Proposals for a New System for Delegated Legislation

A Working Paper of the Hansard Society Delegated Legislation Review

6 February 2023

HANSARD SOCIETY

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Acknowledgements

The Delegated Legislation Review (DLR) is an initiative of the Hansard Society and funded by The Legal Education Foundation.

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Foreword

This Working Paper presents the preliminary proposals arising from the Delegated Legislation Review (DLR) which the Hansard Society has been conducting since November 2021 with financial support from The Legal Education Foundation.

The DLR draws on the Hansard Society's unique record of research and data collection on delegated legislation at Westminster that now stretches back over a decade.

The Review has been supported by a cross-party Advisory Panel chaired by the Society's Chair, Baroness Taylor of Bolton.

The other members of the Panel are:

- Baroness Andrews (Labour);
- Steve Baker MP (Conservative) (until September 2022; resigned on appointment as a Minister of State in the Northern Ireland Office);
- Sir David Beamish (Hansard Society Trustee and former Clerk of the Parliaments, House of Lords (2011-17));
- Kirsty Blackman MP (SNP);
- Dame Angela Eagle MP (Labour);
- Paul Evans CBE (Hansard Society member and former Clerk of Committees, House of Commons (2016-20));
- Mark Harper MP (Conservative) (September-October 2022; resigned on appointment to the Cabinet as Secretary of State for Transport);
- Sir Jonathan Jones KC (former Treasury Solicitor and Permanent Secretary of the Government Legal Department (2014-20));
- Professor Jeff King (Professor of Law, University College London);
- The Lord Lisvane KCB DL (former Clerk of the House and Chief Executive of the House of Commons (2011-14)); and
- Professor the Lord Norton of Louth (Hansard Society member and Professor of Government and Director of the Centre for Legislative Studies, University of Hull).

The Panel has met quarterly to discuss the key issues and challenges involved in reforming the system of delegated legislation. Outside the regular meeting schedule, members of the Panel have offered further support in their areas of expertise through meetings and events. We are grateful for their support and advice in developing these preliminary proposals. Discussion between the Panel members was robust: there was much on which they all agreed, but there were also differences of view on the amount of weight to place on particular factors in the analysis of the problems, and Panel members do not all agree on every aspect of these proposals. This Working Paper is the Society's not the Panel's, and any omissions or errors are ours alone.

Feedback

We welcome feedback from parliamentarians, parliamentary staff, civil servants, users of delegated legislation and other stakeholders as we prepare our recommendations and final report later this year.

A number of questions on which we would be particularly interested to hear views are identified through the paper and also presented as a single list in Appendix A. As well as responses to specific aspects of the proposals, we would welcome feedback about the proposals in general.

Please send any comments or suggestions **by 20 March 2023** to: contact@hansardsociety.org.uk.

Executive Summary

Legislative scrutiny is one of Parliament's core functions, but the delegated legislation system is no longer fit for purpose. It is now a growing source of political frustration across the political spectrum.

The system undermines the constitutional balance between the executive and the legislature, damages the reputation of Parliament and squanders one of the most valuable commodities in politics: MPs' and Ministers' time, particularly that spent in pointless Delegated Legislation Committees (DLCs) in the Commons. Excellent scrutiny of Statutory Instruments (SIs) is conducted in the House of Lords, but parliamentarians' inability to amend an Instrument blunts the value and impact of this work. Civil servants also waste time and resources navigating what has become an increasingly complex system.

But ultimately the price of poorly-conceived, poorly-drafted and poorly-scrutinised legislation is paid by citizens across the country who are subject to its detrimental effects. Unless the problems with the system are addressed, public acceptance of the democratic legitimacy of delegated legislation will come under increasing strain. This Working Paper sets out our 13 draft proposals to reform the system.

Proposal 1: A Concordat on Legislative Delegation should be agreed between Parliament and Government to reset the boundary between primary and delegated legislation.

