

HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

53rd Report of Session 2019–21

Proposed Negative Statutory Instruments under the European Union (Withdrawal) Act 2018

Drawn to the special attention of the House:

Early Years Foundation Stage (Miscellaneous Amendments) and Childcare Fees (Amendment) Regulations 2021

Includes information paragraphs on:

5 instruments relating to COVID-19
Removal and Disposal of Vehicles
(Amendment) (England) Regulations 2021

Protection of Wrecks (RMS Titanic)
(Amendment) Order 2021

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Secondary Legislation Scrutiny Committee

The Committee's terms of reference, as amended on 22 February 2021, are set out on the website but are, broadly:

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

<u>Baroness Bakewell of Hardington Mandeville</u>	<u>Viscount Hanworth</u>	<u>The Earl of Lindsay</u>
<u>Rt Hon. Lord Chartres</u>	<u>Lord Hodgson of Astley Abbotts</u>	<u>Lord Lisvane</u>
<u>Rt Hon. Lord Cunningham of Felling</u>	(Chair)	<u>Lord Sherbourne of Didsbury</u>
<u>Lord German</u>	<u>Lord Liddle</u>	<u>Baroness Watkins of Tavistock</u>

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), Jane White (Adviser) and Ben Dunleavy (Committee Assistant).

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/uksi>

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.

Fifty Third Report

PROPOSED NEGATIVES UNDER THE EUROPEAN UNION WITHDRAWAL ACT 2018

Proposed Negative Statutory Instruments about which no recommendation to upgrade is made

- Aviation Safety (Amendment) (No. 2) Regulations 2021

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Early Years Foundation Stage (Miscellaneous Amendments) and Childcare Fees (Amendment) Regulations 2021 (SI 2021/432)

Date laid: 31 March 2021

Parliamentary procedure: negative

*These Regulations introduce a new Reception Baseline Assessment (RBA), to help measure at school level the progress children make throughout primary school; and ensure that all early years providers in England follow the learning and development, assessment and safeguarding and welfare requirements, as set out in an updated Statutory Framework for the Early Years Foundation Stage. The changes will take effect from September 2021. **We are concerned that the RBA will be introduced at a time when the workload of teachers will be significant, schools will be focused on re-opening and special attention will need to be paid to those children who were unable to develop their language skills because of social isolation during the pandemic: we believe that it would be helpful to provide schools with flexibility and enable them to implement the RBA for the cohort of children starting Reception this year in January 2022.***

The Regulations are drawn to the special attention of the House on the ground that they are politically or legally important and give rise to issues of public policy likely to be of interest to the House.

1. These Regulations have been laid by the Department for Education (DfE) with an Explanatory Memorandum (EM). They introduce a new Reception Baseline Assessment (RBA) and ensure that all early years providers in England follow the learning and development, assessment and safeguarding and welfare requirements, as set out in an updated Statutory Framework for the Early Years Foundation Stage. The changes are set out in more detail below.

Reception Baseline Assessment (RBA)

2. The instrument makes the RBA a statutory requirement from September 2021. DfE says that following an initial consultation in 2013,¹ the RBA was implemented on an optional basis in September 2015, using a model which enabled schools to choose their preferred assessment. This was not considered successful and, following further consultation in 2017,² trials of a revised RBA were conducted in 2018/19, followed by a national pilot in 2019/20. The original plan was to implement the RBA in the 2020/21 academic year, but this was postponed by a year due to the coronavirus pandemic. Schools were able to participate in the RBA as early adopters in 2020/21, enabling them to familiarise themselves with the assessment materials and the administration of the RBA.

1 DfE. *New national curriculum: primary assessment and accountability* 17 July 2013: <https://www.gov.uk/government/consultations/new-national-curriculum-primary-assessment-and-accountability> [accessed 22 March 2021].

2 DfE and Standards and Testing Agency, 'Primary assessment in England' (30 March 2017): <https://www.gov.uk/government/consultations/primary-assessment-in-england> [accessed 22 April 2021].

