Delegated legislation: the problems with the process

Introducing the Hansard Society's Delegated Legislation Review

HANSARD SOCIETY

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1. WHY A REVIEW OF DELEGATED LEGISLATION, AND WHY THE HANSARD SOCIETY?

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. The complex provisions in the Northern Ireland Protocol and the 'common framework' policies affecting the devolved nations will also be delivered via SIs. 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.

A constitutional challenge as confidence in the system wanes

However, public and parliamentary confidence in the delegated legislation system has been stretched close to breaking point in recent years. At stake is democratic control of political power. Will Parliament continue to be a rubber-stamp? How credible is it for 1,000 or more SIs to be laid before Parliament each year and for parliamentarians to exercise little or no influence on their content? How reasonable is it for MPs to be unable to amend SIs and seemingly unwilling to reject them, regardless of any policy flaws or drafting defects they may contain?

Concern about parliamentary scrutiny of, and accountability for, delegated powers and SIs is now one of the most significant constitutional challenges of our time. 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.

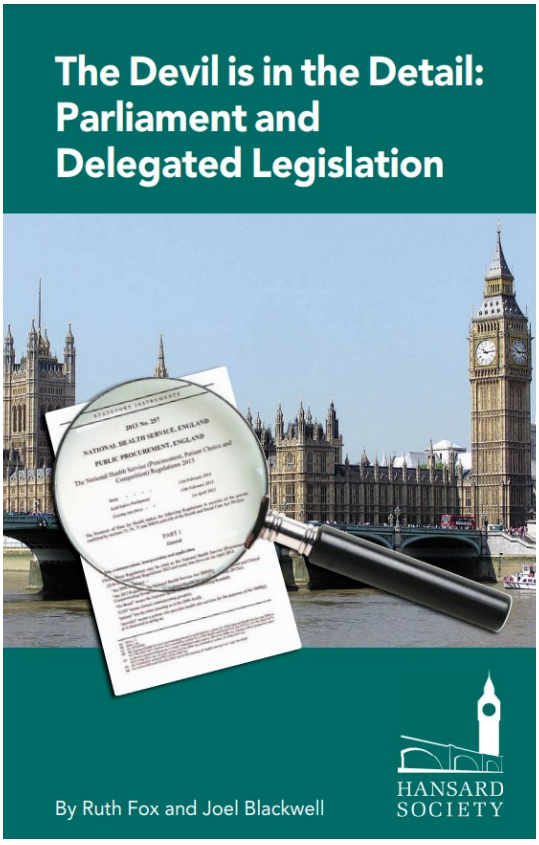
This was an extreme case, in a pandemic. But legal and constitutional experts, and multiple parliamentary committees, have long regarded the way in which Parliament deals with delegated legislation as deficient; the problems significantly pre-date Brexit and Covid-19. It is not a partisan issue: although recent governments have been especially 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. For example, the 2006 Legislative and Regulatory Reform Bill introduced by the Blair government was colloquially known as the 'Abolition of Parliament Bill', such was the scope and constitutional significance of the delegated powers it contained.

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.

The Hansard Society's work on delegated legislation

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



We have now embarked on a Review of Delegated Legislation, with funding support generously provided by The Legal Education Foundation. In launching the Review, we aim to harness the increased awareness and dissatisfaction that now exists about SIs to galvanise reform.

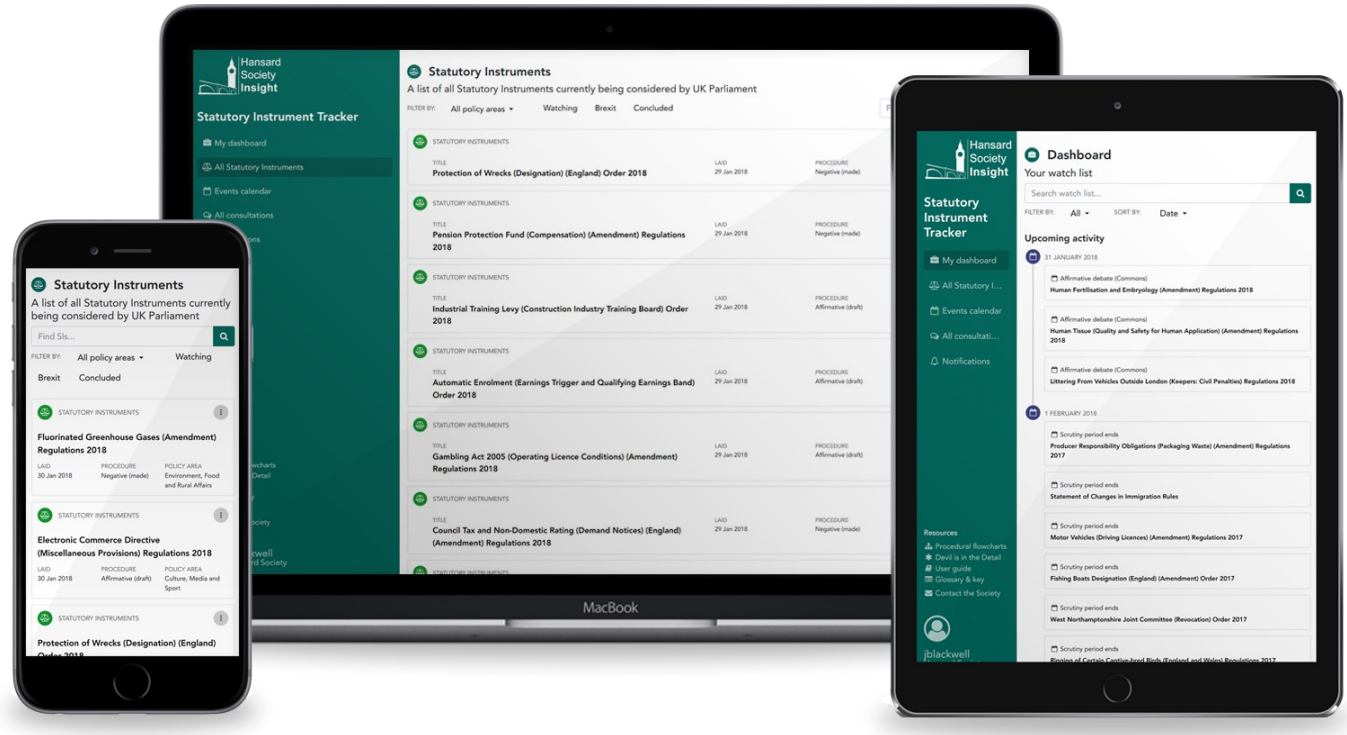
While we have previously made the case for incremental changes, in light of the Brexit and pandemic experience we have concluded that

