HOUSE OF LORDS

SECONDARY LEGISLATION SCRUTINY COMMITTEE

Departmental support of secondary legislation

Government's response to Committee's questions.

Written evidence provided prior to oral evidence session on 20 April 2021.

Government's response to the Committee's questions

1. Quality of legislation and supporting information

Q1: Have the Government evaluated the way they produced emergency legislation during the first year of the pandemic? What strengths and weaknesses have they identified that can be used as learning points for the future?

A1: The pandemic has created unprecedented challenges for the UK Government, the devolved administrations and the public bodies of the UK. It has been vital to take urgent action to stop the virus spreading, protect the NHS and save lives. The Government's approach has been to act swiftly and only take the powers that it considers absolutely necessary.

Although the roadmap regulations have now been published, we are still managing the response to the pandemic and have not yet turned our attention to a review. However, we know that the profound impacts of the Coronavirus pandemic - including the legislative response and the parliamentary scrutiny it has received - will be of interest, not least to Select Committees such as the Secondary Legislation Scrutiny Committee, for some time to come. The Government welcomes the reflections of parliamentarians, Select Committees and other stakeholders on its legislative response to the pandemic, and will reflect on any points raised.

Whilst an overall review of emergency legislation has not been undertaken, in the course of the response lessons have continually been learnt. So, for example, we have built resilient legal teams which have worked on successive iterations of the lockdown regulations, sharing knowledge and experience to ensure that regulations have been drafted to a high standard in the time available. Steps have been taken to ensure that there is an opportunity for timely parliamentary scrutiny of the secondary legislation. The development and publication of the Roadmap is a good example of how we have set out policy in advance of regulations to allow the public and affected industries to prepare for the changes in measures to protect public health. The Government has then been able to confirm the details of the legislation based on the latest data and scientific evidence, lay the legislation, and schedule debates and approval in advance of the legislation coming into force.

Q2: How many departments have appointed Senior Responsible Officers for secondary legislation and how effective have they been in overseeing departmental programmes of secondary legislation and quality assurance?

A2: Currently, 19 departments have a Senior Responsible Officer (SRO) appointed for secondary legislation. The Parliamentary Business and Legislation Secretariat monitor that SI SROs are in place and, where people move on, will take action to ensure they are replaced.

SI SROs were introduced in 2017 and the role broadly covers two areas. The SRO in each department is responsible for oversight of their department's SIs. They also champion and raise the profile of secondary legislation, including ensuring all relevant staff have the skills to engage with secondary legislation and Parliament. SROs should understand their department's performance and feed that information to relevant policy teams. The establishment of the SRO role has improved governance of SIs across Whitehall, with departments now managing their overall programme of SIs more effectively, which in turn results in a more manageable and predictable flow of SIs through Parliament.

The Parliamentary Business and Legislation Secretariat coordinate regular meetings of the SROs to share best practice and lessons learnt with teams across Whitehall. The forum was particularly

beneficial during EU Exit and the Transition Period and helped to ensure the smooth passage of departments' SI programmes through Parliament.

Civil Service Learning offers training for SROs and other senior civil servants to ensure they are equipped to oversee departmental programmes of secondary legislation and the necessary quality assurance. SROs from 7 departments have taken up this offer, and departments are regularly encouraged to take advantage of this training. SROs also work within their departments to improve overall capability in the area of secondary legislation, and regularly promote the secondary legislation training opportunities to departmental colleagues. Civil Service Learning attributes the large number of attendees at their training events in part to the work done by SROs.

Q3: While recognising the exceptional pressures posed by the pandemic, the Committee's reports have pointed to a high level of errors, too frequent changes and poor or formulaic EMs obscuring the purpose of the legislation – why have these flaws not been picked up by departmental checking processes?

A3: The biggest challenge of legislating for COVID-19 has undoubtedly been the need to legislate at an exceptional pace, because the cost of proceeding at a more normal pace would be paid by the loss of lives. The inherently uncertain situation around the virus itself, and the resulting challenges for policy decision-making in response, have meant that the time for drafting and checking the legislation and explanatory material was often squeezed. Projects which, in normal times, might be expected to take several weeks or months have been produced in days or even hours. The challenge has been exacerbated by the long-term nature of the pandemic. In this context, one pressured project has been followed by many others. Against this background it is unfortunately inevitable that from time to time necessary refinements to the policy are identified after the event, requiring correction at a later date, or supporting materials may not be of the quality the Government would normally be able to deliver when there is more time for quality assurance processes. Corrections, where they have been needed, have been brought forward at pace, resulting in an increase in the proportion of SIs issued free of charge. Nevertheless, overall our view is that quality has held up very well. We recognise that there has been an increase in the number of SIs free of charge, and the Joint Committee on Statutory Instruments are also reporting a higher proportion of SIs. These "dips" were inevitable, given the time constraints, and the fact that they are not greater than they are is testament to the expertise and dedication of civil servants across government.

