HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

47th Report of Session 2022–23

Sifting “proposed negative instruments” laid under the Retained EU Law (Revocation and Reform) Act 2023

Drawn to the special attention of the House:

Administration of Estates Act 1925 (Fixed Net Sum) Order 2023

Includes information paragraphs on:

Draft Environmental Permitting (England and Wales) Amendment Regulations 2023

Draft Mayoral and Police and Crime Commissioner Elections, Recall Petitions and Referendums (Ballot Secrecy, Candidates and Undue Influence) Regulations 2023 and two related instruments

Persistent Organic Pollutants (Amendment) Regulations 2023

Drivers’ Hours and Tachographs (Amendment) Regulations 2023

Criminal and Civil Legal Aid (Amendment) Regulations 2023

Social Security (Contributions) (Amendment No. 4) Regulations 2023

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Secondary Legislation Scrutiny Committee

The Committee's terms of reference, as agreed on 17 July 2023, are set out on the website but are, in summary:

To report on draft instruments and memoranda laid before Parliament under section 23(1) of the European Union (Withdrawal) Act 2018 and sections 11, 12 and 14 of the Retained EU Law (Revocation and Reform) Act 2023.

And, to scrutinise –

(a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;

(b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in the terms of reference.

The Committee may also consider such other general matters relating to the effective scrutiny of secondary legislation as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

Lord De Mauley
Baroness Harris of Richmond
Lord Hunt of Wirral (Chair)
Lord Hutton of Furness
Baroness Lea of Lymm
Lord Powell of Bayswater
Baroness Randerson
Baroness Ritchie of Downpatrick
Lord Rowlands
Lord Russell of Liverpool
Lord Thomas of Cwmgiedd

Registered interests

Information about interests of Committee Members can be found in the last Appendix to this report.

Publications

The Committee's Reports are published on the internet at https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/

Committee Staff

The staff of the Committee are Christine Salmon Percival (Clerk), Philipp Mende (Adviser), Chris Smith (Adviser), Jane White (Adviser) and Riona Millar (Committee Operations Officer).

Further Information

Further information about the Committee is available at https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/

The progress of statutory instruments can be followed at https://statutoryinstruments.parliament.uk/

The National Archives publish statutory instruments with a plain English explanatory memorandum on the internet at http://www.legislation.gov.uk/uksi

Contacts

Any query about the Committee or its work, or opinions on any new item of secondary legislation, should be directed to the Clerk to the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW. The telephone number is 020 7219 8821 and the email address is hlseclegscrutiny@parliament.uk.

Forty Seventh Report

SIFTING "PROPOSED NEGATIVE INSTRUMENTS" LAID UNDER THE RETAINED EU LAW (REVOCATION AND REFORM) ACT 2023

1. Following the passage of the European Union (Withdrawal) Act 2018 ("the 2018 Act"), the terms of reference of the Secondary Legislation Scrutiny Committee (SLSC) were amended by the House to include the sifting of proposed negative instruments laid under sections 8, 9 and 23 of that Act.[1] They were later further amended to include sifting of proposed negative instruments laid under section 31 of the European Union (Future Relationship) Act 2020 ("the 2020 Act").[2] The Retained EU Law (Revocation and Reform) Act 2023 ("the 2023 Act"), which received Royal Assent on 29 June 2023, contains similar sifting provision and, following a report by the Procedure and Privileges Committee,[3] the House has agreed that proposed negatives instruments laid under that Act should also be included in the terms of reference of the SLSC.[4]

Sifting of proposed negative instruments

2. The sifting function applies to the exercise of powers–in the case of the 2023 Act, powers contained in sections 11, 12 and 14 of that Act–where a minister may choose whether instruments to be made using those powers should be subject to the negative or the affirmative resolution procedure. Ministerial choice is exceptional. Usually, the scrutiny procedure applied to the exercise of a delegated legislative power will be prescribed in the parent Act. So, as a safeguard in this exceptional circumstance, where a minister has a choice, the 2023 Act provides for a parliamentary scrutiny procedure–sifting–whereby committees in each House may consider, in draft, instruments where the minister proposes the negative procedure should apply, and may make a recommendation that the affirmative procedure should apply instead. In the House of Lords, the SLSC performs this function and in the House of Commons it is undertaken by the European Statutory Instruments Scrutiny Committee (ESIC). The powers are time-limited: the power conferred by section 11 expires at the end of 2023, and the powers conferred by sections 12 and 14 on 23 June 2026. At the end of 2023, what is now known as "retained EU law" will be called "assimilated law".

