



House of Lords
House of Commons
Joint Committee on Statutory
Instruments

**Sixteenth Report of
Session 2021–22**

Drawing special attention to:

Air Navigation (Amendment) Order 2021 (S.I. 2021/879)

Domestic Abuse Support (Local Authority Strategies and Annual Reports) Regulations 2021 (S.I. 2021/990)

National Health Service (General Medical Services Contracts and Personal Medical Services Agreements) (Amendment) (No.2) Regulations 2021 (S.I. 2021/995)

National Lottery (Revocation and Amendment) Regulations 2021 (S.I. 2021/1009)

Health Protection (Coronavirus, International Travel and Operator Liability) (England) (Amendment) (No.12) Regulations 2021 (S.I. 2021/1066)

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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. 74](#), 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.

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Instruments reported

At its meeting on 24 November 2021 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 five 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. 2021/879: Reported for defective drafting

Air Navigation (Amendment) Order 2021

1.1 The Committee draws the special attention of both Houses to this Order on the ground that it is defectively drafted in one respect.

1.2 This Order, which is subject to the negative resolution procedure, creates requirements to notify the Civil Aviation Authority of specified details relating to en-route obstacles the height of which is 100 metres or more above ground level. In relation to existing en-route obstacles, article 8 (inserted article 225A(7)) places the obligation to notify on the “person in charge” of that obstacle. The Committee asked the Department for Transport to explain what it is about the context that puts it beyond doubt who the “person in charge” of an existing en-route obstacle is and how the person in charge is meant to know that they satisfy the criteria for being in charge. In a memorandum printed at Appendix 1, the Department explains that “in most cases” it will be clear who the person in charge is, for example, the owner of the building or the person in occupation, the user of the obstacle (where, for example, the obstacle is a crane) or the site developer where the obstacle is part of a construction site. The Department refers to guidance relating to obstacles in other situations where “person in charge” is used in the Air Navigation Order 2016 and refers to guidance on the en-route obstacle notification process published on their own and other websites. Whilst this guidance may provide useful context, guidance cannot be relied on to remedy lack of clarity in the meaning of the legislative text. It should always be clear on the face of legislation on whom an obligation is being imposed. In this case, it will not always be clear as a matter of natural language usage who is “in charge” of a property, particularly as between owners and occupiers, or as between different occupiers. **The Committee accordingly reports article 8 (inserted article 225A(7)) for defective drafting.**

2 S.I. 2021/990: Reported for doubtful *vires*

Domestic Abuse Support (Local Authority Strategies and Annual Reports) Regulations 2021

2.1 The Committee draws the special attention of both Houses to these Regulations on the ground that there is doubt as to whether they are *intra vires* in one respect.

2.2 These Regulations, which are subject to the negative resolution procedure, make provision about the form and content of annual reports that relevant local authorities are required to submit to the Secretary of State under section 59 of the Domestic Abuse Act 2021. Regulation 7 provides that the section 59 report must be in the form specified

by the Secretary of State from time to time by notice to the relevant local authority. It appeared to the Committee that this sub-delegation of power was not permitted by the enabling power—section 59(2) of the Domestic Abuse Act 2021—which states that “The Secretary of State may by regulations make provision about (a) the form of the report, and (b) the content of the report.” The Committee asked the Department for Levelling Up, Housing and Communities to explain. In a memorandum printed at Appendix 2, the Department argues that the power in section 59(2)(a) is broad and is not limited to specifying the form of a report in the regulations themselves. The Committee disagrees. By conferring express power to make provision about the form and content of the report by subordinate legislation, the enabling power provides a single legislative mechanism for dealing with those matters, and it is not open to the Department to create another parallel route by sub-delegating powers to itself. As to the breadth of a power to “make provision”, the Committee refers to its Fifth Report of Session 2019–21 in relation to S.I. 2020/41, where it recorded that the general power to “make provision” does not rebut the strong presumption against sub-delegation. **The Committee accordingly reports regulation 7 for doubt as to whether it is *intra vires*.**

3 S.I. 2021/995: Reported for doubtful *vires* and for failure to comply with proper legislative practice

National Health Service (General Medical Services Contracts and Personal Medical Services Agreements) (Amendment) (No.2) Regulations 2021

3.1 The Committee draws the special attention of both Houses to these Regulations on the ground that there is doubt as to whether they are *intra vires* in one respect and that they fail to comply with proper legislative practice in another respect.

