

MERITS OF STATUTORY INSTRUMENTS COMMITTEE:

GUIDANCE FOR DEPARTMENTS

INTRODUCTION

1. The Government have agreed to supply an Explanatory Memorandum (EM) for all instruments laid before Parliament that are subject to negative or affirmative resolution. Although the EM is for members of Parliament in general, it particularly helps the scrutiny Committees, such as the House of Lords Select Committee on the Merits of Statutory Instruments, in their work. Full information on how to complete an EM is given in Appendix H to the Cabinet Office's *Statutory Instrument Practice* (SIP)¹. **This guidance aims to give civil servants more information about the content that is of particular interest to the Merits Committee and to give some examples from past EMs that, in the Committee's view, illustrate good practice.**

HOW THE COMMITTEE ON THE MERITS OF STATUTORY INSTRUMENTS WORKS

2. The Committee has eleven members and its Chairman is Lord Filkin. It is supported by a Clerk, a Committee Administrator and two Advisers. The contact details for the Committee are at the end of this note.
3. The Committee meets weekly in term time, on Tuesday afternoons, and its reports are usually available to the House in electronic form on Wednesday evening² and published on the internet and in hard copy on Thursday.³ Instruments laid on any day of week 1 will usually be considered by the Committee on the Tuesday of week 3, i.e. within 12-15 days of laying.
4. Unlike the Joint Committee on Statutory Instruments (JCSI), the Merits Committee does not have a scrutiny reserve, so the Government may schedule a debate to approve an instrument whether or not the Committee has reported. By convention however, the Government seek to avoid this.
5. The Committee's job is to draw significant affirmative and negative SIs⁴ to the attention of the House if they meet one of the following tests:
 - (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
 - (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;

¹ The most recent version is in Circular 3 (08) see <http://www.opsi.gov.uk/si/sip-circulars/sip-circ03-2008.pdf>

² Members of the House and anyone regularly dealing with secondary legislation may subscribe by emailing merits@parliament.uk.

³ The Stationery Office publishes the Committee's reports in hardcopy and on the website http://www.parliament.uk/parliamentary_committees/merits/merits_reports_and_publications.cfm

⁴ The term "SI" is used throughout this guidance for convenience, but the Committee examines almost every instrument and draft instrument subject to parliamentary procedure, whether or not a Statutory Instrument. This includes the majority of statutory codes of practice, orders, regulations and rules. There are some minor exceptions, largely where another, more specialised, Committee will be considering the instrument: these exceptions are listed in brief in para 46 of this note and in full in our terms of reference.

- (c) that it may inappropriately implement European Union legislation;
- (d) that it may imperfectly achieve its policy objectives.

When the Committee draws an instrument to the attention of the House it may be in neutral terms and simply because the policy is topical but, particularly when reporting an instrument on grounds (b) to (d), the report may suggest that it is deficient in some aspect and propose questions which the House may wish to pursue.

6. The Committee also mentions in its reports “*other instruments of interest*”. Paragraphs published in that section inform the House about SIs, often signalling a significant policy development such as the implementation of a contentious element of an Act but without implying that the House needs to take action. Such paragraphs may also commend or criticise departmental practice in relation to process, for example, on consultation or consolidation.
7. When considering an instrument, the Committee will often seek further information from the Government before clearing or reporting it. Depending on its importance, the information request may be made at official level or by letter from Chairman to Minister. When the Advisers seek further information they will initially approach the official named as the contact point in each EM but, due to the scrutiny timetable, they are forced to set short deadlines for response. **Where there are significant concerns the Committee may ask for oral evidence from either officials or the Minister. A good EM can prevent this, so this guidance sets out the Committee’s regular concerns and some examples of good practice.**

What happens after a Report?

8. The Committee clears 90% of SIs without comment. When the Committee reports an SI, any member of the House may use that report to engage with the SI, often by a motion for debate, or an oral or written question.

Government Responses

9. There is no need for the Government to respond to Reports unless the Committee explicitly requests such a response by separate letter. Such letters may be either at official or ministerial level and will indicate a deadline. Any such correspondence may be published for the benefit of the House.

LAYING INSTRUMENTS: FLOW MANAGEMENT

10. Ministers may lay SIs before Parliament at any time⁵, but can adversely affect the progress of scrutiny if they lay them at a time of peak activity, for example, just before the end of the calendar or financial year, a common commencement date (CCD) or recess. The Government’s guidance is that “*working to a CCD timetable does not prevent you from laying instruments throughout the year, thereby allowing time for parliamentary scrutiny and, if appropriate, debate, well in advance of commencement*”⁶.

