

HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

54th Report of Session 2019–21

Work of the Committee in Session 2019–21

Ordered to be printed 27 April 2021 and published 29 April 2021

Published by the Authority of the House of Lords

HL Paper 276



Secondary Legislation Scrutiny Committee

The Committee's terms of reference, as amended on 22 February 2021, are set out on the website but are, broadly:

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.

Members

<u>Baroness Bakewell of Hardington Mandeville</u>	<u>Viscount Hanworth</u>	<u>The Earl of Lindsay</u>
<u>Rt Hon. Lord Chartres</u>	<u>Lord Hodgson of Astley Abbotts</u>	<u>Lord Lisvane</u>
<u>Rt Hon. Lord Cunningham of Felling</u>	(Chair)	<u>Lord Sherbourne of Didsbury</u>
<u>Lord German</u>	<u>Lord Liddle</u>	<u>Baroness Watkins of Tavistock</u>

Registered interests

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

Publications

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

Committee Staff

The staff of the Committee are Christine Salmon Percival (Clerk), Philipp Mende (Adviser), Jane White (Adviser) and Ben Dunleavy (Committee Assistant).

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

Any query about the Committee or its work, or opinions on any new item of secondary legislation, should be directed to the Clerk to the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW. The telephone number is 020 7219 8821 and the email address is hseclegscrutiny@parliament.uk.

EXECUTIVE SUMMARY

Given the uncertainty about the length of session 2019–21, we published an Interim Report about our activity during the first 12 months of the session (up to 18 December 2020) (We called this period “Year 1”).

This report is in two parts. The first part examines activity in the remainder of the session (from 19 December 2020 to 27 April 2021). We found that although some of the matters we raised in the Year 1 report have improved, others continue to be an issue:

- Corrections and flawed instruments (paragraphs 5–6)
- Poor quality explanation (paragraphs 7–8)
- Blurring of boundaries between legislation and guidance (paragraphs 9–11)
- Restricting Parliamentary scrutiny (paragraphs 12–13)

The second part of the report provides our usual statistical overview of the whole of session 2019–21 (paragraphs 14–26).

During recent times, departments have had to meet the twin challenge of producing large numbers of EU Exit and pandemic-related instruments to very tight timetables and under difficult working conditions. In this report, and the reports we have published throughout the session, we have made a number of criticisms – some of them points of detail but others matters of principle that go to the very heart of the relationship between Parliament and the executive and the rule of law. That said, we wish to take this opportunity to acknowledge the work and the achievements of the many civil servants who have had to respond to the exceptional demands of the current period.

On 20 April, we heard evidence from three Permanent Secretaries: First Parliamentary Counsel, the Treasury Solicitor and the Head of the Policy Profession. Amongst other things, we asked how the experience of this exceptional period might be analysed to see what weaknesses have been exposed and what lessons can be learned for the future. We shall in due course be publishing a report about this and some of the other issues raised in this report.

As ever the effectiveness of the Committee remains dependent on the efforts of our staff who have dealt with this continuing high volume of regulations with their characteristic efficiency and cheerfulness. Their work plays a critical part in enabling our Committee and, indeed, the whole House to hold the government to account.

