

GUIDANCE FOR DEPARTMENTS LAYING INSTRUMENTS FOR THE SECONDARY LEGISLATION SCRUTINY COMMITTEE

INTRODUCTION

1. The Secondary Legislation Scrutiny Committee (SLSC) scrutinises *policy* aspects of certain types of secondary legislation. It contrasts with, and complements, the [Joint Committee on Statutory Instruments](#) (JCSI) which looks at *technical and legal* aspects.
2. The SLSC is also responsible for scrutinising proposed negative instruments laid under the European Union (Withdrawal) Act 2018 (“the withdrawal Act 2018”).
3. Subject to certain exceptions (including Commons-only instruments), the SLSC considers every instrument, or draft of an instrument, laid before both Houses of Parliament, on which proceedings may be taken. Although these are largely made up of statutory instruments (SIs), they also include other instruments subject to the affirmative or negative resolution procedure such as statutory codes of practice, Immigration Rules and statutory guidance.
4. This Guidance is in two Parts:

Part 1

5. This deals with the process:
 - [How the SLSC works](#)
 - [SLSC reports](#)
 - [Special provisions under the European Union \(Withdrawal\) Act 2018](#)
 - [Delivering the paperwork](#)
 - [Timetabling](#)
 - [SLSC contact details](#)

Part 2

6. The Explanatory Memorandum (EM) provided with each instrument is a key tool in helping the Houses and the public to understand the purpose of an instrument and how it is intended to operate. (Full information on how to complete an EM is given in the SI Registrar’s electronic proforma which appears on most departmental intranets.) Part 2 sets out some of the Committee’s concerns about EMs and provides examples of good practice:
 - [Explanatory Memoranda – general issues](#)
 - [Common faults](#)
 - [Implementing EU legislation](#)
 - [Policy Background](#)
 - [Consultation outcome](#)
 - [Guidance](#)
 - [Impact Assessment](#)
 - [Monitoring and review](#)
 - [Other sections of the EM](#)

PART I: HOW THE SLSC WORKS

1. The SLSC is a Lords-only committee and has eleven members. It is supported by a Clerk, a Committee Assistant and Committee Advisers. Contact details are provided [below](#). While the SLSC team are happy to answer queries, **departmental officials are urged initially to raise any questions with members of their Departmental Parliamentary Unit** who are usually very familiar with the SLSC's requirements.

2. The Committee meets every sitting Tuesday. Instruments laid on any day of week 1 will usually be considered by the Committee on the Tuesday of week 3 (that is, within 12 to 16 days of laying). If the Committee raises additional questions the instrument may be held over while further information is obtained. **During the scrutiny process, officials may be asked questions by the Committee which, of necessity, will be have a tight deadline.**

Grounds for reporting

3. The SLSC scrutinises up to about 1,000 instruments a year and its task is to draw any significant or flawed instrument to the special attention of the House. Under its [terms of reference](#), the grounds for reporting are that an instrument:

- (a) is politically or legally important or contains policy likely to be of interest to the House;
- (b) is inappropriate in view of changed circumstances since the parent Act;
- (c) may inappropriately implement European Union legislation;
- (d) may imperfectly achieve its policy objectives;
- (e) has supporting material that is inadequate in explaining the policy intention;
- (f) has been subject to an inadequate consultation process;
- (g) appears to deal inappropriately with deficiencies in retained EU law.

4. A report on ground (a) is may be cast in neutral terms. A report on grounds (b) to (g) is likely to suggest that the instrument is deficient in some respect and propose questions which the House may wish to pursue. A clear distinction is made between instruments where the Committee's view is that the policy is flawed (grounds (c) and (d)) and instruments where the Committee has insufficient information to form a clear view (grounds (e) and (f)).

Special Reports

5. The SLSC, on occasion, issues special reports. They may, for example, be prompted by the Committee observing certain trends in the way departments handle instruments. For example, grounds (e) and (f) were agreed by the House of Lords in 2015 following special reports which drew attention to a significant drop in the quality of EMs and of consultation.

European Union (Withdrawal) Act 2018

6. Sections 8, 9 and 23, of the withdrawal Act 2018 give Ministers wide powers to make regulations. Under these provisions, the Minister often has a choice about whether the regulations should be subject to the affirmative or negative resolution procedure. Where the negative procedure is chosen, the Act requires the instrument to first be laid before both Houses as a "proposed negative instrument".