We recognise, too, that despite this context, there are lessons to be learnt and progress to be made, especially in relation to the explanatory memoranda.

The Government continues to work hard on the quality of Explanatory Memoranda. Your Committee's scrutiny of these has shown that some good progress has been made, with the number of EMs corrected or replaced having decreased. Secondary legislation governance across Government has improved through the appointment and training of Senior Responsible Owners (SROs) (as mentioned in the response to question 2). In the SRO's role overseeing their department's SIs, and raising the profile of secondary legislation, they play a vital part in ensuring the quality of EMs in their department. They have access to support from Civil Service Learning, including the "Effective EMs" training, which was attended by 547 staff in 2019-20, and 274 staff in 2020-21. Furthermore, to ensure training remained accessible during COVID-19 restrictions, existing EM training was quickly adapted from classroom-based training to a mixture of short remote workshops, e-learning and 'learn as you work' materials. This has helped to ensure that the quality of EM's continues to improve.

Furthermore, work is currently underway to develop an updated EM template and guidance following the end of the Transition Period. This work is being undertaken collaboratively, seeking views from Parliamentary staff supporting committees as well as from within Government, in order to provide the information that is of the greatest assistance to Parliament when scrutinising instruments. This work will also be used as an opportunity to reinforce the importance of EMs with a view to improving their quality and reducing the number of errors.

Q4: Has the performance of individual departments in relation to secondary legislation been assessed and what have been the key findings?

A4: Each SI SRO has a vital role to play in ensuring the necessary arrangements are in place in their department to ensure the quality of the instruments and supporting material. To this end, SI SROs are responsible for assessing the performance of their department in relation to secondary legislation. The SI SRO will identify any issues of capacity or capability and ensure they are addressed.

Q5: The Committee noticed that as the pandemic continued, the titles of some instruments became longer and more intertwined, especially those of the regional lockdown instruments. In contrast, a simpler numerical approach was adopted for amending the International Travel Restrictions. How can departments increase clarity in this area? Do you agree that a coordinated approach across government would be helpful?

A5: We do not consider that there is a widespread problem with clarity in the titling of SIs. In the majority of cases, SI titles are appropriate, clear and helpful. As such we do not think a more coordinated approach across Government is required. General guidance on titling SIs is available which sets out the overall approach, and the drafter will take account of this guidance when exercising their judgement to determine the most appropriate title in the circumstances. In particular:

- Statutory Instrument Practice contains five pages of guidance on titles of SIs, with the general overarching advice that "The title should give an accurate reflection of the nature of the SI, and distinguish it from all others".
- The GLS Drafting Guidance contains another two pages of guidance, including on titles for amending SIs, commencement regulations and territorial application.

Additionally, in the context of COVID-19, guidance was issued to departments to include the word "Coronavirus" in the title of any SI which they were making in response to the crisis. This approach was also adopted in Scotland, Northern Ireland and Wales. We consider that this small change has been particularly helpful to Parliament and the reader to enable them to easily identify the secondary legislation made across the UK in response to the COVID-19 crisis. We issued similar guidance for EU Exit SIs, which was likewise helpful.

Nevertheless, with the benefit of hindsight, we recognise that the approach to titling of some of the local lockdown regulations caused confusion. At the time, however, that problem was not apparent. The first local lockdown regulations were made in respect of Leicester in early July. At that time, the national lockdown regulations for England were set out in an SI called The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 (S.I. 2020/684). In that context, the obvious approach to titling an SI which applied only to Leicester was to include "Leicester" in the title – thus, The Health Protection (Coronavirus, Restrictions) (Leicester) Regulations 2020 (SI 2020/685). This was, at that time, clearly preferable to a title which just included a number (e.g. "(No. 3) (England)" regulations, or similar) because the reader, looking at

the title, would not have been able to tell from the title that the SI only applied in the Leicester area.

