

# Statutory Instrument Practice

## Circular No.3 (04)

Date of Issue: 30 April 2004

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### THE PROVISION TO PARLIAMENT AND PUBLICATION OF EXPLANATORY MEMORANDA TO STATUTORY INSTRUMENTS

#### Purpose

1. This circular deals with:
  - 1.1 the new requirements which have been agreed by the Government in relation to the supply of Explanatory Memoranda and other information to the new House of Lords Select Committee on the Merits of Statutory Instruments ("the Merits Committee"), the Joint Committee on Statutory Instruments (JCSI) and the House of Commons Select Committee on Statutory Instruments (SCSI); and
  - 1.2 the arrangements which are being made for the future publication of Explanatory Memoranda to Statutory Instruments.
2. A further Circular (No.2 (04)) provides further information about the remit of the Merits Committee.

#### The provision of Explanatory Memorandum to Parliament

3. The Merits Committee has requested that departments should provide an explanatory memorandum to accompany all statutory instruments within the Committee's remit, setting out a brief statement of the purpose of an instrument and providing information about its policy objective and policy implications. This would mean that, in addition to the Explanatory Memorandum currently produced for affirmative resolution instruments, such memoranda would also be required for all negative instruments laid before Parliament. The Government have agreed to the Committee's request but have decided that such memoranda should also be produced for instruments which are only required to be laid or are only subject to procedures within the House of Commons. For this category of instrument there is no requirement to provide copies to the Merits Committee.

#### The Form of the Explanatory Memorandum

4. Following concerns from departments about the potential additional burden in the production of the new Explanatory Memoranda, it has been agreed with both the Merits Committee and JCSI/SCSI that a single Explanatory Memorandum will be produced in future. This should meet the current

requirement for supply of information in relation to affirmative resolution instruments but also the new requirements of the Merits Committee. It has also been agreed that the new Explanatory Memorandum may include any other supplementary information which departments might otherwise have provided to the JCSI/SCSI at the time of laying by means of a voluntary memorandum..

5. Any and all information which departments would formerly have included in a voluntary memorandum to JCSI/SCSI (see *Statutory Instrument Practice (SIP)*, paras 5.4.16 - 5.4.19) should now be included in a separate and self-contained section of the new explanatory memorandum. Departments are, in particular, required to include in the memorandum an explanation for any breach of the 21-day rule, any instances of instruments coming into force before being laid, instances of fee increases above the rate of inflation and instances where novel or complicated powers are being exercised. They are reminded of the considerations set out in *SIP* (para 5.4.17) regarding the information to be provided to the Joint Committee. The Joint Committee is prepared to accept information provided by means of a voluntary memorandum (i.e. the previous arrangements set out in *SIP* paras 5.4.16 - 5.4.19), if there are exceptional and compelling reasons why such information should not be supplied by means of a memorandum laid before Parliament.
6. Further information about the form and content for the Explanatory Memorandum is set out as an Annex to this Circular. It replaces the existing provisions set out in Appendix H of *SIP*.
7. The arrangements for provision of memoranda to JCSI/SCSI in response to requests from those Committees will continue to apply (*SIP* para 5.4.18 refers).

### **Delivery of Explanatory Memoranda to Parliament**

8. The Explanatory Memorandum should be laid with the instrument. The covering letter to the instrument should indicate that the memorandum is laid by Command. In addition to the laid copies, 50 copies should be supplied to the House of Commons Vote Office and 75 copies to the Printed Paper Office in the House of Lords.

Copies should also be sent as follows:

**22 copies** of the explanatory memorandum, **collated with** 22 copies of the instrument it describes, to Jane Lauder, Joint Committee on Statutory Instruments, Delegated Legislation Office, House of Commons, Room 258, 7 Millbank, LONDON SW1P 3JA.

Where the instrument is to be laid before the House of Commons only, then the number of copies to be supplied should be reduced to **12 copies**, and the package directed to the Select Committee on Statutory Instruments (at the same address)

**15 copies** of the Explanatory Memorandum, **collated with** 15 copies of the instrument it describes, to: John Rhodes, Lords Committee on the Merits of

9. **Note:** There is no requirement to send to the Merits Committee instruments/explanatory memoranda where the instrument is:
- to be laid before the Commons only; or
  - an Order in Council or draft Order in Council made or proposed to be made under paragraph 1 of the Schedule to the Northern Ireland Act 2000; or
  - an remedial order or draft remedial order under Schedule 2 to the Human Rights Act 1998; or
  - an draft order proposed to be made under section 1 of the Regulatory Reform Act 2001, or any subordinate provisions order made or proposed to be made under that Act.

### **Publication of Explanatory Memoranda**

10. The Government has also decided that, in addition to being laid before Parliament and provided to the Committees, the Explanatory Memoranda should, also be made available to the public by being published on HMSOnline, the HMSO website ([www.hmso.gov.uk](http://www.hmso.gov.uk)). The EMs and the Draft SI/SI will be linked on the website in a similar fashion to the way Bills and Explanatory Notes are linked on the Parliament website. The EMs will not be printed in hard copy for sale. Once an affirmative instrument has been made the link will be made between the numbered instrument and the original EM.
11. Departments should provide the Explanatory Memorandum in the form of an electronic "Word" document for which a template will shortly be available for download from the SI template pages on HMSOnline at:

[www.hmso.gov.uk/si/template](http://www.hmso.gov.uk/si/template).

