House of Lords
House of Commons

Joint Committee on Statutory Instruments

Twentieth Report of Session 2023–24

Drawing special attention to:

Pensions Increase (Review) Order 2024 (**S.I. 2024/331**)

Tribunal Procedure (Amendment) Rules 2024 (**S.I. 2024/364**)

Ordered by the House of Lords to be printed 8 May 2024

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Joint Committee on Statutory Instruments

Current membership

House of Lords

Lord Beith (*Liberal Democrat*)

Lord Haselhurst (*Conservative*)

Lord Chartres (*Crossbench*)

Lord Meston (*Crossbench*)

Lord Sahota (*Labour*)

Baroness Sater (*Conservative*)

Lord Watson of Wyre Forest (*Labour*)

House of Commons

Jessica Morden MP (*Labour, Newport East*) (Chair)

Peter Grant MP (*Scottish National Party, Glenrothes*)

Paul Holmes MP (*Conservative, Eastleigh*)

Gareth Johnson MP (*Conservative, Dartford*)

Damien Moore MP (*Conservative, Southport*)

Maggie Throup MP (*Conservative, Erewash)*

Liz Twist MP (*Labour, Blaydon*)

Powers

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

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

Contacts

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Contents

Instruments reported

At its meeting on 8 May 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. 2024/331: Reported for doubtful vires

Pensions Increase (Review) Order 2024

Procedure: Made negative

1.1 **The Committee draws the special attention of both Houses to this Order on the ground that there is doubt as to whether it is *intra vires* in one respect.**

1.2 This Order purports to deal with an annual increase in official pensions. There is a duty in section 59 of the Social Security Pensions Act 1975 to make such an order when a relevant direction has been given under section 151 of the Social Security Administration Act 1992. However, this Order was made a day before the direction (contained in S.I. 2024/242) was made. Accordingly, the power to make this Order was not available when it was made.

1.3 Acknowledging this error, His Majesty's Treasury provided a voluntary memorandum to the Committee. The Committee also asked the Department whether it had anything further to add and it has provided a supplementary memorandum. These memoranda are printed at Appendix 1 and 2. The Department explains that an administrative miscommunication gave rise to the sequencing error, and that a replacement order has now been made (S.I. 2024/372).

1.4 In this case, the Department was presented with particular difficulties because the implied power to revoke an instrument or provision that arises from section 14 of the Interpretation Act 1978 is not available to revoke this Order as the power to make it is from an Act that pre-dates the commencement of the 1978 Act. Schedule 2 to the 1978 Act preserves the position under the Interpretation Act 1889 that such an implied power only applies to pre-1978 Act powers that relate to rules, regulations or byelaws, and not Orders (paragraph 3 of Schedule 2). In lieu of such an implied power, the only option available to the Department was to make incidental, supplementary, consequential or transitional provision, relying on section 61B(3) of the 1975 Act. The Department has inserted an inert signpost into this Order to signal readers towards the validly made Order in S.I. 2024/372. The Committee accepts that this was the best option in these unusual circumstances. The Committee commends the candour of the Department in its voluntary memorandum but stresses the importance of ensuring that instruments are properly sequenced when one power relies on the exercise of another. In this case, the incorrect sequencing has led to an Order which is effectively null remaining on the statute book. **The Committee accordingly reports this Order for doubt as to whether it is *intra vires*, acknowledged by the Department.**

2 S.I. 2024/364: Reported for requiring elucidation

Tribunal Procedure (Amendment) Rules 2024

Procedure: Made Negative

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

2.2 These Rules include an amendment to the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 which inserts a reference to uncommenced provisions, namely paragraph 27ZE of Part 4ZA of Schedule 3A to the Communications Act 2003 (regulation 4(2)). The Committee was unclear why this amendment had been made as it would put the Rules out of step with the underlying legislation. The Committee asked the Ministry of Justice to explain.

2.3 In a memorandum printed at Appendix 3, the Department sets out the background to the proposed commencement of Part 4ZA and indicates that it was anticipated that this would come into force in or around Spring 2024. However, the Department goes on to describe that there has been some slippage in the implementation of Part 4ZA, and that the current intention is to make the necessary secondary legislation by the end of the year.

