Correspondence: Quality of information provided in support of secondary legislation
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 Sherborne 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 Fourth Report

CORRESPONDENCE

1. The Committee took evidence from three Permanent Secretaries - 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 at the Department of Health and Social Care and head of the Civil Service Policy Profession, on 21 November 2018. It published a commentary on this evidence in its 43rd Report of this Session. The transcript of the evidence session has been published on the Committee’s website.¹

2. Sir Chris Wormald has now written to follow up that evidence, and to send copies of the reports which have been prepared by Whitehall’s own Secondary Legislation Monitoring Board: the correspondence is published at Appendix 1 and the Reports at Appendix 2.

¹ Oral evidence taken before the Secondary Legislation Scrutiny Committee, 21 November 2018 (Session 2017-19).
APPENDIX 1: QUALITY OF INFORMATION PROVIDED IN SUPPORT OF SECONDARY LEGISLATION

Letter from Sir Chris Wormald, Permanent Secretary at the Department of Health and Social Care and head of the Civil Service Policy Profession, to Lord Trefgarne, Chairman of the Secondary Legislation Scrutiny Committee

Quality of information provided in support of secondary legislation

Thank you for the opportunity to attend the Committee on 21 November to provide an update on the work that is being done to improve the quality of Explanatory Memoranda.

As promised during the evidence session, we enclose a copy of the Secondary Legislation Monitoring Board’s (SLMB) most recent quarterly reports from June and September 2018. We would be happy to share future reports with the Committee on a regular basis. Further to our discussion about the SLMB, we can confirm that it pays close attention to the Committee’s reports and usually reviews EMs about which the Committee expresses particular concern. Where EMs are reviewed by the SLMB, any comments made by the Committee are always summarised alongside the SLMB’s own comments.

At the evidence session Baroness Finn asked whether a list of SI SROs across Government is publicly available (Q6). There is not a publicly available list, and we do not intend to make this publicly available. However, a central list is held by the Cabinet Office and the information about each SI SRO and SI Minister is widely publicised within departments.

We also discussed the spike in the number of EMs needing replacement since April, and our belief that this is caused by a new and more complicated EM template. It is our intention to test this assumption with departmental SROs. We will be writing to them to seek the departmental view of how the new EM template has been received, and what additional help or advice we can give to reduce the number of EMs being replaced in the short term. Our letter to SROs will include information about the guidance and training available to officials in relation to the new EM template and we will ensure that this is as widely distributed as possible.

To tackle the rise in EM replacements in the immediate term, we will be piloting a ‘sense check’ scheme for EMs, allowing the authors to have their EMs proofread for simple errors before laying. This is a temporary measure to address the rising number of EM replacements. The process will be managed by the secretariat to the SLMB and members of the SLMB will do the checking. Civil servants in all departments will be able to access the scheme, but precedence will be given to those writing EMs for EU exit legislation to be laid before March.

We will continue to monitor the quality of Explanatory Memoranda through the SLMB and the Government Legal Department’s SI Hub. We will naturally continue to use the Committee’s reports as a barometer of our success in this space.

20 December 2018
APPENDIX 2: SECONDARY LEGISLATION MONITORING BOARD
QUARTERLY REPORTS

June 2018

The Secondary Legislation Monitoring Board (SLMB) considered 27 Explanatory Memorannda (EMs) in March, April and May of 2018. EMs from the following departments were viewed in each month of the review period:

- **March**: CO, DCMS, DEFRA, DfE, DfT, HO, HMT, MHCLG, MoJ, Privy Council
- **April**: BEIS, DCMS, DfE, HMT, HO, MoJ, Privy Council
- **May**: BEIS, CO, DEFRA, DfT, FCO, HMRC, HMT, MoD, WO

*Themes across Government*

The quality of EMs is generally high, with 50% of all EMs reviewed rated as either Green or Green/Amber and good points highlighted for all EMs. Remaining areas of concern include:

- Readability is improving but there are still instances of long and overly complicated sentences.
- Simple errors are still creeping into EMs. These could be easily spotted and rectified with a second and third pair of eyes to proof read the EM.
- Consultation sections are lacking detail generally but detail of the responses to public consultation is especially lax.

*Process review*

- Feedback to departments is still going well, and monthly reports are used in departmental training on EMs.
- Asked if a formal checking process for departments would help improve the quality of EMs, SLMB noted that this would be difficult to achieve if centrally imposed and expressed concerns about resource.
- There are instances where the SLMB will flag a problem with an EM but the SLSC do not (and vice versa). Is the SLMB doing what it should? In a discussion between the secretariats of the SLMB and SLSC, it was observed that the SLSC critique policies, whereas the SLMB provides a vital ‘literary criticism’ function aimed at improving the quality of EMs.

