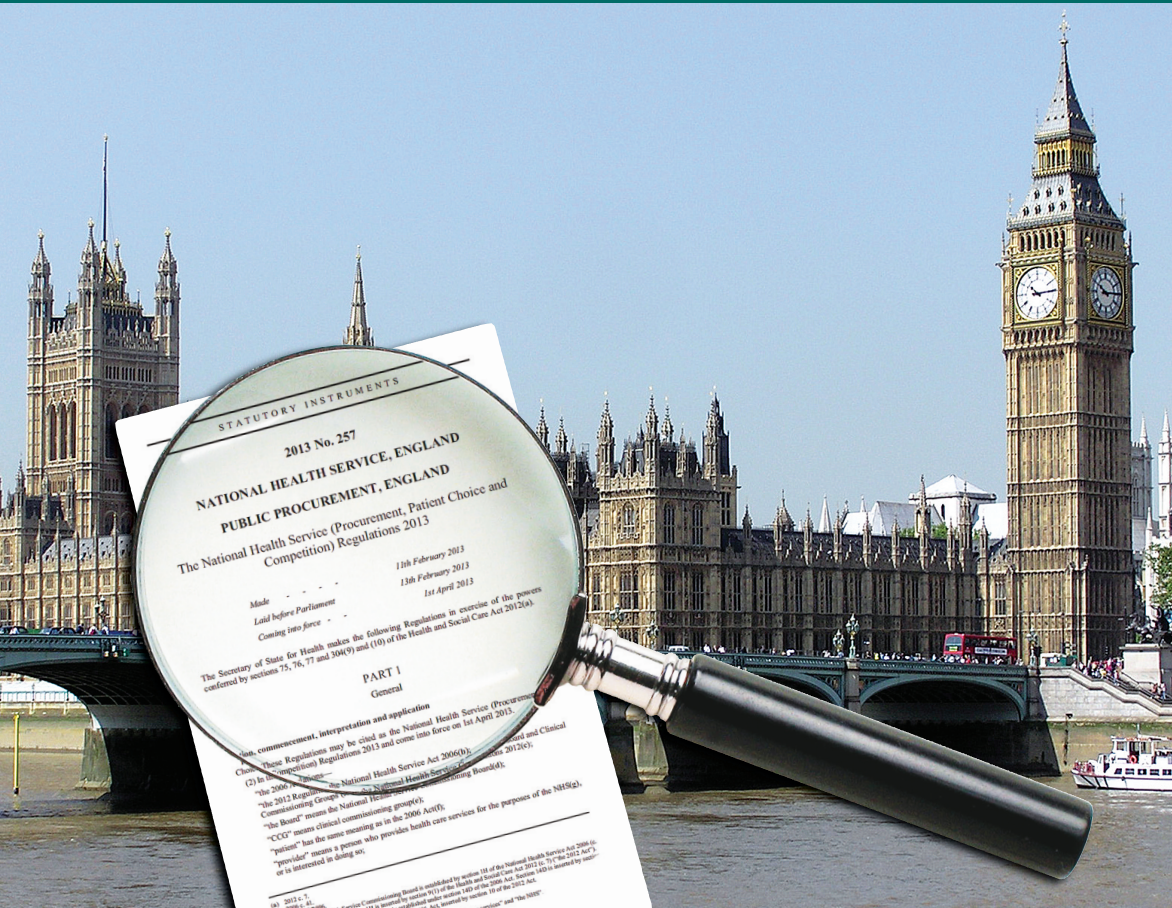


The Devil is in the Detail: Parliament and Delegated Legislation



HANSARD
SOCIETY

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Executive Summary

What is delegated legislation?

