



House of Lords
House of Commons
Joint Committee on Statutory
Instruments

Twenty-Second Report of Session 2022–23

Drawing special attention to:

Terrorism Prevention and Investigation Measures (Polygraph) Regulations 2022 (S.I. 2022/462)

Merchant Shipping (Nuclear Ships) Regulations 2022 (S.I. 2022/1169)

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Joint Committee on Statutory Instruments

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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](#), relating to Public Business.

Remit

The Joint Committee on Statutory Instruments (JCSI) is appointed to consider statutory instruments made in exercise of powers granted by Act of Parliament. Instruments not laid before Parliament are included within the Committee's remit; but local instruments and instruments made by devolved administrations are not considered by JCSI unless they are required to be laid before Parliament.

The role of the JCSI, whose membership is drawn from both Houses of Parliament, is to assess the technical qualities of each instrument that falls within its remit and to decide whether to draw the special attention of each House to any instrument on one or more of the following grounds:

- i that it imposes, or sets the amount of, a charge on public revenue or that it requires payment for a licence, consent or service to be made to the Exchequer, a government department or a public or local authority, or sets the amount of the payment;
- ii that its parent legislation says that it cannot be challenged in the courts;
- iii that it appears to have retrospective effect without the express authority of the parent legislation;
- iv that there appears to have been unjustifiable delay in publishing it or laying it before Parliament;

- v that there appears to have been unjustifiable delay in sending a notification under the proviso to section 4(1) of the Statutory Instruments Act 1946, where the instrument has come into force before it has been laid;
- vi that there appears to be doubt about whether there is power to make it or that it appears to make an unusual or unexpected use of the power to make;
- vii that its form or meaning needs to be explained;
- viii that its drafting appears to be defective;
- ix any other ground which does not go to its merits or the policy behind it.

The Committee usually meets weekly when Parliament is sitting.

Publications

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

Committee staff

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

Contacts

All correspondence should be addressed to the Clerk of the Joint Committee on Statutory Instruments, House of Commons, London SW1A 0AA. The telephone number for general inquiries is: 020 7219 3296; the Committee's email address is: jcsi@parliament.uk.

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Instruments reported

At its meeting on 11 January 2023 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 two of those considered. The instruments and the grounds for reporting are given below. The relevant departmental memoranda are published as appendices to this report.

1 S.I. 2022/462: Reported for unusual or unexpected use of enabling powers

Terrorism Prevention and Investigation Measures (Polygraph) Regulations 2022

1.1 The Committee draws the special attention of both Houses to these Regulations on the ground that they make unusual or unexpected use of the enabling power in one respect.

1.2 These Regulations, which are subject to the negative resolution procedure, govern how polygraph tests must be conducted on individuals who are subject to a Terrorism Prevention and Investigation Measures Notice (“TPIM”). They “have been drafted to be consistent with the Polygraph Rules 2009” (S.I. 2009/619, “the 2009 Rules”), which govern the conduct of polygraph tests in relation to sex offenders, terrorist offenders and domestic abuse offenders on licence. The Explanatory Memorandum states, at paragraph 7.7, that this consistency is intended “to ensure a cohesive statute book and ensure that the framework governing polygraph examinations for different subjects is consistent across Government”. The Committee noticed one important difference between these Regulations and the 2009 Rules: both instruments impose a requirement for specified matters to be explained to the subject of the polygraph test before the first session; but whereas rule 6(2) of the 2009 Rules requires that individual to be asked for written confirmation that they have received and understood the explanation (which confirmation must be attached to the individual’s case record), regulation 5(2) of these Regulations only requires that the police officer who offered the explanation provide written confirmation that they have done so. The Committee asked the Home Office to explain why regulation 5(2) does not require written confirmation from the individual that they have understood the explanation.

1.3 In a memorandum printed at Appendix 1, the Department explains that it was considered that there would be only a “very limited” prospect that TPIM subjects would agree to provide such written confirmation of understanding given their observed “reluctance to comply with requirements placed upon them unless clearly mandated to do so”. It explains that having a police officer (rather than an employee of the polygraph provider) give the explanation was considered to be a sufficient safeguard, since in practice this is likely to be the TPIM subject’s contact officer, a person with significant experience of dealing with TPIM subjects, and a person familiar with TPIM subjects’ individual needs and levels of understanding. The Department also suggests that the TPIM subject can seek clarification during the polygraph process if there is something they do not understand, and that the recording of the explanation can be used to resolve disputes as to what was said.