The UK has no binding rules that govern what delegated legislation can be used for. In practice, the boundary between primary and delegated legislation has now shifted intolerably. To reset the boundary, Parliament and Government should negotiate and agree a Concordat comprising a set of 'Principles of Legislative Practice' for the preparation, production and scrutiny of delegated powers and Statutory Instruments, and a list of 'Criteria on the Use of Delegated Legislation', setting out matters that should not be included in delegated legislation. If a Bill was presented containing provisions that Parliament deemed incompatible with the Concordat, then these powers, and the subsequent regulations laid under them after Royal Assent, could be subjected to additional scrutiny. (Paragraphs 8-26)

Proposal 2: A new Statutory Instruments Act should remove the existing scrutiny procedures applied by parent Acts to the use of delegated powers. In their place, a new single scrutiny procedure should apply to all SIs, in which Parliament can calibrate the level of scrutiny to the content of the Instruments.

A new SI Act is needed to break the link between an SI and the scrutiny procedure assigned in its parent Act. The current scrutiny procedures ('negative', 'affirmative' and the various 'strengthened' procedures) should be replaced by a single procedure, thereby simplifying the system. Under this procedure, Parliament should determine – through a triaging process – the degree of scrutiny to which an SI should be subject (see Proposal 5). This would prevent needless debates on uncontroversial measures, while ensuring that more controversial Instruments receive the scrutiny they deserve. (Paragraphs 34-38)

Proposal 3: All SIs should be laid before Parliament in draft, other than in exceptional circumstances.

Laying all SIs in draft would be more administratively efficient, facilitating the correction of errors before an SI is made into law, so obviating the need to make a subsequent correcting or substituting SI. The length of time between an SI being laid and it coming into force would not deviate significantly from existing practice: the majority of SIs would still come into force within weeks of being laid. Only when serious concerns about an SI were identified would progress slow. (Paragraphs 39-43)

Proposal 4: A Parliamentary Office for Statutory Instruments (POSI) should be established as a joint department of both Houses of Parliament to analyse and produce briefings on SIs for MPs and Peers.

The staff-led analysis currently undertaken by existing committees should be undertaken by a new joint Parliamentary Office for Statutory Instruments (POSI), headed by an 'Officer for Statutory Instruments'. This would raise the visibility, status and resourcing of SI scrutiny, and streamline a process that currently engages multiple committees across both Houses, so providing a central focal point for SI scrutiny. (Paragraphs 46-54)

Proposal 5: A Joint Secondary Legislation Sifting Committee (JSLSC) should be established to determine which SIs require further scrutiny and approval by Parliament.

A new joint committee of MPs and Peers should be established to triage SIs to determine what further parliamentary scrutiny is desirable. The majority of SIs would be sifted to 'Group A': SIs that raise no issues of legal, policy, drafting or procedural importance. The Government would be able to make these SIs into law immediately once the sifting process is complete. A smaller share of SIs would be sifted to 'Group B': these SIs would merit further scrutiny because they raise legal or political issues likely to be of interest to Members. Compared to the current system, the time spent by Ministers and parliamentarians debating SIs should therefore be better targeted. (Paragraphs 55-65)

Proposal 6: In the House of Commons, a set of permanent Regulatory Scrutiny Committees (RSCs) should be established to scrutinise, debate – and in some circumstances – approve SIs placed into 'Group B' by the JSLSC.

House of Commons Delegated Legislation Committees (DLCs) should be abolished. In their place, new permanent Regulatory Scrutiny Committees (RSCs) should undertake scrutiny of SIs that have been placed in Group B by the JSLSC. RSC scrutiny would not be limited to formal debates on SIs; they could tailor the nature of their scrutiny to the concerns raised by the content of the Instrument. For example, the Committees could hold Q&A sessions with the Minister, officials, or stakeholders. RSC debates would be held on an amendable substantive motion (not the toothless 'take note' motion used by DLCs). RSC members would be supported by a permanent staff drawn from the Parliamentary Office for Statutory Instruments (POSI). (Paragraphs 67-75)

Proposal 7: In the House of Commons, motions to approve SIs should be amendable so that MPs can propose changes to an SI before it is approved.

Rather than direct textual amendment of an SI (which would present a number of practical difficulties), MPs should be able to table amendments to SI approval motions debated in the Commons (including in RSCs). These amendments would outline in narrative form the Members' concerns with the SI that must be addressed before the SI is made into law. An amended motion would indicate conditional approval of the Instrument – that is, approval provided that the modifications identified in the amended motion were implemented. This would incentivise scrutiny by MPs and provide an opportunity to rigorously test the Government's proposals. (Paragraphs 76-83)

Proposal 8: In the House of Lords, a new 'think again' procedure should be introduced so that Peers can ask the House of Commons to consider their concerns before an SI is approved.

