivery service fees, with “working day” service relating to guaranteed delivery on Monday to Friday before 1 p.m. and “Saturday” relating to guaranteed delivery on a Saturday before 9 a.m. The Department asserts that this meaning is clear. The Committee is not persuaded. Although the general subject of regulation 3C is unambiguous, it is possible to read the fees in paragraph 1(b) and (c) as relating either to delivery on the relevant day or to action taken by the Registrar General on that day in order to provide

the service. The provision itself makes neither a clear reference to nor a guarantee of the date of delivery. **The Committee accordingly reports new regulation 3C for defective drafting.**

3.4 The Committee also asked whether a refund will be paid if the higher Saturday premium postal service does not deliver the item by the promised day. In its memorandum, the Department explains that the General Register Office will request a refund from Royal Mail if, following an investigation, it finds that a customer’s complaint of non-delivery is well-founded. The Committee is grateful for this clarification **and accordingly reports new regulation 3C as requiring elucidation, provided by the Department’s memorandum.**

3.5 New regulation 3E, also inserted by regulation 5, provides for a fee of £3.50 to be retained by the Registrar General where an application is made for a certified copy “and the corresponding entry cannot be located from the relevant information provided”. The Committee asked the Home Office to explain how this might arise given that “relevant information” is defined as “either a reference number relating to an index... or sufficient information which allows [the relevant person] to establish such a reference number”. In its memorandum, the Department identifies various scenarios in which an application might not be fulfilled, but in each case the applicant would not have provided “relevant information” as defined by regulation 2 of the Fees Regulations as amended. Although the Committee believes the courts are likely to be driven to a conclusion that matches the Department’s policy intent, provisions should be drafted in a way that correctly reflects defined terms. **The Committee accordingly reports new regulation 3E for defective drafting in one respect.**

3.6 The Committee asked the Home Office to confirm the basis on which the rest of the fee paid for the certified copy will be refunded under new regulation 3E. In its memorandum the Department explains the circumstances in which a partial refund will be made and the reason a small portion of the fee will be retained. This does not, however, clarify the legal basis for the refund. The relevant enabling provisions allow regulations “to provide for the reduction, waiver or refund of part or all of a fee”. Regulation 3E provides only for the retention of a £3.50 fee in specified circumstances. It says nothing about reducing, waiving or refunding the fee, charged in accordance with Schedule 1 to the Fees Regulations, for providing a certified copy. Although the Committee accepts that the Department’s stated policy is to provide such a refund, the right to receive it ought to have been clearly expressed in accordance with the enabling power. **The Committee accordingly reports new regulation 3E for defective drafting in a second respect.**

4 Draft S.I.s: Reported for failure to conform to proper drafting practice

Dover (Electoral Changes) Order 2019; Reigate and Banstead (Electoral Changes) Order 2019; Runnymede (Electoral Changes) Order 2019

4.1 **The Committee draws the special attention of both Houses to these draft Orders on the ground that they fail to conform to proper drafting practice in one respect.**

4.2 Each draft Order provides for new wards and numbers of councillors for the Council covered by the Order. Article 1(3)(a) of each Order relates to the coming into force of specific articles for certain purposes. The Committee asked the Local Government

Boundary Commission for England to explain the difference between “for the purposes of proceedings preliminary” (in the Dover Order) and “purposes preliminary” (in the Reigate and Banstead, and Runnymede Orders). In a memorandum printed at Appendix 4, the Department explains that there is no difference between the two formulae. It is an important principle of statutory interpretation that a change of language implies a change of meaning, and the drafters of a group of instruments dealing with cognate matters should ensure consistency of language where the drafts are intended to have the same effect. **The Committee accordingly reports these draft Orders for failure to conform to proper drafting practice, acknowledged by the Department.**

