Secondary Legislation Scrutiny Committee

Oral evidence: Quality of information provided in support of secondary legislation

Tuesday 12 September 2017
4 pm

Watch the meeting

Members present: Lord Trefgarne (The Chairman); Lord Faulkner of Worcester; Baroness Finn; Baroness Gould of Potternewton; Lord Janvrin; Lord Kirkwood of Kirkhope; Baroness O’Loan; Lord Sherbourne of Didsbury; Baroness Watkins of Tavistock.

Evidence Session No. N/A Heard in Public Questions 1 - 13

Witnesses

Examination of witnesses

Elizabeth Gardiner, Jonathan Jones, and Sir Chris Wormald.

Q1  **The Chairman:** My Lords, my Ladies, ladies and gentlemen, we are now in public session. Thank you very much for coming. I am asked to say that in case of a fire there will be a voice-activated alarm. Any bells are Division bells. Should there be an incident, please follow the clerk's instructions. May I now welcome our witnesses? Elizabeth Gardiner, Jonathan Jones and Sir Chris Wormald, thank you very much. Chris, you—and the others, indeed—were here a year ago nearly.

**Sir Chris Wormald:** Yes, all three.

**The Chairman:** You have been knighted, no less, since then.

**Sir Chris Wormald:** Since then, yes.

**The Chairman:** How much your appearance here contributed to that would not be for me to say.

**Sir Chris Wormald:** If it did, I am very grateful to the Committee.

**The Chairman:** This is a formal evidence-taking session on the record and is being webcast live on audio only. A verbatim note is being taken, which will be put on the public record in printed form and on the parliamentary website. We will, of course, send a copy of the transcript for amendment of any errors. I wonder if any members now have any special interests to declare. No. All right. Thank you very much. Let us now get going and thank you again very much for coming. Would you like to make an opening statement? If you would, you are most welcome to do so.

**Sir Chris Wormald:** If it is helpful to the Committee, we can set out what our overall position is. Essentially, we think we have done all the things that we promised to do when we came to this Committee a year ago. We have made a considerable amount of progress around our three main objectives, which I will come back to, but we recognise that we still have an awful lot more to do before the results of all those improvements show up in the kind of consistent improvement in the information around statutory instruments that both we and the Committee, and/or my colleague permanent secretaries, all want to see.

**The Chairman:** This is work in progress. We think we have got a lot done and have done a lot of the right things, but we are not complacent at all about the progress that is still needed before we get to where we want to go.

We set out seven actions when we were here last time and we think we have done them all, which we might come back to. You can group them into three. There is a set of things around awareness and whether senior people take this issue as seriously as they should, and we are pretty confident that around Government people now do and there is much more senior recognition. We can come back to what we have been doing around that.
There is a set of things around capacity, particularly training, development and guidance, both centrally and at departmental level, where we have begun the process. We have a lot of good things in place, but we have a lot to do before it is universal.

Then there is a set of process things, both at departmental level and centrally, about how we check the material that eventually comes to Parliament. We have made some significant changes to things like the PBL process that happens before things come out of Government, which I or my colleagues can describe, and changes at departmental level. We think we have the right processes in place, but again we have to demonstrate to you and everyone that all those processes are working.

Those are the three big areas we have been addressing over the last year. As I say, that is our overall position, but I am sure you will want to question us on all those things. Do you want to add a bit about the SI hub, Jonathan?

Jonathan Jones: Last time we came I told you of a relatively new initiative in the Government legal department, which was the establishment of a specialist SI drafting hub. That has now had its first anniversary and is confirmed as a fixture in my department, and we have expanded it slightly.

The purpose of that, obviously, was to provide a core centre of excellence for the actual drafting of the instruments: to do some of the most difficult drafting and to act as a source of training, guidance and other supporting material for all the other drafting that goes on around government. We think that is making a real difference. It is doing what Chris describes. It is increasing the visible ownership and importance we are attaching to SI drafting as a craft, but it is also helping to raise standards and awareness across that bit of my department that does the drafting. That is now a fixture.

It is still quite new. It does not mean, as Chris has said, that we have cracked all these things, but it is making an important contribution to the quality of drafting and levels of awareness.

The Chairman: Thank you. What you have largely done is answer the question that I was going to ask you initially. Thank you very much for that. The SI hub, which you have referred to, has been in place a year or so now.