fundamental and far-reaching reform is needed. Over the course of 2022, our Review will develop our existing ideas – in consultation with parliamentarians, and constitutional and legal 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.

In undertaking the Review, we begin from the basic premise that delegated legislation is a necessary feature of modern governance: it is not necessary, possible or even desirable to make legislative changes solely via primary legislation. The problem with delegated legislation lies in its inappropriate use. Since we are to have delegated legislation, it is essential that it is carefully prepared, properly evidenced, and subject to meaningful parliamentary scrutiny.

This report introduces some of the issues that will be addressed during the Review. There are problems with both the **delegation of powers** in Bills and the **scrutiny of the SIs** that arise from those powers. With respect to these two aspects of the system in turn, this report sets out some of the central problems that need to be resolved. A number of case studies evidence the problems and provide practical illustrations of why reform is needed.



The Hansard Society Statutory Instrument Tracker®

2. PROBLEMS WITH THE DELEGATION OF POWERS

The powers to make delegated legislation that Parliament grants Ministers in Acts of Parliament are often too broad.

i) 'Skeleton' Bills: deferring the detail

Too many Bills are now 'skeleton' Bills (or have 'skeleton' parts to them) 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.

In 'skeleton' Bills the majority of the content is left to be decided at a later date through delegated legislation. Broadly-drawn delegated powers cannot be effectively scrutinised, and the Statutory Instruments that emanate from these powers are subsequently also subject to little or no parliamentary scrutiny. Ministerial action is thus not accompanied by any meaningful parliamentary oversight.

The Delegated Powers and Regulatory Reform Committee (DPRRC), which looks at the delegated powers in almost all Bills, drew attention to the fact that the **2016 Childcare Bill** "*contains virtually nothing of substance beyond the vague 'mission statement' in Clause 1 (1)*".[1]

The Committee similarly judged that the **2018 Haulage Permits and Trailer Registration Bill** was "*wholly skeletal, more of a mission statement than legislation*".[2]

With respect to the 2018 version of the **Agriculture Bill**, the Committee concluded, even more damningly, that: "*Parliament will not be able to debate the merits of the new agriculture regime because the Bill does not contain even an outline of the substantive law that will replace the CAP after the United Kingdom leaves the EU. Most debate will centre on delegated powers because most of the Bill is about delegated powers. At this stage it cannot even be said that the devil is in the detail, because the Bill contains so little detail*".[3]

ii) Vague and ambiguously worded powers that confer excessive ministerial discretion

Ministers increasingly seek very broad powers which are open to wide interpretation. Powers that provide for a Minister to be able to simplify or improve something, for example, provide considerable scope for ministerial discretion. As the Delegated Powers and Regulatory Reform Committee has noted, one person's improvement may be another person's vandalism.[4]

Bills sometimes include a power to enable Ministers to ensure that the provisions remain fit for purpose in the future. This enables government to change the provisions of the Act by delegated legislation if their policy changes at a later date, and to do so without meaningful recourse to Parliament. Similarly, powers in the 2018 Data Protection Bill were sought on grounds of flexibility in order to deal with future changes in circumstances. But this approach enables Ministers to legislate with limited parliamentary scrutiny, in areas of policy which are undefined and unknown at the time the power is granted.

Ministers sometimes seek powers to enable them to take actions they consider 'appropriate in connection with' a Bill. This wording leaves the power to make consequential provision a matter for the subjective judgement of Ministers, rather than a more objective test of necessity. Conditions may be imposed on the exercise of a power but if these provisions are not exhaustive then considerable ministerial discretion will still remain.

iii) Power of precedent in the legislative process

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.