2.4 In the Committee's view, there is a risk of confusion where an instrument comes into force some time before the relevant primary legislation it is implementing. The Committee understands that the commencement of legislation is a complex exercise, which requires coordination across Government to produce the necessary secondary legislation and that implementation may not be synchronised in all cases. In such cases, the Committee would expect an Explanatory Memorandum accompanying an instrument to give at least an indication of the likely implementation timetable. In this case, it may appear to a user of the First-tier Tribunal (Property Chamber) that Part 4ZA is in force and so a hearing is not required under rule 31 in an unresponsive grantor case, whereas in fact Part 4ZA may not be coming into force for over eight months. However, given that it seems that when the Department made this instrument it was under the impression that Part 4ZA was going to come into force at an earlier point, **the Committee is content to report regulation 4(2) for requiring elucidation, provided by the Department's memorandum.**

Instruments not reported

At its meeting on 8 May 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. Number	S.I. Title
Draft	Code of Practice on Fair and Transparent Distribution of Tips
Draft	Product Security and Telecommunications Infrastructure (Security Requirements for Relevant Connectable Products) (Amendment) Regulations 2024
Draft	Human Medicines (Amendments relating to Registered Dental Hygienists, Registered Dental Therapists and Registered Pharmacy Technicians) Regulations 2024
Draft	Recognition and Enforcement of Judgments (2019 Hague Convention etc.) Regulations 2024

Instruments subject to annulment

S.I. Number	S.I. Title
S.I. 2024/280	Merchant Shipping (Special Measures to Enhance Maritime Safety) Regulations 2024
S.I. 2024/301[1]	Financial Services and Markets Act 2000 (Financial Promotion) (Amendment and Transitional Provision) Order 2024
S.I. 2024/315	Registration and Inspection of Education, Children's Services and Skills (Fees and Frequency of Inspections) (England) (Amendment) Regulations 2024
S.I. 2024/325	Care and Support (Charging and Assessment of Resources) (Amendment) Regulations 2024
S.I. 2024/327	Recovery of Costs (Remand to Youth Detention Accommodation) (Amendment) Regulations 2024
S.I. 2024/328	Electronic Monitoring (Responsible Persons) (Amendment) Order 2024
S.I. 2024/333	Infrastructure Planning (Fees) (Amendment) Regulations 2024
S.I. 2024/346	Export Control (Amendment) Regulations 2024
S.I. 2024/349	Child Trust Funds (Amendment) Regulations 2024
S.I. 2024/386	Social Security Benefits Up-rating Regulations 2024
S.I. 2024/391	Countryside Stewardship (England) (Amendment) Regulations 2024
S.I. 2024/398	Immigration, Nationality and Passport (Fees) (Amendment) Regulations 2024
S.I. 2024/425	Proceeds of Crime Act 2002 (References to Financial Investigators) (England and Wales and Northern Ireland) (Amendment) Order 2024

1 The Committee requested a memorandum on this instrument and a satisfactory response was received. Please see Appendix 4

S.I. Number	S.I. Title
S.I. 2024/478	Local Authorities (Capital Finance and Accounting) (England) (Amendment) Regulations 2024
S.I. 2024/493	Medical Examiners (England) Regulations 2024
S.I. 2024/510	Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2024
S.I. 2024/535	Special Educational Needs and Disability (Amendment) Regulations 2024

Instruments not subject to parliamentary proceedings not laid before Parliament

S.I. Numbers	S.I. Title
S.I. 2024/431	Pensions Act 2004 (General Code of Practice) (Appointed Day, Amendment and Revocations) Order 2024
S.I. 2024/473	Compulsory Purchase of Land (Prescribed Forms) (Ministers) (Amendment) Regulations 2024
S.I. 2024/516	Coroners and Justice Act 2009 (Commencement No. 22) Order 2024
S.I. 2024/518	Judicial Review and Courts Act 2022 (Commencement No. 5) Regulations 2024

Appendix 1: Voluntary Memorandum from HM Treasury

S.I. 2024/331

Pensions Increase (Review) Order 2024

1. HM Treasury anticipates that the Committee will request a memorandum on the following points:

> Given that the Pensions Increase (Review) Order 2024 (S.I. 2024/331) is made using powers contained in section 59 of the Social Security Pensions Act 1975 that rely on a direction having been made by the Secretary of State by way of order under powers contained in section 151 of the Social Security Administration Act 1992, whether the department accepts that S.I. 2024/331 has been made before the Social Security and Benefits Up-rating Order 2024 (S.I. 2024/242) in error, and
>
> that being the case, how the department plans to correct the error.

2. The department submits this voluntary memorandum by way of explanation and apology regarding the above error.

3. The department accepts that HM Treasury may only make an order under section 59 of the Social Security Pensions Act 1975 to provide for the annual increase of official pensions, where the Secretary of State has made a direction to increase additional pensions in long-term benefits by way of order, using powers contained in section 151 of the Social Security and Administration Act 1992.

4. Due to an administrative miscommunication, Lords Commissioners signed and made an instrument under section 59 of the Social Security Pensions Act 1975, S.I. 2024/331 (the 'HMT Order'), the day before S.I. 2024/242, which makes the direction referred to above, was signed and made by the relevant Minister.