7. The withdrawal Act 2018 also provides that committees in each House should consider these proposed negative instruments to determine whether they agree with the Minister’s choice or whether they recommend that the affirmative procedure should apply. In the Lords, this sifting function is discharged by the SLSC. In the Commons it is undertaken by the European Statutory Instruments Committee (ESIC).

8. At an early stage, the SLSC published a report about how it would approach this new function: [37th Report](#), Session 2017-19. A technical note about delivering the paperwork for proposed negatives is also available: [Guidance for departments on proposed negatives](#). The comments in Part 2 about writing EMs apply equally to the explanatory material accompanying proposed negatives.

9. **The Committees have 10 sitting days, beginning with the day after the proposed negative instrument is laid,¹** to scrutinise the instrument and report their recommendations. Once that sifting period has expired, whether or not the Committees have reported, the proposed negative can be laid as a statutory instrument. Where either, or both, of the Committees recommend that a proposed negative should be upgraded to the affirmative procedure, the Minister may choose whether to accept that recommendation. If the Minister rejects it, he or she must make a written statement explaining why. Any instrument the SLSC recommends for upgrade is listed on the Committee’s webpages. We have called this sifting stage, **Stage 1**.

10. At its meetings, the SLSC considers items under Stage 1 and then gives routine scrutiny to all other instruments, including those laid following sifting, (now called **Stage 2** scrutiny). The Committee’s findings on both Stage 1 and Stage 2 instruments are included in the same weekly report. There is no “fast track” for SIs that have been through Stage 1 as the issues being examined are different.

SLSC REPORTS

11. SLSC weekly reports are usually published on the Thursday morning following the Tuesday meeting, in hard copy and on the Committee’s webpages. A summary is also available by email on Wednesday evening. Anyone may subscribe by emailing a request to hseclegscrutiny@parliament.uk.

What is the purpose of the Report?

- When the Committee draws an instrument to the special attention of the House, the report will set out the Committee’s reasons and may include suggested questions that the House may wish to pursue. A member of the House may follow up points raised in the Committee’s Report, either by tabling a motion for debate or by asking an oral or written question.
- The report also includes an “Instruments of Interest” section. This contains brief information about instruments that the House may wish to know about without suggesting that the House may wish to take action.
- The titles of instruments drawn to the special attention of the House and those on which an information paragraph has been published are listed on the front cover of the Committee’s reports. Those instruments on which the Committee makes no comment, which is most of them, are simply listed at the back of the report.

¹ The end of the sifting period for Proposed Negatives is published [on Parliament’s SI Service](#).

12. By convention, a debate in the House of Lords to approve an instrument is not scheduled before the SLSC has reported on it.

Government Responses

13. Where the Committee has drawn an instrument to the special attention of the House, **the Government are only expected to make a written response to the Report if the Committee has sent a letter to the Minister requesting one.** To avoid unnecessary delay in scheduling any debate, the deadline will usually be very short, often less than a week.

14. Where the Committee has not made a specific request, no written response is expected. **However, when an instrument is debated, the House expects the Minister to address any points made by the SLSC in his or her opening speech.**

DELIVERING THE PAPERWORK

Please deliver to the SLSC, **on the day of laying:**

- **15 double-sided hard copies** of an instrument with the EM attached to each.
- where applicable, 15 copies of any other supporting documents (such as the Impact Assessment)
- copies of any codes or guidance necessary to the understanding of the instrument (for example, when an instrument simply brings a code into force but the code itself is not subject to parliamentary scrutiny).

Please do **not** send the SLSC:

- instruments that are laid before the Commons only;
- instruments not subject to parliamentary procedure
- commencement orders
- correction slips

TIMETABLING: MANAGING THE FLOW

15. As departments will be well aware, there are certain times during the year when the flow of statutory instruments peak: just before the end of the calendar or financial year, a common commencement date or recess. Departments are encouraged to avoid these periods if at all possible or, if not, to allow extra time for an instrument to pass through the scrutiny process.

Negative instruments

16. A negative instrument may be laid at any time of year, subject to the restrictions set out in paragraphs 3.61-3.65 of the Companion to the Standing Orders of the House of Lords.

