

SECONDARY LEGISLATION SCRUTINY COMMITTEE: GUIDANCE FOR DEPARTMENTS ON PUBLIC BODIES ORDERS

INTRODUCTION

1. The Secondary Legislation Scrutiny Committee (formerly known as the Merits of Statutory Instruments Committee) was established in 2003 to scrutinise the policy aspects of all instruments laid before Parliament that are subject to negative or affirmative resolution. More recently it has also acquired responsibility for scrutinising Public Bodies Orders, and its name was changed to reflect this wider remit. A separate note on SIs covers

- How the Secondary Legislation Scrutiny Committee (SLSC) works
- Scrutiny of Statutory Instruments
- Some tips on what the Committee is looking for in supporting paper work.¹

2. Scrutiny of Public Bodies Orders is done on a slightly different basis, by checking conformity with the tests set out in the Public Bodies Act 2011: the Committee's procedural approach is set out in our 50th report of session 2010-12. This guidance note provides hints for Departmental officials on the paperwork associated with PBOs.

SCRUTINY OF PUBLIC BODIES ORDERS

3. The Secondary Legislation Scrutiny Committee (SLSC) has eleven members with Lord Goodlad as its Chairman. It is supported by a Clerk, a Committee Assistant and two Advisers. Contact details for them are given at the end of this note.

4. The Committee meets weekly in term time, on Tuesday afternoons, to consider the policy aspects of secondary legislation including Public Bodies Orders (PBOs). 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 Although instruments laid on any day of week 1 will usually be considered by the Committee on the Tuesday of week 3, i.e. within 12-16 days of laying, this is subject to no more than two PBOs being laid in the same week. The organisation of what is to be laid when is coordinated by Cabinet Office (Contact Claire Barnes Tel: 020 7271 6661 Email: claire.barnes@cabinet-office.gsi.gov.uk for further information.)

5. The Joint Committee on Statutory Instruments (JCSI) also considers PBOs but looks at the legal drafting of the instrument with a technical eye, there is no overlap with the SLSC which looks at the policy intention and how the instrument meets the tests set out in the Act. The JCSI acts for both Houses.

6. Scrutiny of the policy aspects of a PBO are also undertaken separately by the Commons, usually by the Select Committee with oversight of the Department that is

¹ See the SLSC website www.parliament.uk/seclegscrutiny

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

³ See the SLSC website www.parliament.uk/seclegpublications

laying it. The Commons’ consideration of PBOs tends to look at how the proposal fits into the broader context of the Department’s activities.

7. Any individual Member of either House may also lay a resolution about a PBO or some aspect of it. They are not obliged to wait for the Committees to consider the instruments first, although in practice it is likely that any resolution would not be debated until after Committees have reported on the PBO.

TIMETABLING

8. PBOs are laid as affirmative instruments and can only be laid when both Houses are sitting.

9. The Act sets out a specific number of days for the consideration of a PBO, and these are expressed in sitting days, and only take into account days on which both Houses are sitting.⁴ (The time limits for Statutory Instruments are calculated differently). The PBO cannot be debated until these set periods have elapsed.

- 30 sitting days are allowed for the SLSC, the JCSI and the relevant Commons departmental Select Committee to consider the instrument and decide whether to trigger the 60 day enhanced scrutiny procedure.
 - *If the 60 day enhanced procedure is not triggered* – then after a total of 40 sitting days has elapsed since laying the PBO may be debated.
 - *If the 60 day enhanced procedure is triggered* – then the scrutiny period is extended to 60 sitting days from laying for further consideration, which may include a call for written or oral evidence. If at the end of that period any of the Committees make recommendations about the instrument the Minister is obliged to take them into account.
- Where, following recommendations from a Committee, the Government decides to rewrite some element of the PBO, a revised instrument must be laid: where this involves a material change to the instrument then it must be considered again by the SLSC – however there is no set time period for this second consideration and it is likely to be dealt with in 12 to 16 calendar days from laying like any other instrument.