3.2 These Regulations, which are subject to the negative resolution procedure, amend the National Health Service (General Medical Services Contracts) Regulations 2015 and the National Health Service (Personal Medical Services Agreements) Regulations 2015 to make it easier for Crown servants and their dependants returning from overseas postings to register with contactors (GPs) in a timely way when returning to the UK.

3.3 Section 89(3) of the National Health Service Act 2006 (which is cited as an enabling power) covers general medical services contracts and states that regulations must make provision as to the circumstances in which a contractor must or may accept a patient, may decline to accept a patient or may terminate responsibility for a patient. Section 94(8) contains a similar provision in respect of personal medical services agreements but section 94(8) is not cited in the preamble. The Committee asked the Department of Health and Social Care to explain the discrepancy in the citations. In a memorandum printed at Appendix 3, the Department argues that while section 94(8) requires regulations made under section 94(1) to contain certain provisions, it is not itself an enabling power upon which the validity of the Regulations depends. The Department accepts that, on that basis, section 89(3) should not have been cited in the preamble. The Committee notes that there are several previous instruments in which section 89(3) and/or section 94(8) have been cited as enabling powers by the Department. The Committee reminds Departments that it is important to be consistent in relation to what is and is not cited in preambles, particularly as this goes to *vires* since the decision in *Vibixa Ltd and Polestar Jowetts Ltd v Komori UK Ltd* [2006] EWCA Civ 536. This being a case where the Department

has omitted from the preamble a provision which is cited in other preambles in similar contexts, **the Committee reports new Part 2A (inserted by paragraph 3(e) of Schedule 2) for doubt as to whether it is *intra vires*.**

3.4 Paragraph 1 of Schedule 1 (inserted regulation 27A(5)) includes inert parenthetical material: “(this means, for example, that “the next financial year”, in relation to the financial year ending 31st March 2021, is the financial year ending 31st March 2022).” Having regard to the principle that inert parenthetical material should be included in subordinate legislation sparingly and only where it adds needed clarity to the operative text, the Committee asked the Department to explain whether it considers the parenthetical explanation justified. In its memorandum, the Department explains that it considers the explanation justified on the basis that it aids readers of the legislation. As the Committee states in its First Special Report of Session 2013–14, *Excluding the inert from secondary legislation*, Departments should separate provisions that need to be included in legislation from those that do not properly belong there. In this case, the Committee considers that the parenthetical words add nothing significant to the clarity of the natural language meaning of the phrase “the next financial year”. **The Committee accordingly reports paragraph 1 of Schedule 1 (inserted regulation 27A(5)) for failure to comply with proper legislative practice.**

4 S.I. 2021/1009: Reported for requiring elucidation

National Lottery (Revocation and Amendment) Regulations 2021

4.1 The Committee draws the special attention of both Houses to these Regulations on the ground that they require elucidation in one respect.

4.2 These Regulations, which are subject to the negative resolution procedure, raise the minimum age at which a person may sell a National Lottery ticket to 18, unless the person has attained the age of 16 and either the sale has been specifically approved by a responsible person or the person has been authorised to sell National Lottery tickets by an authorising person (regulation 3(2), inserted regulation 3(2)). Paragraph 7.5 of the Explanatory Memorandum purports to explain the effect of the requirement for a sale to be “specifically approved” and appears to require approval to be “in the moment”, rather than at any time but relating to one or more specified sales. The Committee asked the Department for Digital, Culture, Media and Sport to explain. In a memorandum printed at Appendix 4 the Department explains that it expects that specific approval will generally be given “in the moment” before any sale is made (as is the general approach adopted by retailers in respect of alcohol sales) but acknowledges that the Regulations do not preclude other approaches. **The Committee accordingly reports regulation 3(2) (inserted regulation 3(2)(b)) for requiring elucidation, provided by the Department’s memorandum.**

5 S.I. 2021/1066: Reported for doubtful *vires* and for requiring elucidation

Health Protection (Coronavirus, International Travel and Operator Liability) (England) (Amendment) (No.12) Regulations 2021

5.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that there is a doubt as to whether they are *intra vires* in one respect and require elucidation in two respects.**

5.2 These Regulations, which are subject to the negative resolution procedure, amend the Health Protection (Coronavirus, International Travel and Operator Liability) (England) Regulations 2021 (S.I. 2021/582).