Jonathan Jones: A year or so, yes.

The Chairman: It is doing a good job.

Jonathan Jones: It is doing a good job.

The Chairman: How big is it?

Jonathan Jones: It was about 20 lawyers and we are increasing that marginally, so about 25 lawyers. It is not a huge unit, but the ambition was always that it would do a proportion—about 20%—of the SI drafting, and that it is doing. Equally important, as I have said, is the wider work
of training, guidance and spreading the expertise across the wider drafting community, so you have a core hub that is the centre of excellence and then that excellence is being spread.

The Chairman: They will presumably need to become bigger still as Brexit descends upon us.

Jonathan Jones: We are enlarging it slightly and we have increased the leadership of the hub. Again, a lot of the drafting of the individual instruments will be done not in the hub. It will do some, but much of the drafting will be done in the departmental legal teams. What that means is it becomes ever more important that you have a source of central guidance and co-ordination to ensure that that work is indeed co-ordinated. That is the plan.

Q2 Lord Faulkner of Worcester: I am going to ask about explanatory memoranda. In 2015-16 this Committee reported 13 SIs on the grounds that insufficient information was provided alongside the EM, and it asked for 39 EMs, or 5.5% of all EMs seen, to be replaced because the original EM was deficient. In 2016-17 we reported seven instruments for insufficient information, but 47 EMs, or 7.1%, were replaced because of deficiencies. First, would you agree that these higher figures for 2016-17 are disappointing?

Sir Chris Wormald: It is disappointing if any need to be replaced on the grounds that you say. The overall percentage of reported SIs fell between those two years. The figure I have is that it went from 9.4% to 7.7%. That is not to say that that is good enough, for the reasons I was describing before. As to the heart of your question—do we want to see those numbers come down?—yes, we do. I do not think there is any difference between us and the Committee on the objective here.

Lord Faulkner of Worcester: Okay. Is the review panel, which was mentioned by the Minister in his annexe at point 7, now in place and how will the panel’s findings be implemented?

Sir Chris Wormald: It is being established this month. This is something we changed from what we said at the Committee last year. We started with a process that we suggested last year, whereby the three of us selected a number of statutory instruments and reviewed them ourselves, including the explanatory memoranda et cetera. My colleagues might want to comment on what they found. It was an interesting exercise and it certainly confirmed for us the points that the Committee made last year about how explanatory some of the explanatory memoranda were, so it undoubtedly clarified what some of the challenges were.

What we found is, bluntly, the three of us, given all our other jobs, could not do enough to be making a difference. We were reviewing really quite a small number of EMs and SIs, which is why we then developed this replacement thing of having a bigger panel drawn across departments that could look at a much wider range of SIs. We have the nominations of the people to be on the panel. It will be established this month, and the idea
is that it looks at 5% of all SIs, which is a much bigger percentage than we could do.

Q3 Lord Kirkwood of Kirkhope: Does everyone on your panel do 5% of the SIs?

Sir Chris Wormald: No, the panel will do 5%.

Lord Kirkwood of Kirkhope: Collectively, not individually.

Sir Chris Wormald: Yes, it will do one in 20. It is an important point. We have two levels of activity and I am sure this will come out a lot during the hearing. We have the things we do collectively across government and then there is what an individual department does. We do not want to replicate or replace what an individual department does. The final responsibility that an SI is in good shape, that the policy and the explanatory memorandum are in good shape, has to remain that of the Minister, the permanent secretary and the senior officials of that department.

We want to do a check across the top that allows us to tell whether departments are doing what they should be doing and, when you look across the piece, what lessons we can pull out and push back to departments and into training et cetera. We positively do not want to be the people who check every SI, because, as I say, you want responsibility to remain with that set of Ministers and that set of officials. The panel will look at about 5% of SIs—that is the plan—and that should get going basically from now. Do you want to add anything on that?

Jonathan Jones: On the experience of looking at the material, we recognise, as Chris has said, some of the concerns that the Committee has raised about quality, the comprehensibility of memoranda and the use of jargon, because we approach them as you will do—typically as, we hope, intelligent but non-expert readers. We found we were bumping up against exactly those problems: that they were written by subject experts, often with too much jargon and assuming too much prior knowledge, and therefore not really very explanatory.

