

HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

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9th Report of Session 2023–24

# Government Response: Work of the Committee in Session 2022–23

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### *Secondary Legislation Scrutiny Committee*

The Committee's terms of reference, as agreed on 8 November 2023, are set out on the website but are, in summary:

To report on draft instruments and memoranda laid before Parliament under section 23(1) of the European Union (Withdrawal) Act 2018 and sections 11, 12 and 14 of the Retained EU Law (Revocation and Reform) Act 2023.

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*

[Lord De Mauley](#)

[Baroness Harris of Richmond](#)

[Lord Hunt of Wirral](#) (Chair)

[Lord Hutton of Furness](#)

[Baroness Lea of Lymm](#)

[Lord Powell of Bayswater](#)

[Baroness Randerson](#)

[Baroness Ritchie of Downpatrick](#)

[Lord Rowlands](#)

[Lord Russell of Liverpool](#)

[Lord Thomas of Cwmgiedd](#)

### *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 <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/>

### *Committee Staff*

The staff of the Committee are Jen Mills (Clerk), Philipp Mende (Adviser), Chris Smith (Adviser), Jane White (Adviser) and Riona Millar (Committee Operations Officer).

### *Further Information*

Further information about the Committee is available at <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/>

The progress of statutory instruments can be followed at <https://statutoryinstruments.parliament.uk/>

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 [hlseclegscrutiny@parliament.uk](mailto:hlseclegscrutiny@parliament.uk).

# Ninth Report

## GOVERNMENT RESPONSE: WORK OF THE COMMITTEE IN SESSION 2022–23

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1. At the end of October 2023, we published our Report on the Work of the Committee in Session 2022–23.<sup>1</sup> Drawing on the scrutiny of 937 instruments laid before Parliament in that period, we concluded that “our overall impression of this session remains that we have too frequently had to ask basic questions about the policy, its intended effects or expected impact”. We were particularly disappointed to note that, despite the well-evidenced criticism in our earlier Interim Report,<sup>2</sup> the general quality of the explanatory material presented to Parliament in the second half of the session remained poor. This was despite the Government’s very positive response to the Interim Report’s findings, which included launching several initiatives to encourage ownership by senior officials and ministers of the work needed to improve departments’ performance on secondary legislation.
2. The Government’s response to our report on the complete Session 2022–23, published in full in Appendix 1, recognises “the need for robust, accurate and comprehensive supporting documents and adherence to good processes”. The response sets out in more detail a range of measures the Government is introducing to improve the quality of secondary legislation and explanatory material. This includes a revised template for Explanatory Memoranda (EMs) and supporting guidance, both of which have now been published.<sup>3</sup> We welcome the strong support from the Government “to ensure that the information departments provide to Parliament is of a consistent, high-quality standard”.
3. We concluded in both our 2022–23 reports that senior leadership is important, and that it must focus not only on the flow of legislation and the timely delivery of a department’s programme of legislation through Parliament, but also on its quality. Every EM is signed off by a minister and senior official (the “Senior Responsible Owner”) to say that it is fit for purpose, but too often we see legislation where the EM has simply not met this standard. We therefore welcome the Government’s intention to hold meetings of all SI ministers “at least twice a year”, to discuss and share best practice and to ensure a more consistent approach across government. We also welcome the commitment to convene at least one meeting of Senior Responsible Owners. We hope this will be a significant step in ensuring that the improvements the Government is making are implemented successfully across departments.
4. We have also expressed concern in the past<sup>4</sup> about the need for proper assessment of the likely costs and benefits of legislation as part of the policy design. The Government announced a new Better Regulation Framework for

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1 SLSC, *Work of the Committee in Session 2022–23* (56th Report, Session 2022–23, HL Paper 264).

2 SLSC, *Interim Report on the Work of the Committee in Session 2022–23* (42nd Report, Session 2022–23, HL Paper 205).

3 Cabinet Office, ‘Explanatory Memorandum: Template and Guidance’ (2 January 2024): <https://www.gov.uk/government/publications/explanatory-memorandum-template-and-guidance> [accessed 15 January 2024].

4 SLSC, *Losing Impact: why the Government’s impact assessment system is failing Parliament and the public*, (12th Report, Session 2022–23, HL Paper 62).

conducting these assessments in September 2023 with a one-year transitional period. No examples of the new form of Impact Assessment have yet been published; we will be monitoring the outcome carefully to see whether it delivers the improvements the Government anticipates.

