



HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

43rd Report of Session 2017–19

**Oral evidence and
correspondence: Quality
of information provided
in support of secondary
legislation**

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Secondary Legislation Scrutiny Committee

The Committee's terms of reference, as amended on 11 July 2018, are set out on the website but are, broadly:

To report on draft instruments and memoranda laid before Parliament under sections 8, 9 and 23(1) of the European Withdrawal Act 2018.

And, 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 the grounds specified in the terms of reference.

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

Rt Hon. Lord Chartres	Lord Goddard of Stockport	Baroness O'Loan
Rt Hon. Lord Cunningham of Felling	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	

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 <http://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>

Committee Staff

The staff of the Committee are Christine Salmon Percival (Clerk), Paul Bristow (Adviser), Nadine McNally (Adviser), Philipp Mende (Adviser), Jane White (Adviser), Louise Andrews (Committee Assistant) and Ben Dunleavy (Committee Assistant).

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 hlseclegscrutiny@parliament.uk.

Forty Third Report

ORAL EVIDENCE

Quality of information provided in support of secondary legislation

1. On 21 November, the Committee took evidence from Elizabeth Gardiner, First Parliamentary Counsel and Permanent Secretary of the Government in Parliament Group in the Cabinet Office; Jonathan Jones, Treasury Solicitor; and Sir Chris Wormald, Permanent Secretary, Department of Health and Social Care and head of the Civil Service Policy Profession. A transcript of the evidence has been published on the Committee's website.¹
2. This was the third time that the Committee had heard from the Permanent Secretaries. The first session took place in July 2016, when the officials acknowledged the Committee's concerns about the preparation and presentation of secondary legislation to Parliament and undertook to implement an "improvement package".²
3. The second session was held in September 2017, when the Permanent Secretaries set out in detail the steps that had been taken to deliver that package. These included changes in officials' awareness of the importance of secondary legislation; reinforcement of capacity, above all through training; and process changes, notably the creation of an officials' Secondary Legislation Monitoring Board; the designation in all Departments of Senior Responsible Officials to oversee secondary legislation, and a new role for the Parliamentary Business and Legislation (PBL) Committee of the Cabinet to coordinate the laying of statutory instruments.³
4. The prime focus of the latest evidence session was to take stock of Departments' handling of secondary legislation in the context of preparations for the UK's exit from the EU. On 1 November, the Chairmen of Sub-Committees A and B of the Secondary Legislation Scrutiny Committee, with the Chairmen of the European Statutory Instruments Committee and of the Procedure Committee of the House of Commons, had written to all Ministers with Departmental responsibility for secondary legislation, asking questions about their plans for statutory instruments related to the UK's exit from the EU, and for other, "business-as-usual" (BAU), instruments. On 19 November, a reply was received from the Rt Hon Andrea Leadsom, MP, Leader of the House of Commons, and from Chris Heaton-Harris, MP, Minister in the Department for Exiting the European Union. We are publishing that correspondence at Appendix 1 to this report.
5. Points made in the correspondence were raised with the Permanent Secretaries, including the Government's confirmation that the number of BAU SIs would be much lower than in previous sessions, and that the total number of Brexit-related SIs anticipated by the Government was now put at 700 (rather than 800 to 1,000, as hitherto).