Fifty Fourth Report

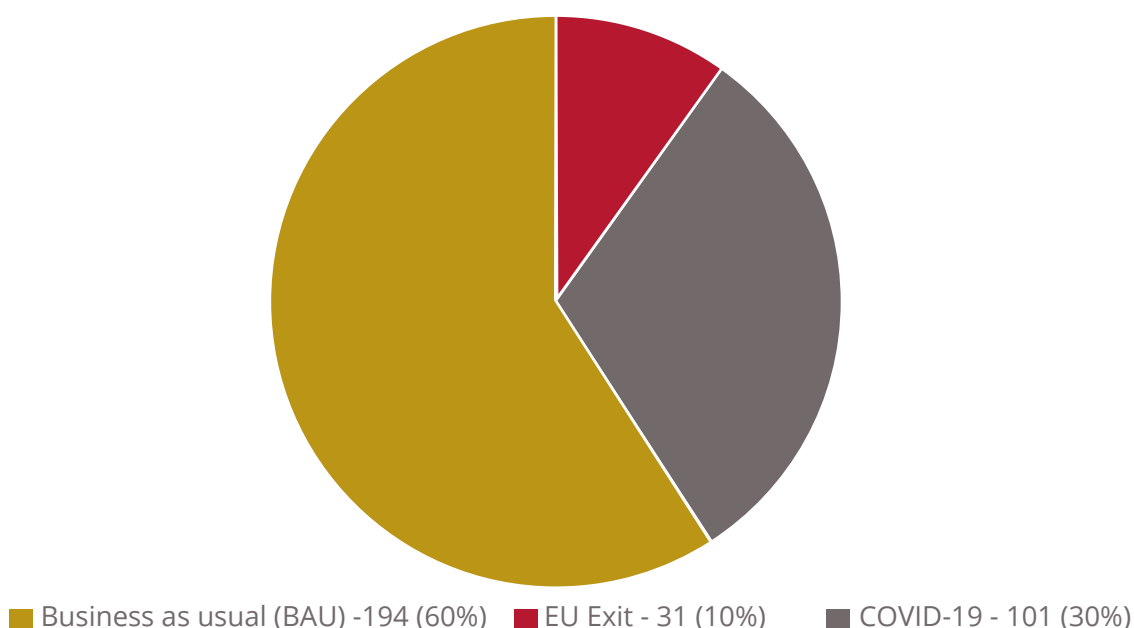
WORK OF THE COMMITTEE IN SESSION 2019–21

1. Given the uncertainty about the length of session 2019–21, we published an Interim Report about our activity during the first 12 months, up to 18 December 2020 (“Year 1”).¹ This report covers the remainder of the session, from 19 December until 27 April 2021: for the purposes of the report we refer to this period as “the second part of the session”.
2. In this report, we also provide a statistical overview of the whole of the 2019–21 session.

Activity during the second part of session 2019–21

3. During the second part of the session, 326 statutory instruments (SIs)² were laid for scrutiny, of which 96 were affirmatives (29%) and 230 negatives (71%). We also considered 21 Proposed Negatives (PNs), laid for sifting under the European Union (Withdrawal) Act 2018 (“the 2018 Act”), of which three were recommended for upgrade to the affirmative procedure.
4. Much of the second part of the session took place under the full pandemic lockdown rules. Nonetheless, a significant number of coronavirus-related instruments were laid (101 or 30%), several of which related to the tightening of travel restrictions. EU Exit-related legislation also continued, although this became difficult to track because of the Government’s decision to remove the words “EU Exit” from the title of SIs laid after the end of the Transition Period (on 31 December 2020).

Figure 1: Proportions of SIs in the second part of session 2019–2021



1 Secondary Legislation Scrutiny Committee, *Interim report on the Work of the Committee in Session 2019–21* (39th Report, Session 2017–19, HL Paper 200).

2 As well as SIs, the Committee considers almost all instruments subject to parliamentary procedure, for example, statutory Codes and Immigration Rules but the term “SIs” is used in this report as shorthand for all the instruments within our remit.

Corrections

5. Of the 326 instruments laid, the number of Explanatory Memoranda (EMs) which needed correcting was high at 17 (5.2%) and the number of correcting instruments was 33 (10.1%), double the 5% benchmark figure we regard as a tolerable error rate.
6. A further unwelcome feature of this period has been the number of instruments which have been procedurally flawed. These have included, for example, SI 2021/370,³ a draft affirmative instrument, which was signed into law by the minister before it had been approved by both Houses, and SI 2021/199,⁴ which was laid before Parliament as a negative instrument but should have followed the affirmative procedure under paragraph 14 of Schedule 8 to the 2018 Act. **We acknowledge that departments have been under stress for a prolonged period but an effective checking system should have caught these errors before the instruments were laid.**

Poor quality explanation

7. During this second part of the session, the number of SIs which we have drawn to the special attention of the House has increased in comparison to Year 1 — 25 of the 326 SIs laid or 7.7% compared with 6.7% of instruments laid in Year 1. Of these, several related to the arrangements for testing travellers for COVID-19 and for lorry drivers at borders; they also concerned financial arrangements in the post-Brexit period. Non-Brexit related legislation also began to take a more prominent role including a scheme to restrict claims for whiplash injury, the detention of asylum seekers, and legislation relating to local planning, educational and environmental matters.
8. Of those drawn to the special attention of the House, three instruments (12%) were on the ground of inadequate explanation. Our Year 1 report made clear that implementing legislation within days, sometimes hours, of laying made the clarity of the accompanying explanatory material even more important in ensuring that the intention and effect of an instrument were clear to both Parliament and the public. We were therefore particularly disappointed that we felt it necessary to bring several sets of pandemic regulations, laid by the Department of Health and Social Care (DHSC),⁵ to the special attention of the House on the ground that the explanation of the policy changes effected, as set out in the EMs, was inadequate.

