Number of Corrections to Statutory Instruments in 2014
Secondary Legislation Scrutiny Committee (formerly Merits of Statutory Instruments Committee)

Historical Note

In January 2000, the Royal Commission on the Reform of the House of Lords said that there was a good case for enhanced Parliamentary scrutiny of secondary legislation and recommended establishing a “sifting” mechanism to identify those statutory instruments which merited further debate or consideration. The Merits of Statutory Instruments Committee was set up on 17 December 2003. At the start of the 2012–3 Session the Committee was renamed to reflect the widening of its responsibilities to include the scrutiny of Orders laid under the Public Bodies Act 2011.

The Committee has the following terms of reference:

(1) The Committee shall, with the exception of those instruments in paragraphs (3) and (4), 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 (2).

(2) 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;
   (d) that it may imperfectly achieve its policy objectives;
   (e) that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument’s policy objective and intended implementation;
   (f) that there appear to be inadequacies in the consultation process which relates to the instrument.

(3) 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.

(4) 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.

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

Members
Baroness Andrews            Lord Eames                     Baroness Stern
Lord Bichard                Rt Hon. Lord Goodlad *(Chairman)* Lord Plant of Highfield
Lord Borwick                Baroness Hamwee                  Lord Woolmer of Leeds
Lord Bowness                 Baroness Humphreys

Registered interests
Information about interests of Committee Members can be found in Appendix 4.

Publications
The Committee’s Reports are published on the internet at www.parliament.uk/seclegpublications

Information and Contacts
If you have a query about the Committee’s work, or opinions on any new item of secondary legislation, please contact the Clerk of the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW; telephone 020–7219 8821; fax 020–7219 2571; email seclegscrutiny@parliament.uk.

Statutory instruments
Twentieth Report

NUMBER OF CORRECTIONS TO STATUTORY INSTRUMENTS IN 2014

Introduction
1. Since the Secondary Legislation Scrutiny Committee (SLSC) was established in 2003 (originally known as the Merits of Statutory Instruments Committee), we have kept a watchful eye on the quality of the statutory instruments (SIs) laid before Parliament. The Committee is particularly well placed to detect changes in quality because all instruments subject to a parliamentary procedure fall within the scope of its scrutiny.

2. One of the subjects which we have considered in our end of session reports has been the number of correcting instruments laid during the period covered by the report. We have monitored this figure for two principal reasons: first, because of the waste of resources, for both the Departments and the SLSC, in having to consider an instrument twice (the original and the correction); and, secondly, because it seemed to us that there was a correlation between the degree of care that Departments were taking in ensuring that the instrument was correct and how carefully the policy, and its implementation, had been thought through.

3. Table 1 below summarises the data for sessions 2003–04 to 2008–09. Because of the decline in the percentage error rate, the Committee stopped its regular count in 2009.

   Table 1: Percentage error rates for negative instruments

<table>
<thead>
<tr>
<th></th>
<th>% of negative instruments issued free of charge to correct an earlier SI</th>
<th>% of corrections when negative instruments mixing corrections and new material included</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003–04</td>
<td>5.3</td>
<td>-</td>
</tr>
<tr>
<td>2004–05</td>
<td>5.3</td>
<td>5.6</td>
</tr>
<tr>
<td>2005–06</td>
<td>3.64</td>
<td>4.85</td>
</tr>
<tr>
<td>2006–07</td>
<td>2.5</td>
<td>-</td>
</tr>
<tr>
<td>2007–08</td>
<td>3.5</td>
<td>-</td>
</tr>
<tr>
<td>2008–09</td>
<td>2.16</td>
<td>-</td>
</tr>
</tbody>
</table>

More recent developments
4. Although, recently, the SLSC has focused primarily on problems relating to the quality of consultation and of Explanatory Memoranda (EMs), the number of corrections to instruments is again emerging as a cause for concern. According to our figures, for example, the number of correcting instruments as a percentage of the total laid by the Department for Business, Innovation and Skills (BIS) in 2014 was 9.26%, for the Home Office the percentage was 8% and for the Department for Communities and Local
Government (DCLG) it was 7.69%. We find this level of corrections unacceptable. We commented about this issue in our most recent end of session report. We also commented in the same report that a wider range of problems had started to creep in (for example, poor planning, with affirmative instruments being laid too close to their intended implementation date to allow for normal scrutiny). Our current concern about the number of correcting instruments is that the problem is not simply a matter of poor proof-reading but a more fundamental issue to do with the level of understanding within Departments of parliamentary procedure and parliamentary timetables. It is the Committee’s wish to inspire Government Departments to stem and, if possible, reverse this trend that has prompted this report.