The 2021 Health and Care Bill, for example, includes a power to transfer functions between health bodies on the basis of precedent: justified on the basis that there are comparable powers in the Public Bodies Act 2011 which apply to a wider range of bodies than the power in the 2021 Bill. However, Parliament inserted safeguards into the Public Bodies Bill – a strengthened scrutiny procedure (known as the 'enhanced affirmative' procedure) and the sunsetting of some provisions – which are not reflected in the 2021 Bill. The government thus claimed the precedent for the power but ignored the precedent for the scrutiny procedure.[5]

iv) The blurred boundary between what should go in primary and what should go in delegated legislation

Historically, delegated legislation was designed for prescribing matters of administrative and technical detail, not substantive policy decisions. Gradually, however, the threshold between primary and delegated legislation has shifted. Today, significant policy decisions – including the creation of criminal offences, measures that infringe people's rights, or incur substantial financial implications – are being enacted by Ministers via SI with limited parliamentary scrutiny.

In recent years, for example, delegated legislation has been used to allow fracking under English National Parks and World Heritage Sites; to cease operation of a statutory adoption register; and to establish the entire UK REACH regulatory regime for the post-Brexit control of chemicals use.

In 2015, the means-tested student maintenance grant available to lower-income students was replaced with a new increased loan for living costs for new full-time students starting in the 2016-17 academic year. This was done by delegated legislation rather than a Bill – in the shape of the **Education (Student Support) (Amendment) Regulations 2015**.[6] This was not a technical tinkering with payment thresholds, but a significant change to the financial framework underpinning student access to higher education, with considerable financial implications for government and students.

Also in 2015, the **Human Fertilisation and Embryology (Mitochondrial Donation) Regulations**[7] enacted a significant policy decision with important ethical and moral dimensions. The Regulations enabled mitochondrial donation techniques to be used, under licence, as part of in-vitro fertilisation (IVF) treatment – that is, they permitted the use of a third person's mitochondria to replace defective material from the mother, thereby preventing the transmission of mitochondrial disease from a mother to her child. Many parliamentarians felt that delegated legislation was an inappropriate vehicle for a measure engaging such important and controversial issues.

The **Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015**[8] gained notoriety when the House of Lords declined to consider the SI, following which the government established the Strathclyde Review with a view to curbing House of Lords powers over SIs in the future. But this controversy aside, the Regulations also prompted questions as to whether it was appropriate to use delegated rather than primary legislation to enact such a significant financial measure. In evidence to the Secondary Legislation Scrutiny Committee (SLSC), the then Minister, Earl Howe, said that the SI related to "*a major plank of the Government's economic and fiscal strategy under which a reshaping of tax credits would contribute swiftly and substantially to a reduction in the public sector deficit*".[9]

The establishment of important public bodies has also been left to delegated powers rather than set out on the face of primary legislation, shifting the balance of oversight and accountability away from Parliament. The Children and Social Work Bill introduced to Parliament in 2016, for example, proposed to establish a dedicated regulatory body for social workers, but there were no details about this body on the face of the Bill. There was little information about the identity of the regulator or other members of the body, and nothing about its constitution or governance. Parliamentarians were asked to approve the establishment of a public body, in principle, with little or no idea about how it would function and to whom it would be accountable.

A worrying development is the extent to which successive governments have sought powers to create criminal offences by delegated legislation rather than doing so in Acts of Parliament. Creating offences to which a fine attaches with little or no parliamentary scrutiny is one thing; creating offences punishable by imprisonment represents a different order of magnitude. Should it be possible for Ministers to create such an offence with little or no oversight by Parliament?

NET ZERO: A major policy decision subject to just 90 minutes debate

An important recent example of delegated legislation being used to introduce a major policy change was the decision to increase the UK's climate change target from an 80% reduction in greenhouse gas emissions by 2050 to 100% ('net zero').

The adoption of the 'net zero' target via SI was possible because of a power conferred on Ministers in the Climate Change Act 2008. The revised target was introduced on the advice of the Climate Change Committee, which said that 'net zero' was achievable with known technologies and within the expected cost framework that Parliament accepted at the time of the 2008 Act, but that new policies needed to be introduced without delay as current policy was insufficient to reach even the existing 80% target.[10]

However, the change in the target was not a mere technical update: it was a consequential policy decision, with significant financial implications.

But, as a Statutory Instrument subject to the 'affirmative' scrutiny procedure, the **Climate Change Act 2008 (2050 Target Amendment) Order 2019**[11] was debated for just 90 minutes by MPs, despite the significant economic and social implications of the proposal.

During the debate, a number of MPs commented on the lack of time available, and the mismatch between the importance of the SI and the 'low-key' nature of the debate. The Deputy Speaker noted that, due to the 90-minute limit on the debate, "*Every time somebody intervenes, they take away the time of Members who have been sitting patiently, waiting to make speeches*". The Minister acknowledged that the "*format of this debate prevents me from responding to many of the points made*".[12]

In the House of Lords, an amendment to the approval motion was passed, regretting the lack of detail about how the target would be met and of "*the full and proper scrutiny that such a change deserves*".[13]

Meanwhile, the former Director of Legislative Affairs at No. 10 Downing Street tweeted that this SI was "*another good example of advantages of legislating by secondary powers when a minority govt - seen to take action without risking gauntlet of amendment/more than one vote*".[14]

v) 'Henry VIII powers'

A 'Henry VIII power' is a delegated power in an Act of Parliament that enables Ministers to amend, repeal or otherwise alter the effect of primary legislation by delegated legislation. The use of such powers challenges the constitutional principle that Parliament is the sole legislative authority with the power to create, amend or repeal any law.

