



House of Lords
House of Commons

Joint Committee on Statutory
Instruments

Thirty-Seventh Report of Session 2022-23

Drawing special attention to:

Tribunal Procedure (Amendment) Rules 2023 (S.I. 2023/327)

*Criminal Legal Aid (Remuneration) (Amendment) (No. 2)
Regulations 2023 (S.I. 2023/366)*

*Secretaries of State for Energy Security and Net Zero, for Science,
Innovation and Technology, for Business and Trade, and for Culture,
Media and Sport and the Transfer of Functions (National Security
and Investment Act 2021 etc) Order 2023 (S.I. 2023/424)*

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Joint Committee on Statutory Instruments

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Lord Chartres (*Crossbench*)

Baroness D'Souza (*Crossbench*)

Lord Leong (*Labour*)

Lord Sahota (*Labour*)

Baroness Sater (*Conservative*)

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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, 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.

Committee staff

The current staff of the Committee are Sue Beeby (Committee Operations Officer), Ines Nizigama (Committee Operations Officer), Michael O’Leary (Committee Operations Manager), Christine Salmon Percival (Lords Clerk), Jonathan Whiffing (Commons Clerk). Advisory Counsel: Sarita Arthur-Crow, Klara Banaszak, Justin Leslie, Vanessa MacNair (Commons); Nicholas Beach, James Cooper, and Ché Diamond (Lords).

Contacts

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Instruments reported

At its meeting on 17 May 2023 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 are given below. The relevant departmental memoranda are published as appendices to this report.

1 S.I. 2023/327: Reported for defective drafting

Tribunal Procedure (Amendment) Rules 2023

1.1 **The Committee draws the special attention of both Houses to these Rules on the grounds that they are defectively drafted in two respects.**

1.2 These Rules, which are subject to the negative resolution procedure, amend five Procedure Rules that apply to the First-tier Tribunal and the Upper Tribunal.

1.3 Rule 4(2) inserts a new paragraph (3A) into rule 6 of the Tribunal Procedure (First-tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules 2008 (S.I. 2008/2686) (“the 2008 Rules”). This provides that a party making a written application for a direction must, in addition to sending a copy of the application to other parties or persons, request that any comments on the application should be sent to the Tribunal “within 7 days”. The Committee asked the Ministry of Justice to explain when the 7-day period is to run from, such as the day the copy of the application is sent or the day it is received. In a memorandum printed at Appendix 1, the Department explains that the intention is that the period should run from the day that the copy of the application is received and acknowledges that the drafting has not made this clear. **The Committee accordingly reports rule 4(2) for defective drafting, acknowledged by the Department.**

1.4 Rule 4(4)(b) amends rule 22(2) of the 2008 Rules to replace “decision maker” with “Tribunal”. Rule 22(2) contains two references to decision maker. Amending both references will result in an inconsistency with rule 22(1)(b) and the Committee asked the Department to explain. In its memorandum, the Department acknowledges the drafting error and explains that the intention was to only replace “decision maker” in the second place where it occurs. **The Committee accordingly reports rule 4(4)(b) for defective drafting, acknowledged by the Department.**

2 S.I. 2023/366: Reported for doubt as to whether the instrument was validly made

Criminal Legal Aid (Remuneration) (Amendment) (No. 2) Regulations 2023

2.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that there is doubt as to whether this instrument was validly made.**

2.2 These Regulations, which are subject to the negative resolution procedure, amend the Criminal Legal Aid (Remuneration) Regulations 2013 (S.I. 2013/435) to provide for an additional fee.

2.3 The preamble states that the Regulations are made by the Secretary of State. However, the enabling power in section 2(3) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 confers the power to make regulations on the Lord Chancellor. The Committee asked the Ministry of Justice to explain. In a memorandum printed at Appendix 2, the Department asserts that the reference to the Secretary of State was a drafting error and that urgent consideration is being given to the most appropriate remedy.

