

HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

45th Report of Session 2017–19

**Accessing the scrutiny
work of the Committee
and information
resources relating to
secondary legislation**

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HL Paper 312

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), Helen Gahir (Adviser), Nadine McNally (Adviser), Philipp Mende (Adviser), Jane White (Adviser), Louise Andrews (Committee Assistant), Ben Dunleavy (Committee Assistant) and Paul Bristow (Specialist Adviser).

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 Fifth Report

ACCESSING THE SCRUTINY WORK OF THE COMMITTEE AND INFORMATION RESOURCES RELATING TO SECONDARY LEGISLATION

Purpose of this Report

1. Preparations for leaving the European Union have required Parliament to consider, in a short period of time, an extraordinary volume of secondary legislation, much of it complex, lengthy and making provision for the significant consequences of a ‘no deal’ exit from the EU.
2. All of this secondary legislation is scrutinised, from a policy perspective, in the House of Lords, by Sub-Committees A and B of the Secondary Legislation Scrutiny Committee (SLSC) which, since their appointment, have undertaken the scrutiny work previously performed by the Select Committee. The Joint Committee on Statutory Instruments (JCSI), in contrast, provides technical, legal scrutiny of instruments.
3. The purpose of this report is to refresh the understanding of the House about the role of the SLSC and also to provide practical guidance about how to access the work of the SLSC and its Sub-Committees. It also highlights other useful information resources.
4. We will, as is our practice, report our reflections on the session, along with activity statistics, in an end of session report. Given the unusual length of the current session, we published an interim report in April 2018.¹ Our next end-of-session report will cover the period from May 2018.
5. This is a report of the Select Committee, chaired by Lord Trefgarne. It has however been endorsed by the members of the two Sub-Committees on whose work it is based.
6. While the Sub-Committees have power to report directly to the House, where issues are overarching and concern the work of both Sub-Committees, the Chairmen of the two Sub-Committees, Lord Trefgarne (Sub-Committee A) and Lord Cunningham of Felling (Sub-Committee B), act collaboratively and, where appropriate, make representations to the Government jointly. Recent correspondence relating to the flow and volume of Brexit-related instruments, “bundling instruments” and the availability of Impact Assessments (IAs) are examples.²

Background

7. The SLSC was set up in 2003 and charged with examining all instruments laid before Parliament and subject to parliamentary proceedings – in effect,

1 [26th Report](#), Session 2017-19, HL Paper 125.

2 See the correspondence from 19 February 2019 published on Secondary Legislation Scrutiny Committee publications page: <https://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/publications/> and the correspondence connected to Sub-Committee B’s 17th Report on their publications page: <https://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee-sub-committee-b/publications/>.

all negative and affirmative statutory instruments. The SLSC terms of reference include treaties laid under the Constitutional Reform and Governance Act 2010 (“the CRaG Act”). Given the anticipated number of treaties to be laid under the CRaG Act as a result of leaving the EU, we are grateful to the European Union Committee for taking over this function until the end of the session.

8. In 2018, the Committee’s remit was extended to include sifting proposed negative instruments laid under the European Union (Withdrawal) Act 2018 (“the withdrawal Act”). A committee, the European Statutory Instruments Committee (ESIC), was set up specially to perform the function in the House of Commons. Since its inception, while preserving our mutual independence, we have developed a close and co-operative relationship with ESIC which we have welcomed.
9. Following the change in terms of reference, in July 2018, the Committee published a report entitled “Sifting “proposed negative instruments” laid under the European Union (Withdrawal) Act 2018: criteria and working arrangements” (“our sifting report”). In that report, we set out the criteria we proposed to apply when exercising the new sifting function, how the new function would interact with the Committee’s original role, and how the new function might affect our interaction with other scrutiny committees.³
10. We also set out in an appendix to that report the Committee’s extended terms of reference.⁴ They are reproduced in Appendix 1 to this report. They included a new power to form Sub-Committees which, we said, would not be exercised until the number of instruments laid before Parliament appeared likely to rise beyond the capacity of a single committee.
11. Sub-Committees were formed later in 2018, and our first meetings, as Sub-Committees A and B, took place on 15 and 16 October 2018 respectively. Since that time, each Sub-Committee has made 19 reports covering a total of 811 instruments (including both Brexit-related and other instruments, and proposed negatives).
12. The work of the Sub-Committees has been substantial but, assisted by an increased and hard-working team of Advisers and Committee Assistants, we have, almost invariably, been able to maintain our practice of reporting on instruments within 12 to 16 days. We have also been able to report on proposed negative instruments within the 10-day deadline set by the withdrawal Act.
13. We welcome the frequent recognition by the House of the work of the Sub-Committees. The Leader of the House, the Rt Hon. Baroness Evans of Bowes Park, during a recent debate on parliamentary approval of the outcome of negotiations with the EU, referred to the “excellent job” being performed by the SLSC and its Sub-Committees and by the Joint Committee on Statutory Instruments (JCSI).⁵ Lord Callanan, Minister of State at the Department for Exiting the European Union, in a debate on further discussion with the EU, said: “Once again I place on record my

