

HOUSE OF LORDS

Procedure and Privileges Committee

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6th Report of Session 2019–21

**Further temporary suspension of  
the Standing Orders relating to  
hereditary peers' by-elections**

**Terms of reference of the Secondary  
Legislation Scrutiny Committee**

**House procedures and Court  
Injunctions**

**Cessation of Membership and  
Revision of Standing Orders  
Relating to Public Business**

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### *Procedure and Privileges Committee*

The Select Committee on Procedure and Privileges of the House is appointed each session to consider any proposals for alterations in the procedure of the House that may arise from time to time, and whether the standing orders require to be amended.

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[Lord Eames](#)

[Baroness Evans of Bowes Park](#)

[Lord Faulkner of Worcester](#)

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# Sixth Report

## Hereditary peers' by-elections

### *Background*

1. Since 23 March 2020, Standing Order 10 (6), which states that by-elections for hereditary peers must be held within three months of a vacancy occurring, has been suspended by the House through a series of decisions, most recently on 14 December 2020.<sup>1</sup> The motion the House then agreed further suspended by-elections pending a further report from this Committee. At the time of writing, there are four outstanding by-elections.
2. As in the House, a range of views are held in the Committee about what constitutes an appropriate point to resume by-elections, given the continuing and unpredictable impact of the COVID-19 pandemic. However, on balance, we are agreed that, in line with our previous recommendations, the House should be invited further to suspend Standing Order 10 (6). In making this recommendation, we note that it would be technically possible to proceed with the by-elections, should they be carried out using electronic means. But the sense of the Committee is that it would be difficult to conduct the by-elections in a satisfactory way in this manner, in particular that it is unsatisfactory to restrict hustings to a virtual form when candidates largely unknown to the electorate might be at a disadvantage.
3. In recommending a further suspension of the Standing Order we are also mindful of the legal position, something which was raised by a number of members in the debate on 14 December. We are clear that the House of Lords Act 1999 requires by-elections as a matter of law; any suspension is temporary and a response to the ongoing national pandemic. The impact of the pandemic on the timing of the resumption of by-elections should continue to be subject to regular review and decision by the Committee and the House, to ensure that the suspension remains proportionate and necessary to reflect the circumstances of the pandemic. Therefore we again recommend only a short further suspension, until after Easter 2021, at which point the position should be reviewed again. **We accordingly recommend that Standing Order 10 (6) be further suspended pending a further review by this Committee after the Easter Recess.**

## Changes to the Secondary Legislation Committee's terms of reference and Standing Order 72

4. The Leader of the House, in a letter dated 11 January 2021, requested that the terms of reference of the Secondary Legislation Scrutiny Committee (SLSC) should be extended to include a new "sifting" function in relation to proposed negative instruments laid under section 31 of, and Schedule 5 to, the European Union (Future Relationship) Act 2020 ("the 2020 Act"). This sifting function is time-limited to two years from Implementation Period (IP) completion day and will therefore expire on 31 December 2022. The new function will be additional to the "sifting" function currently undertaken by the SLSC in relation to proposed negative instruments laid under sections 8

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<sup>1</sup> The initial suspension of the Standing Order was on 23 March 2020 until 8 September; on 8 September it was further suspended until 31 December; and on 14 December it was further suspended until after this report from the Committee could be considered.

and 23(1) of the European Union (Withdrawal) Act 2018 (“the 2018 Act”). Regulations may be made under section 8 for two years from IP completion day and under section 23(1) for 10 years from IP completion day. The Leader’s letter is at Appendix A.

5. In considering the Leader’s letter, the Committee also took the opportunity to suggest three tidying up amendments to the SLSC’s terms of reference, thereby deleting paragraphs (2) and (4) (c), and removing unnecessary wording concerning the point at which the SLSC’s power to appoint sub-committees lapses. **The House is invited to agree to the updated terms of reference in Appendix A.**
6. Under Standing Order 72, proposed negative instruments laid under the 2018 Act can be laid during a recess. We therefore propose that Standing Order 72 should be amended so that it extends to proposed negative instruments laid under the 2020 Act. The proposed revision to Standing Order 72 is included in the draft updated Standing Orders.<sup>2</sup>

### House Procedures and Court Injunctions

7. The Committee has considered the use of parliamentary privilege to reveal confidential information that is subject to a court order. It is important that members understand the responsibility that comes with parliamentary privilege and that in exercising their undoubted right to free speech in Parliament they do not set themselves in conflict with the courts or seek to supplant them. While there is clear guidance available for members wishing to raise issues that are sub judice there is not such clear guidance for members proposing to raise issues subject to court orders and injunctions. **We therefore recommend the following text be added to the Companion to Standing Orders:**

“4.66A Members should also respect United Kingdom court orders which are no longer sub judice and should be careful that in exercising their undoubted right to free speech in Parliament they have due regard to the relationship between Parliament and the courts. The Clerks are available to give advice. Members should also bear in mind their personal responsibility to respect the provisions of primary legislation.”

We have also agreed to raise awareness of this new guidance through articles in member newsletters, the content of member training materials and procedural guides.

### Cessation of membership

8. The House of Lords Reform Act 2014 provides that a member who does not attend the House during a session of six months or longer ceases to be a member of the House at the beginning of the following session upon certification of the same by the Lord Speaker. The provision does not apply to those on leave of absence for the whole or part of the session in question or to members who were suspended or disqualified from sitting or voting for the whole of the session in question.

