HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

12th Report of Session 2022–23

Losing Impact: why the Government's impact assessment system is failing Parliament and the public

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Secondary Legislation Scrutiny Committee

The Committee's terms of reference, as agreed on 12 May 2022, are set out on the website but are, in summary:

To report on draft instruments published under paragraph 14 of Schedule 8 to the European Union (Withdrawal) Act 2018; to report on draft instruments and memoranda laid before Parliament under sections 8 and 23(1) of the European Union (Withdrawal) Act 2018 and section 31 of the European Union (Future Relationship) Act 2020.

And, to scrutinise –

(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 the terms of reference.

The Committee may also consider such other general matters relating to the effective scrutiny of secondary legislation as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

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Information about interests of Committee Members can be found in the last Appendix to this report.

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The Committee's Reports are published on the internet at https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/

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Further Information

Further information about the Committee is available at https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/

The progress of statutory instruments can be followed at https://statutoryinstruments.parliament.uk/

The National Archives publish statutory instruments with a plain English explanatory memorandum on the internet at http://www.legislation.gov.uk/uksi

Contacts

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EXECUTIVE SUMMARY

In 2017, we noted that there had been some improvement in the quality of Impact Assessments (IA) provided with secondary legislation. Unfortunately, this improvement has not survived the dual challenges of Brexit and the pandemic, during which time the speed of legislating meant that corners were cut. We had hoped that the return to more normal working would provide an opportunity not just to reinstate the previous IA system but to improve it: this has not happened.

Relaxations in the assessment of the impacts of Brexit and pandemic legislation could, to some extent, be justified as proportionate and pragmatic in a difficult situation, but that excuse has never applied to 'business as usual' legislation and yet this is where we have found some of the worst examples of IA practice. What particularly worries us is that we are still finding them.

An IA should not just be treated as an item on a 'to do' list but be an integral part of the policy formulation process. Used properly it should analyse different options for achieving the policy goal, act as a focus for external comment during the consultation stage, and gradually guide the policy maker towards the most efficient and cost-effective solution to the problem identified. **One of our major concerns is that IAs which are published late, or that appear to have been scrambled together at the last minute to justify a decision already taken, may undermine the quality of the policy choices that underpin the legislation.** (paras 26–32)

We are not unsympathetic to the burdens on policy makers and question whether the IA process has become too technical, focusing on complex economic forecasts rather than options analysis. **We have some suggestions on how it might be streamlined and simplified to make it more user-friendly**. (paras 33–36 and 50–55)

When done properly, an IA is a thorough and useful document, not least because it has a different emphasis to an Explanatory Memorandum and can illuminate other aspects of the policy our scrutiny and Parliament may wish to explore. We acknowledge that many IAs are done well, but the number done badly, or worse that are simply not available to the House alongside the legislation, has increased. Our attempts to quantify this have been frustrated by the lack of any central tracking of either the requirement to produce an IA initially or to review its accuracy after five years. **The IA rule book is good but it is ineffective if no one imposes discipline when its provisions are not followed**. (paras 41–49 and 57–62)

As a result, this report is based on our scrutiny of the hundreds of statutory instruments laid before Parliament every year, and on oral evidence with key players in the IA process who appear to share and confirm our concerns. We identify these areas of weakness in the current system in the expectation that the Government's current review of the Better Regulation Framework will address them promptly.

Providing Parliament with poor quality impact information or only providing the information after the scrutiny process is over is another example of the transfer of power from Parliament to the Executive that we highlighted in *Government by Diktat*. Parliament's legitimate role is to challenge the actions of

the Executive**. If Parliament is to perform its critical function of holding the Government to account, it is of paramount importance that the two Houses are given complete and comprehensive information about the basis on which policy choices are made and the reasons why alternative options have been rejected. We cannot perform that role without the right information at the right time.**

Losing Impact: why the Government's impact assessment system is failing Parliament and the public

CHAPTER 1: INTRODUCTION

1. This Committee has been scrutinising the policy aspects of secondary legislation since its inception in 2003. During that time, we have developed standards for the supporting information that should accompany secondary legislation when it is laid before Parliament. These standards have been endorsed repeatedly during debates in the House and are set out both in our guidance to departments[1] and in Cabinet Office guidance.[2]

2. In relation to the consideration of the effects of the legislation, the standard is that:

   - **every Explanatory Memorandum (EM) should include "impact information"** (that is, an explanation of the costs and benefits of the legislative change proposed that is proportionate to the instrument's effect); and

   - **for more significant instruments, whether in terms of cost or policy, an Impact Assessment (IA)[3] should be prepared and should be published on the same day that the instrument is laid before Parliament**.

3. Better Regulation Executive (BRE) guidance states that an IA should include an options analysis, "identifying the rationale for government intervention, the different policy options (including the non-regulatory ones) and quantifying expected costs and benefits" (see paragraph 14 below).[4] It states that a preliminary version of the IA should be included with any consultation exercise so that those affected can comment and, for example, identify any unintended consequences or cheaper alternative solutions.

4. In our end of year report for session 2017–19, we acknowledged an improvement in the provision of impact information:

   > "We are pleased to note that the majority of the EMs that we see now have an adequate summary of the effects of the legislation. Some, like the Department of Transport, have taken to attaching the Regulatory

1 Secondary Legislation Scrutiny Committee (SLSC), *Guidance for Departments Laying Instruments*: https://committees.parliament.uk/publications/28455/documents/171063/default/.

2 Government Skills and Curriculum Unit, 'Making sense of Parliament, virtually': https://www.gov.uk/government/news/making-sense-of-parliament-virtually [accessed 25 July 2022].

3 In this report the term Impact Assessment (IA) is used for the formal document produced and independently verified for instruments with a net annual cost above £5 million. "Impact information" is used to indicate the information that should be in every EM and for a simple instrument may comprise just a couple of sentences.

4 Department for Business, Energy and Industrial Strategy (BEIS), *Better Regulation Framework* (March 2020) para 1.2.4: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/916918/better-regulation-guidance.pdf [accessed 25 July 2022].

> Triage Assessment[5] that they prepare to demonstrate why they do not need to produce a full IA. Even where there are no financial effects, those preparing the EMs are getting better at explaining their reasoning rather than hiding behind the bald statement "no Impact Assessment is necessary"."[6]

5. Unfortunately, the exceptional volume of statutory instruments (SIs)[7] caused by Brexit and then the pandemic undermined that progress. We have acknowledged the achievement of officials in producing the necessary legislation at speed, but there has been a noticeable reduction in the quality of the associated documentation. As a result, our scrutiny task has been made more difficult and, in turn, the ability of Parliament to hold the Government to account diminished.

6. In November 2021, we published a report entitled *Government by Diktat: A call to return power to Parliament*[8] in which, amongst other things, we set out our concerns about the quality of secondary legislation and supporting information including the dearth of impact information for pandemic legislation.

7. This review goes wider. It has been prompted by departments' failure to provide IAs for a number of significant SIs covering a range of policy areas. We have, in our regular scrutiny work, commented on each instrument individually, but concern over the developing trend has led us to consider more generally the growing gap between the Government's stated policy on IAs and what is actually provided.

8. For this inquiry, we have taken evidence from those involved in the production of IAs: Christopher Carr (Director of the BRE); Stephen Gibson (Chair) and Andrew Williams-Fry (Member) of the Regulatory Policy Committee (RPC); the Lord President and Leader of the House of Commons, the Rt Hon. Mark Spencer MP, in his role as Chairman of the Parliamentary Business and Legislation (PBL) Committee; and Lord Callanan, Parliamentary Under Secretary of State at the Department for Business, Energy and Industrial Strategy (BEIS), in his role as Minister responsible for the Better Regulation initiative who was accompanied by Ms Sarah Montgomery, Deputy Director, Policy and Delivery, BRE.[9] We are grateful for their assistance.

