

HANSARD SOCIETY BRIEFING PAPER ISSUES IN LAW MAKING



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3 : Delegated Legislation December 2003

1 Introduction: The Hansard Society is undertaking a review of its 1993 Commission report *Making The Law* to highlight critical issues in the legislative process, stimulate debate and identify options for change.¹ We are producing a series of 'Briefing Papers' on a number of legislative issues and in 2004 these papers will be compiled with an overview of the legislative process and an update of developments.²

Delegated Legislation: This third paper considers delegated legislation, (which in the majority of cases can be described by the term 'Statutory Instruments' (SIs)). It is an area of the legislative process that has been subject to considerable criticism in recent years with numerous calls for reform. Regarded by many as a 'tedious corner of the constitutional edifice'³, delegated legislation is in fact crucial to the operation of Government in this country. This paper focuses on the process by which delegated legislation is scrutinised and passed by Parliament rather than its formation and drafting by ministers and officials.

The 3,000 or so Statutory Instruments (SIs) that reach the statute book every year may be part of the dull routine of everyday government, and may even appear boring and trivial at first glance, but as Professor Edward Page notes, their collective force impacts on all aspects of daily life: the alarm that wakes us up, the bread we eat for breakfast, the car we drive to work, the roads we drive on, the content of the tea we drink, the bed we fall asleep on.⁴

2 What is Delegated Legislation? There are two types of general law – primary legislation and secondary legislation. Primary legislation is made up of Acts of Parliament. Delegated (or secondary) legislation is law made by Ministers under powers delegated to them by Parliament in primary

legislation.⁵ It can be used to amend, update or enforce existing primary legislation without Parliament having to pass a new Act. Delegated legislation is therefore crucial to the effective operation of Government.

As *Making The Law* argued,

'The main advantages of making greater use of delegated legislation outweigh the very real disadvantages...[it] makes Acts easier for the user to follow, helps Parliament to focus on the essential points ... [and keeps] the legislative process flexible so that statute law can be kept as up to date as possible ... [and eases] pressure on the parliamentary timetable.'

Delegated legislation tends to operate below the public and parliamentary radar and has increased significantly in volume over the past half-century. For example, in 1970, SIs filled 4880 pages of legislation; by 1996 that had grown to 10,230 pages.⁶ Yet the majority of these SIs are subject to little, if any, parliamentary scrutiny. This is because most SIs are subject to negative procedures, which means they will become law in the form determined by the Minister unless one or other House of Parliament votes against them, which rarely happens.⁷

On the other hand, a minority of SIs are subject to affirmative procedure, which means that they cannot become law unless a draft is first approved by both Houses. The affirmative procedure, however, is much less common than the negative procedure. For example, in 1998/9, 178 SIs were subject to the affirmative procedure, compared to 1266 subject to negative procedures.⁸

Delegated Legislation

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BOX A PARLIAMENTARY PROCEDURES APPLYING TO SIs

Statutory Instruments are subject to different degrees of parliamentary scrutiny. In broadly ascending order of rigour these are:

- Those which have only to be made to come into effect;
- Those which have to be laid before Parliament after being made;
- Those which have to be laid before Parliament after being made and which are subject to the provision in their parent Act that if either House resolves within 40 sitting days that the instrument should be annulled they will not come into effect (the negative resolution procedure);
- Those which are required under the terms of their parent Act to be laid before Parliament in draft and to be approved by each House before being made and brought into effect (the affirmative resolution procedure);
- A small category of instruments which are laid before Parliament when made rather than in draft but which cease to be of effect if not approved by each House within a period specified in the parent Act;
- So-called 'super-affirmative' instruments which, except in certain urgent cases, have to be preceded by 'proposals' which are subject to consultation. This procedure allows for amendments to be proposed by parliamentary committees or others, which the Minister may incorporate in the draft order.