3. The RBA will be administered in schools within the first six weeks of children starting Reception (at age four to five). DfE says that this will “create a valid and reliable starting point from which to measure pupils’ progress” from starting school to the end of key stage 2/Year 6 (the end of primary education at age 10 to 11). According to DfE, the RBA will be a teacher-mediated, one-to-one assessment of children’s early mathematics, literacy, communication and language skills, lasting up to 20 minutes and similar in content and style to existing checks which the majority of schools carry out when children start Reception. The Department says that the intention is for the RBA to replace the statutory national curriculum tests and teacher assessments at the end of key stage 1/Year 2 (age six to seven) which currently form the starting point of school progress measures. The current assessments are to become optional once the RBA has been established fully, with the exception of a phonics screening check at the end of Year 1 (age five to six) which will remain a statutory requirement.
4. DfE says that no pupil-level data from the RBA will be published. The data will be used to measure school-level progress from Reception to the end of key stage 2, with school-level data to be published from 2028. In the interim years, progress measures will continue to be published using the current key stage 1 assessments as the baseline.
5. The instrument enables the Secretary of State to make delegated supplementary provisions, after consulting with the Office of Qualifications and Examinations Regulation (Ofqual) and others as appropriate. DfE says that supplementary provisions will be made, for example, in relation to the monitoring of assessment arrangements for the RBA and to require schools to inform parents about the RBA taking place. Parents will not be given the RBA data for their child. We asked the Department why the requirement to inform parents had not been included in this instrument and about the rationale for not sharing the data with parents. DfE responded:

“The requirement to inform parents of the RBA taking place has not been included in the SI itself as the delegated supplementary provisions, which include the RBA Assessment and Reporting Arrangements (ARAs), will have just as much statutory force as if included in the SI by virtue of section 42(6C) of the Childcare Act and the insertion of new article 3D in the Early Years Foundation Stage (Learning and Development Requirements) Order 2007. Including this requirement in the delegated supplementary provisions, together with other arrangements, was thought to be a more coherent strategy, as all the relevant provisions will be in the same place.

As the purpose of the RBA is to create a baseline measure, the data from the assessment, including numerical scores, will not be shared with external bodies, including schools, teachers, pupils or parents/carers. There is no legal requirement for schools to report RBA narrative statements to parents, although it may be helpful to use them as the basis of any feedback to parents. However, schools must share RBA narrative statements with parents if they are requested. The ARAs will stipulate that parents be informed of the RBA taking place.”

6. DfE says that during the 2017 consultation, 56% of respondents agreed with moving to a baseline assessment at Reception and supported the introduction of the RBA, while 28% disagreed with this approach. According to DfE,

those in favour found that the RBA would be “a fairer way to evaluate school performance, particularly for schools in challenging circumstances and that credit should be given to schools for the progress made in reception, and years 1 and 2”. Some concern has been raised, however, about the appropriateness and effectiveness of the RBA and the decision to implement it from September 2021, at a time when schools may still be dealing with the impacts of the pandemic and some children starting Reception may not have had the opportunity to attend nursery.³

7. We asked the Department whether it had considered a further delay. DfE told us that:

“The Department has confirmed that the RBA will be statutory for schools from September 2021. The RBA will be administered as a short, teacher-mediated, age-appropriate assessment covering material that many pupils will already be familiar with. Teachers administering the RBA in 2021/22 academic year will be provided with the assessment materials and guidance in good time in order to familiarise themselves adequately with the assessment, including access to the training materials. The assessment will be carried out in normal teaching time, and teachers will receive a series of short narratives explaining what knowledge and skills each child demonstrated during the assessment. This can be used as one source of evidence to inform teaching, and will be a helpful snapshot of where each child is when they enter reception. Additionally, the assessment itself will provide valuable one-to-one time with each child, particularly during those important first weeks.”

8. **While we note that RBA assessment materials, guidance and access to the training materials will be available to schools before the summer holidays, we are concerned about the introduction of the RBA in September, at a time when the workload of teachers will be significant, and schools will be focused on re-opening. Special attention will need to be paid to those children who were unable to develop their language skills because of social isolation during the pandemic. We believe that it would be helpful, therefore, to provide schools with flexibility and enable them to implement the RBA for the cohort of children starting Reception this year in January 2022.**

9. We also asked whether the RBA would take into account that children who will start Reception in September may not have been in nursery over the last year because of the pandemic and may find it difficult to adapt to a school environment. DfE explained that:

“The purpose of the RBA is to act as the starting point to enable the Department to measure the progress schools make with their pupils. Whilst nurseries remained largely open during the COVID-19 pandemic, the attendance rates of nursery pupils do not impact on the RBA as an assessment. The assessment will assess all children on-entry, accounting for any impact on their education up to this point. This is important so that we can acknowledge and give credit to schools that do well to address lost time in education. The progress measure ensures schools are recognised for the work they do with their pupils, in particular for

3 See: More Than a Score, ‘Homepage’: <https://www.morethanascore.org.uk/> [accessed 22 April 2021].

those with a challenging intake and those who have been significantly affected by the COVID-19 pandemic.