Current error levels

First half of 2014

5. Despite drawing attention to the problem in our end of session report for 2013–14, the number of correcting instruments remained high at the start of the current session. Our analysis indicates that 45 correcting instruments were issued in the first six months of the calendar year 2014. This compared with a total of 43 such instruments in the whole of 2013 and 48 in 2012. In addition, 15% of the affirmative instruments considered by the Committee at that mid-year point were corrections.

6. As a result, in July 2014, the Chairman wrote, on behalf of the SLSC, to Richard Heaton, First Parliamentary Counsel and Permanent Secretary at the Cabinet Office (see full correspondence in Appendix 1). In response, Mr Heaton said that he did not know the reason for the increase and asked for any information or analysis that the Committee could provide. To supplement our original analysis, which was largely based on our own records and information derived from the National Archives’ Legislation.gov.uk website, the Chairman tabled a Question for Written Answer to 10 Government Departments asking each for a statement of the number and percentage of correcting instruments that they had laid in the period 1 January to 22 July. The responses are summarised in Table 2 below.

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2 The text of the question was “To ask Her Majesty’s Government how many statutory instruments from the Department of x have been laid this calendar year; of those, what percentage corrected errors in a previous instrument (including drafts of affirmative instruments that had to be superseded by correcting drafts); and what steps that Department is taking to reduce the need for correcting instruments.” [WPQs 1420–29 and 1702].
Table 2: Responses to the Question for Written Answer

<table>
<thead>
<tr>
<th>Department</th>
<th>Total No. of SIs</th>
<th>No. of Corrections</th>
<th>% of SIs Corrected</th>
<th>Mitigation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Business, Innovation and Skills</td>
<td>71 (Affirmative instruments not included)</td>
<td>7 [10]$^1$</td>
<td>$^{9.9%}$ $^2$</td>
<td>Legal advisers have this year reviewed and refreshed the SI checking processes and training given to lawyers.</td>
</tr>
<tr>
<td>Cabinet Office</td>
<td>Directed to website</td>
<td>Directed to website</td>
<td>Directed to website</td>
<td>Errors are fed back into the quality assurance process.</td>
</tr>
<tr>
<td></td>
<td>22</td>
<td>3 [4]</td>
<td>14%</td>
<td>Regularly reviews SI checking, training and guidance processes. The Treasury Solicitor’s Department (TSols) will be looking at ways of improving the quality of statutory instrument drafting and the possibility of a specialist drafting “hub” for SIs.</td>
</tr>
<tr>
<td>Communities and Local Government</td>
<td>60</td>
<td>12 [7]</td>
<td>20%</td>
<td>Working with TSols on ways to strengthen drafting.</td>
</tr>
<tr>
<td>Culture, Media and Sport</td>
<td>21</td>
<td>3 [2]</td>
<td>14.3%</td>
<td>The Department is committed to continuous improvement and seeks to learn from errors.</td>
</tr>
<tr>
<td>Energy and Climate Change</td>
<td>31</td>
<td>2 or 4 [3]</td>
<td>6.5% or 12.9%</td>
<td>Reasons for corrections to SIs are investigated and appropriate action taken. Will be working with TSols on improvements.</td>
</tr>
<tr>
<td>Environment, Food and Rural Affairs</td>
<td>33</td>
<td>2 [3]</td>
<td>6.1%</td>
<td>Not all “errors” in an SI are drafting errors. Some instruments are withdrawn due to factual errors or changes in policy. Will be working with TSols on improvements.</td>
</tr>
<tr>
<td>Home Office</td>
<td>51</td>
<td>5 [6]</td>
<td>10%</td>
<td></td>
</tr>
</tbody>
</table>
In addition to training and adopting rigorous checking processes, a new post is to be established to co-ordinate the sharing of best practice. Will be working with TSols on improvements.

Checking, mentoring, GLS training, cross-Whitehall drafting specialists act as a point of contact and a review into statutory instrument drafting arrangements. Will be working with TSols on improvements.

DWP and the TSols are taking steps to mitigate the need for correcting instruments through training, sharing best practice and a review into statutory instrument drafting arrangements.

7. Analysis of the responses in Table 2 shows that:

- the average error rate, during the period 1 January to 22 July, across the 10 Departments, was 9.5%;
- although there was wide variation between Departments, the Cabinet Office, the Home Office, BIS and DCLG showed correction levels well above the mean; and
- there is no agreed definition of a correction – various Departments treated differently corrections responding to the Joint Committee on Statutory Instruments (JCSI), policy changes or planning errors (for example, where only the commencement date required changing).
Overview of 2014 as a whole

8. Having raised the issue mid-year, we then analysed Departments’ performance to the end of the year to see whether there had been any improvement.