To properly perform its revising function, the House of Lords needs a power that is more effective than both a non-fatal motion merely expressing regret about an SI, and a fatal motion that rejects the Instrument entirely. Peers should be able to provisionally withhold their approval or disapproval of an Instrument while they ask the House of Commons to consider their concerns. 'Think again' motions would detail Peers' concerns about an SI and be conveyed to MPs by means of a 'message' between the two Houses. MPs would have to debate and respond to those concerns. (Paragraphs 84-90)

Proposal 9: A 30-sitting-day 'safety window' should be introduced during which any parliamentarian could table a revocation motion against an SI after it had been made.

The 'safety window' would protect the rights of parliamentarians who were not involved in the scrutiny process (for example, who were not Members of the sifting Committee or the relevant RSC). Parliamentarians with concerns about a made SI could seek a revocation debate on the Instrument (unless the SI had been approved following a debate in the Commons Chamber). If a revocation motion were passed, the SI would be automatically revoked after a set period. (Paragraphs 91-94)

Proposal 10: A new urgent procedure should be introduced for use only in exceptional circumstances when the Government needs an SI to be made and come into force more quickly than is possible under the new standard scrutiny procedure.

In cases of genuine emergency, SIs under any power could be made and if necessary come into force in advance of laying before Parliament, subject to a range of stringent conditions including: written and oral statements by Ministers; during a recess the Speaker in each House determining whether a recall is needed; and automatic expiry of the SI after a set period. These conditions should secure the accountability of Government to Parliament and discourage Ministers from abusing the procedure. The procedure could also be used in certain statutorily-defined circumstances in which an SI must come into force soon after being laid

(for example to impose sanctions or indirect taxes). In these cases, most emergency conditions would not apply: the SI would be placed in Group B for further detailed scrutiny. (Paragraphs 100-103)

Proposal 11: The UK's legislatures should agree a hierarchy of conditions that must be met before a UK Minister can lay and / or make an SI that engages a devolved competence.

An inter-parliamentary working group should be established comprising Members and officials of each of the five legislative chambers and four executives in the UK, to negotiate an agreement about the conditions relating to consultation, timing and consent under which a UK Minister can lay and / or make an SI in areas of devolved competence. (Paragraphs 107-110)

Proposal 12: The Joint Secondary Legislation Sifting Committee (JSLSC) should be able to delay Parliament's approval of an SI where the Parliamentary Office for Statutory Instruments (POSI) finds that important information and / or supporting documentation has not been provided by Ministers. POSI and the National Audit Office should report regularly on the relative performance of Departments in relation to the preparation of SIs.

Parliament's scrutiny of SIs is hindered when Ministers lay SIs with incomplete or inadequate supporting documentation. To incentivise better preparation of SIs, a time penalty should be incurred in the form of a delay in the approval of an SI if Ministers fail to provide the materials required for Parliament to conduct its scrutiny. Sessional reporting to Parliament by the POSI and annual reporting by the National Audit Office would also help drive improvements in departmental performance in the preparation of SIs. (Paragraphs 120-126)

Proposal 13: Parliament should publish draft SIs together with related materials on its website, bringing the SI publication process in line with that for primary legislation.

The National Archives publishes all SIs at legislation.gov.uk. This includes both SIs that have been made and are law, and draft SIs which are not law at the point they are published. This is an historic anomaly and can be confusing for non-experts. Under our proposals, all SIs – with exceptions only for matters of genuine urgency – would be laid in draft. To reflect this change, Parliament's website should become the primary repository for SIs and their supporting documentation until such time as the Instrument is made. (Paragraphs 127-132)