1 <https://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/publications/>

2 The Committee referred to this evidence session in its [7th Report](#) of Session 2016–17 (HL Paper 32).

3 The Committee referred to this session in its [6th Report](#) of the current Session (HL Paper 23).

6. On BAU SIs, Ms Gardiner stated her understanding that there was no “huge backlog” of SIs that would come forward after “exit day” in March 2019; and that, if numbers were to pick up, the flow of SIs to Parliament would be controlled by PBL oversight. On Brexit-related SIs, noting that Government estimates indicated that at least 500 SIs were still to come forward, Ms Gardiner confirmed that work was already underway on all of these, and that the Government were confident that the necessary resources were in place to complete the work. She also said that the Government recognised the need for effective Parliamentary scrutiny, and that PBL sought to smooth out peaks and troughs in the laying of statutory instruments before Parliament to make this possible.
7. Reference was made to the report on “The Legislative Process: The Delegation of Powers” from the Constitution Committee,⁴ and to its conclusion that there needed to be a compelling justification for delegated powers and that Parliament should decide if that justification was acceptable: Ms Gardiner said that she concurred with that conclusion. On the issue of treaties to be laid under the Constitutional Reform and Governance Act 2010, mentioned in the letter of 19 November 2018 from the Leader of the House of Commons, Mr Jones said that provision would have to be made for the continuity of treaties, whether or not there was a deal when the UK exited from the EU, so that work was still ongoing.
8. On the changes that had been introduced since 2016 into the Government’s handling of secondary legislation, Sir Chris Wormald described the pressure on Departments to give a clearer justification for introducing a statutory instrument as “an entirely beneficial thing to the policy-making process”. He said that Departments would wish to keep permanently many of the changes that had been introduced for the purposes of the secondary legislation needed because of the UK’s exit from the EU. As regards the designation of Ministers, and Senior Responsible Officials, with responsibility for secondary legislation, Mr Jones said that “senior ownership of the process” had made a huge difference. Sir Chris undertook that he and his colleagues would consider whether there were wider lessons that the Government could learn from the experience since 2016 of improving the management of secondary legislation.
9. We have found our discussions with the Permanent Secretaries to be both relevant and helpful to our scrutiny work, and we may in due course wish to involve them further in our own reflections on the lessons to be learnt.

4 Constitution Committee, *The Legislative Process: The Delegation of Powers* (16th Report, Session 2017-19, HL Paper 225).

APPENDIX 1: CORRESPONDENCE ON THE FLOW AND VOLUME OF SECONDARY LEGISLATION

Letter from the Rt Hon. Lord Trefgarne, Chairman of the Secondary Legislation Scrutiny Committee and Sub-Committee A, the Rt Hon. Lord Cunningham of Felling, Chairman of the Secondary Legislation Scrutiny Committee Sub-Committee B, the Rt Hon. Sir Patrick McLoughlin MP, Chair of the European Statutory Instrument Committee and Mr Charles Walker OBE MP, Chair of the Procedure Committee to all Ministers with departmental responsibility for secondary legislation

Flow and volume of secondary legislation

We are writing this joint letter in our capacity as Chairmen of the House of Lords Secondary Legislation Scrutiny Committee (SLSC) and its sub-committees, the House of Commons European Statutory Instruments Committee (ESIC) and the House of Commons Procedure Committee. As you know, the SLSC and ESIC are charged with considering all proposed negative instruments laid under the European Union (Withdrawal) Act 2018. In addition, the SLSC considers all negative and affirmative instruments whether laid under the Withdrawal Act or other Acts of Parliament, as well as treaties laid under the Constitutional Reform and Governance Act 2010.

The Government have said on a number of occasions that they anticipate that the decision to withdraw from Europe would give rise to 800 to 1,000 instruments. Of those Brexit-related instruments, a significant proportion would be “proposed negative instruments” laid under provisions of the European Union (Withdrawal) Act 2018 (“the Withdrawal Act”) which provide for a choice between the affirmative and negative resolution procedure.

From an early stage, when it became clear that the decision to leave the European Union would result in a large number of additional statutory instruments, committees in the Lords and the Commons have pressed the Government to ensure that the flow of instruments should be as even as possible and to keep Parliament informed about anticipated numbers. The SLSC, in evidence to the House of Commons Procedure Committee, for example, urged the Government to ensure “proper management of the flow of instruments ..., offering advance information about the planned flow”. The House of Commons Procedure Committee, in its report on the scrutiny of delegated legislation under the Withdrawal Act, said: “We expect the [PBL Committee] to take an active role in managing the flow of secondary legislation under the Act. The Government must ensure a steady even flow of instruments for scrutiny for the Parliamentary process to work effectively.”

Whilst both Houses have made every effort to ensure that they are well-placed to undertake the scrutiny work resulting from the decision to withdraw from the EU, we are disappointed to observe that, so far, the flow of both Brexit-related statutory instruments and of proposed negative instruments has been very slow to start. We note that the Hansard Society has recently suggested that only 9% of Brexit-related instruments have been laid before Parliament. Bearing in mind the deadline to which we are working, it is vital that our Committees and the Houses more generally are given more information about what we can expect in the coming months. To this end, we would be grateful if you would provide answers to the following questions. We are writing to all departments and would like responses from each department so that we can, ourselves, piece together the Whitehall-wide picture.

