House of Lords
House of Commons

Joint Committee on Statutory Instruments

Transparency and Accountability in Subordinate Legislation

First Special Report of Session 2017–19

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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, available on the Internet via www.parliament.uk/jcsi.

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 Mike Winter (Commons Clerk), Jane White (Lords Clerk) and Liz Booth (Committee Assistant). Advisory Counsel: Daniel Greenberg, Klara Banaszak, Peter Brooksbank, Philip Davies and Vanessa MacNair (Commons); James Cooper, Nicholas Beach, John Crane and Ché Diamond (Lords).

Contacts

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1 Introduction

1.1 The Committee is publishing this Report in order to draw together some recurring themes in its recent Reports on individual statutory instruments.

1.2 The Committee hopes that this will focus attention on issues of transparency and accountability of subordinate legislation in a manner that will help the Government and Parliament to maintain rule of law standards in relation to the promulgation of subordinate legislation.

1.3 This Report covers the following themes:

- Timing of publication
  - Unjustifiable delay in laying before Parliament.
  - 21 day rule.
  - Section 4(1) of the Statutory Instruments Act 1946.
- Correction of errors
  - Correction slips and authorised corrections.
  - Free Issue procedure.
- Accessibility
  - Access to subsidiary documents.
  - Other issues.

2 Timing of publication

2.1 In relation to timing of publication, the Committee is principally concerned with three issues:

- unjustifiable delay in laying before Parliament;
- the 21 day rule; and
- section 4(1) of the Statutory Instruments Act 1946.

Unjustifiable delay in laying before Parliament

2.2 Most statutory instruments subject to negative resolution procedure are required to be laid before Parliament (*section 5, Statutory Instruments Act 1946*).

2.3 A statutory instrument is made when it has been signed and any other necessary formalities have been completed (for example, consent or concurrence of the Treasury or other persons).

2.4 Arrangements for registration and printing are made by the National Archives. The relevant Department submits the instrument for registration and requests a "laid date" to be inserted (for those instruments that are required to be laid). Registration checks are completed by the National Archives within 24 hours and the statutory instrument is numbered, the laid date is inserted in the italic rubric on the front page of the instrument, and a "Certified copy from legislation.gov.uk Publishing" banner is added.

2.5 Laying must take place on the date printed on the instrument (otherwise the National Archives will withdraw the statutory instrument from the system). The parliamentary clerk for the relevant Department lays a physical copy of the Statutory Instrument at the Journal Office (Commons) and Printed Paper Office (Lords). The Journal Office notifies National Archives when the instrument has been laid. Laying then triggers the publication process.[1]

2.6 Delays in laying before Parliament can be as a result of delay in sending the completed instrument for registration, or a delay as a result of the Department requesting a laid date at some point in the future.

2.7 The Committee has noticed and reported on a number of instruments where there is a significant delay between making the instrument and laying it before Parliament. One of the Committee's express reporting grounds in Standing Orders is that there appears to have been unjustifiable delay in the laying of a statutory instrument before Parliament. The ground also covers the situation where there is a delay in publication of an instrument where it is not required to be laid (*House of Commons Standing Order No. 151 (paragraph (1)(B)(iv)) and House of Lords Standing Order No. 73 (paragraph (2)(d)*).

1 The National Archives procedures for the registration, laying and publishing of statutory instruments are set out in Part 4 of Statutory Instrument Practice, 5th Edition (November 2017).

The Committee's view

2.8 **Laying before Parliament is not a meaningless formality, but an important part of access to justice and the rule of law.** The statutory arrangements for laying before Parliament are part of the required formal measures by which publicity is assured. Once a statutory instrument has been made, it is law from that point (although of course whether it is law in force is a matter for the commencement arrangements of the instrument). The instrument should therefore be laid before Parliament as soon as possible. Even if the instrument comes into force some months later after being made, Parliament and the general public are entitled to as much notice of the prospective law as the Government has itself, and the legal and practical effects of an instrument may be felt long before the date on which it comes into force.