5. These commitments and initiatives will take time to embed and deliver progress. The weekly reports we have published in session 2023–24 so far show that the need for improvement remains pressing: we continue to see examples of inadequate explanatory material,<sup>5</sup> missing impact information<sup>6</sup> and flawed policy design.<sup>7</sup> We will therefore continue to monitor departmental performance. **We are grateful for the Leaders’ offer to talk to us about these issues in a few months, by which time progress towards improving the quality of explanatory material should be apparent.**

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5 Explanatory Memorandum, Private Crossings (Signs and Barriers) Regulations 2023 ([SI 2023/1112](#)), [2nd Report](#), (Session 2023–24, HL Paper 7).

6 Draft Explanatory Memorandum, [The Strikes \(Minimum Service Levels: Border Security\) Regulations 2023](#) and linked SIs, [3rd Report](#) (Session 2023–24, HL Paper 13).

7 Explanatory Memorandum, Misuse of Drugs (England and Wales and Scotland) (Amendment) Regulations 2023 ([SI 2023/1099](#)), [1st Report](#) (Session 2023–24, HL Paper 3).

## APPENDIX 1: GOVERNMENT RESPONSE

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### Letter from The Rt Hon. Penny Mordaunt MP, Leader of the House of Commons, and The Rt Hon. Lord True CBE to The Rt Hon. Lord Hunt of Wirral MBE, Chair of the Secondary Legislation Scrutiny Committee

Thank you for your End of Session report on the Work of the Committee in Session 2022–23 (HL Paper 264).

In the interim and end of session reports, your Committee put forward a series of recommendations that the Government accepted. We are grateful that your Committee recognises the important initiatives that the Government has already put in motion. We agree that they will take time to embed, but we are confident that they will lead to improvements in the quality of information Parliament receives to support its scrutiny.

Of these initiatives, your Committee may take particular interest in the work of the Secondary Legislation Steering Group, a working-level group set up to review Explanatory Memoranda, provision of wider supporting documentation and the governance of secondary legislation.

A key action to come from this work is the revisions to the Explanatory Memorandum template. The template, and revised accompanying guidance, are part of a wider Government effort to ensure the information that departments provide to Parliament is of a consistent, high quality standard. For the first time, the guidance will be published on [legislation.gov.uk](https://legislation.gov.uk). We enclose a copy of the revised template and guidance both of which will be published in due course. We are grateful to your clerks and advisers for their support in revising the template and to the officials on the steering group for their invaluable input.

The Government is committed to promoting best practice and continuous improvement. The work of your Committee has been invaluable as it demonstrates that Parliament wants to see the changes we are all striving to make. We will continue to work closely with your Committee to assess the impact of our work so far and inform future efforts. We note that the Committee will look to schedule an evidence session which we look forward to attending. We would suggest this takes place in the spring, to enable some time for recent changes to embed.

We would also like to take this opportunity to reiterate that the Government is committed to providing Parliament with both high quality information and sufficient time to scrutinise legislation. As business managers, we do and will continue to champion the need for robust, accurate and comprehensive supporting documents and adherence to good processes.

**19 December 2023**

## Response to the End of Session Report on the Work of the Committee in Session 2022–23

### *1. Explanatory Memorandum*

**We note that there continue to be positive examples of well explained instruments (see below) but remain concerned that there are still too many instances where poor explanatory material or missing or incorrect information is not detected during the departmental approval and quality assurance processes. (paragraph 7)**

**[Information such as potential consequences of their policy choices and decisions] should form a key part of any EM and should not have to be extracted through our questions. (paragraph 11)**

**It is disappointing that despite the work that the Government have undertaken to improve the quality of secondary legislation and its supporting material over the last few months, there are still too many instances where ministers are signing-off explanatory material that is not “fit for purpose”. (paragraph 13)**

**We therefore consider proportionate consultation, and a thorough review of the responses before the instrument is laid, as a key part of robust policy development. (paragraph 29)**

**These figures confirm our concerns about the quality of explanatory material and our observation that departments need to take immediate action to strengthen their quality assurance and approval processes, including by examining the lessons that can be learnt from our findings in this report and our regular weekly reports. (paragraph 64)**

**[The increased number and increased length of special reports to the House] has been a concern for some time and, as this Report shows, this has got worse since our Interim Report in May. (paragraph 65)**

We would like to thank the Committee for highlighting that, across Government, there are positive examples of high quality explanatory memoranda (EM). The Government remains committed to ensuring that high quality EMs are standard. We are also grateful that the Committee has published guidance on drafting good EMs, and for the support of the Committee’s clerks and advisers in sharing examples of good EMs. These will be circulated across Whitehall as exemplars to support the Government’s understanding of the content the SLSC expects to be included in EMs.