- Most of the United Kingdom's general public law is made not through Acts of Parliament but through delegated (or secondary or subordinate) legislation.
- Acts of Parliament provide a framework into which much of the real detail and impact of the law will subsequently be added through delegated legislation.
- The majority of delegated legislation is made in the form of Statutory Instruments (SIs) that exist within that framework of powers delegated to ministers by Parliament in the parental Act. They can be used to fill out, update, or sometimes even amend existing primary legislation without Parliament having to pass a new Act.
- Unlike primary legislation delegated legislation is subject to judicial review.
- The scope of delegated legislation varies considerably, from the very technical power that is procedural in character to the wide-ranging Henry VIII power that can, for example, abolish quangos.
- A range of factors – the expansion of the regulatory state, the wide range of social security provision, the rapidly changing nature of technology, the growth in EU legislation – have all contributed to a significant increase in the volume, technicality and complexity of delegated legislation in recent years.
- How Parliament deals with this legislation is unsatisfactory. The way in which delegation and its scrutiny is treated is neither systematic nor consistent.
- Too much of the process relies on 'gut feeling' and 'judgement' rather than objective criteria.
- The procedures are complex and often illogical, and many parliamentarians willingly admit they don't understand them.
- The nomenclature – 'made' and 'laid', 'negative', 'affirmative' and 'super-affirmative', 'prayers' and 'Henry VIII powers' – is confusing and undermines parliamentary and public understanding of the legislation.

Beyond the boundary of reasonableness and acceptability

- The factors taken into account when deciding on whether to seek delegated powers in a bill may include: the volume of technical detail; readability;

administrative convenience; an incomplete policy process; unpredictability; and time management.

- Historically, acceptance of the system of delegated powers and legislation has been predicated on its reasonable use and application by ministers coupled with trust in Parliament's system of scrutiny.
- However, the use of delegated legislation by successive governments has increasingly drifted into areas of principle and policy rather than the regulation of administrative procedures and technical areas of operational detail.
- It is used extensively, for example in areas such as the criminal law – with clear implications for civil liberties – that in the view of many parliamentarians and external observers can hardly be regarded as technical or inconsequential.
- Ministers also use delegated powers in ways that were not originally intended by Parliament, for example through recourse to old laws passed in a different era or through very broad, ambiguous wording of the primary enabling Act, which can then be open to wide interpretation when delegated powers are later used.
- Governments seek delegated powers that they do not subsequently use, 'reserve' powers that are stored up to give them freedom to act in the future, even if they have no plans to do so at the time they are taking the legislation through Parliament.
- Ministers also seek powers to amend or repeal primary legislation by Order, commonly known as Henry VIII powers, with little or no scrutiny. These undermine the constitutional principle of parliamentary sovereignty; namely that Parliament is the supreme, sole legislative authority with the power to create, amend or repeal any law.
- In recent years, for example, ministers have sought the power by Order to '*make provision for reforming legislation*', to repeal legislation deemed to be '*no longer of practical use*', to '*disapply or modify the effect of a provision*' in any Act of Parliament, and to make provisions with retrospective effect if they '*consider it necessary or desirable*'.
- There has been such an expansion in the scope and application of powers and procedures that a precedent could arguably be found to justify almost any form of delegation a minister might now desire.
- Increasingly, rather than removing such powers, the focus of parliamentary debate is on reining them in using strengthened scrutiny procedures. Members focus on the form (the scrutiny procedure) rather than the substance (the power) of a bill.