2.9 There is no reasonable excuse for delay in such a simple administrative step as laying before Parliament.

2.10 The Committee also notes that there is a statutory duty imposed on Departments to engage with the National Archives' registration and publication process "immediately after the making of any statutory instrument" (*section 2(1), Statutory Instruments Act 1946*).

2.11 It has been represented (informally) to the Committee that in some cases a Department's Press Office requests a delay in laying instruments before Parliament in order to coordinate publication of their initiatives. The Committee does not consider this practice acceptable. If a delay is required in order to coordinate a number of legislative changes or other matters, the solution is to delay the making of the instrument; once it has been made it is wrong in principle to delay laying before Parliament. The importance to the rule of law of not allowing law to remain secret once made is obvious, and clearly overrides any interests of the Government in controlling publicity.

2.12 The following examples, taken from JCSI reports, will generally be regarded as unacceptable delays by the Committee. This list is not exhaustive:

- Delays in printing and publication.[2]
- Desirability of a package of documents being laid at the same time.[3]
- Administrative matters such as cross-Government business-planning concerns.[4]
- Machinery of Government delays.[5]
- Political or presentational reasons.[6]
- Delay in clearing the impact assessment.[7]

2 Twenty-third Report of Session 2015/16 in relation to S.I. 2016/190 and Ninth Report of Session 2013/14 in relation to S.I. 2013/1474.
3 Twenty-third Report of Session 2015/16 in relation to S.I. 2016/185.
4 Twelfth Report of Session 2015/16 in relation to S.I. 2015/1776.
5 Twenty-fourth Report of Session 2015/16 in relation to S.I. 2016/484 and Seventeenth Report of Session 2014/15 in relation to S.I. 2014/2821.
6 Twenty-fourth Report of Session 2015/16 in relation to S.I. 2016/484.
7 Fifth Report of Session 2017/19 in relation to S.I. 2017/855.

2.13 The Committee considers that, as a general rule and unless there are exceptional circumstances, a delay of 10 calendar days or more will amount to an unjustifiable delay.[8] This period is for guidance only. There may be some instances where a period of longer than 10 calendar days is acceptable or instances where a period of less than 10 calendar days is considered to be an unjustifiable delay.

2.14 Most affirmative instruments are approved in draft by resolution of each House but certain affirmative instruments (generally called "made affirmatives") must be laid before Parliament after being made, and cease to have effect at the end of a specified period, normally 40 days, 28 days or a month beginning with the day on which the instrument was made, unless before the end of that period the instrument is approved by resolution of each House. In such cases, it is obviously particularly important to minimise the period between making and laying. The Committee's view is that curtailment of the period potentially available to Members of each House to examine the instrument during the specified approval period cannot be justified.[9]

The 21 day rule

2.15 The 21 day rule is that, if an instrument is subject to negative procedure,[10] it should generally be laid at least 21 days before it is due to come into force, including the date of laying, and only be brought into force on the twenty-second day at the earliest. The 21 days are calendar days and days on which Parliament, or either House, is not sitting (or is dissolved) are not excluded. The 21 day period should be treated as a minimum period. This is a convention established by Government and set out in successive editions of the Government's Statutory Instrument Practice (now reflected in paragraph 2.11, 5th Edition, November 2017).

2.16 The Committee has noticed and reported on a number of breaches of the 21 day rule.

2.17 Breaches of the 21 day rule are usually reported for failure to comply with proper legislative practice as part of the residual ground at the end of *paragraph 1(B) of House of Commons Standing Order No. 151 and paragraph 73(2) House of Lords Standing Order No. 73*.

The Committee's view

2.18 The Committee stresses the importance of compliance with the 21 day rule, which is designed to protect those affected by changes in the law made by subordinate legislation from being subject to the effect of the changes before they have had a reasonable opportunity to understand the effects and what they must do to satisfy any requirements.