Blurring of boundaries

9. During the second part of the session, we have seen instances where, in our view, important aspects of a policy have been implemented using a legislative type that seemed ill-matched to the significance of those policy changes.

3 The Energy Performance of Buildings (England and Wales) (Amendment) Regulations 2021 ([SI 2021/370](#)) were signed on 23 March; the debate in the Lords took place on 24 March: <https://lordsbusiness.parliament.uk/ItemOfBusiness?itemOfBusinessId=94605§ionId=40&businessPaperDate=2021-03-24>.

4 The Motor Fuel (Composition and Content) and the Biofuel (Labelling) (Amendment) Regulations 2021 ([SI 2021/199](#)); see the rubric on the instrument.

5 For example, the Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 9) Regulations 2021 ([SI 2021/223](#)) in our [49th Report](#) (HL Paper 245) and the Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 11) Regulations 2021 ([SI 2021/442](#)) in our [52nd Report](#) (HL Paper 268).

10. For example, repeating an issue already highlighted in our Year 1 report, our 52nd Report⁶ questioned the use of secondary legislation to make permanent changes to Town and Country planning matters:

“Given that the changes made by this Order are permanent and may have a considerable impact on high streets and the development of key infrastructure, such as schools, colleges, universities, prisons and ports, the instrument again raises the question whether it would have been more appropriate to make these changes in a Bill, enabling Parliament to scrutinise the changes and their potential impact more fully.”

11. We have also raised concerns about important elements of a policy change being left to guidance rather than being included in the relevant SI. The Heather and Grass etc Burning (England) Regulations 2021⁷ provide one example and also demonstrate the uncertainties that arise when key aspects of a decision-making process are to be set out in guidance that is not available, even in draft form, when the Regulations are being scrutinised. A second example is provided by the Health Protection (Coronavirus, Restrictions) (No. 3) and (All Tiers) (England) (Amendment) Regulations 2021⁸ which left a key definition, in this case the meaning of “critical worker”, to guidance.⁹

Restricting parliamentary scrutiny

12. The practice of bringing pandemic-related instruments into rapid effect continued, though at a slightly slower rate. This was to be expected as more became known about the disease and the societal controls needed to combat it. Of 77 instruments (made affirmative¹⁰ and negative) with “Coronavirus” in the title laid during this period:
- 17 (22%) were made affirmatives of which two came into effect before being laid (down from 27.6% in Year 1) and
 - 27 (35%) came fully into effect, and four (5.2%) partially into effect, within 48 hours of laying (down from 58.4% and marginally up from 5% in Year 1).
13. While there may be public health reasons for using an accelerated timetable for pandemic-related SIs, we could find no convincing reasons for the curtailed timetable applied to the Abortion (Northern Ireland) Regulations 2021.¹¹ We remain of the view that **Parliamentary scrutiny should not be curtailed save in exceptional circumstances and with a full justification clearly set out in the EM.**

6 Town and Country Planning (General Permitted Development etc.) (England) (Amendment) Order 2021 ([SI 2021/428](#)), [52nd Report](#), Session 2019–21 (HL Paper 268).

7 [SI 2021/158](#), [48th Report](#), Session 2019–21 (HL Paper 242).

8 [SI 2021/8](#), [41st Report](#), Session 2019–21 (HL Paper 210).

9 See also Heavy Commercial Vehicles in Kent (No. 3) (Amendment) Order 2021 ([SI 2021/109](#)), [44th Report](#), Session 2019–21 (HL Paper 220).

10 Draft affirmative instruments have to be approved by each House before they can be made law; made affirmatives have immediate effect and have to be approved within a period specified in the parent Act (for example, 28 days for some COVID-19 instruments) to prevent the legislation lapsing.

11 [SI 2021/365](#); See our [51st Report](#), Session 2019–21 (HL Paper 264).

