

HOUSE OF LORDS

Merits of Statutory Instruments Committee

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29th Report of Session 2005–06

# **The Management of Secondary Legislation**

Volume I: Report

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### *The Select Committee on the Merits of Statutory Instruments*

The Committee has the following terms of reference:

- (1) The Committee shall, subject to the exceptions in paragraph (2), consider—
  - (a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;
  - (b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament, with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (3).
- (2) The exceptions are—
  - (a) Orders in Council, and draft Orders in Council, under paragraph 1 of the Schedule to the Northern Ireland Act 2000;
  - (b) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;
  - (c) draft orders (including draft subordinate provisions orders) under section 1 of the Regulatory Reform Act 2001, subordinate provisions orders under that Act and proposals in the form of a draft order under that Act;
  - (d) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.
- (3) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—
  - (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
  - (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;
  - (c) that it may inappropriately implement European Union legislation;
  - (d) that it may imperfectly achieve its policy objectives.
- (4) The Committee shall also consider such other general matters relating to the effective scrutiny of the merits of statutory instruments and arising from the performance of its functions under paragraphs (1) to (3) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

### *Current Membership*

The Members of the Committee are:

Lord Armstrong of Ilminster	Lord Filkin ( <i>Chairman</i> )	Baroness Morgan of Drefelin
Lord Boston of Faversham	Lord Jopling	Earl of Northesk
Viscount Colville of Culross	Baroness Maddock	Lord Tunnicliffe
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### *Contacts for the Merits of Statutory Instruments Committee*

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NOTE: (Q) refers to a question in oral evidence

The Report of the Committee is published in Volume I (HL Paper 149–I)  
and the Evidence is published in Volume II (HL Paper 149–II).



## **ABSTRACT**

Statutory Instruments (SIs) rarely hit the headlines, but they can affect us all. Often described as “secondary legislation,” they are measures which give statutory effect to detailed rules and regulations by means of which policies laid down by Acts of Parliament (“primary legislation”) are implemented. About 1200 SIs are laid for parliamentary proceedings each year, and since April 2004 our Committee has examined the policy merits of each of these with a view to bringing to the attention of the House those with significant public policy implications.

In the two years since we began our work we have examined carefully over 2,000 instruments. Though we have drawn to the attention of the House only about 8% of these, many more have revealed shortcomings either in the process by which they are prepared and laid before Parliament or in the quality of the end product. While the majority of instruments appear to us to be generally well-crafted and fit for purpose, some are laid in such a way—for example, at less than the required 21 days notice of coming into force or in large numbers at peak periods of the year—as to render proper scrutiny difficult. Others can be difficult to follow, either as the result of opaque drafting or because they rely heavily on cross-references to earlier instruments. Yet others show evidence of inadequate consultation with those *most* likely to be affected by their provisions.

Having taken written and oral evidence from a selection of Government departments and from organisations and individuals outside government, we have observed that, while arrangements exist within Whitehall for monitoring and improving the quality of Government regulation as a whole, there is no specific focus on the efficiency and effectiveness of the process by which SIs, which constitute a major form of regulation, are planned and managed by departments. Though guidance is available on specific aspects of the process—such as carrying out consultation, measuring regulatory impact and getting the legal and procedural steps right—departments are left very much to their own devices as regards planning and managing their SI programmes and putting in place suitable quality assurance arrangements.

While we recognise that each Government department must be fully responsible for and accept ownership of the SIs which it produces, we consider that there is a need for certain important steps to be taken if the overall quality of the end product is to be improved. In particular, there should be one senior official appointed within each department with responsibility to the appropriate Minister for the efficiency and effectiveness of the process of preparing SIs and laying them before Parliament. Each department should be required to prepare an annual plan covering all its projected secondary legislation, including milestones to be met and arrangements for reviewing their achievement. Lists of projected SIs should be published, and there should be a central mechanism within Whitehall for consolidating these lists, for assessing whether the total programme is likely to result in congestion at the stage of parliamentary scrutiny and, where necessary, for taking action in consultation with departments to smooth the flow of secondary legislation.

We believe that arrangements such as those outlined above will help to improve the overall quality of SIs which emerge from departments. We have however drawn attention to a number of specific qualitative improvements which seem to

us to be necessary and on which we hope that departments will focus their attention. In particular, action should be taken to ensure that the requirement for 12 weeks consultation with stakeholders (currently met in only three out of four cases) is more strictly adhered to and that the requirement that SIs should be laid before Parliament at least 21 days before their planned implementation date (which currently 10% of instruments do not meet, many of them by a significant margin) is applied in all but exceptional cases. There should also be greater impetus behind moves to consolidate amended instruments, a process which, we were told, has been facilitated by the introduction of electronic templates for SIs.

We consider that there is a need also to ensure that consultation extends in appropriate cases beyond the normal representative bodies to include the ordinary citizen who may be affected by regulations which are being prepared. There is, too, a need to ensure that the impact of EU Directives is fully appreciated at the time when these are being discussed in Brussels and that adequate consultation is conducted at that stage as well as at the point when agreed Directives come to be transposed into UK law.

For our part we propose to help departments with what we accept is a demanding task in preparing statutory instruments by producing brief and readable guidelines of the standards which the Committee would expect to see when it scrutinises SIs. We shall also continue to make available the services of our secretariat staff to assist departments where appropriate.

A full list of our recommendations appears at Paragraph 126.

# The Management of Secondary Legislation

## CHAPTER 1: INTRODUCTION

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### Prologue

1. Statutory Instruments rarely hit the headlines. Yet, as the rules and regulations by which laws are put into effect, they have an impact on us all. The way they affect us depends to some extent on how well thought-through they are—for example, whether they are clear about their objectives, whether they can be put into effect without undue complexity and whether they are clearly expressed. Unlike primary legislation they cannot be amended by Parliament—only approved or rejected—so it is important that they should have received full quality assurance before they are submitted for consideration by Parliament.
2. In the two years in which we have been scrutinising the merits of statutory instruments submitted for the approval of the House, we have found deficiencies in a number of areas. We have also detected little sign of coordinated planning and management by Government departments of the process by which instruments are prepared and laid before Parliament. We believe these two issues are linked—that the lack of management grip on the process of preparation is an important factor in the variable quality of the end product. In this report we examine how statutory instruments are prepared in Whitehall and whether they are meeting satisfactory quality standards in a number of key areas.

### Origins of the Inquiry

3. Our Special Report on the work of our Committee in Session 2004–05 recommended as follows:

“In order to assist our understanding of the management of the statutory instrument process and to enable us to report to the House on this matter, we propose that this Committee, in the new session, should conduct an inquiry with a view to finding out how the statutory instruments process is managed across Government departments; how decisions are taken within departments on, for example, consolidation and grouping of instruments; why there are peaks and troughs in secondary legislative activity; and how they can be ameliorated to ensure that proper scrutiny can take place”<sup>1</sup>.
4. The Procedure Committee endorsed our recommendation that such an inquiry should be conducted, and on 20 July 2005 our terms of reference were amended accordingly. We issued a Call for Evidence (see Appendix 1) on 13 September 2005 to a range of Government departments, non-government organisations and individuals with known expertise in this subject, and we began taking oral evidence from a selection of them on

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<sup>1</sup> HL Paper 106 (Session 2004–05), Paragraph 18

1 November. A list of those who provided written and oral evidence to us can be found at Appendix 2.

## Background

### *Terms of Reference*

5. Our Committee was appointed on 17 December 2003, and our membership and terms of reference—including the addition (Section 4) to enable us to conduct the present inquiry—are shown on the inside front cover of this report. Briefly, we are required to examine all statutory instruments which are laid before the House for parliamentary proceedings and to draw to attention any instrument which in our view:
  - (1) is politically or legally important or gives rise to issues of public policy likely to be of interest to the House; or
  - (2) may be inappropriate in view of changed circumstances since the enactment of the parent Act; or
  - (3) may inappropriately implement European Union legislation; or
  - (4) may imperfectly achieve its policy objectives.

### *Statutory Instruments*

6. Statutory Instruments (SIs) are made by Ministers under the authority of a parent Act of Parliament. About 3,500 such instruments are made each year, though the majority are local in their effect and usually temporary in nature (for example, road closures or air navigation orders) and do not require parliamentary approval. Some 1,200 SIs, however, are subject to parliamentary approval every year. About one tenth of these are instruments requiring affirmative resolution in order to pass into law—that is to say, Parliament must vote positively to approve them. The other nine tenths are instruments subject to negative resolution, which means that they become law after a period of time following their laying before Parliament unless a Member of either House lays a prayer against them and the House of Lords agrees (by a vote) to reject them. In practice the House has only very rarely rejected delegated legislation<sup>2</sup>. According to the Hansard Society, “the majority of SIs are subject to little, if any, parliamentary scrutiny. This is because most SIs are subject to negative procedures, which means they will become law in the form determined by a Minister unless one or other House of Parliament votes against them, which very rarely happens”<sup>3</sup>.
7. We have written this report from our perspective of scrutinising affirmative and negative instruments. For completeness however we should perhaps add that there are, in addition, super-affirmative instruments subject to two stages of parliamentary scrutiny, usually by specialist committees, such as the Joint Committee on Human Rights and the Regulatory Reform Committee. Church of England measures are also considered to be delegated legislation and their merits are scrutinised by the Ecclesiastical Committee. At the other end of the spectrum Parliament has in the past delegated some specific

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<sup>2</sup> The three 20th century instances are cited in Paragraph 8.02 of the *Companion to the Standing Orders of the House of Lords*

<sup>3</sup> See Volume II: Evidence, HL Paper 149–II, Page 198

powers to Ministers to make significant secondary legislation which is not subject to any parliamentary proceedings<sup>4</sup>: such instruments also fall outside our terms of reference.

8. An instrument is prepared by the Government department which is responsible for the area of policy in question and it is signed by the appropriate Minister and laid before Parliament under his or her authority. In the case of negative SIs, Government departments are required to observe, other than in exceptional circumstances, a rule requiring that SIs are laid at least 21 calendar days before they are scheduled to come into force, though a Member of Parliament may pray against an instrument during a period of 40 sitting days after its laying. There is therefore the possibility that an instrument could be annulled after entering into force. All SIs must be accompanied by an Explanatory Note (EN), which is a brief statement of what is its desired effect and under what parent Act it is being laid; and, since 2004, by an Explanatory Memorandum (EM), which is a fuller statement in layman's language of the legislative and policy background to the instrument, of what consultation has been conducted and of what regulatory impact is foreseen on those who will be affected by it. If appropriate, a regulatory impact assessment and/or a transposition note (in the case of SIs which transpose EU Directives into UK law) will also be laid. Broadly similar arrangements for the making of secondary legislation exist in the Scottish Parliament and the National Assembly for Wales.
9. All SIs, affirmative and negative, are scrutinised once they have been laid by the Joint Committee on Statutory Instruments (JCSI), which reports to both Houses on the legality and technical aspects of instruments. Since April 2004 all SIs have also been scrutinised by our own Committee, though reporting only to the House of Lords, on their policy and administrative merits as set out in Paragraph 5 above.

### *Experience to Date*

10. We began our scrutiny task in April 2004. By the end of February 2006 we had considered a total of 2,194 instruments, of which we had drawn 180 (just over 8%) to the attention of the House. In fact, our reporting rate has risen over the period in question. Our first Special Report<sup>5</sup>, covering the period from April to November 2004, recorded that we had drawn to the attention of the House 30 out of a total of 657 instruments considered (4.6%); our second Special Report<sup>6</sup>, covering Session 2004–05 (November 2004 to April 2005) recorded 40 out of 620 instruments as being drawn to attention (6.5%); while our reporting rate during the period from May 2005 to February 2006 (110 out of 928 SIs considered) was approaching 12%. We are keeping our reporting rate under review. While the criterion for reporting must obviously be the merits of each instrument, we are conscious of the need to be properly selective in bringing SIs to the special attention of the House.
11. While the number of instruments drawn to the attention of the House has risen, the grounds for reporting have remained fairly constant. In more than

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<sup>4</sup> For example, the Foot and Mouth Disease (England) Order 2006 (SI 2006/182), which was made under the Animal Health Act 1981 and in which criminal offences are created.

<sup>5</sup> HL Paper 206 Session 2003–04

<sup>6</sup> HL Paper 106 Session 2004–05

nine out of ten cases we have drawn attention to instruments which in our view raised issues of public policy likely to be of interest to the House. In some of these cases there were other reasons for our action as well as the instrument's public policy content—for example, that it imperfectly achieved its policy objectives or that it sought inappropriately to implement European Union legislation. In the majority of cases however the instruments to which we drew attention appeared to us to contain no particular defect but nonetheless dealt with an issue of which we considered that members of the House would wish to be aware.

12. In our first and second Special Reports we drew attention to a number of aspects which had caused us concern in regard to the process by which Government departments prepare and lay SIs. Among these were:
  - the tendency for large numbers of instruments to be laid in the run-up to the end of the financial year and to the beginning of parliamentary recesses, presenting the Committee with serious problems of absorption and prejudicing the effectiveness of the scrutiny process;
  - the variable quality of Explanatory Memoranda (EMs) provided with instruments when they are laid;
  - a tendency for SIs to be laid which simply specify detailed changes to previous ones rather than consolidate all changes into one new instrument;
  - the need for greater transparency, so that those affected by the enactment of SIs are able to understand their import by reference to the instruments themselves and without having to cross-refer to other documents;
  - a tendency to regard the “21-Day-Rule” as a maximum rather than a minimum period—and even its breaching on a number of occasions.
13. These concerns remain with us a year after our second Special Report, and they constitute the major reason why this inquiry has been carried out. The chart which appears at Appendix 3 shows the profile of the flow of SIs from all departments between April 2004 and March 2006. It will be seen that there has been some evening-out of the peaks and troughs experienced in the last session. This is, of course, to be expected following the unusual situation in early 2005, when the approach of the end of a financial year combined with the imminence of the dissolution of Parliament to produce a veritable flood of secondary legislation. Nonetheless, it is also clear at the time of going to press that we are heading for another “spike” in March 2006. We also continue to receive SIs which appear to us to fall within one or other of the criteria of defectiveness specified in our terms of reference.
14. We would not wish to suggest that the story is all one of doom and gloom. It is fair to say that the majority of instruments laid before the House appear to us to be generally well-crafted and to achieve their objectives without undue burden on those who will be affected by them. And there are also some examples of particularly good practice, to which we should draw attention. For example, Defra's recent Veterinary Medicines Regulations (SI 2005/2745) replace, within the compass of a single instrument, some 45 SIs which previously had covered individual aspects of the production of veterinary medicines and their placing on the market. SIs 2006/5 and 2006/6 from HM Treasury (Office of Government Commerce), which seek to

implement agreed EU Directives on the rules governing the award of public works, supply and service contracts, were accompanied by an EM which explained with admirable clarity and conciseness the results of consultation carried out during the summer of 2005.

