

HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

28th Report of Session 2017–19

**Correspondence: Government
consultation policy**

Includes 3 Information Paragraphs on 5 Instruments

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Secondary Legislation Scrutiny Committee

The Committee was established on 17 December 2003 as the Merits of Statutory Instruments Committee. It was renamed in 2012 to reflect the widening of its responsibilities to include the scrutiny of Orders laid under the Public Bodies Act 2011.

The Committee's terms of reference are set out in full on the website but are, broadly, to 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 these specified grounds:

(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.

The Committee may also consider such other general matters relating to the effective scrutiny of secondary legislation as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

Baroness Blackstone	Lord Haskel	Lord Sherbourne of Didsbury
Lord Faulkner of Worcester	Rt Hon. Lord Janvrin	Rt Hon. Lord Trefgarne (Chairman)
Baroness Finn	Lord Kirkwood of Kirkhope	Baroness Watkins of Tavistock
Lord Goddard of Stockport	Baroness O'Loan	

Registered interests

Information about interests of Committee Members can be found in the last Appendix to this report.

Publications

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

The National Archives publish statutory instruments with a plain English explanatory memorandum on the internet at <http://www.legislation.gov.uk/uksi>

Information and Contacts

Any query about the Committee or its work, or opinions on any new item of secondary legislation, should be directed to the Clerk to the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW. The telephone number is 020 7219 8821 and the email address is hseclegscrutiny@parliament.uk.

Twenty Eighth Report

CORRESPONDENCE

Government consultation policy

1. In our 25th Report of this Session,¹ we referred to the oral evidence on Government consultation policy that we had taken from Mr Oliver Dowden, CBE MP, Parliamentary Secretary (Minister for Implementation) at the Cabinet Office, on 20 March 2018 (the evidence has been published on our website).² On 18 April, we wrote to Mr Dowden about that evidence, in particular about the relationship between the Cabinet Office and other Government Departments in monitoring consultation exercises. We have received a reply of 2 May from Mr Dowden, and we are publishing this correspondence at Appendix 1 to this report.

¹ [25th Report](#), Session 2017–19 (HL Paper 120).

² See: <https://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/publications/> [accessed 9 May 2018].

INSTRUMENTS OF INTEREST

Framework Agreement between the European Union and its Member States, on the one part, and Australia, of the other part (Cm 9584)

Partnership Agreement on relations and cooperation between the European Union and its Member States, of the one part, and New Zealand, of the other part (Cm 9585)

Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part (Cm 9586)

2. These Agreements add a political framework to existing (EU-Canada CETA) and future (Australia and New Zealand) free trade agreements with the European Union. The Committee asked the Foreign and Commonwealth Office (FCO) whether these agreements would risk diminishing the UK's trading relationships, after the UK's withdrawal from the EU, with these countries in any way. The FCO replied:

“The UK has, as an EU Member State, advocated closer cooperation between the EU and these three key allies, and the UK will continue to support a strong Europe. The UK Government has also committed to seeking continuity in its current trade and investment relationships including those covered by EU free trade agreements such as CETA, whilst both Australia and New Zealand have made very strong commitments at Prime Ministerial level that they wish to have ambitious and comprehensive deals with the UK, in addition to deals with the EU. Given the global nature of supply chains, it is in the UK's interest that comprehensive trade agreements, which uphold the rules based system, exist not just between the UK and its partners but also between other global partners”.

Oil and Gas Authority (Offshore Petroleum) (Retention of Information and Samples) Regulations 2018 (SI 2018/514)

3. These Regulations aim to improve the existing licensing regime governing the UK's offshore petroleum industry, by clearly identifying information produced by the industry that needs to be retained, and setting out for how long the information needs to be kept, and by whom. The UK's offshore petroleum industry produces geological information, rock samples and other types of data in the course of its exploration, drilling and production activities. This information is valuable to the wider industry as it can be used to support future development of both oil and gas resources and potential alternative uses of offshore industry infrastructure or installations, such as Carbon Capture Utilisation and Storage. While current offshore petroleum licences contain some requirements to retain information, the licences do not cover all relevant parts of the industry. These Regulations are intended to address this better. According to the Department for Business, Energy and Industrial Strategy, the Regulations will ensure that relevant information and samples are not lost when offshore petroleum licences are terminated or transferred to another party. The Oil and Gas Authority, the industry regulator, believes that the measures are needed to meet the Government's commitment to generate up to £140 billion of additional revenue from the UK's offshore industry.