Activity during the whole of session 2019–21

Instruments drawn to the special attention of the House

14. In session 2019–21, we met 52 times and published 54 reports (including this one). We considered 1,227 instruments, of which 405 or 33% were affirmative SIs and 822 or 67% negative SIs. The unusually high proportion of affirmative instruments, well above the norm of about 20%, was sustained throughout the session. We also considered 53 PNs (see paragraph 23 below).
15. Of the 1,227 SIs considered, we drew 85 or 6.9% to the special attention of the House. This is in line with our annual average of about 7%. Of the instruments reported, 17.6% were from DHSC and 12.9% from the Department for Transport (DfT) (both mainly related to the pandemic), 13% were from the Department for Business, Energy and Industrial Strategy (BEIS) and an unusually high proportion of instruments, 14.1%, laid by the Ministry of Housing, Communities and Local Government (MCHLG).
16. All but eight of the 85 instruments drawn to the special attention of the House were on the ground of policy interest (90%). Of the other eight instruments:
 - one was reported on the ground it may inappropriately implement European Union legislation:
 - Accreditation of Forensic Service Providers (Amendment) Regulations 2019 (SI 2019/1384)¹²
 - one was reported on two grounds: that it may imperfectly achieve its policy objective and on the ground of insufficient explanation:
 - Statement of Changes in Immigration Rules (HC 1043)¹³
 - six were reported on the ground that the EM provided insufficient explanation:
 - Homes and Communities Agency (Transfer of Property etc.) Regulations 2020 (SI 2020/31)
 - Prison and Young Offender Institution (Coronavirus) (Amendment) (No.2) Rules (SI 2020/508)
 - Electric Scooter Trials and Traffic Signs (Coronavirus) Regulations and General Directions 2020 (SI 2020/663)¹⁴
 - Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 26) Regulations 2020 (SI 2020/1337)¹⁵
 - Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 9) Regulations 2021 (SI 2021/223)¹⁶
 - Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 11) Regulations 2021 (SI 2021/442)¹⁷

12 See [1st Report](#), Session 2019–21 (HL Paper 6).

13 See our [40th Report](#), Session 2017–19 (HL Paper 206).

14 See respectively our [6th Report](#) (HL Paper 25), [16th Report](#) (HL Paper 68) and [22nd Report](#) (HL Paper 104) of Session [2017–19](#).

15 [37th Report](#), Session 2017–19 (HL Paper 189).

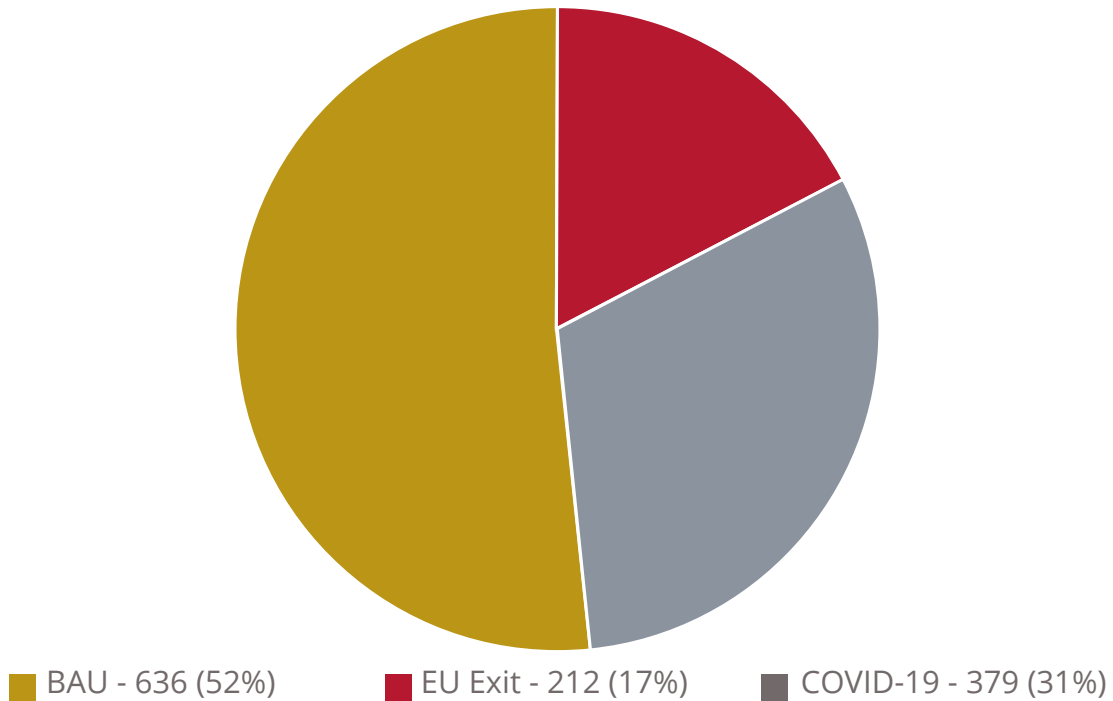
16 [49th Report](#), Session 2017–19 (HL Paper 245).

