

HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

17th Report of Session 2023–24

Correspondence: Draft West Midlands Combined Authority (Transfer of Police and Crime Commissioner Functions) Order 2024 and one linked instrument

Includes information paragraphs on:

Draft Occupational Pension Schemes
(Funding and Investment Strategy and
Amendment) Regulations 2024

School Attendance (Pupil Registration)
(England) Regulations 2024 and two linked
instruments

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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)

[Baroness Lea of Lymm](#)

[Lord Powell of Bayswater](#)

[Baroness Randerson](#)

[Baroness Ritchie of Downpatrick](#)

[Lord Rowlands](#)

[Lord Russell of Liverpool](#)

[Lord Thomas of Cwmgiedd](#)

[Lord Watson of Wyre Forest](#)

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/ukxi>

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.

Seventeenth Report

CORRESPONDENCE

Draft West Midlands Combined Authority (Transfer of Police and Crime Commissioner Functions) Order 2024

Draft South Yorkshire Mayoral Combined Authority (Election of Mayor and Transfer of Police and Crime Commissioner Functions) Order 2024

1. We drew these draft Orders to the special attention of the House in our 15th Report.¹ The Orders would transfer the functions of the Police and Crime Commissioners (PCCs) in each area to the respective Mayors and would abolish the standalone PCC posts.
2. Our comments highlighted that the Home Office initially took a decision to make the transfers but, in doing so, had overlooked a statutory requirement for a public consultation. This oversight, and the later handling of the consultation, has led to an application for a Judicial Review of the West Midlands transfer by the current West Midlands PCC. We wrote to the Permanent Secretary to ask how this important part of the process was overlooked. The response suggests that the Department for Levelling Up, Housing and Communities was not aware that the Levelling-up and Regeneration Act 2023 (“the Act”) placed an obligation on the Government to meet certain statutory tests and carry out a consultation. **We continue to find it extraordinary that the Government appears not to have understood the implications of its own legislation. Given that it was not the Government’s intention for PCC transfers to be subject to the tests in the Act, and that there may be more PCC transfers in the future, the House may wish to enquire whether the Government intends to leave these provisions on the statute book or will legislate to adjust the position.**
3. We also reported that the information provided by the Home Office alongside the instruments was poor. We therefore also wrote to the Minister, the Rt Hon. Chris Philp MP, about these concerns. The reply from the Minister defends the Explanatory Memorandums (EMs) omitting to mention that the changes were opposed by majorities of respondents expressing a view in both public consultations and by other prominent figures in the West Midlands transfer. The Minister’s justification includes that “the public consultation was not a referendum” and that other postholders did not sign a letter of support for the transfer. **We find these reasons unconvincing.** Whatever the status of a consultation, the basic numbers for and against would be a key part of the outcome—as would the views of figures such as the PCC himself and the constituent members of the West Midlands Combined Authority. **As we said in our 15th Report, any selective reporting of the views of consulted bodies is unacceptable; EMs should acknowledge and address significant concerns expressed about the policy.**
4. Our report noted that we have recently been critical of the Home Office’s information provision much more frequently than in the case of any other

1 *15th Report* (Session 2023–24, HL Paper 75), paras 1–27.

department. We welcome the assurances in the Minister's reply that the Home Office is working hard to improve its explanatory material. **We will assist the Home Office in that process where we can but will continue to highlight examples where the information falls short.**

5. Both exchanges of letters are published in Appendix 1.

INSTRUMENTS OF INTEREST

Draft Occupational Pension Schemes (Funding and Investment Strategy and Amendment) Regulations 2024

6. This is a revised version of an instrument originally laid on 29 January 2024, which would require trustees or managers of defined benefit occupational pension schemes to send a written statement of the scheme’s investment strategy, articulating their approach to long-term planning and risk management to The Pensions Regulator (TPR), alongside the three-yearly actuarial valuations already required. The Department for Work and Pensions (DWP) needed to amend the commencement date of a provision to ensure it aligns with the policy intention.
7. Our 13th Report² of this session provided the House with extensive supplementary information on how the obligation is intended to work, and we are disappointed that DWP did not take this opportunity to improve its Explanatory Memorandum. The comments made in our 13th Report still apply, in particular the questions over the robustness of recommendations based on a cost-benefit analysis that uses data from 2021.

