Secondary Legislation Scrutiny Committee of the House of Lords

Historical note[1]

In January 2000, the Royal Commission on the Reform of the House of Lords[2] said that there was a good case for enhanced Parliamentary scrutiny of secondary legislation. It recommended a "sifting" mechanism to identify those statutory instruments (SIs) which merited further consideration. The Merits of Statutory Instruments Committee ("the Merits Committee") was set up on 17 December 2003. At the start of the 2012–13 Session the Committee was renamed the Secondary Legislation Scrutiny Committee ("the SLSC") to reflect the widening of its responsibilities to include scrutiny of Orders laid under the Public Bodies Act 2011.

From its foundation in 2003 until the end of the 2014–15 session of Parliament, the Committee considered a grand total of 11,603 SIs; using its power to report, it brought 718 of these SIs to the special attention of the House. It has regularly published a report on its work at the end of each session since 2004.

The Committee from 2003 to 2005

The Committee's first Chairman was Lord Hunt of Kings Heath. At its establishment, it was given the power to draw SIs to the special attention of the House using four possible grounds:

- that an SI was politically or legally important, or gave rise to issues of public policy likely to be of interest to the House;
- that an SI was inappropriate in view of changed circumstances since the passage of the parent Act;
- that it inappropriately implemented EU legislation; and
- that it imperfectly achieved its policy objectives.

As the Committee pointed out in its first end-of-session report (25th Report of Session 2003–04), the second, third and fourth of these grounds required it to find that an SI had, or appeared to have, some element of deficiency; and, while the first ground could be seen to suggest that an SI was wholly acceptable in policy terms, the Committee considered that its use should be triggered where there was also an element of controversy or contention. In line with this approach, of the 30 SIs formally reported in that session, 25 had been reported using the first ground, and only five using either the third or fourth ground (none using the second ground). It is fair to say that this approach has been maintained by the Committee in subsequent years, with the large majority of SIs reported for reasons of public policy interest.

Until 2003, Departments provided Explanatory Memoranda (EMs) only in support of SIs subject to the affirmative resolution procedure – that is, about 20% of all SIs laid before Parliament. The Government agreed in 2004 to the Committee's request that EMs should be laid alongside all SIs, including those subject to negative resolution.

[1] A fuller version of this article is being published in the 2016 edition of "The Table", the Journal of the Society of Clerks-at-the-Table in Commonwealth Parliaments.

[2] "A House for the Future", January 2000, Cm 4534.

Several of the Committee's continuing concerns were flagged up in the first end-of-session report. The need for EMs to be both accurate and complete in the information provided was stressed, and the Committee put particular emphasis on the need for EMs to provide full information about consultation responses. The Government were invited to consider how to reduce the number of SIs brought forward to correct mistakes in earlier instruments, given the frequency with which correcting SIs had been laid. Noting the marked peaks and troughs in the laying of SIs through the year, the Committee also invited the Government to consider what steps could be taken to ensure a more even flow of instruments. All these issues were to be explored more fully in later work by the Committee.

The Committee from 2005 to 2010

After the 2005 Election, Lord Filkin took over as Chairman of the Committee until the end of the 2008–09 session; he was succeeded by Lord Rosser, who was Chairman for the final session (2009–-10) of the Parliament. The Committee maintained its scrutiny of SIs, but widened its activity through the conduct of several inquiries.

Inquiry into Management of Secondary Legislation

The first of these, conducted between September 2005 and March 2006, looked at "The Management of Secondary Legislation", presented in the 29th Report of Session 2005–06.[3] The Committee said that, over the previous two years, it had scrutinised over 2,000 SIs; and that, though it had reported only about 8% of them to the House, many more had revealed shortcomings either in the process by which they were prepared and laid before Parliament or in the quality of the end-product. Its recommendations to Government for securing improvements included the appointment of a senior official within each Department with responsibility for the efficiency and effectiveness of the process of preparing SIs and laying them before Parliament; the preparation within each Department of an annual plan covering all its projected secondary legislation; and a central mechanism within Whitehall for taking action to smooth the flow of secondary legislation.