17 [52nd Report](#), Session 2017–19 (HL Paper 268).

Strands of activity

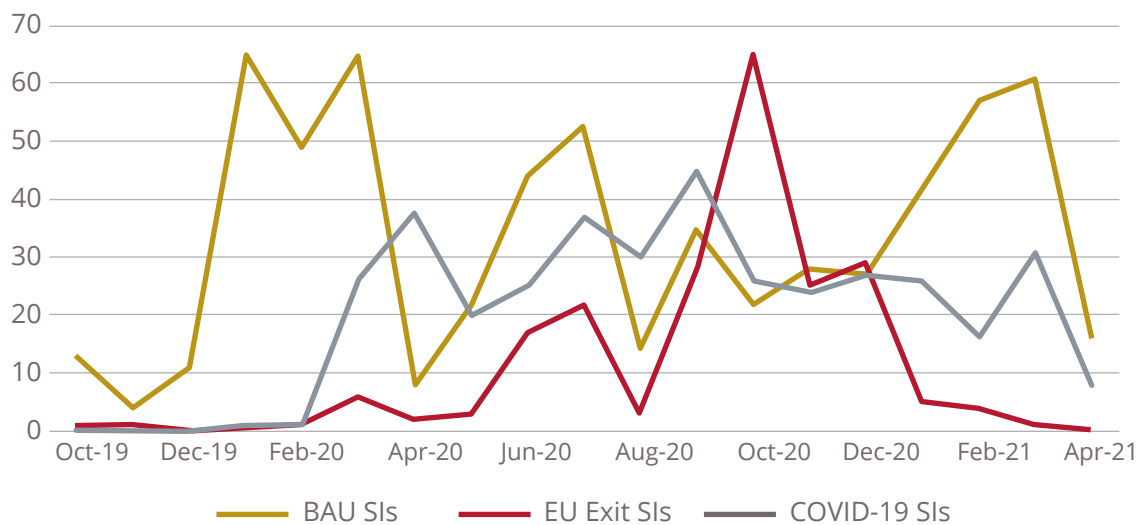
17. There have been three main strands of activity during the year: EU Exit legislation, COVID-19 legislation and “business as usual” (BAU) activities. Figure 2 shows the proportion of these three types of instruments over the whole session.

Figure 2: Total SIs for session 2019–21



18. Figure 3 shows how the different types peaked at different times of the year, and that the final quarter of 2020 was exceptionally busy because all three strands coalesced.

Figure 3: EU Exit v COVID-19 v BAU SIs for session 2019–21



Information paragraphs

19. In addition to drawing instruments to the special attention of the House, we alert the House to other instruments which appear to be of interest, are topical or follow an unusual process. We do this by means of short information paragraphs that act as a kind of “news service”. Over the session we published 472 information paragraphs. A large proportion of these, 309 or 65%, related to COVID-19 instruments. This high figure was in part because of our decision, early in the pandemic, to help the House cope with the speed of legislative change by providing an information paragraph on all SIs relating to COVID-19, irrespective of their significance.¹⁸
20. There were 327 instruments (made affirmative and negative) with “Coronavirus” in the title over the course of the session. Of these:
 - (a) 89 (27%) were made affirmatives of which 28 came into effect before being laid, and
 - (b) 180 (55%) came fully into effect, and 16 (5%) partially into effect, within 48 hours of laying.
21. As well as the information paragraphs, we also publish a list of COVID-19-related SIs on our website.¹⁹ Of those listed, approximately 15% do not have the word “Coronavirus” in the title, so a simple search of SIs with that word in the title would not provide a researcher with the full picture of relevant legislation.