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5 Also known as a "*De minimis*" assessment – a simplified version of an IA used to prove that the policy is below the threshold for a full IA. See for example, HM Treasury, 'De minimis assessment': https://assets.publishing.service.gov.uk/media/62c46d57d3bf7f2ffaa4a9b9/_proposed_neg__DMA_Fin_Serv__misc_amend___EU_Exit__regs.pdf [accessed 25 July 2022].

6 SLSC, *26th Report* (Session 2017–19, HL Paper 125), paras 39–42.

7 Our remit is wider than just Statutory Instruments and also includes most statutory codes, rules, and instruments subject to the negative or affirmative resolution, but SI is used here as a shorthand for that list.

8 SLSC, *Government by Diktat: A call to return power to Parliament* (20th Report, Session 2021–22, HL Paper 105).

9 SLSC, 'Oral Evidence Transcripts': https://committees.parliament.uk/work/6620/quality-of-impact-assessments/publications/oral-evidence/. The written evidence from Mr Spencer is in Appendix 2 to this report. References to evidence in the text are footnoted with the relevant name and question number, for example Q 7 (Sarah Montgomery).

CHAPTER 2: GOVERNMENT POLICY—THE BETTER REGULATION CYCLE

Background to Better Regulation

9. The five principles of Better Regulation were established in 1997.[10] They require that any policy intervention and its enforcement should be:

   - transparent,
   - accountable,
   - proportionate,
   - consistent, and
   - targeted only at cases where action is needed.

   These principles have been applied by successive governments and Lord Callanan confirmed that they are still used today.[11]

10. The Better Regulation Framework uses these principles to encourage departments, when formulating policy, to consider a wide range of options for achieving the desired outcome, not just legislation. Associated guidance reminds officials to analyse proposals rigorously, avoid unnecessary costs, look out for unintended consequences, and ensure that the intervention is likely to be effective. For SIs imposing significant costs, departments demonstrate that they have followed this process by producing an IA.

11. According to the BRE guidance, the IA should evolve as the policy evolves: a "consultation-stage" version should be included with any consultation exercise for public comment, and a "final-stage" IA should accompany any request for collective agreement from the Cabinet and be published alongside the SI on the National Archive's website[12] when the instrument is eventually laid before Parliament.

12. Originally, it was Government policy that an IA was required for any instrument with an impact on business or the voluntary sector of over £1 million net per annum but this threshold was raised to £5 million in 2017 to aid the management of Brexit legislation.[13]

13. The five principles were enshrined in law in section 2 of the Legislative and Regulatory Reform Act 2006. The Small Business, Enterprise and Employment Act 2015 ("the 2015 Act") further formalised the process by placing a duty on regulators to assess the economic impact of their interventions according to the format and methodology set out in guidance by the Secretary of State. It also requires the assessment to be verified by an independent body,[14] currently the Regulatory Policy Committee (RPC), which judges whether an IA is "fit for purpose" using a traffic light system

10 Better Regulation Task Force, *Principles of Good Regulation* (2003): https://www.rqia.org.uk/RQIA/media/RQIA/Resources/Better-Regulation-Task-Force-Principles-of-Good-Regulation.pdf [accessed 28 July 2022].
11 Q 1 (Lord Callanan).
12 The National Archives, 'Legislation.gov.uk': https://www.legislation.gov.uk/uksi [accessed 28 July 2022].
13 SLSC, *15th Report* (Session 2017–19, HL Paper 59), Appendix 2.
14 Small Business, Enterprise and Employment Act 2015, section 24A and 25.

where "green" meets the required standard and "red" has significant weaknesses. The RPC can also "call in" measures deemed to be below the £5 million per annum threshold to check that analytical methods and exclusions have been applied correctly.

Role of the BRE

14. The Better Regulation Executive (BRE) within BEIS leads across government on better regulation policy and is responsible for embedding its precepts into departmental policymaking. This includes operating a Better Regulation Unit within each department and issuing guidance to departmental officials on how to operate the Better Regulation Framework, the latest version of which was published in March 2020.[15]

15. The BRE guidance explains the key requirements as follows:

- "This guidance sets out a general threshold for independent scrutiny of Regulatory Impact Assessments (RIAs) and Post Implementation Reviews (PIRs) where the equivalent annual net direct cost to business (EANDCB) is greater than ±£5m. For measures below this threshold, Departments should undertake proportionate cost-benefit analysis to inform decision-making, as well as demonstrating that the impact of a measure is below the ± £5m EANDCB threshold." (Introduction)

- "All correspondence seeking collective agreement to a regulatory measure should continue to include an IA rated "fit for purpose" by the RPC, except where the impact on business is below the threshold for independent scrutiny." (Introduction)

- "A regulatory impact assessment (RIA) is a tool used to inform policy decision-making. It is based on the ROAMEF policy cycle [Rationale, Objectives, Appraisal, Monitoring, Evaluation, Feedback] and uses cost-benefit analysis, as set out in the Green Book,[16] to ensure good practice in developing policy based on robust evidence … A RIA summarises the rationale for government intervention, the different policy options (including non-regulatory options) and the impacts of the intervention, as well as quantifying expected costs and benefits." (paragraphs 1.2.2–4)

16. A key element of the ROAMEF policy cycle is evaluation and feedback, so that lessons can be learned, and subsequent legislation be made more effective. Sections 28–30 of the 2015 Act place a duty on ministers to conduct a *Post-Implementation Review* (PIR) of qualifying legislation (using the same £5 million per annum threshold). Ministers must publish a review within five years of the commencement of the legislation which must also be validated by the RPC.

17. The IA procedure, supported by the independent check by the RPC, is well-established and clear (albeit quite technical and complex to apply) and

15 BEIS, *Better Regulation Framework* (March 2020): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/916918/better-regulation-guidance.pdf [accessed 28 July 2022].

16 A standardised methodology on how to appraise and evaluate policies, projects and programmes is set out in HM Treasury guidance. HM Treasury, *The Green Book Central Government Guidance on Appraisal and Evaluation* (2020): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1063330/Green_Book_2022.pdf [accessed 28 July 2022].

ensures consistent measurement across government, accountability and transparency.

18. **Our concern is that the number of qualifying instruments which have not followed the IA procedure has increased and, given that no sanctions appear to be applied where a department fails to comply, there would seem to be little incentive for departments to improve**.

19. We therefore welcome the fact that, in July 2021, the BRE published a consultation document about legislating in the post-Brexit period.[17] It asked how the UK's future framework for new regulation can encourage the right design of interventions and suggested how the impacts of regulation should be measured and scrutinised in the future. (Our response to that consultation is set out in Appendix 3.)

20. The BRE's analysis of the consultation responses has recently been published.[17] We note that respondents strongly supported validation of options assessments at an earlier stage and maintaining independent verification of IAs but did not support any proposals to reduce IA content. It therefore seems an opportune moment to set out some of our own concerns about the Government's provision of impact information.

17 BEIS, 'Consultation outcome Reforming the framework for better regulation' (22 July 2021): https://www.gov.uk/government/consultations/reforming-the-framework-for-better-regulation [accessed 28 July 2022].

CHAPTER 3: WHAT ARE THE PROBLEMS? PRINCIPAL CONCERNS WITH IMPACT ASSESSMENTS

21. In this chapter we set out our principal concerns based on our scrutiny of hundreds of SIs each year. We make reference throughout to the five principles of Better Regulation to illustrate where we think the current system is falling short of those precepts.

Missing IAs

22. We have found that an increased number of instruments which require an IA have been laid before Parliament without one. In a report in October 2021, we published correspondence in which we drew to the attention of the responsible Minister, Paul Scully MP, the following examples:[18]

- HM Treasury: Money Laundering and Terrorist Financing (Amendment) Regulations 2019 (IA was awaiting sign-off by the RPC at the time).
- Department for Digital, Culture, Media and Sport: draft Code of Practice for Online Services on Age Appropriate Design (IA was promised before the Code had passed through Parliament).
- BEIS: draft Product Safety and Metrology etc. (Amendment etc.) (UK(NI) Indication) (EU Exit) Regulations 2020 (promise of publication of regulatory triage assessment "later this year").