3 [37th Report](#), Session 2017-19, HL Paper 174.

4 Agreed by the House on 11 July 2018.

5 HL Deb, 28 January 2019, col 918.

thanks, for their valuable and extensive work, to the committees chaired by the noble Lords, Lord Trefgarne and Lord Cunningham”.

Role of the SLSC and its Sub-Committees

14. Under the SLSC’s revised terms of reference, the Committee has two broad functions: (1) to scrutinise proposed negative instruments and recommend, where appropriate, that they should be upgraded to the affirmative procedure (“the new sifting function”), and (2) to scrutinise all instruments upon which proceedings may be, or might have been, taken in Parliament (“the usual policy scrutiny function”).⁶

The new sifting function

15. In our sifting report, we set out the Committee’s approach to the new sifting function. We said that it would involve the following elements:⁷
- considering each proposed negative instrument on its merits, taking into account the Minister’s reasons for choosing the negative procedure;
 - applying an overarching test: “is the subject matter of this instrument and the scope of any policy change effected by it of such significance that the House would expect to debate it?”;
 - in assessing whether the test is met, taking into account features such as those set out in the report (at paragraph 40) (including, for example, whether the instrument has the effect of causing significant divergence from the EU acquis, whether an instrument concerns the scope of, and penalties relating to, criminal offences, or whether it imposes an administrative or financial burden);
 - applying a presumption of the affirmative procedure where a proposed negative contains significant amendment to primary legislation or to retained direct principal EU legislation.
16. The Sub-Committees’ recommendations in relation to the new sifting function are, in effect, directed at the Government. A Minister cannot make a proposed negative instrument (so that it becomes law) until the Sub-Committees (and ESIC) have reported on it, subject to the statutory deadline of 10 sitting days. If a Minister disagrees with any recommendation, he or she is required to make a written statement.⁸ To date, no such disagreement has arisen.

The usual policy scrutiny function

17. The “usual policy scrutiny function” of the SLSC does not involve challenging the overall objective of an instrument. The grounds on which the SLSC draws an instrument to the special attention of the House (see Appendix 1 to this report) can be split into three types:
- The first ground, ground (a), is a neutral one – that the instrument is “politically or legally important or gives rise to issues of public policy likely to be of interest to the House”.

6 See SLSC, [37th Report](#), Session 2017-19, HL Paper 174, paras 51 to 53, for further information.

7 *Ibid*, para 46.

8 See Schedule 7, para 17, to European Union (Withdrawal) Act 2018

- Grounds (b), (c), (d) and (g) are critical of the substance of the instrument. The most commonly used of this group is ground (d) – that the instrument “may imperfectly achieve its policy objectives”.
- Grounds (e) and (f) are critical of processes associated with the instrument – ground (e) concerns the quality of the accompanying explanatory material and ground (f) the adequacy of consultation.

Where a report is made on a ground other than ground (a), it is our practice to issue an accompanying press notice.

18. As part of its investigatory work, the Sub-Committees may engage in correspondence with departments to seek further clarification about an instrument, or the Advisers may request further information. In these cases, that further information may form the basis of an information paragraph which is published in the body of the report or be published in an appendix to a report. The Sub-Committees are also concerned about issues relating to the impact of an instrument and are vigilant about the availability and quality of IAs. Where appropriate, they will press the Minister for an explanation about why an IA has not been laid.

Reporting cycle and format

19. A Sub-Committee will consider instruments which have been laid two weeks prior to the meeting of the Sub-Committee. So, instruments laid in week 1 will be considered by the Sub-Committee in week 3.
20. The instruments before the Sub-Committees at their next meetings are set out on the SLSC webpages: <https://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/guidance/new-instruments-being-considered-by-the-committee/>

This allows those interested in an instrument to see what each of the Sub-Committees are about to consider.