15. Nonetheless, and accepting that no system is ever perfect, we believe that there are more defaulters than should reasonably be expected. And, what is more to the point, there does not appear to us to have been a noticeable improvement in either the flow or quality of instruments brought forward to the House despite the comments which we have felt obliged to make in our reports. Our inquiry therefore has sought to try and learn more about the process of how SIs are prepared within departments and laid before the House and to see whether there are parts of that process which might be improved.

### *Structure of Our Report*

16. After this introduction our report comprises two chapters summarising the evidence we have received and a chapter summarising our conclusions and recommendations. Chapter 2 (Better Regulation) seeks to establish a broad policy framework for secondary legislation, which is one of the means through which activities are regulated in the public interest. We are especially indebted to the independent Better Regulation Task Force (BRTF) under its Chairman Sir David Arculus; to the Better Regulation Commission (BRC), which under its new Chairman Mr Rick Haythornthwaite assumed the role of the BRTF on 1 January 2006; and to the Government's own Better Regulation Executive (BRE) under its Executive Chairman, Mr William Sargent, for the evidence which they gave to us on this aspect of our remit.
17. We feel however that we should make clear at the outset that this is not a report about Better Regulation *per se*. It is a report on the management of the process of preparing, laying and scrutinising one aspect of the regulatory process—the making of statutory instruments. Our purpose in looking at the Better Regulation scene is to provide a benchmark against which to measure how far the practices which are currently followed in submitting statutory instruments for parliamentary scrutiny conform with best regulatory practice and with the Government's own Better Regulation agenda.
18. Having set the Better Regulation framework in this way, we proceed in Chapter Three to examine the processes by which SIs are prepared within Whitehall and laid before Parliament. We have examined the wide range of issues involved here under three main headings—management, quality and scrutiny.
19. Under the first of these headings, we have examined how the process of preparing and laying instruments is managed by departments, and in particular whether each department has an overall SI programme to which it works and against which progress is measured; and whether there is a case for a greater degree of overall coordination than is currently exercised.
20. Under the second heading we have tried to put ourselves into the shoes of those who find themselves on the receiving end of secondary legislation—i.e. the users, whether they be large firms, small businesses, charities, householders or the proverbial man in the street. We have considered whether users have a clear enough view of the regulations which departments are planning to introduce, whether they are consulted adequately about the

impact which such regulations will have on their lives, whether SIs are sufficiently intelligible to their users and whether there is enough simplification and consolidation, so that those affected do not have to follow a trail from one instrument to another in order to understand what is happening. We have also looked specifically at the use of SIs to transpose obligations assumed under EU Directives into UK law and whether there are deficiencies here which need attention.

21. And, finally, we have tried to look at the problem from the standpoint of the House and to consider whether there are adjustments which might be made at the parliamentary end of the process which would facilitate effective scrutiny.
22. We would like to thank all those who gave oral or written evidence to us. Without their help this inquiry could not have been conducted or this report written.

## CHAPTER 2: BETTER REGULATION

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23. Statutory instruments are one tool of regulation. As such, they need to be viewed against the background of what is currently regarded as best practice in the regulatory field. To obtain a view of this we took evidence from Sir David Arculus, Chairman of what was then (November 2005) the Better Regulation Task Force (BRTF), an independent body providing Whitehall with an external perspective of the impact of regulation on business; from Mr Rick Haythornthwaite, Chairman of the Better Regulation Commission (BRC), which took over the BRTF's role on 1 January 2006; and from Mr William Sargent, Executive Chairman of the Better Regulation Executive (BRE), which sits within the Cabinet Office as coordinator of the Government's Better Regulation agenda.
24. In March 2005 the BRTF submitted to the Government its report, entitled *Regulation—Less is More*, which sought to identify the administrative burden which regulation often places on business and to propose measures for its reduction. The report contains eight recommendations including:
- By May 2006 there should be a systematic measurement of the administrative burden of regulation in the UK.
  - By the end of 2005 the Regulatory Impact Unit (as it then was) in the Cabinet Office should develop a means by which businesses and others affected by regulation might submit proposals, supported by evidence, for simplification, with responses to be made within 90 working days.
  - By September 2006 every Government department should develop a rolling programme of simplification to identify regulations which can be simplified, repealed, reformed or consolidated.
  - By the end of 2005 the guidance on Regulatory Impact Assessment should be amended to require consideration of compensatory simplification measures for major regulatory proposals, with reasoned explanations to be given in cases where it is concluded that such offsetting action is not possible.
  - By April 2006 the Government should extend the use of common commencement dates and include simplification measures as well as new regulation.
  - The Government should develop a methodology for assessing the total cumulative costs of regulation and, having done so, should consider the introduction of “regulatory budgets”.
25. The Government has accepted all eight recommendations of the Report. In doing so, it told us, it had “defined the Better Regulation agenda for the next two to three years”<sup>7</sup>. More specifically, in the wake of *Less is More* the Cabinet Office's Regulatory Impact Unit was converted into the Better Regulation Executive. The BRE, stated the Government response to the BRTF report, “has been established as a central coordination unit and is working with departments and stakeholders to map the stock of existing legislation”<sup>8</sup>. The Government announced that the BRTF was also to be put

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<sup>7</sup> See Volume II: Evidence, HL Paper 149-II, Page 170

<sup>8</sup> Formal Government Response, Page 3

onto a permanent footing from 1 January 2006 as the Better Regulation Commission (BRC). One of the roles of the BRC would be to “vet simplification plans prior to submission to the Panel for Regulatory Accountability<sup>9</sup> in addition to undertaking the existing independent advisory and challenge role of the BRTF”<sup>10</sup>.

26. Two key messages of *Less is More* were that the administrative cost of legislation needs to be measured—on the principle that “what gets measured gets done”; and that there was at least as much need to remove legislation as to make new laws—what the report calls the “one in, one out” principle. As an example of the first message, the report cited Dutch experience, which had suggested that upwards of 4% of GDP was being consumed by the administrative costs of legislation<sup>11</sup>: the Dutch, Sir David Arculus told us, had set targets to cut these costs and had so far succeeded in reducing them by about a quarter. As an example of the second message, Sir David suggested that the enactment of one “horizontal” law involving a general duty not to trade unfairly might enable a large amount of vertical product-related legislation to be swept away—“so it might be a case of one in and 20 or 30 out in that case” (Q 2). Such streamlining was, he suggested, of greater importance for small businesses and for voluntary bodies than for larger business enterprises, which had the necessary resources to cope with the administrative burdens involved (Q 8).
27. Sir David told us that he regarded it as part of his role to caution Whitehall officials against a mind-set that the right solution to a problem is necessarily a legislative one. “I think,” he told us, “that my job as a businessman looking from the outside is to say to government: ‘Look! If I were running a business, I would be looking at least five different ways of achieving my objective: I would not just be looking at the legislative option’” (Q 2). There was, he suggested, “a touching belief” that legislative solutions would ensure greater compliance, whereas in his experience a higher level of compliance was often the result of pursuing lighter-touch solutions (Q 20).
28. James Walsh, for the Institute of Directors (IoD), agreed with this approach. It was essential, he suggested, to get officials “to treat regulatory solutions to problems as very much the last resort, so that first you would ask them to consider whether there is a possibility of self-regulation, codes of practice or other light-touch alternatives” (Q 261). Matthew Fell, for the Confederation of British Industry (CBI), agreed, advocating a move towards a risk-based rather than a blanket approach to regulation (Q 260).
29. Where legislation was the chosen route, however, there was consensus among our witnesses on the need to take stock after the event in order to see whether new regulations were working as intended. In the view of the BRTF, “legislation (be it primary or secondary) should not be introduced and then left unexamined”<sup>12</sup>. The Government shared this view in its response to *Less is More*. “Departments are required” stated the response to the Report, “to conduct reviews of regulations to ensure they are having the intended effect”. And it added that “when undertaking a post-implementation review,

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<sup>9</sup> This body, which is chaired by the Prime Minister, examines all major regulatory proposals

<sup>10</sup> Formal Government Response, Page 9

<sup>11</sup> According to Chancellor Merkel (Financial Times, 26 January 2006), German estimates are similar

<sup>12</sup> See Volume II: Evidence, HL Paper 149–II, Page 10

departments should consider the scope for simplification, including revisiting EU Directives”<sup>13</sup>.

30. According to the BRTF, the quality of Regulatory Impact Assessments (RIAs) had improved since the requirement for them was introduced 8 years ago. Quality was however variable from one regulatory proposal to another and from one Government department to another. The BRTF told us that since 2001 it had been referring strong and weak RIAs to the National Audit Office (NAO) for examination and that the NAO’s 2005 report on a sample of RIAs had registered an overall improvement in quality. Last year the BRTF had asked the NAO to look at RIAs for whole Government departments and to compare and contrast the good and less good performers<sup>14</sup>.
31. A similar picture emerged with regard to consultation, which the BRTF regarded as lying “at the heart of better regulation” and as meaning “the right people being consulted in the right way and at the right time”<sup>15</sup>. Overall, thought the BRTF, consultation was done better than before and the Government’s own consultation code was adequate when adhered to. But, as with RIAs, quality was variable. “Some departments,” said the Task Force, “need to show greater willingness to change direction on the basis of consultation responses” and consultation should be used “to inform policy decisions rather than to tick the right box”. It was also important to think carefully in advance whom to consult, how and when. Standing advisory panels of practitioners were particularly commended, such as the Viper Group for the vehicle industry. Sir David Arculus told us: “When the Department of Transport is looking at legislation, it will pull the Viper Group together and it will just talk about what the Department of Transport wants to do for half a day or a day, and then will draft the consultation document after that” (Q 9). This approach was commended also by the IoD<sup>16</sup>. The Government response to *Less is More* announced that other such groups were being formed to include the construction, chemicals, retail and food sectors<sup>17</sup>.
32. It was important, Sir David considered, that Ministers should be required strictly to observe the 12-week consultation requirement. However, he felt that the requirement was insufficient by itself: “you have got to have a change of culture in departments and you have got to have civil servants and Ministers who actually want it to happen” (Q 11). The BRTF also pointed to a contrast between the 12-week consultation period and the 21-day laying period for statutory instruments. “We note,” wrote the Task Force, “that guidance accompanying legislation that imposes burdens should be issued at least 12 weeks in advance of the legislation coming into force...We are therefore surprised that as little as 21 days notice is considered to be enough before SIs are implemented after they have been laid—particularly for the more complex and controversial SIs”<sup>18</sup>. Indeed, the BRTF took the view that it would be helpful if SIs were to be made available, if only in draft form,

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<sup>13</sup> Formal Government Response, Page 9

<sup>14</sup> See Volume II: Evidence, HL Paper 149–II, Page 10

<sup>15</sup> See Volume II: Evidence, HL Paper 149–II, Page 11

<sup>16</sup> See Volume II: Evidence, HL Paper 149–II, Page 129

<sup>17</sup> Formal Government Response, Pages 6–7

<sup>18</sup> See Volume II: Evidence, HL Paper 149–II, Page 11

when the parent legislation was being considered by Parliament<sup>19</sup>. We commend this practice as one which facilitates scrutiny.

33. We asked Sir David Arculus for his views on what we as a Committee referred to as “gold plating,” which the NAO defined in a recent report<sup>20</sup> as “unnecessary over-implementation” of legal requirements (in particular, of EU Directives when transposed into UK law). He had not, he said, found evidence of deliberate “gold plating”. But he had found evidence that laws were being added to as the regulatory process was developed. “For instance,” he told us, “a great many of the regulatory powers in the UK have now been devolved by Parliament to the independent regulators, and the independent regulators tend to put their own particular gloss on the regulation. And then they will pass their guidance down to the local authorities, and they will put another level on as well; and then the firms will get their legal department to look at it, and they may well put another level on as well”. Sir David referred to this process of accidental “gold plating” as regulatory creep (Q 22).
34. One of our concerns as a Committee has been that there is not always adequate recognition by departments of the burden which their regulations place not only on industry and business, which have large organisations (such as the CBI and the Small Business Service) to speak for them, but also on such bodies as charities and on ordinary people. Sir David told us that there was a move on the part of the BRTF to address this concern. “As a result of the work that we have done in the Better Regulation Task Force with the business community,” he said, “a number of other people are coming along and saying ‘why can we not be treated in the same way?’”. He cited both the public service and the voluntary and community sector. “They all want the same quality of consultation, the same look at their administrative costs...so there is much more work to be done” (Q 13).
35. In order to see how much progress is being made on the ground towards this vision of Better Regulation, we took evidence from the Better Regulation Executive. The BRE was said by its Executive Chairman, Mr William Sargent, to be “at the core of trying to drive this forward together with the rest of the Government departments” (Q 24). Each department, we were told, had its own Better Regulation Unit (Q 28) and it was the BRE’s function to act as, in Mr Sargent’s words, “the ‘best practice’ catalyst or clearing house”. Mr Sargent added however that “we need to persuade a significant number of people outside our own world to deliver the goods” (Q 24).
36. The BRE has no enforcement powers. Mr Sargent told us that “our role is to ensure that people understand how to do better regulation and we are doing that. We do not have the resources nor the remit to go beyond that” (Q 38). Putting it another way, Mr Sargent said: “We have the ability to highlight the fact that [Government departments] are not doing what they could do and they could do it better, but we do not have specific powers to discipline people” (Q 47). And he added: “We are there as a challenge function, but the decisions are always made by those departments and those Ministers who originate them” (Q 43).