¹⁸ From our [11th Report](#), Session 2017–19 (HL Paper 49) onwards.

¹⁹ Secondary Legislation Scrutiny Committee, ‘Scrutiny of secondary legislation laid to tackle coronavirus pandemic’: <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/news/115532/scrutiny-of-secondary-legislation-laid-to-tackle-coronavirus-pandemic/>.

Table 1: Instruments considered and reported by department session 2019–21

Department	Total laid	%	Reported Affirmative	Reported Negative	Reason for report ²⁰						
					a	b	c	d	e	f	g
Attorney General	3	0.24	0	0	0	0	0	0	0	0	0
BEIS	45	11.83	7	4	11	0	0	0	0	0	0
Cabinet Office	23	1.88	2	0	2	0	0	0	0	0	0
DCMS	31	2.53	0	2	2	0	0	0	0	0	0
Defence	12	0.98	0	1	1	0	0	0	0	0	0
Defra	121	9.87	2	1	3	0	0	0	0	0	0
DExEU*	0	0.00	0	0	0	0	0	0	0	0	0
DIT	6	0.49	1	0	1	0	0	0	0	0	0
DWP**	94	7.67	0	0	0	0	0	0	0	0	0
Education	54	4.40	0	8	8	0	0	0	0	0	0
FCO**	31	2.53	0	0	0	0	0	0	0	0	0
Health****	155	12.64	8	7	13	0	0	0	2	0	0
Home Office	85	6.93	2	3	3	0	1	1	1	0	0
Justice	88	7.18	1	5	5	0	0	0	1	0	0
LGBCE	20	1.63	0	0	0	0	0	0	0	0	0
MHCLG	80	6.53	1	11	11	0	0	0	1	0	0
NIO	17	1.39	3	1	4	0	0	0	0	0	0
Privy Council	8	0.65	0	0	0	0	0	0	0	0	0
Scotland Office	10	0.82	0	0	0	0	0	0	0	0	0
Transport	152	12.38	1	9	8	0	0	0	2	0	0
Treasury*****	91	7.42	2	3	5	0	0	0	0	0	0
Wales	1	0	0	0	0	0	0	0	0	0	0
Total	1227		30	55	77	0	1	1²¹	7	0	0

*Dissolved on 31 January 2020

**Includes Health and Safety Executive

***Now incorporates DFID and is known as Foreign, Commonwealth and Development Office

****Includes Food Standards Agency

*****Includes HMRC

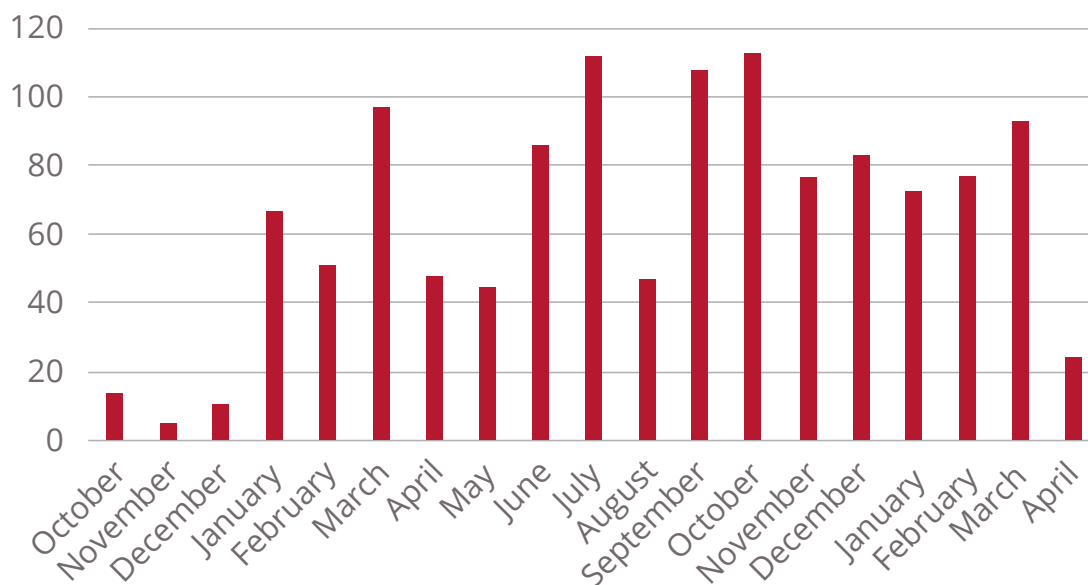
20 The grounds for report as set out in our Terms of Reference at the start of the session were: a) policy interest b) changed circumstances since the Act c) inappropriately implements EU legislation d) may imperfectly achieve its policy objectives e) insufficient information f) inadequate consultation g) deals inappropriately with retained EU law.