The Joint Committee on Statutory Instruments: Set up in 1972, the Joint Committee on Statutory Instruments (JCSI), a Committee of both Houses, has helped to provide some level of sustained and detailed scrutiny of delegated legislation. It does this by ensuring that particular SIs are made within the powers delegated by the parent Act, as well as checking that the drafting is not defective and that an SI does not impose a charge on public revenues. However, the JCSI is expressly barred from considering the merits of any SI.

- 3 **Problems with the system:** The parliamentary procedures that exist for scrutinising delegated legislation are seen by many as inadequate. The use of delegated legislation allows the executive to make or change the law without having to go through the elaborate parliamentary process required for primary legislation. Its use can deliver more power to an already mighty executive. Parliament's role in scrutinising and authorising delegated legislation is therefore crucial to the functioning of the democratic system. As the volume of SIs has expanded steadily, it is imperative that these flaws are addressed. Despite many calls for reform (with the exception of super-affirmative procedures – see Box A), no significant changes to delegated legislation procedure have

been adopted in the decade since *Making the Law* was first published.

- 4 **Making The Law:** Numerous problems with Parliament's scrutiny of delegated legislation were identified in *Making The Law* and several recommendations were made to improve its effectiveness. The main recommendations were that:
- Departmental select committees should review SIs in their field prior to their being laid before Parliament and then report on matters of particular public importance. By identifying matters that required further clarification or justification, such pre-legislative scrutiny would reduce the heavy workload of the JCSI.
 - Debates on SIs (under the affirmative procedure and those against which prayers had been tabled) should only take place once the JCSI has reported.⁹
 - A Legislation Steering Committee should be set up to determine which prayers should be debated, thus standardising the procedure and removing control over the allocation of such debates from the control of the Government's parliamentary business managers.

BOX B SPECIFIC TYPES OF DELEGATED LEGISLATION

Henry VIII Clauses: These are clauses that allow Ministers to amend the substance of the Act itself, not just to change the secondary legislation made under the Act. Some merely allow updating of the original Act but some provisions give Ministers very wide powers to change the substance of policy.¹⁰

Regulatory Reform Orders: A new procedure, introduced in 1994, to amend primary legislation through SIs made under the Deregulation and Contracting Out Act. The procedure was confined to the repeal or amendment of primary legislation that imposed 'an unnecessary burden in the carrying on of any trade, business or profession or otherwise' so long as necessary protection in the original Act was not removed. This power was enlarged under the Regulatory Reform Act 2001.

Remedial Orders: Under the Human Rights Act 1998, if a court declares a provision in UK law incompatible with Convention rights, the Government can propose a draft order to amend the primary legislation to remedy the incompatibility. In urgent cases, there is a procedure whereby the Order can be laid and made simultaneously; Parliament examines it retrospectively.

Commencement Orders: Commencement provisions in most Acts of Parliament give power to Ministers to set the date on which the operative provisions of the Act come into force: they may allow for different dates to be set for different provisions.

Orders in Council: A form of delegated legislation which require the royal assent to be signified to them in the presence of the Privy Council: they may sometimes reflect the use of prerogative powers as well as delegated powers.

Local SIs: About half the SIs laid are local, rather than general, in character. Many are made under powers contained in private acts which are exercised by local authorities or other non-ministerial authorities. The most common form of local SI is a road order, which is required to close roads temporarily, classify them and to regulate traffic along them.

- The time limit (of an hour and an half) imposed on debates should be removed.
 - Once an SI had been selected for debate, a special standing committee should undertake more detailed scrutiny. *Making The Law* suggested that rather than merely concentrating on technical details, committees scrutinising SIs should be allowed to question Ministers on the purpose, meaning, and effect of the SI. The debate on the SI in the standing committee should be held on the substantive motion approving, rejecting, or otherwise expressing opinions on the instrument.
- 5 **The proposals of the Commons Procedure Committee:** Despite widespread support for the reforms suggested in *Making The Law*, no significant changes to the procedures for scrutinising delegated legislation have been made in the last decade. As a result, demands for reform were repeated, most notably by the Commons Procedure Committee, which produced two reports, in 1996 and 2000.¹¹ Both Procedure Committee reports made broadly the same conclusions and recommendations, including:
- The introduction of a sifting committee in both Houses to consider the political and legal significance of individual SIs. These committees should have the power to call for further information from government departments where necessary. They would recommend which negative procedure instruments ought to be debated (regardless of whether any member of either House had 'prayed' against them) and which affirmative instruments could be agreed to without debate (despite the requirement in the parent Act that one should take place), unless six Members demanded one.
 - At present all affirmative resolution SIs must be debated either in standing committee or on the floor of the House, though many are of no political interest and are entirely uncontroversial, and the meeting may only last for a few minutes. In contrast, many substantial negative resolution SIs are not subject to any parliamentary scrutiny when, on the face of it, they raise significant issues of which few members of either House are made aware.