<table>
<thead>
<tr>
<th>SIs</th>
<th>Number laid</th>
<th>Number replaced free of charge</th>
<th>Percentage %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Affirmative</td>
<td>301</td>
<td>37</td>
<td>12.29%</td>
</tr>
<tr>
<td>Negative</td>
<td>750</td>
<td>28</td>
<td>3.73%</td>
</tr>
<tr>
<td>Total</td>
<td>1051</td>
<td>65</td>
<td>6.18%</td>
</tr>
</tbody>
</table>

9. In the past, the Committee has considered an error rate in excess of 5% as unacceptable. In our assessment, the error rate for 2014 overall, and across all Departments, was 6.18%. When the performance of the 10 Departments considered in Table 2 are analysed separately, the outcome is 13.04% for affirmative and 4.26% for negative instruments, an average error rate of 6.81%. This is lower than the figure in the summer but still unacceptably high. As before, we found wide variation between Departments: the Cabinet Office, the Home Office, BIS and DCLG are still showing correction levels well above the mean, and have now been joined by the Department for Culture, Media and Sport.

10. We are particularly alarmed by the high figure in relation to affirmative instruments. Given that the availability of pre-laying scrutiny of affirmative instruments (offered by lawyers supporting the JCSI) affords Departments the opportunity to correct most of the technical errors in the drafting of an instrument before it is formally laid, 13% corrections (1:8 instruments) seems very high. As is customary, we anticipate a spike of secondary legislation in the run up to the General Election in May. Regrettably this is also likely to contribute to high error rates for the remainder of the 2014–15 session.

Cabinet Office response: “the hub”

11. On 21 October, the Chairman wrote to Mr Heaton and Jonathan Jones, the Treasury Solicitor, to share the evidence from the written questions with them. In their joint response on 3 November, they announced an initiative, to be launched in December 2014, which was intended to bring about significant improvements in the drafting of SIs (see Appendix 1). It involved the establishment of a “statutory instrument hub”: a new team which would bring together lawyers currently working in a range of Departments under the leadership of an experienced drafter from the Office of the Parliamentary Counsel and a senior lawyer from Treasury Solicitors. A number of the responses to the Chairman’s written questions also referred to this initiative.
12. The purpose of the hub is, we are told, to improve the quality and efficiency of SI drafting by centralising and co-ordinating knowledge management, training, guidance and mentoring and by the dissemination of good practice. It will be a source of support for both lawyers and policy officials, improving understanding of processes and promoting consistency and coherence of approach. The Committee welcomes the establishment of a “statutory instrument hub”. The Committee will, however, continue to monitor the level of correcting instruments and will await with interest to see how the hub improves the quality of SIs.

BOX 1

The sorts of errors that we anticipate the hub will assist in reducing include for example:

**Draft Crime and Courts Act 2013 (Consequential Amendments) Order 2013**

This Home Office instrument corrected the omission of immigration officers from the list of officials within the scope of the codes of practice issued under the Crime and Courts Act 2013.

**Draft Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) (Advocacy Exceptions) Order 2014**

This revised draft instrument was laid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 because the Ministry of Justice failed to take into account subsequent amendments made to that Act by the Crime and Courts Act 2013. The error was found after the original instrument had been approved in both Houses and so the revised instrument had to go through the parliamentary scrutiny process again.

**Types of Errors**

13. We have mentioned that a particular cause for concern is the increase in range of errors requiring correction. These are no longer simply proof-reading errors but procedural and policy errors that should have been addressed before the original instrument was laid. We set out below some illustrative examples.

“**Typos**”

14. A small percentage of corrections due to typographical errors or IT problems is inevitable. As we have said, the Committee has in the past taken the view that the error rate should be no higher than 5%. Table 2 above and our end of year figures in Table 3 show that a number of Departments are currently far in excess of that threshold. Even a minor spelling error can have a significant effect on the delivery of the policy. See Box 2:

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Football Spectators (2014 World Cup Control Period) Order 2014 (SI 2014/144)

Football Spectators (2014 World Cup Control Period) (Amendment) Order 2014 (SI 2014/220)

SI 2014/144 prescribed the control period under the Football Spectators Act 1989 for the 2014 FIFA World Cup tournament in Brazil. During this period certain individuals with a record of football-related violence would not be allowed to travel abroad. The control period should have begun on 2 June 2014, ten days before the first match in the tournament finals, and end when the last match in the tournament finished or was cancelled. The second instrument, SI 2014/220, was laid in a hurry to amend the date in the first Order from 13 June to 13 July to match the policy intention.°

Poor Planning

15. For some time SLSC guidance to Departments has included the advice from the Lords’ business managers that for an affirmative instrument Departments “should allow around 6 sitting weeks for the passage of the instrument through all its Parliamentary stages”. In 2014 a number of Departments acted against this advice and laid SIs too close to the intended implementation date. For example, on 27 March a suite of five controversial affirmative instruments were laid by BIS to amend the copyright system. Although both the Easter recess and the Queen’s Speech were imminent, an implementation date of 1 June was printed on the face of the instrument – the period between the laying date and intended implementation date included only 15 sitting days.

