

HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

60th Report of Session 2017–19

Work of the Committee in Session 2017–19

**Correspondence: Quality of information provided
in support of secondary legislation**

Ordered to be printed 5 September 2019 and published 10 September 2019

Published by the Authority of the House of Lords

HL Paper 420

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

<u>Baroness Bakewell of Hardington Mandeville</u>	<u>Viscount Hanworth</u>	<u>The Earl of Lindsay</u>
<u>Rt Hon. Lord Chartres</u>	<u>Lord Hodgson of Astley Abbotts</u>	<u>Lord Lisvane</u>
<u>Rt Hon. Lord Cunningham of Felling</u>	(Chairman)	<u>Lord Sherbourne of Didsbury</u>
<u>Lord Faulkner of Worcester</u>	<u>Lord Kirkwood of Kirkhope</u>	<u>Baroness Watkins of Tavistock</u>

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>

Committee Staff

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

Further Information

Further information about the Committee is available at <https://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/>

The progress of statutory instruments can be followed at <https://beta.parliament.uk/find-a-statutory-instrument>

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

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.

Sixtieth Report

WORK OF THE COMMITTEE IN SESSION 2017–19

An unusually long session

1. Since 2004 the Secondary Legislation Scrutiny Committee (SLSC)¹ has published a series of sessional summaries, usually in its last report of the Parliamentary session, setting out the statistics of the instruments that it has examined in that session and making any observations on examples of good and bad practice that have arisen during the period. The differing length of sessions can make statistical comparisons difficult and, in the extended 2017–19 session, we decided to address this by publishing interim reports so that figures were broadly comparable and so that our observations could be acted on while still relevant.
2. We published an Interim Report² in April 2018 (our Year 1 Report), looking at Committee activity during the first 12 months of the session (up to 13 April 2018),³ and a Second Interim Report in June 2019, looking at ‘Year 2’ (the subsequent 12 months up to 13 April 2019) (our Year 2 Report).⁴ Encompassing the peak of the legislative activity in preparing for Brexit, Year 2 was characterised by high volumes and certain new formats, such as the additional Stage 1 function of sifting proposed negative instruments laid under the European Union (Withdrawal) Act 2018 and the SLSC divided into two Sub-Committees to ensure its scrutiny remained timely.⁵

Government Response to our Year 2 Report

3. Appendix A includes the Government’s Response to the observations made in our Year 2 Report. Both the Government and the Committee acknowledge that the flow of statutory instruments was unpredictable and involved having to deal with unfamiliar processes. This undoubtedly contributed to some of the problems identified and the higher correction rate. **We welcome the Government’s commitment to improving Departments’ knowledge of the processes governing the scrutiny of secondary legislation and the quality of the paperwork produced.**
4. There is an aspect of the Government’s Response with which we take issue—this is their tendency to equate instruments reported on the ground of policy interest as having been, in some way, “cleared”, implying that no response is necessary, even though the SLSC may have made comments to which a government reply could be expected. The Response notes that in Year 2 the Committee drew 74 of the 77 instruments reported to the attention of the House on the ground of public policy interest, and attributes this to public

1 Originally established as the Merits of Statutory Instruments Committee in 2003.

2 *Interim Report on the Work of the Committee in Session 2017–19* ([26th Report](#), Session 2017–19, HL Paper 125).

3 Because Statutory Instruments (SIs) are laid before Parliament almost continuously, our figures treat the current session as having started with the first instrument that was laid too late to be considered at the final meeting of the previous session. Although the current parliamentary session started on 21 June 2017, the SLSC’s first meeting of this session examined the backlog of SIs that had accumulated since 14 April 2017.

4 *Work of the Committee in Session 2017–19: Second Interim Report*, [51st Report](#), Session 2017–19 (HL Paper 376).

5 Active from 15 October 2018 to 30 April 2019.

interest in EU Exit. First, the 77 reported instruments in Year 2 were fairly evenly divided between Brexit (38) and non-Brexit (39) issues. Second, the Response omits the caveat in our Report that of those 74 reported on the grounds of public policy interest, five were jointly reported on the ground of insufficient information, and one jointly on the ground that it may imperfectly achieve its policy objective.