Special Restrictions on Adoptions from Abroad (Ethiopia) Order (SI 2018/517)

4. This Order responds to serious child safeguarding concerns that have been raised by diplomatic missions and organisations which process intercountry adoption applications about adoptions of children from Ethiopia. The evidence shows a pattern of cases of unethical practice and procedural irregularities within the Ethiopian system. This includes private orphanages receiving payments for child placement decisions and false claims in relation to children being available for adoption. There is also a lack of certainty around the legal guarantees in the Ethiopian adoption process. The Department for Education (DfE) says that the Ethiopian Government has failed to provide satisfactory reassurances or guarantees that future adoptions will be carried out in line with international standards. The Order will suspend intercountry adoptions from Ethiopia. The statutory suspension will apply, for the time being, to all adoption cases, unless the relevant authority in the UK is satisfied that a case should be treated as an exception. The DfE will keep the suspension under review through regular contact with the UK's diplomatic mission in Ethiopia and international partners.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft instruments subject to affirmative approval

Offshore Combustion Installations (Pollution Prevention and Control) (Amendment) Regulations 2018

Instruments subject to annulment

- | | |
|-------------|--|
| Cm 9584 | Framework Agreement between the European Union and its Member States, on the one part, and Australia, of the other part |
| Cm 9585 | Partnership Agreement on Relations and Cooperation Between the European Union and its Member States, of the one part, and New Zealand, of the other part |
| Cm 9586 | Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part |
| Cm 9587 | Political Dialogue and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Cuba, of the other part |
| Cm 9588 | Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States on the one part, and the Republic of Armenia, of the other part |
| SI 2018/507 | Export (Penalty) (Amendment) Regulations 2018 |
| SI 2018/509 | First-tier Tribunal and Upper Tribunal (Chambers) (Amendment) Order 2018 |
| SI 2018/510 | Plant Health etc. (Fees) (England) (Amendment) Regulations 2018 |
| SI 2018/511 | Tribunal Procedure (Amendment) Rules 2018 |
| SI 2018/513 | General Osteopathic Council (Continuing Professional Development) (Amendment) Rules Order of Council 2018 |
| SI 2018/514 | Oil and Gas Authority (Offshore Petroleum) (Retention of Information and Samples) Regulations 2018 |
| SI 2018/517 | Special Restrictions on Adoptions from Abroad (Ethiopia) Order 2018 |
| SI 2018/526 | Transfer of Functions (Digital Government) Order 2018 |
| SI 2018/527 | Bathing Water (Amendment) (England) Regulations 2018 |
| SI 2018/530 | Police Pension Schemes and Additional Voluntary Contributions (Amendment) (England and Wales) Regulations 2018 |

APPENDIX 1: CORRESPONDENCE WITH THE CABINET OFFICE ON CONSULTATION POLICY

Letter from Lord Trefgarne, Chairman of the Secondary Legislation Scrutiny Committee, to Mr Oliver Dowden, CBE MP, Parliamentary Secretary (Minister for Implementation) at the Cabinet Office

We have now had the opportunity to consider the evidence which you gave to the Committee on 20 March of this year, in the light of the transcript. We have also received the letter of 14 March from the Rt Hon. David Lidington, MP, offering an update on training related to Explanatory Memoranda, as well as your letter of 26 March about the Secondary Legislation Monitoring Board, and the role of the Cabinet Office.

At the evidence session, we were pleased to learn about your involvement in the issue of Government consultation policy, and about your recognition of the interest which we as a Committee continue to take in this, in the context of the preparation and presentation of secondary legislation.

However, we were not persuaded of the merits of Ministers' decision to go back on the commitment given by Sir Oliver Letwin, MP, in 2016 that the Cabinet Office would actively monitor the effectiveness of consultation processes carried out across Whitehall, and would then set down its findings in an annual report. You explained that the Cabinet Office was committed to supporting other Departments, for example, through training, as you again make clear in your letter of 26 March. This is of course to be welcomed, but we take the clear view that such support should be a complement to the monitoring function, rather than an alternative to it.

Nor were we inclined to agree with you that, in looking at evidence of the quality of Departmental consultation practice, the Cabinet Office could rest on reports by our Committee drawing individual statutory instruments to the attention of the House. As I explained in my letter to you of 21 March, our reports often comment less formally on aspects of other statutory instruments scrutinised, including how relevant consultation has been handled. We would hope that the Cabinet Office considers these comments as well.

There is a wider point to be made. We are concerned with consultation in relation to secondary legislation, but the Government's Principles apply to all consultation exercises carried out by Departments. We have no knowledge of such exercises which do not relate to secondary legislation.

At the evidence session, we referred to evidence given to the Constitution Committee of the House of Lords, and mentioned in its report on "The Legislative Process: Preparing Legislation for Parliament" (4th Report of Session 2017–19, HL Paper 27). That report contains a chapter on consultation and pre-legislative scrutiny which reflects a range of views on the Government's approach, several of them critical. If the Cabinet Office looks to the findings of Parliamentary committees as a litmus test of Government consultation practice, it should take account of reports such as this one from the Constitution Committee; and where there are criticisms, we suggest that it should take an active interest.