Mandatory affirmative procedure

3. There are circumstances where the exercise of some powers under sections 11 (power to restate secondary retained EU law), 12 (power to restate secondary assimilated law or reproduce sunsetted retained EU rights, powers, liabilities

1 House of Lords Procedure Committee, *5th Report* (Session 2017–19, HL Paper 163). See also HL Deb, 11 July 2018, cols 915–919.
2 The power in section 8 of the 2018 Act and the sifting function under section 31 of the 2020 Act ended on 31 December 2022. Section 9 of the 2018 Act was repealed by the 2020 Act. The sifting function under section 23 of the 2018 Act will not end until 31 December 2030, but few proposed negative instruments have been laid under this provision.
3 House of Lords Procedure and Privileges Committee, *6th Report* (Session 2022–23, HL Paper 228).
4 HL Deb, 17 July 2023, cols 2052–5.

etc.) and 14 (power to revoke or replace)[5] are required by the 2023 Act to be subject to the affirmative procedure (and will not, therefore, engage the sifting procedure). These are:

- Regulations made under sections 11 and 12 which amend, repeal or revoke primary legislation (paragraph 5(2)(c)).
- Regulations made under section 14(2) which confer a power to make subordinate legislation (also known as tertiary legislation) or create a criminal offence (paragraph 5(2)(d)).
- Regulations made under 14(3) (paragraph 5(2)(e)). (These are regulations which "revoke any secondary retained EU law and make such alternative provision as the relevant national authority considers appropriate".)

Other affirmative instruments

4. Even if not a *mandatory* requirement, a minister may decide that an instrument made under sections 11, 12 and 14 should be laid in draft and subject to the affirmative resolution procedure. These will not be subject to sifting and will be laid and scrutinised by the SLSC in the usual way.

Siftable instruments

5. Instruments under certain provisions under sections 11, 12 and 14 which the minister proposes should be made using the negative resolution procedure are subject to sifting. The procedure is set out in paragraph 6 of Part 2 of Schedule 5 to the 2023 Act. Where a minister proposes that the negative procedure should apply, the minister cannot make the instrument unless condition 1 and either condition 2 or 3 are met (paragraph 6(2)).

- Condition 1 is that the minister has made a statement in writing that in their opinion the negative procedure should apply and has laid before both Houses of Parliament a draft of the instrument and a memorandum setting out the statement and the reasons for their opinion.
- Condition 2 is that committees in the two Houses (the SLSC in the Lords and ESIC in the Commons) within 10 sitting days ("the relevant period") have made a recommendation about the appropriate procedure in relation to the proposed negative instrument.
- Condition 3 is that condition 2 has not been met–that is, that the committees have not reported in the relevant period.

6. If either of the committees (the SLSC or ESIC) recommends that an instrument should be upgraded, but the minister disagrees, the minister must make a statement explaining why (paragraph 6(6) and (7)). The statement must be in writing and published in a way the minister considers appropriate. To date, the minister has not disagreed with any of the sifting decisions of the committees under the 2018 Act and 2020 Act. During the passage of the Retained EU Law Bill, the Minister, Lord Callanan,

5 The power under section 14 is especially broad and enables a minister:

- to revoke any secondary retained EU law without replacing it (section 14(1)),
- to revoke and replace "with such provision" as they consider "to be appropriate and to achieve the same or similar objectives" (section 14(2)), and
- to revoke and "make such alternative provision" as they consider appropriate (section 14(3).

said, referring to the sifting procedure: "It is a tried and tested method of parliamentary scrutiny which, in my view, delivers good results for everyone and draws on the experience of our parliamentary committees. We will, of course, respect the judgment of the sifting committees relevant to the Bill, in the same way as we did for the EU withdrawal Act."[6] **We welcome the Government's commitment to adopting the same approach to sifting recommendations made under the 2023 Act as that applied to the 2018 and 2020 Acts.**

Our approach to sifting under the 2023 Act

7. In 2018, when the terms of reference of the SLSC were extended to include the sifting of instruments under the 2018 Act, the SLSC published a report about how it would approach its consideration of proposed negatives.[7] The SLSC concluded, amongst other things, that it would:

- consider each proposed negative instrument on its merits, taking into account the minister's reasons for their opinion that the negative procedure should apply, and

- apply the overarching test: "is the subject matter of this instrument and the scope of any policy change effected by it of such significance that the House would expect to debate it?"