As more local lockdowns were decided on, we continued that approach (Blackburn, Luton, Bolton etc.). This remained the clearest way of titling those SIs "to give an accurate reflection of the nature of the SI". The approach started to break down with the increasing policy imperative to move localities between levels of restrictions, and with the introduction of SIs for larger regions (North of England, North West of England etc.). However, the situation was largely resolved on 12 October, with new regulations introducing the Tiers system for the first time.

The International Travel Regulations, to which the Committee draws attention contained a series of amendments to a single, existing set of regulations which applied to England as a whole. In a case like that, the clearest approach is to number each set of amending regulations. By contrast, in the case of local lockdowns, we were drafting free-standing regulations each time, and these applied just to sub-areas of England. The numbering approach using generic titles was less obviously helpful here (even if, as noted above, we had known at the outset how the situation would develop, which we did not).

2. Impact Assessments for coronavirus instruments

Q6: In its response to the Committee's 2nd Interim Report in Session 2017-19, the Government undertook to provide "adequate information on potential impacts of the legislation in the cases where a full impact assessment is not required". Few of the coronavirus SIs that the Committee has seen, however, make any attempt to do this. Do you acknowledge that the EMs of coronavirus SIs have fallen short in this regard and that it is a serious matter because of the need for the Houses to be informed about conflicting priorities, for example between public health and the costs to industry? If so, why did this happen, and what steps will be taken to remedy this?

A6: A pragmatic and proportionate approach must be taken in the face of national emergencies such as COVID-19. We have had to be flexible in our approach to legislating, meaning our response has sometimes needed adapting at speed to reflect the circumstances and the latest understanding of the virus and its transmission. As a result, the analysis of legislation might look different or contain different levels of detail. For example, analysis of regulations can be found in the regularly published SAGE documents and, for the Roadmap regulations, analysis can be found within the Roadmap itself, published ahead of the legislation being laid in Parliament and coming into force.

The Government will always strive to ensure that there is enough analysis to explain decision making. Although it is true that temporary measures, in force for less than 12 months, do not require a full impact assessment for better regulation purposes (and therefore do not need to undergo formal scrutiny by the Regulatory Policy Committee), it is also clear that many regulations have resulted in long term and irreversible impacts on society. Such measures will still need to undergo appropriate analysis which should be published in the explanatory memorandum of the regulation in question. The basic premise of an impact assessment is to identify causal relationships between individual regulations and the effects they lead to, and to do so with a significant level of precision and certainty. This has not proved possible over the course of the response to the pandemic – but we have tried to address this by publishing overall analyses about the impacts of the pandemic and of the measures taken to deal with it.

Departments are being reminded of the importance of ensuring that the appropriate level of resource is invested in gathering and analysing evidence on the regulatory impacts of their policies, and to publish this, where appropriate.

3. Clear and accessible law: incomplete revocations and use of sunset provisions

Q7: The law should be clear and accessible. During the pandemic, however, the speed and volume of legislation meant that it was not always clear which regulations had been superseded or revoked or had expired. What can be done to ensure that information about the status of instruments or individual measures is easily accessible to both Parliament and the public?

A7: Legislation.gov.uk has continued to play a vital role in aiding legal certainty during the COVID-19 pandemic. In order for legislation to be made publicly available, it must first be registered at The National Archives (TNA) and then published on the legislation.gov.uk website. TNA have prioritised the rapid publication of COVID-19 regulations throughout the pandemic and, to assist this, have extended the SI Registration and Publishing Support Service beyond the usual working hours.

Many significant changes to the numerous health protection regulations made during the pandemic have been made by amending existing regulations. There have been over 2,000 amendments to date. In order for the public to be able to read and understand these changes in context, it is crucial that a version of the original regulations incorporating all of the latest amendments is made available quickly. On average, TNA have produced the "as amended" versions of COVID-19 legislation within two days of the commencement of the amending legislation. In the case of the most significant changes, they have reduced this time even further. Out of 131 UK SIs which amended health protection regulations, at least 63[1] contained amendments which were incorporated into the legislation being amended, and published, on or before the date on which they came into force.