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- Greater use of pre-legislative scrutiny. The report proposed the wider use of the 'super-affirmative' procedure to deal with complex SIs in draft. (This was endorsed by the Conservative Party report, *Strengthening Parliament*,¹² for certain important orders which should be published in draft before being laid before the House, and examined by a departmental select committee.) Select committee involvement might be a way to raise public and media awareness of certain important proposals and to test the climate of opinion.
- Extension in 'praying time' (during which time opposition parties can call for a debate of the measures) from 40 to 60 days.
- Neither House should vote on an SI until the JCSI has reported on it.
- When SIs are discussed in committees, proceedings should begin with a Ministerial Statement and questions, as in the case of Commons' European Standing Committees.

None of the Procedure Committee proposals have been adopted in the Commons. This is despite the fact, as the 2000 report noted, that the proposals had been endorsed by the Procedure Committee under both a Conservative and Labour administration, as well as by the Royal Commission on House of Lords Reform and by the Chairmen's Panel in the House of Commons.

- 6 Recent Reform; The House of Lords Sifting Committee:** There has, however, been one recent, significant reform to delegated legislation procedure in the House of Lords with the establishment of a sifting committee to identify SIs 'which it considers to be of sufficient political importance...to merit debate'. The committee came into operation at the start of the 2003-04 parliamentary session. Following the decision of the House of Lords to establish the committee, the Commons' Procedure Committee issued a further report in 2003 which concluded,

'We welcome the Lords' decision to appoint a sifting committee, but emphasise our view that it would be advantageous for discussions to begin immediately

with a view to establishing a Joint Committee for sifting delegated legislation from the outset. The alternative of waiting for the Lords' Committee to start and then attempting to join in later strikes us as much less sensible.'¹³

The Government rejected the Committee's proposals, claiming that, 'a sifting committee may lead to greatly increased demands on parliamentary time'. The Procedure Committee expressed its disappointment at the Government's decision.¹⁴ It is possible that the Lords Sifting Committee may, in fact, help the Commons to identify important SIs in the absence of its own sifting committee. However since the decision to debate SIs subject to the negative procedure lies with the Government, any debate would still require its agreement.

- 7 Concerns and criticisms:** The Government's failure to implement reforms aimed at improving the processes relating to delegated legislation has provoked further criticism of the current system. Most criticism was concerned with the negative resolution procedure. Under this procedure the initiative lies with the Opposition to table appropriate annulment motions in the form of Early Day Motions (known as 'prayers'). Given that the Government controls almost all the available parliamentary time in the Commons, unless the Opposition can persuade the Government to provide time, either on the floor of the House or in Standing Committee, the SI will not be debated.

As the Procedure Committee noted in 2000,

'The reduction in the overall number of negatives debated, at a time when there has been no decrease in the numbers laid or it may confidently be assumed in the complexity or importance of the instruments themselves, strengthens the supposition that existing arrangements for triggering debate on negatives are less than adequate.'