5. The department accepts that consequently, the HMT Order is invalidly made.

6. To ensure an order is made in accordance with the requirements imposed and powers provided by section 59 of the Social Security Administration Act 1975, the department will make a new order sequenced correctly at the earliest opportunity. The new order will be offered free of charge to all known recipients of the instrument and contain the appropriate headnote.

7. The department is of the view that the department cannot use the new order to revoke the invalidly made HMT Order because:

   a) There is no express power to revoke an order made using powers contained in section 59 of the Social Security Pensions Act 1975; and

b) Section 14 of the Interpretation Act 1978 does not operate to imply a power to revoke the HMT Order, given that the Social Security Pensions Act 1975 pre-dates the Interpretation Act 1978.

8. Regrettably, the HMT Order will therefore remain in print as an invalidly made instrument.

9. In the absence of being able to revoke the HMT Order, the department is conscious that it should take whatever reasonable action is available to it to make clear on the face of the HMT Order that the HMT Order does not operate as intended. The department will therefore use powers conferred by section 61B(3) of the Social Security Administration Act 1975 to insert a new provision in the HMT Order, signposting readers to the new order.

10. The department accepts this will be an unusual use of the powers conferred by section 61B(3). The department also acknowledges that it would not typically be appropriate to insert an inert provision into an existing order. Nonetheless, the department views this as the most appropriate action available to it to take in the circumstances.

11. The department acknowledges that the error referred to in this memorandum is highly regrettable. The department confirms that it is reviewing its internal procedures accordingly, to ensure the same error does not occur in the future.

HM Treasury

8 March 2024

Appendix 2: Memorandum from HM Treasury

S.I. 2024/331

Pensions Increase (Review) Order 2024

1. The Committee has asked HM Treasury for a memorandum on the following point(s):

> Explain whether the Department has anything it wishes to add to its voluntary memorandum provided to the Committee in respect of this instrument.

2. Since submitting its voluntary memorandum the Department has made a new order, the Pensions Increase Review (No. 2) Order 2024 (S.I. 2024/372), sequenced correctly in accordance with the requirements of section 59 of the Social Security Administration Act 1975. S.I. 2024/372 was issued free of charge to all known recipients of S.I. 2024/331.

3. S.I. 2024/372 also inserts a note in S.I. 2024/331, indicating that there was an error in the making of S.I. 2024/331.

HM Treasury

30 April 2024

Appendix 3: Memorandum from the Ministry of Justice

S.I. 2024/364

The Tribunal Procedure (Amendment) Rules 2024

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

> Explain why rule 4(2) inserts into S.I. 2013/1169 a reference paragraph 27ZE of Part 4ZA of Schedule 3A to the Communications Act 2003 when that Part has not been commenced.

2. The Ministry is grateful for the Committee's consideration of this instrument and confirms that the Tribunal Procedure Committee (TPC) received a request in October 2023 from the Department for Science, Innovation and Technology (DSIT) for changes to the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules (Property Chamber Rules) to accommodate amendments made to Schedule 3A to the Communications Act 2003 (Electronic Communications Code) by sections 67 and 71 of the Product Security and Telecommunications Infrastructure Act 2022 (PSTI Act).

3. Section 67 of the PSTI Act inserts a new Part 4ZA to the Electronic Communications Code (the Code), which provides a faster and more streamlined process through which telecommunications operators can apply for rights under the Code when faced with unresponsive occupiers of land. In addition, section 71 of PSTI Act amends the power under paragraph 95 of the Code to make regulations in respect to the conferral of jurisdiction of Code cases to the tribunal.

4. DSIT proposed in exercise of the power under paragraph 95 of the Electronic Communications Code (the Code) (as amended by section 71 of the PSTI Act) to make amendments to the Electronic Communications Code (Jurisdiction) Regulations 2017 (S.I. 2017/1284) to confer concurrent jurisdiction on the First-tier Tribunal and the Upper Tribunal to hear all Code cases. This change would ensure that the First-tier Tribunal's jurisdiction was no longer limited to, in England, Code cases transferred by the Upper Tribunal to the First-tier Tribunal and Part 4A Code cases, and in Wales, Part 4A Code cases. DSIT's proposal would in effect provide the Tribunal with the flexibility to determine the appropriate venue for Code cases, with the expectation (following judicial engagement) that Code cases (including Part 4ZA cases), would going forward be dealt with by the First-tier Tribunal, unless transferred to the Upper Tribunal for consideration. That change was given effect by the coming into force of Electronic Communications Jurisdiction (Amendment) Regulations 2023 (S.I. 2023/1220) on 6th April 2024.