To support ease of access and aid legal certainty, TNA has created a new Coronavirus service (www.legislation.gov.uk/coronavirus) to provide important information about COVId-19 legislation, including links to key regulations, and guidance for researching it. This page receives approximately 15,000 page views per week, and is the first result when searching for "Coronavirus legislation" on Google. This approach was validated by targeted user research into the COVID-19 response in the summer of 2020, which also demonstrated that for the first time legislation.gov.uk was being used more by members of the public for personal use than by professionals, with one third of all users visiting the website specifically to view COVID-19 legislation. Since March 2020, COVID-19 legislation has received almost 25 million page views from 6 million users, which is an average of 115,000 users per week – increasing to over one million users in weeks when major changes to regulations are published.

Q8: The Committee has noted the use of a wide variety of different sunset provisions, giving rise to concerns about a lack of clarity. What is the Government's approach to the use of sunset provisions – when are they seen as appropriate and how are they monitored?

A8: In recent years, the Government has moved away from requiring sunset provisions in regulatory secondary legislation as a matter of course. This provides departments with flexibility to deliver Government's priorities proportionately.

By way of exception, during the EU Transition Period a coordinated approach was taken towards the inclusion of sunset provisions in instruments implementing new EU law obligations arising from the Withdrawal Agreement. Such EU obligations generally expired at the end of the EU Transition Period, so it was appropriate to apply sunsets unless the continued application of the implementing

[1] A small number of SIs were updated through a different fast track process, which are not counted in this total, but which were updated in similar timeframes.

provisions was in line with UK domestic priorities or was required under the terms of the Withdrawal Agreement.

The decision as to whether to include a sunset provision lies with the relevant department and is always carefully considered. If included, the length of the sunset period may depend on a number of factors, including the policy aims of the legislation and the length of time it is expected to be required. In the context of COVID-19, it is inevitable that the length of sunset provision, or mechanism by which an SI is time-limited, will vary depending on the individual SI, the policy objectives and the subject area of the legislation.

A sunset provision is only one method by which departments can seek to ensure that SIs, or provisions under them, are time-limited and only in effect for as long as they need to be. In the context of COVID-19, other approaches include requirements to keep SIs under review in line with the Coronavirus Act 2020, to require regular reviews by a Secretary of State, to make one-off changes which set out the timescale within which they apply, or to confine changes to particular periods (e.g. academic years). There are also changes which, for good reason, the Government wish to be in force permanently, or until a change of policy as yet unforeseen, and so are not the subject of any form of sunsetting.

We do not see that the use of different approaches to sunsetting of itself creates a lack of clarity. As outlined above, there are good reasons why different approaches are adopted in different cases. For example, in the education sphere where there may already be defined concepts such as "academic year", it is likely to be clearer to ensure that a time limited change is expressed as applying to a particular academic year than it would be to try to apply a "one-size-fits-all" sunset clause. To assist with clarity, each EM should outline whether a sunset provision is included and explain the rationale.

It is the department's responsibility to set and monitor the sunset provisions in their legislation and ensure that, if the provisions are to be extended, any subsequent SIs are laid before Parliament in a timely way.

4. Clear and accessible law: blurring of legislation and guidance

Q9: The Government's preferred means of communication of coronavirus restrictions has been through the Gov.uk website. What advice is given to departments about where to draw the line between legislation and guidance?

A9: As highlighted in the letter of 14 February from the Lord President of the Council, the Rt. Hon. Jacob Rees-Mogg MP to the chairman of your Select Committee, these exceptional times have given rise to the need for exceptional legislation, and the response to the pandemic has also required an increased amount of supplementary guidance. That is not different in kind from previous practice, but it has had a wider reach. Throughout the pandemic, the Government has continued to evolve its approach to communicating clearly the effects of changes made to the law, alongside publication of the legislation and its associated guidance.

It is recognised that legislation needs to be detailed and clear enough that guidance does not need to be relied upon for the purposes of interpretation. However, in some instances, it is possible (and sometimes desirable) for legislation to refer to external publications and effectively give them the force of law (e.g. documents, maps or plans).

Guidance has continued to be an important and necessary way of supporting the public and supplementing legislation during this unique and difficult time. It would not have been possible or practicable to legislate for everything that the Government needed to do in response to the pandemic. Guidance can be a more proportionate way of encouraging changes in behaviour and has been an invaluable tool. It is for departments to make judgements about the right balance to strike between law and guidance in any particular case.