2.4 A power to make subordinate legislation rests only with the person or persons specified by the enabling power. The power to make regulations in this instance, and to have overall responsibility for legal aid, rests with the Lord Chancellor. Whilst the offices of the Secretary of State for Justice and the Lord Chancellor have in recent times been held by the same person, the capacity in which the person is acting will determine whether the instrument was validly made. On the face of the instrument, this instrument was not made in conformity with the powers cited. Since the constitutional changes made by the Constitutional Reform Act 2005, the Government has chosen to retain the Lord Chancellor as an active office. As a matter of constitutional law, the two offices are not interchangeable and the Secretary of State did not have power to make these Regulations. **The Committee accordingly reports this instrument for doubt as to whether it was validly made.**

3 S.I. 2023/424: Reported for failure to comply with proper legislative practice and defective drafting

Secretaries of State for Energy Security and Net Zero, for Science, Innovation and Technology, for Business and Trade, and for Culture, Media and Sport and the Transfer of Functions (National Security and Investment Act 2021 etc) Order 2023

3.1 **The Committee draws the special attention of both Houses to this Order on the grounds that it fails to comply with proper legislative practice in one respect and is defectively drafted in two respects.**

3.2 This Order, which is subject to the negative resolution procedure, makes provision in connection with the establishment of the Department for Energy Security and Net Zero, the Department for Science, Innovation and Technology, and the Department for Business and Trade; and the distribution of certain functions between those new Departments and the Department for Culture, Media and Sport.

3.3 The Order was laid on the 13 April and comes into force on the 3 May, resulting in a breach of the 21-day rule. The Explanatory Memorandum does not provide an explanation and the Committee asked the Department for Energy Security and Net Zero to explain. In a memorandum printed at Appendix 3, the Department explains that the breach was due to a technical error in the Cabinet Office's email system. The delay resulted in the instrument being laid on 13 April instead of 11 April. **The Committee reiterates the importance of complying with the 21-day rule (as set out in its First Special Report of Session 2017–19, Transparency and Accountability in Subordinate Legislation) and accordingly reports this Order for failure to comply with proper legislative practice, acknowledged by the Department.**

3.4 Article 15(2) provides that the functions of the Secretary of State under sections 85 to 95 of, and Schedules 7 and 8 to, the Enterprise Act 2002 are to be exercisable concurrently with the Chancellor of the Duchy of Lancaster. Section 90 of the 2002 Act provides that Schedule 10 shall have effect and the Committee accordingly asked the Department whether article 15(2) should have included a reference to Schedule 10. In its memorandum, the Department explains that the functions in Schedule 10 are not at present intended to be included. That being so, the Committee considers that section 90 should not have been included in article 15(2). As article 15(2) includes functions under section 90 and the sole purpose of section 90 is to provide that Schedule 10 is to have effect, article 15(2) creates a doubt as to whether the functions in Schedule 10 are to be exercisable concurrently with the Chancellor of the Duchy of Lancaster. **The Committee accordingly reports article 15(2) for defective drafting.**

3.5 The Schedule contains various amendments to primary and secondary legislation. Paragraph 10(4) amends the meaning of “Secretary of State” in section 91(5) of the Enterprise Act 2002 to include the Chancellor of the Duchy of Lancaster. The Committee asked the Department to explain why the extended meaning was limited to subsection (5), given that there are other references to Secretary of State in section 91 of the 2002 Act. In its memorandum the Department explains that there is not a practical prospect of the Chancellor of the Duchy of Lancaster exercising those other functions. The Department explains that it took a sparing drafting approach when it came to textual amendments so as to only amend where there was a realistic prospect of the functions being exercised by the Chancellor of the Duchy of Lancaster in the future.

