



House of Lords
House of Commons
Joint Committee on Statutory
Instruments

**Seventh Report of
Session 2023–24**

Drawing special attention to:

Dangerous Dogs (Designated Types) (England and Wales) Order 2023
(S.I. 2023/1164)

Civil Legal Aid (Financial Resources and Payment for Services and
Remuneration) (Amendment) Regulations 2023 (S.I. 2023/1177)

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Joint Committee on Statutory Instruments

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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), Jennifer Mills (Lords Clerk), Ines Nizigama (Committee Operations Officer), Jonathan Whiffing (Commons Clerk). Advisory Counsel: Sarita Arthur-Crow, Rupert Grist, Justin Leslie, Vanessa MacNair, and Hannah Stewart (Commons); Nicholas Beach, James Cooper, and Ché Diamond (Lords).

Contacts

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Contents

Instruments reported	3
1 S.I. 2023/1164: Reported for defective drafting	3
Dangerous Dogs (Designated Types) (England and Wales) Order 2023	
2 S.I. 2023/1177: Reported for unjustifiable delay in laying before Parliament	4
Civil Legal Aid (Financial Resources and Payment for Services and Remuneration) (Amendment) Regulations 2023	
Instruments not reported	5
Annex	5
Appendix 1: Memorandum from the Department for Environment, Food and Rural Affairs	7
S.I. 2023/1164	7
Dangerous Dogs (Designated Types) (England and Wales) Order 2023	
Appendix 2: Memorandum from the Ministry of Justice	8
S.I. 2023/1177	8
Civil Legal Aid (Financial Resources and Payment for Services and Remuneration) (Amendment) Regulations 2023	
Formal Minutes	10

Instruments reported

At its meeting on 10 January 2024 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 are given below. The relevant departmental memoranda are published as appendices to this report.

1 S.I. 2023/1164: Reported for defective drafting

Dangerous Dogs (Designated Types) (England and Wales) Order 2023

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

1.2 This Order, which is subject to the negative resolution procedure, adds the type of dog known as the XL Bully to the list of prohibited dogs under the Dangerous Dogs Act 1991 (article 2). There is no recognised Royal Kennel Club breed standard for the XL Bully and the Department for Environment, Food and Rural Affairs explains (in paragraph 7.5 of the Explanatory Memorandum) that a confirmation standard for this dog type was developed by an expert group and will be published in guidance. Given that a key element of the rule of law is for legislation to be clear and that criminal offences will apply in relation to dogs of the XL Bully type, the Committee asked the Department to explain why identifying information for the XL Bully is included in guidance rather than in the legislation itself.

1.3 In a memorandum printed at Appendix 1, the Department explains that article 2 mirrors the approach of the provisions in section 1 of the 1991 Act (and the designation of certain types of dog under S.I. 1991/1743). The Department further explains that “dog of the type” in section 1 of the 1991 Act has been held in case law to mean any dog having a substantial number or most of the characteristics of that type of dog. Consequently, the Department concluded that it would be more appropriate to ensure a consistent approach with what has been previously included in legislation rather than attempt to provide an exhaustive list of characteristics of the XL Bully type in this Order.

1.4 As the Committee noted in its First Special Report of Session 2021–22, [*Rule of Law Themes from COVID-19 Regulations*](#) (at paragraphs 48 to 58), where legislation leaves uncertainty, guidance cannot be used to fill the gap as if it were the law itself. The non-statutory guidance referred to by the Department has not undergone Parliamentary scrutiny and may be amended informally. It is not certain from this Order which dogs will fall within the XL bully type. The Committee remains unclear why the Department could not have included identifying information from the confirmation standard in, for example, a schedule with an indication that a dog will be considered an XL Bully type if it has a substantial number or most of the characteristics listed. **The Committee accordingly reports article 2 for defective drafting.**

1.5 Section 1(3) of the 1991 Act provides that after such day as the Secretary of State appoints, no person (subject to limited exceptions) shall have any prohibited dog in his possession or custody. Article 3 appoints 31 January 2024 as that day in respect of the

XL Bully type by providing that the date in article 2 of the Dangerous Dogs Act 1991 (Commencement and Appointed) Order 1991 (S.I. 1991/1742) is to be read as a reference to that date. The Committee noted that the 1991 Order had been revoked by article 27 of S.I. 2015/138 and asked the Department to explain why it referred to the 1991 Order to appoint the day. In its memorandum, the Department acknowledges the oversight but considers that the policy intention is clear. The Department undertakes to amend article 3 at the next available opportunity. **The Committee accordingly reports article 3 for defective drafting, acknowledged by the Department.**

2 S.I. 2023/1177: Reported for unjustifiable delay in laying before Parliament

Civil Legal Aid (Financial Resources and Payment for Services and Remuneration) (Amendment) Regulations 2023

2.1 The Committee draws the special attention of both Houses to these Regulations on the ground that there was an unjustifiable delay in laying before Parliament.