As mentioned in the letter of 17 February, Departments have been reminded of the importance of clarity when legislation is being supplemented by guidance at the monthly SI Leads forum that is organised by the Parliamentary Business and Legislation Secretariat.

Q10: We have drawn attention to examples where that distinction has not been properly made. Does any central body check that the guidance that departments publish correctly represents the law?

A10: It is the responsibility of each department to ensure that guidance is complete and accurate. However, for COVID-19 guidance, there is a central clearance process to quality assure the guidance and ensure that it is consistent with the law.

Q11: What progress have the Government made in ensuring that explanatory material uses plain English, so that the law is accessible to all those who may be affected by it?

Q11: The Parliamentary Capability Team based in the Cabinet Office provides a range of training and resources for civil servants of all grades and departments on Secondary Legislation, including practical advice on how to produce effective Explanatory Memoranda (EMs). This workshop in particular has been designed in partnership with SLSC staff and focuses on the information and considerations that go into effective EMs. The training provided sets out four main criteria for writing a good EM: written in plain English; short and concise; self-contained, with context explained; and summarises the costs and benefits of the legislation. Attendees are asked to read a selection of EMs and to assess them against the criteria of what makes a good EM. These examples are provided by the committee's staff and are chosen specifically to demonstrate good use of plain English versus the use of jargon and inaccessible language. From April 2019 to March 2020, PCT ran 17 'Effective EMs' workshops to a total of 293 civil servants.

5. Threshold between primary and secondary legislation and increased use of "skeleton bills"

Q12: Statutory instruments are intended to address the detailed implementation of policy or make technical updates or corrections. But the Committee has been presented with instruments that introduce significant or potentially controversial policies, such as SIs to establish a UK regime for the regulation of chemicals or to revoke EU State aid rules, thereby appearing to reverse the previous Government's position of seeking continuity of the EU State aid rules in a UK domestic context. We have raised concerns about the use of skeleton legislation and the use of secondary legislation to make significant policy changes. Do you recognise these concerns, and do you agree that, having recently been through an exceptional period which has given rise to exceptional legislation, it is time to consider re-balancing the threshold between primary and secondary legislation?

A12: The Government recognises the importance of reflecting well developed policy in appropriate legislative detail. Delegated legislation is an essential part of our legislative framework and all legislation, including delegated legislation, should be clear, precise and proportionate and must also be subject to appropriate scrutiny.

The current pandemic and leaving the European Union have required some Government legislation to be delivered swiftly, giving rise to some Bills which have had to provide for significant secondary

powers. The Government acknowledges that these are exceptional times and do not necessarily provide a model example of how Parliament would like to see legislation brought forward.

The Government is committed to ensuring the appropriateness of any delegated powers included in a bill is fully tested as part of the bill preparation process by policy leads and departmental lawyers acting with advice from Parliamentary Counsel. Moreover, training and resources are available to ensure that information about the appropriate use of delegated powers is provided and understood by those working on primary legislation: the Guide to Making Legislation published by the Cabinet Office contains extensive guidance for teams in relation to delegated powers; the Office of the Parliamentary Counsel provide training sessions for departments on the issues around taking delegated powers; and the Government Legal Department maintain extensive guidance on 'LION' (the central legal know-how platform for all Government lawyers) relating to delegated powers generally, the role of the DPRRC, and on the role of Government lawyers relating to new delegated powers.

You have highlighted Defra's SIs establishing a UK regime for the regulation of chemicals which have made significant or potentially controversial policies, in particular, the REACH etc. (Amendment etc.) (EU Exit) Regulations 2019. The SI, laid on 9 January 2019 was the first such regulation relating to the REACH regime and its purpose was to replicate the current EU regime for the regulation and control of chemicals in a UK domestic context, to ensure regulatory continuity after EU exit and to provide legal certainty for business regarding their duties when managing chemicals and placing them on the UK market. The JCSI did not challenge the legal vires of this SI. The European Union (Withdrawal) Act 2018 specifically delegated powers to correct, via SI, retained EU legislation and EU derived domestic legislation in order to ensure it remained operable after EU Exit or the EU Transition Period. The SI did no more than was appropriate in making the amendments and transitional arrangements necessary to make the retained EU legislation and EU derived domestic legislation operate effectively after the UK's withdrawal from the EU.