17. It is a convention that a negative instrument should not come into effect until at least **21 calendar days** after it has been laid (“the 21-day rule”) (see EM Heading 3, page 14 below). **A department may be criticised for breaching the 21-day rule without justification or where the period allowed for implementation appears too short.**

18. A negative instrument laid during recess will be considered by the SLSC at the start of the next term and **a department may be criticised if regulations introducing new policy come into effect when the House is not sitting.**

Affirmative instruments

19. A *draft affirmative* instrument can only be laid when both Houses are sitting, and the instrument cannot come into force unless approved by both Houses. Certain Acts make provision for emergency legislation to be introduced at any time using a *made affirmative* instrument – although it can be brought into effect straight away it can only remain in force if approved by both Houses within a set time limit (often 28 or 40 days).

20. When calculating how much time to allow for the parliamentary process, departments are advised to find out when the SLSC and the JCSI intend to consider the instrument, and then allow a further three to four sitting weeks after that.

21. Government business managers (the Whips) recommend that departments **allow a minimum of six sitting weeks** for an affirmative instrument to pass through all its parliamentary stages. However, more time may be required if the instrument is not cleared on first consideration by one of the Committees, or if there is a high volume of affirmative instruments waiting for approval by the Houses (for example, in the run-up to recesses). Officials are strongly encouraged to liaise with their Departmental Parliamentary Unit which should be aware of the timetables in each House.

22. In the past the Committee has commented adversely on affirmative instruments which included an implementation date on the face of the instrument but were laid too close to that date to allow for normal scrutiny. In its end of session reports, the SLSC has made clear that, if a Minister wishes to specify a particular coming into force date on an instrument, **it is the department's responsibility to lay the instrument sufficiently in advance of that date to be sure of completing the parliamentary process in time.**

SLSC CONTACT DETAILS

23. SLSC contact details are:

Address: Secondary Legislation Scrutiny Committee
Room 25, First Floor, West Front
House of Lords
London SW1A 0PW

Telephone: 020 7219 8821 **Email:** hseclegscrutiny@parliament.uk

Webpage: <http://www.parliament.uk/seclegscrutiny>

The Committee Assistant, to whom all paperwork should be sent, at the address given above, is **Ben Dunleavy**. The Committee Clerk is **Chris Salmon Percival**.

PART 2: EXPLANATORY MEMORANDA – GENERAL ISSUES

1. The Explanatory Memorandum (EM) should follow the format set out by The National Archives in the [Tools and Guidance section](#) of the Legislation.gov.uk website. The EM template is available on most departmental intranets.
2. The EM template is just a framework – this guidance sets out some of the Committee’s concerns about EMs and offers examples of good practice to illustrate how the sections of the template are best completed to meet the SLSC’s needs.
3. From time to time, the SLSC team tell departments about EMs which the Committee has commended. Departmental Parliamentary Units should be able, therefore, to supply you with examples of good practice.

Purpose of an EM

4. **The purpose of an EM is to provide the Houses and the public with a plain English, free-standing, explanation of the effect of an instrument and how it is intended to operate.** It is not meant for lawyers. Legal explanations of the changes are given in the Explanatory Note that forms part of an SI and should not be duplicated.
5. An EM should explain the basics: for example, **it should not simply refer the reader to a weblink without stating the key points of the document in question:**
 - don’t say the policy was all explained in the White Paper without summarising the relevant aspects in the EM and providing relevant page and paragraph numbers of the document referenced;
 - don’t say the consultation was “broadly positive” without providing a summary of the percentages for and against the policy proposal and the major points that were supported or disagreed with.

Single memorandum for a group of instruments

6. It can be helpful to produce a single EM for a group of instruments with a common theme. This prevents unnecessary duplication of common background and makes sure that the reader is aware of the links between instruments. In the policy section (see EM Heading 7, page 9 below), after explaining the shared background to the policy, the EM should explain the special features of each instrument and how the instrument contributes to the overall policy objective. **Linked instruments should be laid on the same day and, ideally, numbered sequentially.**
7. For formal laying a “group EM” should be attached to each individual instrument that it relates to; for the SLSC we are happy to receive collated sets of SIs with one EM.
8. Where a series of instruments is to be spread over several weeks or months, each instrument or group of instruments will need its own EM. Each EM should explain under Heading 6 (*Legislative Content* – see page 15 below) how it is linked to earlier (or later) instruments in the series (for example, to set fees or the enforcement procedures that support a system set up by an earlier instrument).