2.2 These Regulations, which are subject to the negative resolution procedure, make legal aid freely available for persons subject to removal under the Illegal Migration Act 2023. The Regulations were made on 25 October 2023 and were laid before Parliament on 6 November 2023. A rubric on the Regulations states that they have been “published in substitution of S.I. 2023/1135 which did not reflect the version signed by the Minister and has been removed from legislation.gov.uk.” S.I. 2023/1135 was laid and published on 26 October 2023. The Committee asked the Ministry of Justice to give further details of the reasons for the delay between the making and laying of this instrument. In a memorandum printed at Appendix 2, the Department gives a thorough account of the reasons for the delay explaining that it was a result of a combination of what they believe to be a glitch in the drafting software, registering the instrument and other administrative issues.

2.3 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 and therefore of the rule of law. The situation described in the Department’s memorandum was particularly undesirable in this case, as it meant that for several days the public were on notice that an instrument had been made but were not able to access the accurate text. Whilst noting the difficulties the Department encountered, **the Committee accordingly reports these Regulations for unjustifiable delay in laying before Parliament.**

Instruments not reported

At its meeting on 10 January 2024 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	Gender Recognition (Approved Countries and Territories and Saving Provision) Order 2023
Draft	National Crime Agency (Directed Tasking) Order 2023
Draft	Carer's Leave Regulations 2024
Draft	Combined Authorities (Mayoral Elections) Order 2017 (Amendment) Regulations 2024
Draft	Combined Authorities (Mayors) Filling of Vacancies Order 2017 (Amendment) Regulations 2024
Draft	Local Government Finance Act 1988 (Prescription of Non-Domestic Rating Multipliers) (England) Regulations 2023
Draft	Maternity Leave, Adoption Leave and Shared Parental Leave (Amendment) Regulations 2024
Draft	Post Office Network Subsidy Scheme (Amendment) Order 2024

Instruments subject to annulment

S.I. Numbers	S.I. Title
S.I. 2023/1185	Enterprise Act 2002 (Merger Fees and Determination of Turnover) (Amendment) and Energy Network Mergers (Consequential Amendments) Order 2023
S.I. 2023/1198	Central Counterparties (Equivalence) (Singapore) (Monetary Authority of Singapore) Regulations 2023
S.I. 2023/1204	Dangerous Dogs (Compensation and Exemption Schemes) (England and Wales) Order 2023
S.I. 2023/1227	Police and Crime Commissioner Elections (Amendment) Order 2023
S.I. 2023/1237	Social Security (Widow's Benefit and Retirement Pensions) (Amendment) Regulations 2023

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. Numbers	S.I. Title
S.I. 2022/1056	Nationality and Borders Act 2022 (Commencement No. 3) Regulations 2022

S.I. 2022/1075	Police, Crime, Sentencing and Courts Act 2022 (Commencement No. 3) Regulations 2022
S.I. 2022/1228	Trade Union Act 2016 (Commencement No. 5) Regulations 2022
S.I. 2023/1130	Nationality and Borders Act 2022 (Commencement No. 7 and Transitional Provisions) Regulations 2023
S.I. 2023/1206	Economic Crime and Corporate Transparency Act 2023 (Commencement No. 1) Regulations 2023
S.I. 2023/1222	Nationality and Borders Act 2022 (Commencement No. 8) Regulations 2023
S.I. 2023/1248	Non-Domestic Rating Act 2023 (Commencement No. 1 and Saving Provision) (England) Regulations 2023

Appendix 1: Memorandum from the Department for Environment, Food and Rural Affairs

S.I. 2023/1164

Dangerous Dogs (Designated Types) (England and Wales) Order 2023

1) The Committee has asked the Department for Environment, Food and Rural Affairs for a memorandum on the following point(s):

Explain why identifying information for the XL Bully is included in guidance rather than in the legislation.

Explain why article 3 applies article 2 of S.I. 1991/1742 in order to appoint a day for the purposes of section 1(3) of the Dangerous Dogs Act 1991 when that instrument was revoked by S.I. 2015/138.

2) Article 2 of the Dangerous Dogs (Designated Types) (England and Wales) Order 2023 (“the Order”) designates the type of dog “known as” the XL Bully. It mirrors the provisions in section 1 of the Dangerous Dogs Act 1991 (“the 1991 Act”) and the designation of the types of dog “known as” the Dogo Argentino and the Fila Brasileiro under S.I. 1991/1743. The meaning of section 1(1)(a) of the 1991 Act, namely whether a dog is of a type known as the pit bull terrier, was considered in *R V Knightsbridge Crown Court ex p Dunne; Brock V DPP* [1993] in which the High Court held that a dog of the type known as the pit bull terrier included any dog having a substantial number or most characteristics of a pit bull terrier. In deciding how to designate the XL Bully breed type, the Department concluded that it would be more appropriate to ensure a consistent approach in the interpretation of the types of dog that are prohibited for the purposes of section 1 of the 1991 Act rather than attempt to provide an exhaustive list of characteristics of the XL Bully breed type in the Order when this type is not regarded as a recognised breed of dog in the UK. The guidance on the conformation standard for the XL Bully type was developed by the Department to reflect the court’s approach in *R V Knightsbridge Crown Court ex p Dunne; Brock V DPP* [1993]. It was developed primarily to provide Dog Legislation Officers in police forces with a single conformation standard from which to type dogs that they suspect are XL Bully types. The guidance can also be used by dog owners to assist them in determining whether they may own an XL Bully dog if they are unsure.

