The Hansard Society Delegated Legislation Review

HANSARD SOCIETY

A Hansard Society initiative funded by
The Legal Education Foundation

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The Hansard Society has long argued that the system of delegated legislation is not fit for purpose.

It has now embarked on a Review of Delegated Legislation, with funding support generously provided by The Legal Education Foundation.

We will be working through 2022 with parliamentarians and legal and constitutional experts to develop concrete, practical proposals for reform.

Delegated legislation: centre stage

After decades languishing in relative obscurity, delegated legislation is now at the centre of often contentious political debates. It is delegated legislation - delegated powers in Bills and the resulting Statutory Instruments (SIs) - that has been used to amend the statute book to support the UK's departure from the EU. And it is through delegated legislation - over 500 SIs - that the government has tackled the Coronavirus pandemic.

But, after these events, delegated legislation is not going to fade again into the background. It will remain the principal legislative vehicle for delivering the government's agenda in critical policy areas in the coming years.

New Acts for immigration, agriculture, fisheries and customs are replete with broad delegated powers. The same seems set to apply to further major Bills still to reach the statute book, on the environment, healthcare, borders, subsidies and online harms, for example. Trade agreements will require implementation via SI. And plans for regulatory reform, and to review retained EU law, herald the prospect of more legislation and a further raft of Statutory Instruments.

The parliamentary scrutiny process for delegated legislation is thus poised to be an ongoing focus of political controversy and constitutional concern.

Confidence in the system is waning

Public and parliamentary confidence in the delegated legislation system has been stretched close to breaking point in recent years. During the pandemic in particular, Parliament was marginalised by Ministers' habitual use of 'urgent' powers. To the astonishment of many people, a single Minister's signature on a Statutory Instrument, accompanied by a simple declaration of urgency, was sufficient to 'lock down' the whole of England, with no obligation to consult Parliament for up to 28 sitting days.

This was an extreme case, in a pandemic. But legal and constitutional experts, and multiple parliamentary committees, have long regarded the way in which Parliament deals with delegated legislation as deficient; the problems well pre-date Brexit and Covid-19. It is not a partisan issue: although recent governments have been widely criticised for their approach to delegated legislation, administrations of all political stripes over the last quarter century have pushed the boundaries of executive law-making using delegated powers.

Yet, despite reform proposals being made repeatedly over the years by a range of parliamentary committees, the essential architecture of the system has remained largely unchanged, particularly in the House of Commons. By launching our Review of Delegated Legislation, we aim to harness the increased awareness and dissatisfaction that now exists to galvanise reform of the system.

WHAT'S THE PROBLEM?

There are problems with both the delegation of **powers** in Bills and the **scrutiny** of the Statutory Instruments (SIs) that arise from those powers.

Problems with the delegation of powers

The **powers that Acts give Ministers to make delegated legislation are often too broad.**

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This may happen because **too many Bills are now 'skeleton' Bills** that contain powers rather than policy – reflecting administrative convenience, incomplete policy development or Ministers' wish for the greatest freedom to act at a later date. The result is legislation that is very difficult to scrutinise.

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The trend towards broadly-drawn powers is also advanced by the **power of precedent in the legislative process**. When Parliament accepts controversial powers in a Bill (as happened during the Brexit process), it creates a precedent that makes it politically easier for the government to argue in favour of taking similar powers in subsequent Bills – creating a 'normalisation' or 'ratchet' effect.

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As a result of such processes, **the boundary between what should go in primary and what should go in delegated legislation is blurred.** Significant policy decisions – including the creation of criminal offences and measures with substantial financial implications – are being enacted by Ministers via SI with limited parliamentary scrutiny.

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'Henry VIII powers' – which enable Ministers to amend or repeal primary legislation by SI – are common. While some 'Henry VIII powers' can be anodyne in their application, others have serious constitutional implications. If Ministers can, with little oversight, alter Acts that Parliament has passed, it calls into question the purpose of Parliament's detailed scrutiny of Bills.

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Broadly-drawn powers can also **pose a political risk** because they may be used by a future Minister – potentially decades later – in ways that Parliament could not have anticipated at the time it granted them.

Problems with the scrutiny of Statutory Instruments

There is no sensible correlation between the content of an SI and the scrutiny procedure to which it is subject. Scrutiny procedures are generally set out in the parent Act and may therefore have been determined years before an SI appears. MPs may be required to spend time debating uncontroversial SIs of little relevance to them but struggle to secure a debate on other SIs that are of significant concern to them or their constituents.

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Parliament has no power of amendment, and the risk of an SI being rejected is negligible. A 'take it or leave it' decision acts as a powerful disincentive to scrutiny. Even when MPs or Peers identify specific concerns with an SI, they have no mechanisms to oblige the government to think again, other than the drastic step of rejecting an Instrument in its entirety. Only 16 SIs have been rejected since 1950, and no SIs have been rejected by the House of Commons since 1979, so Ministers know the risk they run in standing firm is low. The 'all or nothing' nature of SI scrutiny procedures means that the resources Parliament and parliamentarians do expend on scrutiny of SIs have only limited effect on the law.

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Government control of the House of Commons agenda restricts MPs' ability to secure debates on SIs of concern. MPs must table a 'prayer' motion if they wish to debate an SI which is subject to the 'negative' scrutiny procedure. But it is the government that decides whether to grant time for the prayer motion to be debated. There is no guarantee that time will be allocated even to a prayer motion tabled by the Leader of the Opposition. Sometimes the government allows a debate but schedules it only after the SI has come into force and/or after the statutory scrutiny period has passed.