Your question has also referenced the State Aid (Revocations and Amendments) EU Exit Regulations 2020. You reported on this SI in your 30th report of Session 2019-21, and drew the SI to the special attention of the House. These regulations revoked and disapplied retained EU law relating to the State aid rules that contained fundamental deficiencies, and which made EU State aid law inoperable in the UK after the end of the transition period. Ministers considered this was an appropriate use of delegated powers in the European Union (Withdrawal) Act 2018 (as amended). These regulations were considered and not reported by the JCSI. They were debated and approved by both Houses of Parliament, made on 4 December 2020 and came into force at 11pm on 31 December 2020.

6. Restricting parliamentary scrutiny

Q13: A significant proportion of the pandemic instruments we considered came into effect within 48 hours of having been laid or even before laying. We have not been persuaded that all of them justified that degree of urgency. Are there standardised criteria that departments should apply before bringing an SI into force before the end of the customary 21-day period or, in the most urgent cases, before the instrument is laid?

A13: It is critical that Parliament is able to scrutinise all Covid-19 measures properly. As such, all the statutory instruments brought forward in response to the pandemic have been scrutinised in line with the requirements set out by Parliament in the relevant parent Acts. However, inevitably the fast-moving and urgent nature of the pandemic has necessitated the use of made affirmative procedure in a number of instances, or in other cases SIs coming into force fewer than 21 days

after they have been laid. As you are aware, under normal circumstances it takes between six and eight weeks for a draft-affirmative SI to pass through Parliament. Waiting this long to implement some of the measures, such as the national lockdown initiated in January, would have led to significantly more cases, deaths and placed the NHS under severe strain.

All of the SIs made under the Public Health (Control of Disease) Act 1984 have complied with the necessary parliamentary procedure. But the urgency of the need to put measures in place to protect the public's health means that many Regulations have to come into force before they can be debated. The points raised in those debates are nonetheless useful feedback for subsequent iterations of this ongoing legislative process. The Government has also committed to going further on nationally significant measures, to achieve a better balance between urgency and scrutiny. Having listened to concerns from parliamentarians, the Secretary of State for Health and Social Care committed to having debates in advance of the regulations coming into force wherever possible for measures of national significance. As a result, Parliament debated regulations on the tiers system on 13 October and 1 December 2020 ahead of them coming into effect. Parliament also considered the regulations setting out each of the steps of the Roadmap on 25 March 2021 before they came into force.

The 21-day rule is a long-standing convention that gives Parliament adequate time to scrutinise secondary legislation subject to the negative procedure before it comes into force. The Government is committed to complying with this important convention as far as possible. As you note, many SIs laid as part of the Government's response to COVID-19 have not adhered to the convention, in order to enable the swift implementation of the necessary emergency legislation. In line with standard practice, decisions on SIs are made on a case-by-case basis, with the default position being that the 21-day rule is complied with wherever possible. If an SI does need to be laid fewer than 21 days before it comes into force, then the Explanatory Memorandum must explain why urgent action is needed and what the impact of delaying the legislation would be.

7. Looking ahead: volume and flow of SIs

Q14: The legislative focus over the last couple of years has been on preparing for EU exit and, more recently, on dealing with the pandemic. Is there now a backlog of business-as-usual (BAU) instruments? How many BAU instruments does the Government intend to lay during the remainder of 2021?

A14: As you know, the Government made a number of important changes to its approach to preparing SIs to prepare for EU Exit. For the first time, the Government put in place a central process for coordinating its overall SI programme. A team was established within the Cabinet Office's Parliamentary Business and Legislation Secretariat (PBL) to oversee new arrangements for governance of secondary legislation across Government. PBL set up a Triage process to prioritise SIs to ensure that the flow of secondary legislation through Parliament was manageable. Working closely with departments across Whitehall, via the triage process, PBL helped ensure that essential EU Exit SIs were prioritised, and other SIs with less time pressure were laid later. This ensured Parliament and its committees had as much time as possible to scrutinise the legislation effectively.

Recognising the unprecedented scale of the Exit SI programme, the Government undertook to provide the Committee with high level estimates for the volume of EU Exit SIs in each month. However, that period has now passed and we anticipate returning to business as usual with the exception of COVID-19 SIs which, naturally, the Government will need to respond to as the situation evolves and on which we continue to provide regular updates. There is no indication

that there is a backlog of "business as usual" SIs as more than half of the SI's made in the last three years have been business as usual.