The assessment is not a test of pupils' knowledge and should not be viewed in the same way as the tests taken in formal conditions at the end of year 6 or in secondary school. It will simply provide a snapshot of where pupils are in their development when they start school. Pupils will not have to prepare for it, either in pre-school or at home.”

10. Finally, given that the RBA will be a 20-minute assessment of four year-olds in their first weeks at school, we asked how robust it would be as a baseline for assessing children's progress and the school's performance over a seven-year period. DfE responded that:

“The purpose of accountability is to ensure schools are getting the best outcomes for their pupils. It is therefore right that we put in place incentives for schools to focus on the progress of all their pupils, including during the very important first three years, which the current progress measure does not capture.

We will ensure that the data collected is valid and reliable for the purpose of creating a value-added progress measure. Value-added progress measures are well regarded by schools and statisticians as a fairer way to judge school performance, as they take prior attainment into account. The Department has published a full validity report⁴ on the RBA, demonstrating the reasons why we feel it is valid and reliable.

We have always made it clear that data is just the starting point for a conversation about schools' performance - and why we provide additional background information about schools alongside performance data.”

Early Years Foundation Stage Reforms

11. The instrument also implements changes to the Statutory Framework for the Early Years Foundation Stage document (“the Document”), by ensuring that from 1 September 2021 all early years providers in England will have to follow an updated version of the Document, with the aim of improving outcomes for all children at age five, especially disadvantaged children, and reducing teacher and practitioner workload, so that more time can be spent interacting with children in their care.
12. According to DfE, the changes to the Document include making sure that the educational programmes focus on early language and other key aspects within a broad curriculum; making the early learning goals clearer and more specific to make it easier for teachers to form accurate judgments; removing the ‘exceeding’ criteria and the statutory requirement for local authorities to moderate Early Years Foundation Stage Profile judgements in 25% of schools; and changing the safeguarding and welfare requirements to also promote good oral health.

⁴ DfE, *Reception baseline assessment validity report* (February 2020): <https://www.gov.uk/government/publications/reception-baseline-assessment-validity-report> [accessed 22 April 2021].

Transitional Arrangements

13. Finally, the instrument extends temporarily a transitional provision to allow sessional childcare providers (other than childminders)⁵ which operate for fewer than four hours per day and which transferred automatically on 1 September 2008 from a previous childcare register onto the early years register, to continue to pay the same annual fee rate until 31 August 2023 at the latest. According to DfE, this is to help reduce the financial burden on these providers and help promote affordability of childcare while the Department develops new fee arrangements for all early years providers.

Conclusion

14. Amongst other changes, these Regulations introduce from September a new assessment of children at the start of Reception which is to help measure at school level the progress children make throughout their time at primary school and to ensure that schools, especially those with a challenging intake, are recognised for the work they do with their pupils. **We are concerned about the timing: at a time when the workload of teachers will be significant, schools will be focused on re-opening and special attention will need to be paid to those children who were unable to develop their language skills because of social isolation during the pandemic. We believe that it would be helpful to provide schools with flexibility and enable them to implement the RBA for the cohort of children starting Reception this year in January 2022. The Regulations are drawn to the special attention of the House on the ground that they are politically or legally important and give rise to issues of public policy likely to be of interest to the House.**

⁵ The majority of these providers are small pre-school groups/community centres, for example providers operating from a leisure centre during school holidays or a playgroup open for just a few days per week during term time only.

INSTRUMENTS RELATING TO COVID-19

Changes to business regulation and practice

Town and Country Planning (General Permitted Development) (England) (Amendment) (Coronavirus) Order 2021 (SI 2021/467)

15. This instrument introduces a new temporary permitted development right to allow the use of moveable structures on land within the existing curtilage of cafes, restaurants and pubs, including where these are listed buildings, and historic visitor attractions where they are listed buildings. The temporary permitted development right will be in force until 1 January 2022. The Ministry of Housing, Communities and Local Government says that the aim is to support the economic recovery of hospitality businesses and heritage attractions. The measures allow businesses to use temporary structures to increase outdoor seating capacity through new spaces, such as temporary marquees, and enable heritage visitor attractions to operate while minimising the need for visitors to gather in enclosed spaces, for example through the use of temporary moveable structures for ticket sales.

Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) (Amendment) (No. 2) Regulations 2021 (SI 2021/487)

16. This instrument extends until 30 September 2021 the protections introduced by earlier instruments, so that various statutory entitlements based on a week's pay and connected with termination of employment are not reduced as a result of an employee being furloughed under the Coronavirus Job Retention Scheme (CJRS). Without this instrument, the protections would end on 30 April 2021. This is the third extension⁶ and reflects the extension of the CJRS by HM Treasury until 30 September 2021. The protected entitlements include redundancy pay and compensation for unfair dismissal. The instrument also extends the effect of the earlier instruments regarding how a week's pay is to be calculated for the purpose of deciding whether an employee is taken to be on short-time for statutory purposes. The instrument makes a further change to reflect a new alternative scheme cap of £576.92 per employee per week, in addition to the existing monthly cap of £2,500 per employee.

Public services

Education (Pupil Information) (England) (Coronavirus) (Amendment) Regulations 2021 (SI 2021/482)

17. This instrument makes changes to relieve head teachers of maintained schools in England of their obligations to include in their annual report to parents and adult pupils for the current school year 2020/21 information on a pupil's attendance and certain information in relation to assessment and attainment at Key Stage 1 and 2. According to the Department for Education (DfE), these temporary changes address the impact of the pandemic on pupils' attendance and the lack of assessment information following the cancellation of statutory assessments at Key Stage 1 and 2 in the current school year. The changes mirror the temporary measures introduced in the 2019/20 academic

⁶ [SI 2020/814](#), protected furloughed employees until 31 October 2020. Following two extensions of the CJRS, this period was extended until 31 March 2021 by [SI 2020/1296](#) and until 30 April 2021 by [SI 2021/177](#).

year.⁷ DfE says that information on attendance would not reflect the remote education many pupils have received, and that the changes will not prevent schools from raising any concerns they may have about a pupil's attendance with parents. Non-statutory guidance will advise schools to provide a general assessment of attendance, participation in remote education and progress and achievements in their reports to parents and adult pupils. Attendance information will continue to be provided in common transfer files (CTF) which are passed on when a pupil changes school.

Changes to benefits

Social Security (Coronavirus) (Miscellaneous Amendments) Regulations 2021 (SI 2021/476)

18. These Regulations extend the expiry date for special pandemic relaxations for several benefits:
- The Employment and Support Allowance and Universal Credit (Coronavirus Disease) Regulations 2020⁸ provisions which suspended waiting days and removed the requirement to look for work for those either infected with COVID-19, self-isolating, or looking after a child in either of those categories, is extended by another four months to 12 November 2021.
 - Regulations 8 and 9 of the Social Security (Coronavirus) (Further Measures) Regulations 2020⁹ are extended to 31 August 2021. Regulation 8 allows periods of sickness or isolation with COVID-19 to be ignored for the purposes of Jobseeker's Allowance. Regulation 9 allow carers to retain their entitlement to carer's allowance if they or the person cared for are sick or must self-isolate due to COVID-19.
 - Provisions allowing prisoners temporarily released because of COVID-19 to claim benefits under the Social Security (Coronavirus) (Prisoners) Regulations 2020¹⁰ are also extended until 31 August 2021. However, the scope of the provision is narrowed to make it clear that separate arrangements apply to those released for other reasons.

Social Security and Tax Credits (Miscellaneous and Coronavirus Amendments) Regulations 2021 (SI 2021/495)

19. This instrument ensures that a one-off payment of £500 that will be paid under the COVID-19 support scheme to working households receiving tax credits is disregarded as income for the purposes of tax credits. This will ensure that recipients will receive the full benefit of the support payment. The payment was announced at Budget 2021 and is being introduced to continue support for low-income households during the pandemic after the temporary increase in Working Tax Credit ended on 5 April.
20. The instrument also corrects an omission in a previous instrument¹¹ to provide that non-European Economic Area nationals who are subject to

7 Education (Pupil Information) (England) (Coronavirus) (Amendment) Regulations 2020 ([SI 2020/599](#)).

8 [SI 2020/289](#).

9 [SI 2020/371](#).

10 [SI 2020/409](#).