Instruments not reported

At its meeting on 16 January 2019 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.	Invasive Non-native Species (Amendment etc.) (EU Exit) Regulations 2019
Draft S.I.	Veterinary Surgeons and Animal Welfare (Amendment) (EU Exit) Regulations 2019
Draft S.I.	Employment Rights (Miscellaneous Amendments) Regulations 2019
Draft S.I.	Construction Products (Amendment etc.) (EU Exit) Regulations 2019
Draft S.I.	Ecodesign for Energy-Related Products and Energy Information (Amendment) (EU Exit) Regulations 2019
Draft S.I.	Insurance Distribution (Amendment) (EU Exit) Regulations 2019
Draft S.I.	Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2018
Draft S.I.	Maritime Transport Access to Trade and Cabotage (Revocation) (EU Exit) Regulations 2019
Draft S.I.	Mortgage Credit (Amendment) (EU Exit) Regulations 2019
Draft S.I.	Motor Vehicles (International Circulation) (Amendment) (EU Exit) Order 2019
Draft S.I.	Recognition of Professional Qualifications (Amendment etc.) (EU Exit) Regulations 2018
Draft S.I.	European Qualifications (Health and Social Care Professions) (Amendment etc.) (EU Exit) Regulations 2018
Draft S.I.	Kimberley Process Certification Scheme (Amendment) (EU Exit) Regulations 2019
Draft S.I.	Carriage of Dangerous Goods (Amendment) Regulations 2019
Draft S.I.	Judicial Pensions and Fee-Paid Judges' Pension Schemes (Amendment) Regulations 2019

Instruments subject to annulment

S.I. 2018/1283	European Network of Employment Services (EU Exit) Regulations 2018
S.I. 2018/1323	Criminal Legal Aid (Remuneration) (Amendment) (No. 2) Regulations 2018

S.I. 2018/1325	Pipe-lines, Petroleum, Electricity Works and Oil Stocking (Miscellaneous Amendments) (EU Exit) Regulations 2018
S.I. 2018/1326	Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018
S.I. 2018/1331	Single European Sky (National Supervisory Authority) (Amendment) Regulations 2018
S.I. 2018/1335	Government Resources and Accounts Act 2000 (Estimates and Accounts) (Amendment) Order 2018
S.I. 2018/1336	CRC Energy Efficiency Scheme (Amendment) (EU Exit) Regulations 2018
S.I. 2018/1337	Money Laundering and Terrorist Financing (Miscellaneous Amendments) Regulations 2018
S.I. 2018/1346	Council Tax Reduction Schemes (Prescribed Requirements) (England) (Amendment) Regulations 2018
S.I. 2018/1352	Heavy Goods Vehicles (Charging for the Use of Certain Infrastructure on the Trans-European Road Network) (Amendment) (EU Exit) Regulations 2018
S.I. 2018/1353	Freedom of Information Act 2000 (Amendment) (EU Exit) Regulations 2018
S.I. 2018/1354	Air Navigation (Single European Sky) (Penalties) (Amendment) Order 2018
S.I. 2018/1355	Districts of Aylesbury Vale, Chiltern, South Bucks and Wycombe (Changes to Years of Elections) Order 2018

Draft instrument subject to negative procedure

Draft S.I. Carlisle (Electoral Changes) Order 2019

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. 2018/1224	Space Industry Act 2018 (Commencement No. 1) Regulations 2018
S.I. 2018/1343	Haulage Permits and Trailer Registration Act 2018 (Commencement) Regulations 2018
S.I. 2018/1359	Social Security (Reciprocal Agreement) (Isle of Man) (Amendment) Order 2018

Appendix 1

S.I. 2018/1231

Electronic Communications (Universal Service) (Broadband) Regulations 2018

1. I refer to the request for a memorandum from Ofcom sent from the Committee by email by on 19th December 2018.
2. Ofcom was asked to confirm whether “shall” and “must” are intended to have the same meaning in this instrument and explain the basis on which their different use is determined.
3. Ofcom accepts that greater consideration should have been given to the use of the words “shall” and “must” in this instrument, given that both are used.
4. In particular, the obligations in the instrument which are imposed on Ofcom by use of the word “shall” in regulations 3(1), 3(2), 3(5), 3(7) and 4(2) would have been clearer if the word “must” had been used, rather than “shall”.
5. This is because the word “must” is used to impose obligations elsewhere in the same regulations and also because the word “shall” is used in a different way in order to express an assertion or intention in relation to legal force or effect at both regulation 1 and regulation 4(3).
6. Had the instrument been drafted in that way, there would then have been consistency in the language used when describing obligations on Ofcom. While Ofcom considers that the intention is already clear, such consistency of language would have left no scope for any possible doubt on the part of the reader of the instrument that these provisions were all intended to be obligations.