5. We only use the more specific terms of reference for the most egregious examples of poor explanation or consultation practice, but routinely include in reports on “policy interest” further questions that the House may wish to pursue. Such questions indicate that, although the general thrust of the policy is understood, there is some specific area that is less clear.⁶ The Government’s failure to appreciate this is behind our reminder to Ministers in Recommendation 1⁷ that, where the Committee has published a report on any ground (including therefore the ground of policy interest), they should respond to any issues raised in their opening remarks in debate. **We welcome the Government’s assurance that this will be undertaken more assiduously in the future.**

Activity since the end of Year 2

6. In the period from the end of Year 2 to the end of the session (14 April-3 September 2019), 170 statutory instruments (SIs)⁸ were laid for Stage 2 scrutiny (41 affirmatives and 129 negatives). This decrease in activity reflects the fact that this was primarily a tidying up phase, with the vast majority of the Brexit legislation having been laid in Year 2. In the same period, only 19 proposed negatives were laid for Stage 1 sifting, and these were mainly related to the change in Brexit date.
7. During this period, because of the decrease in the number of instruments, the SLSC Sub-Committees met only once before being suspended and scrutiny reverted back to the main Committee. A total of 16 reports were published (one from each of the Sub-Committees and 14 from the main Committee). They drew 12 instruments to the special attention of the House (five affirmative and seven negative instruments): 11 on the ground of public policy interest and one on the ground of insufficient information to gain a clear understanding about the instrument’s policy objective and intended implementation.⁹
8. Our concern with that instrument—the Children’s Homes etc. Inspection Fees, Childcare Fees, Adoption and Children Act Register (Amendment) Regulations 2019—was that it removed a duty on adoption agencies to

6 See for example our [53rd Report](#), Session 2017–19 (HL Paper 383), which includes three SIs all reported on the ground of policy interest: one states that the wide-ranging economic and wider social changes required by the Government’s Climate Change policy should have been described, one that the Explanatory Memorandum should be revised to include information on other elements of the complex background to the Capacity Market that may affect the policy, and one that seeks further reassurance about plans for an IT programme designed to ensure that there is no gap in the arrangements relating to the safeguarding of vulnerable groups.

7 Paragraph 10 and footnote 13 : *Work of the Committee in Session 2017-19: Second Interim Report*, [51st Report](#), Session 2017-19 (HL Paper 376)

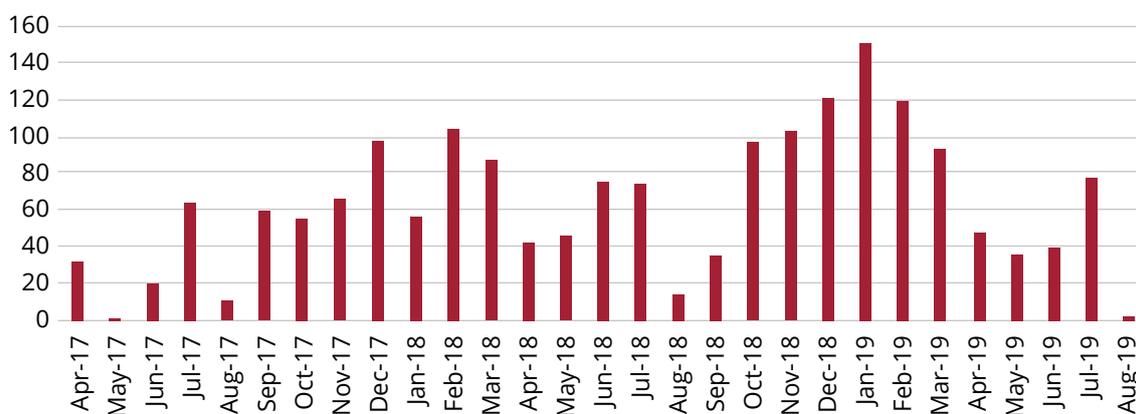
8 As well as SIs, the Committee considers almost all instruments subject to parliamentary procedure, for example, statutory Codes, Treaties and Immigration Rules, but the term “SIs” is used in this report as short hand for all the instruments within our remit.