The steps the Government has taken have largely focussed on developing officials’ capability and identifying the key target areas for further work via the Secondary Legislation Steering Group.

The EM template has been revised to ensure the right information, in the right depth, is provided to Parliament. The revised template has been streamlined, putting what the instrument does, to who, where, and why front and centre. The template has also been separated into sections to enable readers with specific interests, whether members of the public or parliamentarians, to find what they are looking for faster.

The template will be accompanied by new guidance to support those drafting EMs. The guidance will set out in detail the purpose, expected content, and depth

of each section of an EM. The guidance will also link to the SLSC's 'Top ten tips for a good EM'. The intention is that officials with any level of experience can follow the guidance and produce a high quality EM. Further, for the first time, the guidance will be published on legislation.gov.uk. This will mean that officials and members of the public will not only be able to access clear explanations of the law, they will be able to understand why the law is explained in the way it has. This is an important step in ensuring transparency in the preparation of secondary legislation. We would like to take this opportunity, again, to thank the clerks and advisers of the Committee for their input into this work.

As the Committee has recognised, these changes will take time to embed. There will need to be a transition period between old and new templates to ensure that there is not an undue burden on those already working on EMs. We therefore expect that the new template will become standard from the start of the financial year.

The Government agrees that it is disappointing that a number of EM have required correction or replacement in the last session, and that more must be done to assure their quality before publication. The Government will continue to monitor the number of EMs that require correction or replacement to identify trends and ensure the changes we make lead to tangible improvement. In addition, we have asked the PBL Secretariat to liaise with the departments you cite as having a higher percentage of replacement EMs.

## *2. The role of ministers and senior officials*

**While we recognise that each minister should be responsible for the quality of any secondary legislation they sign into law, we consider that the SI Minister in each department should be accountable for the overall quality of its instruments and the supporting explanatory material. In response to our Interim Report, the Government held a forum for departmental SI Ministers to “discuss the need for continuous improvement in the delivery of secondary legislation”. We welcome this initiative and hope that such a forum could become a recurring event that could also be open to officials who are the Senior Responsible Owners of secondary legislation in their departments. (Executive summary)**

**The Government's improvement initiatives will need time to embed, but we trust that we will not have such a long list of poor examples to illustrate our next overview report. (paragraph 16)**

The Leaders of both Houses met with SI ministers in September to discuss the Committee's interim report and what the Government can do to improve its management of its secondary legislation programme. This meeting was a useful forum to discuss the issues departments may be facing and to share experiences. However, while meetings can be useful, we need to ensure they have clear outcomes. We will therefore look to hold meetings of all SI ministers at least twice a year. These meetings will ensure SI ministers can discuss and share best practice, which will lead to a more consistent approach across Government. The meetings can also discuss the expectations of the role of SI ministers in managing the secondary legislation their departments bring forward.

The PBL Secretariat will also convene a meeting of SI Senior Responsible Owners to discuss the concerns the Committee raises and to ensure that the changes Government is making are implemented successfully across departments. Further

meetings will be convened, as necessary, to support Senior Responsible Owners in their roles. It is expected that these will align with meetings of SI ministers.

In relation to increasing capability, a programme of training on managing SI currently exists for officials. This will be extended over the next 6 months to include bespoke support for ministers and Senior Civil Servants (SCS). A new course for officials that focuses on the project management aspect of managing SI will also be launched in spring 2024. We will continue to assess the requirement for further training opportunities.

**We will continue to monitor departmental performance, and we intend to take evidence from ministers and senior officials in the first part of 2024 to understand how our concerns about the current quality of explanatory material are being addressed in practice. We are minded to publish an update report then to assess the progress made. (paragraph 68)**

We note that the Committee will monitor departmental performance. As we have set out in this response, we believe that the Government is implementing changes that will improve the quality of explanatory material. Our officials will continue to work across Whitehall to ensure best practice is shared, changes are implemented and there is continuous improvement on the delivery of secondary legislation.