8. **We propose to take the same approach in relation to proposed negatives laid under the 2023 Act. We shall also be looking keenly at the quality of the consultation that has been undertaken prior to the laying of the instruments**.

Explanatory material

9. In order to discharge its sifting function effectively, and for the House to understand the basis of the SLSC's decisions, it will be critically important that the explanatory material accompanying the proposed negative instrument should state clearly the context of the policy to be implemented by the instrument, including the legislative context. If, for example, the instrument is laid under section 11, then the explanation should include what is being restated, whether there are any differences between the restatement and what is being restated, and whether there is a broader context relevant to the SLSC's assessment of an instrument. In 2018, the SLSC said: "[t]he Committee will apply the same rigour when scrutinising the explanatory materials accompanying proposed negative instruments laid under the [2018] Act as it does in discharging its current function … ".[8] **This will remain the case in relation to the explanatory materials relating to proposed negative instruments laid under the 2023 Act**.

Conclusion

10. We welcome the extension of our terms of reference, and we will seek to discharge this additional function to the high standard which the House expects. **To assist us, we–in turn–expect explanatory material to be sufficiently complete to enable us, and the House and the wider public,**

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6 HL Deb, 6 June 2023, col 1254.

7 SLSC, *Sifting "proposed negative instruments" laid under the European Union (Withdrawal) Act 2018: criteria and working arrangements"* (37th Report, Session 2017–19, HL Paper 174).

8 *Sifting "proposed negative instruments" laid under the European Union (Withdrawal) Act 2018: criteria and working arrangements"*, para 69.

to understand the significance of a proposed negative instrument and how it meets the requirements of the 2023 Act.

11. **We also take the opportunity to encourage anyone who wishes to comment on a proposed negative instrument to make a submission to our generic email (hlseclegscrutiny@parliament.uk) as soon as possible,** and—given that the SLSC must make its recommendation within 10 sitting days (as it did under the earlier Acts)—**preferably within five working days of the instrument being laid.**[9]

12. Finally, the powers under sections 11, 12 and 14, especially section 14, of the 2023 Act are significant and could be used to make substantial policy changes. Earlier this year, in February 2023, we published a report on the Retained EU Law (REUL) Bill, *Losing Control?: The Implications for Parliament of the Retained EU Law (Revocation and Reform) Bill*,[10] in which we commented on the effect of downgrading the status of direct principal retained EU legislation so that it could be amended by secondary legislation rather than primary legislation. In response, Lord Callanan said:

> "Where the Government is reforming REUL in a way that fundamentally changes existing legislative and policy frameworks it has used, and will continue to use, primary legislation to make those changes".[11]

13. **We look to the Government to uphold this commitment to use primary legislation to make fundamental policy changes.** Where we find that an instrument–whether a proposed negative instrument or an affirmative instrument–laid under the 2023 Act makes provision for a significant policy change, we will expect the minister to explain why it is appropriate to do so using secondary legislation rather than the more robust and accountable procedures applied to primary legislation. **If we find the explanation unconvincing, we shall report to the House accordingly.**

9 A list of instruments currently under consideration by the Committee is on our main web page.
10 SLSC, *Losing Control? The Implications for Parliament of the Retained EU Law (Revocation and Reform) Bill: Government Response*, (39th Report, Session 2022–23, HL Paper 194).
11 *Losing Control? The Implications for Parliament of the Retained EU Law (Revocation and Reform) Bill: Government Response*, p 3.

INSTRUMENT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Administration of Estates Act 1925 (Fixed Net Sum) Order 2023 (SI 2023/758)

Date laid: 5 July 2023

Parliamentary procedure: negative

This Order increases the fixed net sum, which is the amount that a surviving spouse or civil partner receives if a person who also has descendants dies intestate, from £270,000 to £322,000. The fixed net sum is designed to balance the interests of the surviving partner and the descendants. Increases in the sum should follow a mechanical process, set out in primary legislation, and which the Ministry of Justice (MoJ) must implement within 21 days of an inflation index rising by more than a certain percentage. However, the threshold was passed in December 2022 and MoJ only made this Order in July 2023. This means that MoJ has breached the law: an inexcusable error. As a result, some estate beneficiaries may have lost out because they have received amounts that are significantly lower than they would have been entitled to, had the legislation been complied with. Some beneficiaries of future estates may also lose out. MoJ has not yet said how it will deal with this situation, stating that it is still considering all options available..