Draft Maternity Allowance (Curtailment) Regulations 2014

This instrument comprised Regulations laid by BIS and by DWP. The lead BIS Regulations were laid just before the summer recess, on 21 July, and were made on 18 November, broadly in line with the six-week period advised. The DWP Regulations, however, which were subject to the negative procedure, were laid on 20 November and intended to take effect on 1 December, thereby breaching by 10 days the normal 21-days allowed for parliamentary consideration before an instrument is brought into effect. In our report, we criticised both Departments for failing to coordinate properly so that implementation could be achieved without reducing the standard scrutiny period.


These Regulations were laid by the Home Office on 3 November with a request from the Home Secretary that they be considered by the Committee at its meeting the following day. The Regulations consisted of 90 pages of complex and sensitive legislation and the request was wholly unfeasible. A full and critical report was published following our meeting on 11 November.⁶

16. Allowing sufficient time for scrutiny is important. The House set up the SLSC to assist it in its consideration of the myriad of SIs laid before Parliament. The service the House expects from the Committee is being impeded by the failure of Departments to take adequate care in the preparation and timetabling of instruments.

17. **Whilst we acknowledge that there are genuine emergencies that require scrutiny to be expedited, we urge Departments to timetable the generality of SIs realistically and in accordance with the recommended period.** In particular they need to be aware that the six-week period advised for affirmatives relates to weeks when Parliament is actually sitting and that they should therefore make allowances for parliamentary recesses. Departments also need to consider the wisdom of putting a specific date on the face of an affirmative instrument unless that date allows adequate time for all the delays that might legitimately occur as Members raise questions about the instrument.

*Internal clearance procedures*

18. A common reason given by Departments for failing to comply with the standard scrutiny period is delay caused by the Regulatory Policy Committee (RPC). The RPC was set up in 2009 to assess the quality of evidence and analysis supporting regulatory changes affecting businesses, charities and voluntary organisations, in particular the quality of the impact assessment. Although the system has been in place for a number of years, it appears that Departments continue to fail to allow sufficient time to deal with questions that the RPC might reasonably ask about their evidence or methodology.

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BOX 4

**Control of Explosives Precursors etc. Regulations (Northern Ireland) 2014 (SR 2014/224)**

As a result of delays in RPC clearance, this instrument had to be brought into effect before it was laid before Parliament. The EM accompanying the instrument stated that if the Northern Ireland Office had not acted in that way, no retailer would have been able to sell any product containing the chemical substances listed in the instrument after 2 September 2014 (see correspondence in Appendix 2). Given this timetabling error, it was particularly unfortunate that there was another mistake in the processing of this instrument, namely that the description of the consultation process in the EM was wholly inaccurate. As the correspondence (in Appendix 2) shows, the Minister, Dr Andrew Murrison MP, has asked the Permanent Secretary to review the Department’s clearance process.

*Poor process and “version control”*

19. There are a number of steps which have to be followed, and followed in the right sequence, when making law. They are part of the system of checks and balance that ensure that legislation is not made lightly or without due care. Most unusually, we have this year seen corrections required due to a loss of “version control”.

**BOX 5**

**Consular Marriages and Marriages Under Foreign Law (No. 2) Order**

The instrument made by the Privy Council as SI 2014/1110 had two additional articles that were not in the draft version previously cleared by Parliament. The new instrument set out the correct position and repealed the previous Order. The Foreign and Commonwealth Office stated that in its view Parliament had approved the full extent of the order made by the Privy Council, that the original Order was valid and that marriages, whether same or opposite sex marriages, conducted under it were valid. Confirmation of these issues however would be a matter for the courts. It is important to get the legislation right first time because it can cause significant problems for individuals.7

**Rail Vehicle Accessibility (Victoria Line 09TS Vehicles)**

A version of the Order was originally laid before Parliament on 9 December 2013. However, another version was laid on 16 May 2014 when it became apparent that the version of the Order laid in December differed in two minor respects from the Order actually signed by the Minister. The Order as signed by the Minister included provision for one of the exemptions to expire on 31 May 2015, the version of the Order laid in December and later published SI 2013/3031 did not include that provision. There were also other

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7 The purpose of the Order is to revoke and re-enact (with some additional and consequential amendments) the Consular Marriages and Marriages under Foreign Law Order 2014 (S.I. 2014/1110), [11th Report](#), Session 2014–15, HL Paper 55.
minor errors relating to the power under which the Order was laid. The new version was eventually made as SI 2013/3318 having passed through the scrutiny process a second time.\(^8\)

20. A Minister should be able to have confidence that an instrument presented for signature is legally correct and has followed the correct procedure. This sort of error is not insignificant: it may have very serious consequences where it brings into doubt whether actions taken under the version originally laid are legally valid. That two quite unconnected Departments should independently make this type of error indicates a weakness in the training or supervision of staff being allocated to this legislative role. **It is critically important that Departments ensure that they have robust systems in place to prevent errors involving loss of “version control”**.