1.4 The Committee acknowledges the difficulties identified by the Department, but remains concerned about the omission, which reduces the level of safeguard provided. Instead of the terrorism suspects being given an opportunity to confirm (or deny) that they have understood matters explained to them – as for terrorist offenders as well as sex and domestic abuse offenders – the Regulations move straight to confirmation by a police officer that an explanation has been provided. Since one of the matters to be explained is that anything the TPIM subject discloses during the session will be communicated to the Secretary of State and may be shared with police and intelligence services, it is important to ensure that the individual understands what has been said to them before the session begins. The Committee considers that the Regulations ought to have included a provision that aimed to achieve the same or similar effect as requiring written confirmation of understanding, **and accordingly reports regulation 5(2) for making unusual or unexpected use of the enabling power.**

2 S.I. 2022/1169: Reported for defective drafting

Merchant Shipping (Nuclear Ships) Regulations 2022

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

2.2 These Regulations, which are subject to the negative resolution procedure, implement in UK law international safety standards for nuclear ships.

2.3 One of the enabling powers relied on to make this instrument is section 85(5) of the Merchant Shipping Act 1995, which requires that safety regulations which provide for approval to be given by the Secretary of State must also provide for such approvals to meet specified requirements as to form and content. In this instrument, those requirements are (for the most part) imposed by regulation 6(3) in relation to the approval provisions listed at regulation 6(2). The Committee asked the Department for Transport to explain why no such provision is made in relation to regulation 13(3), which requires that any change to a nuclear ship's safety assessment be approved by the Secretary of State. In a memorandum printed at Appendix 2, the Department acknowledges that there may be doubt as to whether the requirements of regulation 6(3) apply to the approval of any such change under regulation 13(3) and undertakes to amend regulation 6(2) at the earliest opportunity. **The Committee accordingly reports regulation 6(2) for defective drafting, acknowledged by the Department.**

2.4 Regulation 31 is the principal enforcement provision in this instrument. It provides that contravention of the provisions listed in regulation 31(1) is an offence by the owner and master of a nuclear ship, punishable by up to two years in prison and an unlimited fine. Regulation 31(1) lists several provisions that require approval to be obtained from the Secretary of State, including regulation 7(1) (the requirement for a safety assessment to be prepared and approved), and sub-paragraph (g) lists several paragraphs of regulation 13 – but not paragraph (3). The Committee asked the Department to explain what the consequences are for failing to comply with the requirement in regulation 13(3). In its memorandum, the Department addresses the slightly different question of failure to comply with the requirements imposed by regulation 6(3). The Committee is clear that a legal obligation must be capable of being enforced in order to be effective. It considers that

the obligation in regulation 13(3) to obtain approval for a change to a safety assessment in the context of the operation of a ship differs from the obligation in regulation 7(1) to obtain approval for the initial assessment before the ship is constructed. On that basis, a specific enforcement provision should have been included to address contravention of regulation 13(3). **The Committee accordingly reports regulation 31(1)(g) for defective drafting.**

2.5 Regulation 31(1)(m) makes it an offence to contravene regulation 20(8), which provides that a UK nuclear ship “may be subject to continuous surveys ... at the request of the Secretary of State or with the approval of the Secretary of State”. This is an alternative to the requirement in regulation 20(7) that a ship must be subjected to surveys at frequencies specified in the Nuclear Code. The Committee asked the Department to explain what would constitute a contravention of regulation 20(8) for these purposes. In its memorandum, the Department suggests that regulation 31(1)(m) criminalises non-compliance with a decision made under regulation 20(8) that a ship must be subjected to continuous surveys. The Committee agrees in principle, but regulation 31(1)(m) does not achieve this effect: regulation 20(8) merely confers a discretion to impose a requirement; it does not itself impose any requirement that can be contravened. **The Committee accordingly reports regulation 31(1)(m) for defective drafting.**

Instruments not reported

At its meeting on 11 January 2023 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

Instruments requiring affirmative approval

S.I. Numbers	S.I. Title
S.I. 2022/1280	Energy Bill Relief Scheme Pass-through Requirement (Heat Suppliers) (Amendment) Regulations