We were pleased to receive David Lidington's letter of 14 March, which shows the progress that has been made in offering training across Whitehall. The Annex to the letter lists some 20 Departments, alongside the number of officials from

those Departments who have attended the training. We were struck by the fact that, among Departments that expect to prepare larger numbers of Brexit-related statutory instrument, BEIS and Defra have sent 31 and 50 officials respectively to the training, but HM Treasury has sent only three. We also note that the FCO is not included in the list at all. On the face of it, these details seem anomalous.

We would welcome a further response from you to the points raised in this letter. Above all, we would ask you to take seriously our concern that what we might call the arm's-length approach which you and your Ministerial colleagues have chosen to follow towards consultations by other Government Departments is likely to leave the Cabinet Office with too little knowledge of practice "on the ground", and also to create a vacuum within Government where, in our view, there should be a central function to intervene and press for improvements where these are needed.

18 April 2018

Letter from Mr Oliver Dowden, CBE MP, to Lord Trefgarne

Thank you for your letter of 18 April in response to mine of 26 March.

As I promised in my previous letter, I enclose a report from the Secondary Legislation Monitoring Board's first quarter. As you will see the Board has identified a number of areas of concern, and outlined the action that will be taken to address this.

At the evidence session, and in my last correspondence, I also updated you on the work the Government Digital Service (GDS) is undertaking to prompt departments when closed consultations are approaching the twelve week mark for publishing a response, or an explanation of why that cannot be provided. This will allow us to monitor, on a periodic basis, whether departments are publishing responses within the timeframe set by the Consultation Principle.

With regards to your point about the Contented Committee: Effective Explanatory Memorandum training, a further session ran on 23 March and this was attended by four civil servants from the FCO. To date 261 civil servants have attended the training since its introduction. Two further sessions are planned for 18 May and 6 July: these currently have 76 and 9 civil servants registered to attend respectively. There are further bespoke sessions planned for the Home Office and Defra. The training is available to all civil servants across Whitehall and it is not prescribed that departments send a particular quota, hence the anomalies you refer to. It should also be noted that the training is not limited to EU Exit Explanatory Memorandum (EM), but applies to all EMs. These numbers do not take account any other internal training or resources on statutory instruments that departments may be providing.

Finally, as promised I have written to departments highlighting the importance of the newly updated Consultation Principles and the DExEU guidance regarding consultation on EU Exit secondary legislation. I have also taken that opportunity to seek the views of Ministerial colleagues on performance in this area and will consider any further steps in the light of responses, consistent with the position I outlined in my evidence that individual departments are properly responsible for the content and conduct of their negotiations.

SLMB quarterly report March 2018

The Secondary Legislation Monitoring Board (SLMB) have considered a total of 27 Explanatory Memoranda (EMs) in December, January and February. EMs from the following Departments were viewed in each month of the review period:

December: BEIS, DCLG, DfT, DH, HMRC, MoD, MoJ

January: CO, Defra, DfE, DfT, DWP, FCO, HMT, NIO

February: BEIS, DCMS, DfE, DH, DWP, HMRC, HO, MoD, NIO

These EMs were considered at the Board's quarterly meeting on 13 March 2018.

Themes across Government:

The Board noted that there has been a general increase in the quality of EMs, with each EM considered having a number of positive points. However, there are several key areas of concern noticed across Government:

- Long and overly complicated sentences are still used
- A lack of coherent structure presents as policy experts sharing everything they know about a topic rather than presenting it in a coherent way
- Communications are not focused around the reader
- Assumed knowledge lead to a lack of detail in the EMs
- Poor consultation description
- Consultation principles not applied in all documents

Action taken:

Civil Service Learning will be adapting its training course, titled 'Contented Committees: Effective EMs', to emphasise where EMs are falling short of the expected standard, how to avoid the problematic practices noted by the Board, and why this is important for ensuring that Parliament can properly scrutinise secondary legislation laid before it.

These key areas of concern have also been directly fed back to Departments by Board Members, and have been fed into internal training offered by Departments to up-skill their policy professionals.

Concerns identified by the Board have also been fed back to the cross-Government SI Practitioners Network and Policy and SI Processors Working Group to ensure that those who deal with Sis and EMs on a daily basis are aware of the trends identified by the SLMB and what improvements need to be made going forward.

2 May 2018

APPENDIX 2: INTERESTS AND ATTENDANCE

Committee Members' registered interests may be examined in the online Register of Lords' Interests at <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests>. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 8 May 2018, Members declared no interests.

Attendance:

The meeting was attended by Baroness Blackstone, Lord Faulkner of Worcester, Lord Janvrin, Lord Kirkwood of Kirkhope, Lord Sherbourne of Didsbury and Lord Trefgarne.