The Government response to the inquiry[4] agreed that there was scope for Departments to improve their management of secondary legislation, and tied greater responsibility for the quality of secondary legislation to Departmental implementation of the Government's Better Regulation agenda. However, the Government resisted the call for a central Whitehall mechanism: given that timetables for secondary legislation often needed to be changed, they did not think that Departments could produce effective detailed management plans for all projected secondary legislation, with such plans being centrally consolidated.

In the 2007–08 Session, the Committee took further evidence from Government Ministers to follow up its report on the management of secondary legislation, publishing its findings in its 13th Report of that Session.[5] It welcomed the fact that several Departments had undertaken to produce plans for secondary legislation resulting from new primary legislation, and it urged all Departments to do likewise. At the same time, however, it stressed that Departments still

[3]HL Paper 149.

[4]Published in the Committee's 49th Report of Session 2005-06 (HL Paper 275).

[5]HL Paper 70.

needed to do much more to improve their handing of SIs, and it pointed to recent debates which had shown the House's objection to poorly prepared secondary legislation, notably its rejection of the draft Gambling (Geographical Distribution of Casino Premises Licences) Order 2007,[6] which (among other things) would have allowed a regional casino (or "super-casino") to be established in Manchester. The Committee saw the House's willingness to challenge bad policy as a necessary incentive to improve Government practice.

Inquiry into Cumulative Impact of SIs on Schools

Between September 2008 and March 2009, the Committee carried out an inquiry into the cumulative impact of regulation on schools. It published the outcome in its 9th Report of Session 2008-09.[7] It noted that, in the 2006–07 Parliamentary session, schools were the subject of around 100 new SIs made by the Department for Children, Schools and Families (DCSF), which had major implications for the whole range of schools' activities. Around one-fifth of these SIs came into force at the start of the school year, but the rest took effect on a wide range of dates throughout the remainder of the school year. The Committee made a number of recommendations. These included that DCSF should adopt 1 September as the commencement date for all schools-related SIs (except in very exceptional circumstances); and that schools should be given at least one full term's lead-in time between the notification of a new requirement in a statutory instrument and the commencement of that requirement.

The Committee published the Government response in its 18th Report of Session 2008-09.[8] The Government accepted the spirit of the recommendations, albeit allowing for some limited exceptions. After the 2010 Election, when DCSF was re-formed as the Department for Education (DfE), the commitments given in the response to the inquiry were upheld.

Inquiry into Post-Implementation Review

Between June and November 2009, the Committee conducted a study to assess the extent to which Government Departments checked whether secondary legislation was actually working as originally intended. It published its Report "What happened next? A study of Post-Implementation Reviews of secondary legislation" in November 2009.[9]

The Committee had seen that a significant number of SIs were being laid to amend existing secondary legislation without any apparent prior evaluation of the earlier legislation. A survey of the most significant SIs from 2005, carried out for the Committee by the National Audit Office, found that 46% of them had not been subject to any evaluation after four years. Drawing on more detailed case-studies, the Committee concluded that proper evaluation of an SI was impossible if Departments failed to give a clear statement of the policy objective, and to provide baseline data, when laying the SI before Parliament. The Committee set out a number

[6]The Committee drew this draft Order to the special attention of the House, on the grounds that it gave rise to issues of public policy interest and that it might imperfectly achieve its policy objectives, in its 13th Report of the 2006-07 Session (HL Paper 67), published on 20 March 2007. The debate on the draft Order took place on 28 March 2007.

[7]HL Paper 45.

[8]HL Paper 100.

[9]30th Report of Session 2008-09 (HL Paper 180).

of recommendations for Government to improve and extend post-implementation review (PIR) of SIs; most of these were accepted in the Government response in January 2010.[10]

The Government made it clear, however, that they intended to focus PIRs on secondary legislation which had originally been presented with an Impact Assessment (IA). In its end-of-session report for 2009–10,[11] the Committee stated its difference of view on this focus, pointing out that its scrutiny had shown that it had often been "routine" SIs, laid without IAs, which had prompted the most serious questions, and which should therefore be reviewed.