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<sup>19</sup> See Volume II: Evidence, HL Paper 149–II, Page 10

<sup>20</sup> NAO Report, “Lost in Translation: Responding to the Challenges of European Law,” 26 May 2005, Page 1

37. The BRE's work to improve the quality of regulation is focused principally on RIAs and on consultation. As regards RIAs, the BRE does not distinguish between primary and secondary legislation but reviews all legislative proposals which have an estimated regulatory impact in excess of £20m. Marie-Anne Mackenzie, Head of the BRE's Scrutiny Team, told us that "departments are required to undertake regulatory impact assessments for all measures that are going to have an impact on business, charities, the voluntary sector or the public sector...In the centre, in the Cabinet Office, for RIAs we perform the same challenge function for significant proposals, whether they are primary or secondary legislation. Of course, if secondary legislation does not cost enough, if it does not cost as much as the criterion for significance (which is £20m), then it would not be scrutinised in the centre, and of course that is where some of the secondary legislation misses out from that challenge that we perform. But that does not mean that it should not be scrutinised carefully within the department" (Q 28).
38. The BRE told us that it uses its RIA policy function "to help officials analyse the best way to achieve their objectives and secure implementation—including "do nothing" and non-legislative options"<sup>21</sup>, and cited as an example of this process working successfully the Department for Transport's decision to pursue non-legislative solutions to the problem of financing the homeward journeys of passengers whose airline goes bankrupt while they are abroad. We were told also<sup>22</sup> that Cabinet Office guidance to departments on the conduct of RIAs now includes a requirement to record plans for Post-Implementation Review (PIR). But stating a requirement does not necessarily mean that it will happen. As one Defra witness told us candidly, "there is so much pressure to create further regulation and give effect to further policies that it does become very difficult to get the resource to deal with something which is already happening" (Q 195).
39. Kate Jennings, Head of the BRE's Regulatory Reform Strategy Team, differentiated between the BRE's role in regard to consultation and its role in regard to RIAs. "We do not scrutinise consultation documents," she said, "in the same way as we would scrutinise the impact assessments. Our role in consultation is to look at the Code of Guidance rather than looking at the individual responses" (Q 31). She told us that "our role in the Cabinet Office is issuing the guidance on consultation...We also help to coordinate a network of consultation coordinators across all departments" (Q 27). The BRE's role, she said, was "partly to disseminate good practice but also to try and make sure that those consultation coordinators are joining up where they have policies in one department which might be relevant to stakeholders in another department...What we are trying to do is to encourage more joined-up thinking and more joined-up consultation where issues are cross-departmental" (Q 27).
40. We were surprised to find that the BRE's "best practice catalyst" function did not extend to statutory instruments. Miss Jennings told us that "we do not have a formal role in SI management or production. The guidance on SI practice is produced by the Office of Public Service Information and not by BRE. Where we do disseminate best practice is on things like regulatory

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<sup>21</sup> See Volume II: Evidence, HL Paper 149-II, Page 20

<sup>22</sup> See Volume II: Evidence, HL Paper 149-II, Page 21

impact assessments, consultation policy; and the SBS<sup>23</sup> produces best practice guidance on common commencement dates” (Q 32). Mr Sargent confirmed that the BRE had no role in overseeing the SI process but simply in “ensuring that people understand that the regulatory impact assessments are applied to that process” (Q 33). When we put to him the question whether it would not be logical for his Executive to include the working of the SI process within its remit of promoting better regulation, he replied that “the responsibility needs to be with those who originate the legislation. The parliamentary system is part of those checks and balances which ensures that the job is done right in the end, because if it is not you should reject it” (Q 39).

41. We were astonished by this reply, and we shall return to the point later. Suffice it to say here that we noticed a tendency on the part of the BRE to describe its role largely in terms of RIA policy. For example, Mr Sargent, when asked how in the absence of an audit function the BRE knew what was going on in the regulatory field, replied that “the RIAs are very much how we see the flow of information” (Q 42); and Miss Jennings, explaining why the BRE had little involvement with the preparation and scrutiny of SIs, stated that “it is only really where they have an impact on business, charities and others where we have a role” (Q 43). While we would not wish in any way to detract from the importance of RIAs as part of good regulatory practice and while we are aware that the BRE does have other roles (for example, in issuing the Government’s Code of Practice on consultation), we have acquired the impression that the RIA function tends to predominate within the BRE over other aspects of its Better Regulation portfolio.

### HMSO

42. In an effort to pin down what, if any, central responsibility the Cabinet Office held for the effectiveness of the SI process, we took evidence from Mr Alan Pawsey, Head of Publications at HM Stationery Office (HMSO). Mr Pawsey’s department is a remnant of the old HMSO, which since the privatisation of its trading functions in 1996 has operated from within the Cabinet Office under the aegis of the Office of Public Sector Information (OPSI). Since 1996 HMSO, through Mr Pawsey’s unit, has had responsibility for authorising the electronic and hard-copy publication of all SIs and for developing the templates which are used for their drafting. It has responsibility also for editing *Statutory Instrument Practice* (SIP). This is a manual which (in HMSO’s words), “is intended primarily for the use of civil servants and others concerned with the preparation and making of statutory instruments and the parliamentary procedures relating to them”<sup>24</sup>. The manual is publicly available—for example, on OPSI’s website. It is directed essentially at the procedural aspects of preparing and laying SIs—for example, their format and content, their registration, printing and publication, and the parliamentary procedures which govern their laying—rather than with them as vehicles of regulation.
43. While HMSO sets the standards for the drafting and presentation of SIs, individual departments are responsible for putting those procedures into practice. Mr Pawsey told us that “each department has its, shall we say,

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<sup>23</sup> The Department for Trade and Industry’s Small Business Service

<sup>24</sup> See Volume II: Evidence, HL Paper 149–II, Page 22

interpretation of *Statutory Instrument Practice* and they work to their own processes and procedures, their own instructions and timetables” (Q 110). There were, said Mr Pawsey, a number of inter-departmental groups, one of which he himself chaired, on which sat departmental lawyers and coordinators of parliamentary business and “where we primarily look at the process of producing an SI and look at the future development of templates which are used for drafting the SI itself” (Q 101). Nonetheless, HMSO’s influence over what departments actually do is limited, like the BRE’s, to persuasion. Mr Pawsey told us, for example, that “we do try to encourage departments to get instruments to us spread out because there is absolutely no way we can process them if they all hit us at the same time” (Q 95) and that “departments are reminded of the fact that they should ensure Parliament has adequate time to consider the instruments which they are laying out” (Q 107). The templates which were being developed should, he believed, make it easier for departments to consolidate successive instruments (Q 125), and the forthcoming edition of *Statutory Instrument Practice* would remind officials that SIs should be laid before Parliament as soon as they are ready rather than just 21 days before coming into force. However, when asked whether he believed his efforts to persuade departments to achieve a more even flow of SIs were succeeding, he did not believe that they were (Q 104).

44. The BRTF believed that a more radical approach was needed if the situation was to be improved. Sir David Arculus took the view that the BRE did a good job but was under-resourced. “There are,” he said, “something like 60 civil servants in the Better Regulation Executive, although I think that number is being slightly expanded now. But 60 or 70 civil servants—and they have to deal with 15 government departments, 150 independent regulators, and a whole mass of primary legislation...and then all the ensuing secondary legislation that comes out of that. It is a mammoth task, and I think that for the number of people it is very difficult to catch the leaves as they fall off the tree” (Q 12). Sir David repeated what he had said before—that “we need a culture change in Government departments” (Q 12).
45. Sir David described the tendency of some departments to interpret CCDs as common laying dates as “sheer inefficiency” (Q 18). Peaks and troughs in the laying of SIs could be avoided given “proper timetabling and better project management. The bunching around certain dates is not being caused by CCDs in themselves. CCDs set dates when SIs should come into force—not when they should be submitted for scrutiny”<sup>25</sup>. Sir David suggested that, if Parliament were able to refuse to accept instruments submitted without proper time for effective scrutiny, that might provide a salutary lesson to the sponsoring departments (Q 19).

### Conclusion

46. What conclusions can we draw from this overview of the Better Regulation scene? It is clear enough that the theory of good regulation is there: we are not inclined to question or add to the principles which the BRTF, the BRC, the BRE and the Government have enunciated. But it is equally clear that the theory is not always put into practice and that there is in some cases a difference between what ought to happen and what actually happens on the

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<sup>25</sup> See Volume II: Evidence, HL Paper 149–II, Page 10

ground. While we recognise that to an extent this deficit is a result of human imperfection, our first-hand experience of one part of the regulatory scene—statutory instruments—inclines us to believe that there is more to it than that and that there could be structural defects at work also.

47. In this connection we are concerned about two of the things which have emerged—that the responsibility within Government for “keeping the regulatory conscience” is divided; and that those who are charged with making the regulatory rules appear to have little sanction other than persuasion to ensure that the rules are adhered to. We shall explore these concerns more fully in the next chapter: this survey of the regulatory scene is intended to be descriptive rather than argumentative. But we believe it appropriate to make brief mention of them here before proceeding to look in detail at the way in which regulation via statutory instrument is carried out.

### CHAPTER 3: STATUTORY INSTRUMENTS

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48. We turn now to that area of regulation with which as a Committee we are closely concerned—the scrutiny of statutory instruments after they have been submitted for parliamentary approval. We shall divide our examination of the subject into three parts. In the first, we shall look at how Government departments manage the process of preparing and laying SIs before Parliament. In the second we shall try to look at SIs from the standpoint of the users in order to form a view of whether the end product is sufficiently tailored to the needs of those who are affected. In the third we shall ask whether there is anything which we as a Committee can do to help improve the situation.

#### *Management*

49. In this section we ask who is accountable within Government departments for the efficiency and effectiveness of the SI process; whether departments have integrated plans for secondary legislation which guide their work or whether instruments come off departmental production lines as and when they are ready and in response to demands, as they arise; what efforts are made to schedule secondary legislation so that it reaches Parliament in a relatively even flow rather than in congested form in the run-up to the end of the financial year and to parliamentary recesses; whether instruments with common commencement dates (CCDs) are planned and managed so that CCDs do not become in effect “common laying dates”; and what role is played in the management of the SI process by the central departments.
50. Because of the constraints on the timetable for our inquiry, we were able to take oral evidence from only three departments—the Department of Environment, Food and Rural Affairs (Defra); the Department for Trade and Industry (DTI); and the Home Office. We also invited written evidence from three other departments with a major interest in SIs—the Department for Constitutional Affairs (DCA), the Department for Transport (DfT) and the Department for Work and Pensions (DWP). We did not however receive submissions from them, as it was decided by the Cabinet Office that a single written submission should be made on behalf of all Government departments<sup>26</sup>—though at our request the contributions which DCA, DfT and DWP made to this were subsequently provided to us<sup>27</sup>. It is therefore necessary for us to begin with a disclaimer—that the picture we have been able to build up of the process of managing SIs is based on a limited sample of Government departments and, while we have made every effort to report accurately what we were told, we cannot say whether the picture we have painted is typical of Whitehall as a whole.

#### *Management Responsibility*

51. Who is responsible within departments for overseeing the process of preparing SIs? Donald MacRae, Defra’s Director-General of Legal Services, told us that he was the Department’s Board Member responsible for regulation, adding that “overall responsibility for managing and controlling

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<sup>26</sup> See Volume II: Evidence, HL Paper 149–II, Pages 165–170

<sup>27</sup> See Volume II: Evidence, HL Paper 149–II, Pages 181–191

SIs probably falls to me but it is not something that has ever been articulated before” (Q 183). Mr Anthony Inglese, DTI’s Director-General of Legal Services, likewise told us that he was the Board Member responsible for managing the SI process. “So, for example,” he said, “if there are points on bunching of statutory instruments, those points would be my responsibility to do something about” (Q 133).

52. The Home Office, on the other hand, told us that there was no one official within the Department who had responsibility for maintaining an overall picture of what was happening on the SI front. Officials suggested that this was necessary because the Home Office was a devolved organisation, with accountability delegated to the Directors-General in charge of the Department’s three operating pillars (QQ 276–280). We found this explanation unconvincing, as most if not all Government departments operate on the basis of devolved executive responsibility. We were pleased to hear that consideration was being given to a strategic overview of Home Office secondary legislation at Director-General level (QQ 283–284), but we believe that more radical action than this may be necessary if the fragmented approach which appears to obtain at the moment is to be remedied. We were told by Graham McCabe, of the Home Office Better Regulation Team, that “we do have a Better Regulation Minister, who has overall responsibility for the whole Better Regulation agenda, but his concentration is more on the aspects of better regulation, which is in good public consultation, producing regulatory impact assessments and that sort of thing, rather than focusing specifically on SIs” (Q 286). We have found this to be a recurring theme in our inquiry—that good regulation is not interpreted in practice as including the efficiency of the process by which secondary legislation is prepared and made. **We recommend therefore that in each department there should be one member of top management (i.e. at Board level) who is accountable to the relevant Minister for the efficiency and effectiveness of the process of preparing SIs as well as for ensuring that the finished products meet the requirements of good regulation.**

### *Active Management*

53. We also sought to ascertain the degree of active management by departments of the preparation of SIs. Mr Inglese told us that “we always aim to draw up a timetable, and any statutory instrument which is of a significant size is normally run as a project” (Q 136). DTI maintained risk registers for the larger SIs, and any instrument which showed signs of running into trouble would be reviewed. “I ask for monthly reports,” Mr Inglese told us, “from the senior lawyers who are responsible for the drafters, and those monthly reports tell me about the progress of every significant statutory instrument which we run as a project” (Q 136). Mr MacRae on the other hand told us that “the production of SIs is something that we have always done and just do, as opposed to something which is actively managed as a generic process”. Defra, he said, was a major generator of legislation. “It is so much part of the culture that there are lots of questions that we just do not ask about what we do”. Mr MacRae told us that “many SIs are run on proper project terms, but what we have been tending to lack is the programme element of looking at a collection of projects. What we certainly lack is one single overview of the entire legislative output” (Q 183). Mr MacRae went on to say however that PPM (programme and project management) had been introduced for the Environment Division of Defra and that he met regularly, as DG Legal

Services, with the Director-General of the Environment Division in order to review the progress of legislation in that field. Active consideration was, he said, being given to extending PPM across the rest of the Department (Q 184).