23. Mr Scully replied that it "remains the responsibility of individual departments to produce a proportionate assessment of the impacts of their policy proposals" but said that the Government "will always strive to ensure that there is sufficiently robust analysis to support the decision-making that underpins regulation". He continued: "I will ask my officials to take additional steps to reinforce this message, by writing to departments to remind them of the requirements and asking them to commit to meeting them".[19]

24. More than six months later, we have found no discernible improvement:

- Department for Levelling Up, Housing and Communities (DLUHC): failed to complete an IA for the draft Private Parking Code of Practice (because the department had incorrectly assumed that only statutory instruments required an IA).[20]
- Department for Transport: published the IA on the Motor Vehicle (Driving Licences) (Amendment) (No. 5) Regulations 2021 six months after they had been laid and four months after the Regulations had come into effect (because of a lack of data).[21]
- BEIS: laid the Draft Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022 without an IA ("not yet finalised" to be published "shortly, ahead of debates").[22]

18 SLSC, *14th Report* (Session 2021–22, HL Paper 76).
19 *Ibid.*, Appendix 1.
20 SLSC, *32nd Report* (Session 2021–22, HL Paper 171).
21 SLSC, *37th Report* (Session 2021–22, HL Paper 197), Appendix 2.
22 SLSC, *5th Report* (Session 2022–23, HL Paper 28).

25. IAs provided months after the instrument has come into effect are no use for scrutiny purposes. Other examples include:

    - DLUHC: the Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 3) Order 2020 came into effect on 31 August 2020 and the IA was published in March 2021.

    - Department of Health and Social Care:

        - Regulations imposing the compulsory vaccination of care home staff[23] were laid on 22 June 2021, we took oral evidence from the Minister on 13 July 2021 about the lack of an IA, which was finally published on 9 November 2021.

        - Further legislation extending the vaccination requirement to all NHS staff[24] was laid on 9 November 2021, its IA was submitted for independent validation to the RPC on 15 November, which subsequently rated several sections as unfit for purpose.[25]

26. This is not just about 'paperwork'—late laying of an IA raises important concerns:

    - **Parliamentary scrutiny**: we endeavour to report on an instrument about two weeks after laying. We often have questions about what other policy options were considered or costs, which is information that should be included in an IA. Without this information, the Committee and Parliament are unable to scrutinise an instrument effectively. Furthermore, given that IAs tend to be substantial documents, laying an IA shortly before a debate may be of limited value.

    - **Opportunity for wider challenge**: publishing an IA at the same time as the instrument gives those affected an opportunity to challenge the Government's assumptions. For example, the Home Office recently revoked legislation to licence a chemical that could also be used as a drug: it had believed only 65 firms used the substance, but an industry body subsequently told them it was closer to 7,500 firms and the system envisaged would, therefore, not work.[26]

    - **Policy development**: most important of all, the IA should inform policy development and evolve with it (see paragraphs 10–11 above). If an IA is not available when an instrument is laid, then we are led to the conclusion that the information was not available or used when the policy was being formulated.

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23 The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021.

24 The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) (No. 2) Regulations 2021.

25 Regulatory Policy Committee, *The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) [No. 2] Regulations 2021 - COVID-19 Vaccination as a Condition of Deployment in Health and Care providers* (November 2021): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1039496/2021–11-29-RPC-DHSC-5132_1__-_VCOD2_Health_and_Care_settings__002_.pdf [accessed 28 July 2022].

26 Misuse of Drugs (Amendment) (Revocation) (England, Wales and Scotland) Regulations 2022 (SI 2022/559). SLSC, *4th Report* (Session 2021–22, HL Paper 20).

27. **All supporting information, including IAs, must be laid before Parliament at the same time as the instrument in order to ensure effective Parliamentary scrutiny, transparency and accountability.**

Delays due to the RPC?

28. On occasion, a department may explain their failure to provide an IA alongside an instrument on the grounds that it has not yet been cleared by the RPC. We raised this with Stephen Gibson, Chair of the RPC. He told us that RPC scrutiny periods were well advertised:

> "We have a target of a 30-day turnaround for the RPC process for the production of an opinion on an impact assessment. Currently the average timescale for that production is 22 days."[27]

29. Given this, we queried whether the delay is not within the RPC but rather a failure by the departments to factor in the RPC turnaround time. Andrew Williams-Fry of RPC commented:

> "In 2019, 35% of impact assessments received a request for an expedited process, that increased in 2020–21 to 40%. Where RPC have to expedite a process for a particular IA, that leads to other IAs potentially being delayed."[28]

30. **Departments should ensure that they plan realistically, including time to address any problems identified by the RPC, and only ask for expedited consideration in exceptional circumstances. We urge the BRE to take steps to ensure departments understand this important point and to support departments with appropriate training.**

31. Conversely the publication of the RPC's opinion on an IA can be delayed because the department itself has not published the IA. For example, when the draft Money Laundering and Terrorist Financing (Amendment) (No. 2) Regulations 2022 were laid before Parliament on 15 June, the EM stated that a full IA would be published "in due course". After we had completed our scrutiny of the draft Regulations, it was brought to our attention that the IA had been assessed as not fit for purpose ("red-rated") by the RPC. The IA and the RPC's rating were published together on 14 July, a month after the instrument had been laid.[29]

32. We find the current approach unsatisfactory: if the RPC feels constrained not to pre-empt a department's publication of an IA, material on the quality of an IA that could influence our view of the instrument's policy is not available to us. **We suggest that the RPC should demonstrate its independence by publishing its view of a final-stage IA as soon as it is ready: when an SI has been laid for scrutiny Parliament should always have access to the RPC's assessment, whether the department publishes the IA or**

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27 Q 6 (Stephen Gibson).
28 Q 1 (Andrew Williams-Fry).
29 HM Treasury, *Impact Assessment The Money Laundering and Terrorist Financing (Amendment) (No. 2) Regulations 2022 Statutory Instrument* (July 2022): https://www.legislation.gov.uk/ukia/2022/62/pdfs/ukia_20220062_en.pdf [accessed 28 July 2022]. See also: RPC, Amendments to the Money Laundering, Terrorist Financing and Transfer of Funds (June 2022): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1090613/2022-06-30-RPC-HMT-5079_2__-_Amendments_to_the_Money_Laundering_Terrorist_Financing_and_Transfer_of_Funds___002_.pdf [accessed 28 July 2022].

not. We also suggest that the RPC could do more to communicate to Parliament when it has 'red-rated' any IAs.

Delays due to the BIT target?

33. The 2015 Act introduced the Business Impact Target (BIT) to monitor the financial impact of government legislation on business. The Act requires IAs to be produced within the BIT reporting year so that the net cost of government legislation in that year can be calculated. Laying an IA six months after an instrument has come into effect can still meet the BIT requirement, as long as the IA arrives before the end of the reporting year. We are concerned that this looser deadline may distract officials from Parliament's need for an IA to be available as soon as an instrument has been laid. In addition, the BIT requires highly technical calculations about costs that may significantly lengthen the time it takes to produce an IA. Both BRE and RPC agreed that, at present, the BIT system was not achieving its intended purpose.[30] **We urge the BRE to ensure that officials are aware that, irrespective of the BIT reporting year, parliamentary scrutiny starts as soon as the instrument is laid before Parliament and an IA needs to be published at the same time as the instrument it supports.**

'No IA required'

34. For instruments that do not require an IA (because they do not exceed the £5 million per annum threshold), the Impact Section of the EM often just states that 'no IA is required'. This is, in our view, unhelpful in terms of both transparency and accountability.