Ofcom

2 January 2019

Appendix 2

S.I. 2018/1255

Branded Health Service Medicines (Costs) (Amendment) Regulations 2018

1. In its letter to the Department of 19th December 2018, the Committee requested a memorandum on the following points:

(a) Explain what “to which a payment percentage is determined in accordance with regulation 3(5A)” in regulation 2(5)(a) (inserted paragraph (fa)) is intended to mean.

(b) Explain why regulation 2(5)(b) qualifies regulation 21(1)(n) of the Branded Health Services Medicines (Costs) Regulations 2018 and not regulation 21(1)(o).

2. The Department’s response to the Committee’s points is as follows.

Meaning of “to which a payment percentage is determined in accordance with regulation 3(5A)”

3. The words “to which a payment percentage is determined in accordance with regulation 3(5A)” in regulation 2(5)(a) (inserted paragraph (fa)) is intended to refer to the payment percentage (i.e. 7.8%) that is applicable to the net sales income received for:

- a) an item of presentation supplied under a contract with a contracting authority based on a framework agreement, where that framework agreement was entered into on or after 1st April 2018 but before 1st January 2019, or was entered into following a tender which closed on or after 1st April 2018 but before 1st January 2019; or
- b) an item of presentation supplied under a public contract entered into on or after 1st April 2018 but before 1st January 2019, or which was entered into following a tender which closed on or after 1st April 2018 but on or before 1st January 2019.

4. Net sales income received for an item of presentation supplied under such contracts would not be subject to the payment percentages set out in the table in regulation 3(1). The net sales income would be subject to a payment percentage of 7.8%.

5. We consider the intention of inserted paragraph (fa) would be clearer if the word “to” was replaced with the word “for” so that the provision reads “for which a payment percentage is determined in accordance with regulation 3(5A)”. We consider the word “to” should also be replaced with the word “for” in inserted regulation 21(1)(fb), regulation 22(fa) and regulation 22(fb) accordingly. We apologise and would propose to rectify the position by a correction slip.

Why regulation 2(5)(b) does not qualify regulation 21(1)(o)

6. Regulation 2(5)(b) of the Branded Health Service Medicines (Costs) (Amendment) Regulations 2018 (“the Amendment Regulations”) qualifies regulation 21(1)(n) of the Branded Health Service Medicines (Costs) Regulations 2018 (“the Costs Regulations”) so that, if sales of an item of presentation have been recorded under regulation 21(1)(b), they should not also be recorded under regulation 21(1)(n) of the Costs Regulations.

7. Regulation 21(1)(b) of the Costs Regulations requires information to be provided on the total of the net sales income received for the total supply of all presentations. Under the Costs Regulations, all presentations are “relevant medicines” (see definition of “presentation” at regulation 1(1) of the Costs Regulations) and, prior to the amendment made to the definition of “relevant medicine” (see regulation 1(1) of the Costs Regulations and regulation 2(2) of the Amendment Regulations), a health service medicine would only qualify as a “relevant medicine” if it was also a “branded medicine” (see definition of “branded medicine” at regulation 1(1) of the Costs Regulations).

8. Prior to the amendment to the definition of “relevant medicine”, it would not have been possible to record sales of “relevant medicines” under regulation 21(1)(n) of the Costs Regulations because regulation 21(1)(n) only required information relating to “unbranded generic health service medicines”, and prior to the amendment to the definition of “relevant medicine”, a health service medicine could not be both a “relevant medicine” and an “unbranded generic health service medicine”. However, as a result of the amendment to the definition of “relevant medicine”, and specifically the fact that the definition of “relevant medicine” now includes a biological medicinal product whether or not it is a branded medicine, there is a possibility that the reporting of net sales income received for the supply of medicines could be included under both regulation 21(1)(b) and regulation 21(1)(n) of the Costs Regulations. The Amendment Regulations therefore qualify regulation 21(1)(n) of the Costs Regulations to the extent that the sales are not already recorded under regulation 21(1)(b) of the Costs Regulations.