3.6 The problem with this approach is that as a matter of law, all of the functions in section 91 are exercisable concurrently with the Chancellor of the Duchy of Lancaster due to article 15(2). However, reading section 91 as amended by paragraph 10(4) of the Schedule, it would appear that only some of the functions are exercisable concurrently. This is not a desirable outcome because of the potential confusion that this would create for a reader of section 91. If the policy intention was for the Chancellor of the Duchy of Lancaster to only exercise a limited number of functions concurrently, article 15(2) should have transferred only those limited functions. **The Committee accordingly reports article 15(2) for defective drafting in this additional respect.**

Instruments not reported

At its meeting on 17 May 2023 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

Draft instruments requiring affirmative approval

S.I. Numbers	S.I. Title
Draft	Amendments of the Law (Resolution of Silicon Valley Bank UK Limited) (No. 2) Order 2023
Draft	Animal Welfare (Electronic Collars) (England) Regulations 2023

Instruments subject to annulment

S.I. Numbers	S.I. Title
S.I. 2023/447	Middlesbrough Development Corporation (Functions) Order 2023
S.I. 2023/479	National Health Service (Pharmaceutical and Local Pharmaceutical Services) (Amendment) Regulations 2023

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. Numbers	S.I. Title
S.I. 2023/450	Nationality and Borders Act 2022 (Commencement No. 6) Regulations 2023
S.I. 2023/502	Public Order Act 2023 (Commencement No. 1) Regulations 2023

Appendix 1: Memorandum from the Ministry of Justice

S.I. 2023/327

Tribunal Procedure (Amendment) Rules 2023

1. The Committee has asked the Ministry of Justice for a memorandum on the following point(s):

1. Explain when the 7-day period in new paragraph (3A), inserted by rule 4(2) is to run from (the day the copy of the application is sent or the day it is received).
2. Explain whether the amendment made by rule 4(4)(b) intended to substitute “decision maker” in both places where it appears, bearing in mind the existing wording in rule 22(1)(b) of S.I. 2008/2686 (“the notice of the revised decision sent by the decision maker to the appellant”).

2. The Ministry is grateful for the Committee’s consideration of this instrument and responds as follows:

- a) In relation to the first point, the intention is that the 7-day period should run from the day that the copy of the application is received. It is acknowledged that the drafting has not made this clear.
- b) In relation to the second point, the amendment made by rule 4(4)(b) was intended to substitute “decision maker” only in the second place where it occurs, not in both places, and the drafting error is acknowledged.

3. The Ministry will seek to correct these errors in the next routine amending instrument for the tribunal procedure rules (this is likely to be in October 2023).

Ministry of Justice

9 May 2023

Appendix 2: Memorandum from the Ministry of Justice

S.I. 2023/366

Criminal Legal Aid (Remuneration) (Amendment) (No.2) Regulations 2023

1. The Committee has asked the Ministry of Justice for a memorandum on the following point:

Explain why the preamble states that the instrument is made by the Secretary of State (given that the enabling power confers the power to make regulations on the Lord Chancellor).

2. The Ministry confirms that the reference to the Secretary of State was a drafting error. The intention was that the instrument was made in exercise of the Lord Chancellor's powers, as stated in section 6.1 of the Explanatory Memorandum.

3. The Ministry apologises for this error, and is giving urgent consideration to the most appropriate remedy.

Ministry of Justice

9 May 2023

Appendix 3: Memorandum from the Department of Energy Security and Net Zero

S.I. 2023/424

Secretaries of State for Energy Security and Net Zero, for Science, Innovation and Technology, for Business and Trade, and for Culture, Media and Sport and the Transfer of Functions (National Security and Investment Act 2021 etc) Order 2023

1. The Committee has asked the Department for Energy Security and Net Zero for a memorandum on the following points:
 - (1) Explain why this instrument does not comply with the 21-day rule.
 - (2) Explain whether article 15(2) should also have made reference to Schedule 10 of the Enterprise Act 2002 (in light of section 90 being included).
 - (3) Explain why paragraph 10(4) of the Schedule has limited the expanded meaning of “Secretary of State” to only subsection 5 of section 91.