Lord Faulkner of Worcester: They had probably rather too many acronyms too.

Sir Chris Wormald: They had far too many acronyms, yes.

Jonathan Jones: Even with the relatively small number we were able to look at, we recognised that as a problem. That is quite easily curable, because it is not that people were not putting in effort in a way; they were just not approaching these things with the right mind-set. We like to think it will not be more effort to draft a better, more explanatory SI than it is to draft one that may be just as long but less comprehensible. That is our aim.

Q4 Baroness O’Loan: Sir Chris, you said this review panel is established now.

Sir Chris Wormald: It is being established.
Baroness O’Loan: It is being established. Have members been appointed?

Sir Chris Wormald: Yes. Departments are nominating members, so we should have a member from each main department that does SIs. They will then meet, and, as I say, they will select about 5% of all SIs, which they will review and then will feed back to departments. As I say, the idea is that we are checking whether departments are doing what they are supposed to be doing and what lessons we should be feeding back, as opposed to that being a gateway for all SIs. That is not what we are aiming at.

Baroness O’Loan: Does this review panel have terms of reference?

Sir Chris Wormald: It does. I am sure we can share the terms of reference for the review panel.

Baroness O’Loan: That would be very helpful.

The Chairman: We would welcome that.

Baroness O’Loan: Can I ask just one more, Lord Chairman? Just to be very clear, because it has been a year, I know that the three of you have reviewed individual instruments and memoranda—that is what you are saying—but probably, given your work, not a lot of them.

Sir Chris Wormald: No—as I say, that was the challenge. What we promised when we were here last time was that the three of us would do that. We had a go and, as I say, we were not looking at enough, which is why we have created this new process.

Baroness O’Loan: When would you expect the first meeting of this review panel to occur?

Sir Chris Wormald: Next month.

Baroness O’Loan: October.

Sir Chris Wormald: Yes. There is a second process change that we have made around how the PBL Committee works, which goes with the review panel. Would it be worth us describing that at this point?

The Chairman: No. Lady Finn has a question.

Q5 Baroness Finn: It has taken a bit of time to set it up. Will the names of the people who are responsible and nominated to sit on it be in the public domain—maybe put on GOV.UK—and will there be regular updates on what they are looking at and finding that is being fed back and incorporated?

Sir Chris Wormald: I think that is the plan. I will absolutely confirm afterwards, but I do not see why we should not. That is only one bit of the central architecture that we put in, and I would not want to say that that panel is the whole answer.
Of the other big changes that we have made since the last time we were here, one of the biggest is that every department has now appointed a senior responsible owner for the SI process, so there is somebody senior in every department who has a responsibility for the SI process within their departments. If I take the Department of Health as an example, the senior responsible owner is my Director of Strategy, so it is the job of one of my very senior staff to look across everything the department is doing and ask themselves, “Is it good enough?”—as well as the ownership of individual SIs by the policy leads.

As I say, we have also changed how the Cabinet Committee that oversees legislation works in relation to secondary legislation. Elizabeth, do you want to describe what we have done?

Elizabeth Gardiner: In addition to the senior responsible owner, who is not just responsible for process but has accountability for quality within the department, there is also in each department a Minister who is leading on their SI programme. Attached to that, the Parliamentary Business and Legislation Committee, who traditionally just looked at the legislative programme for primary legislation in the House, are now taking an overview of all secondary legislation across Government.

That is quite a step change from anything we have done up until now. Traditionally, SIs have been managed within a department and they have looked at their programme within the department. Now we are looking at the programme across government, and that is partly to iron out some of the concerns about peaks and troughs, which I know have been raised by this Committee, to try to make sure we have more of a flow, so that we understand what is coming and when, and we can make sure that it is on time and we have an across-the-board view of the quality of what is coming and the accompanying documents. The Committee will be looking at managing that process and prioritising the instruments to make sure they come through at the right time and that we get the programme through.

Sir Chris Wormald: Yes. That should ensure that in future, we are managing the secondary legislation programme much more like the way we have always managed the primary legislation programme. That is what we are working towards. If you put those three things together—a Cabinet Committee focused on this, senior responsible owners in each department and then our review panel—that gives us a much clearer structure for addressing the questions that this Committee has rightly raised. It gives us a much better process, and if it all works it will also ensure that we have much more senior people who are focused on this as an important issue, which I think we all agreed last time was one of the things we need to achieve.