5.3 Regulation 12 introduces new exemptions from testing and self-isolation requirements. There is a new exemption for a “performing arts professional”. The definition includes the requirement that the individual holds a certificate issued by Arts Council England in accordance with ‘Travelling or returning to England for work as a performing arts professional during COVID-19: Self-isolation Exemptions Guidance’ published by Arts Council England on 17th September 2021. The Committee asked the Department of Health and Social Care to explain which power is relied on to define the term by reference to a certificate issued by Arts Council England, the obtaining of which will require satisfying criteria set by Arts Council England. In its memorandum, the Department explains that the criteria were developed by the Department for Culture, Media and Sport and approved by the Minister and that the guidance was published in advance of the Regulations being made. The Department asserts that the guidance is tightly drafted and that Arts Council England serves an administrative function only. The Committee does not agree. On their face, the eligibility criteria require Arts Council England to take a view as to whether the criteria have been met; for example, the provision of media recognition of their work will require Arts Council England to consider and assess whether what is presented suffices, without reference to prescribed standards. This is more than an administrative function and means that the decision on whether a person falls within “performing arts professional” and therefore comes within the exemption is sub-delegated to Arts Council England. In the absence of a power to do so, **the Committee reports new paragraph 50(2)(e)(iii), as inserted by regulation 12(6), on the ground that there is a doubt as to whether it is *intra vires*.**

5.4 Regulation 10(3) adds to the list of reasonable excuses for failing to possess notification of a negative test result the excuse that P took a test onboard the cruise ship on which P arrived in England, that the test was positive and it was not reasonably practicable for P to disembark other than in England. Paragraph 7.21 of the Explanatory Memorandum explains that this amendment is made to resolve a conflict with the cruise industry’s COVID-19 Framework, which covers the safe return of UK residents who test positive for COVID-19 on board. In the light of this, the Committee asked the Department to explain why the exemption is not limited to returning UK residents. In its memorandum printed at Appendix 5, the Department explains that it was the policy intention for this exemption to also apply to non-UK residents. The Committee finds the Explanatory Memorandum misleading in this respect and **reports paragraph 7.21 of the Explanatory Memorandum for requiring elucidation, provided by the Department.**

5.5 A vessel is not permitted to moor at a port in England if the last point of departure was a country listed in paragraph 5 of Schedule 13 of the amended regulations. Regulation 16(3) removes the last country contained within that list. The Committee asked the Department to explain why paragraph 3, which sets out the prohibition, and paragraph 5 of Schedule 13 were not also omitted, having regard to the need for clarity in this fast-changing area of law. In its memorandum, the Department explains that in future there may be a need to reinstate such prohibitions and given the unpredictable nature of the COVID-19 pandemic and the need to respond quickly, retaining the provisions had a practical purpose. The Committee has some sympathy with this line of reasoning: but it must be balanced against the needs of clarity and simplicity for readers of legislation from time to time. The Committee encourages the Government to think carefully before leaving “empty” provisions on the face of the statute book in case they may come to be re-populated by later amendment. At times of particular volatility of legislation (such as earlier in the pandemic) this technique may be helpful or inevitable; but the Committee thinks that at this point in the evolution of COVID-19 legislation the line of least complexity, and therefore of greatest ease of understanding for the readers, would have been to remove the entire provision until it was needed again (if ever). **Having said that, the Committee is content to report regulation 16 for requiring elucidation, provided by the Department’s memorandum.**

(The Committee also asked the Department to explain whether the new definition of “non-disembarking cruise passenger” should have captured persons who do not disembark from the cruise ship while it is in the territorial waters in England. The Committee is satisfied with the Department’s explanation.)

Instruments not reported

At its meeting on 24 November 2021 the Committee considered the instruments set out in the Annex to this Report, none of which was required to be reported to both Houses.

