



HOUSE OF LORDS

Procedure and Privileges Committee

6th Report of Session 2022–23

**Leave of Absence, Sifting
of proposed negative
instruments under the
Retained EU Law (Revocation
and Reform) Act 2023 and
amendments to the SLSC
Terms of Reference**

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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.

Membership

The members of the Procedure and Privileges Committee are:

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Sixth Report

Leave of absence: return date

1. Members can obtain leave of absence if they are unable to attend the House because of ‘temporary circumstance’ (SO 21(1)). In so doing, they should “state in their written application both their reason for seeking leave of absence and the date by which they expect to return” (SO 21(3)). These rules are explained in more detail in paragraphs 1.37–1.42 of the *Companion*.
2. The requirement for a member upon application to specify a date by which they expect to return to the House has caused some difficulty, as members do not always know at the point of application when they will be in a position to resume active membership. This might include, for example, cases where a member is seeking leave of absence for medical treatment, to care for a family member, or to take up a diplomatic or other role of uncertain duration.
3. **We recommend that members applying for leave of absence should in future either give the date by which they expect to return or, if they are unable to specify a date, explain the circumstances which will allow their return. We seek the House’s agreement to amendments to the Standing Orders and to the *Companion* to give effect to this recommendation. The changes are set out in Appendix 1.**

Instruments laid under the Retained EU Law (Revocation and Reform) Act

4. The Retained EU Law (Revocation and Reform) Act 2023 (“the REUL Act”) makes provision for the sifting of proposed negative statutory instruments. This report proposes changes to the terms of reference of the Secondary Legislation Scrutiny Committee (SLSC) to include sifting of proposed negative instruments laid under the REUL Act, an amendment to Standing Order 71 to allow proposed negative instruments laid under the REUL Act to be laid during a recess, and consequential changes to the *Companion*.
5. The report also proposes amendments to the SLSC’s terms of reference and consequential amendments to the *Companion* to reflect the expiry of certain sifting provisions under the European Union (Withdrawal) Act 2018 (“the 2018 Act”) and the European Union (Future Relationship) Act 2020 (“the 2020 Act”), and the abolition of the published drafts procedure under paragraph 14 of Schedule 8 to the 2018 Act.
6. **Our proposed amendments to the Standing Orders, to the amended terms of reference for the SLSC, and consequential changes to the *Companion*, are set out in Appendix 3.**

Amendments relating to the REUL Act 2023

7. The Leader of the House wrote to the Senior Deputy Speaker on 17 May asking the Committee to consider a proposal that the terms of reference of the SLSC should be amended to include sifting of proposed negative instruments laid under the REUL Act. A copy of his letter is at Appendix 2.
8. In 2018 the Procedure Committee made proposals in relation to the scrutiny of certain “proposed negative instruments” laid under sections 8, 9 and 23

of the 2018 Act about which the Minister had (or, for section 23(1), has) a choice about the level of scrutiny (negative or affirmative) applied to them. The House agreed to amending the terms of reference of the SLSC to enable it to carry out the new sifting function. The amendments gave the SLSC power to recommend that an instrument which the Minister proposed should be a negative instrument be upgraded to an affirmative instrument.

9. In 2020, following the enactment of the 2020 Act, the sifting function of the SLSC was extended to include proposed negative instruments laid under section 31 of that Act.
10. Part 2 of Schedule 5 to the REUL Act subjects the exercise of powers under sections 11, 12 and 14 to an identical sifting procedure to that set out in the 2018 Act. The Leader of the House proposed that this new sifting function should be undertaken by the SLSC. 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. The changes requested by the Leader build on the scrutiny functions already exercised by the SLSC in relation to the 2018 and 2020 Acts and the SLSC has been consulted and is content with the proposals.
11. **We recommend that the terms of reference of the SLSC should be amended to include sifting of proposed negative instruments laid under the REUL Act 2023.**
12. Under paragraph 14 of Schedule 8 to the 2018 Act, instruments that amend or revoke delegated legislation made under section 2(2) of the European Communities Act 1972 and made under a power conferred before the beginning of session 2017–19, must be (1) subject to an enhanced scrutiny procedure, and (2) when laid formally, subject to the affirmative procedure. Scrutiny of published drafts is undertaken by the SLSC. Section 10 of the REUL Act 2023 abolishes the published drafts procedure.
13. **We recommend that the terms of reference of the SLSC should be amended to remove reference to the published drafts procedure.**