35. We raised the problem of 'no IA required' with the BRE and RPC.[31] Although neither routinely see impact information for SIs below the threshold, they told us that departments have to prepare a simplified *de minimis* IA to be able to demonstrate when 'called-in' by the RPC that the £5 million threshold has not been reached. **For instruments below the threshold, departments should always include basic impact information in the EM and, we suggest, attach the *de minimis* assessment where available.**

36. That need not be an onerous request—often a couple of sentences in the EM would be adequate, for example:

> **Pneumoconiosis (Workers' Compensation) (Amendment) Regulations 2021**[32]
>
> There will be an estimated £218,000 increase to the DWP Departmental Expenditure Limit for 21/22. These estimates are at the time of the submission but delayed assessments due to Covid-19 may impact on final costings.

This example also helpfully indicates the degree of uncertainty in the estimate. For pilot projects and new initiatives accurate data may not be available, but a well-explained 'best guess' of the likely costs offers a reassurance that the policy's likely effects have been thought through and analysed.

30 Q 8 (Christopher Carr) and Q 8 (Stephen Gibson).
31 Q 4 (Christopher Carr) and Q 5 (RPC).
32 The Pneumoconiosis etc. (Workers' Compensation) (Payment of Claims) (Amendment) Regulations 2021 (SI 2021/271).

37. We have remarked in several recent reports that, despite being made at speed, many of the Foreign, Commonwealth and Development Office (FCDO) instruments imposing sanctions against Russia have been accompanied by a well-developed draft of the IA. In these cases, there is good reason why the RPC has not had time to consider the IA but the FCDO has nonetheless provided the best information available alongside the instrument. **We encourage other departments introducing emergency legislation to follow the same practice and avoid the 'all or nothing' approach we frequently see.**

Pandemic exemption

38. During the pandemic, temporary measures lasting less than 12 months were exempted from the IA requirement. In consequence, the EMs to most coronavirus SIs simply stated 'no IA required'. Mr Gibson of RPC thought that this was a missed opportunity:

> "We think we could have added a lot of value, perhaps not at the first lockdown stage but thinking about what we learnt from the first lockdown for the second and third lockdowns: was it right to close gyms, hairdressers, restaurants or whatever? Doing that monitoring and seeing how it worked the first time around would have informed better regulatory policy-making at a later stage."[33]

39. **When the Government are reviewing their handling of the pandemic legislation, we recommend that they consider whether these IA exemptions prevented useful information from being gathered that could have made subsequent measures more proportionate and better targeted.**

40. We wrote to Mr Scully, the previous BEIS Minister with responsibility for the provision of IAs, when he announced that exemption and he reassured us that:

> "We will also continue to monitor the position of emergency legislation to ensure departments produce retrospective impact assessments where Covid-19 measures are to be made permanent."[34]

We would welcome information about how many departments have actually done this and what proportion of the total due that represents.

Post-Implementation Review

41. *Post-Implementation Review* (PIR) is a checking process to see whether estimates were accurate, predictions were fulfilled, and the policy has achieved its intended outcome.

42. Sections 28–32 of the 2015 Act require any "regulatory provision" that passes the IA threshold to be reviewed five years after commencement and every five years after that. Section 30 requires the minister to publish a report on the conclusion of each review that must be validated by the RPC. It is required to:

    (a) set out the objectives intended to be achieved by the regulatory provision,

33 Q 11 (Stephen Gibson).
34 Letter of 4 September 2021 see Appendix 1, *14th Report*, (Session 2021–22, HL Paper 76)

(b) assess the extent to which those objectives are achieved,

(c) assess whether those objectives remain appropriate, and

(d) if those objectives remain appropriate, assess the extent to which they could be achieved in another way which involves less onerous regulatory provision.

43. There is extensive guidance on how to carry out a PIR from BRE,[35] the RPC,[36] the Treasury's Magenta Book[37] and the National Audit Office (NAO).[38]

44. We find it surprising that despite the statutory requirement to carry out a PIR and the range of guidance available, we very rarely see any mention in EMs that the changes being made by an instrument are the result of a PIR. Mr Gibson made a similar point:

> "Often we see *post-implementation reviews* that simply have a default assumption that everything is working well, whereas in my experience Governments do not always get it right first time."[39]

45. In 2008, this Committee conducted an inquiry into the use of PIR in collaboration with the NAO.[40] Key issues identified were the lack of any common review methodology or consistent tracking of SIs. The NAO followed up 229 SIs which required an IA and were at least three years old (which was the standard review date at that time). The outcome was:

- **29% of them had completed a PIR,**
- **54% had done some sort of evaluation (though mainly informal and in-house), and**
- **46% had not been subject to any sort of review**.

46. Regrettably, there appears to have been little progress since then. Mr Carr of the BRE estimated that only 25–40% of instruments completed their PIR despite it often being a statutory obligation.[41] Lord Callanan gave a higher figure, stating that before the pandemic 72% of instruments received a review on time, and suggested that the recent slump was understandable due to the pandemic.[42] **We have found that a few PIR reports on secondary legislation may be found on the Gov.uk website[43] but they are hard to**

35 BEIS, 'Producing post-implementation reviews: principles of best practice': https://www.gov.uk/government/publications/business-regulation-producing-post-implementation-reviews/producing-post-implementation-reviews-principles-of-best-practice [accessed 28 July 2022].

36 RPC, *Post Implementation Reviews* (March 2019): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/790031/RPC_case_histories___post-implementation_reviews__March_2019.pdf [accessed 28 July 2022].

37 HM Treasury, 'The Magenta Book' (27 April 2011): https://www.gov.uk/government/publications/the-magenta-book [accessed 28 July 2022].

38 National Audit Office, *Principles of effective regulation* (May 2021): https://www.nao.org.uk/wp-content/uploads/2021/05/Principles-of-effective-regulation-SOff-interactive-accessible.pdf [accessed 28 July 2022].

39 Q 11 (Stephen Gibson).

40 Merits of Statutory Instruments Committee, *What happened next? A study of Post-Implementation Reviews of secondary legislation* (30th Report, Session 2008–9, HL Paper 180).

41 Q 7 (Christopher Carr).

42 Q 6 (Lord Callanan).

43 HM Government, 'Search: post-implementation review': https://www.gov.uk/search/all?keywords=post-implementation+review&order=relevance&page=3 [accessed 28 July 2022].

find, not systematically published and do not appear to use a common format or methodology.

47. The BRE guidance says that each PIR report should be reviewed by the Cabinet Office Domestic and Economy Implementation Committee and both statutory and non-statutory reviews should be published on the Legislation.gov.uk website, under the "More resources" tab of the instrument to which it relates.[44] Our search of that website identified five such PIR documents[45]—the most recent of which was published in 2013. However, they are inconsistently flagged and hard to find.[46]

48. Lord Callanan told us that, as part of the review of the Better Regulation Framework, he was looking to set up a scrutiny board that would keep track of when PIRs are required, would remind departments of the timescale perhaps a year in advance, and support them through the process of implementing and coming up with the outcome of the review.[47] **We welcome this initiative to ensure that PIRs are monitored but the carrot of BRE support needs to be balanced with an effective stick to ensure compliance.**

49. **We also recommend that the review should consider how PIRs are published to make them more easily accessible and how officials can be encouraged to make use of them when formulating subsequent legislation.**

Operational difficulties

50. Despite the availability of guidance and 80 BRE staff advising departmental officials on the process, between a quarter and a third of IAs sent to the RPC get an initial review notice (IRN) to say they are not fit for purpose.[48] Mr Gibson said that at the initial stage IAs tended to be weakest on the policy objectives and consideration of options, and those submitted for the final stage review tended to be weakest on the wider impacts (such as the legislation's effects on competition, innovation, trade, or the environment) and on the monitoring and evaluation plan.[49]

51. Due to the RPC's interventions very few final-stage IAs are judged not fit for purpose ("red-rated"). We query why there is such a high percentage of IRN's issued, when there is such substantial support available. We think that part of the explanation may be the complexity of IAs, which are often 60–80 pages long, and their focus on the technical financial calculations set out in the Treasury Green Book.

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44 BEIS, *Better Regulation Framework* (March 2020), sections 1.6–1.7: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/916918/better-regulation-guidance.pdf [accessed 28 July 2022].