On entering the site users will be prompted to enter a user name and password which are as follows:

User name: sitemplate

Password: carr3t

12. Where the SI template has been used for originating the instrument then the Explanatory Memorandum should be included as an attachment to the e-mail sent to HMSO at the time the instrument is sent for registration. In the case of Draft Statutory Instruments the Explanatory Memorandum should be included as an attachment to the e-mail sent to TSO for printing, but for which the SI Registrar ([siregistrar@cabinet-office.x.gsi.gov.uk](mailto:siregistrar@cabinet-office.x.gsi.gov.uk)) should now be added as a copy recipient. HMSO will then ensure that the Explanatory Memorandum is published on the website at the same time as the instrument is published.
13. Where traditional methods have been used for origination and printing then the Explanatory Memorandum should still be sent to the SI Registrar as an electronic "Word" document under cover of an e-mail. This should include

details of the title of the instrument, its SI number and the date when the instrument is to be published.

### **Explanatory Memoranda for Orders in Council**

14. In the case of Orders in Council it is the responsibility of the originating department to provide copies of the Explanatory Memoranda and the instruments to both the Merits Committee and the JCSI/SCSI. The Privy Council Office will, however, arrange for the Explanatory Memoranda to be laid with the instruments to which they refer. Departments should therefore provide the Privy Council Office with the electronic Word file of the Explanatory Memorandum together with the covering letter for laying. Privy Council Office will also forward the Explanatory Memorandum with the instrument to the SI Registrar at the time of registration.

### **Enquiries**

15. Any enquiries regarding the content of this circular should be addressed to:

Alan Pawsey, Head of Publishing Services Division, Her Majesty's Stationery Office.

Tel: 01603 723014 or 020 7276 5200

e-mail: [alan.pawsey@cabinet-office.x.gsi.gov.uk](mailto:alan.pawsey@cabinet-office.x.gsi.gov.uk)

or

John Marks, SI Registrar, Publishing Services Division, Her Majesty's Stationery Office

Tel: 020 7276 5209

e-mail: [john.marks@cabinet-office.x.gsi.gov.uk](mailto:john.marks@cabinet-office.x.gsi.gov.uk)

## EXPLANATORY MEMORANDUM TO STATUTORY INSTRUMENTS: FORM AND CONTENT

The purpose of the Explanatory Memorandum is to explain to Members of both Houses and, in particular to the relevant scrutiny Committees, the intent and purpose of the instrument it describes. **This should be in plain English and assume no prior knowledge of the subject.**

The format below suggests some headings that will help the Scrutiny Committees judge the proposed instrument against the criteria set out in their respective terms of reference. Entries should be kept concise but should provide clear information in accordance with the headings set out below. An Explanatory Memorandum of less than a page is perfectly adequate as long as it provides the necessary information. Departments should seek to ensure, unless the instrument is extremely complex, that it does not exceed 4 pages.

1. i) **Title of the Instrument** (and SI registration number, where appropriate)

ii) **Laying Authority and Purpose:** Every memorandum should contain the appropriate declaration(s) at its head:

**“This explanatory memorandum is laid before Parliament by Command of Her Majesty.”**(where this is a Commons-only instrument “before the House of Commons” should be used instead of “before Parliament”)

and, where relevant,

**“This memorandum contains information for the Joint Committee on Statutory Instruments.”** (where this is a Commons-only instrument “for the Select Committee on Statutory Instruments” should be substituted “for the Joint Committee”)

iii) **Department responsible**

2. **Description:** State clearly in no more than 3 sentences what the instrument does. Please use plain English.

3. **Matters of special interest to the Joint Committee on Statutory Instruments/Select Committee on Statutory Instruments:**

Insert here 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:** if the instrument breaches the 21-day rule (see *Statutory Instrument Practice* paras 5.4.13-14) please explain why;
- 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 Speaker and Lord Chancellor;
- 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.

#### 4. **Legislative Background:**

- i) **General:** Explain **why** the instrument is being made: for example, is it to effect an annual uprating in line with inflation; to introduce an amendment following a significant court case; or to implement an EU Directive? Give a little relevant background information to set the instrument in context, mention in particular:
  - if this is the first use of a power under an existing Act.
  - 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.
- ii) **EU legislation:** If the instrument implements EU legislation, attach a Transposition Note; 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. **Extent:**

- Specify whether the instrument applies to all UK, all Great Britain or only to one or more of its component parts e.g. England, England and Wales, Northern Ireland.
- If the instrument applies to Gibraltar, the Channel Isles or the Isle of Man, have their legislatures been consulted and consented to the proposal?

#### 6. **European Convention on Human Rights:** Please state the Minister's view of compatibility with Convention rights. Cabinet Office guidance requires this to be supplied in respect of all instruments subject to affirmative resolution, and all instruments subject to negative resolution which amend primary legislation.

**7. Policy background: 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?

**8. Impact:**

On business, charities or voluntary bodies	Where a Regulatory Impact Assessment has been prepared then this should be attached. There is no need to duplicate the information. 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.
On the Exchequer	

- 9. Contact:** Please give the name and contact details of an official who can answer any queries on the proposed legislation.