

JOINT COMMITTEE ON STATUTORY INSTRUMENTS

Guidance to Departments: informal pre-laying scrutiny of affirmative instruments

Any reference in this document to an affirmative instrument includes one laid in draft. Any reference in this document to sitting days (or weeks) means a day (or week) when both Houses are sitting.

Informal pre-laying scrutiny of affirmative Instruments

1. The Joint Committee on Statutory Instruments has for many years permitted the Counsel who advise it on affirmative statutory instruments to offer comments on drafts of instruments prior to their being laid before Parliament. Those informal arrangements are subject always to the availability of legal resources, and to counsel's being satisfied that Departments' own internal checking arrangements are sufficiently robust to maintain appropriate standards.

The Committee's legal advisers

2. Counsel to the Chairman of Committees, and Deputy and Assistant Counsel, in the House of Lords advise the Joint Committee on affirmative instruments and drafts which require the approval of both Houses.

How long to allow for informal pre-laying scrutiny

3. Many Departments routinely send a draft of an affirmative instrument to the Joint Committee's legal adviser, before the instrument is laid. Provided that sufficient time is allowed, this process can help to avoid difficulties about powers, drafting, etc. arising at a later stage, and assists both the Department and the Committee in minimising any delay in the passage of an instrument. Unless otherwise agreed with the legal adviser, Departments should normally allow a period of not less than ten sitting days for receiving comments on a draft sent for informal pre-laying scrutiny. The informal pre-laying scrutiny arrangements always depend on the availability of counsel to operate them, and Departments should be aware that a longer period may need to be allowed, or that it may prove necessary to suspend the arrangements altogether, at times when Departments commonly lay large numbers of affirmative instruments and drafts (for example, towards the end of a Parliamentary session). Should either of those instances occur, a Department will be warned at the time of submitting a draft for informal pre-laying scrutiny.

Drafts of instruments which combine affirmative and non-affirmative provisions

4. The arrangements for informal pre-laying scrutiny apply to material which must be subject to affirmative procedure or for which an affirmative procedure has been selected. Sometimes, an enabling Act allows material which would otherwise be subject to negative, or to no, procedure to be included in an affirmative draft, provided that the whole instrument is made subject to affirmative procedure. Where a Department chooses to include it, the arrangements for informal pre-laying scrutiny are normally available only in respect of the affirmative material in the draft, unless the amount of non-affirmative material is considered by the Committee's legal adviser not to be disproportionate. Counsel in the House of Lords

may be consulted in cases of doubt. If a draft of an instrument submitted for informal pre-laying scrutiny does include material which would not otherwise attract an affirmative procedure, all such material must be clearly identified, along with the power(s) under which the provision in question is to be made.

Quality control by Departments of their draft instruments

5. Informal pre-laying scrutiny is not a substitute for internal Departmental checks. The draft should normally be sent to the Committee's legal adviser only when it is finalised and complete (i.e. all necessary policy clearance has been given), and once it is considered to be in the form in which it could be laid. Where the approval of Parliamentary Counsel is required (where, for instance, the instrument amends primary legislation), the draft should be sent only after such approval has been given. The draft should also have been checked, in accordance with the Department's own arrangements, to the same level as that required for an instrument being submitted for signature and should have been approved by a SCS lawyer as being in a form suitable for laying.

6. There is no requirement for Departments to take advantage of informal pre-laying scrutiny, but those wishing to do so should inform the Committee's office in writing of their own internal scrutiny arrangements for affirmative instruments as requested, keeping the office informed of any changes to those arrangements. Departments are reminded that, unless these include a lawyer in the SCS taking responsibility for the instrument, they are most unlikely to be regarded as adequate by those advising the Joint Committee. If it transpires that a Department's own scrutiny arrangements are later found to be insufficiently effective in practice, the facility for informal pre-laying scrutiny by the House of Lords counsel may be withdrawn from that Department.

Submitting drafts of instruments for informal pre-laying scrutiny

7. Where a draft of an instrument within the remit of the Joint Committee is submitted for informal pre-laying scrutiny, it should be sent by email, not to any of the individual counsel, but to HLcounselJCSI@parliament.uk by the person who drafted it or by that person's line manager. Shortly after receipt of the draft, the drafter will be informed which counsel will be considering it, and approximately when a response might be expected. Thereafter, the drafter should send any further communication about that draft to the counsel who is dealing with it.

8. The draft instrument should be accompanied by a draft of the Explanatory Memorandum (where that is judged to be sufficiently well advanced) and a note of the name, email address and telephone number of—

(a) the lawyer who drafted the instrument;

(b) the lawyer in the SCS who certifies that the draft has undergone the Department's own internal scrutiny procedures and is in a form considered suitable for laying;

(c) if the instrument amends primary legislation, the Parliamentary Counsel who approved the draft.

Drafts not accompanied by a note containing those details are unlikely to be accepted for informal pre-laying scrutiny until the relevant information has been supplied.

Subsequent revisions to drafts

9. Where, following comments from counsel, a Department submits a revised version of the draft, the revisions must be shown in track changes on the revised draft, and the drafter must confirm at the time of submission that there are no other changes. If a draft as eventually laid contains any changes from the one, or the last one, sent for informal pre-laying scrutiny, apart from changes arising directly out of points raised during that process, counsel must be informed of the specific changes before or when the draft is laid.

Committee's consideration of instruments and drafts that received informal pre-laying scrutiny

10. Departments should be aware of the Committee's interest in the wider aspects of its terms of reference, and particularly in those matters which go beyond the technicalities of drafting. Departments are reminded not to assume that the Committee will never wish to request further information about an affirmative instrument following its initial consideration. Departments should not, therefore, prepare their timetables on the basis that the Committee will always complete its consideration of an affirmative instrument at its first meeting following the laying of the instrument before Parliament.

Timetables

11. Departments are further reminded of the timetables applying to the scrutiny of affirmative instruments and drafts. An affirmative instrument will normally be considered at a Wednesday Joint Committee meeting only if it has been laid before Parliament, and delivered to the Committee's office, by **5.45pm on the Wednesday two sitting weeks previously**. But—

(a) if the Committee's legal adviser has had a sufficient opportunity to see in advance, and comment on, an earlier draft (in substantially the same form as laid), and

(b) any points raised by the legal adviser have been satisfactorily addressed in the instrument as laid,

the instrument can normally be considered at the Committee's Wednesday meeting if it has been laid before Parliament, and delivered to the Committee's office, **by 5.45pm on the Monday of the preceding sitting week**. This relaxation does not, however, apply to instruments containing non-affirmative material that has not received informal pre-laying scrutiny.

<p>The references above to "sitting" weeks are significant, because the JCSI does not normally consider an affirmative instrument unless at least five clear sitting days have elapsed since the day on which it was laid, so as to afford Members of either House and others an adequate opportunity to make representations to the Joint Committee about the instrument.</p>

Exceptional arrangements for urgent consideration by Committee

12. If, in exceptional circumstances, a Department wishes an affirmative instrument which has been laid and supplied to the Committee's office later than the applicable deadline to be considered at a particular meeting, a letter from the relevant Minister to the Chairman (copied electronically to the Committee's office) will be required setting out the reasons why expedited consideration is thought necessary and why the instrument was not laid sooner. The general approach of the Committee is to allow such expedited consideration only where compelling reasons have been shown.