45 The National Archives, 'Search Results: UK Impact Assessment': https://www.legislation.gov.uk/ukia?stage=Post-Implementation [accessed 28 July 2022].

46 For example, although it did not appear in the website's search facility the Draft Microchipping of Dogs (England) (Amendment) Regulations 2022 which builds on a PIR for SI 2015/108 was published in December 2021. Department for Environment, Food and Rural Affairs, *The Microchipping of Dogs (England) Regulations 2015 Post-Implementation Review* (December 2021): https://www.legislation.gov.uk/uksi/2015/108/pdfs/uksiod_20150108_en.pdf [accessed 28 July 2022].

47 Q 6 (Lord Callanan).

48 Q 5 (RPC). We note that BRE staff numbers have since been reduced as part of the spending review: Q 1 and 13 (Christopher Carr). RPC also mentioned an expectation of a 20% cut in its secretariat Q 1 (Stephen Gibson).

49 Q 1 (Stephen Gibson).

52. The Better Regulation principles define well-targeted regulation as law that focuses on the problem identified, minimises side effects and focuses enforcement primarily on the most serious risks. It is difficult to know the extent to which a thorough analysis of risks and options has been undertaken from looking at final-stage IAs because they often only offer the alternatives 'do nothing' or 'do this'. We acknowledge that an IA produced at the consultation stage may have included a more extensive consideration of options, but we do not see it and we wonder why this useful information is removed.

53. Mr Gibson made a similar point:

> "… often the options we see at the final stage are to do nothing or to take the preferred option … whereas in fact there may be quite a lot of choices: different options for how the regulation may be introduced, mitigation for smaller micro-businesses or different ways in which it can be as effective but have much lower costs to businesses and to society."[50]

54. To improve the targeting of regulation, the BRE make a proposal in their consultation on *Reforming the framework for better regulation*[51] that departments should be required to submit an options appraisal for independent scrutiny at an earlier stage in the process. This proposal appears to us to have merit because it would demonstrate that departments have properly considered alternatives to regulation or different lighter-touch regulation, leaving the more complex analysis involved in a full IA for "the right option".[52]

55. This approach has the potential for several benefits:

- easier for non-specialist civil servants to operate, whereas by contrast a full IA often needs the services of an economist;
- broadening the range of factors considered at an early stage
  - because a policy team may lack experience of the business environment, and
  - because teams can unintentionally develop 'group think' that exposure to an external body should challenge;
- improving the quality of policy targeting because the IA process is better integrated into the policy process; and
- wider in scope because at the initial stage it will not be so evident which proposals will exceed the £5 million threshold.

Public sector projects

56. At present, measures that only impact the public sector are not required to provide an IA, although they are sometimes provided on a voluntary basis for major public policy changes and we find that extremely helpful.[53] Properly used the impact assessment process encourages officials to think of the wider

50 Q 4 (Stephen Gibson).
51 BEIS, 'Consultation outcome Reforming the framework for better regulation': https://www.gov.uk/government/consultations/reforming-the-framework-for-better-regulation [accessed 28 July 2022].
52 Q 2 (Christopher Carr).
53 For example, Ministry of Justice, *Extending Magistrates' Court Sentencing Powers Impact Assessment* (April 2022): https://www.legislation.gov.uk/ukia/2022/39/pdfs/ukia_20220039_en.pdf [accessed 28 July 2022].

consequences of their legislation and might have avoided the sort of 'tunnel vision' we recently saw in a Department for Education instrument on Student Loans.[54] The EM included a single sentence stating that the changes were expected to generate £3.7 billion of savings for the Government, but failed to mention that this money would come from around a million students each paying an extra £113.40 per year. **We recommend that IAs should be published alongside all instruments which implement significant policy changes irrespective of the sector impacted.**

Lack of a central point of authority

57. Both the Rt Hon. Jacob Rees-Mogg MP, former Leader of the House of Commons, and the current Leader, told us that they took seriously the importance of assisting parliamentary scrutiny by providing supporting explanatory material.[55] But the responsibility for the provision of that material rests with departments without any apparent point of authority within government to ensure the IA procedure is followed.

58. Lord Callanan said he was very keen to promote the use of IAs but admitted that:

> "because we have no statutory means of enforcing the writ of impact assessments, we are relying on peer pressure to encourage and cajole departments to do it".[56]

We find this disheartening because there appears to be little substance behind that peer pressure. As Baroness Vere of Norbiton, a Department for Transport Minister, told us during an oral evidence session about the missing IA for the Draft Motor Vehicles (Driving Licences) (Amendment) (No.5) Regulations 2021, the absence of an IA "did not cause delay because the regulations went through without the impact assessment."[57]

59. Mr Gibson was clear that the RPC could not insist on an IA:

> "We simply assess the quality of the evidence and analysis. If the Minister wishes to bring forward a measure where the costs and benefits have not been properly assessed, that is up to him or her."[58]

60. The BRE guidance says that "All correspondence seeking collective agreement to a regulatory measure should continue to include an IA rated "fit for purpose" by the RPC, except where the impact on business is below the threshold for independent scrutiny." Lord Callanan told us that "the provision of impact assessments is enforced by the Cabinet Office under the application of collective agreement rules".[59] Yet no one appears to be enforcing those rules.

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54 The Education (Student Loans) (Repayment) (Amendment) Regulations 2022 (SI 2022/301). SLSC, *36th Report*, (Session 2021–22, HL Paper 193).

55 SLSC, 'Correspondence—The Rt Hon. Jacob Rees-Mogg' (16 November 2021): https://committees.parliament.uk/committee/255/secondary-legislationscrutiny-committee/publications/3/correspondence/. See also SLSC, *Government Response: What next? The Growing Imbalance between Parliament and the Executive: End of Session Report 2021–22* (8th Report, Session 2022–23 HL Paper 35).

56 Q 4 (Lord Callanan).

57 Oral Evidence on Adequate information to support the Department for Transport's regulations, (Session 2021–22) Q 9 (Baroness Vere of Norbiton).

58 Q 6 (Stephen Gibson).

59 Q 3 (Lord Callanan). See a similar description in correspondence from Paul Scully MP, previous Minister for Better Regulation, in SLSC, *18th Report* (Session 2021–22 HL Paper 98).

61. We reasonably assumed that enforcement was a function of the Parliamentary Business and Legislation (PBL) Committee as the Cabinet Committee responsible for giving clearance for secondary legislation to be laid before Parliament. In his written evidence, however, Mr Spencer told us that the PBL triage process "does not consider the policy within secondary legislation, or supporting documents such as Impact Assessments. This is a matter for the department responsible … Departments are responsible for their own internal clearances and quality assurance including the text of the SI, vires and the content of the Explanatory Memorandum".[60]

62. In an oral evidence session on 20 July 2022 with the Leaders of both Houses we raised PBL's hands-off approach again.[61] On this occasion the responses were slightly more promising:

- Mr Spencer agreed that "in principle, wherever possible, the impact assessment should be produced at the same point as the legislation. We are fairly robust in PBL in making sure that departments understand that."
- Baroness Evans of Bowes Park added that "we often go back expressing unhappiness at the way in which some departments have been running the process."

However, the Committee concluded that some departments are serial offenders and PBL's "expressions of unhappiness" do not appear to have sufficient influence to persuade them to change their ways.

So who within Departments is responsible for quality control?