10. When calculating how much time to allow for securing parliamentary approval for a PBO, you need to take these set periods into account. **Even if the Committees report more quickly, the PBO cannot be debated until after the 40 (or 60) sitting days have passed.** Days in recesses do not count, so if laid in June the PBO may not become eligible for debate until October or November. Once the 30 statutory days have passed without a report triggering the 60 day enhanced procedure you should liaise with the Whips Office in each House about scheduling a debate but this may not necessarily happen on the 41st day, particularly if there is a high volume of affirmative instruments waiting for approval by the House.

⁴ Under section 11(12) of the Public Bodies Act 2011 in calculating this period no account can be taken of any time in which **either** House is adjourned for more than 4 days

THE STATUTORY TESTS

11. These are set out in section 8 of the Public Bodies Act. All of them must be satisfied to meet the requirements of the Act:

8(1) A Minister may make an order under sections 1 to 5 only if the Minister considers that the order serves the purpose of improving the exercise of public functions, having regard to—

- (a) efficiency,
- (b) effectiveness,
- (c) economy, **and**
- (d) securing appropriate accountability to Ministers.

(2) A Minister may make an order under those sections only if the Minister considers that—

- (a) the order does not remove any necessary protection, **and**
- (b) the order does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.

12. In addition, Section 11 of the Act sets out the procedure which must be followed:

11(1) If after consultation under section 10 the Minister considers it appropriate to proceed with the making of an order under sections 1 to 5, the Minister may lay before Parliament—

- (a) a draft order, **and**
- (b) an explanatory document.

(2) The explanatory document must—

- (a) introduce and give reasons for the order,
- (b) explain why the Minister considers that—
 - (i) the order serves the purpose in section 8(1), and
 - (ii) the conditions in section 8(2)(a) and (b) are satisfied,
- (c) if the order contains provision made by virtue of more than one entry in Schedules 1 to 5, explain why the Minister considers it appropriate for it to do so, and
- (d) contain a summary of representations received in the consultation.

(3) The Minister may not act under subsection (1) before the end of the period of twelve weeks beginning with the day on which the consultation began.

13. The SLSC will always publish a full report on PBOs, expressing its view on whether each of the statutory tests have been satisfied. It may also comment on any other policy aspects that it has considered in the course of its scrutiny, and may make informal (within the 40 day period) or formal recommendations (in the 60 day period). There is no need for the Minister to reply to the SLSC on these reports but he is expected to respond to any points raised during the course of the debate in the House.

EXPLANATORY DOCUMENTS

When and how should the Explanatory Document be delivered?

14. Section 11(1) of the Act (see above) requires that the Explanatory Document (ED) should be laid before the House at the same time as the instrument itself. **15 double-sided copies** of the instrument collated with the ED (and, where applicable, the Impact Assessment) should be **delivered to the SLSC secretariat on the day of laying**. Please also include 2 collated copies of the responses to consultation.

15. Although the format of the Explanatory Document for PBOs is very like the format for the Explanatory Memorandum used for Statutory Instruments, EDs have a legal significance of their own, for example if a revised ED were laid the effect would be the same as if the instrument had been re-laid, that is the calculation of sitting days would start again from day one.

16. **The Act requires the Minister to explain his reasoning in the ED why he considers the statutory tests to have been met** – a simple statement that in his opinion they have been met is insufficient. So a good Explanatory Document is vital to ensuring the safe passage of your PBO and some hints are given below based on the SLSC's experience of the first dozen Orders.

What the ED needs to explain

17. As well as demonstrating that the tests have been met the ED needs to provide members of both Houses of Parliament with a plain English, free-standing, explanation of the effect of the instrument and the context in which it is laid (section 11(1)(a)). Particularly where organisations are merging you need to explain how the system has been operating and what practical differences the change will make. Identify any current problems that will be solved by the organisation's change in status, and any consequences, for example staff redundancies.

18. 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.

Single memorandum for linked instruments?

19. It can be helpful to produce a single ED for a group of PBOs with a common theme or a PBO that deals with two or more similar institutions. This prevents unnecessary duplication of common background and makes sure that the reader is aware of the links between instruments. **But you will need to demonstrate that each of the organisations satisfies each of the tests.** Where an "omnibus" PBO deals with two or more unrelated organisations it is better to make the explanations sequentially as jumping between different scenarios can be confusing.

