



HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

29th Report of Session 2022–23

Drawn to the special attention of the House:

Merchant Shipping (Watercraft) Order 2023

Includes information paragraphs on:

One instrument related to COVID-19:

Draft Airports Slot Allocation (Alleviation
of Usage Requirements) Regulations 2023

School and Early Years Finance (England)
Regulations 2023

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Secondary Legislation Scrutiny Committee

The Committee's terms of reference, as agreed on 12 May 2022, are set out on the website but are, in summary:

To report on draft instruments published under paragraph 14 of Schedule 8 to the European Union (Withdrawal) Act 2018; to report on draft instruments and memoranda laid before Parliament under sections 8 and 23(1) of the European Union (Withdrawal) Act 2018 and section 31 of the European Union (Future Relationship) Act 2020.

And, to scrutinise –

(a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;

(b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in the terms of reference.

The Committee may also consider such other general matters relating to the effective scrutiny of secondary legislation as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

[Lord De Mauley](#)

[Baroness Harris of Richmond](#)

[Lord Hunt of Wirral](#) (Chair)

[Lord Hutton of Furness](#)

[Baroness Lea of Lymm](#)

[Lord Powell of Bayswater](#)

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[Baroness Ritchie of Downpatrick](#)

[Lord Powell of Bayswater](#)

[Lord Rowlands](#)

[Lord Russell of Liverpool](#)

[Lord Thomas of Cwmgiedd](#)

Registered interests

Information about interests of Committee Members can be found in the last Appendix to this report.

Publications

The Committee's Reports are published on the internet at <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/>

Committee Staff

The staff of the Committee are Christine Salmon Percival (Clerk), Philipp Mende (Adviser), Chris Smith (Adviser), Jane White (Adviser) and Glenn Chapman (Committee Operations Officer).

Further Information

Further information about the Committee is available at <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/>

The progress of statutory instruments can be followed at <https://statutoryinstruments.parliament.uk/>

The National Archives publish statutory instruments with a plain English explanatory memorandum on the internet at <http://www.legislation.gov.uk/ukxi>

Contacts

Any query about the Committee or its work, or opinions on any new item of secondary legislation, should be directed to the Clerk to the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW. The telephone number is 020 7219 8821 and the email address is hlseclegscrutiny@parliament.uk.

Twenty Ninth Report

INSTRUMENTS UNDER THE EUROPEAN UNION (WITHDRAWAL) ACT 2018

Consideration of published draft instruments under Schedule 8 to the European Union (Withdrawal) Act 2018

Published draft on which the Committee makes no recommendations

- Road Vehicles (Authorised Weight) (Amendment) Regulations 2023

DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Merchant Shipping (Watercraft) Order 2023 (SI 2023/35)

Date laid: 18 January 2023

Parliamentary procedure: Negative

The purpose of this instrument is to close a loophole in the law to ensure that those who use mechanically powered personal or recreational watercraft (such as jet skis or small powerboats) in a dangerous or unsafe manner can be prosecuted. That watercraft were not in scope of the enforcement legislation was established by a judgment of the Court of Appeal decision in R v Goodwin in 2005. We wrote to the Minister to seek an explanation of why it has taken the Department for Transport (DfT) 17 years to get around to making this amendment: the correspondence is published in an Appendix to this Report.

We have repeatedly drawn the House's attention to DfT's extensive delays in implementing legislation that would allow the authorities to take enforcement action against non-compliant vessels. We are disappointed to find another example. The House may particularly wish to note that following an initial attempt in 2009, DfT only revived this legislative project in 2018 when a review identified that incidents involving fatalities were occurring: DfT has since discovered 11 confirmed fatalities involving personal watercraft over the past decade.

The House may wish to press the Minister further on why such a delay in implementing legislation to enable consistent national enforcement was allowed to occur and what other delayed legislative projects might be in DfT's backlog.

This Order is drawn to the special attention of the House on the ground that it is politically or legally important and gives rise to issues of public policy likely to be of interest to the House.

1. The purpose of this instrument is clearly stated in the Explanatory Memorandum (EM): it will close a loophole in the law to ensure that those who use mechanically powered personal or recreational watercraft (such as jet skis or small powerboats) in a dangerous or unsafe manner can be prosecuted.
2. The EM states that the Department for Transport (DfT) previously believed that such craft were within scope of the Merchant Shipping Act 1995 and the Harbours Act 1964 which would allow for enforcement and prosecution. However, following a serious accident involving two jet skis, the Court of Appeal ruled that such "watercraft" were not covered by the definition of "ships" used in the Acts. This legislation closes that loophole for powered watercraft.
3. Responses to the consultation, indicated that unpowered watercraft such as kayaks and rowing boats have a very good safety record and DfT suggests including them would be unnecessary.