9 Children’s Homes etc. Inspection Fees, Childcare Fees, Adoption and Children Act Register (Amendment) Regulations 2019 (SI 2019/835). See our [49th Report](#) (HL Paper 366) and [50th Report](#) (HL Paper 371) of Session 2017–19.

provide relevant information to the Secretary of State about children approved for adoption and approved prospective adopters who have not been matched (as a result of the closure of the Adoption Register for England) before a replacement system was in operation. Such was the degree of our concern that we held an oral evidence session with the Parliamentary Under Secretary of State for Children and Families on 14 May 2019 to probe further. Although additional information was provided, we were left with serious concerns about the potential impact of the policy change on those children who are harder to match with prospective adopters.

Activity over the whole of Session 2017–19

Chart 1: The total number of statutory instruments laid each month during session 2017–19



9. During the 2017–19 session, a total of 1,835 instruments were laid, of which 582 (31.7%) were affirmative and 1,253 negative (68.3%), well above the usual 20:80 split between affirmatives and negatives in a normal session. Of these, the Committee drew 84 affirmatives and 56 negative SIs (140 in total) to the special attention of the House, an overall reporting rate of 7.6% (14.4% for affirmatives and 4.5% for negative instruments). The Committee also published 407 information paragraphs on 480 SIs (26.1% of the total considered).
10. The Departments which laid the largest numbers of instruments in Session 2017–19 were the Department for Environment, Food and Rural Affairs (Defra), which laid 239 instruments (13% of the total), the Department for Business Energy and Industrial Strategy (BEIS) with 197 (10.7%), and the Department for Transport (DfT) with 181 (9.9%). Between them, these Departments laid a third of all the instruments considered in the session.

Chart 2: SIs laid and instruments reported by originating Department

Department	Total	Reported negative	Reported affirmative	Ground for Report ¹⁰					
				a	b	c	d	e	f
Cabinet Office	34	0	5	5	0	0	0	0	0
BEIS	197	10	14	24	0	0	0	2	0
DCMS	60	0	5	5	0	0	0	0	0

¹⁰ See SLSC's [terms of reference](#).

Department	Total	Reported negative	Reported affirmative	Ground for Report ¹⁰					
				a	b	c	d	e	f
Defra	239	6	12	18	0	0	0	1	0
DIT	24	0	0	0	0	0	0	0	0
LGBCE	69	0	0	0	0	0	0	0	0
DExEU	11	0	1	1	0	0	0	0	0
DWP*	119	5	3	6	0	0	2	0	0
Education	90	11	2	10	0	0	0	1	2
FCO	94	1	1	1	0	0	0	1	0
Health**	100	3	2	5	0	0	0	0	0
Home Office	155	3	11	13	0	0	0	3	0
House of Commons	0	0	0	0	0	0	0	0	0
Defence	22	0	0	0	0	0	0	0	0
Justice	130	6	3	9	0	0	0	0	0
MHCLG***	111	2	12	7	0	0	1	0	6
NI Office	3	0	0	0	0	0	0	0	0
Privy Council	2	0	0	0	0	0	0	0	0
Scotland	16	0	0	0	0	0	0	0	0
Transport	181	7	7	14	0	0	1	2	0
HMRC	18	0	0	0	0	0	0	0	0
Treasury	152	2	6	8	0	0	0	0	0
Wales	5	0	0	0	0	0	0	0	0
Attorney General	2	0	0	0	0	0	0	0	0
Government Equalities Office	1	0	0	0	0	0	0	0	0
TOTAL	1835	56	84	126	0	0	4	10	8