Draft instruments requiring affirmative approval

S.I. Numbers	S.I. Title
Draft	Civil Contingencies Act 2004 (Amendment of List of Responders) Order 2023
Draft	Immigration (Leave to Enter and Remain) (Amendment) Order 2023
Draft	Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Legal Aid: Family and Domestic Abuse) (Miscellaneous Amendments) Order 2023
Draft	Local Government (Structural Changes) (Supplementary Provision and Amendment) Order 2023
Draft	Police and Criminal Evidence Act 1984 (Codes of Practice) (Revision of Code H) Order 2023

Instruments subject to annulment

S.I. Numbers	S.I. Title
S.I. 2022/1241	EU Agencies (Revocations) Regulations 2022
S.I. 2022/1244	Central Counterparties (Transitional Provision) (Extension and Amendment) Regulations 2022
S.I. 2022/1265	Electricity (Connection Charges) (Amendment) Regulations 2022
S.I. 2022/1267	Criminal Legal Aid (Remuneration) (Amendment) (No. 2) Regulations 2022
S.I. 2022/1272	Competition Act 1998 (Specialisation Agreements Block Exemption) Order 2022
S.I. 2022/1274	Seed (Equivalence) (Amendment) (England) Regulations 2022
S.I. 2022/1279	Organic Production (Amendment) (No. 2) Regulations 2022
S.I. 2022/1285	Pensions Act 2004 (Disclosure of Restricted Information by the Pensions Regulator) (Amendment of Specified Persons) Order 2022
S.I. 2022/1290	Charities Act 2006 (Principal Regulators of Exempt Charities) (Amendment) Regulations 2022
S.I. 2022/1304	Prevention and Reduction of Serious Violence (Strategies etc.) Regulations 2022
S.I. 2022/1319	Government Resources and Accounts Act 2000 (Estimates and Accounts) (Amendment) Order 2022

S.I. Numbers	S.I. Title
S.I. 2022/1325	Whole of Government Accounts (Designation of Bodies) (No. 2) Order 2022
S.I. 2022/1326	Eligibility and Registration of General Practitioners and Specialist Medical Practitioners (Amendment) Order of Council 2022
S.I. 2022/1328	Local Authorities (Capital Finance and Accounting) (England) (Amendment) (No. 2) Regulations 2022
S.I. 2022/1341	Apprenticeships (Miscellaneous Provisions) (England) (Amendment) (No. 3) Regulations 2022
S.I. 2022/1345	Short-term Holding Facility (Amendment) Rules 2022
S.I. 2022/1370	Criminal Legal Aid (General) (Amendment) Regulations 2022
S.I. 2022/1371	Allocation of Housing and Homelessness (Eligibility) (England) and Persons Subject to Immigration Control (Housing Authority Accommodation and Homelessness) (Amendment) (No. 4) Regulations 2022
S.I. 2022/1376	Legal Aid (Financial Resources and Contribution Orders) (Amendment) Regulations 2022
S.I. 2022/1381	Communications Act 2003 (Restrictions on the Advertising of Less Healthy Food) (Effective Date) (Amendment) (No. 2) Regulations 2022

Draft instruments subject to annulment

S.I. Numbers	S.I. Title
Draft	Derby (Electoral Changes) Order 2023
Draft	Havant (Electoral Changes) Order 2023
Draft	Southampton (Electoral Changes) Order 2023
Draft	Slough (Electoral Changes) Order 2023

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. Numbers	S.I. Title
S.I. 2022/1266	Environment Act 2021 (Commencement No. 5 and Transitional Provisions) Regulations 2022
S.I. 2022/1270	Elections Act 2022 (Commencement No. 5 and Savings) Regulations 2022
S.I. 2022/1277	Finance Act 2009, Finance (No. 3) Act 2010 and Finance Act 2021 (Value Added Tax) (Interest) (Appointed Days) Regulations 2022
S.I. 2022/1278	Finance Act 2021 (Value Added Tax) (Penalties) (Appointed Day) Regulations 2022
S.I. 2022/1359	Subsidy Control Act 2022 (Commencement) Regulations 2022

Appendix 1: Memorandum from the Home Office

S.I. 2022/462

Terrorism Prevention and Investigation Measures (Polygraph) Regulations 2022

1) The Committee has asked the Home Office for a memorandum on the following point(s):

Having regard to the statement, at paragraph 7.7 of the Explanatory Memorandum, that these Regulations were drafted to be consistent with the Polygraph Rules 2009 in order to ensure a consistent framework across Government, explain why regulation 5(2), unlike the equivalent provision in the 2009 Rules, does not require written confirmation from the relevant individual that they have understood the explanation required by regulation 5(1).