Annex

Instruments requiring affirmative approval

S.I. 2021/ Heavy Commercial Vehicles in Kent (No. 2) (Amendment) (No. 2) Order 2021

Draft Instruments requiring affirmative approval

Draft Customs Safety and Security Procedures (EU Exit) (No. 2) Regulations 2021

Draft Solvency 2 (Group Supervision) (Amendment) Regulations 2021

Draft Air Traffic Management and Unmanned Aircraft Act 2021 (Airspace Change Directions) (Determination of Turnover for Penalties) Regulations 2022

Draft Transport Act 2000 (Air Traffic Services Licence Modification Appeals) (Prescribed Aerodromes) Regulations 2022

Draft Terrorism Act 2000 (Proscribed Organisations) (Amendment) (No. 3) Order 2021

Instruments subject to annulment

S.I. 2021/992 School Admissions (England) (Coronavirus) (Appeals Arrangements) (Amendment) (No. 2) Regulations 2021

S.I. 2021/1031 Income-related Benefits (Subsidy to Authorities) and Discretionary Housing Payments (Grants) Amendment Order 2021

S.I. 2021/1034 Social Security (Habitual Residence and Past Presence) (Amendment) Regulations 2021

S.I. 2021/1037 Employment Tribunals (Constitution and Rules of Procedure) (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2021

S.I. 2021/1039 Child Benefit (General) (Amendment) Regulations 2021

S.I. 2021/1043 Trailer Registration (Amendment) Regulations 2021

S.I. 2021/1056 United Kingdom Internal Market Act 2020 (Maximum Penalty) Regulations 2021

S.I. 2021/1057	Direct Payments to Farmers (Inspections) (England) Regulations 2021
S.I. 2021/1065	Social Security Benefits (Claims and Payments) (Amendment) Regulations 2021
S.I. 2021/1077	Fines (Deductions from Income Support) (Miscellaneous Amendments) Regulations 2021
S.I. 2021/1089	City of Liverpool (Scheme of Elections and Elections of Elected Mayor) Order 2021
S.I. 2021/1096	Official Controls (Extension of Transitional Periods) (England and Wales) (Amendment) Regulations 2021
S.I. 2021/1115	Renewable Energy, Energy Efficiency and Motor Fuel Emissions (Miscellaneous Amendments) (EU Exit) Regulations 2021
S.I. 2021/1122	Local Government (Assistants for Political Groups) (Remuneration) (England) Order 2021
S.I. 2021/1123	National Health Service (Charges to Overseas Visitors) (Amendment) Regulations 2021
S.I. 2021/1125	Civil Enforcement of Parking Contraventions Designation Order 2021
S.I. 2021/1129	Social Security (Information-sharing in relation to Welfare Services etc.) (Amendment) Regulations 2021
S.I. 2021/1130	Health Protection (Coronavirus, International Travel and Operator Liability) (England) (Amendment) (No. 14) Regulations 2021
S.I. 2021/1132	Jobseeker’s Allowance and Employment and Support Allowance (Amendment) Regulations 2021

Instruments subject to annulment (Northern Ireland)

S.R. 2021/254	Allocation of Housing and Homelessness (Eligibility) (Amendment) Regulations (Northern Ireland) 2021
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Instruments not subject to parliamentary proceedings not laid before Parliament

S.I. 2021/1038	Domestic Abuse Act 2021 (Commencement No. 2) Regulations 2021
S.I. 2021/1062	United Kingdom Internal Market Act 2020 (Commencement No. 3) Regulations 2021
S.I. 2021/1117	Wireless Telegraphy (Licence Charges) (Amendment) Regulations 2021

Appendix 1

S.I. 2021/879

Air Navigation (Amendment) Order 2021

1. By a letter dated 3rd November 2021, the Joint Committee on Statutory Instruments requested a memorandum on the following point:

In paragraph (a) of the definition of “relevant person” (new article 225A(7), inserted by Article 8), explain (1) what it is about the context that puts it beyond doubt who the “person in charge” of an existing en-route obstacle is and (2) how the person in charge is meant to know that they satisfy the criteria for being in charge?