'Henry VIII powers' are now a relatively common feature of Acts of Parliament. Some 'Henry VIII powers' can be anodyne in their application. The Welfare Reform Act 2012, for example, abolished several benefits and replaced them with a new Universal Credit system. Parliament assented to the policy change in the 2012 Act, but amendments to other previous welfare-related Acts were needed so that these correctly referenced Universal Credit instead of the benefits that had been abolished. Using a 'Henry VIII power' in the 2012 Act, Ministers introduced **The Universal Credit (Consequential, Supplementary, Incidental and Miscellaneous Provisions) Regulations 2013**[15] which amended 18 previous Acts of Parliament in the welfare field.

Other 'Henry VIII powers' can have serious constitutional implications. They call into question the purpose of Parliament's detailed scrutiny of Bills.

One particular area of concern is the now-routine inclusion of a power for Ministers to give effect to an Act by making supplementary provision through Statutory Instruments, including the power to amend the Act itself. Such powers grant Ministers the freedom to decide what they consider is necessary to give full effect to an Act and then to alter the detail of the Act accordingly, including by amending what Parliament has previously enacted. Such 'Henry VIII powers' are particularly worrisome as they lower the bar on legislative standards.

vi) Political risk: powers remain on the statute book, to be used potentially years later

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 may not have anticipated at the time it granted them. Such powers may be used by Ministers of a different political stripe, in a different political and policy environment, potentially decades after the powers were sought in the first place.

For example, asset-freezing powers contained in the Anti-Terrorism, Crime and Security Act 2001 were used during the financial crisis in 2008 to freeze the assets of the Icelandic bank Landsbanki after it was placed in receivership.[16] UK investors – including many local councils – had significant funds in Icesave (the UK branch of Landsbanki) and the government wanted to prevent Icesave assets leaving the UK. The decision to freeze the assets was justifiable in the circumstances and given the scale of funds at risk. However, it prompted a diplomatic incident, angering politicians and the public in Iceland. The House of Commons Treasury

Select Committee subsequently noted that "*the use of this Act inevitably stigmatises those subject to it and a less blunt instrument would be more appropriate*".[17] However, the saga powerfully demonstrated that powers intended to be used in one context – namely tackling terrorist funding networks – could be triggered years later in a completely different context.

Ministers are inclined to adopt a 'trust us' approach, promising not to ride roughshod over the legislature or, of course, to misuse the powers they are granted. But Parliament must assess delegated powers not just on how the incumbent Minister proposes to use them but also on how they could be used by any future successor.

vii) 'Urgency': powers to legislate at speed

Between January 2020 and October 2021, just over 500 Coronavirus-related Statutory Instruments were laid before Parliament. Of these, 91 were made using the 'emergency procedure' power in the Public Health (Control of Disease) Act 1984 (as amended by the Health and Social Care Act 2008).[18] This provision confers a power on Ministers to use the 'made affirmative' scrutiny procedure "*if the instrument contains a declaration that the person making it is of the opinion that, by reason of urgency, it is necessary to make the order without a draft being ... laid and approved*". This means an SI made using this power can become law before being scrutinised, and requires only retrospective parliamentary approval, within 28 days (excluding any time during which Parliament is prorogued or dissolved, or during which both Houses are adjourned for more than four days).

This scrutiny mechanism undermines accountability; it turns Parliament into a rubber stamp. A Minister only has to declare that a matter is urgent in order to use the power; (s)he does not have to provide evidence for or justify the grounds on which they believe the matter to be urgent. They do not have to consult anyone about their decision and they do not need to make a statement to Parliament or provide additional supporting documentation to support their claim of urgency.

This power was relied on excessively by Ministers during the pandemic. However, it is not the only 'urgent' power on the statute book. A similarly worded power can be found in a number of other Acts of Parliament, including most recently the European Union (Future Relationship) Act 2020.

WEARING OF FACE COVERINGS: Unjustified use of the 'emergency procedure' power

The Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place) (England) Regulations 2020[19] were laid before Parliament on 23 July 2020 using powers in the Public Health (Control of Disease) Act 1984. The Minister claimed that the measures were urgent and that they were therefore subject to retrospective parliamentary approval under the 'made affirmative' scrutiny procedure. The Regulations came into force the following day, 24 July 2020.

The government first advised the public to wear face masks on 11 May 2020, but face coverings only became mandatory on public transport on 15 June, in shops and transport hubs on 24 July and in other relevant places on 8 and 22 August.

Ministers argued that the legal provisions were delayed because the evidence on the effectiveness of face coverings was evolving, but that the provisions were now needed to coincide with the easing of 'lockdown' restrictions and therefore a rise in footfall in shops, public transport and other areas was increasing.

The Regulations were not debated by MPs until 14 September 2020 (because of the summer recess). When challenged to explain the urgent basis of the SI, the Health Minister did not have an answer: "*I will look further into what the urgency was, but I imagine that the evidence that we were getting at the time was that face coverings could prevent people who might be asymptomatic from spreading or contracting the virus*".[20]

3. PROBLEMS WITH THE SCRUTINY OF STATUTORY INSTRUMENTS

i) 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.