* Includes Health and Safety Executive

** Includes Food Standards Agency

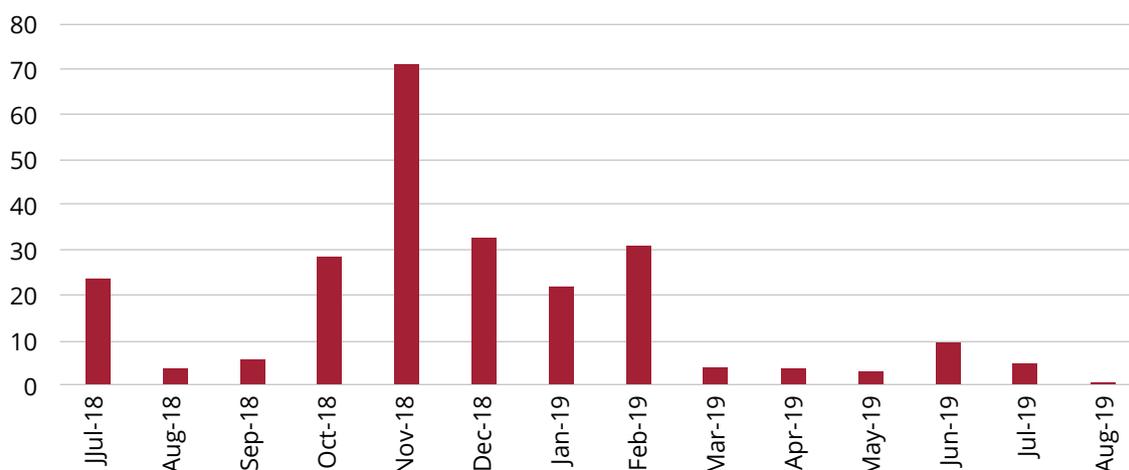
*** Formerly "DCLG"

Corrections

- The number of corrections during the 2017–19 Session to both instruments and Explanatory Memoranda rose and was well above the established 5% benchmark. We welcome the Government's undertaking to address this. We note that Defra was responsible for more than its fair share of those errors, and welcome the Department's commitment to strengthening the management and oversight of its programme of secondary legislation.

Chart 3: Number of corrections

SIs	No. laid	No. SIs replaced by correction (%)	No. EMs replaced by correction (%)
Affirmative	582	53 (9.1)	88 (15.1)
Negative	1253	76 (6.1)	52 (4.2)
Total	1835	129 (7.0)	140 (7.6)

*Proposed negatives***Chart 4: Proposed negatives laid by month**

12. During Year 2, the Government began to lay proposed negative instruments under the European Union (Withdrawal) Act 2018, which requires a two-stage process.¹¹ Initially, proposed negatives were examined to see whether they were appropriate for the negative procedure or whether the Committee should recommend an upgrade to the affirmative procedure (Stage 1 scrutiny). The next step was for the Government to lay the instrument as either a negative or affirmative SI, at which point the Committee would undertake Stage 2 scrutiny in the normal way.
13. During the 2017–19 Session, 247 proposed negatives were laid, and of these we recommended that 45 (18.2%) be upgraded to the affirmative procedure. **We welcome the Government’s positive response to all recommendations to upgrade.**
14. We have commented previously that the gap between the Stage 1 and Stage 2 was sometimes surprisingly long for some instruments. For example, the proposed negative instrument on the European University Institute (EU Exit) Regulations 2019 was sifted on 19 February 2019 but has yet to be brought forward as an SI.¹² We have also identified a number of former proposed negatives that have been made and laid before Parliament as statutory instruments without being sent back to the Committee for Stage 2

11 This process is explained in more detail in *Sifting “proposed negative instruments” laid under the European Union (Withdrawal) Act 2018: criteria and working arrangements* (37th Report, Session 2017–19, HL Paper 174).

12 17th Report of SLSC Sub-Committee B, Session 2017–19 (HL Paper 293). (A corrected version of the PN was laid and sifted again the following week 18th Report (HL Paper 298)).

scrutiny, and we will be asking the relevant Department for an explanation for this deficiency.