School Attendance (Pupil Registration) (England) Regulations 2024 (SI 2024/208)

Education (Information About Individual Pupils) (England) (Amendment) Regulations (SI 2024/209)

Education (Penalty Notices) (England) (Amendment) Regulations (SI 2024/210)

8. These three sets of Regulations implement various measures aimed at improving school attendance in England. Many of them focus on improving the collection and sharing of data. For example, **SI 2024/208** sets out a series of codes that must be used to record each pupil’s attendance or absence, and the reasons for it, in registers every morning and afternoon. Other measures include specifying when leave of absence from school may be granted. SI 2024/208 also states that schools must keep admission and attendance registers in electronic form. This is intended to help schools meet the requirements of **SI 2024/209**, which mandates the sharing of such data with the Government to “support a more timely and more targeted national and local level response” to attendance and safeguarding issues.
9. **SI 2024/210** includes changes to the regime of penalties for parents whose children are absent from school without good reason. These include increasing the fine for a first penalty notice from £60 to £80, if paid within 21 days, and from £120 to £160 if paid later. DfE told us that this was intended to increase the deterrent effect, and that the level of increase was determined by the Consumer Price Index measure of inflation since the last rise in 2012.
10. A consultation covering measures in the three instruments found that, in relation to many of the changes, the majority of respondents from local authorities and schools supported the proposals, while a majority of parents were opposed. DfE said that parents’ opposition was largely because of

2 *13th Report* (Session 2023–24, HL Paper 65), see the paragraph on the Draft Occupational Pension Schemes (Funding and Investment Strategy and Amendment) Regulations 2024 and Appendix 1.

concerns that data being collected would be used punitively. DfE responded that the intention was not to use data punitively, but to standardise approaches and to ensure that pupils who should be receiving support with absence receive it promptly. In relation to parental disagreement with fines for non-attendance, DfE said that “local authorities and schools are clear that penalty notices are one important tool in their toolkit for tackling absence when used in the right case and in the right way”.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft instruments subject to affirmative approval

Draft	Financial Services and Markets Act 2000 (Disapplication or Modification of Financial Regulator Rules in Individual Cases) Regulations 2024
Draft	Occupational Pension Schemes (Funding and Investment Strategy and Amendment) Regulations 2024

Instruments subject to affirmative approval

SI 2024/218	Russia (Sanctions) (EU Exit) (Amendment) Regulations 2024
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Instruments subject to annulment

SI 2024/193	Copyright and Performances (Application to Other Countries) (Amendment) Order 2024
SI 2024/195	Electricity (Individual Exemption from the Requirement for a Generation Licence) (Slough Multifuel) (England) Order 2024
SI 2024/208	School Attendance (Pupil Registration) (England) Regulations 2024
SI 2024/209	Education (Information About Individual Pupils) (England) (Amendment) Regulations 2024
SI 2024/210	Education (Penalty Notices) (England) (Amendment) Regulations 2024
SI 2024/212	Prison and Young Offender Institution (Adjudication) (Amendment) Rules 2024
SI 2024/220	Personal Injuries (NHS Charges) (Amounts) (Amendment) Regulations 2024
SI 2024/228	Aviation Security (Air Cargo Agents) Regulations 2024
SI 2024/229	Water Industry (Special Administration) (England and Wales) Rules 2024
SI 2024/231	Sea Fisheries (Amendment) Regulations 2024
SI 2024/239	Misuse of Drugs and Misuse of Drugs (Designation) (England and Wales and Scotland) (Amendment) Regulations 2024 <i>(to be revoked by SI 2024/248, below)</i>
SI 2024/241	Oil and Gas Authority (Levy and Fees) Regulations 2024
SI 2024/246	Non-Domestic Rating (Consequential and Other Amendments) (England) Regulations 2024
SI 2024/248	Misuse of Drugs and Misuse of Drugs (Designation) (England and Wales and Scotland) (Amendment and Revocation) Regulations 2024

- SI 2024/262 Human Tissue Act 2004 (Supply of Information about Transplants) Regulations 2024
- SI 2024/271 National Health Service (Primary Dental Services and Dental Charges) (Amendment) Regulations 2024

APPENDIX 1: CORRESPONDENCE

Letter from the Rt Hon. Lord Hunt of Wirral MBE, Chair of the Secondary Legislation Scrutiny Committee, to Sir Matthew Rycroft KCMG CBE, Permanent Secretary at the Home Office

I am writing to you in my capacity as Chair of the House of Lords Secondary Legislation Scrutiny Committee, to express the Committee's concerns about the draft West Midlands Combined Authority (Transfer of Police and Crime Commissioner Functions) Order 2024 ("the West Midlands Order"), and in relation to wider concerns about the Home Office's provision of information supporting statutory instruments (SIs).