### *3. Examples of good practice*

**It is our intention to take evidence from the Government in the first part of 2024 to hear what recommendations the Steering Group have made and how they are being put into practice. (paragraph 18)**

With regards to examples of best practice, the Government would like to thank the clerks and advisers of your Committee for sharing examples of what they consider to be high quality explanatory memoranda. Providing officials in Government with examples is a valuable way of showing what good quality EMs look like which can be borne in mind when drafting.

We note your interest in the work of the Secondary Legislation Steering Group (SLSG). The SLSG is a working-level group established to develop and disseminate best practice across Government departments. The Group is considering numerous options to ensure improvements are identified and embedded at various levels. As we have set out, the SLSG has revised the EM template and guidance and is developing new processes to approve SIs and supporting documents that will become standard across departments. This will mean Parliament can be reassured of a consistent level of rigour and accountability for the quality of information departments provide.

We are looking to continue the work of the SLSG. For example, furthering proposals such as holding fora for SI SROs and ministers. It will also review the training offer available to those involved in the end-to-end SI process to create a stronger understanding of the parliamentary passage of secondary legislation and share best practice across Whitehall.

### *4. Inadequate provision of impact information and Impact Assessments*

**We remind the Government of their undertaking to improve performance in this area. Because impact information is vital to proper scrutiny, an instrument should not be laid where an IA is missing, except in a genuine emergency, in which case a full explanation of the omission should be**



**provided in the EM, alongside the headline financial impact information. In future, in cases where an instrument has been laid without the required IA, we may recommend to the House that it should defer consideration of an instrument until a meaningful impact assessment has been provided. (paragraph 23)**

As we stated in the Government response to SLSC's report: *Losing Impact: why the Government's impact assessment system is failing Parliament and the public* (HL Paper116), the Government agrees that it is important that Parliament has the information it needs and that impact assessments (IAs) should be published, where possible, when an applicable instrument is laid before Parliament. Individual departments are responsible for producing a proportionate assessment of the impacts of their policy proposals ahead of laying, and ensuring their timely publication. This is in line with the Better Regulation Framework Guidance which makes it clear that departments should publish their IA and, where applicable, the Regulatory Policy Committee (RPC) opinion, alongside either the relevant consultation document on GOV.UK or the relevant legislation on legislation.gov.uk

The new Better Regulation Framework guidance, published in September 2023, makes it clear at paragraph 3.7 that "The final IA must be laid in Parliament alongside the legislation, permitting scrutiny by parliamentarians and other relevant bodies. This is an important consideration, not only for public and parliamentary transparency, but also to enable the UK Government to meet its legal obligations under international law." It also explains at paragraph 3.9 that "It should be noted that the House of Lords' Secondary Legislation Scrutiny Committee (SLSC) recommends that, even if the policy does not meet the formal threshold for an IA, a short explanation of the net effects of the policy should always be included in the Explanatory Memoranda (EM), including estimated figures for costs and benefits."

### *5. Better Regulation Framework*

**We welcome the assessment of a wider range of impacts under the new Framework. We will be considering further the implications of the increased IA threshold and would be concerned if it reduced the amount, or quality, of impact information that is made available to Parliament and the general public. (paragraph 26)**

The new 'de minimis' threshold of +/-£10 million Equivalent Annual Net Direct Cost to Business (EANDCB) was agreed to ensure scrutiny remains focused on measures with the most significant impacts on business. Whilst this increases the threshold from £5 million to £10 million, the reformed Framework no longer applies de minimis to primary legislation. The Government therefore expects a relatively small change in the number of IAs.

### *6. Potential overuse of urgent procedures*

**We remain concerned that urgent procedures, which curtail parliamentary scrutiny, should be used appropriately and only where absolutely necessary, not just for administrative convenience. We will monitor the appropriate use of urgent procedures in session 2023-24. (paragraph 33)**

The use of the urgent procedures should only be used when it is required by the provisions of the parent Act or extenuating circumstances. They must not be

seen as an alternative to good planning or as a means of limiting parliamentary oversight.

