

TOP TEN TIPS FOR A GOOD EM

The Secondary Legislation Scrutiny Committee (SLSC) considers “every instrument, or draft of an instrument, laid before both Houses of Parliament, on which proceedings may be taken”. Although this is mainly statutory instruments (SIs), it also includes other instruments subject to the affirmative or negative resolution procedure such as statutory codes of practice, Immigration Rules and statutory guidance. The SLSC also “sifts” Proposed Negative SIs.

All of them must be laid with an Explanatory Memorandum (EM) of no more than 10 pages which should explain what the instrument does **and why**. It should be written in plain language that a non-expert in that area can understand. Here are some hints on producing a good one.

More details – and some examples are provided in our [Guidance for Departments](#).

Explaining the Policy

1. **Context** – always explain the background and baseline, before explaining what the regulations do to change it. For example, the EM should not say “*this order extends the XYZ scheme*” without explaining, briefly, what the XYZ scheme does and who is eligible for it.
 - That background should include sufficient ‘bigger picture’ information to let the reader understand how the changes made in this SI relate to the wider policy initiative, and its comparative significance: “*The XYZ scheme is part of a programme to help the unemployed back into work, this change will add 20,000 claimants...*”
2. **Free-standing** - A good EM should be capable of being fully understood without the reader having to refer to other documents. Links to other documents can be helpful to illustrate the wider context of the policy but, where used, the EM should also set out briefly the principal points of the judgment or White Paper, giving any specific page or paragraph numbers.
3. **Evidence** - Simple assertions that all will go according to plan may be challenged, so they should be supported by evidence to demonstrate why change is needed and why it should be done this way.
 - Where new regulations amend existing ones, the Committee will expect to see evidence from an evaluation of how the previous regulations have performed (and a link to the published post-implementation review if one exists).
4. **Balanced** – EMs should also present a balanced view of the policy, reporting and responding to criticisms where necessary. The SLSC has been extremely critical of instances where EMs have, for example, not mentioned concerns expressed in debate or in Select Committee reports. Addressing concerns upfront can also allow you to set out the Government’s response to those concerns and may reduce questions later.
5. **Definitions or criteria** – particularly when used in making decisions on how individuals will be treated, for example to decide whether they qualify for benefits or will be deported, should always be in the legislation itself: not left to non-statutory guidance. Highlight them in the EM.

6. **Penalties** - Always provide a clear statement, *in plain English not legal terms*, of what behaviour will result in the penalty, jail sentence or other sanction being imposed.

Supporting documents

7. **Consultation** - should be proportionate to the degree of change and the number of people affected. Where there is no consultation, it is for less than six weeks, or limited to a target group, reasons for that approach should be given and, in particular, why it provided sufficient opportunity for those affected to comment. A full analysis of the outcome **should be published by the time the instrument is laid**, and a direct weblink included in the EM. The EM should contain a short, balanced summary of the views for and against and how the department responded to them.
8. **“No IA required” helps nobody.** *Every* EM should include a short explanation of the costs and benefits of the SI’s policy, including to the public sector, whether or not the costs meet the threshold for a formal Impact Assessment (IA). Where there is no cost, explain why not: *“There is no additional cost to administer these changes to the XYZ Scheme because the IT infrastructure is already in place, but the additional claims are expected to cost in the region of £2 million per year.”*
- Where a formal IA is required, **include a copy in the laying email** for the use of the Committee, and the weblink in the EM.
 - **Late IAs will be criticised** because they are meant to inform policy as it develops not prop up decisions already made

Timing issues

9. **Plan ahead** - it is the department’s responsibility to lay the instrument sufficiently in advance of its chosen implementation date to be sure of completing the parliamentary process in time. By convention departments should allow at least 21 days between laying the instrument and bringing it into effect to allow for Parliamentary scrutiny. This time should not be reduced for departmental convenience.
- More urgent implementation can be justifiable – for example, certain tax changes or public health measures - **but the circumstances need to be explained** and specific Ministerial clearance is often required for an SI that breaches the convention.
10. **Questions** – The SLSC considers instruments in the order received and generally within a fortnight of being laid, so that the House receives its advice in good time to act on it. During the scrutiny process, officials may be asked questions by the Committee which, of necessity, will have a tight deadline for response, usually less than a week and often less than 48 hours. **This material may be published and must be accurate.**
- Because of these tight deadlines make sure that the contact details provided in the EM are of someone who can provide an answer. If the official named in the EM is absent, the full contact details of a competent alternative should be set out in his or her out of office message – Not *“I’m on leave, speak to Bob”*!