Correcting Instruments

9. Particularly for revised drafts of affirmatives, if the instrument is being re-laid because of drafting or other errors then **the EM should set out the differences between the new text and the previous one.** usually under Heading 3 (*Matters of special interest to the JCSI* – see page 14 below).

COMMON FAULTS WITH THE EXPLANATORY MEMORANDA

10. The following are common faults with EMs:

Writing it like a Press Notice – a Press Notice announces key elements of the policy, whereas an EM explains the effect of an instrument and how it is intended to operate, backed up with evidence. A Press Notice will say “this policy will reduce crime by 10%”, an EM needs to set out the evidence for that statement (for example, why 5% or 12% is not a more reasonable assumption, and why the cost of the legislation is proportionate to the outcome).

Gaps in the logic – When you have been working on a policy area for a long time and are very familiar with its technicalities it is sometimes difficult to remember to explain the basics. This comes out in EMs as missing background information or skipping a step in the logic of the explanation (often why a policy change is being made or why it is being made *this way*).

Familiarity with the topic also leads to overuse of **acronyms, abbreviations and jargon** (for example, SIPP, NO_x, credit repair, wet stamping). Where they are helpful to use, they should be fully explained. Overuse, however, should be avoided.

Out of date drafting – The EM may have been in draft for some time while another part of the process is completed, and then submitted in a hurry. On occasion, we have found that dates in the draft are expressed as “XXXX” or inconsistent with what is in the final instrument, or that the title of the instrument has changed and is different from the title in the EM. **Such errors should be guarded against but, if they occur, will always require the department to replace the EM.**

Time warp – To avoid follow up questions from the SLSC Advisers, the EM should be accurate and up to date on the day of laying. For example, if an EM states that the consultation analysis *will be* published, this will prompt a question from the SLSC Advisers about when.

Just weblinks – The principal findings of the Impact Assessment (IA) and of the consultation analysis should be explained in the EM. It is not enough simply to provide a weblink to the IA or the analysis (although such weblinks should always be included). Where documents, such as White Papers, are long and complex, please include the relevant page or paragraph numbers in the explanation to the part you are referencing.

Don’t use “not applicable” under any EM Heading – This statement may be correct, but the Committee has no way of knowing that unless reasons are given:

Examples of a better approach:

- No separate consultation exercise was conducted as this instrument corrects minor drafting errors in the original regulations and does not change the policy. A consultation exercise conducted when preparing the original regulations found that 63% of respondents supported the proposal. That analysis can be found at [insert weblink].
- This instrument sets the fees for the licensing provisions described in the main regulations, SI 2012/1234. The evaluation of those regulations in December 2016 will include the effect of the fee regime in its assessment of the whole policy change.
- No guidance is needed as the instrument applies minor updates which impose no new obligations on external bodies.

Don't leave loose ends – Sometimes it is helpful to put yourself in the reader's shoes. A simple statement of what the instrument does may still leave some questions in the reader's mind. If you provide answers to predictable questions in the EM, you may save yourself the work that might otherwise result from having to answer follow up letters or Parliamentary questions.

Such questions may arise when an instrument is one of a series – for example, if an SI sets up a licensing system but a later one will set the fee, it would be helpful to explain that the level of fee is currently being consulted on and another SI will follow in three months.

For example:

Draft Code 10: Modification of Subsisting Rights (Pensions Regulator, laid June 2006)

It is intended to bring the Code of Practice into effect as soon as possible, as sections 67 to 67(l) of the Pensions Act 1995 came into force on 6th April 2006. The Code will be published by the Pensions Regulator in draft form whilst Parliamentary approval for it is awaited. The Provisions of sections 67 to 67(l) are permissive, and the Code itself does not impose any legal obligations. There are, therefore, no adverse consequences arising from the different dates for coming into force.

IMPLEMENTING EU LEGISLATION

Until the UK withdraws from the EU these requirements still apply.

11. The SLSC's terms of reference include reporting an instrument, where appropriate, on the way it implements EU legislation.

12. Instruments implementing EU legislation should include a brief summary of the Lords EU Select Committee's scrutiny history, a Transposition Note and, where appropriate, explain if there have been problems in interpreting the EU legislation and transposing it into domestic law.

13. **Where an instrument comes into effect significantly before or after the implementation date in the EU legislation, the EM should explain why.**

14. Some legislation, particularly if it may impact on international trade, must be notified to the EU for a "stand still period" of three months. You need to include this in your planning timetable – the Committee may raise concerns about a request for expedited consideration where, as a result of poor planning, it is needed to avoid infraction proceedings.