Strengthening Parliament, the Conservative Party Commission report, was even more blunt, stating that the negative resolution procedure 'is close to preposterous. Major changes are needed to existing arrangements.' The Commons Liaison

Committee concurred, declaring that the scrutiny of delegated legislation generally was 'woefully inadequate'.¹⁵

A range of problems with the procedures have been identified, including:

- That an SI can be published after it has come into force and may also be scheduled to come into force before the time allotted for scrutiny has run its course.
- That the unpredictability and rigidity of the parliamentary timetable, and the inevitable time constraints, mitigate against effective scrutiny.
- That SIs cannot be amended in part or redrafted.
- That the length, volume and technical complexity of many SIs can obscure important issues with the result that major changes to law and policy can come into force with little or no parliamentary scrutiny.
- That the implications of an SI for other domestic or EU legislation may not be immediately apparent.
- The increasing instance of SIs being used to implement core policy decisions rather than fill out the detail of statutes.

8 Proposals for reform: A number of specific reforms might improve the functioning and scrutiny of delegated legislation:

- **Conditional amendments:** The Procedure Committee has raised the possibility of conditional amendments to SIs whereby an SI could be rejected but the terms under which it would be acceptable would be indicated. The Commission to Strengthen Parliament described this as an 'eminently sensible' solution and strongly believed that this represented the best way to proceed.
- **Post-legislative scrutiny of SIs:** As with primary legislation, it would be open to departmental select committees to commission research on the effect of particular SIs or to undertake a short inquiry. Lords' committees could also scrutinise delegated legislation within their remit to assess its effects.
- **Extending the deregulation procedure:** Blackburn and Kennon discussed whether deregulation procedures could provide a model for better scrutiny of SIs, arguing:

'The only substantial improvement in parliamentary scrutiny of such legislation in recent years has been the introduction of deregulation orders. The deregulation procedure could be used

BOX C DELEGATED LEGISLATION IN THE HOUSE OF LORDS

- No SIs can be amended by either House. This means that the Lords would have to reject the SI entirely if they identified a problem, a path that they are usually unwilling to take. This is despite the fact that the power to reject delegated legislation is one of the few unilateral powers possessed by the Lords (on which they cannot be overruled by the Commons).
- Since the passage of the House of Lords Act 1999, it has become clear that the conventions restraining the Lords from vetoing delegated legislation have been put under increasing strain. For example, in February 2000 the Lords agreed to two motions disapproving the GLA Elections Rules 2000 and the GLA (Election Expenses) Order 2000. In January 2001, the Human Fertilisation and Embryology Regulations 2000 were only agreed to on condition that the House set up a select committee to consider the issues raised by the regulation.
- The House of Lords has set up a select committee on Delegated Powers and Regulatory Reform, which reports on the extent to which powers proposed to be delegated to Ministers in Bills appear to be appropriate in particular cases.
- The House of Lords has established a committee to 'sift' statutory instruments. (see paragraph 6).

for other SIs amending primary legislation, provided an Act was passed defining the categories other than the deregulation to which it would apply.¹⁶

- **Lessons from Scotland:** The Scottish Parliament's procedures for dealing with secondary legislation involve a designated role for its committees and a guaranteed level of scrutiny. Westminster could evaluate whether there are lessons from Scotland that could strengthen its own procedures on dealing with delegated legislation.
- **External consultation:** Most draft social security delegated legislation is referred by the Government to the Social Security Advisory Committee (SSAC) before being presented to Parliament. The SSAC consults with public and interested bodies. The Secretary of State is obliged to take account of the SSAC's recommendations (although is not bound by them) and when the regulations in question are laid before Parliament, the SSAC's report and a statement explaining the Government responses to the recommendations must also be laid. This model of consultation may be appropriate in other specific areas of legislation.
- 9 **Conclusion:** The current parliamentary procedures for scrutinising delegated legislation are not working effectively. A wide range of bodies has reported on this subject in the last ten years and all have proposed substantial reforms. The Law Society has identified delegated legislation as a subject for particular consideration as part of its Better Law Making Programme. It is significant that earlier this year, a decade after the *Making The Law* report was published, the Parliament First group of MPs argued that:

'changes to the way Parliament deals with secondary legislation should be brought forward as a matter of urgency. More detail should be provided within primary legislation and more care taken to provide the best possible legislation through the normal routes.'¹⁷

BOX D PROCEDURES IN THE SCOTTISH PARLIAMENT.