54. Richard Clayton, an Assistant Legal Adviser at the Home Office, told us that “the Legal Adviser’s branch is responsible for both drafting and laying Statutory Instruments. They are laid once they have been returned to the administrator, who will then put them to the Minister for approval... Statutory Instruments are drafted on policy instructions from the relevant administrators” (Q 275). Programme management however appeared to be limited. Martin Bryant, Director of Strategy and a member of the Group Executive Board, told us that that “we have a quarterly trawl for future SIs, which is initiated by our parliamentary section. So we are looking one quarter in advance in order to try and anticipate what would be required” (Q 287). Mr Clayton added however that “the trawl is very much directed at affirmative resolution instruments because they are the ones which will take time in the House. So it is putting in a forward bid for time for debate” (Q 288). We regard this as insufficient: in our view all SIs should be prioritised according to their importance rather than by their parliamentary procedure.
55. Subsequent to taking evidence from officials, we were assured by the Home Office Minister with responsibility for Better Regulation (Andy Burnham MP) that “in response to the Committee’s concerns the Department has made some significant changes to procedures” and that, among these, “the Department’s Group Executive Board will exercise central oversight of the picture across the Home Office through quarterly reviews of the legislative picture”<sup>28</sup>. We were encouraged by this response, which fits well with the advice we received from Rick Haythornthwaite, Chairman of the Better Regulation Commission (BRC)—that “the departments that operate well are those where there is very clear support from the top for a better regulatory programme” (Q 341).
56. In none of the three departments which gave evidence to us did we find evidence of an overall annual SI plan, with milestones and machinery to monitor whether these are being met—though the arrangements described to us by DTI witnesses did not seem to be too far from this. There is already a requirement placed on departments which are planning to lay SIs with CCDs<sup>29</sup> to publish lists of such instruments each January, the intention being to give the business sector early warning of forthcoming secondary legislation and an opportunity to put in place the necessary arrangements for implementing the regulations in question as soon as they come into force. There is however no comparable requirement for SIs as a whole. According to Mr Inglese, SIs with CCDs tend to be better managed because “we tell the world about them and we put them in our annual statement of statutory instruments” (Q 149). If this is so, a requirement on departments to list and publish all projected SIs in the year ahead could have a similar beneficial effect. Indeed, if departments are going to take a holistic view of their secondary legislation as we have recommended above, it will be necessary for them to compile for themselves an overall picture of the instruments they are

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<sup>28</sup> See Volume II: Evidence, HL Paper 149–II, Page 158

<sup>29</sup> See Paragraphs 59–66 below

planning to lay. This would also provide them with the raw material to do some integrated planning, including the setting of milestones and the putting in place of machinery to review their achievement. **We therefore recommend that departments should prepare annual management plans for their SIs, including milestones to be met and machinery for reviewing their achievement; and should publish annual statements of their projected secondary legislation, listing the SIs they plan to submit for parliamentary proceedings, briefly describing each one and stating when it is planned to come into effect.**

57. Publication of SI plans is important not only as an incentive to set and meet milestones but also as a valuable source of information for those who will be on the receiving end of projected regulations. The CBI pointed in its evidence to the need for “a central repository” which would enable the business community to know what was planned in the field of secondary legislation (Q 248). We also received evidence<sup>30</sup> in the course of our inquiry from Kent Police College, whose Learning Support Centre Manager has the task, *inter alia*, of scanning the legal environment for changes to legislation in order to identify those which might have an effect on Force training. The point was made to us that not all sections of Acts of Parliament come into force at the same time<sup>31</sup> and that it was important to be able to keep track of SIs which were being made with the object of activating specific sections on particular dates. While the point was made to us in the context of the 21-day rule, the shortness of which could make it difficult to keep abreast of developments, it does seem to us that the compilation and publication of annual SI plans by Government departments would give valuable long-range warning to those who will have to implement the resultant regulations.
58. In making this proposal we recognise that departments may well not be able to set out precise plans for all their projected secondary legislation a year in advance. The actual content of departmental SI programmes will be affected by the progress of primary legislation and by the size and shape of any secondary legislation which flows from it. It is also important to recognise that most Acts of Parliament come into operation in stages, with commencement instruments being made in tranches and with the process sometimes continuing over several years—indeed, with some sections never being commenced at all. We accept that in such cases there will be uncertainties which will mean that an authoritative 12-month forecast is not always possible. Nonetheless it should be possible for departments, when they have primary legislation before Parliament, to make and publish reasonable estimates of the shape and timing of any subsequent secondary legislation; and, where staged commencement is involved, to indicate both when commencement SIs might be made and when order, regulation and rule-making powers will first be exercised. To do so would both facilitate scrutiny and help those who have to track when new legislation will come into force. Indeed, we would hope that it would also encourage departments to think ahead when they are seeking to enact primary legislation and to consider carefully the secondary legislation which will flow from it. To the extent that uncertainties remain, these can be indicated in the annual lists, which themselves can be updated at periodic intervals—perhaps every

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<sup>30</sup> See Volume II: Evidence, HL Paper 149-II, Pages 219–221

<sup>31</sup> The Fireworks Act 2003 was quoted as an example

quarter. We note with approval that some departments have recently published summary SI programmes along the lines we envisage.

### *Common Commencement Dates (CCDs)*

59. We move on now from overall management of the SI process to specific parts of it, and we begin with the laying of SIs with CCDs. The Chancellor of the Exchequer announced, in the December 2004 Pre-Budget Report, that, beginning in 2005, the Government would introduce progressively CCDs for all regulations bearing on business. Under the CCD initiative regulations with an impact on business would, subject to certain exceptions, come into force on only two dates of the year—6 April or 1 October, the intention being to provide greater certainty to business about regulatory change and to minimise disruption to business activities resulting from constant changes to procedures. Departments were required to prepare and publish each January a schedule showing their plans for introducing regulations on these dates.
60. The CCD initiative does not apply to regulations which implement EU Directives or are otherwise connected with EU regulations nor to measures, including those involving public or animal health or safety or the closure of tax avoidance schemes, where there is considered to be an urgent need to introduce legislation. CCDs were introduced in 2005 for regulations in the fields of health and safety and of company, consumer, employment, and work and pensions law. They are to be extended in due course to other areas.
61. Guidance to departments on the handling of CCDs was published in March 2005 jointly by the DTI's Small Business Service and the Cabinet Office Regulatory Impact Unit (now the Better Regulation Executive). The guidance implies that, while instruments with CCDs should take effect only on two dates each year, this is not a hard-and-fast requirement. It envisages not only "occasions when Ministers need to act where there is a public need for urgent action beyond the exceptions already mentioned"<sup>32</sup>, but also situations in which the timetable for introducing a regulation has slipped and the sponsor department is no longer on course for meeting the target CCD. In these circumstances officials are advised to "consider why the regulation is needed and whether any harm may occur by delaying until the next common commencement date. If it is possible, wait until the next common commencement date to introduce the measure"<sup>33</sup>.
62. The guidance is however clear about the need for good project planning and for allowing Parliament adequate time for scrutiny. It tells officials that "delivering regulation to a timetable can be demanding. Good planning is therefore essential"<sup>34</sup>; and it proceeds to spell out what needs to be done:  

"Your chances of successfully delivering your regulation will be greatly improved if you have a robust project and delivery plan and have timetabled appropriately. The key stakeholders, such as your legal teams, should be actively involved. Keeping to better regulation-making principles should mean that all key actions are taken before the holiday and recess period. Do not leave things to the last minute. Never assume that your regulation will get through clearance or parliamentary processes in the minimum possible

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<sup>32</sup> SBS/BRE Guidance, Paragraph 8

<sup>33</sup> *Ibid*, Paragraph 10

<sup>34</sup> *Ibid*, Introduction

time. The role of Parliament is to scrutinise regulation and the Government has committed to ensure Parliament sufficient time for consideration”<sup>35</sup>.

63. Of even more importance from the point of view of our own work as a Committee is the statement in the guidance that “working to a CCD timetable does not prevent you from laying instruments throughout the year, thereby allowing time for parliamentary scrutiny and, if appropriate, debate well in advance of commencement”<sup>36</sup>.
64. So what has been happening in practice since CCDs were introduced? The Committee does not, in the records it keeps, identify SIs with CCDs separately from other instruments. Mr Inglese, speaking for DTI, told us that his department had had eleven SIs requiring parliamentary approval with a 6 April CCD last year. Of these, one was laid in January, two in February and eight in March (Q 143). For the October 2005 CCD there were 14 SIs requiring parliamentary approval. Three of these were laid in July, eight in August and three in September (Q 144). Though Mr Inglese suggested that DTI’s performance in the second half of the year was an improvement on what had been achieved in the first half, in fact the laying of 11 SIs during August and September does not appear to meet the injunction in the guidance that “all key actions [should be] taken before the holiday and recess period”. Mr Inglese pointed out that, with the requirement for a 12-week consultation period, his department was already having to start work some seven months before an instrument was due to come into force and that a number of circumstances, such as the sickness of key staff or policy problems, could cause slippage (QQ 146–7).
65. For Defra, Mr MacRae said that SIs with CCDs were not a significant part of the departmental output—because CCDs applied to domestic legislation, whereas a substantial part of Defra’s legislative output was in relation to changes in EU obligations. As a result Defra had laid only five SIs with CCDs in 2005. Mr McCabe, for the Home Office, told us that at the time of giving evidence (17 January 2006) his Department was collating a return for publication, adding however that “so far we are not getting an awful lot of information that is likely to be relevant to the announcement because...we are not a big player in things that have a burden on business” (Q 295).
66. The significance of this matter to our inquiry lies in the contribution which SIs with CCDs make to the problem of congestion if they are laid before Parliament in the run-up to the end of the financial or calendar years or to parliamentary recesses. At this stage, with the CCD policy only partially implemented and in the absence of overall data on when such SIs are being laid in practice, we are unable to assess with any accuracy the seriousness of the problem of CCDs becoming common laying dates. However, the problem is certainly there, as both our own experience and the DTI’s figures indicate, and we propose to keep the situation under review. In the meantime **we recommend that departments should plan their scheduling of such SIs in such a way as to avoid the risk of congestion at the stage of parliamentary scrutiny.**

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<sup>35</sup> *Ibid*, Paragraph 11

<sup>36</sup> *Ibid*, Paragraph 12

### *The 21-Day Rule*

67. *Statutory Instrument Practice* (SIP) prescribes<sup>37</sup> that, “if an instrument is subject to negative procedure, it should generally be laid...at least 21 days before it is due to come into force...21 days means 21 calendar days, the period being reckoned without excluding days on which Parliament, or either House, is not sitting,” SIP describes the 21-day rule as a “rule of practice”. It accepts that some SIs may need to take effect at shorter notice but states that “the rule should be strictly observed whenever possible” and that, where compliance is not considered to be possible, the reasons should be explained in the Explanatory Memorandum.
68. HMSO has supplied us with data showing the number of days which elapsed between the laying and entry into force of each SI laid before Parliament during Calendar Year 2005<sup>38</sup>. These show that 110 SIs out of a total of 1160 (about 10%) were laid less than the required 21 days before they were due to come into effect. This average of 1 in 10 instruments breaching the rule masks variations among departments. It is higher than 1 in 3 for the Privy Council Office and as high as 1 in 6 for the Department for Constitutional Affairs and the Home Office; and it is as low as 1 in 22 for DTI, 1 in 32 for the Department for Education and Skills and even 1 in 100 for the Department of Transport. The degree of divergence from the 21-day rule also varies, both between and within departments. In about three quarters of cases (79 out of 110), however, the divergence was more than marginal—i.e. the SIs concerned were laid less than 10 days before coming into effect (there were even three cases of laying *after* the implementation date).
69. Defra was confident that it was meeting the 21-day rule in the overwhelming majority of cases. Mr McRae told us that over the last five years the proportion of his Department’s SIs which had been laid with less than 21 days before entry into force had fallen from 19%—a high figure which, he said, was largely attributable to the foot-and-mouth outbreak at the time—to 3% this year (HMSO’s figures do not bear out the latter figure). Other departments giving evidence were unable to give precise figures but we feel sure that they will find HMSO’s data of interest.
70. What are the causes of these breaches? Some<sup>39</sup> clearly derive from the need to take urgent action, as envisaged in the guidance, but there are many others where there is no clear reason for late laying other than dilatory planning. The object of the 21-day rule is to ensure that Parliament has adequate time to consider and, if necessary, object to an instrument before it comes into force. While members of the House may continue to raise objection for up to 40 days after the laying of an instrument, there is a strong disincentive to do so after its entry into force, if only because any action taken under an instrument between its entry into force and a successful prayer against it remains valid, even if the SI in question should be subsequently revoked. Some might say that, given the complexity and volume of secondary legislation, 21 days, even when complied with, is itself a very tight timetable

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<sup>37</sup> Statutory instrument Practice, Sections 5.4.13 and 5.4.14

<sup>38</sup> See Volume II: Evidence, HL Paper 149–II, Pages 35–79

<sup>39</sup> For example, Defra’s SIs 3394, 2898 and 2990, which are concerned with precautions against Avian Flu and DCMS’s SI 2005/1974 Protection of Wrecks (Designation)(England) Order, which gave immediate protection to a 17th century shipwreck unexpectedly revealed by the tides in order to prevent unauthorised salvaging of historic artefacts.

for proper parliamentary scrutiny. Laying instruments, other than in exceptional cases, at less than the prescribed notice makes the process of scrutiny more difficult and is hard to reconcile with the Government's commitment to ensuring that there is proper parliamentary scrutiny of legislation. In evidence the Government told us that it did not favour lengthening the 21-day period "as this would be likely to result in greater pressure to break the rule"<sup>40</sup>. It therefore behoves the Government to ensure better compliance with the rule as it stands. **We recommend that the Government should take action to ensure that no instrument is laid before Parliament less than 21 days before it is due to come into force unless there are clear and compelling reasons of operational urgency for such action which are explained at the time of laying.** We would not agree, for example, that meeting a CCD deadline constituted grounds for breach of the rule.

### *Congestion*

71. A matter of considerable concern to us, as the Committee charged with examining all SIs submitted to Parliament and identifying those which merit the particular attention of the House, is the recurrent "traffic congestion" which occurs at certain times of the year when departments lay larger numbers of instruments than usual in the run-up to the end of the financial and calendar years and to parliamentary recesses. We have drawn attention to this unsatisfactory situation in our two Special Reports covering Sessions 2003–04 and 2004–05<sup>41</sup>. While the problem has not been as severe during the last 12 months as it was in the run-up to the end of Financial Year 2004/5 and the dissolution of Parliament, it has not been eliminated. And, in the absence of active management of the process, there is no reason why the situation should improve or, indeed, not deteriorate.
72. The Government told us<sup>42</sup> that it is aware of the problem and that it is "committed to ensuring that Parliament has an opportunity to scrutinise all of its legislative proposals". The Government rightly points out that the preparation of SIs is a complex and often lengthy process and that a variety of circumstances—such as changes in proposals, further consultation and re-drafting—can disrupt well-laid plans and result in the "bunching" of large numbers of instruments. The Government observed however that "departments make every effort to fit this timetable within the Parliamentary calendar, to take account of the need for parliamentary scrutiny and approval".
73. This view was reinforced by Bryan Welch, a DTI Legal Director. Pointing out that the preparation of SIs had to begin many months before their planned laying before Parliament, he told us that it was impossible "simply to make the spike disappear, because it depends on how far back we start—and we already have to start really quite a long way back from the coming-into-force date" (Q 145). Speaking for Defra, Donald MacRae said that "this is not as predictable a production line as some people may think. Not all of the SIs have gone according to the original plans" (Q 185), and he conceded that "there is some bunching around March and December which arises from the

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<sup>40</sup> See Volume II: Evidence, HL Paper 149–II, Page 168

<sup>41</sup> See HL Paper 206 Session 2003–04, Paragraphs 53–55; and HL 106 Session 2004–05, Paragraphs 15–19

<sup>42</sup> See Volume II: Evidence, HL Paper 149–II, Page 168

need for various bits of legislation to come into force at the start of the financial year or at the start of the calendar year. That is a seasonal thing which we have always had” (Q 186). Similarly Martin Bryant, for the Home Office, accepted that “we do have some bunching as a consequence of inadequate planning processes” (Q 290).