Lord Sherbourne of Didsbury: That brings me naturally on to the question I want to raise, which is about training. You talked about the structure, the architecture and the system. What matters is whether the people who are operating that structure can do their job. In our most recent end-of-session report, we recommended that civil servants across all grades should be trained in producing high-quality explanatory
memoranda, particularly senior officials who are charged with approving EMs.

Could I ask you two questions? First, no doubt a lot of things are in place in putting in training systems, but how is that training going? Is it going fast enough? Is it going well enough or are there problems in proceeding with that? What is going well? What is not going quite so well? Secondly, what percentage of those attending the training are the senior grades that would sign off the EM?

Sir Chris Wormald: On the training, the clerks of this Committee have helped us design it and indeed deliver some parts of the training, so it has been a joint enterprise between us and Parliament, which is very encouraging. So far we have run it twice. We have been focusing on those departments that have some of the biggest challenges with SIs. So far 81 people have attended those training sessions, and the feedback from them has been excellent so far. We think we have or have developed, with your assistance, a really good product.

The idea is we will train about 300 people a year on that central training. The next run is on Friday. We expect to have 70 people on it. That is what we are doing at the central level. Do we have a grade breakdown of who has been on it? We will go away and check on that. I know a number of the senior responsible officers I have mentioned have been on the training. That is one level of training, which we are doing centrally.

Everything we do, as I have said, fits into either the load of stuff we do centrally or what we ask departments to do. We have asked all departments to do things within their own department on this issue, and we have surveyed all departments. While it is difficult to get numbers trained, every department is doing a number of things within its own organisation to up their skills in this area, and that will supplement what we do centrally. That is basically what we are doing on the policy side. Then on the lawyers side—

Lord Sherbourne of Didsbury: I am sorry to interrupt. Who are the people who are doing the training?

Sir Chris Wormald: The training is organised by Civil Service Learning, who are my colleagues behind me. The person who has been organising it is seconded from Parliament to Civil Service Learning and has been working for committees. Then, as I say, clerks of this Committee have been helping with the training as well. Then we have senior policymakers who deliver some of the other bits of training. It is all done in-house, basically, hopefully by people drawn from both Parliament and departments that are good at this. The guidance we use for departments and that we are promulgating around the Civil Service is the guidance from this Committee, so hopefully we are feeding back everything you tell us about what you find directly into our training. That is certainly the idea of it all.

As I say, we think we have a really good product. I could not hand on heart say we have seen the results of that playing out in SIs and EMs yet, but all the signs are that we have a good product that people like and that appears
to be making a difference. That is, as I say, on the policy side. On the lawyers side, Jonathan?

Jonathan Jones: The training for the lawyers in the drafting of the instruments is mainly co-ordinated by the hub. We have a three-day core drafting course for the lawyers for whom drafting is a large part of their diet. The hub has recently developed some new forms of training. We now have an introductory course. We may come on to this later. We are recruiting and bringing in more lawyers and we need to give them a quick introductory training course, along with some top-up, and more advanced training for those who have been doing it a while but need their skills refreshed.

There is a suite of training products for lawyers, and in June this year we had for the first time an SI drafting conference. We got together about 100 of the drafters and it was a very stimulating occasion. Again, it is a sign of how this is now taken seriously as a skill.

The Chairman: 100 drafters—mercy.

Jonathan Jones: It is a thought to conjure with, but they had a great day.

Lord Kirkwood of Kirkhope: Is the 300 target for the trainees per year a key performance indicator that the Committee could rely on in future?

Sir Chris Wormald: We can certainly report to you on how many are being trained and what the feedback is. Our aim is 300 a year.

Baroness Watkins of Tavistock: To some extent half of my question about new entrants has been answered, because clearly we are doing remedial education that you would hope new entrants would not need if we got it right. I wanted to understand how many the 300 represents of the people involved, because I do not know whether this is 10% you are reaching or 50%.

Sir Chris Wormald: I will be brutally honest: it is very difficult to tell. We know how many SIs there are a year. Trying to get to a number of how many individual civil servants are in some way or other involved with those SIs is really difficult. However, given the number of SIs we have a year—600 or 700 across 18 departments—if we are doing 300 a year we will be getting quite a lot of people in each department, supplemented by what departments are doing themselves. I am afraid I honestly could not give you a percentage because we do not know.

