

Statutory Instrument Practice

Circular No.2 (06)

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EXPLANATORY MEMORANDA TO STATUTORY INSTRUMENTS

1. Following discussions with both the House of Lords Merits of Statutory Instruments Committee and the Joint Committee on Statutory Instruments, revised guidance on preparing Explanatory Memoranda to Statutory Instruments has been agreed and is attached to this circular.
2. The revised guidance will form part of Appendix H within the new 4th edition of *Statutory Instrument Practice* which will be published shortly. The revised guidance:
 - clarifies when it is sensible to produce a single EM for a group of linked instruments;
 - clarifies what information needs to be provided when the instrument is being laid less than 21 days before it comes into force;
 - modifies the information that needs to be provided in relation to the legislative background;
 - updates the information which needs to be provided in relation to the policy background to instruments, the consultation that has been undertaken, the guidance that is being provided to users and stakeholders and, for amending instruments, any plans the department has for consolidation; and
 - updates the guidance in relation to the provision of Regulatory Impact Assessments..
3. Enquiries regarding this circular and the revised guidance should be addressed to the SI Registrar at: SIRegistrar@cabinet-office.x.gsi.gov.uk

Notes on preparing the Explanatory Memoranda to Statutory Instruments

General – Individual headings should be numbered whilst individual paragraphs following the individual headings should be numbered as sub-paragraphs. As an example the heading relating to matters of special interest to the JCSI/SCSI will always be numbered as “3” and sub-paragraphs should follow as “3.1”, “3.2” etc.

In preparing the Explanatory Memorandum (EM) departments should ensure that they do not repeat the content of the Explanatory Note. **The purpose of the Explanatory Memorandum is to provide to the lay reader a plain English, stand alone, explanation of the effect of the legislation and why it is necessary.** It is not aimed at lawyers, but to help people who know nothing about the law or the subject quickly to gain an understanding of its intent and purpose.

It can be helpful to produce a single EM for a group of linked statutory instruments (SIs). This prevents unnecessary duplication of common background and makes sure that the reader is aware of the linkage. 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. Where possible all the SIs should be laid on the same day and numbered sequentially.

Headings – The title of the instrument must be entered. The SI number must be entered for all negative instruments or left blank for affirmative resolution instruments.

1. The name of the department must be entered. The instrument will be laid before either “Parliament” or “the House of Commons” and depending on the choice made will decide the heading for Section 3.

Note: If the instrument does not contain information for either the Joint Committee on Statutory Instruments or the Select Committee on Statutory Instruments then the second paragraph should be deleted.

2. **Description**

Paragraph(s) 2.1 onwards will be free text which should generally be limited to no more than 3 sentences. **Plain English** should be used to explain to the lay reader what the instrument does and why. Acronyms and terms of art should be explained or, better, avoided. Powers are generally irrelevant here.

3. **Matters of special interest to the [Joint Committee on Statutory Instruments *or* the Select Committee on Statutory Instruments]**

The heading will be dependent on whether the instrument has been laid before Parliament (JCSI) or the House of Commons (SCSI).

Paragraph(s) 3.1 onwards will be free text and should cover any information which the department wishes to bring to the attention of the JCSI/SCSI. This should include information which would formerly have been included in a voluntary memorandum to JCSI/SCSI, in particular:

- i) **fee increases:** if the instrument imposes fee increases above the rate of inflation, please explain the reason for the increase, whether any further such increases are planned, and, if so, when they are projected to cease;

ii) **21-day rule:** It is a convention that an instrument should not be laid before parliament less than 21 days before it comes into force (see *Statutory Instrument Practice* section 4.13). Both the Merits Committee and the JCSI have an interest if the instrument breaches the 21-day rule. In such cases the EM should explain why the policy requires such urgent action and what the consequences of delaying the legislation to comply with the rule would be.

Problems with Departmental administration or a project plan are unlikely to be accepted by the Scrutiny Committees as sufficient reason for curtailing Parliamentary scrutiny.

- iii) **if the instrument came into force before it was laid**, please explain the circumstances, and indicate the date on which the notification and explanation required by the proviso to section 4(1) of the Statutory Instruments Act 1946 were sent to the Speakers of the House of Lords and House of Commons;
- iv) **if the instrument uses novel or especially complex powers**, please explain the basis for these powers and indicate the reason for their use.

If the instrument corrects errors previously reported by the JCSI, please provide the reference of the instrument corrected and the relevant JCSI report.