63. In the run up to Brexit, and from time to time thereafter, we have asked the lead civil servants with the responsibility for legislation, the Treasury Solicitor, First Parliamentary Counsel and the Permanent Secretary with responsibility for the Policy Profession, to respond in an oral evidence session to our concerns about SI production. In 2017, we were told by Sir Chris Wormald, the Head of the Policy Profession:

> "**Of the other big changes that we have made since the last time we were here, one of the biggest is that every department has now appointed a senior responsible owner for the SI process,** so there is somebody senior in every department who has a responsibility for the SI process within their departments …
>
> … Of course, the overall responsibility for anything that happens in the department goes to the Secretary of State and the permanent secretary. If the department is underperforming on anything, it is ultimately those two people's responsibility …
>
> … those are quite busy people. **That is why we wanted a clear lead Minister, which is normally at junior Minister level, and a clear SRO who was part of the senior leadership who were responsible for the system;** and then for an individual SI, the quality control would be the lead Minister and normally the deputy director. Those would be the two people who would sign it off. Effectively, those are the three

60 Appendix 2.
61 Oral evidence on the government response to *Government by Diktat* (20th Report, Session 2021–22, HL Paper 105), Q 10

> levels of accountability. The bit we have added is that clear lead Minister and clear lead SRO to make sure that somebody, both at political level and at Civil Service level, was looking across the whole performance on SIs. That is the bit of the accountability that we felt was missing and we therefore dealt with."[62]

64. In a further evidence session in 2021, Sir Chris' successor as head of the Civil Service Policy Profession, Tamara Finkelstein, said:

> "Some of the improvements that have already been put in place have helped, but there is more to do and in a number of areas… **identifying accountable SROs—senior responsible owners—in departments who are accountable on SIs, and having a Minister for SIs, has made a considerable difference.** I see that in Defra. There is proper accountability. We need to build on that so that those SROs across departments are co-ordinated by the PBL secretariat to meet and to share ways in which to improve, and that there is a genuine sense of accountability to make improvements."[63]

65. In contrast, in his written evidence, Mr Spencer told us that SI Ministers "are responsible for their departments' secondary legislation programme as a whole, with policy ministers and officials responsible for delivering each individual SI within that programme".[64] **We have struggled to obtain information on how the SI Ministers carry out that role as it seems to vary widely between departments.** The BRE and the RPC both confirmed that they have no contact with any of the appointed SI Ministers.[65]

66. We acknowledge that departments may have to deal with political imperatives that would make it difficult for an SI Minister to ask for a delay so that an IA can be completed. We note, for example, that even Lord Callanan could not prevent his department from laying the draft Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2022 without one (IA "to be published shortly, ahead of debates, as it has not yet been finalised.")[66] **We are concerned however that insufficient weight is being placed on the role of the SI Minister. We would welcome further information about the role, their common objectives, what training they receive about the standards that SIs are expected to meet and what influence they are able to exert within a department in order to ensure that those standards are maintained.**

Is departmental 'self-discipline' working?

67. Both the BRE and the RPC commented that there is a wide variation in the quality of IAs produced within departments. Mr Carr of the BRE said:

> "The difference between the good and the bad is within departments and not between them. Even the smallest department comprises hundreds of civil servants, and some of them are very good at this and some of them lack the skills and experience."[67]

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62 Oral evidence on Quality of information provided in support of secondary legislation (Session 2016–17), QQ 1–13
63 Oral evidence on Departmental support of secondary legislation (Session 2021–22), QQ 1–16
64 See also correspondence in SLSC, *30th Report* (Session, 2021–22, HL Paper 161).
65 Q 1 (Lord Callanan), Q 1 (RPC).
66 SLSC, *9th Report* (Session 2022–23, HL Paper 46).
67 Q 2 (Christopher Carr).

68. Mr Gibson of the RPC explained:

> "There is a range of reasons for differences. In some cases there are tight timescales or resource constraints. It may be very difficult to obtain good evidence because of the nature of the proposal. We occasionally see that impact assessments have been developed as an afterthought; once the policy has basically been made there is a realisation that they have to go through this hurdle. That undermines much of the purpose of the impact assessment, which is to support the decision-making process … There are also issues with the experience of the civil servants involved. Many of them have very limited experience of business or of life outside Whitehall."[68]

69. As well as frustrating the purpose of the IA as a policy-making tool, Mr Carr of BRE commented that: "The faster you wish to implement a policy, the poorer the analysis and evidence base will be".[69] Such last-minute assessments are likely to be based on poor data or cannot provide a clear baseline, which can in turn create problems for PIR.

70. We infer from this that some departments are failing to carry out adequate consultation with the relevant external groups that might improve their data, or they do not allow enough time for it in their project plan.[70] The high percentage of IRNs that RPC are issuing at initial review stage may also indicate that departments are relying too much on RPC's experts to tell them how to fix some of their deficiencies.

71. Given the large number of BRE staff, mainly based within departments, we are surprised that the quality of IAs within a department varies so much since we would assume that all policy officials have access to that resource. We are forced to conclude **that departments, whether through their BRE Unit or through their internal clearance procedures, are failing to impose adequate quality control themselves.**

72. To be effective any requirement under the IA procedure needs to be robustly enforced, and we will be considering the role of the PBL Committee in providing that enforcement below. Of course, an exemption for emergency legislation needs to be in place, but its conditions should be clearly defined and adhered to. Poor planning by a department should no longer be treated as an acceptable reason to bypass important elements of the policy formulation process.

68 Q 1 (Stephen Gibson).
69 Q 2 (Christopher Carr).
70 Q 8.

CHAPTER 4: ESTABLISHING AN EFFECTIVE GATEWAY

73. We have concluded that there needs to be a central 'gateway' to ensure that secondary legislation is accompanied by the explanatory material necessary for effective parliamentary scrutiny, external to departments and therefore less likely to be overruled. The Cabinet Office, with central oversight, would seem the obvious place. Currently, however, it appears that, although the PBL Committee manages the flow of secondary legislation, it does not police the quality of associated explanatory material. Mr Spencer told us:

> "Each SI is considered on a case-by-case basis including 'the purpose of the SI, anticipated laying date, parliamentary reaction, territorial extent and the type of procedure being used for the SI'".[71]

74. We find this omission surprising and query how this aligns with the Leader's commitment that "Parliament should be provided with the information it needs to scrutinise the legislation the Government brings forward." PBL's current remit does include consideration of "parliamentary reaction" and there have been a number of recent debates in the House where a department has been strongly criticised for not making an IA available on time.[72]

75. **We recommend that the PBL Committee should take responsibility for this commitment and extend its remit to include consideration of the explanatory material accompanying secondary legislation. Where it is deficient, we would expect the proposal for legislation to be rejected or, if an emergency, a full explanation for the deficiency to be provided in the EM.**

71 See PBL written evidence in Appendix 2.

72 See for example HL Deb, 7 June 2022, cols 1124–1142 which referred to there being no IA for the Immigration (Restrictions on Employment and Residential Accommodation) (Prescribed Requirements and Codes of Practice) and Licensing Act 2003 (Personal and Premises Licences) (Forms), etc., Regulations 2022. Members from all parties spoke critically of the lack of an IA.

CHAPTER 5: CONCLUSION

76. We have found that IAs are treated like speed limits—everybody says they are a good thing, but some take a more flexible attitude to complying with the requirements than others. The BRE provides the Highway Code and the RPC issues 'speeding' tickets in the form of red-rated assessments, but they are not enforced and so the problem spreads.

77. The IA procedure is there to produce well-evidenced legislation but an increased number of SIs appear to have taken shortcuts through the system and therefore failed to reap the benefits. The proposal to reform the Better Regulation Framework appears to be an acknowledgement that the current system requires improvement. We reiterate our three priorities for reform from our submission to the review:[73]

- It is essential for effective parliamentary scrutiny that an IA should be made available *at the same time* as the instrument is laid before Parliament.
- Whether as part of an IA (when required) or included in the EM, it would assist parliamentary scrutiny if instruments were accompanied by a broad overview of potential impacts—not just the financial bottom line.
- Greater emphasis on *post-implementation review* would enhance transparency and accountability if cited when amending legislation is put before the House.