⁵ Subject to the rules set out in the *Companion to the Standing Orders of the House of Lords*, 2007, paragraphs 3.61-3.67.

⁶ Small Business Service / Better Regulation Executive, *Common Commencement Dates: guidance for coordinators and officials*, paragraph 12.

EXPLANATORY MEMORANDA

11. The memorandum should follow the format set out in Appendix H to Statutory Instrument Practice. All the headings referred to in this note relate to Appendix H, as does the electronic EM template provided on the OPSI website. What this guidance adds is some recent examples of good practice that illustrate Appendix H's requirements. In addition, this Committee's officials tell Departments about EMs which the Committee commend and so Parliamentary Clerks should be able to provide examples of good practice that relate to your subject area.

Purpose of an EM

12. The purpose of the EM is to provide members of Parliament with a plain English, free-standing, explanation of the effect of the instrument and why it is necessary. It is not aimed at lawyers, but to help people who may know nothing about the subject quickly to gain an understanding of the SI's intent and purpose. Legal explanations of the changes are already given in the Explanatory Note which forms part of the instrument itself. Acronyms and jargon (*eg SIPP, NOx, credit repair*) should be explained or, better, avoided.

Single memorandum for linked instruments

13. It can be helpful to produce a single memorandum for a group of linked SIs. This prevents unnecessary duplication of common background and makes sure that the reader is aware of the links between instruments. It may be helpful to explain (usually in the policy section) the special features of each SI and how it contributes to the overall policy objective. A copy of the group EM should be attached to each of the individual SIs to which it relates. Linked SIs should be laid on the same day and numbered sequentially.
14. Where a series of SIs is to be spread over several weeks or months each item or group will need its own EM. Each EM should explain under heading 4 *Legislative Content* that it is linked to an earlier SI or that later SIs will follow.

Description — EM heading 2

15. Plain English should be used to explain to the lay reader **in two or three sentences** what the instrument does and why. This is to help the reader to identify what the instrument is about and whether it is the item they are looking for. Many readers will be using on-line search engines, so it is helpful if the description uses the common key words that they might search for.

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.

Matters of special interest to the JCSI — EM heading 3*Timing*

16. Both the Merits Committee and the JCSI have an interest in SIs that breach the **21-day rule** (which states that an instrument should not be laid before Parliament less than 21 days before it comes into force). If the instrument breaches the rule, the EM should explain why the policy requires such urgent action, why it could not be avoided, and what the impact of delaying the legislation to meet the rule would be.
17. Similarly, if the instrument came into force before it was laid, the EM should explain why. In this case Departments are also required to send a letter to the Speaker of each House, with a copy to the Chairman of the Merits Committee to explain the circumstances (see section 4(1) of the Statutory Instruments Act 1946).
18. The Merits Committee's main concern will be about practical consequences: for example, whether those on whom the obligation falls, or those who have to enforce the policy, have been given sufficient information within the time allowed. There are circumstances, such as tax changes, or public health measures where bringing a measure in with little notice is justifiable – but the Committee needs to have the circumstances explained.

Legislative background — EM heading 4

19. The legal power under which the instrument is made will be clear from the SI itself and there is no need to mention that power here unless, for example, 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 – that is normally a feature of the Explanatory Note at the end of the SI.
20. Use this section to explain **why** the instrument is being made and to set it in context: this is usually the best place to explain if this instrument forms part of a group or a sequence of SIs that will appear over a few weeks or months, for example to implement a new Act. Sometimes a change to the legislation is required because a legal case has challenged the existing interpretation of it, where relevant you should give a brief explanation of the judgment here.
21. Legislation relating to European Union obligations should include a summary of the scrutiny history and a Transposition Note. Please explain if there have been any problems in interpreting the EU legislation and transposing it into British law.
22. If the instrument meets any specific undertakings that have been given to Parliament, whether in the course of a parliamentary debate, question or Committee appearance, please mention those here together with the relevant Hansard or report reference.

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.

Extent — EM heading 5

23. It is helpful to indicate when a SI simply extends the geographical coverage of legislation which already exists in another part of the United Kingdom. In such cases the Committee will have already discussed any new policy issues when the first order came through.