Ambulatory references

15. An "ambulatory reference" is a reference in UK secondary legislation to a Community instrument which is interpreted as also including any later amendments to the Community instrument. Schedule 2 to the European Communities Act 1972 ("the 1972 Act"), as amended by section 28 of the Legislative and Regulatory Reform Act 2006, makes provision for a power to make "ambulatory references" to Community instruments in secondary legislation made for the purposes of section 2(2) of the 1972

Act. Ambulatory references raise concerns because they, in effect, allow amendments to legislation outside of the normal scrutiny process.²

16. Ambulatory references should only be used for technical updates, which usually appear in an Annex to the Directive, such as adding items to a list of banned chemicals. The Committee reported on the agreed Whitehall position on the use of the power some years ago: see [Appendix I to 25th Report, Session 2008-09](#). The EM should state clearly whether an instrument includes an ambulatory reference. **If the power is applied to anything other than simple technical updates, the Committee will expect to see a full explanation of why this is proposed, including how any risks or unintended consequences are to be managed in the absence of further Parliamentary scrutiny.**

POLICY BACKGROUND – EM Heading 7

What is being done and why

17. On average the Committee considers about 30 instruments a week. **To assist the Committee, the Houses and the public, the explanation of the policy background and purpose of the instrument contained in the EM should be clear, complete and succinct, and able to be fully understood without having to refer to other documents.**

18. The policy background section should explain:

- **Purpose:** the purpose of the SI and how the instrument fulfils the policy objectives of the parent Act or Directive;
- **Context:** the current position, including the size and nature of the problem that the instrument is addressing;
- **Effects:** the effect of any policy change on the target group, numbers affected, and the degree to which they are affected;
- **Evidence:** the evidence which demonstrates why the policy change is likely to achieve the policy objective and, where appropriate, the measurement of that objective (for example, that it will reduce car crime by 15%);
- **Significance:** whether the change is politically or legally important.

19. Where the changes are being made following a review or White Paper, the EM should include a reference to its title and an associated weblink. It should also set out, briefly, the principal points of the review report or White Paper, including relevant page and paragraph numbers.

20. The explanation of the policy background and purpose of the instrument should be addressed to a reader who has no prior knowledge. For example, the EM should not say “*this order extends the XYZ scheme*” without explaining, briefly, what the XYZ scheme does.

21. **Simple assertions that all will go according to plan may be challenged,** so they should be supported by evidence which substantiates them. Where new regulations amend existing ones, the Committee may expect to see evidence of an evaluation of how the previous regulations have performed.

² See for example HL debate 28 October 2009 cols 1231-43

Insufficient information

22. EMs are often good at explaining what the instrument does but fail to explain **why it is necessary**. Because of the prevalence of this problem in the past, a specific [ground for reporting](#) was added to the Committee’s terms of reference, enabling it to draw to the special attention of the House any instrument for which there is *insufficient supporting information* “to gain a clear understanding about the instrument’s policy objective and intended implementation”. Part of the Committee’s role is to consider whether an instrument will fulfil its policy objective. If the EM does not provide enough information to form an opinion, the Committee is likely to report the instrument on this ground.

23. Where there is a minor deficiency or where the Committee’s questions have identified new information that the House may need to understand an effect of an instrument, the SLSC may ask the department to revise and replace an EM. Given the costs of replacing an EM, departments will, no doubt, wish to avoid this.

24. When setting out the policy background, bear in mind that the EM is there to inform all sides of the two Houses. **It should, therefore, present a persuasive case** as to why it is necessary to legislate at all and why the solution proposed will be effective in addressing the problem identified.

Miscellaneous amendments

25. For “miscellaneous amendments” SIs, the EM should briefly address each of the broad areas covered. If there is no obvious structure offered by the format of the instrument itself, one way of doing this is to break the regulations down into associated groups (for example, “regulations 4(a), 5(b) and 6(c) amend the definition of “incapacity” because...”). **Such wide-ranging instruments should only be used for tidying up the statute book and not include any major new policy developments:** the Committee has been very critical in the past of SIs that attempted this mix.

CONSULTATION OUTCOME – EM Heading 10

26. Proper consultation, and a review of the outcome of the consultation exercise before an instrument is laid, are regarded by the Committee as crucial to its assessment of an instrument.