In relation to the West Midlands Order, on 6 December 2023 the Home Secretary wrote to the Mayor of the West Midlands confirming his decision that the functions of the Police and Crime Commissioner (PCC) should transfer to the Mayor following the May 2024 elections, and that the required secondary legislation would be laid before Parliament "shortly". Subsequently, however, on 20 December 2023, the Government launched a six-week consultation on the change. This was required by statute, a fact that officials in the Home Office told us had "come to light" in the meantime. We understand that this sequence of events has given rise to a Judicial Review.

The requirement to consult was contained in an Act that had received Royal Assent less than six weeks before the Minister's original decision, and the issue had been controversial during the passage of the bill through Parliament. That it was initially overlooked appears to indicate failings of some kind in your Department. Can you please tell us how the original Ministerial decision came to be taken prior to a statutory requirement being met? What steps are being taken to ensure that this cannot happen again?

The Committee's 15th Report (forthcoming) also raises a number of other issues relating to this draft Order, and a parallel one for South Yorkshire, about which I am writing to the responsible Minister, the Rt Hon. Chris Philp MP. However, the selectivity of the information in the Explanatory Memorandums, which failed to mention opposition to both proposals, was of particular concern. In that letter I also draw attention to the Committee's serious concerns about the Home Office's poor performance on information provision with its SIs. These repeated failures to meet an acceptable standard, both absolutely and relative to other departments, are evidenced in our Work of the Committee in Session 2022–23 report and in comments in our 1st, 4th, 7th, 8th and 12th Reports of the current session, as well as on these draft Orders. We would be interested to hear your plans to improve that performance.

28 February 2024

Letter from Sir Matthew Rycroft KCMG CBE, Permanent Secretary at the Home Office, to the Rt Hon. Lord Hunt of Wirral MBE, Chair of the Secondary Legislation Scrutiny Committee

Thank you for your letter of 28 February, regarding the Draft West Midlands Combined Authority (Transfer of Police and Crime Commissioner Functions) Order and concerns about the Home Office's delivery of statutory instruments.

I would like to assure you that I treat the delivery of secondary legislation by the Home Office with the utmost importance. The Senior Responsible Owner (SRO) for Statutory Instruments in the Home Office supports me in overseeing the Department's secondary legislation. I receive regular updates from them on the legislative programme and am assured that the SRO is working hard to enhance performance, particularly in relation to Explanatory Memoranda.

In relation to the West Midlands Order, I accept that it is the responsibility of officials to consider carefully the primary legislation under which Statutory Instruments are being prepared, and on which Ministers are being advised. However, in this case there are particular mitigating circumstances. It had not been the Government's intention for the Levelling Up Act to place new statutory tests and a consultation requirement on the power to transfer PCC functions to combined authority mayors. The Department for Levelling Up, Housing and Communities (DLUHC) had not informed the Home Office that Section 66 of the Levelling Up Act would place these new requirements on PCC transfers, as the wider impact of these changes had not been understood. Reassurance had also been given to the West Midlands Combined Authority by DLUHC that a consultation on a standalone transfer of PCC functions would not be required.

As soon as my officials became aware of the statutory requirements that section 66 of the Levelling-up and Regeneration Act 2023 had in fact inadvertently placed upon PCC transfers, the Home Secretary agreed to launch a public consultation on the proposed transfer and to retake his decision after having had due regard to its responses and after being satisfied that the statutory tests would be met by making the Order. I should be clear that no Order was laid before Parliament until this had been done. The Home Secretary was clear in all his communications with stakeholders, including the PCC, that he would make a decision based on these statutory requirements being met. The Home Secretary made a fresh decision whether to proceed with legislation after the public consultation had been concluded, which superseded the decision that he communicated on 6 December.