74. We fully recognise that the preparation of SIs is a complex and far from predictable process and we sympathise with the difficulties which departments experience as a result. Nonetheless we question whether there is sufficient recognition that parliamentary scrutiny is an integral part of the process rather than something which follows it. Good project management should include contingencies to allow for slippage, so that overall timetables are not disrupted when things do not work out quite as planned—which is a further argument for more active management of departmental SI programmes. Of course, even with good project management individual departments cannot be expected to have a view of the total flow of SIs to Parliament at any one time of the year and of the resultant demands which are being made on the House’s scrutiny resources. There are however measures which they could take to help to mitigate the problem of congestion. For example, where a department knows that it is going to have to lay instruments for coming into force at the start of the calendar or financial years or—in the case of SIs with CCDs—on 6 April or 1 October, it could plan ahead to lay such instruments in good time before the due date or, if that is not possible, it could schedule any other secondary legislation which it may be planning in such a way as to avoid submission for parliamentary approval during these peak periods. **We recommend therefore that departments, when planning their SI programmes, should, where possible, avoid scheduling instruments for laying during the peak traffic periods of March, July and December and that, to facilitate effective scrutiny by Parliament, the Government should stagger the laying of instruments which must be approved by the ends of these periods.**

#### *Central Coordination*

75. It is however undeniable that departments would be better placed to take such action if they had sight of the overall picture, and this brings us to a key question under the heading of process management—namely, whether there should be some degree of central coordination of the process. It goes without saying that responsibility for SIs themselves must rest with their originating departments and that each department must remain fully accountable for preparing and laying its own secondary legislation before Parliament.<sup>43</sup> We are not suggesting that there should be a single Government SI programme under the control of one of the central departments. The question we have asked ourselves is whether there should not be some mechanism for overseeing and, where possible, harmonising departmental programmes—in other words, coordination. To answer this question it is necessary to be clear about the status quo.
76. As things stand, the Cabinet Office contains two organs which have an interest in the regulatory process—the BRE, which is concerned with what

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<sup>43</sup> It should be noted that, while the drafting of primary legislation is carried out by Parliamentary Counsel, the preparation of statutory instruments is dispersed among departmental legal staff.

might be called the qualitative aspects of the Better Regulation agenda, including regulatory impact assessment and consultation, but which does not concern itself with secondary legislation *per se* except insofar as individual instruments come to its attention (for example by having a regulatory impact in excess of £20m); and HMSO, which sits within the Office of Public Service Information and which is concerned with the procedural aspects of SIs (for example their layout and the rules governing their laying before Parliament and their printing and publication) but which is not concerned with their impact as regulations. Neither body is concerned with the efficiency of the process by which SIs are prepared and submitted for parliamentary approval. HMSO is concerned that the finished product should conform with the forms and procedures which are laid down in *Statutory Instrument Practice*, and the BRE is concerned that SIs, like other regulations, should conform with Better Regulation guidance on regulatory impact, consultation and so on. But the way that departments plan and manage the preparation of SIs and lay them before Parliament is left to their own discretion. As a result Parliament finds itself on the receiving end of a process which is covered by little central guidance<sup>44</sup> and no central coordination.

77. According to Professors Alan Page and Terence Daintith of the Law Faculty at the University of Dundee, the main reason for this is that “subordinate legislation for the most part has no implications for time on the floor of the House. One of the main impulses to central coordination—the need to allocate scarce parliamentary time—has therefore been missing”<sup>45</sup>. There was an echo of this in evidence, quoted above<sup>46</sup>, which we received from the Home Office; and in our own experience the active involvement of departmental Parliamentary Clerks in the SI process is generally limited to affirmative instruments, for which parliamentary time has to be found. Yet nine tenths of instruments submitted to Parliament are for negative resolution. Whatever the cause of this situation, it is undeniable that the absence of coordinated planning of departmental SI programmes results in a free-for-all, which can impose severe pressures on those on the receiving end and which can prejudice effective scrutiny of the merits of secondary legislation.
78. There are a number of measures which could be taken to alleviate this problem. The first, to which we have already referred<sup>47</sup>, is to require departments to prepare and publish annual SI plans, listing the instruments which they plan to lay before Parliament in the year ahead and stating (very briefly) the subject of each and its scheduled date of laying. This would not only represent a good discipline on departmental planning but it would also enable a coordinating department, if it were to undertake consolidation of the departmental lists, to see the overall picture and to pick up whether there was likely to be congestion at the scrutiny stage. Our Committee would also find it helpful to have an early view of the overall scrutiny requirement. **We therefore recommend that departmental lists of planned secondary legislation should be consolidated into a single list in order to**

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<sup>44</sup> DTI(SBS) Guidance on CCDs is an exception.

<sup>45</sup> *The Executive in the Constitution*, Page and Daintith

<sup>46</sup> See Paragraph 54

<sup>47</sup> See Paragraph 56

**establish whether the resultant Whitehall-wide programme is likely to be manageable at the stage of parliamentary scrutiny.**

79. A slightly more ambitious measure would be for the Government to attempt, in consultation with individual departments, to try to adjust the flow of secondary legislation if there appeared to be problems ahead. The Institute of Directors told us that it was as much concerned about peaks and troughs in the burden of consultation as we were about their impact on parliamentary scrutiny: the IoD would welcome “a coordinating body that spreads out and manages the timing of the process” (Q 248). We do not believe that such a system need be either unduly onerous for the coordinating department or in any way detrimental to the autonomy of individual departments. It could also bring potential benefit to the House’s business managers. **We recommend therefore that a central mechanism should be established for exploring with departments the scope for adjusting the scheduling of SI programmes if it should appear that such action is necessary in order to avoid congestion resulting from peaks and troughs in the flow of instruments for consideration by Parliament.**
80. None of this however will be effective unless there is a recognition on the part of the Government machine that efficient planning and management of secondary legislation is as much a part of good regulation as are regulatory impact assessments and consultation and that the BRE cannot distance itself from the matter as being no more than a procedural process of interest to HMSO. There is a need to recognise that Parliament is a stakeholder, in the same way as are businesses and other organisations, in the process by which statutory instruments are prepared and submitted for approval. Good regulation requires not only that departments should consult and measure the regulatory impact of their proposals but also that they should plan and manage their secondary legislation programmes in such a way as to be conducive to effective parliamentary scrutiny. There is a need therefore for the Cabinet Office, in providing guidance to departments on the requirements of good regulation, to accept that efficient planning and management of SI programmes is an essential part of such guidance and not, as is currently the position, something to be left to departmental discretion. It was indicated to us<sup>48</sup> that the Government Legal Service provides central guidance on the legal aspects of preparing statutory instruments. There is a need, we feel, for the Government to provide guidance to departments on the overall administrative process.
81. There may well be a need also for some internal reorganisation of functions within the Government’s Better Regulation machinery. We would not wish to be prescriptive as to what this should be. But we are clear that the end result should be to ensure that there is a recognition that efficient planning and management of secondary legislation is an integral part of the Better Regulation agenda rather than just a matter of formats and procedures. Whatever arrangements are considered the most appropriate, **we recommend that departments are given guidance on best practice regarding the planning and management of secondary legislation programmes and that they are held to account for their performance in this area.**

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<sup>48</sup> See, for example, Oral Evidence QQ 101, 136 and 191

*Is Guidance Enough?*

82. As we were told by both the BRE and HMSO, the Cabinet Office does not have any authority to enforce the guidance which it issues. According to Martin Bryant of the Home Office, the Cabinet Office “does have a very powerful role in terms of making sure that standards are adhered to, so it publishes extensive guidance, the *Statutory Instrument Practice* manual, which we seek to adhere to. There are Codes of Practice around consultation and the way in which consultations should be conducted and how they should be put into effect”. This guidance function, suggested Mr Bryant, was “the primary responsibility of the Cabinet Office” (Q 294). Mr McCabe, of the Home Office Better Regulation Team, put it rather more strongly. He told us that “they want to ensure that we follow their guidance, that we follow best practice, that we are planning properly and that we are fully supporting the Better Regulation agenda. So they certainly do hold us to account. We have to report to them regularly, they give us guidance on what we need to publish in our annual report”. The BRE and the BRTF, added Mr McCabe, “drag us over the coals frequently where we fail” (Q 300). When asked to be more specific about how the Home Office was held to account, he pointed to the requirement to publish an annual report detailing compliance with regulatory requirements and to the need to answer queries from the Cabinet Office (QQ 326–7). There is however no requirement for departments to report on their management of secondary legislation as such.
83. Sir David Arculus commented to us that the setting of targets for better regulation was important. But, he went, on “it is not enough. The departments have got to be monitored and they have got to be challenged; and I think their feet have got to be continually held to the fire” (Q 11). Rick Haythornthwaite, for the BRC, echoed this when he told us that “pressure should be put on all departments to manage their legislative programmes in a far more effective fashion” (Q 340). The question is—how best can such pressure be exerted or “feet be held to the fire”? No one would wish to see the BRE assume a martinet-style role with departments: there is a need for cooperation and encouragement as much as for challenge and criticism. But, given the wide differences which appear to exist in departmental management, we do believe that some stronger mechanism of accountability may be needed if there is to be sustained improvement across the board. If departments were to be required to publish their total secondary legislation plans every year, if the Cabinet Office were to coordinate these into a consolidated version and if it were to seek, through discussion with departments, to produce an overall plan which was conducive to effective parliamentary scrutiny, that would be a good start. As well as being of help to those committees which scrutinise SIs, such plans might be of interest to others, such as the House of Commons departmental committees. **We recommend therefore that the Government should develop more robust mechanisms to ensure that the guidance which is issued both on managing the process of secondary legislation and on putting into practice specific aspects of good regulation is more closely followed. This might usefully include a requirement on departments to report annually to the Cabinet Office on their management of secondary legislation programmes.**

## Quality

84. We move now from looking at the way in which the process of preparing and laying SIs is managed to considering the quality of the end product. We shall look at this under a number of sub-headings. The first is the consultation process, which is an integral part of preparing an instrument—is it reaching the right people? and is it having an effect on improving the quality of SIs? Second, we shall consider whether enough is being done to simplify for the users of secondary legislation what are inevitably in many cases quite complex legislative documents, particularly through consolidation of successive amendments into one or a small number of easily accessible and easily intelligible documents. Third, we shall look at the question of transparency, in particular whether the Explanatory Memoranda which accompany SIs are being written in such a way as to make clear, both to Parliament and to the user, what each instrument is designed to do and what actions the user must take in order to conform with it; and whether departments are taking sufficient action to alert members of the public (as well as business and other interest groups) to new legal requirements which may affect them as citizens. We shall then look at the making of SIs for the purpose of transposing European Union Directives into UK law—in particular, why there is sometimes what might be considered over-zealous implementation of EU regulations and what can be done about it; and whether consultation on such SIs is sometimes coming too late—i.e. when the UK has already signed up to incorporating EU requirements into national law. Finally, we shall look at the extent to which departments are learning from experience, by reviewing secondary legislation after it has been implemented in order to establish whether it is achieving its desired policy objectives. Inevitably, some of the issues we examine fall into more than one of these categories. In such cases we deal with them under what seems to us the most appropriate heading.

## Consultation

85. Proper consultation is a crucial part of the process of determining the most effective way of achieving a policy objective and, where legislation is deemed to be necessary, of getting an instrument right before it is laid. It should be remembered that the House cannot amend an instrument: it can only accept or reject it. It is important therefore that, when an instrument comes before Parliament, it should have been exposed to those who will be affected by its provisions and its suitability reviewed in the light of their reactions. For this reason we pay particularly close attention as a Committee to the adequacy of the consultation process when we scrutinise individual instruments.
86. To enable proper consultation to take place departments are required to publish their proposals for secondary legislation 12 weeks before they are due to be implemented and to invite comments on them. This compares favourably with the 8-week consultation period which, we were told, is required within the EU. The Government told us<sup>49</sup> that in 2004, 77% of consultations complied with the 12-week requirement—which means that 23% did not. James Walsh, for the Institute of Directors, felt that, while 12 weeks was adequate for effective consultation, “the difficulties arise when, for one reason or another, it is disregarded—and sadly that does still

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<sup>49</sup> See Volume II: Evidence, HL Paper 149–II, Page 169

happen”. He felt that, while officials usually had a plausible excuse to offer, “Ministers and Permanent Secretaries just have to be a bit tougher about this and say that the twelve weeks has to be adhered to, and that may mean some better forward planning in departments in order to ensure that last-minute crises simply do not occur” (Q 245). Stuart Etherington, Chief Executive of the National Council of Voluntary Organisations, agreed. “I think three months is fine,” he told us, “but there are too many opportunities where this is not adhered to” (Q 245). Jim Murphy MP, Parliamentary Secretary at the Cabinet Office (hereinafter referred to as the Minister), cautioned that 100% compliance could not be achieved because of the need from time to time for emergency secondary legislation. “There are some instances,” he told us, “which we all interpret as exceptional—emergency measures, issues related to immigration, disease control and others—where 12 weeks would not be appropriate. The response would be ‘Why are we waiting 12 weeks to do this?’” (Q 372). We acknowledge this as being a fair point, but we are not persuaded that such emergency measures can explain a failure rate of one in every four consultations, which we do not regard as acceptable. **We recommend therefore that the Government should take action, via the BRE, to bring the achievement rate up to 100% in normal cases and that, where there are compelling reasons for breaching this rule, a clear explanation should be given.**

87. Section 2(2) of the European Communities Act 1972 (ECA) carries no requirement for consultation on implementing instruments made under it. During the passage of the bill for that Act the then Chancellor of the Duchy of Lancaster (the Rt Hon. Geoffrey Rippon MP) undertook that, if a specific delegated power in domestic legislation other than Section 2(2) of the ECA could be used to implement an obligation, it should be so used<sup>50</sup>. We have encountered one SI which was being made under Section 2(2) of the ECA rather than under domestic legislation specifically to avoid the requirement to consult. We deprecate this practice, and **we recommend that consultation should be mandatory for all transposing instruments even though the ECA does not require it.**
88. As regards the consultative process itself, Donald MacRae of Defra told us that “an important plank of our Better Regulation strategy is to engage more effectively with the people that we regulate...If the people that we regulate understand the purpose of what we are trying to do, if we engage more proactively with them, then we can increase compliance and effectiveness and also reduce the number of burdens. We see getting smarter on consultation as a very important part of more effective regulation” (Q 229). As an example of this, he cited his department’s “five-minute rule”—that “recipients of our consultation papers will probably give us five minutes...to decide whether this is something they understand, something they want to engage with; and, if they do not want to, it goes into the bin” (Q 229). Defra was trying to apply that rule to its drafting of consultation documents and this is an approach which we would commend to others.
89. For DTI, Mr Inglese told us that “one of the key things is to identify the stakeholders at an early stage. We consult them at an early stage. For example, with our statutory instrument on the supply of extended warranties on domestic electrical goods, the officials met the key stakeholders to discuss

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<sup>50</sup> HC Debates 15 February 1972, Columns 279–284

the policy proposals and listened to their concerns before even the first draft of the statutory instrument was prepared” (Q 136)<sup>51</sup>. Similarly Mr McCabe, for the Home Office, referred to the long gestation period of many SIs, including consultation with stakeholders. “All of that,” he said, “has to be thought through by policy officials and Ministers before we get to the stage of instructing our lawyers on the SI that we want to draft to put that into effect” (Q 309).