Overview of grounds for reporting

15. In Session 2017–19, the main Committee met 56 times and published 60 reports. The Sub-Committees were active from 15 October 2018 to 30 April 2019, and between them they published 49 reports (47 of which were published in Year 2). In total, therefore there were 109 reports produced in the session, ensuring that all the instruments and proposed negatives were considered in a timely manner and the House informed promptly of any issues or concerns that were raised.
16. The grounds on which we drew the 140 instruments to the special attention of the House in Session 2017–19 were (see also Chart 2 above):
 - 126 instruments (90% of those reported) on the ground of political importance or public policy interest;¹³
 - 4 (2.9%) on the ground of imperfectly achieving its policy objective;
 - 10 (7.1%) on the ground that the explanatory material laid in support provides insufficient information;
 - 8 (5.7%) on the ground that there appear to be inadequacies in the consultation process.
17. On average, the Committee draws about 7% of all negative and affirmative instruments to the special attention of the House. In Session 2017–19, we reported 140 instruments (7.6%) which is only slightly above average. However, we were disappointed that during a period of peak activity so many were reported for insufficient information and many more EMs were found to have minor defects or omissions.
18. On other aspects of the performance of Departments, the observations made in our Second Interim Report¹⁴ still apply and, although our recommendations have been accepted by the Government, they are yet to be addressed.

¹³ Of these reports, 8 items were reported on two grounds which is why the total exceeds 100%.

¹⁴ Secondary Legislation Scrutiny Committee, *51st Report*, Session 2017–19 (HL Paper 376).

APPENDIX 1: GOVERNMENT RESPONSE TO THE WORK OF THE COMMITTEE IN SESSION 2017–19: SECOND INTERIM REPORT

Letter from the Rt Hon Mel Stride MP, Leader of the House of Commons, and James Cleverly MP, Parliamentary Under Secretary of State for Exiting the European Union, to Lord Hodgson of Astley Abbotts, Chairman of the Secondary Legislation Scrutiny Committee

We write in response to the Secondary Legislation Scrutiny Committee's (SLSC) report titled 'Work of the Committee in Session 2017–19: Second Interim Report'. We would like to thank the SLSC and its members for the vital work it undertakes and for this informative report. The report raises a number of points to which we would like to respond.

Before we do, we think it is important to acknowledge that the period the report covers (April 2018–April 2019) was exceptional for secondary legislation, requiring the Government-wide coordination and delivery of several hundred statutory instruments (SIs) to prepare the UK statute book ahead of EU Exit.

Volume and Flow

First, the report notes the high volume of SIs over the year - 1,002 of which 512 were EU exit-related, and 490 were 'business as usual' SIs. For the latter, this is a reduction of 173 SIs compared to 663 in the previous year.

This Government has gone further than any before to be open with Parliament through regular letters from the Leader of the House of Commons and DExEU Ministers throughout the period with updates on the volume of SIs expected.

In some cases the number of SIs laid fell outside the estimated ranges given in these letters. Ensuring a functioning statute book is a complex task, and the monthly range of SIs the Government provided were as expected at the time.

As the former Parliamentary Under-Secretary of State in DExEU, Chris Heaton-Harris, made clear in his letter to committee chairs of 25 October, it has always been anticipated that monthly volumes would fluctuate. Nevertheless, we hope that the projections have proved useful in assisting the Committee in managing its considerable workload.

As the Committee notes, maintaining a steady flow of SIs was a significant challenge. The Government introduced new processes to address this challenge, coordinating SIs centrally for the first time, which has proven to be effective, and we are determined to build on this and continue improving our delivery of secondary legislation.

Content

The report states the Committee was disappointed that 77 SIs (7.9%) were drawn to the special attention of the House, compared to 7.7% of SIs in the previous year. Regardless of the fact that the majority of SIs were Exit SIs which made minor amendments or technical fixes, we do not find this surprising given the considerable public interest in EU Exit. Indeed we note that the Committee drew 74 of the 77 to the attention of the House on the grounds of political importance or public policy interest. Where proposed negative SIs have been recommended for upgrade to the affirmative procedure, the Government has followed every single one of those recommendations.