Significant Delay

4. The court case in question, however, was the Court of Appeal decision in *R v Goodwin*¹ in 2005. What the EM does not make clear was why it has taken DfT 17 years to get around to making so necessary an amendment.
5. This Committee has for several years been pressing DfT to clear up a considerable backlog of unimplemented maritime legislation. After several letters on specific instruments, the then Minister, Robert Courts MP, was asked to give oral evidence on the matter. He conducted an audit and compiled a list of over 40 unimplemented commitments—both international and domestic—and gave an undertaking that the work would be completed by the end of 2023.²
6. Baroness Vere of Norbiton, Parliamentary Under Secretary of State (Aviation, Maritime and Security), has since taken over responsibility for maritime legislation and wrote to the Committee on 5 December 2022 with an update on DfT’s progress towards that goal.³ **This instrument was not on that list.** We therefore wrote to the Minister seeking an explanation for the delay and in particular:
 - how many serious incidents there have been involving watercraft (powered and unpowered) per year since 2005; and
 - how the Marine and Coastguard Agency followed them up, if they had no legal powers of enforcement.
7. The correspondence is published in full in Appendix 1.
8. We note in particular from the Minister’s reply that after an initial consultation on remedial legislation in 2009, which identified some difficult issues, the project was shelved until

“an internal review in 2018 which identified that the number, size and power of PWCs [“personal watercraft”], in particular, were increasing and that, for the first time, incidents involving fatalities were occurring. Preparation of substantially revised draft legislation was completed and a second consultation document drafted ... Work to finalise this was, however, paused during the early stages of the pandemic to allow focusing of resource on crisis response issues. As soon as suitable resource became available, the second consultation document was prioritised and published in September 2021. We received nearly 500 responses to that exercise.”

Conclusion

9. **We have repeatedly drawn the House’s attention to DfT’s extensive delays in implementing legislation that would allow the authorities to take enforcement action against non-compliant vessels. We are disappointed to find another example.**
10. Since the 2005 ruling, despite 11 fatalities, no prosecutions of incidents involving personal watercraft have been taken forward by the Maritime and

1 Court of Appeal decision, *R v Goodwin* [2005] EWCA Crim 3184.

2 SLSC, [17th Report](#) (Session 2019–21, HL Paper 73), see Appendix 2 Oral evidence.

3 SLSC, [22nd Report](#) (Session 2022–23, HL Paper 114), see page 4 onwards, particularly page 8 on domestic legislative projects.

Coastguard Agency under the Merchant Shipping Act 1995. The Minister's letter continues:

“Responses indicated that there had been several prosecutions by [harbour] authorities for offences such as speeding and that there had been a significant increase in reports of dangerous use and anti-social behaviour. However, this picture is dependent on the provisions in place in managed waters which can be enforced and is not comprehensive as not all authorities have measures in place which could result in prosecutions.”

11. **The House may wish to press the Minister further on why such a delay in implementing legislation to enable consistent national enforcement was allowed to occur and what other delayed legislative projects might be in DfT's backlog.**

INSTRUMENTS RELATED TO COVID-19

Draft Airports Slot Allocation (Alleviation of Usage Requirements) Regulations 2023

12. An airport “slot” is a permission to use all necessary airport infrastructure at a specified date and time for take-off or landing. Allocation of airport slots at congested airports is governed by Council Regulation (EEC) No 95/93 which, among other things, provides that if an airline has used at least 80% of its slots in the preceding winter or summer season, it is entitled to the same series of slots in the following equivalent season (the “80:20 rule”). The Government have been managing these rules more flexibly during the pandemic, but this instrument returns the airport slot usage to the 80:20 rule for the summer 2023 season (26 March to 28 October 2023). Due to the pandemic’s continuing effects on air travel however, it maintains some mitigations for non-use of slots, in particular for routes where government-imposed measures related to COVID-19 severely reduce the demand for passenger travel. The previous instrument also allowed a waiver that allows up to 10% of slots to be treated as operated if they are handed back before the start of the season. This instrument maintains the waiver but reduces it to 5%.

INSTRUMENTS OF INTEREST

Schools and Early Years Finance (England) Regulations 2023 (SI 2023/59)