**Omissions**

21. One of the functions of the SLSC is to consider the policy objective of an SI and whether the instrument fulfils that objective. On a number of occasions recently we have drawn the attention of the House to the deteriorating quality of EMs accompanying instruments. Even if we do not formally draw an instrument to the attention of the House, the supplementary questions that we ask seek to fill the gaps identified and we often include in our reports clarifications of terms used, additional background or new data.\(^9\)

22. Usually when the Committee asks a Department for supplementary information it is easily available and provided promptly. It may be, for example, that the information, although available, had been omitted simply in the interests of brevity. Increasingly, however, we are finding that information is not included because it is not available within the timetable the Department has set itself for laying the instrument. In recent reports we have called attention to consultation analyses and impact assessments not being available at the time that the instrument is laid. More worryingly, we have also found cases where the instrument has been re-laid because the policy has not been fully worked out. See Box 6:

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BOX 6

Care and Support (Independent Advocacy Support) No 2 Regulations 2014 (SI 2014/2889)

SI 2014/2889 corrected SI 2014/2824, an instrument laid only a week previously, because the Department of Health had second thoughts about the policy it proposed.

Draft Marriage of Same Sex Couples (Conversion of Civil Partnership) Regulations 2014

Draft Marriage (Same Sex Couples) Act 2013 (Consequential and Contrary Provisions and Scotland) and Marriage and Civil Partnership (Scotland) Act 2014 (Consequential Provisions) Order 2014

These instruments set out the procedures to be followed by couples who wished to convert their civil partnership into a marriage. They replaced versions laid on 3 July 2014 which had been withdrawn following “reconsideration of elements of the procedure to address concerns raised by interested parties”. Although there was extensive consultation in relation to the 2013 Act and general principles, it appeared to us that even a brief consultation on the proposed detail of the Regulations might have avoided the need to withdraw and re-lay these instruments.¹⁰

23. We question whether these types of errors will be addressed by the proposal for a “secondary legislation hub”. We therefore recommend that Departments review their internal processes so that, whether through public consultation or other means, they have systems in place to ensure that all aspects of the legislation that they put before the House are complete and robust.

Conclusion

24. It appears to us that Departments are increasingly trying to prepare and lay instruments to a timetable which is shorter than is sensible. This may well account for the high level of correcting instruments. Whether it is because the reduction in the average consultation period for instruments¹¹ also decreases the overall timetable, or due to a loss of experienced staff within Departments with an understanding of the legislative process, or for some other reason, it is clear that there has been a deterioration in all aspects of the quality of secondary legislation laid before Parliament.

¹¹ Latest Cabinet Office data shows the average consultation exercise now lasts 7.6 weeks, down from an average 10.2 weeks in 2012.
25. The situation is not without hope. After some serious errors in the Department of Health (DH) in 2013, we wrote to the Secretary of State, the Rt Hon. Jeremy Hunt MP (see his response in Appendix 3). The action taken has significantly improved the Department’s error rate: in 2014, DH made no corrections to affirmatives and corrected only three negative instruments out of 60 laid. Similarly the Ministry of Justice laid only six corrections out of 155 instruments laid (3.85%) and HM Treasury had an error rate of only 1.09% from 92 instruments laid. We would urge the Cabinet Office to examine what procedures are followed in those Departments with the lowest error rates so that best practice can be applied more widely.

26. It might also be helpful if the Cabinet Office were to review, perhaps through the “statutory instrument hub”, correcting instruments and categorise the types of error in order to establish a comparable and consistent basis for Departments to monitor their own performance.

27. Whilst we have welcomed the establishment of a “statutory instrument hub”, we shall continue to monitor the level of correcting instruments. It is with regret that we feel the need to do this since it is important that Departments take responsibility for the quality of their legislative output. As this report demonstrates, quality of drafting is only part of the problem. We are disappointed that individual Departments with a poor record on corrections have not done more to improve their performance. They need to engage in a process of continuous improvement. This should be done by addressing the apparent lack of awareness within their Departments about the legislative process and by introducing more robust checking systems with the close involvement of senior staff.
APPENDIX 1: CORRESPONDENCE ON IMPROVING THE QUALITY OF SECONDARY LEGISLATION

Letter from Lord Goodlad, Chairman of the Secondary Legislation Scrutiny Committee, to Richard Heaton, First Parliamentary Counsel, at the Cabinet Office

We observed in our last end of session report that the Committee’s work was made more onerous by the number of correcting instruments that we had to consider during the session, whether in the form of replacement drafts of affirmative instruments or correcting instruments for negatives. Our observations indicated that these corrections are due to both policy and drafting revisions. It appears that the number of such instruments has continued to increase in the current session.