21. Sub-Committee A meets every Monday afternoon and Sub-Committee B meets every Tuesday afternoon. The Sub-Committees’ reports are published shortly after, Sub-Committee A on the following Wednesday morning and Sub-Committee B on the following Thursday morning. Reports are available in the Printed Paper Office in the House of Lords and on the SLSC webpages.
22. Reports generally have four sections:
 - decisions on proposed negative instruments
 - reports on instruments to which the Sub-Committee draws the special attention of the House
 - information paragraphs about other instruments
 - appendices setting out additional information provided by departments and correspondence.
23. Until recently, only those instruments drawn to the special attention of the House were listed on the front cover of our reports. In the interests of making the work of the Sub-Committees more accessible, all instruments on which

a Sub-Committee says something substantive, whether as a report drawing the instrument to the special attention of the House or as an information paragraph, are now set out on the front cover.

24. In addition, a list of the instruments, identified by the report in which they feature, on which the Sub-Committees have commented, and which are still before the House (that is, those affirmative instruments yet to be debated and those negative instruments still within their 40-day prayer period) is on the SLSC webpages:

<https://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/stage-2-scrutiny/reports-and-information-paragraphs/>

House of Lords Business

Minute entry

25. After a Sub-Committee meeting, a minute entry is placed in House of Lords Business setting out the fact that the Sub-Committee has made a report. That minute entry appears in the “Minutes of Proceedings” at the back of the document, which is available the day following the meeting. So, Sub-Committee A’s minute entry appears in Tuesday’s House of Lords Business and Sub-Committee B’s in Wednesday’s.
26. The minute entry sets out instruments reported as part of “usual policy scrutiny”. Until recently, only those instruments drawn to the special attention of the House were listed in the minute entry. Now, as with the front covers, all instruments on which a Sub-Committee says something substantive are included in the minute entry.

Italicised notes

27. House of Lords Business includes a section called “Statutory Instruments in Progress”. This section is made up of a number of subsections, the principal of which are:
- Affirmative instruments waiting for consideration by the JCSI.
 - Affirmative instruments waiting for affirmative resolution.
 - Negative instruments.
 - Proposed negative statutory instruments laid under the withdrawal Act.
28. Affirmative instruments are split into these two categories because Standing Order 72(1) states that an approval motion in respect of an affirmative instrument cannot be moved until the JCSI has reported on the instrument. It therefore assists the House to know whether an instrument is awaiting consideration by the JCSI or awaiting a debate in the House. There is no similar obligation to await a report from the SLSC.
29. Whilst all affirmatives are listed in House of Lords Business, only certain negatives appear in the list. They are the ones which either (or both) have been commented on by the Sub-Committees or are the subject of a motion which has been tabled by a member of the House (such motion being either

listed under “Motions relating to delegated legislation” or scheduled for debate).

30. Some of the statutory instruments listed have an italicised note next to the name of the instrument referring to a report of one of the Sub-Committees. This indicates that one of the Sub-Committees has commented on the instrument. An example of an entry for an affirmative instrument is:

- Draft Aviation Security (Amendment etc.) (EU Exit) Regulations 2019 *16th Report from the Secondary Legislation Scrutiny Committee (Sub-Committee A) (25 February)*.

The date in brackets indicates the date on which the instrument is scheduled for debate.

31. An example of an entry for a negative instrument is:

- Universal Credit (Transitional Provisions) (SDP Gateway) Amendment Regulations 2019 *14th Report from the Secondary Legislation Scrutiny Committee (Sub-Committee B). Praying time expires 22 February*.

The date, as it states, indicates the period during which a motion to strike down the instrument (“prayer to annul”) can be tabled and debated.

32. Until recently, only those instruments drawn to the special attention of the House had an italicised note. Now an italicised note is applied to all instruments on which a Sub-Committee says something substantive.
33. With regard to proposed negative instruments, once they have been before the Sub-Committees and reported upon, whether or not the subject of a recommendation, they are removed from the House of Lords Business list of proposed negative instruments. This is because the next step is for the Government, not the House.

Supporting materials

34. All instruments are supported by an Explanatory Memorandum (EM), which is laid by the responsible department at the same time as the instrument. Sometimes other documents are also required. These include IAs. The SLSC and its Sub-Committees expect IAs to be laid at the same time as the instrument, a point which was emphasised recently in a letter to the Chancellor of the Exchequer.⁹ Instruments, EMs and IAs are available on the legislation.gov.uk website: <http://www.legislation.gov.uk/>.