13. These Regulations, made under the School Standards and Framework Act 1998 and the Education Act 2002, introduce initial changes to the way local authorities (LAs) can allocate schools funding, principally provided through central Government's Dedicated Schools Grant (DSG), for the 2023–24 financial year. The Department for Education (DfE) says that, when fully implemented, the new approach will ensure “full fairness and consistency” in school funding.
14. DSG allocations are determined by the National Funding Formulae (NFF), which is calculated using factors such as the number of pupils and the levels of ‘high needs’ in the area. states that the NFF will provide an average per pupil increase in funding of 1.9% for mainstream schools in 2023–24. Currently, once allocated its DSG, a LA can set its own parameters for how each school's budget is determined. The Government, however, intends to move, over a number of years, to a system of “direct” NFF whereby each school's allocation is determined directly through the national formulae without substantial local adjustment. These Regulations implement the first stage of the transition, in which, for 2023–24, LAs will be allocated a DSG but will only be able to use the parameters in the NFF when determining each school's budget (with the exception of a small number of locally determined factors). Moreover, LAs will be required to move the parameters in their calculations at least 10% closer to those factors' weights in the NFF, unless they are already very close. DfE states that many LAs are already “mirroring” the NFF and will see little change, but for 30 LAs their formulae are currently “significantly different” to the NFF.
15. DfE told us that completing the move to direct NFF requires primary legislation and that no “end date” has been decided, but that the next steps will be set out in July 2023. DfE said that an updated assessment of the transition, taking into account the effects of these Regulations, would also be published in July 2023.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft instruments subject to affirmative approval

Airports Slot Allocation (Alleviation of Usage Requirements) Regulations 2023

Forensic Science Regulator Draft Code of Practice

High-Risk Buildings (Key Building Information etc.) (England) Regulations 2023

Judicial Pensions (Fee-Paid Judges) (Amendment) Regulations 2023

Draft instruments subject to annulment

British Board of Film Classification: Proposal for designation of the appointment of a new President

Instruments subject to annulment

SI 2023/59	School and Early Years Finance (England) Regulations 2023
SI 2023/61	Family Procedure (Amendment) Rules 2023
SI 2023/63	Control of Explosives Precursors and Poisons Regulations 2023
SI 2023/77	Firearms (Amendment) Rules 2023
SI 2023/81	National Health Service (Charges to Overseas Visitors) (Amendment) Regulations 2023
SI 2023/82	Marriage and Civil Partnership (Minimum Age) Act 2022 (Consequential Amendments) Regulations 2023

APPENDIX 1: MERCHANT SHIPPING (WATERCRAFT) ORDER 2023

Letter from Lord Hodgson of Astley Abbots, Chair of the Secondary Legislation Scrutiny Committee, to Baroness Vere of Norbiton, Parliamentary Under Secretary of State (Aviation, Maritime and Security) at the Department for Transport

The Secondary Legislation Scrutiny Committee has today given initial consideration to this instrument but has asked for further information before concluding its scrutiny.

The intent of the instrument is clearly to ensure that “watercraft” are included in enforcement legislation, however the Committee would like to understand:

- Why the Department for Transport (DfT) is only legislating for this now, following the court case in 2005 and a consultation in 2009?
- In supplementary information we were told: “The statistics showed it [incidents involving watercraft] increased as an issue and we returned to the work in 2020”:
 - How many serious incidents have there been involving watercraft (powered and unpowered) per year since 2005?
 - Have any “watercraft” accidents been successfully prosecuted since 2005?
 - How did MCA follow those accidents up, if they had no legal powers of enforcement?
- Why was this item not included in the maritime backlog (which covered delayed legislation from both international and domestic sources)? We note that the second consultation on this instrument was conducted between 6 September 2021 and 1 November 2021, which coincided with the date Mr Courts appeared before this Committee to give oral evidence.
- You also wrote to us, on 5 December 2022, to state that the backlog of maritime legislation is now well on track to be resolved by the end of 2023. With this late addition to the list, how can DfT reassure Parliament that there are no other significant items of legislation that have been similarly overlooked?

31 January 2023

Letter from Baroness Vere of Norbiton to the Rt. Hon. Lord Hunt of Wirral MBE, Chair of the Secondary Legislation Scrutiny Committee

Your predecessor, Lord Hodgson, wrote to me on 31 January following the Committee’s initial consideration of the above Order seeking clarification on several wider points in relation to its development. Our responses are set out below.

Why the DfT is only legislating for this now, following the court case in 2005 and a consultation in 2009?

Following the Court of Appeal’s Judgment in *R v Goodwin* [2005] EWCA Crim 3184, a consultation on personal watercraft (PWCs) was originally completed in 2009. The outcome suggested the draft legislation proposed at the time required significant further development. Responses were, largely, at opposing ends of the spectrum and it was not possible to draw any firm conclusions about how this should be taken forward. It was, however, clear that significant additional

work was required to ensure that future legislation in this area would provide a proportionate and effective response to the Court of Appeal's challenge.

We continued to engage with stakeholders to identify practical options which might unlock a solution. This process was given fresh impetus following an internal review in 2018 which identified that the number, size and power of PWCs, in particular, were increasing and that, for the first time, incidents involving fatalities were occurring. Preparation of substantially revised draft legislation was completed and a second consultation document drafted. The change in use of PWCs expanded the possibilities for legislation which due to the remaining complexity still required careful thought to deliver. Work to finalise this was, however, paused during the early stages of the pandemic to allow focusing of resource on crisis response issues.