During the pandemic, for example, MPs have been unable to debate the ever-evolving series of restrictions and requirements relating to international travel because of the scrutiny procedure determined by the parent Act.[21] MPs could also not debate pandemic-related SIs which extended permissible pre-trial custody by 56 days to a potential total of 238 days,[22] or which permitted the denial of visits to prison and young offender institutions for up to six months.[23]

> Some MPs wished to debate the **Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020.**[24] This SI amended legislation that is nearly two centuries old (the Wills Act 1837) to permit the use of video-link technology in the witnessing of wills, given Coronavirus restrictions. Unusually, the SI had retrospective provision, applying to wills made since the start of the pandemic, nine months earlier. This elicited concerns in the legal community about the prospect of legal challenge to the validity of the Instrument.[25] John Stevenson MP, a Conservative backbencher and solicitor by training, 'prayed' against the SI, but to no avail; the government did not grant time for a debate.[26]

In contrast, because the parent Act stipulated the use of the 'affirmative' procedure, MPs in May 2020 were required to debate the Regulations that delegated fire and rescue functions in Greater Manchester from the Mayor of the Greater Manchester Combined Authority to the Deputy Mayor for Policing and Crime. As important as these Regulations were, they were most relevant to MPs from the north-west of England and elicited little wider interest among parliamentarians.[27] Their political and legal implications were less obviously topical or controversial compared to the pandemic-related regulations that MPs were unable to debate.

ii) 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. And the 'all or nothing' nature of SI scrutiny procedures means that the resources Parliament and parliamentarians expend on scrutiny of SIs have only limited effect on the law.

Only 16 SIs have been rejected since 1950, and no SI has been rejected by the House of Commons since 1979.[28] Ministers thus know that the risk they run in standing firm in the teeth of opposition is low.

In addition, 'negative' SIs can and often do come into force within 40 days of being laid and therefore before the statutory scrutiny period has expired. This inevitably deters parliamentarians from expending political capital and precious time in seeking a debate on this legislation.[29]

iii) Government control of the House of Commons agenda enables Ministers to restrict MPs who are seeking to annul SIs

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 40-day scrutiny period has passed.

The 40-day scrutiny period is the official route – set out in the Statutory Instruments Act 1946 – for MPs to hold Ministers to account for SIs which are subject to the 'negative' scrutiny procedure. 'Made negative' SIs are laid before Parliament after they have been made – signed – into law by the Minister. As 'negative' SIs, they do not require parliamentary debate or active approval; but, under section 5 of the Statutory Instruments Act 1946, they may be annulled if a motion to do so – known as a 'prayer' – is passed by either House within 40 days of the date of laying. If either House resolves within the 40 days that a 'made negative' SI should be annulled, the SI will cease to be law, as the government is statutorily bound to revoke it by Order in Council.

After the 40-day period expires, a 'made negative' SI can still be debated, but the motion to reject it must take the form of a motion that it should be 'revoked' rather than 'annulled'. What would happen to an SI if it were rejected beyond the 40-day scrutiny period is untested. Ministers might argue that, legally, they are under no obligation to bring forward an Order in Council to revoke the SI because they are beyond the 40-day scrutiny period. Politically, such a legalistic position would be difficult to maintain. Nevertheless, there is at least some ambiguity about the effect of an out-of-time resolution against a 'negative' SI.

SIs subject to the 'negative' procedure are the dominant form of delegated legislation, accounting for about three-quarters of all SIs laid before Parliament in an average parliamentary session. By delaying the scheduling of debates, successive governments have used parliamentary procedure to frustrate the 1946 Act and thereby undermine the principle of parliamentary accountability.

VULNERABLE YOUNG PEOPLE IN CARE: an inability to amend regulations

On 19 February 2021 the government laid **The Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021**[30] before Parliament, subject to the negative procedure. This SI prohibits the placement of looked-after children under the age of 16 in independent and semi-independent settings which are not required to register with Ofsted. They must instead be placed in Ofsted-regulated children's homes or foster care. The SI does not apply to young people in care aged 16 and 17.

The Children's Commissioner raised serious concerns about the measure, and the SI therefore attracted significant intra- and extra-parliamentary interest. On 2 March 2021, the Secondary Legislation Scrutiny Committee (SLSC) drew the Instrument to the 'special attention' of the House of Lords,[31] where a 'non-fatal' 'take note' motion was tabled and debated three weeks later. In the House of Commons, a motion to revoke the SI was tabled by the Leader of the Opposition on 27 May 2021,[32] but the government only found time to debate it nearly two months later, on 20 July 2021, in a Delegated Legislation Committee.

The official Opposition broadly supported the SI but wanted to extend the provisions to 16 and 17-year-olds. However, as SIs are not amendable, they were faced with a 'take it or leave it' proposition. As the Labour spokesperson, Peter Kyle MP, made clear: "*This is one of those moments when the Opposition are put in a tricky position. We welcome the increased provision and regulatory safeguards for children under the age of 16, but we are frustrated that those same protections are not available to older young people… We will not push the motion to a vote because we believe that any move forward and any additional protection for any number of young people is something that we should never ever block...*"[33] The regulations came into force on 9 September 2021.

Legal proceedings against the Department for Education have now been brought by Article 39, a campaign group which argues that the regulations are discriminatory and were made following an unfair consultation.[34]

Specifically, the problem lies in the government's control of time in the House of Commons. Standing Order No. 14 states that "*Save as provided in this order, government business shall have precedence at every sitting*".[35] The government is therefore entitled under Standing Orders not to grant time for consideration of a 'prayer' motion within the 40-day scrutiny period, or indeed at all. House of Commons Standing Orders and the provisions of the 1946 Statutory Instruments Act stand in inherent tension.