90. Our non-government witnesses were, understandably, somewhat less sanguine about the quality of the consultation process. “I would say the CBI is consulted,” said Antonia Norman, “but I am also aware that we may be in a privileged position...I got in touch with some of our Trade Association members and got a pretty mixed feedback” (Q 245). This included complaints of inadequate information about the initiation and development of consultation. Did departments listen to the concerns of those whom they consulted? Ms Norman said that “it is very much a mixed bag”. Citing two examples, one where a department appeared to have ignored what most consultees had suggested and another where the advice offered had led to a change of course, she concluded that “sometimes they listen and sometimes they do not” (Q 249).
91. One question which has exercised us during our scrutiny of SIs is whether departments, when they make regulations, are considering sufficiently their impact not only on what might be called the big battalions (the CBI, Trade Associations, Local Government and major charities) but also on the individual citizen. While many regulations are primarily concerned with the way in which industry manufactures its products or firms conduct their business or local authorities manage their affairs, there are others which directly affect our lives as individuals. The question therefore arises—how do departments try to elicit the views of ordinary people prior to making regulations?
92. The need for consultation of this nature depends, of course, on the nature of the legislation and therefore this is more of an issue for some departments than for others. For the Home Office, whose regulations have an impact on the general public perhaps more than those of most other departments, Martin Bryant referred to focus groups and similar fora. “Our policy officials,” he said, “are encouraged to get as much contact and understanding from members of the public about the issues they are seeking to address” (Q 315). Speaking for Defra, Donald MacRae agreed that “we have to find ways of trying to canvass opinion across as wide a range of the population as we can” (Q 230). The Minister told us that “departments...do a scoping exercise as to which organisations, individuals and stakeholders would be likely to have a substantial interest in...a policy proposal” (Q 370). He added that “departments are expected to publish their consultation on their own websites on the day on which consultation starts. The issue then is how do you drive internet traffic through those websites in such a way that there is a substantial citizen interaction with the consultation” (Q 373). The Minister felt that “there is an enormous opportunity afforded to us with the use of technology, but of course there are some who do not use technology. We have to find additional ways to reach those hard-to-reach groups” (Q 374). James Walsh of the IoD thought there were difficulties with

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<sup>51</sup> In our 8th Report of Session 2004-05 we commended DTI’s approach to consultation on this instrument (SI 2005/37) and to the provision of explanatory material to the House

broadcast methods of public consultation, such as the internet or open meetings—that “there is always the risk of getting the people who feel particularly strongly one way or the other rather than the person with more typical views” (Q 270).

93. We fully recognise that it is easier to identify a need for such “grass roots” consultation than to suggest how it might best be carried out. But it is not impossible, as was shown to us recently by a Home Office initiative. In February 2006 the Department laid before Parliament an instrument<sup>52</sup> which sought to improve relations with the community by providing better information on local policing activity. We were told that the consultation which had taken place prior to this instrument being laid had included small pilot projects which were used to elicit, from a cross-section of the public, what sort of information and presentation would be effective in achieving this aim. We commended this initiative at the time<sup>53</sup> and we draw it to attention here as an example of what can be done given imaginative thinking. Nor, we should add, is this the only instance where we have found such good practice<sup>54</sup>. Sadly, however, these are the exceptions rather than the rule. **We recommend therefore that the Government should include in its guidance to departments on the consultation process the need, in appropriate cases, to ensure that there is adequate opportunity for ordinary citizens, as well as representative groups, to make their views known and should offer advice to departments on the various means by which such grass-roots consultation might be achieved.**

### *Simplification*

94. Statutory Instruments, being vehicles of secondary legislation, can be complex at the best of times, and for this reason both affirmative and negative instruments are now supported by Explanatory Memoranda to enable the lay reader, whether in Parliament or in society at large, to understand readily what they involve. We shall be addressing the adequacy of EMs in the next sub-section.
95. There is however another aspect of simplification which needs to be addressed in its own right. Many SIs are made in order to amend previous instruments, either because their predecessors contained errors or (more often) because circumstances have changed and adjustments need to be made to reflect these. In most cases the new instrument simply states the changes which need to be made to the one which is currently valid—for example “in Paragraph 12(e) delete X and insert Y”. Where, as is often the case, there have been successive amendments over a period of time, the reader may have to follow a trail from the latest amending instrument back to the original one which set out the substance of the regulation in question. This can add considerably to the complexity of understanding the impact of secondary legislation. The answer is, of course, consolidation—when amendments have to be made to SIs, they should take the form of complete new instruments which supersede the old ones.

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<sup>52</sup> SI 2006/122 (Police Act 1996 (Local Policing Summaries) Order 2006

<sup>53</sup> 23rd Report (Session 2005–06)

<sup>54</sup> See, for example, the process of consultation involving regional events and focus groups described in the EM prepared by DfES to accompany the Adoption Agencies regulations 2005 (SI 2005/389) and related SIs made under the Adoption and Children Act 2002

96. We were told however that the matter is not as straightforward as might appear. The Government expressed the view to us that “consolidation can make a contribution to the better regulation agenda and significant gains can be made from good consolidation work. However, consolidation does have resource implications for departments which must be taken into account before any decision is made”<sup>55</sup>. There were also, it was suggested, potential additional costs to the reader. “It would be impractical,” said the Government, “in the case of lengthy statutory instruments or statutory instruments which are amended frequently. In such cases, the benefit to the reader may be disproportionate to the extra cost which the reader would incur by buying a longer consolidated statutory instrument each time it was amended”<sup>56</sup>.
97. For the DTI, Anthony Inglese told us “I used to think consolidation was very difficult. I have done consolidations in my time, worthy but dull, and I now realise it is much more than that and there are significant gains which can be made from good consolidation work” (Q 177). Defra was more cautious. “It is very resource-intensive and it takes a very large amount of time,” said Donald MacRae (Q 239). He added that there could also be problems in attempting to consolidate the domestic secondary legislation which underlay regulations implementing EU Directives. For the Home Office, Mr Clayton also emphasised the problem of resources. “One of the difficulties is that there are a limited number of lawyers and, if there is primary legislation, we have to concentrate on primary legislation” (Q 320). He also told us: “Although one might think that consolidation ought to be just scissors and paste and therefore not take very long, they do quite often involve rather more complex issues” (Q 316). We cannot help thinking that, if highly-trained departmental lawyers do not find it to be a straightforward exercise to unravel successive amendments to statutory instruments, the lay reader is not going to fare much better and that this strengthens the case for more consolidation.
98. In fact, HMSO told us that following the introduction of electronic templates for SIs “departments now hold the final version of the instrument within their own systems, maintaining their control of the instruments that they draft. In the past departments have avoided producing consolidated sets of regulations because of concerns about the costs to the end-user required to purchase additional documents. With the increasing use of the internet to access legislation fewer users rely on the printed versions, so this is no longer seen as an argument against more regular consolidation”<sup>57</sup>.
99. Nor are we entirely persuaded by the argument about resource costs to departments. While we would accept that there will be cases of particular complexity where consolidation has additional resource costs, in the great majority of instances it must surely be the case that it would be just as simple to revise an instrument as to specify the detailed changes which need to be made to its predecessor. We quote HMSO again: “If departments control the original set of regulations and any amending instruments within their systems, they should be able to cut and paste any amendments made by subsequent instruments into an original set of regulations. An “updated”

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<sup>55</sup> See Volume II: Evidence, HL Paper 149-II, Page 167

<sup>56</sup> See Volume II: Evidence, HL Paper 149-II, Page 167

<sup>57</sup> See Volume II: Evidence, HL Paper 149-II, Page 35

version of the set of regulations could therefore be produced at periodic intervals...This would be a straightforward mechanical task but would produce a consolidated version which would be easier for the end-user to work with”<sup>58</sup> <sup>59</sup>. Given that the Government is committed to implementing the *Less is More* recommendation<sup>60</sup> to introduce by September 2006 a rolling programme of simplification and that about 1 in 20 SIs is made simply in order to correct mistakes in earlier ones<sup>61</sup>, **we recommend that the Government should put more impetus behind the process of consolidation and aim, as a general rule, to publish consolidated electronic versions of each instrument following amendment.** The case for consolidation is strengthened with each new amendment.

100. The internet is a powerful resource for making statute law more accessible. Private subscription services, such as that operated by LexisNexis Butterworths, provide as-amended, as-in-force and even historic versions of both primary and secondary legislation. But these services are expensive. The Department for Constitutional Affairs has been developing for many years a statute law database for public access and we keenly await its arrival, though we understand this is not imminent. **We recommend however that, once such a database is delivered, it should be extended as quickly as possible to cover secondary as well as primary legislation.**

### *Transparency*

101. Given the volume and complexity of statutory instruments laid before Parliament, the attention of our Committee—and no doubt of the House as a whole—inevitably focuses on the Explanatory Memoranda (EMs) which since 2004 have accompanied all SIs subject to parliamentary proceedings. Many of these are of good quality, and some are exceptional<sup>62</sup>, spelling out clearly and concisely why the instrument is being laid, whom it will affect, what consultation has been carried out and with what results. Such EMs provide a valuable introduction, enabling the text of the instrument to be understood more easily and its significance appreciated. Not infrequently however we have come across others which are less fit for purpose, and there have even been a few which were actually less easy to follow than the text of the instrument itself<sup>63</sup>.
102. Defra witnesses told us that the drafting of SIs was subject to a “keying” process, which comprised “a very thorough quality assurance check, including not only the legal aspects but also wider considerations, such as ensuring that the SI makes sense and is readily intelligible” (Q 189). DTI witnesses told the same story. Anthony Inglese told us that “we have always had a system of checking statutory instruments in draft by a second pair of eyes”; and he added that in one of his own three directorates the head of the unit now acted as “a third pair of eyes” (Q 155). The Home Office accepted

<sup>58</sup> See Volume II: Evidence, HL Paper 149–II, Page 35

<sup>59</sup> As an example, the Home Office maintains a consolidated version of its Immigration Rules on the Laws and Policy page at [www.ind.homeoffice.gov.uk](http://www.ind.homeoffice.gov.uk). Any changes to this version are highlighted in italic text from the date of the change being laid before Parliament until 28 days after the change taking effect.

<sup>60</sup> See Paragraphs 24 and 25 above

<sup>61</sup> See Volume II: Evidence, HL Paper 149–II, Page 167

<sup>62</sup> For example, SI 3308/2005 The Royal Patriotic Fund Corporation (Transfer of Property Rights and Liabilities) Order 200 and Court Security Officers (Designation) Regulations 2005 (SI 2005/588)

<sup>63</sup> See, for example, Draft Transport Act 2000 (Consequential Amendments) (Scotland) Order 2006

that “this is something we need to be better at” and that “we do not have a separate view of this outside the line of drafting”. Mr Bryant added however that there was a proposal within the Home Office “that each Explanatory Memorandum in the future is signed off by the head of unit, so that a senior civil servant looks at this after the individual policy executive has signed it off” (Q 302). We welcome this development, and we would draw the Government’s attention to the crucial role which EMs play in facilitating parliamentary scrutiny. **We recommend that, to the extent that it is not already departmental practice, SIs as a whole, and their EMs in particular, should be subjected to review in the course of preparation by a senior official who is sufficiently detached from the subject in question to be able to assess its intelligibility to the lay reader.**

103. The need for clear exposition is particularly important where an instrument is laid in order to implement an obligation which has been assumed under EU law. We have noted with concern, when considering such SIs, that due to rulings of the European Court of Justice and Government drafting conventions the actual obligation being imposed is regularly not set out in the transposing instrument but rather referred to, often by complex cross references to the EU Directive in question. It is important in our view that those who will be affected by such transposed legislation should be aware of the obligations being imposed on them and of the penalties for non-compliance. We therefore pay particularly close attention to the adequacy of the Government’s guidance to users in explaining the new obligation and we look to the Explanatory Memorandum to provide evidence of such guidance. **We recommend therefore that departments preparing SIs which implement EU obligations should give particular attention to including in their EMs a clear statement of the obligations which the instrument in question imposes, of the penalties for non-compliance and of the guidance which is available to those who will be affected by its enactment. This is especially important where an instrument creates a sanction or penalty for non-compliance and where there is a need to ensure that organisations or individuals are aware of their obligations.**
104. There are however other aspects of a good EM than intelligibility. One of the most important of these is to explain to the reader what consultation has been carried out and what were its results. The Law Society, in its written evidence, cited this as a key concern of the users of secondary legislation. “There should always be full consultation on significant measures and feedback on the consultation...This should make it clear, for example, why a particular suggestion was not adopted, so that the thinking is as clear as possible”<sup>64</sup>. We support this view. If departments are to avoid the suspicion that they are simply “going through the motions” of consultation, they must make clear where changes have been made as a result of comments made to them and explain, where they have not, why the suggested changes were not considered to be feasible.
105. It is also important in our view that EMs should address a more basic question, by making clear why there is considered to be a need for legislation and what other avenues of attaining the desired objective—e.g. self-regulation through a voluntary code of practice—have been explored and

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<sup>64</sup> See Volume II: Evidence, HL Paper 149–II, Page 210

why they have been rejected. Mitchell Leimon, Director of Better Regulation at the DTI, told us that this was one of the objectives of his Department's Ministerial Challenge Panel, to which officials were required to explain "why it [proposed regulation] is good, what problem it is setting out to resolve, the extent to which the alternatives to heavy-handed regulation have been looked at, where the benefits or costs to businesses will lie" (Q 159). Donald MacRae, for Defra, pointed out to us that there were constraints on what can be done in this direction. "When we have European regulations to implement," he told us, "jurisprudence from the European Court of Justice precludes using voluntary regulation or some other self-regulation measures. We have to establish to the courts that there is a legally-enforceable method of implementing the regulation" (Q 240). While we recognise this constraint, we believe that in other cases a requirement to explain why the regulatory path has been chosen is not only helpful to the reader, whether he be in Parliament or in the business or voluntary sectors or in the community at large, to understand the rationale of a proposal; it also provides a useful discipline for departments themselves to ensure that they have considered other options before resorting to legislation<sup>65</sup>. **We recommend therefore that the guidance to departments on consultation should reinforce the need for EMs to report the outcome of consultation and to explain why legislation rather than other forms of regulation is needed.**

106. We come now to another aspect of the issue of transparency—namely, whether enough attention is being paid to ensuring that there is adequate communication to the community at large of regulations which are being made and which may well have an impact on our lives. This is an issue which has surfaced on two previous occasions in our report in slightly different contexts—under the headings of Active Management<sup>66</sup> and Consultation<sup>67</sup>. But it is also a key aspect of transparency. Though we have generally avoided an anecdotal approach in our report, we feel that we must refer here to one specific instrument which has come before us in the present session, because it seems to us to illustrate better than any words we could use the point we are trying to make. Last year Defra submitted an instrument<sup>68</sup> to Parliament, which was needed in order to ensure compliance with obligations assumed by the UK under the EU Waste Framework Directive (Council Directive 75/442/EEC) and the effect of which was to make householders liable for the proper disposal of household waste in order to reduce illegal waste activity, such as fly-tipping. Proper disposal meant that the item in question must be disposed of "to an authorised person or to a person for authorised transport purposes": a householder who did not comply with this requirement would become liable for a fine of up to £5,000. Yet, when we made inquiries of the Department as to the publicity which had been undertaken to ensure that householders were aware of their new legal responsibilities, we found that there were plans for press releases on or after the date on which the instrument would come into force and that local authorities were being encouraged to make householders aware of their new responsibilities. We

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<sup>65</sup> An example of good practice here may be found in the Duty Stamps Regulations 2006 (SI 2006/202). The EM and accompanying RIA by HM Treasury explained clearly how, once the problem had been identified, efforts had been made, in consultation with stakeholders, to implement a voluntary solution and that legislation was resorted to only after these efforts had proved unsuccessful.