The Explanatory Memorandum (EM) laid with the Order was deficient in several respects. Most importantly, the EM did not acknowledge that the uprating process breached the legislative requirements. MoJ has agreed to redraft the EM. ***However, providing essential, accurate and not misleading information on the background to an instrument should not require our intervention. We are writing to the Minister concerned to request further information on how the deficiencies in this EM arose, as well as on MoJ's timetable for resolving the situation.***

This Order is drawn to the special attention of the House on the ground that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation.

Background

14. If a person dies intestate—that is, without leaving a valid will that covers their entire estate—and has both a surviving spouse or civil partner and surviving descendants (children, grandchildren etc), there are laws in place that dictate how the estate is distributed. Specifically, the person's descendants inherit the entire estate apart from an amount known as the 'statutory legacy', or alternatively as the 'fixed net sum', which goes to the surviving partner. The Ministry of Justice (MoJ) states this is "designed to protect the interests of the surviving spouse/civil partner, but also to balance them against the interests of the children of the deceased person".

15. Prior to this Order, the fixed net sum was £270,000. This Order increases the sum to £322,000.

Why is the fixed net sum increasing?

16. Procedures for when and how the fixed net sum should be increased are laid down in primary legislation. The Administration of Estates Act 1925 ("the 1925 Act"), as amended by the Inheritance and Trustees' Powers Act 2014, places a responsibility on the Lord Chancellor to change the fixed net sum periodically by way of statutory instrument and sets out a formula that must be used in doing so.

17. The formula is set out in Schedule 1A of the 1925 Act. The Schedule states that if a particular inflation index increases by more than 15% since the fixed net sum was last revalued, the Lord Chancellor must make an order to increase the sum in line with the increase in that inflation index, rounded up to the next £1,000. The Schedule does allow the Lord Chancellor to increase the sum in other circumstances and by other amounts, but MoJ is not seeking to exercise those provisions in this Order.

18. According to the 1925 Act, the order to increase the sum must be made within 21 days of the publication of the relevant inflation data.

Why has MoJ breached the legislation?

19. In operating the formula, MoJ uses as an inflation index the Consumer Prices Index including owner occupiers' housing costs (CPIH), published by the Office for National Statistics. At the time the fixed net sum was last revalued, in November 2019, CPIH was 108.5.[12]

20. The CPIH figure for November 2022, published on 14 December 2022, was 124.8, exceeding the 15% threshold.[13] Hence, MoJ should have made an order to increase the sum in early January 2023. However, it did not do so; this Order was not made until 5 July 2023. **This means that MoJ is in breach of the requirements of the 1925 Act. For a government department to breach the law in this way is an inexcusable error**.

What are the implications of the breach?

21. Had MoJ made an order in January 2023, based on the November 2022 inflation data, it would have increased the fixed net sum from £270,000 to £311,000, and this would have come into force in late January 2023. Instead, this Order brings in a new level for the fixed net sum of £322,000, based on the May 2023 inflation data, coming into force on 26 July 2023.

22. Hence, any estate which has been distributed using the fixed net sum rules between late January 2023 and 26 July 2023 may have provided a payment lower than it should have been to the surviving spouse or civil partner. **Such partners could have lost out by £41,000.**

23. Further, had MoJ implemented the increase in January 2023, the fixed net sum would have remained at £311,000 until the inflation index increased by a further 15% (or one of the other provisions in the 1925 Act was activated). Hence, from 26 July 2023 onwards, payments to surviving spouses or

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12 Office for National Statistics, 'CPIH Index: All Items 2015=100': https://www.ons.gov.uk/economy/inflationandpriceindices/timeseries/l522/mm23 [accessed 13 July 2023].

13 Office for National Statistics, 'Consumer price inflation, UK: November 2022': https://www.ons.gov.uk/economy/inflationandpriceindices/bulletins/consumerpriceinflation/november2022 [accessed 13 July 2023].

civil partners will be up to £11,000 higher than they would have been. **Correspondingly, payments to descendants will be up to £11,000 lower**.

24. **The breach has created, and will continue to create, 'losers' and 'winners' compared to if the legislation had been followed, with significant sums of money at stake in each case**.

How many people are affected?

25. We asked MoJ how many cases have been and might continue to be affected. MoJ was not able to provide any estimates. It said that "unfortunately no central records are kept of the numbers of people in receipt of the fixed net sum". It also noted that there could be complications, such as whether the family home was held on joint tenancy such that the deceased's interest would have passed on survivorship and not formed part of the estate.

26. MoJ noted that for an estate to be affected, it would have to fulfil all the following conditions:

- The person died intestate;
- the residual estate must be worth more than £270,000—MoJ quoted figures from 2007–2008 that suggested 90% of estates were then worth less than this sum; and
- there was both a surviving partner and surviving dependants.

