



House of Lords  
House of Commons  
Joint Committee on  
Statutory Instruments

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# Thirteenth Report of Session 2017–19

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**Drawing special attention to:**

*Registration (Entries of Overseas Births and Deaths) (Amendment) Order 2017 (S.I. 2017/1279)*

*Immigration Act 2016 (Consequential Amendments) (Licensing of Booking Offices: Scotland) Regulations 2017 (S.I. 2017/1317)*

*Ordered by the House of Lords  
to be printed 21 February 2018*

*Ordered by the House of Commons  
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## Joint Committee on Statutory Instruments

### Current membership

#### House of Lords

Baroness Bloomfield of Hinton Waldrist (*Conservative*)

Lord Lexden (*Conservative*)

Baroness Meacher (*Crossbench*)

Lord Morris of Handsworth (*Labour*)

Lord Rowe-Beard (*Crossbench*)

Lord Rowlands (*Labour*)

Baroness Scott of Needham Market (*Liberal Democrat*)

#### House of Commons

Derek Twigg MP (*Labour, Halton*) (Chair)

Dan Carden MP (*Labour, Liverpool, Walton*)

Vicky Foxcroft MP (*Labour, Lewisham, Deptford*)

Patrick Grady MP (*Scottish National Party, Glasgow North*)

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

Lee Rowley MP (*Conservative, North East Derbyshire*)

Sir Robert Syms MP (*Conservative, Poole*)

### Powers

The full constitution and powers of the Committee are set out in House of Commons Standing Order No. 151 and House of Lords Standing Order No. 73, available on the Internet via [www.parliament.uk/jcsi](http://www.parliament.uk/jcsi).

### 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**

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](http://www.parliament.uk/jcsi).

#### **Committee staff**

The current staff of the Committee are Mike Winter (Commons Clerk), Jane White (Lords Clerk) and Liz Booth (Committee Assistant). Advisory Counsel: Daniel Greenberg, Peter Brooksbank, Philip Davies and Vanessa MacNair (Commons); James Cooper, Nicholas Beach, John Crane and Ché Diamond (Lords).

#### **Contacts**

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# Instruments reported

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At its meeting on 21 February 2018 the Committee scrutinised a number of Instruments in accordance with Standing Orders. It was agreed that the special attention of both Houses should be drawn to two of those considered. The Instruments and the grounds for reporting them are given below. The relevant Departmental memoranda are published as appendices to this report.

## 1 S.I. 2017/1279: Reported for defective drafting

### *Registration (Entries of Overseas Births and Deaths) (Amendment) Order 2017*

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 amends the Registration (Entries of Overseas Births and Deaths) Order 1982 (S.I. 1982/1526), which applies provisions of enactments relating to the registration of births and deaths in the United Kingdom to certified copies of birth and death entries sent from overseas for deposit with the Registrars General in the United Kingdom. Article 6 purports to insert text into Schedule 1 to the 1982 Order, but the nature of the insertion led the Committee to believe that the insertion should have been into Schedule 2. The Committee asked the Home Office to confirm. In a memorandum printed at Appendix 1, the Department confirms the Committee's belief and undertakes to take steps to rectify the error at the first available opportunity. **The Committee accordingly reports article 6 for defective drafting, acknowledged by the Department.**

## 2 S.I. 2017/1317: Reported for requiring elucidation

### *Immigration Act 2016 (Consequential Amendments) (Licensing of Booking Offices: Scotland) Regulations 2017*

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 amend the Civic Government (Scotland) Act 1982 (Licensing of Booking Offices) Order 2009 so that applying for, and holding, a booking office licence in Scotland is conditional on not breaching the UK's immigration laws. The enabling power is section 92(2) of the Immigration Act 2016 which allows the Secretary of State to make such provision as she considers "appropriate in consequence of this Act". The relevant provisions of the 2016 Act are section 37 and Schedule 5 which provide that operator licences in England and Wales and Northern Ireland and taxi and private hire car driving licences cannot be held by a person who does not have permission to work in the United Kingdom. Booking office licences in Scotland are not specifically covered.

2.3 In the Explanatory Memorandum laid with the Regulations, the Home Office set out why it concluded that the Regulations are a consequence of section 37 of and Schedule 5 to the 2016 Act, namely that: booking office licences in Scotland are equivalent to operator licences in England and Wales and Northern Ireland; Schedule 5 amends the taxi hire

and private hire vehicle regime in Scotland to which the licensing regime for booking office licences is closely connected and the Regulations remedy what would otherwise be a jurisdictional gap which was not the intention of Parliament. The Committee invited the Department to expand on the explanation in the Explanatory Memorandum and to explain, in particular, why the Immigration Act 2016 was not used to provide express vires for the expansion of the Scottish regime.

2.4 In a memorandum printed at Appendix 2, the Department helpfully expands the reasoning behind the overall legislative approach. In particular, it explains that: it wanted to avoid using the 2016 Act to amend secondary legislation directly (because of general concerns about mixing primary and secondary legislation); amending the 1982 Act directly would have been confusingly inconsistent with previous legislation; and advice to the Department at the time was that the enabling power was sufficient.