Baroness Watkins of Tavistock: How many people do you employ?

Sir Chris Wormald: Do you mean in total in the Civil Service?

Baroness Watkins of Tavistock: Yes—in your three departments.

Sir Chris Wormald: If you take the Department of Health, we employ in total about 1,600 people.

Baroness Watkins of Tavistock: Yes, so it is quite a small percentage.
**Sir Chris Wormald:** Yes, but if you look at what civil servants do, the drafting of SIs is a very small percentage of what we would do. If you look on the lawyer side, it is about 100 lawyers across the whole of government who write all the SIs.

**Jonathan Jones:** That is the core. That number may have to grow as we tackle the Brexit SIs. Just to be clear, we would expect the legal training to cover every lawyer that has SI drafting. It is easier to get your arms around that number than it is Chris’s problem. Regarding the policy officials who might be involved in some respects in the preparation of the policy around a statutory instrument, there, the numbers are more difficult.

**Lord Janvrin:** You mentioned guidance just now. Could I come on to guidance? I think it is point 3 of the seven-point improvement plan. The Minister said in his letter that new guidance for the policy professions on the preparation of explanatory memoranda will be ready in the autumn. Can I ask you three questions about that? First, why are we still waiting for the guidance? Secondly, could you give us an indication of the key messages that will be in that guidance? How are you going to ensure that that guidance is taken up consistently across departments?

**Sir Chris Wormald:** As I said before, the main guidance we are using with departments and promoting is the one produced by this Committee on publishing EMs. We have all read it; it is very good. Our issue is less the quality of the guidance; it is, as you say, the take-up and people taking these issues seriously enough.

The first thing we have done around that is raise the issue with all our permanent secretary colleagues. We wrote round on this issue following the last hearing, and then we discussed it again very recently with all permanent secretaries. Hopefully every department has the message that this is a really important thing and we have to follow the guidance. Secondly, it is the basis of what the senior responsible officers that we mentioned in each department use. Thirdly, we use it in training, both for the general Civil Service training we have described and then the things that departments do themselves. The issue comes back to what we have just discussed: how we get all this in the mainstream of what civil servants do.

The messages are all the messages of this Committee. In a way, they are not very complicated. One, you have to take this stuff really seriously, as seriously as you take primary legislation. Two, certainly in terms of the policy side—the explanatory memoranda et cetera—if you have made good policy in the first place, you will find providing Parliament with what it needs quite straightforward. You should not be making policy where you do not know the impact. You should not be making policy where you do not know how it will play out or on what timetable—all the things the Committee tends to ask. If you have made your policy really rigorously in the first place, doing this bit will be easy.

The third point, which Jonathan raised earlier, is that when you are writing the stuff you have to get yourself out of the expert mindset and into the
“how does an intelligent but lay reader understand what you are doing?” mindset. Those are the three big messages we have been pushing across government, both via the guidance and via the training that we were just discussing.

This always comes out whenever I describe these things. They are not in themselves complicated; they are not difficult messages. The question is more one of ensuring everyone takes these seriously enough, alongside all the other things they do in their day job, if you see what I mean. Is there anything you would like to add?

Q9 Baroness Finn: I am interested in the clarity of the guidance. Is it published on the GOV.UK website or an equivalent, so that all departments know what they are following?

Sir Chris Wormald: Yes, it is all published.

Baroness Finn: It is perfectly clear, because you are drafting a new section that is going to be a quick guide rather than a—

Sir Chris Wormald: Yes, but, as I say, there were very clear messages coming out of this Committee of what you expect and we fully endorse that. We do not want to create something separate that causes confusion. We are sticking to those messages, but we want to find ways of getting those messages across much more clearly to people.

Q10 Baroness O’Loan: I want to move on to impact assessments, about which you have just been speaking. In 2015-16 we referred to the problem that full impact assessments were not always available when an SI was laid. In 2016-17 we did note some improvement. At this session we have again voiced concern. With the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, for example, the impact assessment was published more than two weeks after the regulations were laid and, indeed, after the regulations had come into force. We have been clear throughout that all supporting documentation needs to be laid at the same time as the SI. Is there a particular problem with the system for clearing impact assessments?