27. We accept that estimating the extent of the impact may be difficult. **However, it is concerning that MoJ appears to have no idea of the number of people affected and is relying on data that is 15 years old for even basic underlying information**.

How is MoJ dealing with the situation?

28. MoJ has provided limited information on how it is dealing with the situation resulting from the legislative breach. For example, the Explanatory Memorandum (EM) laid with the instrument said only that "the Government will be taking steps to communicate the position on the sum not being increased following the trigger point being reached in December 2022 and reviewing any further steps to be taken as a result". In response to our questions, MoJ added that "the Government needs to take time to properly consider the form and nature of the review of this situation and of the legislation itself, and what next steps may be appropriate. It would be premature to speculate on the timescale at this stage, but any action and reforms arising will be made public". MoJ also told us that it had bought the matter to the attention of relevant stakeholders such as the Law Society, Bar Council, Society of Trust and Estate Practitioners and the Chartered Institute of Legal Executives.

29. **MoJ's breach of the law has led to some people losing out. MoJ has not yet said what it will do about these losses; for example, whether it will make compensation available. It is reasonable, as an initial step, for MoJ to consider the available options, but we are keen to understand more about the timescales for deciding what action will be taken. We will be writing to the Minister to request further details on this point, and the House may also wish to press the Minister on MoJ's intended response.**

30. As described in the previous section, MoJ has stated that no central records are kept of those in receipt of the fixed net sum. **Given this, if remedial action is deemed necessary following MoJ's review, it is not clear how those affected will be identified and contacted.**

Failure to disclose the breach

31. The version of the EM laid with the Order was deficient in several respects. Most significantly, it did not acknowledge that the uprating process had breached the requirements of the 1925 Act. **This is a critical piece of information in understanding the background to the instrument, and MoJ has not explained why it was absent.**

32. In response to our challenges, MoJ agreed to revise the EM to acknowledge the breach. **However, it should not require our intervention to ensure that Parliament and the public have access to essential information about instruments. Departments should make sure EMs are 'right first time'.**

Misleading information on inflation rates

33. In our view, the original EM contained misleading information about the movements in the inflation index in the later months of 2022 and early 2023. The EM recognised that the trigger point of a 15% increase was reached in the November 2022 data, but continued that "inflation was volatile, and the figure for January 2023 […] fell before rising again". This could be taken to imply that the inflation index for January 2023 fell below the 15% threshold, when this was not the case; the index has been more than 15% above its November 2019 level continuously since November 2022. Even if it had not been, we do not understand the relevance of the January 2023 data, as the 1925 Act simply requires a rerating within 21 days of the threshold being reached.

34. **MoJ has also agreed to revise the EM in this area but, again, EMs laid alongside instruments should not mislead the reader or obscure issues with the policy.**

Inaccurate description of inflation index

35. The original EM stated that the inflation index MoJ was using was "the Consumer Price Index (CPI)". Following our questions, it transpired that MoJ was, in fact, using the Consumer Prices Index including owner occupiers' housing costs (CPIH), which is a different index to CPI. **The EM should contain accurate references to facilitate scrutiny.**

Conclusion

36. This Order increases the amount that surviving spouses or civil partners receive if a person dies intestate and also has surviving dependants. MoJ failed to follow the process, set out in primary legislation, for increasing the sum, leading to losses for some beneficiaries compared to if the legislation had been followed.

37. We are disappointed that the EM laid with the instrument did not set out this policy background and was also deficient in several other respects. We have recently highlighted the prevalence of poor-quality information in EMs; for example, we have made clear that EMs are not press notices and

that they "should not just announce a policy but provide a justification for it and set out the consequences of its implementation".[14] We have also stated that departments should "acknowledge and address significant concerns" about the policy being implemented by an SI.[15] By now, departments should be clear on what is expected, but these requirements were not complied with in this instrument. **When writing to the Minister, we will also ask for an explanation of why the EM was so uninformative. The House may wish to enquire further on this point, as well as on what MoJ's plans and timetables are for dealing with the situation—including whether it is considering compensating those who have lost out.**

14 SLSC, *Interim Report on the Work of the Committee in Session 2022–23* (42nd Report, Session 2022–23, HL Paper 205), para 37.
15 *Interim Report on the Work of the Committee in Session 2022–23*, para 23.