Statutory Instruments Service

35. Information about statutory instruments laid before Parliament can be found on the Statutory Instruments Service (“SI Service”), the webpage for which is: <https://beta.parliament.uk/statutory-instruments>. The webpage for finding an instrument is: <https://beta.parliament.uk/find-a-statutory-instrument>. There, it is possible to find any report of the Sub-Committees associated with an instrument, along with any debate on the instrument. In addition, the SI Service provides a very rich and searchable source of information about the progress of statutory instruments and proposed

⁹ Published on the main Secondary Legislation Scrutiny Committee publications page: <https://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/publications/>.

negative instruments laid before Parliament, including, for example, reports of the JCSI and ESIC, and a timeline for each instrument with links to relevant documents and debates.

36. The SI Service is valuable not only to members of the two Houses. It is also intended to assist external organisations and members of the public who have an interest in specific instruments. As we said in our sifting report, "... we welcome submissions offering constructive criticism about the way any instrument will operate" and we hope that the SI Service will enable those outside of Parliament to contribute more easily.

Summary of information sources

37. This is set out in Appendix 2 to this report.

APPENDIX 1: REVISED TERMS OF REFERENCE

The Committee has the following terms of reference:

1. The Committee shall report on draft instruments and memoranda laid before Parliament under sections 8, 9 and 23(1) of the European Union (Withdrawal) Act 2018.
2. Paragraph (1) shall lapse upon the expiry of the power to make instruments under sections 8, 9 and 23(1) of the European Union (Withdrawal) Act 2018.
3. The Committee shall, with the exception of those instruments in paragraphs (5) and (6), 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).
4. 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.
 - (g) that the instrument appears to deal inappropriately with deficiencies in retained EU law.
5. The exceptions are—
 - (a) (a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;
 - (b) (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) (c) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.
6. 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.

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

That the Committee have power to appoint sub-committees and to refer to them any matters within its terms of reference; that the Committee have power to appoint the Chairmen of sub-committees; that the quorum of each sub-committee be two;

The Committee's power to appoint sub-committees shall lapse upon the expiry of the power to make new instruments under sections 8, 9 and 23(1) of the European Union (Withdrawal) Act 2018 and shall lapse entirely upon expiry of the last such remaining power;

That the Committee have power to co-opt any member to serve on a sub-committee;

That the Committee and its sub-committees have power to send for persons, papers and records;

That the Committee and its sub-committees have power to appoint specialist advisers;

That the Committee and its sub-committees have leave to report from time to time;

That the reports of the Committee and its sub-committees be printed, regardless of any adjournment of the House;

That the evidence taken by the Committee or its sub-committees in the last session of Parliament be referred to the Committee or its sub-committees;

That the evidence taken by the Committee or its sub-committees be published, if the Committee or its sub-committees so wish.

APPENDIX 2: SUMMARY OF INFORMATION SOURCES

SLSC webpage:

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

Instruments before the Sub-Committees at their next meetings:

<https://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/guidance/new-instruments-being-considered-by-the-committee/>

Instruments on which the Sub-Committees have commented (and which are still before the House):

<https://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/stage-2-scrutiny/reports-and-information-paragraphs/>

Minute entry:

After a Sub-Committee meeting, a minute entry is placed in House of Lords Business setting out the fact that the Sub-Committee has made a report. That minute entry appears in the “Minutes of Proceedings” at the back of the document, which is available the day following the meeting. The minute entry sets out instruments reported as part of “usual policy scrutiny” and includes all instruments on which a Sub-Committee says something substantive.

Italicised notes:

House of Lords Business includes a section called “Statutory Instruments in Progress”. It lists all affirmatives instruments. Those negative instruments listed include ones which either (or both) have been commented on by the Sub-Committees or are the subject of a motion which has been tabled by a member of the House. Where appropriate, an italicised note is published next to the name of the instrument referring to a report of one of the Sub-Committees. This indicates that one of the Sub-Committees has commented on the instrument.

Instruments, EMs and IAs are available on the legislation.gov.uk website:

<http://www.legislation.gov.uk/>

SI Service:

<https://beta.parliament.uk/statutory-instruments>

<https://beta.parliament.uk/find-a-statutory-instrument>

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.