Sir Chris Wormald: Yes, and hopefully we are improving it. It is very nice to hear that you think you have seen some improvement, but clearly there is still more to do. There are two things in play here. There is the formal statutory impact assessments that we do with the Better Regulation Executive, which I think is the area where there have been problems. The other issue the Committee raised last time—hopefully, you will see some improvements in this regard—is where there is no formal impact assessment but nor does the explanatory memorandum set out clearly what the impact is. We need to address both of those.

On the second, hopefully that is one of the big things our guidance and training covers. As I say, if you make your policy well and know what the impact is, it is not difficult to write it down. On the former, we have been in discussion with the BRE about two changes that we are hoping will be making a difference to the problem you raised. One is to have much better...
prioritisation of the BRE process so that it is focusing on the most difficult ones, so that we can get the impact out at the same time as the SI. The second is to have effectively a more streamlined fast-track process for the ones that need to come out with an SI, so that we aim to have them out at the same time.

This is common throughout everything we are saying. In terms of where we want to get to, there is no difference at all between us. It is a question of getting the two bits of bureaucracy lined up better, and we are having those discussions with the BRE.

Baroness O’Loan: I just have a slight concern. You say, “We aim to have them out with the SI”, but in order for us to consider an SI we need to have the impact assessment, and we have made that fairly clear.

Sir Chris Wormald: Yes. There is no difference in objectives. What we have not quite managed to do in every case is to get the two timetables lined up properly, and that is what we are working on.

Baroness O’Loan: Parliament cannot do the job it is supposed to do with SIs if we do not have the information that enables us to scrutinise them.

Sir Chris Wormald: Yes. As I say, there is no difference between us on what we are trying to achieve. I am not disagreeing with you that we have not always managed to achieve that in practice, but that is what we are trying to get to.

Baroness O’Loan: Is there a departmental planning process that identifies the stages that legislation needs to go through?

Sir Chris Wormald: I could not guarantee that. I would expect every department to do that. I could not, hand on heart, say I have checked and every single one has done.

Jonathan Jones: This should be the job of the SRO now, and there are various tools to help departments plan, setting out the stages in the process. Like Chris, I could not say hand on heart that all departments are using them consistently. It will absolutely be part of the job of the SRO and the departmental system to oversee the whole departmental programme and timetabling for making SIs.

Baroness O’Loan: When things go wrong, as in the case of the money laundering regulations, and we do not get an impact assessment, is there a process for revisiting that and making sure that this does not happen again? I am concerned because it has happened again, despite all that you have done.

Sir Chris Wormald: I could not comment on that particular case, but I know there have been several cases where there have been challenges within an individual department, particularly those departments that deal with very technical regulations, where the right approach—I know the Committee has done this itself and we have done likewise—is to raise it with that department individually. Across the issues that we are looking at
we always have to determine whether this is a systemic problem about our systems—and, as I say, there are some systemic problems with our systems that need dealing with—or whether there is an individual department that for one reason or another is struggling.

I do not know in the case you quote which of those two that is, but we need to look at it through both those lenses, as it were. Where it is a departmental problem, it should rightly be raised with that department and they should do something about it and reassure you that they are doing so. If it is a systemic problem, we ought to change the system.

Baroness O’Loan: Finally, if I may, Lord Chairman, your annexe here says that impact assessments will be built into future training. I wondered if there was a plan as to when impact assessments, which are still missing on occasion, might become part of the training.

Sir Chris Wormald: These things are already part of the training. I do not think anyone is in doubt that you have to get these things there at the same time. It is the compliance bit that we have found a bit of a challenge.

Baroness O’Loan: And the quality of them.

Sir Chris Wormald: Yes.

Lord Janvrin: Just following up on that, is this requirement to get the supporting documentation at the same time as the SI part of your core guidance?

Sir Chris Wormald: Yes, it is.

Jonathan Jones: It is in all our guidance and all our training.

Q11 Baroness Watkins of Tavistock: This continues from the previous question in relation to the 21-day rule. Our first-year reports of the 2017-19 session have expressed concern about breaches of the 21-day rule. As Baroness O’Loan said, this has happened in the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, and the Data Reporting Services Regulations 2017, which were laid on 22 June and came into force in part on 3 July to meet another directive’s deadline. The Insolvency Amendment (EU 2015/848) Regulations 2017 were laid on 23 June and brought into force three days later, again because of an EU deadline.