8 Twenty-sixth Report of Session 2016/17 in relation to S.I.s 2017/66 and 2017/112.

9 Second Report of Session 2015/16 in relation to S.I. 2015/1396.

10 Under the negative procedure the person in whom the power is vested can exercise it to make a statutory instrument without the approval of Parliament but Parliament has a period within which to object (usually 40 days). If no resolution for annulment of the instrument is passed within that period, the statutory instrument continues to have effect.

2.19 The Committee is aware of the pressures faced by Departments in producing legislation and that an allowance also has to be made in any timetable for registration and printing. At peak times (for example, around the common commencement dates in April and October), those responsible for handling these administrative tasks may need significantly more time than usual to cope with the volume of instruments in a Department.

2.20 The following examples, taken from JCSI Reports, will not generally be regarded as justification for breach of the 21 day rule by the Committee. This list is not exhaustive:

- Administrative oversight.[11]
- Problems or delays within Government.[12]
- Failure to settle policy within Government.[13]
- Time needed for co-ordination among Government Departments and the need to obtain concurrence.[14]
- Insufficient time allowed within Government for consideration of consultation responses.[15]
- Lack of resources leading to prioritisation of other instruments.[16]
- Desire to cut down Government expenditure.[17]
- Raising fees as soon as possible.[17]
- Desirability of making changes on a common commencement date.[18]
- Desirability of a package of instruments coming into force simultaneously.[19]
- Mere assertion of a desire to avoid delay.[19]

2.21 The Committee accepts that some instruments must take effect on shorter notice (see paragraph 2.22 below). Where it is not possible to comply with the 21 day rule the Explanatory Memorandum should explain why the instrument could not have been made and laid sooner, the reason it has to come in to effect on the date specified and the consequences of delaying the legislation to comply with the 21 day rule. The Committee will consider these reasons and state whether or not it finds them acceptable in the circumstances.

11 Fourth Report of Session 2017/19 in relation to S.I. 2017/555 and First Report of Session 2013/14 in relation to S.I.s 2013/707 and 725.
12 Twelfth Report of Session 2016/17 in relation to S.I. 2016/954, Eleventh report of Session 2014/15 in relation to S.R. 2014/224 and Tenth Report of Session 2014/15 in relation to S.I. 2014/1686.
13 Third Report of Session 2014/15 in relation to S.I. 2014/880.
14 Third Report of Session 2012/13 in relation to S.I. 2012/867.
15 Fifth Report of Session 2012/13 in relation to S.I.s 2012/953 and 954.
16 Forty-third Report of Session 2010/12 in relation to S.I. 2012/20.
17 Twelfth Report of Session 2016/17 in relation to S.I. 2016/954.
18 Fourth Report of Session 2015/16 in relation to S.I. 2015/768.
19 Fifth Report of Session 2014/15 in relation to S.I. 2014/1183.

2.22 The following examples may, depending on the circumstances, be regarded as sufficient justification for breach of the 21 day rule by the Committee. Again, this list is not exhaustive:

- Urgency (for example, the imposition of sanctions where it is necessary to maximise the effectiveness of the sanctions and to minimise the risk of asset flight or in the case of public health measures).
- EU instruments published with close implementation deadlines.[20]
- Significant operational difficulties in changing a date on which fee changes are to take effect.[18]
- Existence of unexpected external factors that justify the breach.[21]
- Delays to Royal Assent for a Finance Act where an instrument is dependent on that Act.