Unsatisfactory scrutiny procedures

- There is no clear and consistent pattern between the subject matter of a delegated power and the scrutiny procedure to which the SI arising from it is allocated.
- Several levels of parliamentary control have been created and tweaked over time to reflect the different types of delegated power available to ministers. This incremental approach has produced a patchwork of procedures, resulting in a system of scrutiny that is overly complex and confusing.
- Some SIs are not subject to any form of parliamentary scrutiny at all. The majority of SIs are simply signed off ('made') by ministers; they are not 'laid' before Parliament for scrutiny purposes and they are therefore not subject to debate or a vote.
- Some SIs are 'laid' before Parliament after being signed off by the minister ('made') but they are also not subject to scrutiny.
- But for those SIs that are subject to parliamentary scrutiny, they are assigned to one of three forms of scrutiny procedure: the negative resolution procedure; the affirmative resolution procedure; or a strengthened procedure.
- There are no fewer than 16 variations on these three procedures, including 11 forms of strengthened procedure alone.
- Scrutiny procedures are bartered to buy off opposition during a bill's passage through Parliament but, in doing so, the fundamental reasons for pursuing delegation in the first place are undermined.
- It can take between 11 and 18 months, for example, to complete a Public Bodies Order or a Legislative Reform Order, negating the advantages of legislating with speed and flexibility rather than putting the matters on the face of a bill.
- Only 25 Legislative Reform Orders have been laid since 2007 and one Localism Order since 2011. Only 29 Public Bodies Orders have been laid to date; it is estimated that there will be 30% fewer Orders than estimated.
- Government departments now acknowledge that these Orders consume too much time and resource and that, wherever possible, it is better to use a primary legislative vehicle. Knowing this, Parliament should resist any further attempt by government to include such models in future bills.

Scrutiny by the numbers

- Between 1950 and 1990, the number of general and local SIs produced each calendar year rarely rose above 2,500. Since 1992 it has never dipped below 3,000. Around 1,200 of these are subject to parliamentary scrutiny each year.
- MPs wanting to debate a negative SI must ‘pray’ against it. Since the 1997-98 session just 411 prayer motions have been tabled in the House of Commons amounting to just 2.5% of the total number of negative instruments laid in that period.
- In the 2013-14 session, 882 negative instruments were laid but only 10 prayer motions were tabled against them by MPs (1.13% of the total).
- Of these 10 prayer motions, just two were actually considered, one in the Chamber and one in a Delegated Legislation Committee.
- In only one session in the last decade (2007-08) has the House of Lords considered motions against more than 1% of all negative instruments.
- MPs can debate affirmative SIs for up to 90 minutes in Delegated Legislation Committees. In the 2013-14 session, the average length of a debate was just 26 minutes, two minutes less than in 2012-13. But they can be much shorter – the debate on the Draft Contracting Out (Local Authorities Social Services Functions) (England) Order lasted just 22 seconds.
- Statutory Instruments, with just a few exceptions cannot be amended by MPs or Peers, in keeping with the principle of delegation. But both Houses of Parliament rarely reject an SI. This ‘take it or leave it’ proposition does nothing to encourage effective scrutiny and Member engagement with the issues.
- Just 16 SIs out of over 169,000 – or 0.01% – in nearly 65 years have been rejected. Since 1950 the House of Commons has rejected just 11 instruments and the House of Lords has rejected five.
- The House of Lords rarely votes on a fatal motion; there have been only 21 such motions in the last decade and on only two occasions was the government defeated. This leaves the House reliant on non-fatal motions of regret as a way to express dissatisfaction with an SI.
- There have been only 79 non-fatal motions between 2004 and 2014, and the government has been defeated on only 12 occasions.
- The quality of consultation and Explanatory Memorandums for SIs is highly variable. In 2013-14 the government had to replace 6% of all Explanatory Memorandums.
- In the last eight sessions, the Secondary Legislation Scrutiny Committee has drawn attention to 741 SIs about which it had serious concerns, the majority of those (448 or 60.4%) in relation to drafting.

- The current system whereby many SIs are ‘made’ and come into effect before they are considered by Parliament permits defective delegated legislation to sit on the statute book until such time as the government revokes the SI and lays an amended version.