Proportionate Consultation

27. **The Committee recognises that consultation should be proportionate to the policy change being made**, but it has been critical of a department where the conduct of the consultation has been deficient in some way. This has happened where a department has mistimed the exercise – for instance, by holding a consultation for a short period over Christmas or consulting on teachers’ pensions during the school holidays. As a result, the Committee’s terms of reference were amended to include a specific [ground for reporting](#) based on inadequate consultation.

28. The Government’s [Consultation Principles](#), published in 2018, allow for a period of public consultation lasting from two to 12 weeks, with the expectation that the more significant policy initiatives will have a longer consultation period. The SLSC takes a close interest in the quality of consultation exercises. **Where there is no consultation, or it is for less than six weeks, or limited to a target group, reasons for that approach should be given and, in particular, why it was thought to give sufficient opportunity for those affected to comment.**

29. Where an instrument directly affects members of the public (for example, if it imposes fines or other penalties), the Committee will expect evidence of how they, or organisations that might reasonably be considered to represent them, were involved in the formulation of the policy. The Committee will also expect the consultation to have included a wide range of interest groups, not just those that the legislation will benefit, including those expected to enforce the proposed system or advise users (such as Citizens Advice).

Summary of key issues raised

30. Where there has been a consultation, EM Heading 10 should briefly set out who was consulted, over what period and how many people responded. There should be some analysis of the key points raised in responses and a short justification of why the department did or did not make changes to its policy in the light of the opinions expressed. **A full analysis should be available at the time the instrument is laid before Parliament, and a weblink included in the EM.**

For example:

Dairy (Specific Market Support Measure) Regulations 2010 (SI 2010/1085)

Across the UK we sought views on the mechanism for distributing payments from the EU dairy fund through public consultations in January and February 2010. The UK decision, Defra consultation letter and a summary of responses to Defra’s consultation (relating to England) can be found at (link). Roughly three-quarters of respondents (including all bar one representative organisation) favoured the option which is to be implemented).

Smoke-free (Premises and Enforcement) Regulations SI 2006/3368

A three-month consultation on the draft regulations ran from July to October 2006. Around 550 responses were received, many of them very detailed, from a range of stakeholders *[from what groups? what percentage supported the initiative?]*. The Department of Health has made a number of changes to draft regulations based on consultation responses. The most notable changes to this instrument are that:

- enforcement responsibilities for smoke-free legislation will be with the lower tier local authorities;
- Port Health Authorities have been included as enforcement authorities;

A full analysis of consultation responses is available on the Department’s website at: <http://www.dh.gov.uk/Consultations/...>

GUIDANCE – EM Heading 11

31. Where guidance associated with an instrument is important to understanding how the instrument will operate (even if the guidance is not itself subject to a parliamentary procedure), **two copies of the guidance should be sent to the SLSC at the same time as the SI is laid** (and you may wish also to consider sending a copy to the Libraries of each House). However definitions or criteria to be used in making decisions on how individuals will be treated under the legislation, for example, deciding whether to grant or deny someone benefits, permit entry to the country, or determine fitness to practice, should be in the legislation itself.

32. The EM should set out what guidance or training the department or others³ are providing to the civil servants who will have to operate a new system as well as to the public or industry sector that will be required to meet a new obligation. It is generally regarded as best practice to publish such guidance in advance of the legislation coming into effect to allow time for familiarisation or training.

For example:

Beef and Pig Carcase Classification (England) Regulations 2010 (SI2010/1090)

A detailed guidance note for the industry explaining how the new EU provisions on the beef and pig carcase classification will operate is being provided by Defra. It will be placed on the Rural Payments Agency website as the Agency is responsible for the implementation and enforcement of the carcase classification rules. It will be available to users, stakeholders and enforcement agencies: a draft is available here ([link](#))

Sanctions

33. Where an instrument imposes a penalty or other sanction, there needs to be a clear statement, in plain English, of what behaviour will result in the penalty or other sanction being imposed. In addition, there may need to be different versions of the guidance, for example one for enforcers and one for the public.