European Convention on Human Rights – EM heading 6

24. Formal Government policy is that this section is only required to be completed for affirmative instruments and negative instruments that amend primary legislation, however the Committee sees no harm in Departments giving the same reassurance for other instruments. It is very rare for a Minister to have to qualify the ECHR statement but, when it is necessary to say that the instrument, or parts of it, does not comply with the European Convention on Human Rights, a clear explanation should be given.

Policy Background — EM heading 7

What is being done and why

25. Although brief, the explanation of the policy and its background should be addressed to the ordinary reader, who should not be expected to have any previous experience of the subject. For example, do not say “*this order extends the XYZ scheme*” without explaining briefly what the XYZ scheme does.
26. The EM's explanation of the policy and purpose of the SI is meant to be a succinct, free-standing document that can be fully understood without having to look up other documents. Where the changes are being made following a review or White Paper, refer to its title and include a link to the report that led to law being changed, but remember to give the gist of the White Paper proposal and the outcome in couple of sentences.
27. This section should cover the following elements:
- the policy objectives of the parent Act/Directive and how the instrument fulfils them;
 - the size and nature of the problem it is addressing;
 - the level of public interest in the policy (for example from the response to consultation if undertaken, or from media attention);
 - whether the change is politically or legally important.
28. The memorandum should also make clear why the Government need to legislate and what other avenues of attaining the desired objective (e.g. self-regulation through a voluntary code of practice) were explored and why they were rejected.

Closing off questions

29. Sometimes it is helpful to try and put yourself in the reader's position. 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 arise from follow-up letters or Parliamentary questions. Such questions often arise when an instrument is one of a series – for example if this SI sets up a licensing system but a later one will set the fee: it would be helpful to let the reader know that the fee is currently subject to consultation and those regulations will follow in 3 months.

For example: Draft Code 10: Modification of Subsisting Rights (Pensions Regulator, laid June 2006) EM para 4.3

It is intended to bring the Code of Practice into effect as soon as possible, as sections 67 to 67(I) 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(I) 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.

Miscellaneous amendments

30. For “Miscellaneous amendments” SIs, the memorandum 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 e.g. “regulations 4(a), 5(b) and 6(c) amend the definition of “incapacity” because...”

Consolidation

31. Where an instrument amends another instrument, particularly if it is not for the first time, the memorandum should indicate the department's intentions and timescale for consolidation. Although there may be good reasons for it happening at a later date, the Committee will tend to be unsympathetic if there is no such plan. If an informal consolidated text is available online to the public free of charge⁷, that should be stated in the memorandum.

For example: National Health Service (Pension Scheme and Compensation for Premature Retirement) Amendment Regulations SI 2006 EM para 7.9

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.

⁷ As, for example, with the Home Office Immigration Rules website <http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/> or the DWP's Law on Social Security website (the Blue Books) <http://www.dwp.gov.uk/advisers/docs/lawvols/bluevol/>

Consultation outcome — EM heading 8

32. The Committee considers that proper consultation is a crucial part of the process of getting an instrument right before it is laid. As the House cannot amend secondary legislation, it is important that each instrument should have been exposed to those who will be affected by its provisions and its suitability reviewed in the light of their reactions before it is laid before Parliament.
33. The EM should 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 justification of why the department did or did not make changes to its policy in the light of the opinions expressed. **A link to the full analysis on the department's website is a useful supplement, but is not a substitute for summarising the conclusions in the EM itself.** A full analysis should be available on the Departmental website at the time the instrument is laid before Parliament.

For example: **The 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. 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 smokefree 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/ResponsesToConsultations/fs/en>

34. Where an instrument has implications for members of the public, particularly if the legislation imposes fines or other penalties, the Committee looks closely for evidence of how they or representative organisations that might reasonably be considered to represent them were involved in the formulation of the policy.

Guidance — EM heading 9

35. The memorandum should set out what guidance the department or others⁸ is providing to stakeholders to explain the new obligation to ensure that it is fulfilled. This is especially important where a regulation is legally complex, for example where legislation has been amended several times or it implements a European obligation by cross-reference to European instruments.

For example: **NHS (Pension Scheme and Compensation for Premature Retirement) Amendment Regulations SI 2006/2919 EM para 7.10**

⁸ E.g. trade organisations or professional bodies with which the Government liaises.