Whist we understand that no figures on corrections are collected centrally, even a simple search of the number of Statutory Instruments with the rubric heading which states that they have been issued free of charge demonstrates that, in the first six months of 2014, 45 such instruments have been issued, which compares with a total of 43 instruments for the whole of 2013 and 48 in 2012. So far this year 15% of the affirmatives that the Committee has considered have been corrections.

Given your promotion of the Good Law initiative across government, the Committee has asked me to draw this to your attention and ask for your views on why the problem has arisen and how it may be remedied.

3 July 2014

Letter from Richard Heaton to Lord Goodlad

My office is strongly committed to excellent legislation, both primary and secondary. Parliamentary Counsel is not responsible for secondary legislation; this is the accountability of individual departments and, increasingly, of the Treasury Solicitor’s Department which is expanding to become the in-house provider of legal services for most departments across Whitehall. But Jonathan Jones (the new Treasury Solicitor) and I are keen to raise the standard and improve the consistency of secondary legislation drafting. I hope the growth of a shared legal service provided by Jonathan’s department will make this easier, for example by better monitoring of quality across legal teams, and more flexible use of experienced and skilled drafters.

Meanwhile, my office are active participants in the training of government lawyers, running regular training in drafting skills for government lawyers, both for individual departments and under the Government Legal Service’s training programme. This training is aimed at raising the standards of drafting and focuses on the importance of ensuring accuracy and a clear and coherent outcome. A cross-Whitehall group of drafting specialists exists to act as a point of contact and facilitate the sharing of best practice. The reports of your Committee and of the Joint Committee on Statutory Instruments are important pointers to areas on which we need to focus.

I know from my own experience as a departmental lawyer that correcting instruments are something that all legal teams try to avoid. I do not know the reason for the recent increase you have experienced: I will bring this to GLS colleagues’ attention, and we will try and discern any pattern or underlying cause.
Meanwhile, if your Committee or supporting staff have any information or analysis that you could share on the problems you are observing, I know we would find that helpful in better understanding how departments are falling short.

I am copying this letter to Jonathan Jones.

14 July 2014

Letter from Richard Heaton and Jonathan Jones, Treasury Solicitor and HM Procurator General to Lord Goodlad

We are very pleased to announce an initiative that we hope will lead to significant improvements in the drafting of statutory instruments. We propose to set up a new team on a trial basis as a “statutory instrument hub”. The hub will bring together drafting lawyers currently working in a range of Whitehall departments, under the leadership of an experienced drafter from the Office of the Parliamentary Counsel and a senior lawyer from the Treasury Solicitor’s Department. It will be formally launched this December.

The hub will aim to improve quality and efficiency of SI drafting in a number of ways. It will centralise and co-ordinate knowledge management, training, guidance and mentoring. It will look for examples of best practice to share and also seek to embody “good law” principles of clarity, coherence and simplicity in drafting. It will be a source of support for both lawyers and policy officials, improving understanding of processes and promoting consistency and coherence of approach.

Lawyers drafting in the hub will benefit from intensive training and mentoring, enabling them to produce higher quality drafts themselves and also provide higher quality mentoring to drafting lawyers outside the hub.

The pilot will also test ways of delivering additional high quality, efficient drafting services to Whitehall teams where these are needed and can add value. As part of this, it will aim to co-ordinate the use of freelance drafting services to provide quality assurance and ensure value for money.

More generally, as part of measures to improve quality within the Treasury Solicitor’s Department (which now includes most Government advisory legal teams), heads of teams have been asked specifically to report weekly on any criticism or other feedback from Parliament (including your Committee and the JCSI) on the quality of SI drafting. This will assist in identifying any problem areas or common issues so that they can be quickly addressed and disseminated among drafting lawyers, as appropriate.

Finally, we hope that the hub will be able to open a dialogue between the Treasury Solicitor’s Department and officials and legal advisers at both the JCSI and the Scrutiny Committee. We are very keen that the hub should work closely with colleagues in Parliament to identify innovative ways to address the quality issues which concern us all.

3 November 2014
APPENDIX 2: CORRESPONDENCE ON THE CONTROL OF EXPLOSIVES PRECURSORS ETC. REGULATIONS (NORTHERN IRELAND) 2014

Letter from Dr Andrew Murrison MP, Parliamentary Under-Secretary of State for Northern Ireland to Baroness D'Souza, the Lord Speaker

In compliance with the proviso to section 4(1) of the Statutory Instruments Act 1946 I invite your attention to the fact that SI 2014 (number pending) Control of Explosives Precursors etc. Regulations (Northern Ireland) 2014, which was made under articles 3(1)(c), (2) and (4), 17, 40(2), (3) and (4), 54(1), (2)(b) and (3), and 55(2) of, and paragraphs 1(1) and (4), 2, 3, 5, 14(1), 15 and 22 of Schedule 3 to, the Health and Safety at Work (Northern Ireland) Order 1978, which are exercisable by the Secretary of State in relation to explosives, with modifications, by paragraph 4 of Schedule 12 to the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010, on 28 August 2014 and came into force on 2 September 2014, has yet to be laid before Parliament.

