

Statutory Instrument Practice

Circular No.3 (08)

Date of Issue: 8 October 2008

1. RE-LOCATION OF HMSO STATUTORY INSTRUMENTS REGISTRAR

- 1.1 The re-location of the HMSO Statutory Instruments Registrar to new offices in the Ministry of Justice HQ building (announced in SIP Circular No.2 (08) but subsequently withdrawn) remains on hold and communications with the SI Registrar should, pending completion of the move, be addressed to Room 1.30, Admiralty Arch (North Side), The Mall, London SW1A 2WH. Existing email addresses and telephone numbers continue unchanged.
- 1.2 Further details of the re-location will be issued in a subsequent SIP Circular.

2. EXPLANATORY MEMORANDA TO STATUTORY INSTRUMENTS

- 2.1 Following discussions with the House of Lords Merits of Statutory Instruments Committee revised guidance on preparing Explanatory Memoranda to Statutory Instruments has been agreed and is attached to this circular. The key changes are in relation to:
 - the need to include information about any future instruments for which the current instrument paves the way;
 - the inclusion of a specific new heading relating to the outcome of Consultation;
 - the inclusion of a specific new heading relating to the Guidance or other form of publicity the department has prepared for users, stakeholders and enforcement agencies to explain the new obligation and to ensure that it is fulfilled;
- 2.2 The guidance also takes account of new commitments which the Government has given in relation to Small Businesses and which it has been agreed with the Better Regulation Executive should in future also form part of the Explanatory Memorandum.
- 2.3 Although it is recognised that departments will have already prepared Explanatory Memoranda for instruments which will be laid over coming weeks, departments are asked to adopt the new format as soon as possible and to ensure that all Explanatory Memoranda accompanying documents to be laid in the new session of Parliament follow the new format.

- 2.4 The revised guidance will form a part of Appendix H within the new 5th edition of *Statutory Instrument Practice* which will be published shortly.
- 2.5 The Explanatory Memorandum Template has been updated to take account of these changes and can be downloaded from the SI template website at:

<http://www.opsi.gov.uk/si/template/index.htm>

where you will be prompted to enter a user name and password which are:

User name: sitemplate

Password: carr3t

Enquiries

3. Enquiries regarding this circular and the revised guidance should be addressed to the SI Registrar at: SIRegistrar@opsi.x.gsi.gov.uk

**EXPLANATORY MEMORANDUM TO
THE [TITLE OF INSTRUMENT]**

[Year] No. [XXXX]

1. This explanatory memorandum has been prepared by [Name of department] and is laid before [Parliament *or* the House of Commons] by Command of Her Majesty.

[This memorandum contains information for the [Joint Committee on Statutory Instruments *or* the Select Committee on Statutory Instruments]].

2. **Purpose of the instrument**

2.1 [Free text]

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

3.1 [Free text *or* None]

4. **Legislative Context**

4.1 [Free text]

5. **Territorial Extent and Application**

5.1 This instrument applies to [all of the United Kingdom *or* Great Britain *or* England and Wales *or* England, Wales and Northern Ireland *or* England *or* Scotland *or* Northern Ireland *or* Wales].

[5.2 Free text]

6. **European Convention on Human Rights**

The [Name of Minister or Name of Authority] has made the following statement regarding Human Rights:

[In [my/our] view the provisions of the [Title of instrument] are compatible with the Convention rights *or* Free text]

or

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. **Policy background**

- *What is being done and why*

7.1 [Free text]

- **Consolidation**

7.2 [Free text]

8. Consultation outcome

8.1 [Free text]

9. Guidance

9.1 [Free text]

10. Impact

10.1 The impact on business, charities or voluntary bodies is [free text].

10.2 The impact on the public sector is [free text].

10.3 An Impact Assessment is attached to this memorandum *or* An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation [applies to *or* does not apply to] small business.

[11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken is [free text].]

[11.3 The basis for the final decision on what action to take to assist small business [free text].]