Q15: What is the intended purpose of proposed negative instruments under the European Union (Future Relationship) Act 2020 and how many do you anticipate being laid in 2021?

A15: Negative instruments can be made under sections 31, 33 and 39(1) of the European Union (Future Relationship) Act 2020 ("the Act"). Each of these delegated powers has a different purpose.

Section 31 provides a "relevant national authority" (defined as a Minister of the Crown, devolved authority, or the two acting together) with a power to make appropriate regulations to implement the UK-EU Trade and Cooperation Agreement ("TCA"), the UK-European Atomic Energy Community (Euratom) Nuclear Cooperation Agreement ("NCA") and the UK-EU Agreement on Security Procedures for Exchanging and Protecting Classified Information (known as the "Security of Information Agreement" or "SOIA") (and any other relevant agreement), or to deal with matters that arise out of or are related to those agreements. This section provides that the agreements can be fully and effectively implemented to satisfy the UK's legal obligations under them. The section applies to those agreements as they are updated which allows the power to be used to implement changes to the agreements, and to make provision to deal with matters arising from or related to them (for example, decisions of the UK-EU Partnership Council established under the TCA). There are a number of restrictions on the exercise of the power. It cannot be used to impose or increase taxation; make retrospective provision (with one limited exception); create a relevant criminal offence; amend or repeal key devolution legislation (with limited exceptions); or amend, repeal or revoke the Human Rights Act 1998 ("the HRA 1998") and any legislation made under that Act.

The affirmative procedure is required (under paragraph 6 of Schedule 5 to the Act) where a section 31 instrument contains a provision that amends, repeals or revokes primary legislation or "retained direct principal EU legislation" (defined as EU regulations (excluding tertiary ones) that were brought into UK law on 31 December 2020); or creates a power to legislate. Where those triggers are not met, Ministers have a choice of using either the affirmative or negative procedure. If a Minister elects to use the negative procedure, the instrument will be subject to the "sifting process" (similar to that established for negative instruments under sections 8 and 23(1) of the European Union (Withdrawal) Act 2018) for the first two years after the end of the implementation period on 31 December 2020. Parliament has now charged the European Statutory Instruments Committee with this additional sifting role in the Commons and the Secondary Legislation Scrutiny Committee with the further role in the Lords.

Section 33 provides a "relevant national authority" with a power to make appropriate regulations for the purpose of implementing a decision to suspend, terminate or resume, in whole or in part, the TCA or the SOIA (and any other relevant agreement) provided that decision is made under or in accordance with those agreements. The intention is that this power is capable of implementing actions arising from the general dispute settlement provisions in the TCA; certain non-dispute related measures (such as safeguards); and bespoke arrangements provided for in those relevant agreements. There are a number of restrictions on the exercise of the power. It cannot be used to make retrospective provision; create a relevant criminal offence; confer a power to legislate; implement a ruling of the arbitration tribunal established under the TCA (or other relevant agreements); amend or repeal key devolution legislation; or amend, repeal or revoke the HRA 1998 and any legislation made under that Act. The power in section 33 can be used to impose and increase taxation or fees, which the section 31 power cannot do.

The affirmative procedure is required (under paragraph 12 of Schedule 5 to the Act) where a section 33 instrument contains a provision that amends primary legislation or "retained direct principal EU legislation". Where those triggers are not met, Ministers must use the negative procedure. There is no "sifting process".

Section 39(1) provides a Minister of the Crown with a power to make regulations which are appropriate as a consequence of the Act. This power may be used to amend, repeal or revoke both primary and secondary legislation. Section 39(1) instruments are subject to the negative procedure (under paragraph 18 of Schedule 5 to the Act).

In addition, negative instruments can be made under section 6(3) which contains a power for "the appropriate national authority" (defined as the Secretary of State, the Scottish Ministers or the Department of Justice in Northern Ireland) to amend section 6 to change the meaning of "criminal records database". This definition is used for the purposes of sections 1 to 6 of, and Schedule 1 to, the Act (which relate to the exchange between the UK and member States of information about convictions including information which is on a criminal records database). The negative procedure is provided for by paragraph 1 of Schedule 5 to the Act

The exercise of all these powers is a matter for relevant Government departments. SIs exercising these powers will, in due course, be submitted for Ministerial clearance by departments via the PBL triage system on a monthly basis in the usual way.

7 April 2021