2.23 Although the 21 day rule applies only to negative instruments, the Committee considers that the rationale for the convention applies with equal force to affirmative instruments (that have not been published in draft for approval by resolution of each House). As a starting assumption, the Committee considers that a date of coming into force earlier than 21 days after an affirmative instrument is made is unlikely to be reasonable where the instrument:

- significantly diminishes the legal rights of persons affected,
- imposes new duties on such persons which are significantly more onerous than before, and requires them to adopt different patterns of behaviour, or
- creates criminal sanctions for a failure to comply with an obligation.[22]

Section 4(1) of the Statutory Instruments Act 1946

2.24 Section 4(1) of the Statutory Instruments Act 1946 provides that instruments that are to be laid before Parliament after being made should be laid before the instrument comes in to operation provided that if it is essential that an instrument comes into operation before copies can be laid (for example, instruments imposing sanctions), the instrument may come into operation before it has been laid; and in such a case, notification must be sent to the Speaker of the House of Commons and the Speaker of the House of Lords drawing attention to the fact that copies of the instrument have yet to be laid before Parliament and explaining why such copies were not laid before the instrument came into operation (section 4 letter).

20 Twelfth Report of Session 2016/17 in relation to S.I. 2016/954.
21 Tenth Report of Session 2014/15 in relation to S.I. 2014/1686.
22 First report of Session 2014/15 in relation to the draft Openness of Local Government Bodies Regulations and Fourth Report of Session 2016/17 in relation to the Draft Pubs Code.

2.25 One of the Committee's reporting grounds (*House of Commons Standing Order No. 151 (paragraph (1)(B)(v)) and House of Lords Standing Order No. 73 (paragraph (2)(e)*) is that there appears to have been an unjustifiable delay in sending a notification under the proviso to section 4(1) where an instrument has come in to operation before it has been laid before Parliament.

The Committee's view

2.26 The proviso in section 4(1) of the Statutory Instruments Act 1946 only applies where it is essential that an instrument should come into force before it is laid before Parliament. The Committee suspects that section 4 is being invoked for non-essential reasons, for example, delays within Government, administrative errors or forgetting to lay the instrument in a timely manner. Processes must be put in place within Government to avoid these errors and delays.

2.27 The Committee will report if it considers that there has been an unjustifiable delay in making the notification required to be given in a section 4 letter. Even if there has been no delay in sending the section 4 letter, the Committee may still report the instrument for breach of the 21 day rule.

2.28 Although normally of limited practical significance, care should be taken with instruments that come into force on the day that they are laid. By virtue of section 4 of the Interpretation Act 1978, where an instrument is stated to come into force on a particular day, it comes into force at the beginning of that day. Unless the position is made clear by including times of coming into force and laying, an instrument expressed to come into force on the same day that it is laid will be in breach of section 4(1).[23]

Defence of non-publication

2.29 As an addendum to this section, the Committee draws attention to section 3(2) of the Statutory Instruments Act 1946:

> "In any proceedings against any person for an offence consisting of a contravention of any such statutory instrument, it shall be a defence to prove that the instrument had not been issued by or under the authority of Her Majesty's Stationery Office at the date of the alleged contravention unless it is proved that at that date reasonable steps had been taken for the purpose of bringing the purport of the instrument to the notice of the public, or of persons likely to be affected by it, or of the person charged."

2.30 The Committee believes that this provision–which represents a significant exception to the principle that ignorance of the law is no excuse–illustrates the importance attached by Parliament to prompt publication of law once made, and the inherent unfairness of expecting citizens to comply with law that has not been published.

23 Twenty-sixth Report of Session 2014/15 in relation to S.I. 2015/406.

3 Correction of errors in published law

Correction slips and authorised corrections

3.1 It sometimes happens that enacted subordinate legislation contains errors of form or substance. The National Archives have a process whereby certain errors can be corrected by correction slip. When a correction slip is issued, the online version on legislation.gov.uk is amended. The print PDF version of the instrument is not updated but the correction slip is published alongside the instrument on legislation.gov.uk.

3.2 The decision whether to proceed by correction slip falls to be agreed between the responsible Department and the Statutory Instrument Registrar at the National Archives. Determination of when it is appropriate to rectify the text of a statutory instrument by the issue of a correction slip is the responsibility of the Registrar.