2. The expression “person in charge” occurs in a number of places within substantive provisions of the Air Navigation Order 2016¹ (“the ANO”), namely articles 92, 180, 181, 183, 184, 185, 186, 203, 205, 206, 207, 210, 216, 222, 223 and 261. We note that this expression is used in a variety of contexts (e.g. in relation to aerodromes, air traffic control services, aeronautical radio stations, and air traffic service equipment).

3. Of particular relevance here are articles 222 (relating to the lighting of en-route obstacles) and article 223 (relating to the lighting of wind turbine generators in UK territorial waters), which also place requirements on the “person in charge”. Article 225A therefore uses the same expression in order to achieve consistency with the pre-existing and related provisions in articles 222 and 223.

4. “En-route obstacle” is defined in article 225A(7) as “any building, structure or erection, the height of which is 100 metres or more above ground level”. In most cases it will be clear who the person in charge is, for example the owner of the building, structure or erection or the person in occupation of such, where applicable. The current wording however allows for a degree of flexibility given the wide variety of obstacles that new article 225A covers. Potentially, the person in charge may also include the user of the obstacle (where, for example the obstacle is a crane) but could also be a site developer where the obstacle is in fact part of a construction site.

5. The Civil Aviation Authority (“CAA”) already has pre-existing guidance relating to certain obstacles. This guidance provides useful context in explaining how the new notification requirement may apply in practice.

6. Article 223 of the ANO relates to lighting of wind turbine generators in UK territorial waters, and also places obligations on the “person in charge”. Specific guidance in relation to wind turbines is published in the CAA document CAP 764.² This includes guidance in relation to the lighting of wind turbine generators. The guidance sets out the expectation that it will be for the developer to comply with these requirements (see para 3.18).³

1 S.I. 2016/765

2 See [“CAP764 CAA Policy and Guidelines on Wind Turbines” \(February 2016\)](#).

3 Paragraph 3.18 refers to article 220 of the Air Navigation Order 2009 (now revoked) where the requirements in relation to the lighting of wind turbine generators were previously set out.

7. Where there has been a failure of any light required to be displayed by night (which is required to be repaired or replaced as soon as practicable by the person in charge pursuant to article 223(7)),⁴ the CAA considers that the operator of the offshore wind farm to be the appropriate person to notify the Aeronautical Information Service to ensure that those involved in flight operations are informed (see para 3.23 onwards of the guidance).

8. Similarly, specific guidance in relation to cranes is published in the CAA document CAP 1096,⁵ which is directed at crane users. Furthermore, guidance from the Construction Plant-hire Association⁶ (which existed before the introduction of the notification requirement in article 225A) advises that “(the) responsibility for notification to aerodromes and/or the CAA, together with the lighting of tower cranes, rests with the hirer of the crane (Principal or other contractor), however the supplier of the crane should assist the hirer by reminding him of his obligations”.

9. The CAA are raising awareness of the new legislation more widely with key stakeholders (e.g. RenewableUK, Construction Plant-hire Association etc.), and have published guidance on the en-route obstacle notification process on their website.⁷ Details of the changes introduced by the Order have also been publicised on the CAA’s Skywise site which provides tailored news, notifications and alerts.⁸ Further information is also available in Aeronautical Information Circular P 067/2021 which sets out the legislation and procedures for notifying en-route obstacles to the CAA.⁹

10. With time the CAA should start receiving more and more en-route obstacle notifications. They will use this information to review the way this is working in practice and to assess whether they need to elaborate on, or provide more, guidance about this.

11. The CAA are in the process of creating a consolidated document explaining all types of obstacle notifications, referring to relevant publications, requirements and policies, which will be made available on their website in due course.

Department for Transport

9 November 2021

4 The guidance refers to article 220(7) of the Air Navigation Order 2009 where the requirement to repair or replace a failed light was previously set out.

5 See [“CAP1096 Guidance to crane users on the crane notification process and obstacle lighting and marking”](#) (April 2021)

6 See “TIN 039 Operating Tower Cranes in the Vicinity of Aerodromes, Notification and En-route Obstacle Lighting” (January 2014) available at [TCIG Technical Information Notes | Construction Plant-hire Association \(cpa.uk.net\)](#)

7 See [Obstacle notification | UK Civil Aviation Authority \(caa.co.uk\)](#)

8 See [The Air Navigation \(Amendment\) Order 2021 - SkyWise \(caa.co.uk\)](#)

9 See [Aeronautical Information Circular P 067/2021](#)

Appendix 2

S.I. 2021/990

Domestic Abuse Support (Local Authority Strategies and Annual Reports) Regulations 2021

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

Indicate which enabling power allows the Secretary of State to specify the form of the section 59 report from time to time by notice.