I understand you have also written to Minister Philp raising concerns about the supporting documentation for the Order. Minister Philp will respond to these points, but I would like to assure you that my Department is committed to driving and making improvements to explanatory material. We are also committed to making improvements of our shared investment and invested in enabling the important work of your Committee and parliamentary scrutiny more broadly and I am grateful to you for bringing them to my attention.

8 March 2024

Letter from the Rt Hon. Lord Hunt of Wirral MBE, Chair of the Secondary Legislation Scrutiny Committee, to the Rt Hon. Chris Philp MP, Minister of State at the Home Office

Draft West Midlands Combined Authority (Transfer of Police and Crime Commissioner Functions) Order 2024

Draft South Yorkshire Mayoral Combined Authority (Election of Mayor and Transfer of Police and Crime Commissioner Functions) Order 2024

I am writing to you in my capacity as Chair of the House of Lords Secondary Legislation Scrutiny Committee in relation to the above two instruments. I am also copying Lord Sharpe of Epsom in light of the points below about repeated instances of poor-quality explanatory material that we have seen accompanying many recent Home Office statutory instruments (SIs), as I understand that he is currently reviewing all SIs pending the appointment of a new SI Minister in place of Lord Murray of Blidworth.

Our 15th Report (forthcoming) draws attention to a number of defects in the material supporting these two draft Orders. First, in relation to the public consultations, the Explanatory Memorandums (EMs) do not mention the percentages agreeing and disagreeing with the proposals, which are a key part of the outcome of any consultation and relevant in these instances.

Second, in relation to the wider consultations, the EMs to both Orders report the views of the respective Mayors, both of whom consented to the change. The EM to the South Yorkshire Order also, helpfully, says that the leaders of the Constituent Authorities in the South Yorkshire Combined Authority, and the Police and Crime Commissioner (PCC) there, also signalled their agreement. However, there is no equivalent information in the EM for the West Midlands transfer. It is clear from a submission we received that the PCC opposes the transfer and that when the Combined Authority most recently expressed a view (albeit in 2019) a majority of members were also opposed. As we have reminded the Home Office before (for example, in our 38th Report of Session 2022-23), such selective reporting of the views of key consulted bodies is unacceptable: any EM should acknowledge and address significant concerns expressed about the policy.

Third, the Economic Notes published to accompany the instruments were not available until six days after the instruments were laid. We have made it clear on multiple occasions that, except in emergencies, all supporting explanatory material, including economic impact information, should be available at the time an instrument is laid. When we raised this with officials in your Department, we were told that “whilst there was a slight delay to publication of these notes, they were published as soon as possible, and within a week of laying the orders which we understand to be acceptable”. We are not aware of any justification for this statement, and we do not regard publishing material a week after the Order as “acceptable” as such delays inhibit scrutiny.

I would be grateful if you could explain the reasons why your Department took the approach to providing information that it did in these three areas, contrary to best practice.

Further, as recorded in Table 1 of our report *Work of the Committee in Session 2022–23*, in that parliamentary session we were critical of the Home Office’s information provision much more frequently than any other department. Based on comments in our 1st, 4th, 7th, 8th and 12th Reports of the current session, as well as on

these draft Orders, the situation does not appear to have improved in 2023–24. The Committee has, therefore, asked me to express its serious concern about the Home Office’s overall performance on information provision with SIs and to ask what actions are being taken to improve.

I am also writing in parallel to your Permanent Secretary about this overall poor performance, and also specifically to enquire, in relation to the West Midlands Order, how it came to be that a Ministerial decision was originally taken prior to a statutory requirement being met.

28 February 2024

Letter from the Rt Hon. Chris Philp MP, Minister of State at the Home Office, to the Rt. Hon. Lord Hunt of Wirral MBE, Chair of the Secondary Legislation Scrutiny Committee

Thank you for your letter of 28 February, regarding the Draft West Midlands Combined Authority (Transfer of Police and Crime Commissioner Functions) Order 2024 and the Draft South Yorkshire Mayoral Combined Authority (Election of Mayor and Transfer of Police and Crime Commissioner Functions) Order 2024 and your concern about the Home Office’s delivery of statutory instruments.