In the third session, the made affirmative procedure was used 48 times. As noted in our response to your Interim Report, the majority of these were laid in response to the cost of living crisis and the Russian invasion of Ukraine, both of which required urgent legislation. Made affirmative regulations remain subject to parliamentary scrutiny in the usual way as set out in the terms of the parent Act.

With regards to negative instruments, in some cases, it is necessary and proportionate to bring a statutory instrument into force earlier than the usual 21 days after laying. In these instances and in line with Statutory Instrument Practice, departments should set out a strong justification in the EM why this was both necessary and unavoidable.

### *7. Preparing for a dealing with Retained EU Law*

**We remind departments that where future instruments revoke retained EU law, the EM must provide a broad explanation of the legislation being revoked and whether this may have any adverse impacts on those affected by the legislation or leave any gaps in standards, rights or protections. (paragraph 39)**

The Government agrees with this reminder and will ensure that the SLSC's report is circulated to departments so that officials working on REUL understand the requirements for revoke SI EMs. We agree with the Committee that the EM for REUL SIs must be clear on how the powers are being used, what the change will be, the rationale for the change and its expected impacts on all affected groups. The Department of Business and Trade and the Parliamentary Business and Legislation (PBL) Secretariat have previously advised officials across departments to clarify these points in EMs and have organised and attended civil service learning and development sessions along with clerks from the SLSC and other committees to explain these points clearly. We also welcome the Committee's support for some REUL EMs which you've noted were clear and accessible.

We look forward to continuing to work with the Committee to improve the quality of REUL EMs, alongside work that the PBL Secretariat is undertaking to refine the EM template and to improve explanatory materials for all SIs.

**We welcome this clarification and note that all SIs laid under the REUL Act will use "Retained EU Law reform" as their main subject heading (located on the face of the SI just above the title) and will be identified clearly as such in the EM. In addition, to aid traceability, the Government are publishing all SI laid under the REUL Act on a dedicated webpage on GOV.UK. We consider this a reasonable compromise. (paragraph 42)**

We are grateful that the Committee welcomes this approach. The Department for Business and Trade is ensuring that all REUL Act SI updates to GOV.UK are timely and prompt to support the Committee with its scrutiny. As set out in their letter to the Committee, the Government fully recognises that SIs made under the REUL Act must be readily identifiable. We are glad that we have agreed a way to achieve that which avoids perpetuating outdated references to EU law in SI titles. We look forward to your continuing scrutiny of these regulations.

### *8. Volume and flow*

**The Government seek to regulate the flow of instruments by requiring departments to obtain approval from the Parliamentary Business and Legislation (PBL) Committee of the Cabinet before laying an instrument. Chart 1, however, shows significant fluctuation in the flow of instruments during session 2022-23. Even accounting for times of parliamentary recess, the data suggests that the flow of instruments could be regulated more effectively to allow a more even distribution and the current PBL Committee approval process strengthened. (paragraph 53)**

We are grateful that the Committee has recognised that the Government has established procedures to regulate the flow of statutory instruments. A degree of fluctuation, however, is to be expected. As shown in Chart 1 of your Report, SI flows tend to peak in the run up to, and immediately after, summer recess, with an additional peak in preparation for the new financial year. With the above in mind, the Government considers this degree of fluctuation to be acceptable. Nevertheless, we will continue to encourage departments to plan and lay SIs in good time.

### *9. Conclusion*

Finally, the Government is committed to ensuring the statute book is fit for purpose, and parliamentary scrutiny is a crucial means by which to uphold this duty. Your Committee has provided valuable insight into where the Government could do more to support the work of Parliament. We have already taken important steps to improve the quality of information provided to Parliament, with further initiatives planned. As you have recognised, these changes will take time, but we are confident that our efforts will lead to the improvements that we all want to see.

## **APPENDIX 2: INTERESTS AND ATTENDANCE**

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Committee Members' registered interests may be examined in the online Register of Lords' Interests at <https://members.parliament.uk/members/lords/interests/register-of-lords-interests>. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 16 January 2024 and included in this report, Members declared no interests.

### **Attendance:**

The meeting was attended by Lord Hunt of Wirral, Lord Hutton of Furness, Baroness Lea of Lymm, Lord de Mauley, Baroness Randerson, Baroness Ritchie of Downpatrick, Lord Rowlands, Lord Russell of Liverpool and Lord Thomas of Cwmgiedd.