3.3 The issue of correction slips by the National Archives is not expressly mentioned in the Committee's Standing Orders, but the appropriateness of issuing one is sometimes raised in a memorandum to the Committee by a Department; and sometimes Counsel to the Committee are asked informally to contribute to the decision whether to proceed by correction slip or amending instrument.

3.4 There have been a number of instances where a Department has suggested proceeding by way of correction slip but the Committee has disagreed with that approach.

The Committee's view

3.5 The Committee is concerned that changes to subordinate legislation must be—

- transparent and brought to the attention of those affected by the legislation, and
- accountable, in the sense that a change which does or might affect the meaning or effect of legislation must be made by the same person to whom the power to make the instrument is delegated, and in the same manner.

3.6 Correction slips are not a reliable way of achieving either purpose.

3.7 The Committee is therefore clear that errors in subordinate legislation should not be corrected by correction slip where they amount (or could possibly amount) to a change of substance. Even in other cases, they should be used only in the limited circumstances discussed in paragraphs 3.10 to 3.13 below.

3.8 For transparency, amending legislation is preferable where the change is of any significance. Where amending legislation is used, the new instrument may need to be made using the free issue procedure (see below).

3.9 The Committee is sometimes encouraged to operate a test for acceptability of correction slips along the lines of the test for legislative rectification adopted by the House of Lords in *Inco Europe Ltd v First Choice Distribution [2000] 1 W.L.R. 586*. The Committee accepts the application of the principles in Inco for this purpose, but subject to an important qualification: the Committee is not a court (which is why, for example, its Standing Orders do not encourage it to express a view as to whether an instrument is

intra vires, but only as to whether there appears to be a plausible doubt as to *vires*). Neither the Committee, nor the Statutory Instrument Registrar or other officials of the National Archives, nor Government officials or Ministers, have the right to adjudicate on whether a change to an instrument is potentially of a sufficiently significant substantive effect to justify being achieved through a wholly non-accountable, and imperfectly transparent, system of administrative rectification, which is what correction slips are.

3.10 Subject to that, the Committee agrees that the following criteria will sometimes be helpful in determining the suitability of the issue of a correction slip:[24]

- the errors are small scale (for example, a typographical error that does not affect the substantive meaning);
- the errors are obvious;
- the text and location of the corrections are equally obvious;[25] and
- the corrections are small scale.

3.11 If the errors and corrections are obvious and there is no possibility that a court or users of the legislation can interpret it in any way other than that which was intended, it may be that no correction is necessary. In addition to the criteria above, the Committee believes that the error should also be sufficiently confusing to be worth correcting.[26] The Committee has expressed the view that if the Department is clear that the meaning is obvious despite the error, an acceptable option is to leave the instrument in its existing form.[27]

3.12 The following examples, taken from JCSI reports, will be regarded as instances where correction slips cannot properly be used. This list is not exhaustive:

- Replacing one concept with another distinct concept, for example, making products "available on the market" or "placing" them on the market.[27]
- Small changes that affect the substantive meaning, for example, inserting "not" before "inconsistent".[28]
- Absence of a main verb.[29]
- Express widening of criminal liability (even if the errors and corrections are obvious and small scale in textual terms).[30]
- Downgrading an operative provision to explanatory material.[31]
- Extensive renumbering.[24]
- Restructuring of a definition.[32]

24 Twelfth Report of Session 2016/17 in relation to the Local Justice Areas Order 2016 and Fifteenth Report of Session 2012/13 in relation to S.I. 2012/2748.

25 For examples of where the correction is not obvious see Twenty-third Report of Session 2015/16 in relation to S.I. 2016/220; Fifth Report of Session 2014/15 in relation to S.I. 2014/610; Second Report of Session 2012/13 in relation to S.I. 2012/767 and Fifth Report of Session 2010/12 in relation to S.I. 2010/1813.