The report also expresses concern about what the Committee consider to have been the ‘bundling’ of some Exit SIs. While individual Departments and Ministers are responsible for assessing the appropriateness of the composition of each instrument, we are clear that the only aim of any consolidation is to aid understanding by providing a complete policy picture. This was the intention of the two examples referred to in the report. We were pleased to note that *The Chemicals (Health and Safety) and Genetically Modified Organisms (Contained Use) (Amendment etc.) (EU Exit) Regulations 2019* was highlighted as an example of how consolidation can be effective and that its accompanying explanatory memorandum was commended by the Committee in its report on the instrument.¹⁵

Quality

The Government is committed to improving the quality of legislation and accompanying documents being presented to Parliament. For example, since 2017, Civil Service Learning working with the SLSC’s advisers, has trained over 685 policy officials via a regular workshop on drafting effective explanatory memoranda. We would also highlight the Secondary Legislation Monitoring Board, a cross Whitehall group which monitors 5% of all EMs laid, assessing them for quality and drawing out areas for improvement. As a result of these efforts, we are pleased to note that of the 971 SIs considered by the Committee over the year, only 7 were reported on the grounds that the explanatory material laid in support provided insufficient information. We are committed to ensuring that this continues to fall.

We note that the report expresses disappointment that 8.4% of instruments required correcting (compared to 4.1% in the previous period) and 8.8% of accompanying explanatory memoranda needed to be replaced (compared to 6.6% in the previous period). The Government acknowledges that there were issues and are clear this must be improved, but considers that they are a result of the particular and unique complexities of the Exit SI programme. For instance, the introduction of the new ‘proposed negative’ procedure via the EU (Withdrawal) Act meant that SIs and Ems under that procedure were laid as bundles; consequently, both had to be relaid if there was an issue in just one. There were also a high number of complex SIs which had to be laid in a short amount of time which inevitably led to a slightly higher proportion of corrections and replacements. We acknowledge that some departments experienced particular issues, something also picked up through our centralised monitoring process, and are working closely with SI Ministers and senior responsible owners to resolve these.

The report also raises issues around consultations and impact assessments (IAs) that have been well-documented in the many EU Exit Sidebates. The Government maintains that formal consultations and IAs were published with all SIs that required them in line with publically available guidelines. Some IAs were published after debates and in those cases the Government has apologised. The importance of timely publication of IAs has been made clear to both departmental officials and ministers.

Recommendations

The report asks the Government to:

1. Provide assurance that during a debate on an SI, Ministers will respond to any comments made in an SLSC report in their opening remarks.

¹⁵ Secondary Legislation Scrutiny Committee (Sub-Committee B) 15th Report of Session 2017–19 - published 7 February 2019 - HL Paper 281.

Ministers will respond to comments made in SLSC reports in their opening remarks in debates in the Lords.

2. To review the PBL Committee approval process for secondary legislation to identify strengths and weaknesses, and provide the findings of that review to the Committee.

We are committed to learning lessons and regularly review the internal processes around secondary legislation. While the Government does not disclose the internal processes through which cabinet committees take decisions (see paragraph 2.3 of the Ministerial Code), we welcome the views of the Committee, through their reports, as well as the reflections of Committee staff, and look forward to continuing this dialogue as the Government looks to learn the lessons of the Exit SI programme and to continue to improve the quality of secondary legislation.

3. To avoid laying large combination instruments or merging significant policy developments with a mass of minor adjustments.

It is up to individual departments and the Ministers who make SIs to assess the appropriateness of the composition of each instrument. The advice to departments will remain that combining instruments should only be done in order to aid understanding.

4. Provide assurance that steps will be taken to prevent delays and backlogs in the implementation of international legislation.

It is up to individual departments and Ministers to implement international legislation where required. We will remind Ministers of the importance of doing this in a timely manner.

5. To provide a brief explanation of the costs of the proposed legislation in every EM.

The Government will continue to work to ensure that the quality of explanatory memoranda is high and that all sections provide sufficient information to allow proper scrutiny by Parliament and the public. This includes providing adequate information on potential impacts of the legislation in the cases where a full impact assessment is not required.

We hope this response is helpful. We are copying this letter to the Chair of the European Statutory Instrument Committee and the Chair of the Procedure Committee.

24 July 2019

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.