<sup>66</sup> See Paragraph 57

<sup>67</sup> See Paragraphs 91-93

<sup>68</sup> SI 2005/2900 Waste (Household Waste Duty of Care)(England and Wales) Regulations 2005

recorded our concern that not enough had been done to alert householders in a timely manner to a new regulation which could affect them or to provide advice on how they were to know that the person to whom they passed their household waste was “an authorised person”<sup>69</sup>.

107. Bearing in mind this example, which is not unique in our experience, and the statement by the National Housing Federation that “we do not believe departments see it as their function to draw our attention to impending SIs”<sup>70</sup>, we are concerned lest departments are sometimes not giving sufficient thought to what is going to happen on the ground when the instruments they are drafting have been approved and come into effect. There is a need to consider the user not only at the consultative stage but also at the stage when SIs are about to become law. We have referred above<sup>71</sup> to evidence from Kent Police College, which illustrates how difficult it can be for people who will be affected by secondary legislation to know what is in the pipeline. The failing here appears to us to derive from a tendency, which is understandable amid the pressures of getting secondary legislation drafted and approved, to see the process from a producer standpoint and to forget that getting an instrument signed off by the Minister is not the end of the story. Just as Parliament has then to get to grips with the product during the scrutiny stage, so the users have to know how it is going to affect them when it is approved and becomes law. **We therefore recommend that the guidance which departments are given on the preparation of SIs should emphasise the need for officials to consider, in appropriate cases, how adequate and timely publicity can be given to the implications for members of the public of imminent secondary legislation.**

### *Transposing EU Directives*

108. In this sub-section we address two issues—namely, what is sometimes referred to as the “gold-plating” of EU Directives when these are transposed into national law; and the difficulties inherent in holding meaningful consultation over the implementation of Directives which have already been agreed at the policy level.
109. According to a 1993 DTI Report<sup>72</sup>, there are two main reasons why secondary legislation implementing EU law sometimes goes beyond the strict requirements of the Directives concerned (“gold-plating”). The first was “a tendency to carry over existing national provisions, wider scope and tougher penalties than in other Member States”—i.e. a process of “bolting on” new regulations rather than reviewing existing ones in the light of the Directive being implemented; and the second was that “the domestic tradition of detailed drafting led departmental draftsmen to elaborate upon EC texts which were often drafted in considerably less detailed or precise terms than traditionally had been the case with legislative texts in the United Kingdom”. Professors Page and Daintith comment that “in transposing requirements therefore a departmental gloss might be added which took the implementing legislation beyond the ‘strict’ requirements of the Directive”<sup>73</sup>.

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<sup>69</sup> 12th Report Session 2005–06

<sup>70</sup> See Volume II: Evidence, HL Paper 149–II, Page 198

<sup>71</sup> See Paragraph 57

<sup>72</sup> Cited by Page and Daintith in *The Executive in the Constitution*

<sup>73</sup> *Op cit*, pp 281–282

110. The CBI and IoD recognised the phenomenon. It was, they said, something which “ramps up what business does to make absolutely sure that it is complying with legislation and applying the belt-and-braces approach” (Q 266). As a Committee we ourselves have come across some examples. In our 5th Report of this Session we drew to the attention of the House an instrument<sup>74</sup> which sought to remedy earlier partial implementation of EU legislation by requiring those, including small businesses, who bought fish direct from boats of under 10 metres in length to obtain sales notes from their suppliers in the same way as was required of purchasers from larger vessels. Defra had estimated that this change could involve more than 100,000 sales notes being required from such buyers every year. As we observed in our report: “We understand that under-10-metre vessels account for only some 5% of catches of quota stocks by the UK fishing fleet, albeit that their take of some vulnerable species (such as sea-bass) may be more significant. We note that the EU legislation envisages that exemptions from compliance obligations may be considered if those obligations create a disproportionate burden compared to the economic importance of the activity. We question whether the extensive compliance requirements proposed by these Regulations are proportionate to the relatively small scale of landings from under-10-metre vessels”<sup>75</sup>. Nor is this an isolated instance<sup>76</sup>.
111. We would not wish to suggest that the practice of “gold plating” is widespread in the preparation of SIs. We would endorse the view of Sir David Arculus<sup>77</sup> that it appears more often to be a matter of risk-averse “regulatory creep” further down the enforcement chain. We were pleased to hear from the Minister that “the BRE is now challenging departments where [it] assesses that there is even an element of ‘gold plating’ of Directives” and that, “where a department seeks to go further than the minimum and ‘gold plate,’ it has to be for exceptional reasons and it has to be accompanied by a rigorous impact assessment that identifies the perceived benefits but also the administrative and fiscal burdens that it places upon the business, voluntary and public sector” (Q 383). The BRE however sees only those SIs with a very high value impact assessment, whereas the examples cited above suggest that there may still be some way to go in getting the message across. **We therefore recommend that the Government should take steps to ensure that its guidance on this issue is adequate and is reaching and being understood by officials who are engaged in the transposition of EU Directives into UK law. More specifically, we recommend that departments involved in preparing secondary legislation for this purpose should consider carefully whether parallel action is appropriate—for example, making compensating adjustments to existing UK legislation or invoking any exemptions from Directives which may be allowed—to reduce the risk of over-implementation and whether less complex and burdensome procedures, perhaps reflecting what is being done in other Member States, might suffice.**

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<sup>74</sup> SI 2005/1605 Registration of Fish Buyers and Sellers and Designation of Fish Auction Sites Regulations 2005

<sup>75</sup> Fifth Report, Session 2005–06

<sup>76</sup> See our 20th Report (Session 2005–06), where we drew attention to implementation of an EU Directive on Artists’ Resale Rights

<sup>77</sup> See Paragraph 33

112. There is also the question of how consultation should be handled in the case of SIs which transpose EU Directives into UK law. Both the CBI and the NCVO felt some frustration about consultation over the implementation of Directives which had been agreed in Brussels and which UK users were powerless to change (QQ 246–247). The Minister told us that “we are trying to encourage business organisations and others in the UK, when they have anxieties about an EU proposal, to go through their trade associations...so that their voice is heard with the Commission. Quite often stakeholders and businesses come to the UK government. Of course, we will take up that agenda on their behalf, where we can” (Q 382). He also pointed to the shorter consultation period (8 weeks) allowed under EU regulatory rules, which could make consultation at the directive stage more difficult.
113. It is of course arguable that all SIs are designed to implement legislation, whether it be UK primary law or EU Directives, which has already been agreed and the fundamentals of which the instruments in question cannot change. Consultation on secondary legislation is primarily about the way in which agreed law should be implemented rather than about whether the parent Act or the EU Directive, which has been separately agreed, is right. Nonetheless, there is a serious point here which needs to be considered. While it is conceivable that, in the case of secondary legislation stemming from UK primary law, the sponsoring department could make significant changes to the way in which the legislation is implemented in the light of consultation with those who are affected, in the case of instruments which transpose EU Directives into UK law there is much less freedom for manoeuvre. It is therefore even more important in the case of EU Directives than with domestic legislation that there is full exploration further upstream than at the secondary legislation stage of how proposed EU legislation is going to be implemented, what are the models for doing so, whether they look cost-effective or not and whether there might be less burdensome ways of achieving the policy outcomes sought<sup>78</sup>. The House’s European Union Select Committee has for many years been pressing these issues on UK Ministers at this early point in the process. When our Committee comes to consider the resultant secondary legislation, it can often be too late. **We recommend therefore that the Government should ensure that there is timely consultation with the business community and others likely to be affected at the stage when proposed EU Directives are being examined and that Ministers are fully sighted at that stage of the likely shape and impact of the secondary legislation which will be required to implement such Directives once they have been approved. The shorter consultation period allowed under EU rules requires that the Government’s consultation should be conducted expeditiously when draft Directives are submitted for national agreement.**

#### *Post-Implementation Review*

114. We have referred above<sup>79</sup> to the Government’s statement (in its response to the *Less is More* report) to the effect that departments are required to review

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<sup>78</sup> An example of good practice here may be found in Defra’s Boiler (Efficiency) (Amendment) Regulations 2006 (SI 2006/170). Consultation on the UK’s negotiating position in regard to the European Commission’s original proposal allowed respondents’ concerns to be addressed in the text of the Directive which was finally agreed.

<sup>79</sup> See Paragraph 29

the effectiveness of existing legislation. Anthony Inglese told us that “it is general DTI policy to review regulations after implementation where there has been a regulatory impact assessment” (Q 150), and he pointed to reviews of the Enterprise Act (and the SIs made under it) by the Insolvency Service and of intellectual property law by the Patent Office. As a result, said Mitchell Leimon, “the work plan in large areas of the DTI is like the Forth Railway Bridge” (Q 150), with legislation being continuously enacted, settling down and reviewed. Donald MacRae, for Defra, told us that the enforcement of regulations on air and water quality was constantly measured and that “we also get feedback from enforcers of the regulations and we always take account of their experience of the difficulties in delivering or enforcing a regulation” (Q 193). But there did not appear to us to be an established departmental process of post-implementation review. “The way that we deal with the stock of regulation in the past,” said Mr MacRae, “tends to be when something new is happening in that area. If we have to address an area of regulation again, we do not simply overlay that on the past: we will look at what is there and try and see if we can make sense of what is there” (Q 195). For the Home Office Martin Bryant referred to top-level monthly assessments of the department’s achievement of its PSA (public service agreement) targets and broader quarterly reviews of performance by each of the Department’s three executive pillars. “Both of those types of review,” said Mr Bryant, “would tackle the issues—do we have the appropriate legislation in place? And is what we have working in order to deliver the policy outcomes we expected?” (Q 291).

115. While there would appear, at least from this small sample of departments, to be arrangements of one sort or another in place to review whether existing secondary legislation is working as intended, it is not clear to us that they are structured with sufficient precision to ensure that each significant piece of secondary legislation is placed under the spotlight at some point in its life. **We recommend therefore that departments, when they draw up their plans for secondary legislation, should include against each instrument a target date for post-implementation review and that the outcomes of such reviews should be reported when completed.**

### Parliamentary Scrutiny

116. The purpose of our inquiry has been to understand the process of making secondary legislation, so that we might make recommendations to facilitate parliamentary scrutiny. We have focused so far on what appears to us to be wrong with the process of producing statutory instruments and with the end product from the standpoint of their users, and we have made a number of proposals for Government action to deal with these problems. These recommendations for process and quality improvements, if acted on, should in turn facilitate scrutiny. For example, the amelioration of peaks and troughs in laying should help balance the workload of the Committee and of the House. Improvements in the quality of consultation, clearly summarised in Explanatory Memoranda, should produce better instruments and expedite their progress through our Committee and the Joint Committee on Statutory Instruments.
117. Where within our power, we will ourselves do what we can to assist the implementation of the changes we recommend. Our officials already have close contacts with all Government departments and regularly hold seminars to explain the Committee’s work and the role of Parliament in secondary

legislation. We have suggested above (see Paragraphs 74–75) that there is a need for some central oversight of the planning of secondary legislation with a view to achieving a smoother flow of SIs to Parliament than is currently the case. We believe it would help this process if we as a Committee were to engage, through our officials, with the coordinating department in order to facilitate this process. There are, of course, already in existence formal and informal links between our officials and those of departments, but these tend to be centred on specific topics or particular SIs. We propose therefore that, if our recommendation for coordination of departmental SI programmes is accepted by the Government, the experience of our officials should be made available in order to help to inform that process and to bring it to a satisfactory conclusion.

118. We have already, with HMSO's agreement, expanded the guidance in *Statutory Instrument Practice* on the preparation of Explanatory Memoranda to set out more fully the concerns of the Committee and the evidence we wish to see when scrutinising instruments. Building on this practice, we propose to develop further guidance of our own to departments on how to achieve the most expeditious scrutiny by the Committee. It is not our intention to add yet another tome to sit on office shelves in Whitehall. Our aim will be to produce crisp and readable guidance designed to enable officials who prepare SIs to look at the process through Parliament's end of the telescope and thereby to get a clearer view of what is required for expeditious scrutiny.
119. We have commented above on the tendency in some departments to regard the laying of an instrument as the end of the process rather than as the beginning of another stage—parliamentary scrutiny. This is perhaps best evidenced by the breaches of the 21-day rule (see paragraph 67). It is easy to understand why this attitude exists. Negative instruments, unless prayed against, require no time on the floor, just an entry in the Minutes of Proceedings. Affirmatives require a little time in the House or Grand Committee, but a division is very rare. Indeed only two affirmative and one negative instrument have ever been rejected and, even when a deprecatory tag is attached to the approval motion, the Government still secure the instrument itself in its intended form. The Chairman of the BRE urged Parliament to reject bad secondary legislation (Q 39), but the use of the power of veto, due to its absolute nature, is one which the Opposition rightly regards as a step to be held in reserve. In *A House for the Future*, the Royal Commission on the reform of the House of Lords not only recommended the establishment of this Committee but devoted 12 pages to an analysis of the role and powers of the House in this regard, concluding that the hardly-ever-exercised power of veto should be replaced with a power of delay which might be more regularly used as a sanction against poor secondary legislation<sup>80</sup>. The desirability of such a change is for others to assess, but we suggest that the Government should recognise that a corollary of maintaining the present non-confrontational arrangements is that the secondary legislation which emanates from departments should be well thought-through and free from defect.
120. Despite this apparent lack of leverage over secondary legislation, the House, by setting up this Committee, has already substantially increased its scrutiny

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<sup>80</sup> Report of the Royal Commission on the reform of the House of Lords, January 2000, Cm 4534, pp 68–79

of statutory instruments. Although we were set up to sift instruments in order to draw significant SIs to the attention of the House in the expectation that they would then be debated, we ourselves are challenging departments and, we hope, adding value. We can however only engage with instruments to a limited extent and we must rely on members in general, where they agree, to pursue the concerns which we raise. We accept that the weight of the concern is often not suited to a full debate on motion as originally envisaged and that the front benches have finite resources which do not stretch to pursuing every issue they might wish. But we remind all members of the House that starred and written questions might provide suitable vehicles for calling the Government to account on SIs. We will also, before the end of the session, review our own working practices, including our methods and rate of reporting, to ensure that we are best serving the House.