9. The risk of duplication does not occur with respect to regulation 21(1)(b) and regulation 21(1)(o) of the Costs Regulations because the definition of “relevant medicine” (see regulation 1(1) of the Costs Regulations), even with the amendment to the definition of “relevant medicine”, does not capture “medicinal products subject to general sale”, as referred to in regulation 21(1)(o) of the Costs Regulations. Even though a “relevant medicine” could potentially be an “unbranded generic health service medicine” as referred to in regulation 21(1)(n) of the Costs Regulations, it cannot be a “medicinal product subject to general sale” as referred to in regulation 21(1)(o) of the Costs Regulations. This is because a health service medicine would only qualify as a “relevant medicine” if it was also a “prescription only medicine” (see definition at regulation 1(1) of the Costs Regulations). “Medicinal products subject to general sale” (see definition at regulation 21(4) of the Costs Regulations) cannot be a “prescription only medicine”. Accordingly regulation 2(5)(b) of the Amendment Regulations does not qualify regulation 21(1)(o) of the Costs Regulations.

Department of Health and Social Care

2 January 2019

Appendix 3

S.I. 2018/1268

Registration of Births, Deaths, Marriages and Civil Partnerships (Fees) (Amendment) and Multilingual Standard Forms Regulations 2018

1. This Explanatory Memorandum has been prepared by the Home Office at the request of the Joint Committee on Statutory Instruments (“the Committee”) in a letter dated 19 December 2018.

2. The Committee requested a memorandum on two points:

1. In relation to new regulation 3C, as inserted by regulation 5, explain:

a. whether the words “on a working day” and “on a Saturday” paragraph (1) (a) are intended to refer to the day on which the application is made or to the day on which a particular action is taken by or on behalf of the Registrar General (and if so, what action), and how effect is given to that intention;

Home Office response:

These references are to the Royal Mail delivery service fee and will be fully explained in guidance when the fees come into force. The ‘working day’ service relates to Royal Mail guaranteed delivery on Monday to Friday before 1pm and ‘Saturday’ relates to Royal Mail guaranteed delivery on a Saturday before 9.a.m. The Home Office believes that this meaning is clear from the title of the inserted regulation and by the words “the Registrar General may...provide the document by premium postal service and the applicable fee is-“.

b. and whether a refund will be paid if the higher Saturday premium postal service does not deliver the item by the promised day.

Home Office response:

Yes. If a customer informs the General Register Office that the order has not been received in line with the service offered, General Register Office officials will investigate further and request a refund from Royal Mail on a customer’s behalf if the complaint is well founded.

2. In relation to new regulation 3E, as inserted by regulation 5:

a. explain how an entry might not be located from the relevant information provided, given that relevant information is defined as “either a reference number relating to an index ... or sufficient information which allows [the relevant person] to establish such a reference number”;

Home Office response:

There are a number of scenarios whereby the application cannot be fulfilled. This includes where the General Register Office index reference has been

misquoted or entered incorrectly, or, in the case where the index number has not been supplied, the information provided by the customer is inaccurate. Officials in the General Register Office do undertake a thorough search including for example, a year either side of the birth date provided, and customers also have an option for a 'phonetic' name search. If the record held at the General Register Office is unclear, then a further search of the original document held off site in a secure location, will also be undertaken.

b. and confirm the basis on which the rest of the fee paid for the certified copy will be refunded.

Home Office response:

The fee is for the service to provide a certified copy of a registration entry. The Registrar General will make a partial refund of a fee if the service cannot be completed i.e. a certificate could not be provided. The General Register Office will retain a small portion of the fee to account for the cost of work undertaken searching for the entry.

3. If the Committee requires any further information the Home Office would be happy to provide it.

Home Office

27 December 2018

Appendix 4

Draft S.I.s

Dover (Electoral Changes) Order 2019; Reigate and Banstead (Electoral Changes) Order 2019; Runnymede (Electoral Changes) Order 2019

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

In Article 1(3)(a) of each Order, explain the difference between “for the purposes of proceedings preliminary” (Dover) and “purposes preliminary” (Reigate and Banstead and Runnymede).

Response

2. There is not intended to be a difference between the two cases. The Commission notes the difference in approach which was a consequence of the fact that the drafts were prepared and checked by different lawyers. The Commission does not intend to amend the draft Orders as it considers that there is no difference of substance between the two approaches.
3. The Commission recognises that maintaining consistency between drafts seeking to have the same effect should be drafted identically. The Government Legal Department, which drafts these Orders on behalf of the Commission, has prepared internal guidance on the preparation of these Orders and it will update this guidance accordingly in order to minimise the risk of such inconsistencies.

Local Government Boundary Commission for England

20 December 2018