



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

Eighteenth Report of Session 2021–22

Drawing special attention to:

Radiation Emergency and Consultation Regulations 2021 (S.I. 2021/1110)

Non-Maintained Special Schools (England) and Independent School Standards (Amendment) Regulations 2021 (S.I. 2021/1124)

Motor Vehicles (Driving Licences) (Amendment) Regulations 2021 (S.I. 2021/1128)

*Ordered by the House of Lords
to be printed 8 December 2021*

*Ordered by the House of Commons
to be printed 8 December 2021*

**HL 125
HC 56-xviii**

Published on 10 December 2021
by authority of the House of Lords
and the House of Commons

Joint Committee on Statutory Instruments

Current membership

House of Lords

[Baroness D'Souza](#) (*Crossbench*)

[Baroness Gale](#) (*Labour*)

[Lord Haskel](#) (*Labour*)

[Baroness Newlove](#) (*Conservative*)

[Lord Rowe-Beedoe](#) (*Crossbench*)

[Baroness Scott of Needham Market](#) (*Liberal Democrat*)

[Lord Smith of Hindhead](#) (*Conservative*)

House of Commons

[Jessica Morden MP](#) (*Labour, Newport East*) (Chair)

[Dr James Davies MP](#) (*Conservative, Vale of Clwyd*)

[Paul Holmes MP](#) (*Conservative, Eastleigh*)

[John Lamont MP](#) (*Conservative, Berwickshire, Roxburgh and Selkirk*)

[Sir Robert Syms MP](#) (*Conservative, Poole*)

[Richard Thomson MP](#) (*Scottish National Party, Gordon*)

[Liz Twist MP](#) (*Labour, Blaydon*)

Powers

The full constitution and powers of the Committee are set out in [House of Commons Standing Order No. 151](#) and [House of Lords Standing Order No. 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

© Parliamentary Copyright House of Commons 2021. This publication may be reproduced under the terms of the Open Parliament Licence, which is published at <https://www.parliament.uk/site-information/copyright-parliament/>.

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

Committee staff

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

Contacts

All correspondence should be addressed to the Clerk of the Joint Committee on Statutory Instruments, House of Commons, London SW1A 0AA. The telephone number for general inquiries is: 020 7219 7599; the Committee's email address is: jcsi@parliament.uk.

Contents

Instruments reported	3
1 S.I. 2021/1110: Reported for unjustifiable delay and for doubtful <i>vires</i>	3
Radiation Emergency and Consultation Regulations 2021	3
2 S.I. 2021/1124: Reported for requiring elucidation	4
Non-Maintained Special Schools (England) and Independent School Standards (Amendment) Regulations 2021	4
3 S.I. 2021/1128: Reported for doubtful <i>vires</i>	4
Motor Vehicles (Driving Licences) (Amendment) Regulations 2021	4
Instruments not reported	6
Annex	6
Appendix 1	8
S.I. 2021/1110	8
Radiation Emergency and Consultation Regulations 2021	8
Appendix 2	9
S.I. 2021/1124	9
Non-Maintained Special Schools (England) and Independent School Standards (Amendment) Regulations 2021	9
Appendix 3	10
S.I. 2021/1128	10
Motor Vehicles (Driving Licences) (Amendment) Regulations 2021	10
Formal Minutes	11

Instruments reported

At its meeting on 8 December 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 three 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. 2021/1110: Reported for unjustifiable delay and for doubtful *vires*

Radiation Emergency and Consultation Regulations 2021

1.1 The Committee draws the special attention of both Houses to these Regulations on the ground that there was unjustifiable delay in laying them before Parliament and that there is doubt as to whether they are *intra vires* in one respect.

1.2 These Regulations, which are subject to the negative resolution procedure, replace references to Public Health England with references to the UK Health Security Agency. The Regulations were made on 1 October 2021 and laid before Parliament on 11 October 2021. The Committee asked the Department for Business, Energy and Industrial Strategy to explain the reason for the delay between the making and laying of this instrument. In a memorandum printed at Appendix 1, the Department agree to review their internal processes to avoid such a delay happening again. The Committee refers to paragraphs 2.2 to 2.14 of its First Special Report of Session 2017–19, *Transparency and Accountability in Subordinate Legislation* which emphasised the importance of early laying as a core component of access to legislation. As a general rule, the Committee considers that a delay of 10 calendar days or more will amount to an unjustifiable delay. **The Committee accordingly reports these Regulations for unjustifiable delay in laying before Parliament.**