2.5 The Committee notes this explanation, including the analysis of the considerations applied in determining that the amendment falls within generally accepted understandings of the scope of powers to make consequential provision. The Committee notes that there is always a balance to be struck when deciding whether to take express powers or to rely on powers to make consequential or other incidental provision, and is grateful to the Department for its thorough explanation of how the balance was struck on this occasion.

**2.6 The Committee accordingly reports the Regulations as requiring elucidation, provided by the Department.**

## Instruments not reported

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At its meeting on 21 February 2017 the Committee considered the Instruments set out in the Annex to this Report, none of which were required to be reported to both Houses.

## Annex

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### Draft instruments requiring affirmative approval

<b>Draft S.I.</b>	Armed Forces Act (Continuation) Order 2018
<b>Draft S.I.</b>	Electronic Commerce Directive (Miscellaneous Provisions) Regulations 2018
<b>Draft S.I.</b>	National Employment Savings Trust (Amendment) Order 2018
<b>Draft S.I.</b>	Criminal Justice and Police Act 2001 (Powers of Seizure) Order 2018

### Instruments subject to annulment

<b>S.I. 2018/54</b>	Care Quality Commission (Reviews and Performance Assessments) Regulations 2018
<b>S.I. 2018/61</b>	Social Fund Funeral Expenses Amendment Regulations 2018
<b>S.I. 2018/71</b>	Plant Health (England) (Amendment) Order 2018
<b>S.I. 2018/92</b>	Council Tax and Non-Domestic Rating (Demand Notices) (England) (Amendment) Regulations 2018
<b>S.I. 2018/94</b>	Natural History Museum (Authorised Repositories) Order 2018
<b>S.I. 2018/95</b>	Pension Protection Fund (Compensation) (Amendment) Regulations 2018
<b>S.I. 2018/96</b>	Protection of Wrecks (Designation) (England) Order 2018
<b>S.I. 2018/99</b>	Town and Country Planning General (Amendment) (England) Regulations 2018
<b>S.I. 2018/129</b>	National Emission Ceilings Regulations 2018
<b>S.I. 2018/136</b>	Education (Student Support) (Amendment) Regulations 2018
<b>S.I. 2018/146</b>	Local Authority (Duty to Secure Early Years Provision Free of Charge) (Amendment) Regulations 2018
<b>S.I. 2018/147</b>	Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) Order 2018
<b>S.I. 2018/148</b>	Free School Lunches and Milk, and School and Early Years Finance (Amendments Relating to Universal Credit) (England) Regulations 2018

- S.I. 2018/151** Reduction and Prevention of Agricultural Diffuse Pollution (England) Regulations 2018
- S.I. 2018/152** Adoption and Care Planning (Miscellaneous Amendments) Regulations 2018
- S.I. 2018/154** Novel Foods (England) Regulations 2018
- S.I. 2018/165** Export Control (Amendment) Order 2018

### **Instruments not subject to Parliamentary proceedings not laid before Parliament**

- S.I. 2018/62** Pension Schemes Act 2017 (Commencement No. 1) Regulations 2018
- S.I. 2018/63** Pensions Act 2008 (Commencement No. 16) Order 2018
- S.I. 2018/86** Wireless Telegraphy (Licence Award) Regulations 2018
- S.I. 2018/105** Veterinary Surgeons and Veterinary Practitioners (Registration) (Amendment) Regulations Order of Council 2018

# Appendix 1

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## S.I. 2017/1279

### ***Registration (Entries of Overseas Births and Deaths) (Amendment) Order 2017***

1. By a letter dated 31st January 2018, the Committee sought a memorandum on the following point:

*Confirm that the text in article 6 should be inserted in Part 1 of Schedule 2 and not Part 1 of Schedule 1.*

2. We can confirm that the text in article 6 should be inserted in Part 1 of Schedule 2 and not Part 1 of Schedule 1. This is a typographical error and the Department is grateful to the Committee for drawing it to our attention.

3. The Department will now take steps to rectify this error at the first available opportunity.

**Home Office**

**5 February 2018**

## Appendix 2

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### S.I. 2017/1317

#### ***Immigration Act 2016 (Consequential Amendments) (Licensing of Booking Offices: Scotland) Regulations 2017***

1. The Committee has asked the Home Office for a memorandum on the following point:

*Does the Home Office have anything to add to its explanation in part 3 of the Explanatory Memorandum that these Regulations represent a proper exercise of the enabling power, in particular, why the Immigration Act 2016 was not used to provide express vires for the expansion of the Scottish regime.*

2. The Home Office is grateful for this opportunity to provide a further explanation of why we consider the making of the Immigration Act 2016 (Consequential Amendments) (Licensing of Booking Offices: Scotland) Regulations 2017 to be a proper exercise of the power in section 92(2) of the Immigration Act 2016 (“the 2016 Act”) to make consequential amendments. In this memorandum we outline, firstly, the context relating to the 2016 Act as requested, and secondly, considerations relating to the use of the consequential power.