12. Monitoring & review

12.1 [Free text].

13. Contact

[Name of contact] at the [Name of department] Tel: [Telephone number] or email: [email address] can answer any queries regarding the instrument.

Notes on preparing the Explanatory Memoranda to Statutory Instruments

The purpose of the Explanatory Memorandum is to provide to the lay reader a plain English, self contained, explanation of the effect of the legislation and why it is necessary.

In preparing the Explanatory Memorandum (EM) departments should ensure that they do not repeat the content of the Explanatory Note. The EM is not aimed at lawyers, but to help people who know nothing about the law or the subject quickly to gain an understanding of the instrument's intent and purpose.

It can be helpful to produce a single EM for a group of linked statutory instruments (SIs). This prevents unnecessary duplication of common background and makes sure that the reader is aware of the linkage. It may be helpful to explain (usually in the policy section) the special features of each SI and how it contributes to the overall policy objective. A copy of the group EM should be attached to each of the individual SIs to which it relates. Where possible all the SIs should be laid on the same day and numbered sequentially.

The numbering of the individual section headings is fixed, so the paragraphs that follow should be numbered as sub-paragraphs, for example: the heading relating to matters of special interest to the JCSI/SCSI will always be numbered as "3" and sub-paragraphs should follow as "3.1", "3.2" etc. Your explanation should be concise but comprehensive - the EM should not generally exceed 4 pages.

Headings – The title of the instrument must be entered. The SI number must be entered for all instruments which are registered before laying but should be left blank for instruments laid in draft for affirmative resolution before they are made.

1. The name of the department must be entered. The instrument will generally be laid before "Parliament" but some money issues are only considered by "the House of Commons" (see also Section 3.)

Note: If the instrument does not contain information for either the Joint Committee on Statutory Instruments or the Select Committee on Statutory Instruments then the second heading should be deleted and "None" entered at Section 3.

2. **Purpose of the instrument**

In no more than 3 sentences please describe in **Plain English** what the instrument does and why. Assume that the reader knows nothing about the subject and explain, or better avoid, acronyms and terms of art. The legal powers under which the instrument is made are generally irrelevant here, and in any case are set out in the instrument itself.

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

The heading will be dependent on whether the instrument has been laid before Parliament (JCSI) or just the House of Commons (SCSI). Some financial matters are only laid before the Commons.

Paragraph(s) 3.1 onwards will be free text and should cover any information which the department wishes to bring to the attention of the JCSI/SCSI. in particular:

- i) **fee increases:** if the instrument imposes fee increases above the rate of inflation, please explain the reason for the increase, whether any further such increases are planned, and, if so, when they are projected to cease;
- ii) **21-day rule:** It is a convention that an instrument should not be laid before parliament less than 21 days before it comes into force (see *Statutory Instrument Practice* section 4.13). Both the Merits Committee and the JCSI have an interest if the instrument breaches the 21-day rule. In such cases the EM should explain why the policy requires such urgent action and what the consequences of delaying the legislation to comply with the rule would be.
- The 21 day limit should only be breached where urgent action is necessary. Problems with Departmental administration or a project plan are unlikely to be accepted by the Scrutiny Committees as sufficient reason for curtailing Parliamentary scrutiny.
- iii) **if the instrument came into force before it was laid**, please explain the circumstances, and indicate the date on which the notification and explanation required by the proviso to section 4(1) of the Statutory Instruments Act 1946 were sent to the Speakers of the House of Lords and House of Commons;
- iv) **if the instrument uses novel or especially complex powers**, please explain the basis for these powers and indicate the reason for their use.

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

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

4. **Legislative Context**

Paragraph(s) 4.1 onwards will be free text.

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

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

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

- if in the course of debate, parliamentary question or Committee appearance any specific undertakings were given to Parliament that relate to this instrument (including Hansard or report reference where relevant).
- if this instrument relates to any other instruments (i.e. it is one of a group), please cross reference.
- If this instrument paves the way for future instruments it is helpful to indicate what they will do and when they are likely to appear.