2. Section 59(2)(a) of the Domestic Abuse Act 2021 (“the Act”) enables the Secretary of State to make provision by regulations about the form of a report under section 59(1) which requires local authorities to submit an annual report to the Secretary of State in relation to its functions under Part 4 of the Act. The Department relied on this power in making regulation 7 of the Domestic Abuse Support (Local Authority Strategies and Annual Reports) Regulations 2021, which provides that the report must be made in the form which the Secretary of State specifies from time to time.
3. The power at section 59(2)(a) is broad. It is not, for example, limited to specifying the form of a report in the Regulations themselves. In our view it provides greater flexibility for this administrative aspect of the reporting obligation.
4. The content of the report is set out in regulation 8 of the Regulations and regulation 7 concerns only the means by which that information specified by regulation 8 is to be transmitted to the Secretary of State. In the context of this statutory reporting obligation, the Department considers that the provision made at regulation 7 is within the section 59(2)(a) power.

Department for Levelling Up, Housing and Communities

9 November 2021

Appendix 3

S.I. 2021/995

National Health Service (General Medical Services Contracts and Personal Medical Services Agreements) (Amendment) (No.2) Regulations 20211.

1. In its letter to the Department of 3 November 2021, the Committee requested a memorandum on the following points:

(1) Given section 89(3) of the National Health Service Act 2006 is cited in the preamble in relation to the GMS Regulations (S.I. 2015/1862) explain why section 94(8) is not cited in relation to the PMS Regulations (S.I. 2015/1879).

(2) Having regard to the principle that, as a general rule, inert parenthetical material should be included in subordinate legislation sparingly and only where it adds needed clarity to the operative text, explain whether, on reflection, the Department considers the parenthetical explanation included in Schedule 1, paragraph 1 (inserted 27A(5)) justified.

2. The Department's response is as follows.

3. In relation to point (1), while section 94(8) requires regulations made under section 94(1) to contain certain provisions, it is not itself an enabling power upon which the validity of the Regulations depends and it is for this reason that it was not cited in the preamble. The Department accepts that, on that basis, section 89(3) should not have been cited in the preamble either and apologises for the inconsistency of approach.

4. In relation to point (2), the Department is of the view that the explanation contained in the parentheses is justified on the basis that it aids readers of the legislation. In particular, different financial years are referred to in this provision, and the financial year in which the information in question is to be provided is distinct from the financial year to which the information relates, therefore it was important to provide extra clarity on the distinction. This is the only instance of such parenthetical material in the instrument, having regard to the general principle.

Department of Health and Social Care

9 November 2021

Appendix 4

S.I. 2021/1009

National Lottery (Revocation and Amendment) Regulations 2021

1. The Joint Committee on Statutory Instruments considered the above instrument at its meeting on 3 November 2021 and requested that the Department submit a memorandum on the following point:

In so far as paragraph 7.5 of the Explanatory Memorandum purports to be explaining the effect of the requirement for a sale to be “specifically approved”, explain the basis on which that paragraph appears to require approval to be “in the moment” rather than at any time but relating to one or more specified sales (as the natural meaning of “specifically approved” in regulation 3(2) (inserted regulation 3(2)(b)) would indicate).

2. In developing the National Lottery approved sales regulations two frameworks were considered, both already in operation for other age restricted products. Offering both delivers maximum flexibility to those retailers choosing to adopt an approved sales system, meaning they can implement in a manner best suited to their business model.

3. The system delivered by new regulation 3(2)(b) is based on the frameworks already in place for alcohol sales in England and Wales and Scotland. Its intention is that a 16 or 17 year old salesperson must gain approval from a person aged at least 18 for each specific sale. In contrast to the general pre-approval delivered under regulation 3(2)(a), it is expected that this specific approval will generally be given ‘in the moment’ before any sale is made, as our understanding was that the general approach adopted in practice by retailers in respect of alcohol sales; the Regulations do not, however, preclude other approaches.