Note: If there are no matters of special interest to the JCSI/SCSI then insert “None”.

4. **Legislative Background**

Paragraph(s) 4.1 onwards will be free text.

The power under which the instrument is made will be clear from the instrument itself and reference need not be made to the power unless there is a specific reason to do so, for example, if this is the first use of a power under an Act or the power is being used in a novel way.

In these paragraphs you should explain **why** the instrument is being made: for example, to implement a new Act or European obligation, to effect an annual uprating in line with inflation, or to amend the law following a significant court case.

Relevant background information should be given to set the instrument in context. Mention in particular:

- if in the course of debate, parliamentary question or Committee appearance any specific undertakings were given to Parliament that relate to this instrument (including Hansard or report reference where relevant).
- if this instrument relates to any other instruments (i.e. it is one of a group), please cross reference.

If the instrument implements EU legislation, attach a Transposition Note as an Annex; explain in broad terms the approach to transposition highlighting any difficult areas; and include a brief scrutiny history of when it was considered by the EU Scrutiny Committees.

5. Territorial Extent and Application

Paragraph 5.1 - one of the options must be selected to indicate the area of application of the instrument. Although the extent of an instrument may be England and Wales, but the instrument only applies to England or Wales then "England" or "Wales" should be selected.

Paragraph 5.2 - It is helpful to indicate if the SI simply replicates for one part of the United Kingdom, legislation which already exists in another part.

6. European Convention on Human Rights

Note: This section is only required to be completed in respect of instruments subject to affirmative resolution, and all instruments subject to negative resolution which amend primary legislation. In other instances enter "As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required."

Opening sentence – The name of the Minister or, where the instrument is being made by an Authority, the name of the Authority (e.g. the Commissioners of Revenue and Customs) must be inserted.

Second sentence – The first option, with the title of the instrument entered, will be selected in most cases though there may be exceptions when free text may be entered.

7. Policy Background

Paragraph(s) 7.1 onwards will be free text.

Policy

Departments should state in particular:

- the policy objectives of the parent Act/Directive and how this 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

Departments should ensure that, although brief, explanation should start from the basic. The EM is aimed at the lay reader: not just at the Scrutiny Committees but also Members of both Houses of Parliament. Don't say "this amends the XYZ scheme to open it to the under 18s" without providing a sentence about what the XYZ scheme does. Please explain any acronyms or technical terms e.g. SIPP, NOx, credit repair etc.

The EM should also make clear why the Government needs 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.

For "Miscellaneous Amendments" SIs, the EM 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 ...

Consultation

The memorandum should set out who was consulted, over what period and with what responses. There should be some analysis of the outcome and the Department’s policy response to the opinions expressed (e.g. “60% supported the proposal, of the rest, the main objections were on the proposed fee structure and the Department has responded to this by agreeing to phase in the increase over 3 years”). A brief analysis of consultation should be in the final Regulatory Impact Assessment (RIA) if one is provided, and you should cross refer to this, or refer to more detailed analysis on the Departmental website if available.

Guidance

The memorandum should set out what guidance or other form of publicity, if any, the department is providing to users and stakeholders to explain the new obligation and to ensure that it is fulfilled. This is particularly important where a regulation is legally complex, for example a serial amendment or the implementation of a European obligation by multi-level cross-reference to European instruments.

Consolidation

Where an instrument amends another instrument, particularly if not for the first time, the memorandum should indicate whether the department intends to consolidate the relevant legislation and if so, what the projected timescale for consolidation may be. If an informal consolidated text is available to the public for free then provide details of the website or other reference from where this can be obtained.

8. Impact

Paragraph 8.1 – One of two options must be selected.

Paragraph 8.2 – The paragraph must be completed.

Note: Where a Regulatory Impact Assessment has been prepared then this should be attached as an Annex. There is no need to duplicate the information. If you are recycling the RIA prepared for an Act which this instrument helps implement, please only include the relevant extracts and confirm in the EM that the figures are still up to date.

If no RIA has been prepared please confirm that this is because no impact on the private or voluntary sector is foreseen and simply mention any public sector impacts.

9. Contact

All details must be completed on the copies provided for Parliament. Where, however, there are good reasons for this to be withheld from the version to be published by HMSO on the OPSI website (e.g. for security or other similar concerns) then this may be deleted. In such circumstances departments should request that the HMSO SI Registrar delete this information stating the reasons why.