INSTRUMENTS OF INTEREST

Draft Environmental Permitting (England and Wales) Amendment Regulations 2023

38. This instrument proposes, in relation to England and Wales, changes to the data collection and reporting system that underpins and informs the Extended Producer Responsibility for Packaging scheme ("the pEPR"). The pEPR will launch across the UK in 2024 and will require producers to pay the full costs of dealing with the waste they produce. This instrument would extend the scope of "material facilities" (MFs)[16] which will have to sample and report their waste. The instrument also proposes to extend the types of materials that MFs will have to identify and measure, and to require MFs to report more information on suppliers and destinations of waste. The information will underpin and inform the payment mechanisms under the pEPR, and, according to the Department for Environment, Food and Rural Affairs (Defra), will help to monitor and achieve recycling targets. All MFs within scope will be required to comply from 1 October 2024.

39. We have received a submission from Green Alliance which questions Defra's assessment in the Explanatory Memorandum that the impact of the proposed changes on businesses will not be significant, asks about enforcement and suggests a lack of clarity in relation to the scope of the reporting requirements. We have published the submission and Defra's response on our website.[17] We note the importance of guidance[18] and of work the Department is currently undertaking with industry in preparing the sector for the new requirements.

Draft Mayoral and Police and Crime Commissioner Elections, Recall Petitions and Referendums (Ballot Secrecy, Candidates and Undue Influence) Regulations 2023

Draft Representation of the People (Franchise Amendment and Eligibility Review) Regulations 2023

Draft Representation of the People (Postal and Proxy Voting etc.) (Amendment) Regulations 2023

40. These three sets of draft Regulations propose changes to the rules, procedures and administration of certain elections, in order to implement provisions which were introduced in the Elections Act 2022 ("the Act").

41. The Act introduced new provisions in relation to the offence of "undue influence" for UK parliamentary elections and local government elections in England. Amongst other changes, the first draft instrument would apply these provisions to Police and Crime Commissioner (PCC) elections and Recall Petitions as well as to Council Tax, local authority and neighbourhood planning referenda in England, as well as implement the Ballot Secrecy Act 2023. The Department for Levelling Up, Housing and Communities (DLUHC) describes "undue influence" as an electoral offence which

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16 MFs are facilities which receive mixed waste and sort it into specified waste streams for transfer or recycling.

17 SLSC, 'Scrutiny evidence': https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/8/scrutiny-evidence/ [accessed 19 July 2023].

18 Department for Environment, Food and Rural Affairs, Welsh Government, Environment Agency, Natural Resources Wales, 'Materials facilities: waste sampling and reporting from October 2024': https://www.gov.uk/guidance/materials-facilities-waste-sampling-and-reporting-from-october-2024 [accessed 14 July 2023].

criminalises behaviour which seeks to coerce a person to vote in a certain way or abstain from voting. The new provisions seek to provide greater clarity on this offence, including by specifically covering intimidation.

42. The second draft instrument would implement provisions in the Act to remove the automatic right of EU citizens to vote and stand in local elections in England and PCC elections in Wales. The instrument sets out new eligibility criteria to ensure these rights continue for EU citizens from countries which currently have a bilateral treaty with the UK,[19] and for citizens of EU countries with which the UK does not have a bilateral treaty but who have been lawfully resident in the UK since before 31 December 2020, the end date of the Brexit Implementation Period.

43. Under the new rules, EU citizens will be able to register to vote under the new eligibility criteria, and Electoral Registration Officers (EROs) will be required to conduct a one-off review of all already-registered EU citizens under the new criteria. According to DLUHC, this will be the first review of registered voters based on a reduction of the franchise. The process is to be completed by 31 January 2025 "as far as practicably possible" and will draw on data already available as part of the register, such as nationality and registration history. The Department estimates that 2.1 million EU citizens will be affected in England. It expects around 2 million EU citizens to receive a positive decision and some 160,000 EU citizens to be removed from the register. They will not be removed without first being contacted during the review process. Asked about consultation on the proposals with relevant interest groups, the Department told us that it had engaged with the 3Million Group, which describes itself as "the largest grassroots organisation for EU citizens in the UK".

44. The third draft instrument proposes changes to the rules governing the administration and conduct of Parliamentary elections and other elections, referenda and recall petitions, primarily to implement provisions in the Act in relation to postal and proxy voting (so-called absent voting). Amongst other changes, the instrument would enable voters to apply online via a new digital service to vote by proxy or by post and create an identity checking process for such absent vote applications. This includes matching applications against Department for Work and Pensions held data, and powers for EROs to request additional evidence from applicants to check their identity. DLUHC told us that development of the new digital service was "well underway", and that "extensive testing and user research" was being carried out. The Department also confirmed that in addition to the digital service, the current paper-based application process will continue to be available to voters who do not have digital access or prefer paper applications.