IMPACT ASSESSMENT – EM heading 12

34. In 2015, the Committee asked for clarification of the Government’s policy on the production of formal IAs. The Cabinet Office responded:⁴

“The requirements regarding impact assessments remain as set out in the Better Regulation Framework Manual. In summary, the position is that:

- Impact assessments are mandatory for measures that have a significant regulatory impact on business and civil society organisations;
- For all other measures, responsibility for determining the appropriate level of appraisal (including whether an impact assessment should be produced) is delegated to departments;
- Where departments have delegated responsibility as described, **they are expected to consider the needs of Parliament**, as well as other factors such as proportionality etc.”

35: Even if the policy change does not meet the formal threshold for an Impact Assessment (IA), **the EM should always include a short explanation of the net effects of the policy, including broad brush figures for costs and benefits.**

For example:

End-of-Life Vehicles (Amendment) Regulations

The impact on business, charities or voluntary bodies is estimated to be of minimal cost because the Regulations are principally concerned with making technical changes that are already common across Europe and simplifying certain reporting requirements.

³ E.g. trade organisations or professional bodies with which the Government liaises.

⁴ [11th Report](#), Session 2015-16 (HL Paper 44)

The impact on the public sector is estimated to be a small annual saving of £7,000 because the Regulations now give effect to future changes to a technical annex of the Directive meaning that no time will need to be spent amending UK legislation when these changes are made.

36. Where an IA has been prepared, **a hardcopy should be attached as an Annex to the EM for the use of the Committee** and the weblink included in the text of the EM. The IA provided should be the final version and signed by a Minister.

37. On occasion, departments have not provided an IA because it had not been validated by the Regulatory Policy Committee in time. This is an internal planning matter for the department and it is not an acceptable excuse for failing to present all the necessary documentation at the time the instrument is laid before Parliament.

38. If the IA was originally prepared for an Act which an instrument helps to implement, only the relevant extracts should be provided when the instrument is laid. **There should also be confirmation in the EM that the figures are up-to-date and still accurate.**

39. **Although an IA is not formally required for SIS with only public sector costs**, for example, the cost of any additional civil servants or infrastructure to make the legislation work. Any major savings or costs should be explained in the EM.

For example:

Pneumoconiosis (Workers' Compensation)(Amendment) Regulations 2020

An Impact Assessment has not been prepared for this instrument because the impact on the public sector is negligible. There will be an estimated £726,000 increase to the DWP Departmental Expenditure Limit as a result of this 1.7% uprating.

MONITORING AND REVIEW – EM Heading 14

40. The terms of reference of SLSC include considering whether an instrument “imperfectly achieves its policy objective”. To enable the Committee to do this, the EM needs to set out a clear statement of the Government’s policy objective and target outcome (where appropriate, expressed in a measurable unit).

For Example:

- The changes in the fee structure aim to achieve full cost recovery of the process of issuing and administering these licences by April 2014.
- The changes set out in this instrument aim to reduce identity theft by 10% over the next 3 years.

41. The EM should also explain when and how the legislation will be reviewed to see whether targets have been achieved or what factors have affected the outcome. Secondary legislation will normally be reviewed after 3-5 years, although, particularly with an innovative scheme, there may be reasons for reviewing it sooner. **Here or in the Impact Assessment there should be a clear statement of the current position to act as a benchmark against which the change made by the legislation can be assessed in the future.**

For example:

- The income from crime statistics will be subject to internal review after 12 months and the legislation may be amended accordingly.
- The University of London has conducted a benchmark study ([link](#)) and will review the position again in 3 years; a report will be published towards the end of 2015.
- As the instrument makes only consequential amendments to the Railways Act 1993 no specific monitoring or review is felt to be necessary. However, at the end of the transitional period for Regulation EC/1370/2007 on 3 December 2019 the European Commission must present a report on the implementation and developments in the provision of public passenger transport in the Community. As a result, there are ongoing reviews of existing measures in the rail sector.

OTHER SECTIONS OF THE EXPLANATORY MEMORANDA**EM Heading 2 – Purpose of the Instrument**

42. Plain English should be used to explain **in two or three sentences** what the instrument does and why. **Many readers will be using on-line search engines, so it is helpful to use relevant key words.**

For example:

Three sentences but not plain English: This Order makes supplementary and transitional provision in respect of new provisions regarding police authority membership which are being commenced under the Police and Justice Act 2006 (“the 2006 Act”). The new regime will come into operation in the case of police authorities established under section 3 of the Police Act 1996 on 1 April 2008 and in the case of the Metropolitan Police Authority on 3 July 2008. This Order ensures that, until that new scheme comes into operation, existing lay justice members of police authorities in England and Wales whose appointments would otherwise expire on or after 15 January 2007 shall have their appointments extended until 31 March 2008 or, in the case of the Metropolitan Police Authority, 2 July 2008.