Background and Overview

2) The Terrorism Prevention and Investigation Measures (Polygraph) Regulations 2022 (the TPIM Polygraph Regulations) were drawn up to be consistent with the Polygraph Rules 2009 (the 2009 Rules). However, the TPIM Polygraph Regulations apply to the circumstances of individuals subject to a TPIM notice. This will always include individuals identified as being concerned in “terrorism-related activity” but these individuals need not have been convicted of terrorism offences. The 2009 Rules were prepared with regard to persons to whom section 28 of the Offender Management Act (OMA) 2007 applies. At the time of drafting the 2009 Rules, section 28 of the OMA 2007 only related to sexual offenders.

3) The slight differences in approach when applied to TPIM subjects does not undermine the consistency of the overall framework governing polygraph examinations for different cohorts. As confirmed within the Explanatory Memorandum, drawing on experience of managing the TPIM cohort, it was assessed that it would not be appropriate to apply an identical operation to these differing circumstances. The Explanatory Memorandum, specifically paragraph 7.8, could have been clearer that the differences mentioned within it did not constitute an exhaustive list. There are further aspects of the 2009 Rules that were not directly replicated on the grounds that it would have been inappropriate to do so. This includes the TPIM Polygraph Regulations not stipulating that the polygraph examiner must have completed a post conviction sex offender testing training programme accredited by the American Polygraph Association, for example.

Reason for the divergence in question

4) The decision not to require written confirmation from the TPIM subject (that the matters in regulation 5(1) have been explained and that they have understood them) was taken based on experience of the TPIM cases to date and the proportional level of reluctance among TPIM subjects to comply with requirements placed upon them unless

clearly mandated to do so, for example participation in de-radicalisation sessions imposed under a different TPIM measure. Specifically, it was considered that there was only a very limited prospect of a TPIM subject agreeing to provide their written confirmation of having understood the details of a polygraph session.

5) It was considered that it would be procedurally more effective yet provide sufficient safeguard to the TPIM subject to ensure that they did understand the process, for a police officer (who in practice would most likely be the TPIM subject's contact officer who they interact with regularly) to explain the details of the polygraph session to them, and confirm that had taken place on the TPIM subject's behalf (as per regulation 5(1) and (2) of the TPIM Polygraph Regulations). The police have significant experience of dealing with TPIM subjects, including issuing them with their notice at the point of imposition and explaining the specified measures, and subsequently throughout the ongoing management of the TPIM. The police will often be the first point of contact for a TPIM subject and will routinely explain to a subject their measures and any variation to these within the lifetime of the TPIM notice.

6) The police contact officers are well versed in interacting with TPIM subjects and are familiar with their individual needs and levels of understanding, having to explain a variety of TPIM measures. It was therefore considered that they were best placed to ensure the TPIM subject's understanding.

7) All polygraph sessions are recorded to make sure they are carried out properly, and so that any disagreements about what was said can be checked. If the TPIM subject does have any difficulty understanding the requirements of or arrangements for the polygraph session, they will be able to communicate this at any point during the process to seek clarification.

Home Office

13 December 2022

Appendix 2: Memorandum from the Department for Transport

S.I. 2022/1169

Merchant Shipping (Nuclear Ships) Regulations 2022

1) The Committee has asked the Department for Transport for a memorandum on the following point(s):

1. In relation to the obligation in regulation 13(3) for any change to the safety assessment to be approved by the Secretary of State, explain—

(a) how the requirements as to the form and content of that approval, as imposed by section 85(5)(c) of the Merchant Shipping Act 1995, are achieved; and

(b) what the consequences are for non-compliance.

2. Explain what constitutes a contravention of regulation 20(8) for the purposes of regulation 31(1)(m).

3. Explain why no information is provided as to how to access the Nuclear Code given legal effect by this instrument (in contrast to the other documents to which this instrument refers).

2) The Department's response is below.