Amendments to Standing Order 71

14. Standing Order 71 was introduced in 2018 to allow proposed negative instruments under the 2018 Act to be laid during a recess and was similarly applied to proposed negative instruments laid under the 2020 Act. This did not have an impact on the scrutiny period available to the SLSC because, under the 2018 and 2020 Acts, the period during which the Committee could scrutinise and report on an instrument was prescribed as 10 sitting days—so while recess laying allows committee staff to begin working on an instrument, the formal scrutiny clock did not start until the two Houses were sitting again. **We recommend that Standing Order 71 should be amended to allow proposed negative instruments laid under the REUL Act, like instruments previously laid under the 2018 and 2020 Acts, to be laid during a recess.**
15. **We also recommend that the references in Standing Order 71 to provisions of the 2018 and 2020 Acts that have now expired should be deleted.**

Further amendments to the SLCS terms of reference

16. Most of the 2018 and 2020 Act sifting provisions are now defunct. 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.
17. The grounds on which the SLSC may draw the special attention of the House to an instrument include: “(f) that the instrument appears to deal inappropriately with deficiencies in retained EU law”. This ground was added specifically in relation to section 8 of the 2018 Act. Power to make regulations under section 8 has now expired.
18. **We recommend that the terms of reference of the SLSC should be amended to remove reference to the now defunct provisions under the 2018 and 2020 Acts.**

APPENDIX 1: AMENDMENTS TO THE STANDING ORDERS AND TO THE *COMPANION* RELATING TO LEAVE OF ABSENCE PROVISIONS

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Amendment of Standing Order 21

21 Leave of absence [16 June 1958]

(1) Members of the House are to attend the sittings of the House or, if they cannot do so for reasons of temporary circumstance, obtain leave of absence, which the House may grant at pleasure.

(2) A member of the House may apply for leave of absence at any time during a session for the remainder of that session.

(3) When applying for leave of absence, a member of the House should state in their written application: **(a) either** the date by which they expect to return, **or, if they are unable to specify a date, the circumstances which will allow their return;** **(b)** the reason for their leave of absence; and **(c)** that they have a reasonable expectation that they will be in a position again to take part in the proceedings of the House.”

Amendments to the *Companion*

Leave of absence

1.37 Members of the House are to attend the sittings of the House. If they cannot attend, because of temporary circumstance, they should obtain leave of absence. At any time during a session, a member of the House may obtain leave of absence for the rest of the session by applying in writing to the Clerk of the Parliaments, specifying both a reason for asking to take leave of absence and **either** a date by which they expect to return to the House **or, if they are unable to specify a date, the circumstances which will allow their return.**

APPENDIX 2: LETTER FROM THE LEADER OF THE HOUSE

Letter from Lord True, Leader of the House of Lords, to Lord Gardiner of Kimble, Senior Deputy Speaker

The Retained EU Law (Reform and Revocation) Bill which is currently progressing through this House makes provision for the sifting of proposed negative statutory instruments (SIs). This is similar to provision in the European Union (Withdrawal) Act 2018 and the European Union (Future Relationship) Act 2020.

I understand that the Secondary Legislation Scrutiny Committee is happy to undertake the sifting function for proposed negative SIs laid under the REUL Act. I am sure the Committee will do so expertly as it did for SIs laid under the previous Acts and I am grateful to Members and the staff who support the Committee for once again taking on this role.

I would be grateful if a paper could be considered by the Privileges and Procedure Committee to enable the necessary changes to be made to the Committee's terms of reference and to standing orders to facilitate this. I understand that the Clerk stands ready to bring forward such a paper to enable us to consider this at its meeting in June.

17 May 2023

APPENDIX 3: AMENDMENTS RELATING TO THE SLSC

Deleted text is struck through; inserted text is **in bold text**.

Amendment of Standing Order 71

71 Laying of documents under Schedule 7 to the European Union (Withdrawal) Act 2018 and ~~Schedule 5 to the European Union (Future Relationship) Act 2020~~ **Schedule 5 to the Retained EU Law (Revocation and Reform) Act 2023**.

Where, under ~~paragraphs 3(3) and~~ **paragraph 17(3)** of Schedule 7 to the European Union (Withdrawal) Act 2018 or ~~paragraph 8(3) of Schedule 5 to the European Union (Future Relationship) Act 2020~~ **paragraph 6(3) of Schedule 5 to the Retained EU Law (Revocation and Reform) Act 2023**, any document is to be laid before Parliament, the deposit of a copy of the document with the Clerk of the Parliaments in accordance with this Order at any time during the existence of a Parliament when the House is not sitting for public business shall constitute the laying of it before the House.