Non-compliance with the 21-day rule

2. The Department apologises for the failure to comply with the 21-day rule. This failure occurred because, due to a technical error in the Cabinet Office’s email system, the email providing the instrument to the Journal Office was delayed. This delay, and its knock-on effects, resulted in the instrument being laid on 13 instead of 11 April.

Background context to points (2) and (3)

3. The provisions in the instrument relating to the Enterprise Act 2002 are essentially of transitional rather than permanent relevance. Previously, the Enterprise Act 2002 contained powers to intervene in business mergers on national security grounds. Those powers are now contained in the National Security and Investment Act 2021, so it is the powers under that Act that the Chancellor of the Duchy of Lancaster (“CDL”) will principally exercise in future. However, there are still some extant undertakings in relation to historical cases under the old Enterprise Act 2002 regime, so the Department considered it necessary to make the Secretary of State’s functions under that regime exercisable by the CDL too, in case further actions needed to be taken in relation to those cases.
4. In that context although article 15(2) theoretically makes all of the Secretary of State’s functions under the provisions mentioned there exercisable by the CDL, the Department took a relatively sparing drafting approach when it came to textual amendments to the Enterprise Act 2002, and only glossed “Secretary of State”, and made related textual amendments, in places where there was a realistic prospect of the CDL actually needing to exercise the functions in question. In the Department’s view this was a balanced approach: ensuring that flexibility was afforded to the CDL while avoiding cluttering the statute book with complexities that would never, in practice, be relevant.

Explain whether article 15(2) should also have made reference to Schedule 10 of the Enterprise Act 2002 (in light of section 90 being included)

5. The Department notes this point and thanks the JCSI for bringing it to its attention. Although section 90 falls within the wording of article 15(2) “functions... under sections 85 to 95...and Schedules 7 and 8”, section 90 does not itself contain any functions and as such none are extended to the CDL. This wording will also not provide for the functions in Schedule 10 to be extended to the CDL, as is made clear from the fact that Schedules 7 and 8 are expressly mentioned in Article 15(2), but Schedule 10 is not. (Note also that Schedule 9, part 1 of which is introduced by section 86, is not mentioned in Article 15(2) either, and both the drafting of Article 15(2) and the context make it clear that there is no intention to transfer functions under that Schedule.)

6. In light of the context set out in the section above, the Department is currently assessing whether an amendment including the functions in Schedule 10 amongst those extended to the CDL is desirable and, if considered necessary, an amendment to this effect will be made.

Explain why paragraph 10(4) of the Schedule has limited the expanded meaning of “Secretary of State” to only subsection 5 of section 91

7. The exercise of functions by the CDL will not in practice be relevant except as regards section 91(5). The Department made this drafting choice because there is no practical prospect of the CDL giving consent as mentioned in subsection (3)(d), as the CDL will not in future exercise functions under either paragraph 7, or paragraph 8 of Schedule 7. For this reason those paragraphs were not textually amended.

8. Likewise, there is no practical prospect of the CDL making an order under subsection (6)(a), so in the Department’s view it would have been misleading to include references to the CDL alongside those to the Secretary of State in that subsection.

9. In contrast, the CDL might need to inform the CMA, by virtue of subsection (5), of matters which are registrable by virtue of subsection (3)(a) to (c). As a result, in this instance, it was considered appropriate to include the CDL along with the Secretary of State in relation to subsection (5).

Department for Energy Security and Net Zero

9 May 2023

Formal Minutes

Wednesday 17 May 2023

Virtual meeting

Members present

Jessica Morden, in the Chair

Lord Beith

Lord Chartres

Peter Grant

Gareth Johnson

Lord Sahota

Baroness Sater

Lord Smith of Hindhead

Report consideration

Draft Report (Thirty-Seventh 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 3.6 read and agreed to.

Annex agreed to.

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

Resolved, That the Report be the Thirty-Seventh 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.

Adjournment

Adjourned till Wednesday 24 May 2023 at 3.40 p.m.