5. In anticipation of Code cases being heard in the First-tier Tribunal, DSIT sought amendments to the Property Chamber Rules to ensure that the power for the First-tier Tribunal to award costs applied to all Code cases (including Part 4ZA Code cases), and any other rule change as the TPC considered appropriate to be made in anticipation of Part 4ZA of the Code coming into force in or around Spring 2024.

6. The TPC agreed at its meeting in November 2023 that it would take forward DSIT's request for rule change for inclusion in its April instrument. It noted that in addition to the change to the costs rule, it was also necessary to amend the definition of "unresponsive grantor case" to insert reference to Part 4ZA cases, in anticipation of that Part coming into force. Whilst this change would be made in advance of Part 4ZA coming into force it was considered appropriate to do so given the change was a modest technical change, it was unlikely to create any confusion in practice, and would allow potential future litigants to familiarise themselves with the Property Chamber Rules that would apply to such cases.

7. The Ministry understands that there has been some slippage in respect of the implementation of section 67 (and Part 4ZA). However, DSIT continues to progress work on implementation and is currently working on analysing feedback received following the public consultation that ran from 10 July to 4 September last year in respect of this issue. That feedback will be taken into account as the Government prepares regulations that will implement section 67. The Government's current intention is to make such regulations before the end of the year.

8. As this work progresses, officials at DSIT provide regular updates to stakeholders for whom the implementation of section 67 will be most relevant, including telecommunications operators who may—once commenced—wish to make use of the new process set out in section 67. Officials also provide updates to the judiciary on timelines and plans for bringing this section into force. DSIT's most recent engagement with stakeholders and the judiciary was at the end of March this year. The Government believes that this approach will mitigate the risk of any confusion, or of issues arising in practice, pending the full implementation of section 67.

Ministry of Justice

30 April 2024

Appendix 4: Memorandum from His Majesty's Treasury

S.I. 2024/301

The Financial Services and Markets Act 2000 (Financial Promotion) (Amendment and Transitional Provision) Order 2024

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

> For the period until 31 January 2025, when two alternative forms are available concurrently, explain how a prospective investor who meets the eligibility criteria for the updated exemptions but did not meet the eligibility criteria for the existing exemptions is to decide which statement to sign.

2. Under the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 (S.I. 2001/1060) ("PCIS") or the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (S.I. 2005/1529) ("FPO"), a person can complete and sign a statement that they satisfy the conditions of, to be a "high net worth individual" or "self-certified sophisticated investor". Being a "high net worth individual" or "self-certified sophisticated investor" in the context of the PCIS or FPO, means such a person is exempt from restrictions on receiving relevant financial promotions. The conditions that a person has to meet to be a "high net worth individual" or a "self-certified sophisticated investor" are set out in the statement.

3. This Order amends the PCIS and FPO, by replacing the existing relevant statements ("the existing statements") with new statements ("the updated statements"). However, article 5 of this Order provides for a transitional provision so that the existing statements will remain effective until 31st January 2025. During this period, a person may complete and sign either of the two alternative variations of the statements for the purpose of satisfying the conditions of being a "high net worth individual" of "self-certified sophisticated investor". This allows time for people to become familiar with the updated statements that have been inserted by this Order.

4. Articles 21(2) and 23A(1) of the PCIS and articles 48(2) and 50A(1) of the FPO, provide that if a person completes and signs a statement and their "completion of that statement indicates that they satisfy the conditions in that statement" to be classified as either a "high net worth individual" or "self-certified sophisticated investor" for the purpose of the PCIS or the FPO, then they will be classified as such (provided they completed and signed the statement within the 12 months before receiving the financial promotion). The effect of this is that a person should only sign a statement if the person meets the conditions set out in that statement, if they wish to be a "high net worth individual" or "self-certified sophisticated investor".

5. Therefore, for the period until 31st January 2025, if there is a person who satisfies the conditions in the updated statements, but who did not satisfy the conditions in the existing statements, they should complete and sign the updated statements. They should not complete and sign the existing statements as they do not meet the conditions set out in those statements.

HM Treasury

30 April 2024

Formal minutes

Wednesday 8 May 2024

Virtual meeting

Members present

Jessica Morden, in the Chair

Lord Beith

Lord Chartres

Peter Grant

Lord Haselhurst

Lord Meston

Damien Moore

Lord Sahota

Baroness Sater

Liz Twist

Lord Watson

Report consideration

Draft Report (Twentieth 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 2.4 read and agreed to.

Annex agreed to.

Papers were appended to the Report as Appendices 1 to 4.

Resolved, That the Report be the Twentieth 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 15 May at 3.40 p.m.