List of acronyms

BEIS Committee	House of Commons Business, Energy and Industrial Strategy Select Committee
CCC	Climate Change Committee
C&AG	Comptroller and Auditor General
DLC	Delegated Legislation Committee
DPRRC	House of Lords Delegated Powers and Regulatory Reform Committee
EM	Explanatory Memorandum
ESIC	House of Commons European Statutory Instruments Committee
IA	Impact Assessment
JCHR	Joint Committee on Human Rights
JCSI	Joint Committee on Statutory Instruments
JSLSC	Joint Secondary Legislation Sifting Committee
NAO	National Audit Office
PAC	House of Commons Public Accounts Committee
PBL Committee	Parliamentary Business and Legislation Committee
POSI	Parliamentary Office for Statutory Instruments
RPC	Regulatory Policy Committee
RSC	House of Commons Regulatory Scrutiny Committee
SI	Statutory Instrument
SLSC	House of Lords Secondary Legislation Scrutiny Committee
SRO	Senior Responsible Owner
SSAC	Social Security Advisory Committee

Introduction

Parliamentary control of delegated legislation is one of the most significant constitutional challenges of our time. At stake is democratic control of political power.

In the UK's parliamentary democracy, Parliament is the supreme law-making body. It is also the principal body through which the Government is held to account for its activities.

Parliament makes the law in the form of primary legislation (Acts of Parliament). But it also delegates powers in some Acts to enable Government Ministers (and sometimes other authorities) to make further law to give effect to that Act, usually in the form of Statutory Instruments (SIs).

Most of the UK's general public law is made not through Acts of Parliament but through this delegated legislation (which is also known as secondary or subordinate legislation).

Constitutionally, while Parliament delegates powers to Ministers to make this legislation, it retains responsibility for the scrutiny of the way in which those ministerial powers are subsequently exercised. The Government remains accountable to Parliament for the way in which it uses the powers that have been conferred on it.

What is the problem?

Over the last century, but increasingly in the last few decades, more and more extensive powers to make law have been delegated to Ministers while parliamentary control over the exercise of those powers has eroded, to the extent that it now undermines the constitutional balance between the executive and the legislature. This compromises the UK's system of parliamentary democracy.

This position has arisen for two principal reasons:

1. The shifting boundary between what should go in primary and what in delegated legislation

First, the dividing line between what should go in primary legislation made by Parliament and what should go in delegated legislation made by Ministers has shifted over the decades.

Although recent Governments have been especially widely criticised for their approach to delegated legislation, administrations of all political stripes over the last 30 years have pushed the boundaries of what constitutes an appropriate delegation of power, and Parliament has typically given way. The Government's desire to legislate at speed in response to events – particularly during Brexit and the Covid pandemic – has further normalised the bypassing of proper policy development processes and the consequent inclusion of very broad powers in Bills.

The line between what should be a matter for primary legislation and what for delegated legislation is now often perceived to be arbitrary, defined largely by what Ministers and officials consider politically and practically expedient and what they

think Parliament will stomach, rather than any constitutional or legislative principle.[1]

'Skeleton Bills', or 'skeleton clauses' within Bills, are now a common feature of the legislative landscape: these are Bills that contain broad powers in lieu of policy detail, leaving the actual operation of the Act and the implementation of its policy objectives to ministerial discretion, legislated for via SIs. As the House of Lords Delegated Powers and Regulatory Reform Committee (DPRRC) memorably described them, they are Bills which are "little more than a licence to legislate and so give flesh to the 'skeleton' embodied in the Bill".[2]

Such Bills inhibit effective scrutiny because Parliament is being asked to make laws "without knowing how the powers conferred may be exercised by Ministers and so without knowing what impact the legislation may have on members of the public affected by it".[3] The SIs that Ministers lay before Parliament under these powers are then subject to limited or no parliamentary scrutiny.

This links to the second problem.

2. Inadequate scrutiny procedures

Delegated legislation is not solely the preserve of the uncontroversial administrative and technical detail for which it was historically intended, and for which the parliamentary scrutiny procedures for SIs – particularly in the House of Commons – were designed nearly 80 years ago.

Principal matters of policy – including some of the most politically salient issues of the day – are now found in delegated legislation. However, the parliamentary scrutiny system is inflexible, so it rarely provides a satisfactory forum for Members to express their concerns about these laws that directly affect citizens.