4. The Explanatory Memorandum sought to highlight the contrast between the general pre-approval system and the approval for a specified sale. As drafted it draws this important distinction. Moreover we consider it unlikely that an approval for a specified sale would be made at a different point in time to the sale itself and this was not a scenario raised by the National Lottery retailers with whom we consulted while developing the policy.

Department for Digital, Culture, Media & Sport

9 November 2021

Appendix 5

S.I. 2021/1066

Health Protection (Coronavirus, International Travel and Operator Liability) (England) (Amendment) (No.12) Regulations 2021

1. In its letter to the Department of 3 November 2021, the Committee requested a memorandum on the following points:

(1) In relation to regulation 12(4), explain whether the definition of “non-disembarking cruise passenger” should include the additional category of persons who do not disembark from the cruise ship while it is in territorial waters in England.

(2) In relation to regulation 10(3), in light of the explanation in paragraph 7.21 of the Explanatory Memorandum that this amendment is made to allow the safe return of UK residents, explain why the exemption is not limited to returning UK residents.

(3) Explain why paragraph 3 and paragraph 5 of Schedule 13 were not omitted, alongside the omissions in regulation 16 (having regard to the need for clarity in a fast-changing area of law).

(4) In relation to regulation 12(6), explain which power is relied on to define “performing arts professional” by reference to a certificate issued by Arts Council England, the obtaining of which will require satisfying criteria set by Arts Council England.

2. These points arise in the Health Protection (Coronavirus, International Travel and Operator Liability) (England) (Amendment) (No. 12) Regulations 2021 (“the No. 12 Regulations”) which amend the Health Protection (Coronavirus, International Travel and Operator Liability) (England) Regulations 2021 (“ITOLRs”).

3. The Department’s response is as follows.

Point 1

4. The Committee has queried whether the intention is to include people who do not disembark from a cruise ship while it is in “territorial waters in England” in the definition of “non-disembarking cruise passenger”. That was the intention and this cohort is already covered by the part of the definition which refers to people who do not disembark from a cruise ship while it is “in the territorial waters adjacent to England”. The terminology of “adjacent to” rather than “in” is consistent with that used in primary and other secondary legislation, including the Act under which the No. 12 Regulations were made (see sections 45S and 45T(6) of the Public Health (Control of Disease) Act 1984 (c. 22)). See, for example, the Territorial Sea Act 1987 (c. 49); the Greenhouse Gas Emissions Trading Scheme Order 2020 (S.I. 2020/1265); the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 (S.I. 2020/1374); and Part 1 of the Health Protection (Coronavirus, Restrictions) (Steps) (England) Regulations 2021 (S.I. 2021/364).

Point 2

5. The Committee has queried why the reasonable excuse for failure to possess notification of a negative test result is not limited to UK residents. The requirement (in regulation 4 of the ITOLRs) is for a passenger to be in possession of a notification of a negative result from a COVID-19 test taken no more than 3 days before the service's scheduled time of departure to England (Schedule 7 to ITOLRs). There is a corresponding requirement for operators to ensure that all passengers transported to England are in possession of the same (regulation 17 of ITOLRs).

6. The ITOLRs were made at a time when international cruise travel was suspended due to the COVID-19 pandemic. The restart of international cruises necessitated a number of amendments to the ITOLR regime, introduced by the No. 12 Regulations. Cruise providers indicated that they would be providing COVID-19 tests to passengers onboard services to England, facilitating passenger compliance with the pre-departure testing requirement. Whilst onboard testing is beneficial from a public health perspective in that it allows passengers to be tested closer to the time of their arrival in England, it gives rise to the possibility of passengers testing positive and therefore being unable to comply with the requirement in regulation 4. In order to avoid a situation whereby a passenger who tests positive onboard is unable to complete their journey to England without committing a criminal offence and exposing the carrier to criminal liability, a reasonable excuse was inserted into regulation 19 of ITOLRs by regulation 10(3) of the No. 12 Regulations. This is explained in the underlined parts of paragraph 7.21 of [the Explanatory Memorandum](#):