Stock-taking in 2010

In the 2009–10 end-of-session report, the last such review before the May 2010 Election, the Committee set out a number of continuing concerns. It referred to the "pre-Election avalanche" of SIs: in a truncated Session, it had considered 660 SIs over four months, just under 60% of the number of SIs seen by the Committee in the twelve-month 2008-09 Session; it criticised the failure of Departments to plan ahead and prioritise their production of secondary legislation. It noted that an unusually high number of SIs had been withdrawn and corrections issued; in the first three months of 2010, 26 affirmative SIs had been withdrawn, compared with only four in the last three months of 2009; it urged Departments to have sufficient respect for Parliament not to lay defective SIs. It also criticised the extent to which Departments had failed to provide evidence to support significant policy proposals; and it was concerned about the number of badly drafted EMs which were particularly weak in setting out the results of any consultation.

The Committee from 2010 to 2015

Lord Goodlad chaired the Committee throughout the 2010–15 Parliament. An important extension of the Committee's role came when it was appointed to scrutinise Orders laid under the Public Bodies Act 2011: Public Bodies Orders (PBOs). In total, by April 2015, the Committee had considered 30 PBOs. As well as commenting on each PBO in its weekly scrutiny reports, the Committee published three reports reviewing the laying of PBOs under the 2011 Act twelve months, two years and three years after Royal Assent.[12]

Inquiries into Government consultation principles, and consultation practice

The Committee took a close interest in the changed approach to consultation which the Government signalled in July 2012 when they published a new set of consultation principles, replacing the previous code of practice. In autumn 2012, the Committee carried out an inquiry into the new principles, publishing a report in January 2013.[13] On balance, the Committee felt that the changes made, particularly as regards the time allowed to respondents to submit views, had been detrimental to effective consultation: it looked to the Government's own review of the changes, scheduled to be completed in summer 2013, to remedy this detriment.

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[10]The Committee published this response in its 8th Report of Session 2009-10 (HL Paper 43).

[11]17th Report of Session 2009-10 (HL Paper 113).

[12]See: 19th Report of Session 2012-13 (HL Paper 90); 22nd Report of Session 2013-14 (HL Paper 98); 17th Report of Session 2014-15 (HL Paper 73).

[13]"The Government's new approach to consultation: 'Work in Progress'", 22nd Report of Session 2012-13 (HL Paper 100).

The Committee published the outcome of the Government's review in November 2013.[14] Despite limited adjustments to the 2012 principles, the Committee still saw the underlying approach as prioritising the Government's administrative convenience over the interests of potential respondents, above all in leaving discretion to Departments to compress consultation periods and to run them over traditional holiday periods.

In the autumn of 2014, the Committee held a follow-up inquiry, looking at the practical application of these revised principles in relation to a number of case-studies. The inquiry report was published in January 2015[15]. The Committee welcomed Ministerial undertakings that the principles would be revised to ensure that consultation periods would not be compromised by coinciding with holidays, and that Departments should publish summaries of responses at the same time as SIs were laid. However, it criticised the Government's failure to carry out systematic monitoring of consultation processes, and called for a stronger role for the Cabinet Office to do so. An interim reply from the Government was published by the Committee in March 2015;[16] a substantive response was expected in the new Parliament.

Revised terms of reference

In its 2012–13 end-of-session report,[17] the Committee voiced criticism of the quality of information provided in support of SIs scrutinised in that Session, and stated its intention in the 2013–14 Session to require all inadequate EMs to be re-laid. In its end-of-session report in May 2014,[18] the Committee noted that more than 6% of EMs (some 60 in number) had been re-laid as a result. In the light of this experience, the House agreed that, in the 2014–15 Session, the Committee should be able to report SIs on the ground:

- that the explanatory material laid in support provided insufficient information to gain a clear understanding about the SI's policy objective and intended implementation.

Also in the 2013–14 end-of-session report, the Committee said that, given its continuing concern in relation to the issue of consultation, the House had agreed that the Committee should have as an additional reporting ground in 2014–15:

- that there appeared to be inadequacies in the consultation process that related to an SI.

In its final report of the 2014-15 session, the Committee stated that it had drawn 89 SIs (out of 1153 instruments scrutinised) to the special attention of the House, and that it had used the new reporting grounds in the case of 17 of these 89 SIs. Noting that it had reported only six SIs on the ground of imperfect achievement of the policy objective, by contrast with 13 reported on this ground in the previous Session, the Committee commented that the new grounds allowed it to highlight administrative defects related to an SI, and that the use of the "imperfect achievement of policy objective" ground might now be seen as a much stronger criticism.