1.3 Regulation 2(4) (inserted paragraph 8A) states that if the UK’s emergency reference levels have not been published by the UK Health Security Agency, the levels published by Public Health England must be used instead. The Committee considered this an ambulatory reference and therefore that section 15(4)(b) of the Health and Safety at Work etc. Act 1974 (which provides the power for references in the regulations to any specified document to operate as references to that document as revised or re-issued from time to time) should have been cited in the preamble. The Committee asked the Department to explain. In its memorandum, the Department asserts that it does not consider section 15(4)(b) is appropriate in this case as any replacement document issued by the new executive agency is not “revised or reissued”. The Committee might accept this analysis where the document is published in the same form by the new executive agency. However, there is no indication in the instrument that the document will be in same form and the Explanatory Note refers to provision being made “to account for any future updates to the United Kingdom’s Emergency Reference Levels”. The Committee repeats that it is important to cite all the relevant enabling powers in the preamble, particularly as this goes to *vires* since the decision in *Vibixa Ltd and Polestar Jowetts Ltd v Komori UK Ltd* [2006] EWCA Civ 536. **The Committee accordingly reports regulation 2(4) for doubt as to whether it is *intra vires*.**

2 S.I. 2021/1124: Reported for requiring elucidation

Non-Maintained Special Schools (England) and Independent School Standards (Amendment) Regulations 2021

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

2.2 These Regulations, which are subject to the negative resolution procedure, make changes to the process by which the Secretary of State arranges for identity and right to work checks on certain people to be made. It is no longer mandatory for the Secretary of State to carry out the applicable checks, but they will be able, instead, to request another person to make the check. In relation to the identity check, regulation 2(3)(d) (inserted paragraph (5)(b)) uses the following wording—the Secretary of State “requests the individual or another person that checks are made for the purposes of confirming the individual’s identity”. Similar wording is used in relation to both identity and right to work checks in regulation 2(3)(d) (inserted paragraph (6)), regulation 3(2)(a)(iii) (inserted paragraphs (d)(ii) and (e)(ii)) and regulation 3(2)(b)(iii) (inserted paragraphs (d)(ii) and (e)(ii)). The Committee asked the Department for Education to explain the intention of the quoted wording, in particular, whether it is intended that the checks can be made by the individual whose identity or right to work in the UK is being checked. In a memorandum printed at Appendix 2, the Department confirms that intention (and accepts that it could have been made clearer in the Explanatory Memorandum). The Department also sets out how it expects that any checks made by the individual would be made (while stating that it is the current intention of the Department to carry out checks relating to the right to work in the UK itself). **The Committee accordingly reports regulations 2(3)(d), 3(2)(a)(iii) and (b)(iii) for requiring elucidation, provided by the Department’s memorandum.**

3 S.I. 2021/1128: Reported for doubtful *vires*

Motor Vehicles (Driving Licences) (Amendment) 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.

3.2 These Regulations, which are subject to the negative resolution procedure, enable examiners appointed by any of the Ministry of Defence, police, fire and rescue, and ambulance services to conduct driving tests for each other (cross-testing). In order to conduct cross-testing, a person must have the prior written approval of the Secretary of State. Regulation 4(b) (inserted paragraph (1A)) and regulation 6(b) (inserted paragraph (1E)) allow the Secretary of State to grant this approval “subject to such conditions as the Secretary of State thinks fit” and they “may vary any such conditions by notice in writing given to the person to whom the approval was granted.” The Committee asked the Department for Transport to indicate the power used to make these provisions. In a memorandum printed at Appendix 3, the Department state the power relied on is section 89(3)(b) of the Road Traffic Act 1988. This power states that “Regulations may make provision with respect to ... conditions which must be satisfied during the currency of an appointment” of an examiner. This provides a single legislative mechanism for dealing with those matters. It is not open to the Department to sub-delegate powers to itself to

vary those conditions by notice. The general power to “make provision” does not rebut the strong presumption against sub-delegation. (See also the Committee’s Sixteenth Report of Session 2021–22 in relation to S.I. 2021/990 and Fifth Report of Session 2019–21 in relation to S.I. 2020/41.) **The Committee accordingly reports regulations 4(b) and 6(b) for doubt as to whether they are *intra vires*.**

Instruments not reported

At its meeting on 8 December 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

Draft Instruments requiring affirmative approval

Draft	Draft Flags (Northern Ireland) (Amendment) Regulations 2021
Draft	Wine (Amendment) Regulations 2021

Instruments subject to annulment

S.I. 2021/1158	Employment and Support Allowance and Universal Credit (Coronavirus Disease) (Amendment) Regulations 2021
S.I. 2021/1168	Childcare (Early Years Provision Free of Charge) (Extended Entitlement) (Amendment) (No. 2) Regulations 2021
S.I. 2021/1171	Phytosanitary Conditions (Amendment) (No. 2) Regulations 2021
S.I. 2021/1187	Goods Vehicles (Licensing of Operators) (Temporary Use in Great Britain) (Amendment) Regulations 2021
S.I. 2021/1188	Social Security (Scotland) Act 2018 (Information-Sharing and Disability Assistance) (Consequential Provision and Modifications) Order 2021
S.I. 2021/1198	Birmingham Commonwealth Games (Advertising and Trading) Regulations 2021
S.I. 2021/1203	Aviation Safety (Amendment) (No. 3) Regulations 2021
S.I. 2021/1222	Housing (Right to Buy) (Designated Rural Areas and Designated Regions) (England) Order 2021
S.I. 2021/1224	Universal Credit (Exceptions to the Requirement not to be receiving Education) (Amendment) Regulations 2021
S.I. 2021/1229	Animal Health, Plant Health, Seeds and Seed Potatoes (Miscellaneous Amendments) Regulations 2021
S.I. 2021/1231	Births and Deaths Registration (Electronic Communications and Electronic Storage) Order 2021