This instrument introduces a reasonable excuse to allow a cruise passenger who has tested positive after taking a Pre-Departure Test on board prior to arrival, in line with PHE approved protocols, to be transported to England without criminal liability for either the passenger or the operator. At present, carriers (including cruise operators) commit a criminal offence if they transport passengers without a negative Pre-Departure Test to England, incentivising them to deny such passengers boarding. However, this conflicts with the cruise industry's COVID-19 Framework, approved by PHE, which covers the safe return of UK residents who test positive for COVID-19 on board. At present, passengers who arrive in England without proof of a negative PDT also commit an offence. This amending instrument will resolve this conflict in order to allow operators and port health authorities to handle outbreaks appropriately and to ensure the best possible public health outcome.

7. The problem addressed by the reasonable excuse is not specific to UK resident passengers, hence the reasonable excuse is not limited to UK residents. The problem was, however, particularly acute in relation to UK residents because of the additional issue of a conflict with the cruise industry's COVID-19 Framework. The reference to the Framework is an additional justification (specific to UK residents) for the amendment. The main justification, however, is the need to avoid placing passengers and operators in an impossible position if passengers receive positive results from onboard tests. Policy officials consider that restricting the reasonable excuse to UK residents could constrain the ability of port health authorities to respond in the most appropriate way to COVID-19

outbreaks reported on ships, as in some cases it may be the safest decision from a public health perspective to allow passengers to disembark and isolate ashore in England, even if they are not UK residents.

Point 3

8. The Committee has queried why paragraphs 3 and 5 of Schedule 13 were not omitted, alongside the omissions in regulation 16 (having regard to the need for clarity in a fast-changing area of law). In the future there may be a need to reinstate prohibitions on the arrival of vessels into England from designated countries or territories at short notice, in response to an urgent threat to public health. We therefore consider that there is a legitimate, practical purpose to retaining the provisions in paragraphs 3 and 5 of Schedule 13, despite the omissions in regulation 16, particularly given the unpredictable nature of the COVID-19 pandemic and the need to respond quickly to developing public health risks. We have taken the same approach in relation to paragraphs 2 and 4 of Schedule 13 in the Health Protection (Coronavirus, International Travel and Operator Liability) (England) (Amendment) (No. 17) Regulations 2021 (see regulation 16 thereof).

Point 4

9. The Committee has asked about the power to define “performing arts professional” by reference to a certificate issued by Arts Council England (“ACE”). The Department relied upon the power in section 45B of the Public Health (Control of Disease) Act 1984 to carve out an exemption in the existing borders measures, to apply to specified cohorts. Section 45B carries a broad power to create borders measures and to disapply them; it must carry the power to specify to which groups the measures apply.

10. When drafting the Regulations, the relevant Departments carefully considered the issue of a potential unlawful sub-delegation to ACE by virtue of ACE publishing the guidance and issuing the certificates referred to at regulation 12(6) of the No. 12 Regulations. The Department is satisfied that this provision does not amount to unlawful sub-delegation: the criteria in the [Travelling or returning to England for work as a performing arts professional during COVID-19: ACE Self-isolation Exemptions Guidance](#) was not set by ACE alone but rather developed by the Department for Culture, Media and Sport alongside ACE and approved by the Minister, and the guidance was published in advance of the Regulations being made. The Department considers that the guidance is tightly drafted and ensures that the criteria required to be met to obtain a certificate is clear. A certificate is only issued by ACE where the criteria in the guidance is fulfilled: ACE serves an administrative function only. This drafting was based on [regulation 22\(5\)](#) of the Health and Safety and Nuclear (Fees) Regulations 2016.

Department of Health and Social Care**9 November 2021**

Formal minutes

Wednesday 24 November 2021

Virtual meeting

Members present:

Jessica Morden (*in the Chair*)

Baroness D'Souza	John Lamont
Dr James Davies	Baroness Newlove
Baroness Gale	Baroness Scott of Needham Market
Lord Haskel	Lord Smith of Hindhead
Paul Holmes	Liz Twist

Draft 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 5.5 read and agreed to.

Annex agreed to.

Papers were appended to the Report as Appendices 1 to 5.

Resolved, That the Report be the Sixteenth 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.

[Adjourned till Wednesday 1 December at 3.40 p.m.]