78. We do not think that the proposals we are making are unreasonable, given that departments could produce IAs to a better standard in 2017. Corners were cut because of the pressure to achieve the Brexit and pandemic legislative programmes but, as the examples in this report show, many of the worst IA transgressions are for business-as-usual legislation. **We look forward to the PBL Committee taking a firm lead in instructing departments that, save in exceptional circumstances, secondary legislation will not be laid either without an IA cleared by RPC (when required) or without appropriate impact information being included in the EM.**

79. **The proposal that the RPC should look at an early-stage options analysis could have benefits but only if it is enforced by the Cabinet Office.** Because the current IA procedure is quite technical, the Government may wish to consider whether a simplified IA format might produce more consistent results and be more cost effective. **We recommend that:**

- **All secondary legislation that will add costs of £1–5 million should be published with a *de minimis* assessment.**
- **All secondary legislation that will have costs above £5 million should not be laid without an IA, verified by the RPC.**
- **Parliament should consider deferring approval of an instrument if the IA is not available before the debate.**

73 See Appendix 3

- **The IA procedure should apply to significant public sector projects as well as those that affect business and the voluntary sector.**

Given the improvements made to IAs by RPC scrutiny it may be premature to remove validation from Final Stage IAs as the BRE review proposes. We suggest that the Government retain this step while the other changes are bedding in.

80. The role of a compliance officer is rarely a popular one, whether in government or in the private sector. The effectiveness of an SI Minister will depend on a combination of their own personality and the 'culture' of the department in which they work. They will therefore need the support of their Secretary of State, even—or perhaps particularly—in cases which are politically sensitive or controversial. If in a particular department it is felt that the political career of an SI Minister depends on his or her readiness to 'bend with the wind' there is the potential for any scrutiny process to be fatally undermined.

81. Providing Parliament with poor quality information or only providing detailed information after the scrutiny process has been completed is another example of the transfer of power from Parliament to the Executive that we highlighted in *Government by Diktat*.[74] Parliament's legitimate role is to challenge the actions of the Executive. **If Parliament is to perform its critical function of holding the Government to account, it is of paramount importance that the two Houses are given complete and comprehensive information about the basis on which policy choices are made and the reasons why alternative options have been rejected. We cannot perform that role without the right information at the right time.**

74 SLSC, *Government by Diktat: A call to return power to Parliament* (20th Report, Session 2021–22, HL Paper 105).

CHAPTER 6: LIST OF RECOMMENDATIONS

Recommendation 1: All supporting information, including IAs, must be laid before Parliament at the same time as the instrument in order to ensure effective Parliamentary scrutiny, transparency and accountability. (Paragraph 27)

Recommendation 2: Departments should ensure that they plan realistically, including time to address any problems identified by the RPC, and only ask for expedited consideration in exceptional circumstances. We urge the BRE to take steps to ensure departments understand this important point and to support departments with appropriate training. (Paragraph 30)

Recommendation 3: We suggest that the RPC should demonstrate its independence by publishing its view of a final-stage IA as soon as it is ready: when an SI has been laid for scrutiny Parliament should always have access to the RPC's assessment whether the department publishes the IA or not. We also suggest that the RPC could do more to communicate to Parliament when it has 'red-rated' any IAs. (Paragraph 32)

Recommendation 4: We urge the BRE to ensure that officials are aware that, irrespective of the BIT reporting year, parliamentary scrutiny starts as soon as the instrument is laid before Parliament and an IA needs to be published at the same time as the instrument it supports. (Paragraph 33)

Recommendation 5: For instruments below the threshold, departments should always include basic impact information in the EM and, we suggest, attach the de minimis assessment where available. (Paragraph 35)

Recommendation 6: When the Government are reviewing their handling of the pandemic legislation, we recommend that they consider whether these IA exemptions prevented useful information from being gathered that could have made subsequent measures more proportionate and better targeted. (Paragraph 39)

Recommendation 7: We welcome Lord Callanan's initiative to ensure that Post-Implementation Reviews (PIRs) are monitored but the carrot of BRE support needs to be balanced with an effective stick to ensure compliance. We also recommend that the review should consider how PIRs are published to make them more easily accessible and how officials can be encouraged to make use of them when formulating subsequent legislation. (Paragraphs 48–49)

Recommendation 8: We have struggled to obtain information on how the SI Ministers carry out that role as it seems to vary widely between departments and have insufficient weight. We would welcome further information about the role, their common objectives, what training they receive about the standards that SIs are expected to meet and what influence they are able to exert within a department in order to ensure that those standards are maintained. (Paragraphs 65–66)

Recommendation 9: We recommend that the PBL Committee should take responsibility for the Government's commitment to provide Parliament with the information it needs to scrutinise the legislation the Government brings forward and extend its remit to include consideration of the explanatory material accompanying secondary legislation. Where it is deficient, we would expect the proposal for legislation to be rejected or, if an emergency, a full explanation for the deficiency to be provided in the EM. (Paragraph 75)

Recommendation 10: The proposal that the RPC should look at an early-stage options analysis could have benefits but only if it is enforced by the Cabinet Office. (Paragraph 79)

Recommendation 11: We recommend that:

- ***All secondary legislation that will add costs of £1–5 million should be published with a de minimis assessment.***
- ***All secondary legislation that will have costs above £5 million should not be laid without an IA, verified by the RPC.***
- ***Parliament should consider deferring approval of an instrument if the IA is not available before the debate.***
- ***The IA procedure should apply to significant public sector projects as well as those that affect business and the voluntary sector.***
- ***Given the improvements made to IAs by RPC scrutiny it may be premature to remove validation from Final Stage IAs as the BRE review proposes. We suggest that the Government retain this step while the other changes are bedding in. (Paragraph 79)***

APPENDIX 1: LIST OF WITNESSES

Evidence is published online at https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/oral-evidence/ and available for inspection at the Parliamentary Archives (020 7219 3074)

Evidence received by the Committee is listed below

Tuesday 22 March 2022	
Christopher Carr, Director, Better Regulation Executive, Department for Business, Energy and Industrial Strategy	QQ 1–13
Tuesday 5 April 2022	
Stephen Gibson, Chair of the Regulatory Policy Committee	QQ 1–14
Tuesday 5 April 2022	
Andrew Williams-Fry, Member of the Regulatory Policy Committee	QQ 1–14
Tuesday 28 June 2022	
Lord Callanan, Minister for Business, Energy and Corporate Responsibility, Department for Business, Energy and Industrial Strategy	QQ 1–10
Tuesday 28 June 2022	
Sarah Montgomery, Deputy Director, Policy and Delivery, Better Regulation Executive	QQ 1–10

APPENDIX 2: WRITTEN EVIDENCE FROM THE PARLIAMENTARY BUSINESS AND LEGISLATION COMMITTEE

Letter from the Rt Hon. Mark Spencer MP, Lord President of the Council and Leader of the House of Commons, to Lord Hodgson of Astley Abbotts, Chair of the Secondary Legislation Scrutiny Committee

Thank you for your letter of 26th April requesting information on how the PBL Committee approaches secondary legislation.

As ever, I am grateful to you and your Committee for all the work you do to hold the Government to account. I agree that Parliament should be provided with the information it needs to scrutinise the legislation the Government brings forward.

You will be aware that it is a long-established precedent that information about the discussions that have taken place in Cabinet and its Committees is not normally shared publicly. This is in order to protect the principle of Cabinet collective responsibility, which requires ministers to have a private space for discussion ahead of coming to an agreed position. This also covers information about the workings and processes of the Cabinet and its Committees. Please find my response to your questions overleaf.

How the PBL Committee approaches secondary legislation

The Parliamentary Business and Legislation (PBL) Committee is responsible for considering *'matters relating to the Government's parliamentary business and delivery of its legislative programme'*[75]. The Committee is supported by a secretariat, based in the Cabinet Office. As part of this support, the PBL Secretariat performs a *'central coordination, clearance and monitoring function for delivering secondary legislation across Government (the triage process), which should be considered when formulating plans for secondary legislation'*[76]. It is for Ministers to determine how they discuss policy and reach collective agreement and the maintenance of this convention is fundamental to the continued effectiveness of Cabinet government.

The triage process was introduced to create a centralised process for ensuring, departments were planning their secondary legislation programme in advance, and that there was oversight of the upcoming flow of secondary legislation to support the effective management of Government business in both Houses.