#### ***Context: the Immigration Act 2016***

3. As previously noted, these Regulations complement provision about licensing of private hire vehicles in Schedule 5 to the 2016 Act. The clear intention of Parliament in passing the Act was to regulate operators and drivers throughout the United Kingdom. When introducing the taxi and private hire vehicles amendment provisions to the Immigration Bill which led to the 2016 Act at the Committee stage, Lord Bates stated that “the main thrust of the government amendments is therefore to ensure that this measure applies across the whole of the UK.”<sup>1</sup>

4. We note that when provision relating to illegal working in relation to private hire vehicles was first inserted at Public Bill Committee stage into the Bill, clause 11 introduced a Schedule of provisions amending various regimes in England and Wales and also contained a power to make provisions with “similar effect” in relation to Scotland and Northern Ireland. Subsequently, that power was replaced by provision on the face of the Bill amending the substantive regimes contained in primary legislation for Scotland and Northern Ireland. It was never the legislative intention – and there is no reason to suppose Parliament ever intended – for that “similar effect” to be cut down so as to exclude operators of Scottish private hire vehicles.

5. The reason why the subject matter of these Regulations was not dealt with on the face of 2016 Act itself was due to the unusual structure of the relevant legislation. As noted in the Explanatory Memorandum, these Regulations amend Scottish secondary legislation, namely the Civic Government (Scotland) Act 1982 (Licensing of Booking Offices) Order 2009 (“the 2009 Order”). The 2009 Order in turn makes textual modifications of the

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<sup>1</sup> Lords Hansard, 20 January 2016, column 798.

Civic Government (Scotland) Act 1982 (“the 1982 Act”), which is a general licensing Act applying to a number of different licensing regimes, in so far as it applies to booking offices.

6. At the time of the passage of the Bill it was not considered appropriate to use primary legislation to amend secondary legislation. The reason for this was that it could create uncertainty about the status of any inserted text and whether it could be amended or revoked by future secondary legislation. Nor would it have been appropriate to amend the 1982 Act directly, because that would be inconsistent with the previous approach whereby the 2009 Order operates to modify it. Nor would it have been appropriate to use the power under which the 2009 Order was made, which is exercisable by Scottish Ministers.

7. We recognise that there is no specific power in the 2016 Act providing for these particular changes to be made to the booking office licensing regime. Our records indicate that it was considered at the time of the passage of the Bill that the power in what is now section 92 would be sufficient.

#### *Use of the power in section 92(2) to make consequential provision*

8. We note that Craies on Legislation states, at section 3.4.10.1, that consequential provision will be tested to determine “whether it can fairly be presented as a mere consequence (whether absolutely necessary or merely clearly desirable) of the principal provisions”. We are satisfied that these provisions meet the standard of being “clearly desirable”. In the Secretary of State’s view it is clearly desirable in policy terms that this small gap in the illegal working scheme is filled, so as to create a uniform scheme across the different forms of licensing regime. The 2016 Act clearly made provision for operators’ licences across the United Kingdom including, for example, amending on the face of the Act the Plymouth City Council Act 1975 and the London Hackney Carriages Act 1843. In our view it would also be an expected use of the power, in the context of such a variety of licensing regimes across the United Kingdom, to also make provision for Scottish booking offices.

9. There is also an issue of legislative consistency and fairness across the different regions of the United Kingdom, which makes it “clearly desirable” that this provision is made. Equivalent provision to that made by the Regulations already exists for England and Wales, and for Northern Ireland, so if this Scottish provision were not to be made, that would create an anomaly in Scotland. This argument on consistency and fairness across the UK is illustrated by the justification for the provisions as set out by Lord Bates during the debates on the Bill:<sup>2</sup> “Illegal working is a key driver of illegal migration. Being able to work illegally encourages economic migrants to put themselves in harm’s way in efforts to enter the UK illegally or to overstay. ... Illegal working also undercuts legitimate businesses which play by the rules, and may depress wages and the availability of work for British citizens and lawful migrants.”

10. We further note the Committee’s past view<sup>3</sup> that the principle that “anything at all significant, and certainly anything involving significant intrusion on the liberty of the subject, will not reliably be effected in reliance on a mere power to make incidental or supplemental provision” also applies equally to a power to make consequential provision.

<sup>2</sup> Lords Hansard, 9 March 2016, column 1312.

<sup>3</sup> 8th Report for Session 2007–8, paragraph 1.15 (cited in footnote 91 to section 3.4.10.1 of Craies).

These Regulations make amendments to one statutory instrument, the 2009 Order, concerning one sole issue (illegal working). The Regulations do not impinge on the liberty of the subject: they do not create a criminal offence, or a power of entry, or anything which is of a disproportionately draconian nature. The underlying principles are not new or unusual, because illegal working has already been made an offence under section 24B of the Immigration Act 1971; the purpose of the licensing provisions was simply to prevent an anomaly whereby a person who was already prohibited from working could obtain a licence which purported to allow him to work in a particular sector.

11. In summary, we are therefore satisfied that the Secretary of State can reasonably conclude that it is “appropriate in consequence of this Act” (which, as previously noted, is a lower test than “necessary”) to make these Regulations, so that private hire vehicle operators’ licences are regulated consistently across the United Kingdom.

**Home Office**

**6 February 2018**