Any Government regulation which imposes a burden on business must first be approved by the Reducing Regulation Committee. Due to unforeseen delays within the Northern Ireland Office, the Impact Assessment was not submitted to that Committee for clearance as early as it should have, which resulted in delays.

It was intended that the instrument would be made and laid once clearance was received. The instrument was made in error on 28 August 2014, without clearance from the Reducing Regulation Committee having been received. Clearance has now been received from the Reducing Regulation Committee. The instrument will be authenticated and laid before Parliament as soon as possible.

It was nonetheless necessary for the instrument to come into force on operation on 2 September 2014, before it is laid before Parliament, because this instrument implements Regulation (EU) 98/2013 on the marketing and use of explosives precursors (the “Precursors Regulation”), which comes into force on that date. Although the Precursors Regulation is directly applicable in member States, the UK is required to take some action to implement it.

First, the Precursors Regulation creates a prohibition on the supply of certain substances to, and possession use and import of those substances by, members of the public, but then permits member States to establish a licensing system to permit such use. Even if the UK does not create a licensing system, it is still required under Article 11 of the Precursors Regulation to impose penalties for breach of the prohibition on possession, use, etc of the substances and for failure by suppliers to report suspicious transactions and significant disappearances of all substances covered by the Precursors Regulation. If the UK fails to legislate to impose penalties, the UK will be in breach of EU law.

Second, if the UK does not legislate, the existing licensing system that is in place in Northern Ireland in respect of one of the substances covered by the Precursors Regulation (sodium chlorate) would not comply with the requirements of the Precursors Regulation about licensing systems (e.g. length of licence, way in which licence is granted). So, if the UK fails to legislate to streamline the licensing system, the UK will be in breach of EU law.
Separately from the significant risks of breaching EU law, failure to bring the regulations into force on 2 September would also have a practical effect on business. The Precursors Regulation creates a prohibition on the supply of certain substances to, or the possession, import or use of those substances by, members of the general public. Member States are then permitted to (but do not have to) allow possession, use, etc by way of a licensing system. On 2 September, this prohibition will come into force. If Northern Ireland does not have a licensing system in place by 2 September, the prohibition will take effect so that nobody will be allowed to supply these substances to members of the general public. The Northern Ireland Office would need to inform suppliers that they must immediately cease all retail supply of these substances. No doubt there would be strong objections to this, and the possibility of legal action cannot be excluded. (Note that, as of 2 September, suppliers will be required to report suspicious transactions. Late implementation would not have a direct impact on this.)

I regret the necessity to bring this instrument into operation before copies have been laid before Parliament. This is particularly unfortunate due to the breach of the 21 day rule that it necessarily entails. I am ready to provide further information to the House should it be required.

3 September 2014

Letter from Lord Goodlad to Dr Andrew Murrison MP

Your letter of 3 September to the Lord Speaker about problems in relation to the laying of these Regulations was copied to this Committee, as is standard practice, since it is our function to scrutinise all secondary legislation on behalf of the House and advise its Members of any issues arising.

It is clear from your letter that, given the imminence of the implementation date for the EU Regulation, you could not do other than breach the 21-day rule. We asked your department how this circumstance had arisen. The explanation we received indicated that the relevant officials were insufficiently familiar with the legislative process. Since the general standard of secondary legislation we receive from the Northern Ireland Office is very good, we accept that this is likely to be an isolated incident, particularly as I understand that you have asked the Permanent Secretary to review the process to ensure that it does not happen again.

Unfortunately, there was another serious problem with this instrument. The Explanatory Memorandum laid with it on 8 September stated that a written consultation was launched on 9 December 2013 and closed on 9 January 2014. The Committee has a particular concern about the general standard of consultation and we regard a short consultation over the Christmas period as poor practice, particularly when the main target audience is retailers, for whom it is the busiest time of the year. We therefore asked why that period had been chosen. In response, your officials referred instead to a seven-week consultation that had commenced in November. When we queried this we were told that our question had “prompted them to look again at this” and they realised that the consultation process had been “wrongly described in the EM”.

We regard this lapse from the standard expected for material presented to Parliament as very serious indeed and would ask for your assurance that steps are being taken in your department to improve checking procedures so that such a lapse in accuracy is not repeated. The Committee would also be grateful for your confirmation that the instrument and the material in the revised Explanatory
Memorandum laid on 25 September is now complete and accurate, before the Committee makes its report on it to the House.