In passing the 1946 Statutory Instruments Act, Parliament clearly intended that either House – Commons or Lords – would have an opportunity to require the annulment of SIs subject to the 'negative' scrutiny procedure. It was surely never the intention of Parliament that the opportunity for MPs to exercise this power would be dependent on the whim of a Minister or government business managers. Ministers are potentially acting unreasonably by failing to seek the view of the House of Commons within the 40-day period provided for in the 1946 Act, when asked to do so by the tabling of a 'prayer' motion in the form required by the Act. Standing Order No. 14 is permissive, not mandating: it does not *require* the government always to give its own business precedence. There is nothing in the Standing Order which would prevent government business managers from respecting the spirit of the 1946 Act by scheduling debates on negative SIs in a timely manner. It is ministerial choice not to do so.

iv) 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'. In anonymised interviews we conducted in previous parliamentary sessions, some MPs reported that they had been told by the Whips that it was perfectly acceptable - indeed preferable - to get on with their constituency correspondence during DLC meetings, and we have observed this in practice during DLC debates. In the words of one MP, "*you are told to sit quietly at the back and make sure you vote*".

Whether an SI is six or 600 pages long, debate is frequently perfunctory – rarely lasting more than half an hour. **The Product Safety and Metrology etc (Amendment etc) (EU Exit) Regulations 2019**,[36] for example, was a door-stopper at 619 pages, but was debated for just 52 minutes in the House of Commons[37] and 51 minutes in the House of Lords.[38]

A DLC debate in 2014 – on the draft **Contracting Out (Local Authority Social Services Functions) England Order** – lasted just 22 seconds.[39] A year later, in December 2015, the debate on the draft **Modern Slavery Act 2015 (Consequential Amendments) (No. 2) Regulations** lasted just one minute and 43 seconds.[40]

And the vote at the end of a DLC debate is held on a contentless 'consideration' motion (that is, that the Committee has considered the SI). Apart from inviting ridicule for being pointless, the setting-up of these Committees wastes valuable resources, particularly the time of Members and staff.

PLANNING REGULATIONS: the inadequacies of the 'negative' scrutiny procedure

In Summer 2020, a series of planning-related SIs were laid before Parliament to provide, among other things, for new permitted development rights and to facilitate a change of use of certain buildings by re-categorising them for planning purposes.[41] These Regulations were controversial: they made it easier to extend the height of buildings by up to two storeys, they permitted the demolition of vacant buildings to replace them with housing, and they allowed a change in use for high street buildings. The SIs were laid following publication of the 'Planning for the Future' policy paper in March 2020[42] but before publication of the White Paper in August 2020,[43] many of the proposals in which were subsequently shelved due to their politically controversial nature.

When former Minister David Gauke publicly questioned whether any meaningful planning reform would now take place, the Prime Minister's former chief adviser, Dominic Cummings, declared on Twitter: *"Like most in sw1 you haven't noticed the important SECONDARY legislation changes pushed thro last year, which we barely discussed publicly so MPs wdn't get over-excited. That's already improving things regardless of what happens with next phase".* [44]

The package of SIs was criticised by the Local Government Association for disempowering communities[45] and by a group of professional architecture and building industry bodies because of the "*potential impact on the quality of life of future residents and local communities*".[46]

The SIs were subject to the 'negative' scrutiny procedure because of the provisions in the parent Act, the Town and Country Planning Act 1990. In the House of Commons, the Leader of the Opposition tabled a 'prayer' motion against three of the instruments,[47] and the government backbencher and Father of the House, Sir Peter Bottomley MP, tabled a 'prayer' against one of them.[48] 'Regret' motions were also tabled against several of the SIs in the House of Lords.

In the Commons, because the date of the debate on the SIs fell beyond the 40-day statutory scrutiny period for one of the three Instruments, that Instrument was debated on a motion to 'revoke' it,[49] with the attendant legal uncertainty about what would happen in the unlikely event that the motion were agreed.

As it turned out, although parliamentarians raised concerns during the debate, and despite drafting errors in at least one of the SIs and the apparent contradictions in the government's own evidence about the quality of homes built under permitted development rights, the Regulations were neither annulled nor revoked.

At the time of writing, however, three of the SIs are subject to legal appeal on the grounds that they should have been subject to a Strategic Environmental Assessment after an earlier claim for judicial review was dismissed by the High Court. The appeal was heard on 5 October 2021 and the result is awaited.[50]

The debates often focus on the general policy area rather than the specific provisions in the SI, even though the scope of the debate is supposed to be confined to the Instrument at hand. The lack of briefing material and time for MPs and shadow Ministers to prepare affects the quality of the debates.

The knowledge that it will be over in about half an hour means that there is little incentive for Ministers to do much more than turn up and read out their brief. Any MP who subjected the parent Act to detailed scrutiny and raised questions about the proposed delegation of powers is unlikely to be appointed to sit on the DLC. The lack of external input and briefing material means that there may be few people involved in the process who are aware of what assurances or concessions, if any, were previously promised.

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 (the House of Lords Secondary Legislation Scrutiny Committee, SLSC; and the Joint Committee on Statutory Instruments, JCSI), but they are also unable ultimately to compel the government to respond to their reports or remedy a defect.