Whitehall, Westminster and citizens

- In legal terms ministers make the decision about what goes into primary and what goes into secondary legislation as they ‘sign off’ any bill that goes to Parliament and must subsequently defend it both in parliamentary debate and in the court of public opinion. In practical terms, however, significant discretion lies with civil servants, the government’s legal advisers and Parliamentary Counsel.
- There is a lack of collective memory within the civil service about precedent, the politics of delegated legislation, and where the line that defines the balance between primary and secondary legislation lies.
- Ministerial engagement with the detail of delegated legislation varies from bill to bill but is rarely high.
- MPs are treated as cannon fodder in the process and a huge amount of time and resource is wasted, particularly in Delegated Legislation Committees. Scrutiny procedures are used in which MPs have little faith and confidence and in many cases do not fully understand.
- The House of Lords has the greatest influence on delegated powers and legislation – particularly through the Delegated Powers and Regulatory Reform Committee (DPRRC) – but voluntarily blunts that influence by its reluctance to reject SIs. Its committees are more engaged in the process, more influential with government, and Peers generally have more appetite for the detail and technical scrutiny required than do MPs.
- A key factor in the number and scope of delegated powers being sought is the speed at which successive governments are legislating, often before the detail of policy is pinned down.
- Delegated legislation doesn’t make the legislation easier to understand and read in circumstances where so little by way of draft Orders is available to enable Members to appreciate the government’s intentions for the scope and use of the powers they seek.
- Thoughtful consultation and preparation underpins effective implementation. Too often, however, consultation is treated as an administrative inconvenience by successive governments.
- The role and interests of the public in the delegated legislation process is almost completely ignored. The confusing nomenclature and procedures, the

inability to find and track information, and the lack of proactive communication all undermine the principle that those subject to the law should have the means to be aware of it.

Recommended reforms

An independent inquiry into the legislative process

- It is impossible to separate consideration of delegated legislation from that of primary legislation. The issues with delegated legislation are now so serious that **an independent expert inquiry is needed along the lines of that undertaken in 1975 by David Renton on the ‘Preparation of Legislation’ or our own Commission on ‘Making the Law’ chaired by Lord Rippon in 1993.**
- This should review the entire legislative process looking at:
 - how both primary and delegated legislation is prepared in Whitehall and scrutinised at Westminster;
 - issues of principle and practice, and where the balance should lie between administrative and political convenience and good legislative process;
 - rationalisation of scrutiny procedures - exploring what criteria and principles define what Members want to look at again in the area of delegated legislation and how this can best be achieved;
 - whether the burden on Members to scrutinise delegated legislation should be reduced through the introduction of individuals or independent advisory bodies with genuine technical expertise in particular policy areas;
 - whether the scrutiny system should be re-designed such that the greater burden of work falls on the House of Lords in future.
- The review should be established as soon as possible after the 2015 general election.
- If such an inquiry is not held, then there are a number of areas where reforms could be implemented to ameliorate the problems with delegated legislation. These are key areas for consideration, not a blueprint.

A ‘circle of learning’ in Whitehall

- It is incumbent upon departments to better plan and co-ordinate the production of SIs. A central co-ordinating unit to plan and promote awareness

of the production and implementation of upcoming SIs across government should therefore be established.

Scrutiny reforms

- **A new, clearer annulment motion should be adopted;** praying against a negative instrument in the House of Commons should be decoupled from the Early Day Motion system.
- **Government control over annulment debates should be lessened.** Annulment motions laid by the opposition should have an improved chance of debate; time could be set aside each session for their consideration. Backbenchers should be able to seek a debate on an annulment motion if they can demonstrate some level of support for it; here, the decision-making power about whether time should be allocated for such a debate on the Floor of the House could be accorded, for example, to the Backbench Business Committee or even to the Speaker. A select committee should also be able to request a debate if it is concerned about an instrument and believes it warrants consideration by the House.
- **Delegated Legislation Committees should be reformed along the lines of the European scrutiny committee system in the House of Lords.** A committee should be appointed, supported by a number of sub-committees allocated to deal with particular policy areas. Some of the members should be drawn from the relevant departmental select committees. A committee secretariat would support Members, providing briefing material and advice to the participants.
- **A new conditional amendment provision should be introduced** to enable Members who have concerns to indicate what changes are required to bring an SI within the bounds of acceptability.
- **The House of Lords should make greater, albeit judicious, use of its power of veto** in the future, particularly in respect of any SIs emerging from framework legislation that cannot be effectively scrutinised at the primary bill stage. This would be in keeping with the House of Lords' revising function and its power of delay.
- **The strengthened scrutiny models should be rationalised.** One variant might have provision for drafts, consultation, supporting documents, committee determination of the scrutiny procedure, and consideration for up to 60 days (perhaps formalised as the 'enhanced affirmative' procedure); the other might have all these and additionally a veto power for judicious application in the most contentious cases only (to be known as the 'super-affirmative' procedure). Both variants should statutorily require that the