Instruments not subject to parliamentary proceedings laid before Parliament

S.I. 2021/1226	Land Registration Fee Order 2021
-----------------------	----------------------------------

Instruments not subject to parliamentary proceedings not laid before Parliament

S.I. 2021/1170	Digital Economy Act 2017 (Commencement No. 8) Regulations 2021
S.I. 2021/1172	Firearms (Amendment) (No. 2) Rules 2021
S.I. 2021/1173	Financial Services Act 2021 (Commencement No. 3) Regulations 2021

Appendix 1

S.I. 2021/1110

Radiation Emergency and Consultation Regulations 2021

1. The Committee has asked the Department of Business, Energy & Industrial Strategy for a memorandum on the following points:

1) Explain the reason for the delay between the making and laying of this instrument.

2) Explain why section 15(4)(b) of the Health and Safety at Work etc. Act 1974 is not cited in the preamble in relation to regulation 2(4) (inserted paragraph 8A).

2. In answer to the Committee's first question, we regret the delay. We will review our internal processes to see if there are steps we can take to reduce the likelihood of this happening again.

3. In answer to the Committee's second question, our view is that the power in section 15(4)(b) of the Health and Safety at Work etc. Act 1974 is not appropriate in this case. As the executive agency issuing the document in question is changing, we would not consider any replacement document issued by the new executive agency to be "revised or reissued".

Department of Business, Energy & Industrial Strategy

30 November 2021

Appendix 2

S.I. 2021/1124

Non-Maintained Special Schools (England) and Independent School Standards (Amendment) Regulations 2021

1. The Committee has asked the Department of Education for a memorandum on the following point:

In relation to regulation 2(3)(d) (inserted paragraphs (5)(b) and (6)(b)) (and the other places in this instrument where similar wording occurs), explain the intention of the opening phrase of paragraph (b), in particular, whether it is intended that the checks can be made by the individual whose identity or right to work in the UK is being checked.

2. The Committee has asked for clarification regarding the wording “requests the individual or another person that checks are made for the purposes of confirming the individual’s identity” and “requests the individual or another person that checks are made for the purposes of confirming that the individual has the right to work in the United Kingdom”, where this wording appears in the instrument.

3. The wording allows for the checks in question to be made by the individual whose identity or right to work in the UK is being checked and this was the Department’s intention when the instrument was made. Having reflected on the Committee’s question the Department accepts that this intention could have been made clearer in the Explanatory Memorandum relating to the instrument.

4. Where a request is made to the affected individual for one of the checks in question to be made, information will be provided as to how the Department expects that the check is carried out. However, the current intention of the Department is to carry out checks relating to the right to work in the United Kingdom itself. As regards checks on an individual’s identity, the current intention is that requests may be made to the affected individual, but where this occurs they will be advised by the Department to make use of a professional checking service (such as that offered by the post office) or have the check carried out by a person registered with the Disclosure and Barring Service (“the DBS”) to countersign or transmit applications for enhanced criminal records checks—a “registered person” under section 120 of the Police Act 1997. This is in line with guidance provided by the DBS on identity checks.

Department of Education

30 November 2021

Appendix 3

S.I. 2021/1128

Motor Vehicles (Driving Licences) (Amendment) Regulations 2021

1. The Committee has asked the Department for Transport for a memorandum on the following point:

Indicate the power used to make the provision in regulation 4(b) (inserted paragraph 1A)) and regulation 6(b) (inserted paragraph (1E)).

2. The power used to make regulations 4(b) and 6(b) of SI 2021/1128 is section 89(3)(b) of the Road Traffic Act 1988.

3. That power allows regulations with respect to the conditions which must be satisfied “during the currency of an appointment”.

4. Regulations 4(b) and 6(b) of SI 2021/1128 mirror the framework in SI 1999/2864, which is the subject of amendment, in particular regulations 23(3), (3A), 24(3) and (3A) of 1999/2864.

Department for Transport

30 November 2021

Formal Minutes

Wednesday 8 December 2021

Virtual meeting

Members present:

Jessica Morden (*in the Chair*)

Baroness Gale
Lord Haskel

John Lamont
Baroness Scott of Needham Market

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 3.2 read and agreed to.

Annex agreed to.

Papers were appended to the Report as Appendices 1 to 3.

Resolved, That the Report be the Eighteenth 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 15 December at 3.40 p.m.]