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The scrutiny procedures are superficial and often a waste of time, particularly in the House of Commons. SIs which are subject to the 'affirmative' procedure are debated – but, in the Commons, the Whips control appointment to the Delegated Legislation Committees (DLCs) where this usually takes place. MPs often see appointment to a DLC as a 'punishment', while their Whips see those who actively contribute to the debates as a 'nuisance'. Debate is frequently perfunctory – rarely lasting more than half an hour – and the vote at the end is held on a pointless 'consideration' motion. In the Lords, Peers may table a 'regret' motion about an SI; but, while this potentially inconveniences Ministers, it does not restrict them. More detailed scrutiny is undertaken by the dedicated scrutiny select committees, but they are also unable ultimately to compel the government to respond to their reports or remedy a defect.

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There is no penalty for poor-quality Explanatory Memoranda and other supporting documentation. Effective scrutiny requires the government to explain and provide the evidence base for its decisions. But there is no constraint on the government proceeding with the SI even when parliamentarians have complained about a poorly-prepared Explanatory Memorandum. Parliamentarians, and especially MPs, also lack access to the expert policy advice that is often needed to subject government evidence to detailed scrutiny.

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The system is confusing and overly complex. The scrutiny process is couched in procedural language that is difficult for even the most seasoned observers of Parliament to understand. And there are now so many variations on procedure (we estimate that there are at least nine forms of 'strengthened' scrutiny for SIs where 'normal' scrutiny processes have been judged inadequate), and these are so often unnecessarily complex, that many MPs willingly admit they do not understand them.

REFORM
What difference could it make?

Reform of the scrutiny system could help parliamentarians 'sort the wheat from the chaff' and so focus their time and scrutiny on those SIs that matter most, legally and politically.

Today's parliamentarians could decide on the scrutiny process that applies to a Statutory Instrument. They could have a menu of options to choose from so that they could match the level of scrutiny to the importance of the issue. This would end the current unsatisfactory situation whereby an Act passed sometimes years ago determines how an SI today is scrutinised.

The resources available to parliamentarians, particularly MPs, to undertake scrutiny of SIs could be enhanced and better deployed. Compared to the resourcing of scrutiny of policy (via Select Committees), and the public finances (via the Scrutiny Unit and the National Audit Office), the resourcing of the legislative scrutiny process in the House of Commons is poor.

A new Statutory Instruments Act could address scrutiny issues and legal matters, but it could also bring the rules around consultation, printing and publication of SIs into the digital age. The current Statutory Instruments Act is 75 years old.


BENEFITS FOR GOVERNMENT

Better management of the Statutory Instrument production process and eased pressure on resources

Improved relations with both Houses of Parliament through a more constructive scrutiny process

Reduced prospect of judicial review. The Faulks Review of judicial review noted that respect by judges for Parliament was '*rendered easier where there is evidence of real parliamentary scrutiny.*'

BENEFITS FOR PARLIAMENT

A more responsive scrutiny process that better enables MPs to represent their constituents' concerns

Better use of MPs' time so that it is no longer wasted in ineffectual Delegated Legislation Committees

Greater access to expert advice and support

Enhanced reputation. Reform would send a powerful message about the health of the political system and the effectiveness of our MPs.

BENEFITS FOR THE PUBLIC

Better law. Improving the quality of SIs is in everyone's interest.

Delegated legislation is the 'law of everyday life'; when it is bad, it can have a devastating impact.

Better scrutiny procedures alone cannot fix a deficient policy development process, but they can enhance the prospect of getting legislation that is '*necessary, effective, clear, coherent and accessible*', all of which the Office of the Parliamentary Counsel describes as the classic tests of good law.

THE REVIEW: What next?

Over the course of 2022 our Review will develop our existing ideas – in consultation with parliamentarians and constitutional experts – into fully-formed proposals for reform of the system. We will be holding a series of public and private events to explore the key issues, and publishing regular briefings, discussion papers and reports setting out our latest ideas, research and data analysis. Drawing widely on expert advice and research evidence, we will be designing an alternative approach to delegated legislation that works for government, Parliament and the public and that will strengthen our system of parliamentary democracy.

If you have ideas about ways in which the system could be improved or have evidence about how the delegated legislation system works in practice – good or bad – then please do get in touch. We want to hear from you. We would, for example, welcome the views of parliamentarians, officials and 'end-users' of delegated legislation on some of the key questions with which we are grappling. For example:

- *How can reform help government better manage and resource the delivery of its SI programme?*
- *Where should the boundary lie between what goes in primary and what goes in delegated (or secondary) legislation?*
- *Should Parliament be able to amend delegated legislation?*
- *What provisions should be included in a new Statutory Instruments Act?*
- *What resources and support would enable parliamentarians to scrutinise SIs more effectively?*
- *Could a reformed scrutiny process facilitate more law-making through delegated legislation?*

Updates about the Review will be available via our website – **www.hansardsociety.org.uk** – where you can sign up for our e-newsletter for regular updates direct to your inbox.

Why the Hansard Society?

The Hansard Society has been researching delegated legislation in detail since 2011 and in 2014 published the first in-depth study of the parliamentary scrutiny of delegated legislation at Westminster in over 80 years. In that report, *The Devil is in the Detail: Parliament and Delegated Legislation*, we already concluded that the scrutiny system needed wholesale reform. We have continued since then to take a close interest in the system and to publish further analyses and reform proposals.

In particular, on the basis of our research, we developed a unique online application – the Hansard Society Statutory Instrument Tracker® – through which we record in real time the progress of all Statutory Instruments laid before Parliament. We are therefore able to deploy a unique database of research evidence about the way in which the scrutiny process works.

If you would like to contribute to the Review, contact:

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