Revisions to the SLSC terms of reference

~~(1) The Committee shall report on draft instruments published under paragraph 14 of Schedule 8 to the European Union (Withdrawal) Act 2018.~~

(21) The Committee shall report on draft instruments and memoranda laid before Parliament under—

(a) ~~sections 8 and~~ section 23(1) of the European Union (Withdrawal) Act 2018, and
(b) ~~section 31 of the European Union (Future Relationship) Act 2020~~ **sections 11, 12 and 14 of the Retained EU Law (Revocation and Reform) Act 2023**.

(32) The Committee shall, with the exception of those instruments in paragraphs ~~(4) and (5) and (6)~~, scrutinise—

[...]

(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 ~~(43)~~.

~~(43) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—~~

[...]

~~(f) that the instrument appears to deal inappropriately with deficiencies in retained EU law.~~

(54) The exceptions are—

[...]

(65) 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.

(76) 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 (65) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Amendments to the *Companion*

Scrutiny of delegated powers and delegated legislation

10.7 The Delegated Powers and Regulatory Reform Committee examines the way in which bills delegate legislative power, and also scrutinises legislative reform and similar orders (see paragraph 11.56). The Secondary Legislation Scrutiny Committee scrutinises and reports on the policy content of delegated legislation (see paragraph 11.70).¹ [...]

European Union (Withdrawal) Act 2018 and Retained EU Law (Revocation and Reform) Act 2023

10.41 Exceptionally, a minister may choose whether instruments laid under sections 8 and 23(1) of the European Union (Withdrawal) Act 2018 (“the 2018 Act”) and **sections 11, 12 and 14 of the Retained EU Law (Revocation and Reform) Act 2023 (“the 2023 Act”)** should be subject to the negative or affirmative procedure. Where a minister proposes that an instrument should be a negative instrument, the sifting procedure set out in Schedule 7 to the 2018 Act **and Schedule 5 to the 2023 Act** applies. [...] In the House of Lords, proposed negative instruments laid under the 2018 Act **and the 2023 Act** are scrutinised by the Secondary Legislation Scrutiny Committee.

European Union (Future Relationship) Act 2020

~~10.43 A similar sifting procedure (see paragraph 10.41) applies to instruments laid under section 31 of the European Union (Future Relationship) Act 2020. The sifting procedure is set out in Schedule 5 to the Act and is time-limited to two years from Implementation Period completion day and so expires on 31 December 2022. In the House of Lords, proposed negative instruments laid under the European Union (Future Relationship) Act 2020 are scrutinised by the Secondary Legislation Scrutiny Committee.~~

Secondary Legislation Scrutiny Committee

11.70 This committee scrutinises all instruments laid before each House of Parliament and subject to parliamentary proceedings (with certain exceptions). In particular, it is required to draw to the special attention of the House [...]; **and** (e) those where there appears to have been inadequacies in the consultation process; ~~and, (f) those which appear to deal inappropriately with deficiencies in retained EU law.~~² The committee may conduct broader inquiries from time to time.⁴⁰ In addition, following the passage of the European Union (Withdrawal) Act 2018 **and the Retained EU Law (Revocation and Reform) Act 2023,**

1 The Secondary Legislation Scrutiny Committee also scrutinises proposed negative instruments laid before Parliament under the European Union (Withdrawal) Act 2018 (“the 2018 Act”) and the Retained EU Law (Revocation and Reform) Act 2023 (“the 2023 Act”). Procedure and Privileges Committee, *5th Report* (Session 2017–19, HL Paper 163); Procedure and Privileges Committee, *6th Report* (Session 2019–21, HL Paper 223); Procedure and Privileges Committee, 6th Report (Session 2022–23, HL Paper 228).

2 Procedure and Privileges Committee, *5th Report* (Session 2013–14, HL Paper 167); *6th Report* (Session 2019–21, HL Paper 223); 6th Report (Session 2022–23, HL Paper 228).

the committee was charged with scrutinising proposed negative instruments laid under certain provisions of ~~that~~ **those** Acts with a view to recommending whether the scrutiny procedure applicable to a proposed negative instrument should be upgraded to the affirmative procedure.

11.71 The committee reports on proposed negative instruments laid before Parliament under sections 8 ~~and~~ 23(1) of the European Union (Withdrawal) Act 2018, and section 31 ~~of the European Union (Future Relationship) Act 2020~~ **sections 11, 12 and 14 of the Retained EU Law (Revocation and Reform) Act 2023** (see paragraphs 10.41 and 10.43). It ~~also reports on draft instruments published under paragraph 14 of Schedule 8 to the European Union (Withdrawal) Act 2018 (see paragraph 10.42).~~³

3 *5th Report* (Session 2017–19, HL Paper 163); *6th Report* (Session 2019–21, HL Paper 223); 6th Report (Session 2022–23, HL Paper 228).