minister consider committee recommendations and explain in writing to the relevant committee if the government does not plan to adhere to those recommendations.

Committee reforms

- **The remit of the Delegated Powers and Regulatory Reform Committee should be changed so that it can report on bills immediately**, when they begin their passage through one of the Houses, whether that be Lords or Commons. This would push at the commonly understood boundaries of bi-cameral scrutiny and require an increase in committee resources, but it would ensure that the House of Commons is better advised on the nature of delegated powers in bills than is the case at present.
- The DPRRC should also consider how it might establish a more systematic process for checking past delegations of power and an accountable framework against which to test the decisions that it makes and to which government departments should then have regard when drafting powers and procedures.
- **A Legislative Standards Committee should be established**, ideally on a bi-cameral basis, to assess bills against a set of minimum technical preparation standards that must be met before a bill is introduced. **The DPRRC should confirm whether or not it is content with the quality of the Delegated Powers Memorandum** and its response should be incorporated into the Committee's review of each bill. If such a Committee is not established, **the DPRRC should be vested with the authority to reject a memorandum that it believes is inadequate** resulting, if necessary, in a delay to consideration of the relevant parts of the bill until such time as an improved memorandum is provided to the Committee.
- The DPRRC should call both ministers and Permanent Secretaries to account at oral evidence hearings in the future when the quality of any memorandum falls well below what Members expect.
- **The House of Commons should observe the 'scrutiny reserve'** that exists in the House of Lords in relation to decisions of the Joint Committee on Statutory Instruments (JCSI). The House should not debate an SI before the Committee has concluded its deliberations on an instrument.
- In the event of an egregious breach of the 21-day convention or six-week recommendation, MPs on the JCSI or who otherwise have an interest in the issue should seek a backbench business debate. Alternatively, the JCSI and Secondary Legislation Scrutiny Committee (SLSC) plus any relevant departmental select committees should consider holding an extraordinary

joint meeting at which they invite the responsible minister to appear and account for what has happened.

- **The government should be formally required to respond to all reports** from the Delegated Powers and Regulatory Reform Committee, the Joint Committee on Statutory Instruments and the Secondary Legislation Scrutiny Committee.

Defective SIs

- **The government should be required to remedy defective SIs within four weeks.** A convention should be agreed whereby defects and any transitional consequences must be addressed within this period unless there are exceptional reasons not to, circumstances that must then be justified to the JCSI.
- **The government should also be required to publish departmental statistics accounting for the number of SIs that are revoked each session, and the number of corrective instruments that are produced,** and to do so in a uniform way for the purpose of analysis and comparison.

Tackling complexity and improving knowledge

- **Parliament should undertake a review of the language and terminology used in the delegated legislation process,** as well as the presentation of information about it on the parliamentary website in order to improve curation of material with a view to making the process more accessible and understandable.
- **The government should review the Statutory Instruments Act 1946** with a view to replacing it with new legislation that takes account of modern forms of digital communication and developments arising from the 'Transforming Legislation Publishing' and 'Good Law' initiatives. Importantly, it should also set out clear, minimum standards (of a high level) for publicity and consultation concerning delegated legislation in the future.