Consultation outcome

20. The Committee considers that proper consultation is a crucial part of the process of getting an instrument right before it is laid. The Act requires that public consultation should have taken place at least 12 weeks before the PBO is laid (section 11(3)). The ED must contain a summary of representations received in the consultation (Section 11(2)(d)), this should describe 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 should be available at the time the instrument is laid before Parliament. And two collated copies of the full set of responses should be provided to the Committee for reference. Further copies may be required where the instrument is controversial.

21. The Committee posts an electronic link to the PBO and its Explanatory Document on its webpage as soon as they become available on the National Archives website⁵ so you should ensure that they are published there promptly. We have found that this has resulted in a number of organisations contacting the Committee directly to express views about the effect of the PBO; we will take these representations into consideration and may ask the Department for supplementary material to respond to any issues that the correspondence raises.

Impact

22. Where an Impact Assessment (IA) has been prepared then **a hardcopy should be attached as an Annex** (do not simply include a web-link). You must make sure that the IA is the final version and has been signed by a Minister. During the passage of the Bill the Minister gave the following undertaking⁶:

“The Bill confers a series of enabling powers on Ministers, and accordingly has no directly attributable impact on business, the voluntary sector or the environment that could be captured through an impact assessment. It is therefore not possible to provide details of the likely costs and impacts of the Bill, as any costs or impacts arising from its use relate to orders made under its powers rather than to the Bill itself. When Departments use the powers, they will produce full impact assessments of the change or changes they are seeking where required.”

Accordingly we will generally expect there to be an IA, however in certain circumstances, for example where the PBO abolishes an organisation that has not been functioning for some time and the impact is therefore minimal it is sufficient to give a short analysis of the costs and benefits in the ED.

23. The policy section should address each of the tests explicitly. In relation to *economy* and possibly also to *efficiency* and *effectiveness*, the Committee will expect to see a financial breakdown not only of the anticipated savings but also of any offsetting transitional costs eg staff redundancies, changes to computer systems, premises leases still to run. Even where the PBO is supported by an Impact Assessment you should make clear in relation to the tests which elements you are including as evidence that the test is met.

Monitoring and review

24. One concern that has been raised by the Secondary Legislation Scrutiny Committee on a number of occasions so far, particularly when responsibilities of an NDPB are being absorbed back into a Government department is about transparency. So as well as stating the success criteria for this instrument and when it is to be reviewed internally, it would be useful to inform the House whether any annual statistics

⁵ <http://www.legislation.gov.uk/uksi>

⁶ Notes on Public Bodies Bill as introduced in the House of Lords on 28th October 2010 [HL Bill 25]

or inspection reports that were published by the previous organisation will continue to be available to the public.

For Example: Draft Public Bodies (Abolition of Her Majesty’s Inspectorate of Courts Administration and the Public Guardian Board) Order 2012

The Committee concluded:

“...In the light of the concerns expressed in consultation responses about independent oversight, we recommend that the Ministry of Justice should demonstrate that the changes have been successful by publishing the outcome of the new arrangements at suitable intervals; we would suggest that material be included in the successor bodies’ annual reports in a comparable form to that in the reports of the precursor agencies.”

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COMMITTEE CONTACT DETAILS

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The Committee Assistant, to whom all paperwork should be sent, at the address given above, is **Andrew Conway**. The Committee’s Clerk is **Christine Salmon Percival** (contact as above). The Committee’s Advisers, who are likely to contact you for further information, divide the responsibility for Government departments as follows:

<p>Paul Bristow bristowpn@parliament.uk tel 020-7219 8823</p>	<p>Jane White whiteja@parliament.uk tel 020-7219 8822</p>
<p>Department for Business, Innovation and Skills (BIS) Department for Communities and Local Government (DCLG) Department for Environment, Food and Rural Affairs (DEFRA)</p>	<p>Department for Culture Media and Sport (DCMS) Department of Health (DH) Department for Transport (DfT) Department of Work and Pensions(DWP) Ministry of Justice</p>