Our question is: if departments are facing unforeseeable delays in progressing SIs, is their default solution to reduce the period available for parliamentary scrutiny? Surely the planning should allow more time for contingencies.

Jonathan Jones: Shall I cover this? I believe the departments are very clear that the 21-day rule is a rule, so there is no question of there being a default position that departments can set it aside when it suits them. It is one of the clearest, most well understood bits of the process in departments. I can reassure you to that extent. It is difficult for us to comment on the individual cases that you have mentioned, because there
may be occasions when for good, justifiable but unforeseen reasons departments have to break the rule.

The figures we have are that historically, the numbers of unjustified breaches of the rule are very low, and if they were going up that would be a matter of concern. Going back to Chris’s point, if that were displaying some kind of systemic problem of resource, approach or lack of planning, we would have to take that up. If it is just an individual department having to do something because they have a truncated timetable for some reason, it is for that department to explain what it has done and why.

Going back to your question, I do not believe there is any default position that, if in doubt, the parliamentary scrutiny timetable can be truncated. That, again, is a message that all our guidance would seek to re-emphasise.

Baroness Watkins of Tavistock: Do you think realistically that these will remain very rare events, or do you think they will increase because of the pressure of work associated with Brexit?

Jonathan Jones: We are doing everything we can to resource up this work and to improve our processes in such a way that we can cope. There is no sense from this side that, if something has to give, it is the scrutiny timetable. That is absolutely not our position.

Sir Chris Wormald: No. I can only think of one occasion in my previous department where we had to do something that involved breaking the 21-day rule, and it was a big thing for us. It was escalated to me as permanent secretary, and to Ministers, and we did not do it lightly.

The heart of your question is right: in the vast majority of cases, if you have done your planning properly, you should be able to meet the 21-day rule. There will always be the very odd occasion when something unexpected happens and there needs to be a response, in which case you ought to be able to explain it. Certainly in my experience it is not done lightly, as it were. That is not an excuse for it happening, if you see what I mean, but when it does happen, I think both officials and Ministers take it very seriously.

Elizabeth Gardiner: The project management of SIs across government should also help that, because that will be one of the things that people will be aware of in setting the timetable. The idea is that people will not come along at the last minute and say, “I need to make an SI”, but in fact that is planned for and everybody knows it has to be planned for and entered into the central tool, so that we know what is going on in different departments and what dates need to be met.

The Chairman: We are running into a bit of a problem because we have Mr Hurd from the Home Office coming to us at five o’clock and we need to organise ourselves briefly before that happens. I am going to suggest now that I will ask Lady Finn to ask her question—number nine on our list—and I wonder if the colleagues who are due to ask questions seven, eight and
10 would mind if we asked to have those answered in writing.

**Lord Faulkner of Worcester**: That is fine.

**The Chairman**: You all three have asked another one.

Q12 **Baroness Finn**: In 2015-16 we welcomed the Government’s response to our concern about the proportion of correcting SIs, and you set up the SI hub, which we have discussed. We have noted that in 2015-16 the error rate had reduced to just under 5%, and in 2016-17 it has crept back up to 5.3% and that figure did not include many lesser corrections that did not require a new SI to be laid. Given that, as you say, a good metric is that the success measure is a lower incidence of adverse reports and less requirement, by that metric, it has failed. I suppose we are concerned about why the rate of improvement has stalled and what needs to be done to cut the error rate further.

The independent scrutiny of SIs is quite an important part of a success rate, and we have noticed that the replacement SIs are due not simply to drafting errors but to policy omissions and procedural errors. The interest is really in what is being done to improve quality control before the instrument is formally laid.

You have mentioned that SROs are now responsible, but I am concerned about whose is the final responsibility. Who is signing it off? What level of the SCS is signing off these reports? SROs tend to have more than one thing to deal with. When I have asked SROs what is in their lexicon, it is normally a lot of things, so do they have the capacity to do this properly?

**Jonathan Jones**: Let me have a start at replying to that, because we take it very seriously if there is a mistake and we need to make a correction. It really is quite a big thing for the drafting lawyer and for the team, and it is reported up the line. We do not take it lightly that there is a single correction needed, and if the figure has gone up, that is disappointing.