11 Social Security, Child Benefit and Child Tax Credit (Amendment) (EU Exit) Regulations 2020 ([SI 2020/1505](#)).

immigration control need to be legally working in order to be entitled to Child Benefit under a Trade and Continuity Agreement (TCA) which replaces one of the European Union Association Agreements which provided for the right to receive family allowances (so-called non-equal treatment EUAAs). According to HM Revenue and Customs, this will provide continuity and ensure that access to family benefits under TCAs is the same as the access that was provided under the non-equal treatment EUAAs until the end of the Transition Period on 31 December 2020.

INSTRUMENTS OF INTEREST

Removal and Disposal of Vehicles (Amendment) (England) Regulations 2021 (SI 2021/461)

21. This instrument rectifies an error in the Removal and Disposal of Vehicles Regulations 1986¹² to restore the power to civil enforcement officers in England to remove vehicles from a road for parking contraventions following the issue of a penalty charge notice. An incorrect cross reference in a previous amending instrument unintentionally removed this power with effect from 1 April 2015. The Department for Transport told us that local authorities who have removed vehicles in the last six years and charged for their return will have had legal cover to do so under the Interpretation Act 1978. **We nonetheless regard this error as an example of poor checking by the Department.**

Protection of Wrecks (RMS Titanic) (Amendment) Order 2021(SI 2021/470)

22. There is an International Agreement between the UK, the USA, France and Canada concerning the shipwrecked vessel RMS Titanic.¹³ Article 4 of this Agreement requires each State to regulate through a system of project authorisations:
- “(a) entry into the hull sections of RMS Titanic...;” and
- “(b) activities aimed at the artifacts from the RMS Titanic found outside of the hull of the wreck...”
23. This requirement is implemented in the UK by means of the Protection of Wrecks (RMS Titanic) Order 2003,¹⁴ which provides that specified activities carried out in the designated area around the wreck of the RMS Titanic require a licence granted by the Secretary of State, which may impose conditions or restrictions.
24. Article 4(2)(b) of that Order implies that activities aimed at conserving or curating artefacts found outside the hull of the wreck do not need a licence. This does not comply with the terms of the International Agreement and is not the policy intention: this amendment therefore clarifies that all activities involving artefacts from RMS Titanic must be licensed.

12 [SI 1986/183](#).

13 Agreement concerning the Shipwrecked Vessel RMS Titanic ([CP 205](#)). The agreement was made in 2003 but only came into force on 18 November 2019.

14 [SI 2003/2496](#).

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft instruments subject to affirmative approval

Pollution Prevention and Control (Fees) (Miscellaneous Amendments) Regulations 2021

UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (Consequential Provisions and Modifications) Order 2021

Instruments subject to annulment

- SI 2021/456 Social Security (Claims and Payments) (Amendment) Regulations 2021
- SI 2021/458 Scarborough Borough Council (Removal of Pilotage Functions) Order 2021
- SI 2021/459 Magistrates' Courts (Amendment) Rules 2021
- SI 2021/461 Removal and Disposal of Vehicles (Amendment) (England) Regulations 2021
- SI 2021/462 Civil Proceedings and Gender Recognition Application Fees (Amendment) Order 2021
- SI 2021/463 Solvency 2 (Credit Risk Adjustment) Regulations 2021
- SI 2021/465 Supervision of Accounts and Reports (Prescribed Body) and Companies (Defective Accounts and Reports) (Authorised Person) Order 2021
- SI 2021/467 Town and Country Planning (General Permitted Development) (England) (Amendment) (Coronavirus) Order 2021
- SI 2021/470 Protection of Wrecks (RMS Titanic) (Amendment) Order 2021
- SI 2021/476 Social Security (Coronavirus) (Miscellaneous Amendments) Regulations
- SI 2021/482 Education (Pupil Information) (England) (Coronavirus) (Amendment) Regulations 2021
- SI 2021/487 Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) (Amendment) (No. 2) Regulations 2021
- SI 2021/495 Social Security and Tax Credits (Miscellaneous and Coronavirus Amendments) Regulations 2021

APPENDIX 1: 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 27 April 2021, Members declared no interests.

Attendance:

The meeting was attended by Baroness Bakewell of Hardington Mandeville, Lord Cunningham of Felling, Lord German, Viscount Hanworth, Lord Hodgson of Astley Abbotts, the Earl of Lindsay, Lord Lisvane, Lord Sherbourne of Didsbury and Baroness Watkins of Tavistock.