The Act defines members of the House as follows:

*“For the purposes of this Act a person is a member of the House of Lords if the person is entitled to receive writs of summons to attend that House.”*

9. There is therefore a risk that new members who receive their writs towards the end of a session and who are not introduced before the end of the session could therefore be caught and accordingly cease to be members at the start of the next session. This specific issue was not considered during the passage of the Act through either House. However, section 2(3)(b) of the Act states that the non-attendance provision does not apply to a member if the House resolves that it should not “by reason of special circumstances”. We believe that the situation of new members who have not, for any reason, been introduced, falls within the ‘special circumstances’ envisaged by the Act. **We therefore recommend that the House agrees to resolve that the provisions of section 2(1) of the House of Lords Reform Act 2014 do not apply to members who have not been introduced.**

### **Revision of Standing Orders relating to Public Business**

10. The Committee has agreed an updated version of the Standing Orders relating to Public Business. The draft text of the new edition is available on the Committee’s website.<sup>3</sup> The changes made mainly give effect to changes already agreed by the House, but we have also taken the opportunity to make drafting changes. **The House is invited to agree the revised Standing Orders relating to Public Business.**

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3 [Draft Standing Orders relating to Public Business](#)

## APPENDIX A: CHANGES TO THE SECONDARY LEGISLATION COMMITTEE'S TERMS OF REFERENCE

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### Letter from the Leader of the House of Lords to the Senior Deputy Speaker, 11 January 2021

I am writing to request that you put a proposal to the Procedure and Privileges Committee in respect of the scrutiny of certain drafts of statutory instruments (Sis) that are to be laid before the House under section 31 of the European Union (Future Relationship) Act 2020.

Section 31 contains a new power that is very similar to some of those in the European Union (Withdrawal) Act 2018 in that ministers may choose which parliamentary procedure will apply to Sis made under it. Where a minister would like the negative procedure to apply, a draft of the SI must be laid before parliament so that a committee of each House can make a recommendation as to whether that procedure is appropriate.

For instruments made under the similar powers in the 2018 Act, the House tasked the Secondary Legislation Scrutiny Committee (SLSC) with carrying out this role, which came to be known as 'sifting'. I propose that the SLSC be given the role of sifting the proposed negative Sis laid under the new power as well. I understand that the SLSC has considered this question already and would be happy to take on the role should the Procedure and Privileges Committee agree it should have it.

I have discussed this proposal with the other members of the Usual Channels and it has their full support.

EVANS OF BOWES PARK

### Amended terms of reference

[new words in **bold**, deleted words ~~struck through~~]

That a Select Committee be appointed to scrutinise secondary legislation.

- (1) The Committee shall report on draft instruments and memoranda laid before Parliament under—
  - (a) sections 8, 9 and 23(1) of the European Union (Withdrawal) Act 2018, **and**
  - (b) **section 31 of the European Union (Future Relationship) Act 2020.**
- ~~(2) Paragraph (1) shall lapse upon the expiry of the power to make instruments under sections 8, 9 and 23(1) of the European Union (Withdrawal) Act 2018.~~
- ~~(3)~~(2) The Committee shall, with the exception of those instruments in paragraphs ~~(5)~~(4) and ~~(6)~~(5), 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 paragraph (4)(3).

~~(4)~~(3) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—

- (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
- (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;
- ~~(c) that it may inappropriately implement European Union legislation;~~
- (c) that it may imperfectly achieve its policy objectives;
- (d) that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation;
- (e) that there appear to be inadequacies in the consultation process which relates to the instrument;
- (f) that the instrument appears to deal inappropriately with deficiencies in retained EU law.

~~(5)~~(4) The exceptions are—

- (a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;
- (b) draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, and subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001;
- (c) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.

~~(6)~~(5) The Committee shall report on draft orders and documents laid before Parliament under section 11(1) of the Public Bodies Act 2011 in accordance with the procedures set out in sections 11(5) and (6). The Committee may also consider and report on any material changes in a draft order laid under section 11(8) of the Act.

~~(7)~~(6) The Committee shall also consider such other general matters relating to the effective scrutiny of secondary legislation and arising from the performance of its functions under paragraphs (1) to ~~(6)~~(5) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

That the Committee have power to appoint sub-committees and to refer to them any matters within its terms of reference; that the Committee have power to appoint the ~~Chairsmen~~ of sub-committees; that the quorum of each sub-committee be two;

The Committee's power to appoint sub-committees shall lapse upon the expiry of the power to make new instruments under sections 8, 9 and section 23(1) of the European Union (Withdrawal) Act 2018 and shall lapse entirely upon expiry of the last such remaining power;

That the Committee have power to co-opt any member to serve on a sub-committee;

That the Committee and its sub-committees have power to send for persons, papers and records;

That the Committee and its sub-committees have power to appoint specialist advisers;

That the Committee and its sub-committees have leave to report from time to time;

That the reports of the Committee and its sub-committees be printed, regardless of any adjournment of the House;

That the evidence taken by the Committee or its sub-committees in the last session of Parliament be referred to the Committee or its sub-committees;

That the evidence taken by the Committee or its sub-committees be published, if the Committee or its sub-committees so wish.