Persistent Organic Pollutants (Amendment) Regulations 2023 (SI 2023/729)

45. These Regulations extend until 3 December 2025 an exemption for the use of a persistent organic pollutant (POP), Perfluorooctanoic acid (PFOA), which would otherwise have expired on 4 July 2023. While the production and use of POPs are generally prohibited or restricted under the United Nations

19 These countries are Luxembourg, Poland, Portugal and Spain. Citizens of Cyprus and Malta, which are members of both the EU and the Commonwealth, will also retain their current rights, while the long-standing voting and candidacy rights of Irish citizens pre-date EU membership and will not be affected by the changes.

Stockholm Convention on Persistent Organic Pollutants ("the Stockholm Convention"), there are several exemptions, including for the production and use of PFOA for protective clothing. According to the Department for Environment, Food and Rural Affairs (Defra), the Ministry of Defence (MoD) uses PFOA in oil- and water repellent clothing that offers protection from dangerous liquids. This instrument extends the exemption in domestic law to mirror an extension which the UK registered under the Stockholm Convention.

46. We note that the exemption applies to Great Britain (GB) only. Defra told us that it did not expect the equivalent exemption under EU law, which continues to apply in Northern Ireland (NI) in this area, to be extended beyond 4 July, and that the MoD was working with the Department of Agriculture, Environment and Rural Affairs in NI to explore the implications and how they can be addressed. **This discrepancy between GB and NI is not mentioned in the Explanatory Memorandum, and we are concerned that it will be difficult for the MoD to follow different rules for the use of PFOA in protective clothing in GB and NI and for these different rules to be enforced**.

47. We also note that the instrument is in breach of the 21-day rule, according to which negative instruments should generally be laid at least 21 days before they are due to come into force. Defra told us that it had been unaware of the expiry of the exemption until it was notified about it by the MoD on 31 May 2023 and that, with no legislative or non-legislative alternatives available, the instrument was laid at the first available opportunity.[20] We welcome that the Department is putting in place arrangements for conversations with key known users to try to reduce the risk of future issues particularly where there is a national security aspect.

48. We have received a submission from the CHEM Trust which raises questions about the use of PFOA and about the process that was followed to assess the risk of extending the exemption. We have published the submission and Defra's response on our website.[21]

Drivers' Hours and Tachographs (Amendment) Regulations 2023 (SI 2023/739)

49. This instrument delays until 21 February 2024 the requirement for new lorries and other commercial vehicles *operating within the UK* to install a "smart tachograph 2" because the technology is not yet available. Our comments on the previous Regulations[22] drew attention to industry's concerns that the 21 August 2023 deadline was unachievable, and this has proved to be the case.

50. Similarly, for a six-month period from 21 August 2023, all newly-registered commercial vehicles *to be used for international journeys* will only need to install a 'transitional' smart tachograph 2. The 'transitional' tachograph will

20 Correction: Since publication of this report, Defra has clarified to us that it was aware that the exemption would expire but was not aware that the MoD required continued use of the exemption and therefore required an extension, through this instrument, to allow continued use of the exempted use."

21 SLSC, 'Scrutiny evidence': https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/8/scrutiny-evidence/ [accessed 19 July 2023].

22 Draft Drivers' Hours, Tachographs, International Road Haulage and Licensing of Operators (Amendment) Regulations 2022 (made as SI 2022/1260), SLSC, *10th Report* (Session 2022–23, HL Paper 56), paras 23-24 and Appendix 2.

not feature the Galileo Open Service for Navigation Message Authentication (OSNMA) function which the EU now expects to become available in March 2024. The UK is required to align this legislation with the EU as part of the Trade and Cooperation Agreement.

51. After 21 February 2024, all newly-registered commercial vehicles, regardless of their journey type, will be required to install a 'transitional' or 'full' smart tachograph 2 when it is available. The Department for Transport states that where a transitional unit has been fitted, there is no current requirement to upgrade it to a full smart tachograph 2, although the EU may in the future seek to mandate it.