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

5. Territorial Extent and Application

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

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

6. European Convention on Human Rights

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

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

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

7. Policy Background

Paragraph(s) 7.1 onwards will be free text.

- ***What is being done and why***

Departments should state in particular:

- the policy objectives of the parent Act/Directive and how this instrument fulfils them
- the size and nature of the problem it is addressing
- the level of public interest in the policy, (for example from the response to consultation if undertaken, or from media attention).
- whether the change is politically or legally important

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

The EM should also make clear why the Government needs to legislate and what other avenues of attaining the desired objective (e.g. self-regulation through a voluntary code of practice) were explored and why they were rejected.

For “Miscellaneous Amendments” SIs, the EM should briefly address each of the broad areas covered. If there is no obvious structure offered by the format of the instrument itself, one way of doing this is to break the Regulations down into associated groups, e.g. regulations 4(a), 5(b) and 6(c) amend the definition of “incapacity” because ...

- **Consolidation**

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

8. Consultation outcome

Paragraph(s) 8.1 onwards will be free text

The EM should contain a brief explanation of who was consulted, over what period and with what responses. Non-compliance with the 12-week consultation requirement should be exceptional and always explained fully. There should be some analysis of the outcome and the Department’s policy response to the opinions expressed (e.g. “60% supported the proposal, of the rest, the main objections were on the proposed fee structure and the Department has responded to this by agreeing to phase in the increase over 3 years”). A more detailed analysis of the consultation outcome should be in the final Impact Assessment (IA) if one is provided, or on the Departmental website at the time the instrument is laid before Parliament. It is helpful to cross refer to this for more detail but the EM should contain all the key points.

9. Guidance

Paragraph(s) 9.1 onwards will be free text.

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

Where the guidance is essential to understanding how the instrument will operate, but is not itself subject to Parliamentary scrutiny, please send copies to the libraries of both Houses at the same time the SI is laid.

10. Impact

Paragraphs 10.1 and 10.2 should be completed.

Paragraph 10.3 - One of the two options must be selected

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

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

11. Regulating small business

Paragraph 11.1 -Choose one of the options: The legislation “applies to” *or* “does not apply to” small business.

Paragraph 11.2- Departments should complete the statement “To minimise the impact of the requirements on small firms employing up to 20 people, the approach taken is [including, but not limited to, exemptions / simplified inspection / less frequent reporting].

Paragraph 11.3 – Departments should complete the paragraph.

Officials will need to explain how they consulted businesses employing up to 20 people on the policy and the different approaches explored before deciding to exempt or regulate small businesses. This will help ensure that regulation affecting the smallest businesses is proportionate and appropriate and that it achieves the outcomes aimed for, minimising unnecessary impacts on small firms and showing business that we recognise the economic pressures they face.

12. Monitoring and review

Paragraph(s) 12.1 onwards are free text.

What are the success criteria for this instrument? Where possible please define the intended outcome in measurable terms e.g. the changes in the fee structure aim to achieve full cost recovery of the process of issuing and administering this licence by April 2010, or the changes set out in this instrument aim to reduce identity theft by 10% over the next 3 years.

When and how will they be reviewed? State who will review the outcome, when and how the results will be published. For example:

the outcome will be subject to internal review after 12 months and the legislation may be amended accordingly or

The University of London has conducted a benchmark study and will review the position again in 3 years; a report will be published towards the end of 2012.

Where this material has already been included in the IA, please include the headline answers in the EM and cross refer to further detail in the IA (specifying the relevant paragraph or page).

13. Contact

All details must be completed on the copies provided for Parliament. The contact phone number given should be covered by someone who is able to answer questions on the instrument for at least 3 weeks after the instrument has been laid.

Where there are concerns about security for a named individual this may be withheld from the version to be published by HMSO on the OPSI website. In such cases,

departments should contact the HMSO SI Registrar stating the reasons why the information should be omitted.