26 Eleventh Report of Session 2017/19 in relation to S.I. 2017/1297.

27 Fifth Report of Session 2017/19 in relation to S.I. 2017/737.

28 Fifth Report of Session 2017/19 in relation to S.I. 2017/835.

29 Sixteenth Report of Session 2016/17 in relation to S.I. 2016/1024.

30 Twentieth Report of Session 2014/15 in relation to S.I. 2014/3258.

31 Third Report of Session 2014/15 in relation to S.I. 2014/790.

32 Third Report of Session 2014/15 in relation to S.I. 2014/572.

3.13 The following, again taken from JCSI reports, may be regarded as indicative of instances where a correction slip can be used. This list is not exhaustive:

- Changing an incorrect cross reference.[26]
- Amending a footnote or the explanatory note to indicate the availability of documents referred to in the legislation.[33]
- Amending the year of regulations referred to in the instrument.[27]
- Amending inert material that is not operative text, for example, italic cross headings.[34,35]

3.14 The Committee does not routinely report errors that can be rectified by correction slip. Counsel to the Committee do, however, with the approval of the Committee from time to time, draw to the informal attention of Departments minor errors that are not thought to justify a formal report; and the minor errors table which is sent to the Department concerned will sometimes indicate that in the informal opinion of Counsel the error is, or is not, suitable for correction by correction slip.

3.15 Even if corrections can be made by correction slip, a Department should not be relaxed about the fact that errors have been made. Subordinate legislation should be subjected to careful internal checking during and after drafting with a view to minimising or eliminating mistakes which are a source of confusion to users even if they are subsequently corrected. The Committee has occasionally drawn an instrument to the special attention of both Houses on account of the number of individually insignificant errors made, where the Committee thinks that this suggests insufficient care in the preparation of the instrument.

Free issue procedure

3.16 The Government's internal manual for statutory instrument procedure (Statutory Instrument Practice, 5th Edition, November 2017) says—

> "3.5.20 If an SI is found to be defective, or contains typographical errors, you may need to produce a new SI and make it available, free of charge, to everyone who received the original SI."

3.17 Every instrument that is issued under this procedure carries an italic rubric at the top of the first page that says—

> "This Statutory Instrument has been printed to correct errors in [SI XXXX/XXXX] / in consequence of a defect in [SI XXXX/XXXX] and is being issued free of charge to all known recipients of that Statutory Instrument."

33 Fifth Report of Session 2017/19 in relation to S.I. 2017/669; Fourth Report of Session 2017/19 in relation to S.I.s 2017/268 and 2017/336; Twenty-seventh Report of Session 2016/17 in relation to S.I.s 2017/233 and 2017/237 and Twelfth Report of Session 2016/17 in relation to S.I. 2016/716.

34 Fifth Report of Session 2017/19 in relation to S.I. 2017/176; Twentieth Report of Session 2016/17 in relation to S.I. 2016/1161 and Fifteenth Report of Session 2014/15 in relation to S.I. 2014/2721.

35 For an explanation of the difference between inert and operative text see First Special Report of Session 2013/14 published in May 2013 titled, "Excluding the inert from subordinate legislation".

3.18 There is no requirement as a matter of law for the Government to follow this procedure but it has been followed by successive Governments as part of their internal statutory instrument procedure for many decades.

3.19 It is sometimes open to question whether or not the procedure applies.

3.20 In particular, if a new instrument corrects errors in an old instrument but also implements a good deal of additional policy, it can be tempting for Departments not to follow the free issue process. In principle, however, it is probably right that readers of the original instrument should be given the corrected version without charge; if the Department chooses to combine the corrections with a large replacement instrument that is therefore costly to issue free of charge, that is its choice. Statutory Instrument Practice says the following (paragraph 4.7.6)—

> "4.7.6 If your Department wants to introduce new amending provisions at the same time as it is correcting a defective instrument, it should include both the new and correcting provisions within the one instrument. You should then agree with the SI Registrar whether or not to provide free replacement copies. The Explanatory Memorandum for the amending SI needs to state whether or not the procedure for free issue has been applied and give the reasons for the decision."