21 One instrument reported on two grounds (see para 16 of this Report).

Volume and flow

22. The departments which laid the largest numbers of instruments in session 2019–21 were DHSC 155 (12.6%), DfT 152 (12.3%) and BEIS 145 (11.8%). Between them, they accounted for almost 40% of the total (see Table 1 above). While the Government’s system of filtering all SIs through the Cabinet Parliamentary Business and Legislation Committee has helped to manage the flow of instruments during this challenging session, there have been some peaks and troughs of activity.

Figure 4: SIs laid by month in session 2019–21



Withdrawal from the European Union

23. There was a late surge in the number of Proposed Negatives (PNs) laid under the 2018 Act: 21 in the last four months. A total of 53 PNs were laid in the session, of which five (9.4%) were recommended for upgrade to the affirmative procedure. (The Government accepted each recommendation.) Many of the PNs were laid more than once due to process errors, such as omitting the coming into force date or using inconsistent titles for the PN throughout the accompanying EM. **We again question the efficacy of the quality assurance processes within departments.**
24. A similar PN sifting procedure has also been introduced under the European Union (Future Relationship) Act 2020 (“the 2020 Act”) and is set out in Schedule 5 to that Act. No PNs under this provision have yet been laid. **Given the error rate in relation to the PNs laid under the 2018 Act, we urge departments to take steps to ensure that similar errors not repeated in relation to 2020 Act PNs.**
25. When the House agreed to extend our terms of reference to include PNs laid under the 2020 Act, the opportunity was taken to update our terms of reference by removing the ground for reporting an instrument “that may inappropriately implement European Union legislation”.²²

Corrections

26. We are disappointed that SI corrections have remained high throughout the session at 9.7% (119) of all SIs considered and 5.7% (70) of all EMs. As we have said, we understand that some of this can be attributed to the pressure of legislating at speed during a public health emergency over an extended period but the checking and quality assurance processes should by now have been adapted to cope with the new demands upon them.

Table 2: Number of corrections in session 2019–21

SIs	No. laid	SIs replaced by correction	EMs replaced by correction
Affirmative	405	59 (14.6%)	32 (7.9%)
Negative	822	60 (7.3%)	38 (4.6%)
Total	1227	119 (9.7%)	70 (5.7%)

Conclusion

27. Departments have had to meet the challenge of producing large numbers of EU Exit and pandemic-related instruments to very tight timetables and under difficult working conditions. In this report, and the reports we have published throughout the session, we have made a number of criticisms — some of them points of detail but others matters of principle that go to the very heart of the relationship between Parliament and the executive and the rule of law. That said, we wish to take this opportunity to acknowledge the work and the achievements of the many civil servants who have had to respond to the exceptional demands of the current period.
28. On 20 April, we heard evidence from three Permanent Secretaries: First Parliamentary Counsel, the Treasury Solicitor and the Head of the Policy Profession.²³ Amongst other things, we asked how the experience of this exceptional period might be analysed to see what weaknesses have been exposed and what lessons can be learned for the future. We shall in due course be publishing a report about this and some of the other issues raised in this report.

23 SLSC oral evidence transcripts: <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/oral-evidence/>.

APPENDIX 1: INTERESTS AND ATTENDANCE

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 business taken at the meeting on 27 April 2021, Members declared no interests.

Attendance:

The meeting was attended by Baroness Bakewell of Hardington Mandeville, Lord Cunningham of Felling, Lord German, Viscount Hanworth, Lord Hodgson of Astley Abbotts, the Earl of Lindsay, Lord Lisvane, Lord Sherbourne of Didsbury and Baroness Watkins of Tavistock.