The SI hub has led some work on this again. The first thing to do is to analyse what the reasons are for the mistakes and, as you said, some will just be drafting errors but not all—sometimes there will be errors of process and so on. Where the drafting error results in an issue for the lawyers, we are back to what training we do and how we ensure that the drafting lawyer has the skills that they need to avoid relatively simple drafting errors.

The hub has also produced some guidance—it may seem a bit trivial—on how to check SIs. We have a good system of multiple checking, but the hub has produced some really good, practical guidance on what sorts of things to look for, how to check, whose responsibility it is and, coming back to your point, who is signing off what. That deals with the technical drafting issues, which are a part of the whole.

As to the rest, if they are errors of process, the drafting does not match up with the policy or there would be insufficient time for checking, that forms part of the wider discussion we have been having, which is how departments are organising this work more generally and who is checking.
That is the part of the lawyer’s job, but it also has to be part of the SRO job.

**Baroness Finn**: Does the SRO have capacity? I do know that there are a lot of people being overloaded. It is difficult, detailed work to check. Is their capacity sufficient?

**Jonathan Jones**: If you are talking about checking the SIs—the actual instrument—we are not saying the SROs do that. That is the job of the drafting lawyer, and then we have this system of second and third pairs of eyes. There is a thorough process of checking the instrument, informed by this new guidance on how to check, which I have referred to. If the reason for the mistake is not that the draft is wrong but that there has been some problem with the process, that comes back into the role of the SRO and the departmental structure. That is not so much about checking the instrument; it is just making sure that the whole process is managed correctly.

**Sir Chris Wormald**: You remember your time in government very well, clearly, Lady Finn. The accountability was one of the things we wanted to clear up, and it does work on three levels. Of course, the overall responsibility for anything that happens in the department goes to the Secretary of State and the permanent secretary. If the department is underperforming on anything, it is ultimately those two people’s responsibility.

As you say, those are quite busy people. That is why we wanted a clear lead Minister, which is normally at junior Minister level, and a clear SRO who was part of the senior leadership who were responsible for the system; and then for an individual SI, the quality control would be the lead Minister and normally the deputy director. Those would be the two people who would sign it off. Effectively, those are the three levels of accountability.

The bit we have added is that clear lead Minister and clear lead SRO to make sure that somebody, both at political level and at Civil Service level, was looking across the whole performance on SIs. That is the bit of the accountability that we felt was missing and we therefore dealt with.

Your challenge is a completely fair one. There are no easy answers to capacity questions, and the Government are quite busy, so that is a challenge. We have agreed—and I hope this has come over from the description of what we have done since the last hearing—that previously, we have not put enough emphasis on this area and have left it too much to the individuals concerned. Therefore, a more central system was needed, and that does raise the level of capacity that we put in. As I said at the beginning, if we can get that awareness right, process right and then capability right, that is how we will make progress on the agenda that you have set us.

**Baroness Finn**: Thank you for your honesty.

Q13  **Lord Kirkwood of Kirkhope**: Chairman, your suggestion that we get the
residue swept up in written correspondence is a very sensible one, but can we have an assurance from you that going into EU withdrawal territory, you are not expecting us to accept the additional pressure that will be on everyone as an excuse for diminishing standards?

**Sir Chris Wormald:** Absolutely.

**The Chairman:** Fine. Thank you very much. Do not say any more.

**Sir Chris Wormald:** That is not just for the reason you say. Whatever people’s debates around the Brexit issue, that this type of work is done to the highest possible quality is clearly essential. In terms of Brexit-related SIs, DExEU has set up its own separate process for co-ordinating.

**Jonathan Jones:** There is a separate process for planning the production of the suite of SIs that will be needed if the withdrawal Bill goes through in its current form—he said carefully. You have heard us say what we are doing to co-ordinate that and to provide the training to those who will be responsible for it.

**The Chairman:** Sir Chris, thank you very much indeed to you and your two colleagues for coming here again today. We are most grateful. We are grateful also to the officials you have behind you, who have contributed to all this. Thank you all very much indeed. The three questions that we did not get to we hope you will be able to answer in writing.

**Sir Chris Wormald:** Yes—and, of course, any other questions.