## CHAPTER 4: CONCLUSIONS AND RECOMMENDATIONS

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121. In this chapter we set out our overall conclusions from this review and list the recommendations we have made.

### Conclusions

122. We are clear that the Government have made a commitment to improving the process of regulation, in particular by limiting the impact which new regulations have on the business sector, and that agencies have been put in place within the Whitehall machine to give effect to this commitment. We are clear also that much of the regulation with which as a Committee we are concerned lives up, to a greater or lesser extent, to the Government's prospectus for better regulation. It is however equally clear to us that, while the quality of secondary legislation overall is generally acceptable, there are shortfalls in a number of important areas which need to be remedied if the process is to be given anything like a clean bill of health. We would mention as just a few examples lack of clarity in Explanatory Memoranda, failures to engage in "grass roots" consultation where regulations are being made which will affect the lives of ordinary citizens, inappropriate implementation of EU Directives and insufficient progress in the consolidation of successive instruments. Because statutory instruments cannot be amended during parliamentary scrutiny, it is essential that they should be well formulated and well explained when they are presented.
123. In our view many of these failures derive from inadequacies in the management processes which departments employ for the preparation of statutory instruments. While various central agencies, such as the Better Regulation Executive, HMSO and the DTT's Small Business Service, are providing much needed guidance on specific aspects of good regulation, departments themselves are not always delivering on these principles when they prepare secondary legislation. We believe that a fundamental reason for this failure is the absence in some departments of a strategic approach to the making of statutory instruments—in particular, the absence of serious planning and of programme management measured against milestones, which itself suggests to us that departments are not taking secondary legislation as seriously as they should. If there is to be a sustained improvement in the quality of statutory instruments, it is necessary that the machinery by which they are planned and managed should be overhauled. Secondary legislation should not be given second class treatment: its impact on business or the citizen can be significant. Each of the departments which gave oral evidence to us said that our inquiry had prompted them to re-examine their procedures, and all acknowledged that some areas of their process management needed to be addressed, particularly in relation to negative SIs. While our questioning appears to have acted as a stimulant to these three departments, it is necessary that all departments should review their procedures and identify whether improvements need to be made.
124. We believe that a prerequisite to this overhaul of department machinery is that departments should be provided with central guidance on best practice in the planning and management of secondary legislation. This, in turn, means that there must be an appreciation at the centre that good regulation is as much about efficient planning and management of the process of making statutory instruments as it is about specific aspects of regulation,

such as soundly-based regulatory impact assessment and proper consultation. While we would not wish to be prescriptive about what the guidance to departments should contain, we believe there are certain key ingredients which must be there. First and foremost, there should be a requirement placed on departments to prepare annual plans of their projected secondary legislation and, within these plans, to set milestones and to establish appropriate arrangements to review their achievement. Second, while the originating department must retain ownership of its own plan, there should be a coordinating mechanism to maintain an oversight of the picture as a whole and of the progress being made towards its fulfilment. The best way of doing this would be for departments to be required to submit their plans for consolidation in the centre. Third, having acquired the total picture, the coordinator should consider whether the programme as a whole seems likely to present practical difficulties at the stage of parliamentary scrutiny; and, if so, it should consult departments on possible means to remedy the situation.

125. We believe that, if the process of making statutory instruments can be placed on an efficient footing across Whitehall, the improvements to which we have drawn attention in the quality of the end product are more likely to be realised than if the system is left in its present somewhat *laissez faire* state.

### Recommendations

126. A number of the recommendations which we have made reflect existing guidance or good practice in certain areas. In many cases what is needed is more active engagement on the part of senior management to ensure that the guidance is followed or good practice elsewhere adopted. To this end we have recommended that:
- (1) in each department there should be one member of top management (i.e. at Board level) who is accountable to the relevant Minister for the efficiency and effectiveness of the process of preparing SIs as well as for ensuring that the finished products meet the requirements of good regulation (Paragraphs 51–52);
  - (2) departments should prepare annual management plans for their SIs, including milestones to be met and machinery for reviewing their achievement; and should produce and publish annual statements of their projected secondary legislation, listing the SIs they plan to submit for parliamentary approval, briefly describing each one and stating when it is planned to come into effect (Paragraphs 53–58);
  - (3) departments should plan their scheduling of SIs with common commencement dates in such a way as to avoid the risk of congestion at the stage of parliamentary scrutiny (Paragraphs 59–66);
  - (4) the Government should take action to ensure that no instrument is laid before Parliament less than 21 days before it is due to come into force unless there are clear and compelling reasons of operational urgency for such action which are explained at the time of submission (Paragraphs 67–70);
  - (5) departments, when planning their SI programmes, should, where possible, avoid scheduling instruments for laying during the peak traffic periods of March, July and December and, to facilitate effective scrutiny by Parliament, the Government should stagger the laying of instruments

- which must be approved by the ends of these periods (Paragraphs 71–74);
- (6) departmental lists of planned secondary legislation should be consolidated into a single list. A central mechanism should be established for exploring with departments the scope for adjusting the scheduling of SI programmes if it should appear from the consolidated list that such action is necessary in order to avoid congestion at the point of parliamentary scrutiny (Paragraphs 75–79);
  - (7) departments should be given guidance on best practice regarding the planning and management of secondary legislation programmes and should be held to account for their performance in this area (Paragraphs 80–81);
  - (8) the Government should develop more robust mechanisms to ensure that the guidance which is issued on SI planning and good regulation in general is more closely followed (Paragraphs 82–83);
  - (9) the Government should take action, via the BRE, to ensure that the 12-week consultation requirement is met other than in exceptional cases and that, where there are compelling reasons for breaching this rule, a clear explanation is given (Paragraphs 85–86);
  - (10) consultation should be mandatory for all instruments which seek to transpose EU obligations into UK law, even where this is not required by the European Communities Act 1972 (Paragraph 87);
  - (11) the Government should include in its guidance to departments on the consultation process the need, in appropriate cases, to ensure that there is adequate opportunity for ordinary citizens, as well as representative groups, to make their views known and should offer advice to departments on the various means by which such grass-roots consultation might be achieved (Paragraphs 91–93);
  - (12) the Government should put more impetus behind the process of consolidation and should aim, as a general rule, to publish consolidated electronic versions of each instrument following amendment (Paragraphs 94–99);
  - (13) once a public database of statute law is available, it should be extended as quickly as possible to cover secondary as well as primary legislation (Paragraph 100);
  - (14) to the extent that it is not already departmental practice, SIs as a whole, and their Explanatory Memoranda (EMs) in particular, should be subjected to review in the course of preparation by a senior official who is sufficiently detached from the subject in question to be able to assess its intelligibility to the layman reader (Paragraphs 101–102);
  - (15) departments preparing SIs which implement EU obligations should give particular attention to including in their EMs a clear statement of the obligations which the instrument in question imposes, of the penalties for non-compliance and of the guidance which is available to those who will be affected by its enactment (Paragraph 103);
  - (16) the guidance to departments on consultation should reinforce the need for EMs to report the outcome of consultation and to explain why

legislation rather than other forms of regulation is the chosen course for achieving the required objective (Paragraphs 104–105);

- (17) the guidance which departments are given on the preparation of SIs should emphasise the need for officials to consider, in appropriate cases, how adequate and timely publicity can be given to the implications for members of the public of imminent secondary legislation (Paragraphs 106–107);
- (18) the Government should review its guidance on the avoidance of excessive implementation of EU Directives to ensure that it is reaching and being understood by officials who are engaged in the transposition of EU Directives into UK law. More specifically, departments involved in preparing secondary legislation for this purpose should consider carefully whether parallel action is appropriate—for example, making compensating adjustments to existing UK legislation or invoking any exemptions from Directives which may be allowed—to reduce the risk of over-implementation and whether less complex and burdensome procedures, perhaps reflecting what is being done in other Member States, might suffice (Paragraphs 109–111);
- (19) the Government should ensure that there is timely consultation with the business community and others likely to be affected at the stage when proposed EU Directives are being examined and that Ministers are fully sighted at that stage of the likely shape and impact of the secondary legislation which will be required to implement such Directives once they have been approved (Paragraphs 112–113);
- (20) departments, when they draw up their plans for secondary legislation, should include against each instrument a target date for post-implementation review and the outcomes of such reviews should be reported when completed (Paragraphs 114–115).

## **APPENDIX 1: CALL FOR EVIDENCE DATED 13 SEPTEMBER 2005**

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The Committee has decided to conduct an inquiry into the management of secondary legislation. The purposes of the inquiry are:

- to inform the House about the management of the statutory instrument process and the links within that process to the Government's better regulation initiatives, and
- to review the working practices of Government, the House and Committee so that the House and Committee can most effectively scrutinise the merits of statutory instruments and promote better regulation.

The Committee invites written evidence on the following questions by **Tuesday 6th December 2005**. Those submitting evidence should only do so on the questions where they wish to contribute and should not feel obliged to answer every question.

### **Coordination**

How is secondary legislation managed across and within Government departments? Who has overall responsibility within each department? Who has coordinating responsibility across Government?

### **Drafting—policy**

How do departments take decisions on the revision, laying and commencement of linked groups of statutory instruments? How is the scope of any individual instrument within a group decided? How is the user's convenience taken into account? Is the existing regulatory impact assessment process an effective way to ensure that secondary legislation is made in the least burdensome way?

### **Best practice**

What are the Government's mechanisms for distilling and promoting best practice in relation to the instruction, drafting, laying, revision and repeal of statutory instruments? How is best practice monitored and enforced?

### **Drafting—who**

Who instructs the drafting of statutory instruments? Who drafts them and within what guidelines? Are there cross-government drafting standards?

### **Correction**

Why are so many correcting instruments required? What are the repercussions in a department if a correction is required? Is there a process of inquiry about why a correction was needed?

### **Consolidation**

How do departments take decisions on the consolidation of statutory instruments; how will consolidation be promoted in future?

### **Timetabling—peaks and troughs in laying**

Why are there peaks and troughs in the laying of secondary legislation? How can these be ameliorated to facilitate proper scrutiny?

### **Commencement—common dates**

We are keen to avoid the bulk laying of statutory instruments in the run up to each common commencement date. How will departments plan the laying of SIs before each common commencement date in a way that facilitates scrutiny? Are departments developing annual statements on proposed regulation?

### **Commencement—21 day rule**

How well observed is the rule of practice that an instrument should normally be laid at least 21 days before it comes into force? Should the period be lengthened?

### **Consultation**

How well observed is the code of practice on consultation? How can the results be best presented in Explanatory Memoranda? How do the Government coordinate consultations with shared stakeholders, so that they are not overburdened? What changes could be made to the consultation process so as to lead to better secondary legislation?

### **Users and impact**

What are users' most pressing concerns about the current method of making secondary legislation? Does anyone in Government (or in the sectors affected) monitor the collective impact of regulations on e.g. small businesses or local authorities?

### **Links to better regulation**

The Government are committed to implementing in full the recommendations of the March 2005 report from the Better Regulation Task Force (BRTF), *Less is More*? What differences to secondary legislation should Parliament and users expect to see as a result and by when?

### Guidance for those submitting written evidence

The deadline for submitting written evidence is **Tuesday 6th December 2005**.

Evidence and inquiries should be addressed to:

The Clerk

Select Committee on the Merits of Statutory Instruments

House of Lords

London SW1A 0PW

telephone 020 7219 8821

facsimile 020 7219 2571

email [merits@parliament.uk](mailto:merits@parliament.uk)

The submission should be signed and dated, together with a note of the author's name and status and of whether the evidence is submitted on an individual or corporate basis. **Those submitting evidence should only do so on the questions where they wish to contribute and should not feel obliged to answer ever question.**

Concise submissions of 5 pages or less are preferred; longer submissions should include a summary. Evidence must be clearly printed or typed on single sides of A4 paper, unstapled, and should be set out in numbered paragraphs. Electronic copy (MS Word 2002) should be supplied on disk or by email to [merits@parliament.uk](mailto:merits@parliament.uk). Annexes may not be published.

Witnesses may publicise their written evidence themselves, but in doing so must indicate that it was prepared for the Committee.

Evidence becomes the property of the Committee, and may be printed or circulated by the Committee at any stage. If your evidence is not printed, it will in due course be made available to the public in the House of Lords Records Office. Personal contact details supplied to the Committee will be removed from evidence before publication and from the copy deposited in the Records Office. However, personal contact details will be retained by the Committee Office and used for specific purposes relating to the Committee's work, for instance to seek additional information or to send copies of the Committee's Report.

Witnesses who submit written evidence may be invited to give oral evidence at Westminster and transcripts of such sessions are published.

## APPENDIX 2: LIST OF WITNESSES

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The following witnesses gave evidence. Those marked with \* gave oral evidence.

- Mr Tim Ambler
- \* Better Regulation Commission
- \* Better Regulation Executive
- \* Better Regulation Task Force
- Mr Bryan Cassidy
- Professor Francis Chittenden
- \* Confederation of British Industry
- \* Department for Environment, Food and Rural Affairs (Defra)
- The Hansard Society
- \* Her Majesty's Stationery Office (HMSO)
- \* Home Office
- \* Institute of Directors
- The Law Commission
- The Law Society
- LSE
- \* Mr Jim Murphy MP, Parliamentary Secretary, Cabinet Office
- The National Consumer Council
- \* National Council of Voluntary Organisations
- The National Housing Federation
- \* Department of Trade and Industry
- Mrs Linda Weeks, Kent Police College

**APPENDIX 3: CHART SHOWING THE PROFILE OF THE FLOW OF SIS FROM ALL DEPARTMENTS BETWEEN APRIL 2004 AND MARCH 2006**