IMMIGRATION REGULATIONS: no ability to influence the content of the SI despite extensive concern inside and outside Parliament

The Immigration (Guidance on Detention of Vulnerable Persons) Regulations 2021[51] would bring potential victims of modern slavery fully within the scope of statutory guidance on Adults at Risk in Immigration Detention. When they were laid before Parliament, a range of civil society representatives were united in their opposition to the changes. They argued that the proposal ran counter to the government's stated aim of protecting victims of trafficking. The Independent Anti-Slavery Commissioner, Dame Sara Thornton, also expressed concern that victims of modern slavery would be vulnerable to harm if kept in detention.[52]

The Home Office acknowledged that "*some individuals may, as a result of the changes, be more likely to be detained, or have their detention continued, than would currently be the case*".[53]

Eighty-two MPs signed a 'prayer' to annul the Instrument and a debate was granted.[54] In the House of Lords a 'non-fatal' motion was tabled. Both the SLSC[55] and the JCSI[56] expressed concern about various aspects of the Regulations.

And yet, despite the level of concern expressed both inside and outside Parliament, the Regulations were brought into force with no changes, and no need for the government to go back to the drawing -board and think again.

v) There is no penalty for poor quality Explanatory Memorandums 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 an SI even when parliamentarians have complained about a poorly-prepared Explanatory Memorandum.

Through special inquiries and by calling Ministers and Permanent Secretaries to account at oral evidence hearings, the Delegated Powers and Regulatory Reform Committee (DPRRC) in the House of Lords has sought to drive improvements in the quality of Delegated Powers Memorandums (DPMs) published alongside Bills. The Secondary Legislation Scrutiny Committee (SLSC) in the House of Lords has also focused on the quality of Explanatory Memorandums (EMs) for SIs. It has long complained about the extended, legalistic, technical drafting style that renders many EMs impenetrable to users. Concern has also been expressed about the failure to provide an evidence base for SIs, particularly the results of any consultation.[57]

Ultimately, the quality of supporting information is unlikely to improve unless the government is forced to make changes and apply them consistently. But there are no minimum standards of legislative preparation, and Parliament cannot reject an inadequate, poorly-prepared Explanatory Memorandum, or delay the laying of an SI until the problem is rectified.

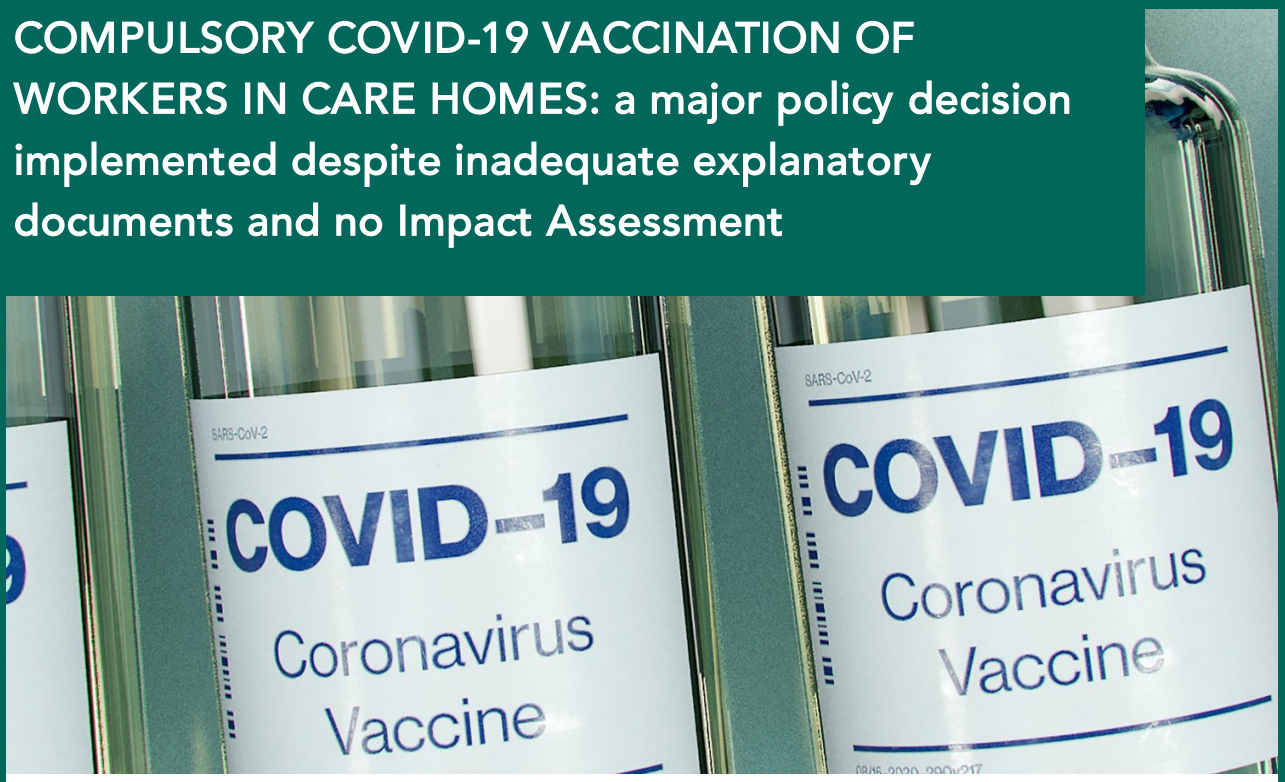
vi) The system is confusing and overly complex

The scrutiny process for delegated legislation is couched in procedural language that is difficult for even the most seasoned observers of Parliament to understand: '*made*' and '*laid*' SIs; '*negative*', '*affirmative*', '*strengthened*', '*enhanced*' and '*super-affirmative*' scrutiny procedures; '*prayers*', '*fatal*' and '*non-fatal*' motions, and '*Henry VIII powers*'. Such language is confusing. MPs we have interviewed for our research freely admit being baffled by it.