I would like to emphasise that I recognise the importance of secondary legislation as a key tool in delivering the Home Office’s priorities and am committed to ensuring it is effectively implemented.

Your letter outlines your concerns that the Explanatory Memorandums (EMs) for the West Midlands and South Yorkshire Orders do not report on the percentage of those who agreed or disagreed in their response to the public consultations. Both public consultations were run in line with the Cabinet Office’s published consultation principles guidance³ and their key objective was to obtain the particular views of those consulted, as opposed to the number of those who are for and against the transfer. Whilst those numbers were taken into account by the Home Secretary, the most useful aspect of the consultation for the purpose of making the decision was the particular views provided in the responses. The public consultation was not a referendum, and the Home Secretary made his decision with regard to its responses and once he was satisfied that the relevant statutory requirements were met.

In relation to views expressed locally on the transfers, when the Mayor of South Yorkshire wrote to the former Home Secretary on 31 May 2023 to indicate his support for the transfer of functions to the mayoralty, this letter included their signatures. It also contained the signature of the PCC for South Yorkshire. The signatures of the leaders of the constituent authorities and PCCs were referenced explicitly in the EM because the Mayor had included those signatures in his letter. The Mayor of the West Midlands’ formal letter on 2 November 2023 to the Home Secretary to express his support for a transfer of functions did not contain the signatures of the constituent authority leaders. That is why they were not referenced in the EM.

3 Cabinet Office, ‘Consultation principles: guidance’ (19 March 2018): <https://www.gov.uk/government/publications/consultation-principles-guidance> [accessed 12 March 2024].

The EMs do clearly highlight the views raised during the consultation process, including those in opposition to the transfer. It also signposts readers to the Government's responses to the consultations which have been published on Gov. UK, which go into further detail on those concerns raised by respondents to the consultation, and in turn, Government's responses to those concerns.

In relation to publication of the Economic Notes, it is important to note that wherever possible, Home Office strives to ensure that Economic Notes are published on the same date as instruments are laid. In exceptional circumstances the Home Office aims to publish as soon as possible and no later than within a week of laying, as was the case here. My officials were working closely with election funding leads cross-departmentally on these Notes, and through this engagement, new information was provided on the economic impacts of the transfers. The decision was made to delay publication of the Economic Notes so that this information could be incorporated to ensure accuracy.

On this occasion, it was more appropriate to delay publication in order to ensure that we could provide more comprehensive Economic Notes, rather than delay laying the Orders. It was crucial that I laid the Orders as soon as possible to provide the areas with as much advance notice as possible ahead of the May 2024 elections.

Officials in the Parliamentary and Legislative Strategy Team are working hard to drive improvements to explanatory material, including through a peer review process and by signposting officials to the necessary resources to make improvements. For example, the recently published Guide to Preparing EMs to Statutory Instruments.⁴ The team also undertake workshops to share best practice and support teams on an individual basis. The Senior Responsible Owner for SIs recognises that we need to continue to develop capability across the department and will consider what more officials can do, in consultation with your Clerks. I am also confident that a revised EM template will support the preparation of better- quality explanatory material. Officials have begun drafting EMs using the new template and I hope see improvement as we adjust to the new template.

I understand you have also written to the Department's Permanent Secretary to raise concerns about the way in which the Home Secretary made his original decision in December, and the Permanent Secretary will respond to these points. I would like to take this opportunity to thank you, the Committee, its clerk, and advisors for their consideration of the Home Office's secondary legislation programme. I am invested in enabling Parliament's scrutiny of our policies and we will continue to work with you on our provision of information to support that shared endeavour.

8 March 2024

⁴ Cabinet Office, 'Explanatory Memorandum: Template and Guidance' (2 January 2024): <https://www.gov.uk/government/publications/explanatory-memorandum-template-and-guidance> [accessed 12 March 2024].

APPENDIX 2: INTERESTS AND ATTENDANCE

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 12 March 2024 and included in this report, Members declared no interests.

Attendance:

The meeting was attended by Baroness Harris of Richmond, Lord Hunt of Wirral, Baroness Lea of Lymm, Baroness Randerson, Baroness Ritchie of Downpatrick, Lord Rowlands, Lord Russell of Liverpool and Lord Thomas of Cwmgiedd.