As soon as suitable resource became available, the second consultation document was prioritised and published in September 2021. We received nearly 500 responses to that exercise. An overwhelming majority supported the rationale for the introduction of legislation but many also offered detailed comments on the draft Order. It was necessary to explore the issues raised and analyse these in detail to ensure that the legislation remained appropriate and fit for purpose. The accompanying Explanatory Memorandum explains the amendments we subsequently made to deliver this outcome.

How many serious incidents have there been involving watercraft (powered and unpowered) per year since 2005?

There are no national statistics collated by government for the number of serious incidents involving watercraft. The second consultation identified published sources of information and presented these for consideration by stakeholders. These included the eleven confirmed fatalities involving PWCs over the past decade. The consultation also sought advice on other potential sources of information which could further improve the evidence base.

The majority of those who responded to this question indicated that these figures appeared to be accurate and confirmed they were from the best-known sources available. Other sources were identified but their antecedence could not be corroborated.

Although the diversity of this sector represents a significant barrier to the accurate and consistent recording of statistics, we recognise their great value and are working to improve the evidence available to the Department. This includes, for example, working with the National Water Safety Forum to establish a substantially revised and updated water incident database.

Have any "watercraft" accidents been successfully prosecuted since 2005?

The 2005 Court of Appeal judgment was restricted in scope to "personal watercraft" (such as Jet Skis). Since the ruling, there have been no prosecutions taken forward by the Maritime and Coastguard Agency under the Merchant Shipping Act 1995. Again, the consultation sought advice from stakeholders as to whether there had been any prosecutions by harbour authorities where any local management measures were in place. Responses indicated that there had been several prosecutions by these authorities for offences such as speeding and that there had been a significant increase in reports of dangerous use and anti-social behaviour. However, this picture is dependent on the provisions in place in managed waters which can be enforced and is not comprehensive as not all authorities have measures in place which could result in prosecutions.

The Order will provide all harbour authorities with the ability to raise cases with the Maritime and Coastguard Agency, as the national enforcement authority, providing another route to enforcement. The national legislation is also applicable outside of waters managed by harbour authorities so covers incidents on all UK waters.

How did MCA follow those accidents up, if they had no legal powers of enforcement?

Examples of serious incidents involving watercraft are rare and there has not been another similar case to Goodwin since the Court of Appeal's judgment in 2005. Most watercraft are used in managed waters and, as noted above, harbour authorities already have powers to introduce byelaws or harbour directions to deal with dangerous use issues and prosecute these if applicable at that level. They remain best placed to consider what measures may be necessary given significant variations in geography and usage.

We have, and will continue, to work in partnership with these authorities, Harbour Masters and user groups to raise awareness of the issues and issue guidance and advice to prevent incidents occurring in the first instance.

Why was this item not included in the maritime backlog (which covered delayed legislation from both international and domestic sources)?

I apologise that this Order was not included in the legislation identified with the maritime backlog. We had believed that the Committee's concerns were largely with delays in the transposition of international requirements and responded on that basis.

I have noted above the reasons why this Order has taken longer than expected to deliver. In recognition of the significant engagement required to resolve these, we have never specified a timetable for the introduction of legislation in this area but have continued to prioritise its development when the necessary resources were available.

How can DfT reassure Parliament that there are no other significant items of legislation that have been similarly overlooked?

The Department has put structures in place to enhance the management of our secondary legislation programme and ensure officials at a senior level are regularly engaged. Additionally, there is work ongoing to upskill the Department on secondary legislation knowledge and skills.

Although this legislation has had a difficult birth, I am happy that we have now delivered an important change in the law which will protect the victims of incidents from those who use powered watercraft in a dangerous manner.

The Order will come into force on 31 March 2023 in time for the start of the recreational maritime sports season. We issued a Press Release on the laying date to raise awareness of the new legislation within the sector and are working with a wide range of user groups to ensure that advice and guidance is available prior to coming into force.

6 February 2023

APPENDIX 2: INTERESTS AND ATTENDANCE

Committee Members' registered interests may be examined in the online Register of Lords' Interests at <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests>. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 7 February 2023 and included in this report, Members declared the following interests:

Merchant Shipping (Watercraft) Order 2023 (SI 2023/35)

Lord De Mauley

Controlling interest in a commercially operated lake in West Oxfordshire

Schools and Early Years Finance (England) Regulations 2023 (SI 2023/59)

Baroness Randerson

Chancellor of Cardiff University

Attendance:

The meeting was attended by Lord Hunt of Wirral, Lord De Mauley, Baroness Harris of Richmond, Lord Hutton of Furness, Baroness Lea of Lymm, Lord Powell of Bayswater, Baroness Randerson, Baroness Ritchie of Downpatrick, Lord Rowlands, Lord Russell of Liverpool and Lord Thomas of Cwmgiedd.