There are also now so many variations on procedure that many MPs say that they do not understand them. By our count, there are at least nine forms of 'strengthened' scrutiny for SIs where 'normal' scrutiny processes have been judged inadequate. As the House of Lords Constitution Committee has noted, "*The proliferation of scrutiny procedures for Statutory Instruments, many with only minor differences, adds unnecessary complexity.*"[58]

Such complexity tends to generate disengagement or mistakes, rather than effective scrutiny. while simultaneously requiring resources to be expended in understanding and operating new procedures which may be used for only a tiny number of SIs.

COMPULSORY COVID-19 VACCINATION OF WORKERS IN CARE HOMES: a major policy decision implemented despite inadequate explanatory documents and no Impact Assessment



The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021[59] are the first explicit provision in English law making a person's Covid-19 vaccination status a characteristic which affects eligibility to carry out work activities. As well as being a good example of delegated legislation being used to enact significant policy change, this case is also a standout instance of an SI which parliamentarians were unable to scrutinise adequately because of a lack of supporting evidence.

The SLSC said that the Explanatory Memorandum accompanying the draft Regulations failed to fully justify the proposed policy, including the decision to legislate at all.[60] Furthermore neither the Impact Assessment nor the operational guidance were provided at the time the Regulations were laid. The SLSC consequently declared that "*effective parliamentary scrutiny is impossible*" and recommended that the House of Lords' debate on the draft SI should be deferred until the documents were available.[61] Asking Parliament to approve a non-sunsetted policy change of this gravity without a published Impact Assessment represented, as the SLSC stated, "particularly poor practice".[62]

The government further worsened matters by giving incorrect and inconsistent information about the status of the Impact Assessment. The debate in the House of Common was consequently dominated by discussion about the existence – or otherwise – of an Impact Assessment and about whether and when it would be made available to parliamentarians.[63]

Some of the sharpest criticism in a heated debate came from the Chair, with the Deputy Speaker, Nigel Evans MP, calling the situation "totally unsatisfactory". Echoing the SLSC's call in the House of Lords, Sir Graham Brady MP was among those who called for the House's decision on the Regulations to be deferred, pending the appearance of the Impact Assessment.

MPs variously called the maximum 90-minute length of the debate "a disgrace", "an insult to care workers" and "frankly offensive". In the circumstances, the only option open to MPs who were sufficiently unhappy about the situation was to oppose the approval motion for the draft Regulations – as 33 Conservative MPs did, to no avail.[64]

STRENGTHENED SCRUTINY PROCEDURES IN THE EU (WITHDRAWAL) ACT 2018: so complex that government departments get them wrong

The EU (Withdrawal) Act 2018 (EU(W)A) established a blanket procedural 'upgrade' for SIs which are made after 1 January 2021 under a power conferred before the start of the 2017-19 parliamentary session and which amend or revoke delegated legislation made under section 2(2) of the European Communities Act 1972. If such an SI would otherwise have been subject to the 'negative' procedure, and as long as its purpose is other than to implement the Withdrawal Agreement or certain other UK-EU treaties, the 'upgrade' requires it instead to be subject to the 'affirmative' procedure (EU(W)A Schedule 8, paragraph 13).

EU(W)A also introduced an additional, unique, 'strengthened' scrutiny procedure whereby *all* SIs which are made after 1 January 2021 under a power conferred before the start of the 2017-19 parliamentary session and which amend or revoke delegated legislation made under section 2(2) of the European Communities Act 1972 must be published in draft for 28 days before being laid before Parliament (EU(W)A Schedule 8, paragraph 14).

On 26 February 2021, the Department for Transport laid the **Motor Fuel (Composition and Content) and the Biofuel (Labelling) (Amendment) Regulations 2021**,[65] subject to the 'negative' procedure. The House of Lords Secondary Legislation Scrutiny Committee (SLSC) noted no procedural irregularities when it reported on the Instrument in mid-March, and the Regulations duly came into force later that month. It took until mid-May for the Department to notice that the SI was the first that should have been caught by the EU(W)A 'upgrade' provision and so been subject to the new 'strengthened' 'affirmative' procedure. The mistake necessitated the laying of a Written Ministerial Statement[66] and a new set of Regulations which revoked the first set but were otherwise identical.[67]

The delegated legislation required for Brexit was always going to be complex and, often, required at speed. The House of Commons made it more likely that Brexit delegated legislation procedures would be inconsistent and poorly understood when it agreed in December 2019 to rush through consideration of the Withdrawal Agreement Act. Nevertheless, this case illustrates the ineffective complexity – for all concerned – that can be created when newly-invented scrutiny processes are inserted as one-off measures into parent Acts.

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