Questions

1. How many Brexit-related statutory instruments in total remain to be laid by your department, and under which Acts of Parliament?
2. With regard to your department, for each of the months from November 2018 to March 2019:
 - (a) how many statutory instruments subject to the negative procedure (excluding proposed negative instruments) and how many statutory instruments subject to the affirmative procedure will be laid before Parliament?
 - (b) what proportion of those instruments are Brexit-related instruments and are therefore included in the Government's estimate of 800 to 1,000 Brexit-related instruments?
 - (c) how many proposed negative instruments will be laid before Parliament?
3. Is the underlying assumption of those figures deal (with an implementation period) or "no deal"? How would they change if the assumption were reversed?
4. When does the department think it can lay the last proposed negative instruments before Parliament, allowing enough time to schedule a debate should the committees recommend upgrades to the affirmative procedure?
5. Does the department expect to use the "urgent cases" procedure under the Withdrawal Act?

In addition, please can you provide your departmental planning document setting out which statutory instruments—whether Brexit-related only or all statutory instruments—are to be laid and when.

The Committees are anxious to receive this information as soon as possible. We would be grateful if you could reply by **Friday 16 November**, to the email addresses provided below. We may decide to publish your response.

1 November 2018

Letter from Rt Hon. Andrea Leadsom MP, Leader of the House of Commons, and Mr Chris Heaton-Harris MP, Parliamentary Under Secretary of State for Exiting the European Union

Flow and Volume of Secondary Legislation

Thank you for your letter to Departmental SI Ministers of 1 November asking for further information on the remaining EU exit SIs we are expecting to lay between now and the end of March next year. We are responding on their behalf.

We agree that the laying of EU exit SIs has accelerated rapidly from a low base. However, as there are many parts to the process in Government and Parliament, it has been useful to allow the system to be tested without huge pressure. We welcome the constructive discussions we have had with you and your Committees, and have been happy to go beyond what is usually expected by providing a forecast of the likely number of SIs, broken down by month, and indicating the departments that will be laying the most SIs.

We hope this has helped your Committees to plan your work better whilst ensuring Parliament has more clarity on when it can expect to scrutinise exit SIs. We want to provide further assurances and assist in your Committees' planning. We have therefore set out at Annex A an indication of the likely percentage of EU exit SIs each department expects to lay. We hope that this information, taken alongside that previously provided (including on the number of SIs expected to be laid each month, which we re-attach in Annex B) provides you with a sufficient forward look to enable you to plan your resources.

We want to be as helpful as possible to the Committees and we have gone further than any previous Government in being open and transparent about our plans regarding secondary legislation.

Flow of Brexit SIs

As Chris Heaton-Harris outlined in his letter of 25 October, the number of EU exit SIs being laid started to increase significantly from 1 November onward, and progress has already been made. As of 16 November 138 SIs have been laid since Royal Assent of the EU (Withdrawal) Act—56 were laid in October alone. 87 proposed negatives have so far been laid for consideration by the Sifting Committees and we expect around 146 more negatives under the EU (Withdrawal) Act to be laid ahead of exit day. 42 affirmative SIs have been laid of which 37 are under the EU (Withdrawal) Act or a combination of that Act and other powers. The final number of affirmatives will of course depend on the sifting recommendations.

Ever since we published the white paper for what became the EU (Withdrawal) Act in January 2017, we have indicated we expect that the total number of Brexit SIs needed before exit day to be between 800-1,000. As Chris Heaton-Harris noted in his letter of 25 October, we have been clear that this total would likely fluctuate and could only be an indicative figure as departmental plans were finalised and negotiations progressed. This figure has continued to become clearer as policy decisions have crystallised, other exit-related primary legislation has received Royal Assent, and legal drafting finalised, which is why we now expect the total number of EU exit SIs we need will be fewer than 800. We now expect the total number to be up to 700, although again this may fluctuate.

The Government has always said that the objective is to ensure a functioning statute book. To do this, SIs necessary for exit day have been prioritised, and other SIs with less time pressure will be laid later in the process to enable a manageable flow and allow the necessary scrutiny by Parliament.