- The Scotland Act 1998 gave Ministers and the Scottish Executive the power to make subordinate legislation (delegated legislation) in any area in which the Scottish Parliament had devolved legislative powers. After a Scottish Statutory Instrument (SSI) is laid, it is passed to and scrutinised by two committees.
- SSIs are considered by the Subordinate Legislation Committee (SLC). Using specific criteria the SLC determines whether or not the SSI should be drawn to the attention of Parliament; for example, whether the SSI is ultra vires or has retrospective effects beyond the authority of the parent Act. The SLC must report to Parliament within 20 days.
- The SSI is also scrutinised by at least one subject committee, under whose remit the instrument falls. If it falls under the jurisdiction of multiple committees, one committee is designated the 'lead committee' and the other committees pass their recommendations to it.
- Instruments are subject to either negative or affirmative procedure, depending on the stipulation in the parent Act. The parent Act may sometimes indicate that an SSI can be made without parliamentary approval. As in Westminster, instruments cannot be amended.
- **Negative Procedure (Motion for Annulment):** An MSP must move for annulment within 40 days of the SSI being laid down, otherwise it is passed into law. The MSP must propose the motion for annulment to the lead committee, where the issue can be debated for no more than 90 minutes. The lead committee must report to Parliament within the 40-day deadline with its recommendations. The SSI may be debated and then voted on by the full House, and if necessary the SSI is annulled.
- **Affirmative Procedure (Motion for Approval):** The lead Committee must decide whether the SSI should be recommended for parliamentary approval, and report to Parliament within 40 days of the SSI being laid. A member of the executive can propose to the lead committee that the SSI be approved. The issue can be debated for up to 90 minutes in the committee. Once the committee reports back to Parliament, a debate may take place in the House after which the issue is voted on. Between 1999 and 2000, 39 SSIs were subject to affirmative procedure and 100 to negative procedure.¹⁸

BOX E THE FINANCIAL SERVICES AND MARKETING ACT 2000

The case of Financial Services and Marketing Act 2000 (FSMA) demonstrates the extent and scope of the use of delegated legislation. The Act provided the framework for the Financial Services Authority (FSA), the new 'super-regulator' for the financial services industry. The passing of the Act was distinctive in a number of ways:

- There was extensive pre-legislative public consultation. The Bill was considered in draft by the House of Commons Treasury Select Committee and the Joint Committee of both Houses and the legislative scrutiny spanned two parliamentary sessions.
- The Act contained considerable powers for the provision of secondary legislation. The purpose of this was to allow for flexibility and to ensure that the law did not become outdated. There was consultation on secondary legislation during the drafting of the FSMA. Seven SIs were subject to the affirmative procedure and were considered by the Commons Delegated Legislation Committee and on the floor of the House of Lords.
- The House of Lords Delegated Powers and Legislation Committee expressed concern over the extensive statutory powers, totalling more than 80, given to the FSA to initiate secondary legislation. The committee recommended the formation of a parliamentary committee to review the FSA's annual report and to take regular evidence from a wide range of interests including consumers and practitioners.
- Following the passing of the FSMA, the FSA has made considerable use of its mandate for delegated legislation. For example:
 - From July 2002 it extended its powers to include the supervision of credit unions.
 - From September 2002 it began to police the sale of mortgages.
 - From early 2003 it began to regulate funeral plans and long term insurance.
 - From October 2004 it will regulate mortgage lenders and from January 2005 it will regulate insurance brokers.

While *Making The Law* acknowledged that the increasing use of delegated legislation over recent decades was inevitable, and indeed necessary, given the complexity of modern Government and the constraints on parliamentary time, it warned that the mechanisms for achieving effective parliamentary scrutiny were absent and needed to be implemented. Parliament has a unique role in both passing legislation and holding Government to account. The way that it deals with delegated legislation goes to the heart of both of these fundamental issues. To that end, the report made a series of recommendations which this paper has outlined.