3.21 Similarly, it is not always entirely clear what amounts to an error for these purposes. At one extreme, typographical errors are clearly caught; at the other extreme, realisation that a policy correctly achieved has turned out to be undesirable is clearly not caught. There is a grey area on which the Committee has occasionally opined in individual reports.

3.22 It is open to question whether the free issue procedure continues to serve quite the purpose that it originally did.

3.23 Few people today rely on hardcopy Queen's Printers' versions of statutory instruments; they generally access statutory instruments online, either using the National Archives website which provides original versions of instruments or one of the commercial subscription services that provide fully updated and consolidated texts of statutory instruments.

3.24 Insofar as the original purpose of the free issue procedure was both to put readers on notice that a mistake had been discovered and corrected and to provide them with a clean text, the free issue procedure is today probably neither necessary nor sufficient: insufficient, because most readers access statutory instruments online as required and will therefore not see when a replacement is issued; unnecessary, because very few people nowadays buy individual hardcopy statutory instruments–the relatively few libraries and other institutions that buy hardcopy instruments do so through periodic subscription.

3.25 A more effective and appropriate modern procedure would probably be to allow readers to register for email or text alerts when a statutory instrument is replaced for the purpose of rectifying errors. **The Committee invites the Government to consider whether a process of this kind should be instituted and aligned to the existing free issue procedure.**

4 Accessibility

Access to subsidiary documents

4.1 Subordinate legislation sometimes refers to and gives significance to another document. This may be done for a variety of purposes. Examples include—

- giving legal effect to the document;
- referring to standards or codes of practice in the document that must be complied with; and
- using the document to clarify the text, for example, where the document is a map which delineates an area that is described in the text.

4.2 In observance of the principle that legislation should be publicly available, information must be given about how to access such documents.

4.3 Although Departments invariably accept (in memoranda to the Committee) that they should make clear where electronic and hard copies of documents given an importance in legislation are available, the Committee continues to see instances where the availability, particularly of hard copy documents, is not given.

4.4 Failure to make documents accessible is reported for failure to comply with proper legislative practice as part of the residual ground at the end of *paragraph 1(B) of House of Commons Standing Order No. 151 and paragraph 73(2) House of Lords Standing Order No. 73*.

The Committee's view

4.5 The Committee is aware that Departments no longer produce numerous hard copies of documents referred to in legislation and that they are increasingly making documents available free of charge on the Internet.[36] The Committee does not disagree with this practice, as a significant part of the population has easy access to the Internet and prefers to access documents electronically. However, the Committee has repeatedly stressed its concern that documents given a significance by subordinate legislation should be available both to citizens who do not have access (or ready access) to the Internet and to citizens who do have such access.[37] It should not be made unnecessarily difficult for persons without easy access to the Internet to perform their legal obligations or assert their legal rights.

4.6 The Committee's view is that availability details should be given for both electronic and hard copies of the relevant document. If the document is not available electronically, access to hard copies alone will suffice. Availability details must be given in the instrument itself (see paragraph 4.8 below). Where details for access to electronic copies is given, references to website addresses should be specific or the website should be easy to navigate to from the address given.[38]

36 Twenty-third Report of Session 2014/15 in relation to S.I. 2014/3283

37 For recent examples, Eleventh Report of Session 2017/19 in relation to S.I. 2017/1251; Seventh Report of Session 2017/19 in relation to S.I. 2017/943; Fifth Report of Session 2017/19 in relation to S.I. 2017/669 and S.I. 2017/706 and Fourth Report of Session 2017/19 in relation to S.I. 2017/268 and 2017/336.

38 Twenty-ninth Report of Session 2010–12 in relation to S.I. 2011/1551.

4.7 Making available hard copies of a document which has a distinct legislative effect cannot be ruled out on the grounds of being too expensive.[39] A Department has the option of making a hard copy of the document available for inspection only. In limited cases, for example, where the document referred to is not produced within Government, electronic and hard copies of the document are not available free of charge and must be purchased. In these circumstances, the Department should give details of a place where the document can be inspected free of charge.