3) The Department thanks the Committee for bringing article 27 of S.I. 2015/138 to the Department’s attention. The Department regrets the oversight but considers that the policy intention of article 3 of the Order is clear and the courts would interpret article 3 to give effect to the policy intention (*Inco Europe Ltd v First Choice Distribution* [2000]). However, the Department intends to amend article 3 of the Order at the next available opportunity to put the matter beyond doubt.

Department for Environment, Food and Rural Affairs

12 December 2023

Appendix 2: Memorandum from the Ministry of Justice

S.I. 2023/1177

Civil Legal Aid (Financial Resources and Payment for Services and Remuneration) (Amendment) Regulations 2023

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

Give further details (in addition to the explanation in the rubric) of the reasons for the delay between the making and laying of this instrument.

2) The Department explained in the correction rubric banner for this SI that it was being published in substitution of S.I. 2023/1135 which did not reflect the version signed by the Minister.

3) SI 2023/1135 was signed by the Minister on 25th October 2023 and was laid on 26th October 2023. After it had been laid, it became apparent that the second table in the SI, which was to be inserted into the Civil Legal Aid (Remuneration) Regulations 2013, contained an incorrect table heading. The version signed by the Minister, however, had the correct table heading.

4) The SI as signed by the Minister is always electronically amended after it has been signed in order to add in printed text, the date on which it was signed, the date it is laid and the name of the Minister who has signed it. Checks are always then carried out to ensure the SI as signed is the same as that actually laid. On this occasion, despite those checks being carried out, and due to what we believe was a glitch in the drafting software “Lawmaker”, the final version printed for laying contained the incorrect table heading. We have now notified the Lawmaker Services Team at the National Archives and have asked them to investigate whether a glitch did cause the issue.

5) Discussions between lawyers, clients and Parliamentary Branch took place on 26th October as soon as the issue was identified. Consideration was given to whether a correction slip could be used, but it was concluded this would not be appropriate given it was not a simple typographical error, but the incorrect table heading had been used.

6) As a result, the Department contacted the National Archives and the Parliamentary laying offices to make them aware of the situation and seek their advice.

7) On 31st October 2023, the SI registrar and laying offices agreed that the best course of action to resolve the issue was for S.I. 2023/1135 to be withdrawn and re-laid.

8) On 2nd November, in order to ensure the same issue did not re-occur on re-laying, the Parliamentary team asked the legal department to conduct the lawyer checks on the corrected version of the SI to be re-laid. It was then scheduled to be re-laid on 3rd November 2023.

- 9) The SI was submitted for registration in the morning of 3rd November 2023. However, it failed registration for a number of reasons relating to the location of punctuation.
- 10) These issues had not been identified when SI 2023/1135 had been submitted for registration, despite the fact that the only change between SI 20223/1135 and SI 2023/1177 was the table heading, nor had they appeared as validation errors in Lawmaker.
- 11) Lawyers and Parliamentary Branch then worked together to correct the registration errors and we noticed that the glitch which resulted in the incorrect table heading appearing in the SI re-appeared. In order to ensure that the registration errors and the glitch did not cause the same issues, we were unable to re-lay the SI by the relevant deadline on 3rd November, and therefore it had to be re-laid the next working day which was 6th November.
- 12) The Department apologises for the delay between signing and laying this SI. As noted above, the Department has now reported the difficulty which occurred with this SI to the Lawmaker Service Team at the National Archives to investigate whether a glitch did cause this issue. We will work with the National Archives to identify any improvements to be made or lessons learned to prevent a future occurrence.
- 13) Whilst the time between signing and laying was longer than it should have been, the SI is not due to come into force until S.56 of the Illegal Migration Act 2023 is commenced, which will be more than 21 days from the date that the correct SI was laid before Parliament. As such it will not deprive Parliament of the required time to consider it. Additionally, there was a published version of the SI with Parliament and on legislation.gov.uk from 26th October 2023, just that until it was re-laid on 6th November the incorrect table heading was still in place.
- 14) SI 2023/1177 will be issued free of charge to all known recipients of SI 2023/1135.

Ministry of Justice

12 December 2023

Formal Minutes

Wednesday 10 January 2024

Members present

Jessica Morden, in the Chair

Lord Beith

Lord Chartres

Baroness D’Souza

Lord Sahota

Baroness Sater

Lord Smith of Hindhead

Liz Twist

Report consideration

Draft Report (*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 2.3 read and agreed to.

Annex agreed to.

Papers were appended to the Report as Appendices 1 to 2.

Resolved, That the Report be the 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 17 January at 3.40 p.m.