14 October 2014

Letter from Dr Andrew Murrison MP to Lord Goodlad

I share your concerns regarding the standard expected for material presented to Parliament. I have already spoken with the Permanent Secretary at the Northern Ireland Office to ensure there is an improvement in the quality of work towards future legislative process.

NIO officials plan to liaise shortly with colleagues in our Parliamentary Section and the Home Office Legal Advisors Branch to arrange training and awareness of the legislative process, including the importance of providing full and accurate information to Parliament. Senior Officials will also ensure that there is sufficient support provided to the policy lead on a legislative project.

NIO officials have checked the Instrument and Explanatory Memorandum, and I am satisfied that they are now complete and accurate.

17 October 2014
APPENDIX 3: CORRESPONDENCE WITH THE DEPARTMENT OF HEALTH

Letter from Lord Goodlad, Chairman of the Secondary Legislation Scrutiny Committee, to Jeremy Hunt MP, Secretary of State for Health

At its meeting today, the Secondary Legislation Scrutiny Committee considered the National Health Service (Direct Payments) (Amendment) Regulations 2013 (SI 2013/2354) which corrects an instrument laid on 4 July 2013 (SI 2013/1617).

The corrections have two aspects: first, they reinstate two paragraphs accidentally omitted from SI 1616; and, secondly, the instrument facilitates the review of any decision made in connection with Direct Payments. The first error indicates poor checking of the instrument before it was laid. The second is rather more worrying as the scheme has existed since 2010 without a full range of internal appeal mechanisms, and this fundamental policy oversight is only now being corrected. We have drawn the attention of the House to both aspects in our latest report.

I am writing to you, at the request of the Committee, because we are concerned about the general quality of the secondary legislation that your Department has put before the House in the first half of the year.

We have several times had to request substantial amounts of additional information to clarify the policy intention or context (for example, an explanation of the quality criteria to be used in assessing payments to the Clinical Commissioning Groups under SI 2013/474) or have had to ask for Explanatory Memoranda to be replaced due to the inadequacy of the material provided (for example the Draft NHS (Direct Payments) Repeal of Pilot Schemes Limitation Order 2013).

We have also had to ask for clarification of the practical implications of policies (for example in relation to NICE International’s liability for damages under SI 2013/259 and 497) and have pointed out flaws in regulations that might have encouraged abuse of the dental charging structure (SI 2013/364 later rectified by 2013/711). In March, our 33rd report of Session 2012–13 drew the attention of the House to this last item and said that although the immediate problem had been resolved the question remained how the Department of Health’s internal checking systems had failed to prevent sub-standard regulations being laid before the House.

8 October 2013

Letter from Jeremy Hunt MP to Lord Goodlad

I attach great importance to ensuring that our secondary legislation is of good quality, and I very much regret that the Committee has had occasion to criticise some of the SIs.

I have therefore asked the Permanent Secretary to take steps to deal with the issues you raise. In particular, we plan to re-emphasise to senior civil servants in the department that they are personally accountable for the SIs and the Explanatory Memoranda falling within their area of responsibility and for ensuring that points likely to be of concern to the Committee have been addressed. We will also place a fresh emphasis on the need for senior civil servants to attend training on secondary legislation – and I very much welcome the input the Committee’s staff make to the training that the department arranges.
Because of the long lead times for preparing SIs (including the time needed to develop policy), it may take time for the full impact of these steps to be felt. I therefore propose to review the department’s performance next summer and I have made clear that I expect to see an improvement by then.

Meanwhile, I apologise to the Committee for the errors in SI 2013/1617 which were corrected by the National Health Service (Direct Payments) (Amendment) Regulations SI 2013/2354, on which you commented in your twelfth report. A provision replicating one in the 2010 regulations had been deleted at a late stage in the drafting of SI 2013/1617, and two paragraphs that cross-referred to it were inadvertently deleted at the same time. Unfortunately, SI 2013/1617 made sense without the two paragraphs, and automatic paragraph numbering meant the omission was not picked up when our normal checks were done. My legal adviser has alerted all our lawyers to this incident and to the need to be careful to check at each stage that all the relevant provisions remain in the instrument. As far as the additional appeal mechanism (now included in the amending 2013 instrument) is concerned, it was originally thought that NHS review processes and the ombudsman were sufficient to deal with any appeals, but over time the department came to a different view.

30 October 2013
APPENDIX 4: INTERESTS AND ATTENDANCE

Committee Members’ registered interests may be examined in the online Register of Lords’ Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 13 January 2015 Members declared no interests.

Attendance:

The meeting was attended by Baroness Andrews, Lord Bichard, Lord Borwick, Lord Bowness, Lord Eames, Lord Goodlad, Baroness Stern and Lord Woolmer of Leeds.