Better: This Order makes transitional provisions to extend existing lay justice appointments to police authorities until the new scheme under the Police and Justice Act 2006 takes effect in 2008.

EM Heading 3- Matters of special interest to the JCSI

43. **If the instrument makes corrections** in response to a JCSI report or revises a previous version of an affirmative SI, the EM should set out the key changes made, including whether the changes amend the policy in any way.

44. Although this section is mainly for the technical, legal aspects that are of interest to the JCSI, the SLSC has an interest where an SI breaches **the “21-day rule”**. This “rule” states that negative instruments should be laid at least 21 calendar days before they come into effect – to allow time for scrutiny and for those affected to become aware of the change.

45. Where the 21-day rule is breached, the EM should explain the urgency, why breach could not be avoided, and what the impact of avoiding the breach would have been. **In**

breaching the 21-day period, the time available to Parliament to scrutinise an instrument – before it comes into force – is reduced. This is an important matter and should not be done for departmental convenience. Most departments require Ministerial clearance to lay an SI that breaches the rule.

46. If an instrument **comes into force before it is laid**, the EM should explain why. Departments are also required to write to the Speaker in each House, with a copy to the Chair of the SLSC and JCSI to explain the circumstances (see section 4(1) of the Statutory Instruments Act 1946).

47. The SLSC’s main interest will be in the practical consequences: do those affected or those who enforce the policy have sufficient information to be able to react within the short time allowed? For urgent SIs (for example, certain tax changes or public health measures), **rapid implementation can be justifiable – but the circumstances need to be explained.**

EM Heading 6 - *Legislative context*

48. The parent Act power under which an instrument is made is set out on the face of the instrument. There is no need, therefore, to refer to it in the EM unless it is being used for the first time or in an unusual way. Nor is it necessary to list the changes that the instrument makes because these are set out in the Explanatory Note at the end of the SI.

49. This section should be used to explain if the instrument forms part of a group or a sequence of SIs that will appear over time. Sometimes an SI clarifies the policy because a recent legal case has challenged the existing interpretation of the law. If that is so, the EM should give the title, reference and a brief explanation of the judgment (with a weblink).

50. If the instrument is intended to meet specific undertakings that have been given to Parliament, whether in the course of a parliamentary debate, question or before a select committee, this should be mentioned together with the relevant Hansard or report reference (including a weblink).

For example:

Concerns were also raised during the Courts Bill’s passage through the House of Lords regarding the conditions to be met before a person was designated a court security officer. It was agreed during the debate that a criminal record check will be undertaken for all court security officers (HL Deb, 11 February 2003, col 592). These Regulations reflect this ...

EM Heading 9 - *Consolidation*

51. Where an instrument amends another instrument, particularly if it is not for the first time, the EM should indicate the department’s intentions and timescale for consolidation. Although there may be good reasons for consolidation happening at a later date, the Committee will expect to see a statement setting out those reasons. Providing an informal consolidated text online to the public free of charge is regarded as good practice and, where appropriate, the weblink to that text should be included in the EM.⁵

For example:

⁵As, for example, with the Home Office Immigration Rules website

<http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/>

National Health Service (Pension Scheme and Compensation for Premature Retirement) Amendment Regulations SI 2006

The on-going review of the NHS pension scheme is expected to lead to a completely new scheme and regulations within two years. In the same timeframe there will also be a significant set of corresponding amendments to the current pension scheme regulations. We will only realistically be in a position to consider consolidation at that stage.

EM Heading 15 - Departmental Contact

52. The name and direct telephone number of the official who can provide additional information on the instrument *must* be provided. **The departmental switchboard is not sufficient.**

53. Some departments use generic e-mails such as jobseekersallowance@dwp or immigrationpolicy@homeoffice. This does not present any difficulties so long as the email box is checked frequently.

54. Because of the tight deadlines to which the Committee works and to avoid undue delay in the progress of an instrument, the deadline for a response to questions is less than a week and often less than 48 hours. It is, therefore, important that, if the official named in the EM is absent, the full contact details of an alternative are made available.

55. **If the deadline for a response is missed, the instrument may be held over to the next meeting and the Committee may seek the information directly from the Minister who signed the regulations.**

[END]