Departments quite rightly continue to refine the drafting and policy content of each SI and, in some cases, have combined measures to form coherent packages and/or to aid public understanding. Furthermore, around a quarter of statutory instruments will legislate on behalf of the devolved administrations adding another layer of complexity. This all impacts the number of SIs and the departmental breakdown. For these reasons, providing a reliable department-by-department month-by-month snapshot would be misleading. But we hope that you will find the detail provided at Annex A useful to understand the likely percentage breakdown of the total number of SIs we expect each department to lay.

Your letter also asked about 'business as usual' SIs. In the months between now and exit day we are very confident that the volume of non-EU exit SIs will be much lower than in comparable months in previous sessions. As the SLSC noted in its interim report on the work of that Committee in this session so far, the number of routine SIs laid before Parliament has remained at a relatively low level.

The number of treaties to be laid under the Constitutional Reform and Governance Act 2010 will be determined by the wider EU exit scenario. In the unlikely event of no deal, we will seek to put a number of successor international agreements with third countries in place by the end of March 2019 to replace EU international treaties and ensure continuity. In a deal scenario, our existing EU international agreements would continue to apply and so we would seek to bring successor treaties into force for the end of the Implementation Period.

Parliamentary scrutiny

You asked in your letter about the secondary legislation required for a deal scenario and a no deal scenario. The majority of EU exit SIs will be needed for a no deal scenario as well as for a deal at the end of the implementation period. Once the withdrawal agreement is legislated for, the SIs that are currently being laid under the EU (Withdrawal) Act will be deferred, amended or revoked by the Withdrawal Agreement Bill, ready for the end of an implementation period rather than for exit day.

Proper parliamentary scrutiny is a vital part of our democracy and the Government is keen to ensure Parliament has sufficient time to scrutinise these important pieces of legislation. We do not plan to use the urgent procedure under the EU (Withdrawal) Act. This power is there as a very last resort.

We will continue to work closely with you and your Committees at both Ministerial and official levels and we will write to you again with a further update before the end of the year.

I am copying this letter to the other Business Managers and all SI Ministers.

19 November 2018

Annex A

Table 1: An indication of the likely percentage of EU Exit SIs each department expects to lay

Department	Percentage of Brexit SIs
BEIS	10–15%
CO	up to 5%
DCMS	0–5%
DEFRA	15–20%
DExEU	up to 5%
DfE	up to 5%
DfT	10–15%
DHSC	up to 5%
DIT	up to 5%
DWP	up to 5%
FCO	up to 5%
FSA	up to 5%
HMRC	10–15%

Department	Percentage of Brexit SIs
HMT	10–15%
HO	up to 5%
MHCLG	up to 5%
MOJ	up to 5%
Other	up to 5%

Annex B

Projected flow of SIs provided in letter from Chris Heaton-Harris of 25 October 2018:

- 50–100 SIs, of which 55% are likely to be negative under the EUWA in October;
- 150–200 SIs, of which 55% are likely to be negative under the EUWA in November;
- 100–150 SIs, of which 35% are likely to be negative under the EUWA in December;
- 100–150 SIs, of which 25% are likely to be negative under the EUWA in January;
- 10–50 SIs, of which 20% are likely to be negative under the EUWA in February;
- 10–50 SIs, of which 30% are likely to be negative under the EUWA in March.

APPENDIX 2: MEMBERS INTERESTS

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 21 November 2018, Members declared no interests.

Attendance:

The meeting was attended by Baroness Bowles of Berkhamsted, Lord Chartres, Lord Cunningham of Felling, Lord Faulkner of Worcester, Baroness Finn, Lord Haskel, Lord Hogan-Howe, Lord Janvrin, Lord Kirkwood of Kirkhope, Lord Sherbourne of Didsbury, Baroness Redfern, Lord Rooker and Lord Trefgarne.

For the business taken at the meeting on 5 December 2018, Members declared no interests.

Attendance:

The meeting was attended by Lord Chartres, Lord Cunningham of Felling, Baroness Finn, Lord Haskel, Lord Janvrin, Lord Kirkwood of Kirkhope, and Lord Trefgarne.