Criminal and Civil Legal Aid (Amendment) Regulations 2023 (SI 2023/745)

52. These Regulations implement the policy changes in Phase 1 (of 4) of the Government's response to the Legal Aid Means Test Review (MTR). The means test restricts access to legal advice, assistance and representation to those with income and capital below specified levels in some types of cases. The Regulations include measures that remove the means test, and therefore widen the availability of legal aid, for:

- those under 18 applying for criminal advice and assistance;
- those under 18 applying for all civil legal representation;
- representation for those with parental responsibility for a child facing the withdrawal or withholding of life-sustaining treatment; and
- legal help relating to inquests where, if the individual were to make an application for Exceptional Case Funding representation, it would be reasonably likely to succeed.

53. The Ministry of Justice (MoJ) told us that these changes combined may affect fewer than a hundred cases per year and may cost around £600,000 per annum. MoJ said that the bulk of the estimated total cost of £25 million per year resulting from the MTR will arise in later phases. MoJ also told us that Phases 2 to 4 are due to be implemented via further instruments, to be laid later this year and in 2024 and coming into force in 2025.

Social Security (Contributions) (Amendment No. 4) Regulations 2023 (SI 2023/751)

54. These Regulations extend the time during which voluntary National Insurance Contributions (vNICs) can be paid in respect of tax years 2006–07 to 2015–16. vNICs allow people to fill gaps in their contributions providing entitlement to state pensions. Under transitional arrangements when the state pension system changed, individuals were permitted to make contributions relating to 2006 to 2016 up until 5 April 2023. In March 2023, HM Treasury (HMT) extended the deadline to 31 July 2023, due to high volumes of contact. These Regulations extend the deadline again, to 5 April 2025. In the Explanatory Memorandum, HMT said this, much longer, extension will give people more time to pay, as "contact levels have remained significant", but will also provide the opportunity to introduce "a new end to end digital service" that will make the process "much easier" for customers.

55. In response to our questions, HMT described how the Department for Work and Pensions (DWP), which can discuss with the person whether paying voluntary NICs would be advantageous, is still finding the volume of calls "challenging". For example, HMT told us that DWP received 233,000 calls in June 2023, compared with around 50,000 in June 2022 (but down from over 950,000 in March 2023). HMT said that DWP has limited ability to deploy additional resource because "the nature of this work is complex and the training requirements are extensive". **We welcome people being given more time to make vNICs, but it is of some concern that DWP has so misjudged demand and available resources that a second, longer, extension has become necessary.**

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft instruments subject to affirmative approval

Draft	Environmental Permitting (England and Wales) Amendment Regulations 2023
Draft	Mayoral and Police and Crime Commissioner Elections, Recall Petitions and Referendums (Ballot Secrecy, Candidates and Undue Influence) Regulations 2023
Draft	Representation of the People (Franchise Amendment and Eligibility Review) Regulations 2023
Draft	Representation of the People (Postal and Proxy Voting etc.) (Amendment) Regulations 2023

Instruments subject to annulment

SI 2023/729	Persistent Organic Pollutants (Amendment) Regulations 2023
SI 2023/737	Justices' Allowances (Amendment) Regulations 2023
SI 2023/739	Drivers' Hours and Tachographs (Amendment) Regulations 2023
SI 2023/74	Victims' Payments (Amendment) Regulations 2023
SI 2023/743	Fruit and Vegetables Aid Scheme Closure (England) Regulations 2023
SI 2023/744	Data Protection (Law Enforcement) (Adequacy) (Bailiwick of Guernsey) Regulations 2023
SI 2023/74	Criminal and Civil Legal Aid (Amendment) Regulations 2023
SI 2023/747	Town and Country Planning (General Permitted Development etc.) (England) (Amendment) Order 2023
SI 2023/751	Social Security (Contributions) (Amendment No. 4) Regulations 2023
SI 2023/755	Safety of Sports Grounds (Designation) (Amendment) (England) (No. 3) Order 2023
SI 2023/759	Divorce, Dissolution and Separation Act 2020 (Consequential Amendments) Regulations 2023

APPENDIX 1: INTERESTS AND ATTENDANCE

Committee Members' registered interests may be examined in the online Register of Lords' Interests at https://members.parliament.uk/members/lords/interests/register-of-lords-interests. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 18 July 2023 and included in this report, Members declared the following interests:

Administration of Estates Act 1925 (Fixed Net Sum) Order 2023 (SI 2023/758)

Lord Hunt of Wirral

Practising Solicitor and Partner at DAC Beachcroft LLP (international commercial law firm)

Attendance:

The meeting was attended by Lord de Mauley, Baroness Harris of Richmond, Lord Hunt of Wirral, Lord Hutton of Furness, Baroness Lea of Lymm, Baroness Randerson, and Lord Thomas of Cwmgiedd.