Guidance on the new redundancy package will be incorporated into the NHS Terms and Conditions Handbook issued by the NHS Employers Organisation and available to all NHS management and staff. NHS Employers have also provided a series of national seminars for NHS Managers. In addition the Pensions Division of the NHS Business Services Authority will provide guidance through their member booklets and website member suite.

Sanctions

36. There may need to be different versions of the guidance directed at enforcers and the public. Particularly where the legislation imposes a penalty or sanction there needs to be a clear statement of what behaviour will result in the penalty or fine being imposed. While it is acceptable for the SI to cross-refer to a long list of numbered European Directives, the EM and/or guidance needs to make a plain English explanation available to the groups affected so that they will know, that if they do x, the consequences will be y.
37. Where the guidance is essential to understanding how the instrument will operate, but is not itself subject to Parliamentary scrutiny, please send a copy to the libraries of both Houses and 2 copies to the Merits Committee at the same time as the SI is laid.

Impact — EM heading 10

38. Where an Impact Assessment (IA) has been prepared then **this should be attached as an Annex** (do not simply include a weblink). You must make sure that the IA is the Final version and has been signed by a Minister. There is no need to duplicate the information but it is helpful to include a brief summary in the EM:

For example:

Implementation of the new licensing system will require 20 new inspectors to be employed at an additional cost of £15m over the next 10 years.

Remember that an IA is now required for public sector costs. If the legislation will need more civil servants or infrastructure to make it work, these costs should be set out.

39. If you are recycling the IA prepared for an Act which this instrument helps to implement, please **only include the relevant extracts** and confirm in the EM that the figures are still accurate.

Regulating Small Business - EM heading 11

40. This is a recent addition to the EM. It is mainly of interest to DBERR but represents an overarching Government policy that the position of small businesses should have special consideration. The Committee will expect to see a brief explanation of how Departments have complied with this policy requirement.

Monitoring and review - EM heading 12

41. What are the success criteria for this instrument? Where possible please define the intended outcome in measurable terms.

For example:

The changes in the fee structure aim to achieve full cost recovery of the process of issuing and administering this licence by April 2010

or

The changes set out in this instrument aim to reduce identity theft by 10% over the next 3 years.

42. This section is of particular interest to the Merits Committee since their terms of reference require them to consider whether an instrument imperfectly achieves its policy objective. To do this they need a clear statement of the Government's policy objective and what it is aiming to achieve.
43. In this section you should also explain when and how the legislation will be reviewed to see whether these targets have been achieved or what factors have affected the intended outcome.

For example:

The outcome will be subject to internal review after 12 months and the legislation may be amended accordingly

or

The University of London has conducted a benchmark study and will review the position again in 3 years; a report will be published towards the end of 2012

Contact — EM heading 13

44. This is the name and telephone number of a person who can provide additional information on the instrument if required. **Please make sure that the contact is actually there for at least three weeks after the instrument has been laid** as, outside of Recess, the Merits Committee generally considers an instrument within 12-15 days of its being laid, but further questions may arise in the course of the Committee meeting.

When and how should the Memorandum be delivered?

45. As set out in SIP, the memorandum should be laid before the House at the same time as the instrument itself. **15 double-sided** copies of the instrument collated with the EM (and, where applicable, the IA) should be delivered to the Merits Committee secretariat on the day of laying. Please also include copies of any necessary Codes or guidance as described above.

What instruments does the Committee not examine?

46. There is no need to send the Committee SIs that are:
- laid before the House of Commons only;
 - a remedial order, or draft remedial order, under section 10 of the Human Rights Act 1998;
 - a draft order under the Legislative and Regulatory Reform Act 2006;
 - a Measure under the Church of England Assembly (Powers) Act 1919 or instrument made under a Measure;

- not subject to parliamentary procedure (unless these are essential to the understanding of an instrument that is subject to procedure: for example when the SI brings a code into force but the code itself is not subject to parliamentary scrutiny)

COMMITTEE CONTACT DETAILS

47. **Address:** Select Committee on the Merits of Statutory Instruments
Delegated Legislation Office
Room 25, First Floor, West Front
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London SW1A 0PW
- Telephone:** 020-7219 8821 **Fax:** 020-7219 2571
- Email:** merits@parliament.uk
- Webpage:** www.parliament.uk/parliamentary_committees/merits.cfm
48. The Committee Administrator, to whom all paperwork should be sent, at the address given above, is Russell Taylor. The Committee's Advisers, who are likely to contact you for further information, divide the responsibility for Government departments as follows:

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