

Coronavirus Amendment Regulations: The Government's dubious response to the 'out out' defence

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Maintaining public confidence in the Government's response to the pandemic matters. Trust will drain away if we are not given the full story about amendments to the coronavirus legislation restricting our movements. The Rule of Law requires full disclosure.

The comedian [Micky Flanagan](#) has a routine about being 'out out'. The central gag is that he only went 'out' to do a bit of shopping, but was waylaid by a friend and ended up in a nightclub for the evening. But he wasn't properly 'out out'.

His joke could have formed a defence to a prosecution under [regulation 6](#) of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020. The original version of regulation 6 provides that

"no person may leave the place where they are living without reasonable excuse".

Contravention is a criminal offence. But consider the 'out out' defence. A person has a reasonable excuse for going out (obtaining basic necessities, as set out in regulation 6(2)(a)), but then decides to stay out out (visiting lots of friends in lockdown). Provided that the original excuse for leaving was valid, they do not commit an offence by continuing to stay out. This rather undermines the social distancing point of the regulation.

This is the classic regulatory paradigm. A problem exists, a law is brought in to fix it, the law doesn't cover all aspects of the problem. It is a microcosm of the centuries old legislative arms race. In this case, the Government followed the traditional route of making new rules, the [Health Protection \(Coronavirus, Restrictions\) \(England\) \(Amendment\) Regulations 2020](#), made on the 21st of April 2020. These Regulations contained many amendments. The out out defence amendment is regulation 2(4)(a) which inserts the words "or be outside of". So, the offence in regulation 6 now reads:

"no person may leave or be outside of the place where they are living without reasonable excuse".

The Regulations also made lots of other sensible minor changes, for example providing that it was also a reasonable excuse to visit a burial ground or garden of remembrance, specifying the places that could be visited for the purposes of obtaining money, requiring the closure of outdoor swimming pools as well as outdoor gyms etc.

I have no difficulty with the content of these changes. It is a perfectly sensible legislative evolution. Arguably it is not ideal that, less than one month after they were made, it was necessary to amend these Regulations. However, it would be uncharitable to make this criticism given the extreme urgency and lack of time there was to make them originally.

The major difficulty I have is with the way in which the Regulations are presented. Firstly, there are the words directly preceding the Regulations:

"This Statutory Instrument corrects errors in the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (S.I. 2020/350) and is being issued free of charge to all known recipients of that Statutory Instrument."

"Error" implies some technical defect which can be quickly remedied. Except on one minor point, the original Regulations do not contain errors (the Department for Work and Pensions is erroneously referred to as the Department of Work and Pensions). In themselves, the Regulations are not defective. They may not cover all the situations which they were intended to cover, but this is not the same as containing an error.

The Government's [Statutory Instrument Practice](#) sets out procedures for correcting errors. Typographical or non-textual formatting errors can be corrected by a correction slip, which is then sent out free of charge to all recipients of the original statutory instrument. A correction slip is not a piece of legislation and has no parliamentary oversight. Substantive errors must be fixed by proper amending legislation, as pointed out by my colleagues Jack Simon Caird and Ellis Patterson in this [Report](#).

With the new Coronavirus Regulations, there is no error. Instead, the Government has had more time to think things through and have decided to change the legislation to make different provision from that which was originally set out.

The second point is on the wording of the explanatory note to the Regulations. It states:

"Regulation 6 is amended to clarify that under regulation 6(1), the prohibition applies both to leaving the place where a person is living without reasonable excuse, and also to staying outside that place without reasonable excuse."

Credit to David Allen Green for originally [pointing out](#) that this is simply not true. It is not a clarification. It is an extension of the criminal offence. Explanatory notes are not formally a part of the statutory instrument. It is highly unlikely that a court would retrospectively read "leave the place" to mean "leave or be outside the place" in relation to conduct which occurred before the amendment. However, using "clarify" in the explanatory note is misleading. It misrepresents that this was always the case, but the Government are just making it clear that it was always the case. A parliamentarian who is reading this as part of their scrutiny function could easily think that this was simply a technical tidying up of the statute book. It isn't. It is an extension of the criminal law that hasn't been flagged as an extension of criminal law.

It is not contrary to the Rule of Law to change the law. There is no expectation that legislation is set in stone. The legislative changes set out in the amending Regulations are unobjectionable in terms of their content. But what is objectionable is that they are being brought in under the radar. To "correct errors" and to "clarify" gives a strong impression that no substantive changes are being made. This is not the case. Changes of substance are being made. Sensible changes perhaps, but still changes that ought to be properly considered by Parliament. Given the fact that procedural safeguards for these kinds of emergency regulations are weaker than for normal regulations, it is incumbent upon Government to be completely candid about what it is doing and why it is doing so. Removing the out of defence is only within the Rule of Law if Parliament and the public are expressly told that it is

being removed.

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