*Actions taken*

It is hoped that tougher scrutiny at SCS level in departments will help to combat these areas of concern. This is being addressed by the following:

- CSL has piloted a 1-hour training session for SCS responsible for checking and clearing EMs. This focuses on what makes a good and bad EM. This is intended to encourage SCS spot and challenge sub-standard EMs.
- The new EM template requires both SCS and ministers to put their names to EMs. This is intended to increase accountability for the quality of EMs, and improve the level of scrutiny given by SCS and ministers.

CSL has adapted its training course, ‘Contented Committees: Effective EMs’, to emphasise how to avoid the issues raised by the SLMB. A condensed and tailored version of this course continues to be offered to departments.
September 2018

The Secondary Legislation Monitoring Board (SLMB) considered 27 Explanatory Memoranda (EMs) in June, July and August of 2018. EMs from the following departments were viewed in each month of the review period:

- **June**: DH, DfE, DWP, MoJ, HMRC, Home Office, BEIS, HMT, CO
- **July**: CO, DEFRA, DExEU, DFID, DfT, FCO, HMT, HO, MHCLG
- **August**: BEIS, DCMS, DfE, DfT, DH, DWP, HMRC, HO, MoD

EMs were considered at the SLMB’s quarterly meeting on 11 September 2018.

Themes across Government

The overall quality of EMs is high, with 50% of all EMs reviewed rated as Green/Amber. Remaining areas of concern include:

- Information about impact is lacking in many EMs, and the assumption that no basic workings are needed because a full Regulatory Impact Assessment is not required persists.
- Where consultation is not required, EMs neglect to explain why a consultation is unnecessary.
- Readability is generally improving, but some instances of overly long and complex sentences.

EMs drawn to the attention of the Permanent Secretaries

The EM for The Higher Education (Fee Limits and Fee Limit Condition) (England) Regulations 2018 was reviewed in August and given an overall RAG rating of Red/Amber. The key points of feedback from the SLMB were as follows:

- Long, complex sentences and overuse of technical language/jargon made it very difficult to understand.
- Too much contextual information was provided, making it unclear what the SI seeks to achieve.
- Does not sufficiently explain why no consultation was required.

Actions undertaken

- The SLMB secretariat will now share feedback on EMs directly with their authors, in the hope that constructive comments will help authors improve the quality of future EMs.
- The SLMB secretariat will select at least one EM for a ‘proposed negative’ SI to be reviewed each month to check whether quality has been affected by EU Exit specific aspects of the new EM template.
- Key themes have been fed back to departments directly by members of the SLMB, and into the cross-Government SI Practitioners Network and the Policy & SI Processors Working Group by the Board’s secretariat.

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2 Explanatory Memorandum to The Higher Education (Fee Limits and Fee Limit Condition) (England) Regulations 2018
December 2018

The Secondary Legislation Monitoring Board (SLMB) considered 26 Explanatory Memoranda (EMs) in September, October and November 2018. EMs from the following departments were viewed in each month of the review period:

- **September**: BEIS, DEFRA, DfT, DIT, HMT, HO, MHCLG, MoD
- **October**: BEIS, DEFRA, DIT, DWP, HMRC, HMT
- **November**: BEIS, DCMS, DfE, DfT, DHSC, DWP, HO, MoJ

EMs were considered at the SLMB’s quarterly meeting on 11 December.

**Themes across Government**

The overall quality of EMs is middling, with 57% of all EMs reviewed rated as Amber or Amber/Green. Remaining areas of concern include:

- Some EMs suffer from readability and a lack of clarity. Many are too dense and jargon heavy.
- Proofreading is a clear issue with some EMs featuring simple errors and typos.
- Many EMs baldly state that no consultation or Impact Assessment is required without explaining the reasoning for this judgement.
- Some EMs lack a top-line summary of impact in section 12 (Impact).

**EMs drawn to the attention of the Permanent Secretaries**

- The Electricity and Gas (Powers to Make Subordinate Legislation) (Amendment) (EU Exit) Regulations 2018\(^3\) Reviewed 10/2018 (RAG rating: Amber/Red) (Appendix B)
  - Poor readability, too much detail provided in places, and too little rationale for decisions provided elsewhere.
  - The SLSC did not draw this instrument to the attention of the House, or comment on the quality of the EM.
- The School Teachers’ Pay and Conditions Order 2018\(^4\) Reviewed 11/2018 (RAG rating: Amber/Red) (Appendix C)
  - Poor readability, documents referred to without being linked or attached. The consultation section was not concise enough, and the impact section did not have enough information.
  - This SI was reported by SLSC in its 41st Report\(^5\) for inadequacies in the consultation process.

**Actions undertaken**

- Key themes have been fed back to departments directly by members of the SLMB, and into the cross-Government SI Practitioners Network and the Policy & SI Processors Working Group by the Board’s secretariat.

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\(^3\) Explanatory Memorandum to The Electricity and Gas (Powers to Make Subordinate Legislation) (Amendment) (EU Exit) Regulations 2018

\(^4\) Explanatory Memorandum to The School Teachers’ Pay and Conditions Order 2018

APPENDIX 3: 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.