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[14] In its 17th Report of Session 2013-14 (HL Paper 75).

[15] 22nd Report of Session 2014-15 (HL Paper 98).

[16] 31st Report of Session 2014-15 (HL Paper 147).

[17] 35th Report of Session 2012-13 (HL Paper 160).

[18] 42nd Report of Session 2013-14 (HL Paper 186).

Correcting Instruments

In January 2015, the Committee published a report on the "Number of Corrections to Statutory Instruments in 2014".[19] This set out concern about the growing volume of correcting SIs: 45 such SIs had been issued in the first six months of the calendar year 2014, by comparison with a total of 43 such SIs in the whole of 2013 and 48 in 2012. Work done by the Committee indicated that the error rate for 2014 overall, and across all Departments, was 6.18%; an analysis of the performance of 10 Departments which had answered PQs gave an outcome of 13.04% for affirmative SIs and 4.26% for negative SIs, an average error rate of 6.81%. The Committee described this level as unacceptably high. In the 2014-15 end-of-session report, the Committee welcomed the fact that the Government had given a positive response by stating an intention to use a specialist team in the Cabinet Office to address the points raised.

Elsewhere, the 2014–15 end-of-session report offered interesting insights into the ongoing work of scrutiny. It noted that the Committee considered 1,153 SIs in 2014–15, a marked increase from the 998 SIs scrutinised in 2013-14, which itself was higher than the 893 SIs considered in 2012–13. It commented on the poor planning of secondary legislation by Departments: around 160 SIs were laid in both February and March 2015, some 28% of the Session's total laid in just two months, even though it had been known for some years that the Parliament would end no later than 30 March 2015. In relation to the adequacy of supporting information, it stated that, as well as using the new reporting ground, it had required 46 EMs to be re-laid.

Scrutiny of individual SIs

While the Committee has tackled several generic concerns, most of its effort is devoted to scrutiny of individual SIs. Two SIs considered in recent years offer examples.

In February 2013, the Department of Health (DH) laid the National Health Service (Procurement, Patient Choice and Competition) Regulations 2013 (SI 2013/357), which governed the use of tendering in the procurement of most NHS services. The Committee received 2,000 submissions, from professional institutions, trades unions and the public, which all indicated a belief that the Regulations did not match up to Ministerial undertakings given during the passage of the parent Act, the Health and Social Care Act 2012, in particular because the SI included a requirement that Clinical Commissioning Groups CCGs should undertake competitive tendering for the procurement of services, rather than the more generalised duty not to be anti-competitive that had been expected. The Committee reported the SI on the ground that it might imperfectly achieve its policy objective.[20]

In March 2013, DH laid the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 (SI 2013/500) to revoke and replace SI 2013/357: the Department had stated its view that both the original, and the replacement, SIs were consistent with earlier Ministerial undertakings, but in SI 2013/500 the wording of some of the provisions had been revised to clarify the policy intentions. The Committee brought this SI to the special attention of the House on the same ground, criticising the speed with which DH was taking

[19]20th Report of Session 2014-15 (HL Paper 93).

[20]See 30th Report of Session 2012-13 (HL Paper 136).

forward the revised SI, which had left insufficient time for interested parties to understand the new requirements before their implementation.[21]

Nearly two years later, in December 2014, DH laid the draft Human Fertilisation and Embryology (Mitochondrial Donation) Regulations 2015, to enable mitochondrial donation techniques to be used, under licence, as part of in-vitro fertilisation (IVF) treatment to prevent the transmission of serious mitochondrial disease from a mother to her child. DH intended that the Regulations would, in due course, permit the application of techniques that use a third person's mitochondria to replace the defective material from the mother (initially in about ten subjects a year). The Committee drew the Regulations to the special attention of the House on the ground of public policy interest, setting out the range of concerns that had been put to it by the authors of some 18 separate submissions of written evidence, both supporting and opposing the techniques to be permitted.[22] The Committee's report was an important contribution to the debate on 24 February 2015, when the Regulations were approved.

May 2015

[21]See 33rd Report of Session 2012-13 (HL Paper 153).

[22]See 23rd Report of Session 2014-15 (HL Paper 99).