4.8 Information on the availability of documents referred to in legislation should be included in the instrument itself (either in the footnotes or the Explanatory Note) rather than in the Explanatory Memorandum. This is helpful for readers who might not be aware of, or think to access, the Explanatory Memorandum. In the Committee's opinion, the Explanatory Memorandum (which is routinely laid before Parliament with statutory instruments) provides valuable background information about the policy intention and the legal context; but it should not be used for basic information which readers require in order to understand the effect of the instrument such as access information for documents on which the instrument relies.[40]

Other accessibility issues

4.9 Accessibility to legislation is a general principle of obvious importance for the maintenance of the rule of law. In addition to access to subsidiary legislation, other accessibility issues sometimes arise to which the Committee will draw attention.

4.10 For example, the Committee does not consider it acceptable for the font used in a statutory form to be so small that it is difficult or impossible to decipher the wording. The Committee is clear that the principle of accessibility of legislation requires that hard copies of forms sold by the National Archives or produced from their website in the normal way should be capable of being read without difficulty.[41]

4.11 The issue of accessibility to the law also arises in the context of steps required to be taken by legislation. Unless there is express power to the contrary, where legislation, for example, requires an application to be made, it should not limit the application to an electronic application and should allow for the possibility of a hard copy application.[42] To restrict a person's right to use paper and post is a sufficiently significant change in access to justice to require it to be addressed in the enabling power by express provision.

4.12 Although the Committee's concerns regarding accessibility to the law are important in all cases, the issue is more acute when the instrument is of general concern to members of the public as opposed to, say, only a small number of well-resourced commercial organisations who can be expected to have stayed abreast of legislative developments concerning them through correspondence with Government Departments or in other ways.

39 Tenth Report of Session 2015/16 in relation to S.I. 2015/1646.
40 Seventh Report of Session 2017/19 in relation to S.I. 2017/943.
41 Second Report of Session 2016/17 in relation to S.I. 2016/336.
42 Fourth Report of Session 2017/19 in relation to S.I. 2017/366 and Sixteenth Report of Session 2016/17 in relation to S.I. 2016/1024.

5 Conclusions

Timing of publication

5.1 The practice of secret law can never be condoned. New law must be readily available as soon as possible after it has been made and those affected by changes in the law must be protected from being subjected to changes in the law before they have had a reasonable opportunity to understand and prepare for the changes (subject to paragraph 2.22 above). Accessibility to the law is part of due process.

5.2 The Committee takes this opportunity to stress that it will continue to draw the special attention of Parliament to instances where we consider there has been unjustifiable delay in publication or in laying before Parliament.

5.3 Unless there are exceptional circumstances and as a general rule, the Committee considers that a period longer than 10 calendar days is unjustifiable delay.

5.4 The Committee will also continue to draw special attention in its reports to instruments which in its view come into force unreasonably soon. It may do so even in relation to instruments which are not subject to the 21 day rule. Therefore, Departments should aim to give Parliament and those affected a full opportunity to be aware of any instrument (including orders which are not required to be laid) before the instrument takes effect.

Correction of errors in published law

5.5 The legislative intent of an instrument must be achieved by the text of the instrument made in the proper way and not by later editorial adjustments made by civil servants.

5.6 The default assumption for the correction of errors in subordinate legislation is that an amending instrument should be used (subject to the limited exceptions in paragraphs 3.10 to 3.13 above).

Accessibility to the law

5.7 Documents given a significance by subordinate legislation should be available both to citizens who do not have access (or ready access) to the Internet and to citizens who do have such access. Details of where both electronic and hard copies of such documents are available should be given in the instrument itself.

5.8 It is important that Departments remind their drafting lawyers of the importance the Committee attaches to legislative accessibility and update any internal guidance to the extent that this has not already been done.