The PBL triage process involves a subset of ministers serving on the PBL Committee who, on a monthly basis, will review the statutory instruments (SIs) planned to be laid over the following three months, and provide departments with PBL Committee clearance to proceed with the SI.

1. What are the administrative processes involved in the PBL Committee triaging secondary legislation (for example, the typical timetable, and what instructions are given to departments about what should be included in their submissions)?

The administrative support for the triage process is provided by the PBL Secretariat, who work on behalf of the Committee to ensure minister have the information

75 HM Government, 'List of Cabinet Committees' (21 October 2021): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1027921/Cabinet_Committee_-_Membership_and_ToRs__October_2021___2_.pdf [accessed 12 May 2022]

76 Cabinet Office, *Guide to Making Legislation* (January 2022), p 139: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1048567/guide-to-making-legislation-2022.pdf [accessed 12 May 2022]

they need to take decisions. Each SI is considered on a case-by-case basis, but generally ministers will take into consideration whether the secondary legislation can be justified and has a clear delivery plan to support its passage. Based on the information submitted to them by departments, the PBL triage ministers may clear SIs to be laid, ask for more information or reject SIs for laying. The monthly triage will consider the purpose of the SI, anticipated laying date, parliamentary reaction, territorial extent, and the type of procedure being used for the SI.

The triage process does not consider the policy within secondary legislation, or supporting documents such as Impact Assessments. This is a matter for the department responsible for the SI as part of their overall management of their secondary legislation programme.

As mentioned in the opening paragraphs, departments will submit information to the PBL triage on a monthly basis, relating to the SIs it plans to bring forward in the coming three months.

2. What role does the PBL Secretariat play in assessing documents' fitness for submission? What percentage pass first time and are there any common faults?

3. What factors does the PBL Committee take into account when considering whether an instrument should be permitted to proceed to laying and what percentage pass first time?

The PBL Secretariat expects departments to draft information that is of ministerial quality, that succinctly and clearly explains the purpose of the SI and what steps it intends to take to support its passage through Parliament. Departments are responsible for their own internal clearances and quality assurance including the text of the SI, vires, and the content of the Explanatory Memorandum.

The PBL Secretariat does not collect information relating to the percentage of SIs that require further information or are rejected by the triage ministers.

4. In what circumstances (giving examples) are instruments allowed to proceed even though they, or the accompanying documentation, fail to meet the standards expected by Parliament?

The Government only brings forward legislation that it deems necessary, proportionate and justified to achieve its objectives.

In instances where errors in Sis have been made, correcting Sis are brought forward as soon as possible. This was seen, for example, when the Government had to move at pace to respond to Russia's invasion of the Ukraine and during the COVID-19 pandemic.

5. What criteria does the PBL apply (giving examples) when it takes the view that an instrument is so urgent that a breach of the 21 day rule is justified?

The Government agrees that breaching the '21 day rule' should be the exception and not the rule to ensure that Parliamentarians have the time they need to scrutinise SIs. However, it is important to balance complying with this convention and the Government's ability to respond to emerging issues, a recent example being the closure of the tier 1 investor route. As the Explanatory Memorandum stated this was " … *for reasons of national security and the operation of the immigration system, and to be consistent with the purpose of the closure of the Tier 1 (Investor) route to new applicants. It is anticipated that closure of the route with 21-days' notice, or*

less, would trigger a "closing down sale" effect, involving a very substantial upturn in application levels in advance of closure."[77]

Where departments intend to breach the convention, they are required to set out the reason why the breach is necessary in the Explanatory Memorandum. As usual practice, departments will inform the SLSC that the Government intends to breach the 21 day rule.

6. Does the PBL Committee make recommendations to departments about the use of sunset or review clauses and, if so, to what effect (giving examples)?

The PBL. Secretariat discusses all aspects of legislation and best practice with departments on a daily basis. However, it is a matter for the minister in charge of the SI to determine whether it is appropriate to include sunset or review clauses. It may also depend on the powers in the parent Act, which Parliament will have scrutinised and endorsed. The reason for inclusion, or not, of sun-setting or review clauses, vary depending on the policy intent of that particular SI. For example, there was clear reasoning for including sunset provisions in some of the Sis responding to COVID-19.

7. What is the relationship between the PBL Committee and departmental SI SROS and SI Ministers?

Each SI Minister and SI SRO is an internal departmental appointment. They are responsible at ministerial and official level for their department's secondary legislation programme as a whole, with policy ministers and officials responsible for delivering each individual SI within that programme. The processes and procedures in each department will vary according to the amount and type of secondary legislation the department lays and its internal structures.

The PBL Secretariat regularly shares advice and guidance with departments. In addition, the Parliamentary Capability Team, based in the Cabinet Office, provides training for civil servants of all grades. Training courses on understanding the secondary legislation process in Parliament and on creating effective Explanatory Memoranda are delivered on an ongoing basis. An ongoing six-monthly training programme for departmental SI Leads is delivered jointly by the Parliamentary Capability Team and the PBL Secretariat. This programme is delivered as a series of monthly seminars. A guidance 'toolkit' for SI Project Managers was also published in 2021, which is available via the Civil Service Learning website. I attach a copy of the toolkit for information. I am grateful the SLSC clerks were able to support the recent round of training. Support specifically for SI SROs is currently being scoped and designed by the Parliamentary Capability Team and they expect to launch this in autumn 2022.

17 May 2022

77 HM Government, *Explanatory Memorandum to the Statement of Changes in Immigration Rules* (CP 632), 17 February 2022: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1055715/E02722027_-__CP_632__-_EXPLANATORY_MEMORANDUM__PRINT_.pdf [accessed: 12 May 2022]

APPENDIX 3: SLSC LETTER TO THE BETTER REGULATION EXECUTIVE ON ITS REFORM OF THE BETTER REGULATION FRAMEWORK

Letter from Lord Hodgson of Astley Abbotts, Chair of the Secondary Legislation Scrutiny Committee, to Christopher Carr, Director of the Better Regulation Executive

I am writing as Chair of the Secondary Legislation Scrutiny Committee (SLSC). The role of the SLSC is to scrutinise all statutory instruments laid before Parliament which are subject to a parliamentary procedure.

The Committee has only just learned of your consultation exercise on Reforming the Framework for Better Regulation from correspondence with the Minister Paul Scully MP. I understand that we have missed the formal consultation period. I hope however that there is still time for the Committee to offer three broad observations:

(1) If it is to assist effective parliamentary scrutiny of secondary legislation, it is essential that an Impact Assessment (IA) should be made available at the same time that an instrument is laid. Where departments deposit an IA after laying, not only does this inhibit effective scrutiny but it is difficult to avoid the conclusion that information on impact was not used in the formulation of policy as it should be, but was treated as an after-thought.

(2) Whether as part of an IA (when required) or included in the Explanatory Memorandum, it would assist parliamentary scrutiny if instruments were accompanied by a broad overview of potential impacts. This should include not only financial bottom line but also a thorough analysis of all potential consequences of the legislative change proposed, thereby enabling Parliament to weigh up the pros and cons of the policy change being effected.

(3) Finally, we would welcome greater emphasis on *post-implementation review*. It would enhance transparency and accountability, if, when considering amendments to existing legislation, information was provided about the success or otherwise of the policy implemented by the original regulations.

18 October 2021

APPENDIX 4: LIST OF MEMBERS AND INTERESTS

Members

Baroness Bakewell of Hardington Mandeville
Lord De Mauley
Lord German
Viscount Hanworth
Lord Hodgson of Astley Abbotts
Lord Hutton of Furness
The Earl of Lindsay
Lord Lisvane
Lord Powell of Bayswater
Lord Rowlands
Baroness Watkins of Tavistock

Interests

Committee Members' registered interests may be examined in the online Register of Lords' Interests at http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests. The Register may also be inspected in the Parliamentary Archives.

For the purposes of this inquiry, Members declared no specific interests.