1.(a) The safety assessment referred to in regulation 13 is the safety assessment required by regulation 7(1) (see regulation 13(1)(a)). The requirements for the safety assessment are contained in regulation 7(2) and regulation 7(3) provides that the Secretary of State must approve the safety assessment, and any change to it, if satisfied that the requirements in regulation 7(2) have been met.

Regulation 6 makes provision for specified provisions in the Regulations requiring the approval of the Secretary of State, or any person authorised by the Secretary of State. Regulation 6(3) prescribes the requirements as to the form and content of an approval (or a continuation, alteration or cancellation of it) referred to in regulation 6(2) for the purposes of section 85(5)(c) of the Merchant Shipping Act 1995. Regulation 6(3) provides that the approval must be in writing, specify the date on which it takes effect and specify the terms, if any, on which it is given.

The Department initially took the view that the requirements in regulation 6(3) applied to a change to the safety assessment approved under regulation 13(3) as a result of the relationship between regulation 7(1) and regulation 13(1)(a); the requirements in regulation 6(3) therefore being engaged by the requirement in regulation 7(3). However, on reflection, the Department is now of the view that there is a distinction between the approval of a change

under regulation 7(3) and the approval of a change under regulation 13(3); the former relates to the construction phase of the nuclear ship and the latter to the operational phase of the ship, albeit that the safety assessment is a single document that stays with the ship throughout its lifespan.

Accordingly, the Department will seek to amend regulation 6(2) at the earliest opportunity to refer to regulation 13(3), to ensure that the requirements of regulation 6(3) apply to an approval given under regulation 13(3).

(b) The omission of a provision to issue an approval in accordance with the requirements of regulation 6(3) has no practical consequence as the Secretary of State (in this case the Maritime & Coastguard Agency (MCA) on behalf of the Secretary of State) will always, as a matter of practice, give an approval required by regulation 13(3) in writing, with a date and setting out the terms of that approval. The Secretary of State will expect to be notified of any change to the safety assessment and this is made clear by the guidance, MGN 679 (M), issued with the Regulations (see paragraph 4.10 in that guidance). Further, there is no consequence in terms of the requirement in regulation 13(2)(a) to keep the safety assessment up to date; this is an overriding obligation and is subject to a criminal offence (see regulation 31(1)(g)).

2. Regulation 20(7) provides that a United Kingdom ship must be subjected to the additional surveys in paragraph 8.4 in Chapter 8 of the Nuclear Code. The additional surveys in paragraph 8.4 include periodical surveys (paragraphs 8.4.3.1 to 8.4.3.4). Regulation 20(7) is subject to regulation 20(8), which provides an alternative to the periodical surveys (continuous surveys under paragraph 8.4.3.5) where the Secretary of State either requests those surveys be undertaken, or approves the surveys to be undertaken. In either of these circumstances, where the continuous surveys replace the periodical surveys, it is appropriate that there should be a corresponding criminal offence for non-compliance, in the same way that a criminal offence attaches to a contravention of the requirement for periodical surveys under regulation 20(7).

3. The definition of the “Nuclear Code” in regulation 2(1) explains which International Maritime Organization (IMO) resolution adopted the Code, with an identifying date and number. The footnote to the “Convention” on the preceding page provides the contact details for the IMO. Footnote (d) below that provides contact details for the MCA, including a telephone number. The source of the Nuclear Code is also set out in paragraph 6.2 of the Explanatory Memorandum, which includes the contact details of the IMO and a direct link to the Code on the IMO’s website. The Department takes the view that there is enough information in the Regulations and the Explanatory Memorandum for the reader to be able to locate the Code.

Department for Transport

13 December 2022

Formal minutes

Wednesday 11 January 2023

Virtual meeting

Members present

Jessica Morden, in the Chair

Lord Chartres

Baroness Gale

Lord Haskel

Lord Smith of Hindhead

Richard Thomson

Report consideration

Draft Report (Twenty-Second Report), proposed by the Chair, brought up and read.

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

Paragraphs 1.1 to 2.5 read and agreed to.

Annex agreed to.

Papers were appended to the Report as Appendices 1 to 2.

Resolved, That the Report be the Twenty-Second Report of the Committee to both Houses.

Ordered, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

Adjournment

Adjourned till Wednesday 18 January at 3.40 p.m.