The stark truth is that none of the proposals put forward in *Making The Law*, in two separate reports by the Procedure Committee, and in other reports such as the Royal Commission on House of Lords Reform and the Conservative Party Commission on Strengthening Parliament, have been implemented

by the Government. The result is that the system for scrutinising delegated legislation is exhibiting the same problems identified ten years ago, but in the context of an increasing volume of SIs.

It is a reality that for parliamentary and legislative reform to make any progress, there must be government support. It is essential, therefore, that Parliament returns to this subject and continues to make the case for reform. The recommendations outlined in *Making The Law*, and by others, particularly the Procedure Committee, would, if adopted, improve a system that has attracted criticism from across the political spectrum, both inside and outside Parliament.

ENDNOTES AND REFERENCES

- 1 The Report of the Hansard Society Commission on the Legislative Process (1993), *Making The Law*, chaired by Rt Hon Lord Rippon of Hexham.
- 2 The first two papers in this series considered Private Members' Bills and Standing Committees.
- 3 See Hayhurst, J.D. and Wallington P. (1998) 'The Parliamentary Scrutiny of Delegated Legislation' in *The Law Making Process*, Zander, M, London, Butterworth, (1994), p.95.
- 4 Page, E.C. (2001) *Governing by Numbers: Delegated Legislation and Everyday Policy-Making*, Portland, Hart Publishing.
- 5 Recent examples of delegated legislation include rules made by the Department of Trade and Industry on corporate insolvency under the Enterprise Act 2002 and new powers over pirate radio stations, made under the Communications Act 2002, introduced in September 2003.
- 6 See Procedure Committee, *First Report (1999 – 2000) Delegated Legislation* HC 48 and Tyrie, Andrew MP (2000) *Mr Blair's Poodle, An Agenda for Reviving the House of Commons*, Centre for Policy Studies.
- 7 When following negative procedure, an SI is produced in draft and comes into force unless a motion to annul (known as a prayer) is passed within 40 days. However such motions are rarely tabled. Prayers are generally put down as Early Day Motions. If the Official Opposition puts them down they stand a better chance of being debated either in the Standing Committee or on the floor of the House. The principal disadvantage of the negative procedure in the Commons is that there is no requirement for prayers to be debated at all; the decision whether to do so is made by the Government.
- 8 Blackburn, R. and Kennon, A. (2003) *Griffith & Ryle on Parliament: functions, practice and procedures*, London, Sweet and Maxwell.
- 9 See Endnote 7.
- 10 'Henry VIII Clauses' are so called because statutory legislation was first used by Henry VIII in the Statue Proclamation of 1539, giving him the power to legislate by proclamation.
- 11 Fourth Report of the Procedure Committee (1995-1996) *Delegated Legislation*, HC 152 and First Report of the Procedure Committee (1999-2000) *Delegated Legislation*, HC 48.
- 12 Lord Norton, Professor The Lord Norton of Louth, (Chairman), (2000) *Strengthening Parliament, Report of the Commission to Strengthen Parliament* (Conservative Party).
- 13 First Report of the Procedure Committee (2002- 2003) *Delegated Legislation: Proposals for a Sifting Committee*, HC 50.
- 14 Second Report of the Procedure Committee (2002- 2003) *Delegated Legislation: Proposals for a Sifting Committee, the Government's Response to the Committee's First Report*, HC 684.
- 15 First Report of the Liaison Committee (1999-2000) *Shifting the Balance: Select Committees and the Executive*, HC 300.
- 16 See Endnote 8.
- 17 Parliament First (2003) *Parliament's Last Chance*.
- 18 Winetrobe, Barry K (2001) *Realising the Vision of a Parliament with a purpose: an audit of the first year of Scottish Parliament*, Constitution Unit, UCL, Table 6.3, p. 95.

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The views expressed in this report are those of the author and the Hansard Society, as an independent non-party organisation, is neither for nor against. The Society is, however, happy to publish these views and to invite analysis and discussion of them.

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