With around 1,000 Statutory Instruments being laid before Parliament each Session, the Commons has no effective mechanism to sort the wheat from the chaff and focus scrutiny on the SIs of greatest legal or political significance. The resourcing of legislative scrutiny in the Commons is also poor compared to that of Select Committee policy scrutiny: MPs are not systematically provided with impartial legal or policy briefing material about SIs laid before Parliament. This puts them at an immediate information disadvantage.

When MPs and Peers do have concerns about an SI they are faced with an unsatisfactory 'all or nothing' choice:

- debate and approve unsatisfactory regulations, knowing that they cannot iron out any problems because the scrutiny process means they cannot amend the Instrument; or
- reject the entire Instrument, even if they are content with 99% of it.

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[1] The Delegated Powers and Regulatory Reform Committee (DPRRC) concluded after listening to evidence from the Lord President of the Council and Leader of the House of Commons that "the Government consider the inclusion of delegated powers as a political and practical decision, rather than a matter of principle." See DPRRC (2021-22), *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*, HL Paper 106, para. 125.
[2] DPRRC (1998-99), 29th *Report*, para. 23.
[3] Joint letter from the Chairs of the House of Lords Constitution Committee, the DPRRC and the SLSC to the Lord President of the Council and Leader of the House of Commons, 25 September 2020, available at https://committees.parliament.uk/publications/2960/documents/28317/default/

The vexed question about whether to reject an SI bears down particularly hard in the House of Lords. The Lords have, in theory, a unilateral veto over delegated legislation (unlike the situation with primary legislation). But if they exercise this veto they are vulnerable to the accusation of thwarting the will of the House of Commons. After the Lords had refused to pass an Instrument in 2015 which appeared to implement a policy change wider than any envisaged in the original delegation of powers, the Government, in the Strathclyde Review, threatened to curb the Lords' role and power in relation to SIs.[4] Scrutiny in the Commons may be a partisan battle; in the Lords it is constitutional shadow-boxing. Consideration of the detail of the legislation – the SI itself – can become a second-order question in this wider context.

One of the results: A waste of time and resources

The system is also inefficient, despite the obvious attraction for Ministers of escaping detailed scrutiny of the laws they make. For example, Instruments that require active parliamentary debate and approval through the affirmative resolution procedure are by default referred to a Delegated Legislation Committee (DLC), comprising 17 Members who must debate the SI on a 'take note' motion. A Minister must prepare for an unpredictable debate, and civil servants must prepare briefing to cover all potential lines of inquiry. Although a DLC debate rarely lasts more than 30 minutes, Standing Orders make provision for 90 minutes, so Ministers and their support staff need to clear an hour and a half in their diaries, as do participating MPs. A Chair must be appointed, and a Clerk allocated, Hansard reporters and broadcasting staff have to be assigned for the whole hour and a half plus potential time for delivering a transcript. A committee room has to be set aside for two hours, allowing for set-up time, and all the necessary papers prepared and distributed in advance. This inefficient use of resource – not least MPs' and Ministers' time – is replicated several hundred times each Session.

Inefficiencies and poor use of resource are also found in relation to the high error rate in the system. In the 2021-22 Session, the House of Lords Secondary Legislation Scrutiny Committee (SLSC) reported that 9.6% of all SIs had to be replaced by a correcting SI due to errors in the original Instrument.[5] Mundane technical errors might be addressed with a Correction Slip, but once an SI is made into law any significant corrections that need to be made to it require that it be revoked, amended or replaced via a new Instrument, thus duplicating many elements of the workload of departmental civil servants, National Archives staff and parliamentary officials as well as Members.

The increasing complexity of the scrutiny system is also problematic. The plethora of strengthened scrutiny procedures – designed to rein in the use of the broadest delegated powers – leads to confusion: unnecessary time is spent by civil servants and parliamentary officials trying to work out which scrutiny procedures apply, and correcting mistakes when they arise. The different ways of counting scrutiny

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[4] Strathclyde Review: Secondary legislation and the primacy of the House of Commons, Dec 2015, Cm 9177, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/486791/53088_Cm_9177_PRINT.pdf

[5] SLSC (2021-22), *What next? The growing imbalance between Parliament and the Executive: End of Session Report 2021-22*, HL Paper 200, para. 60.

deadlines lead to needless error; Instruments have to be re-laid because they were not approved in time.

The waste of time and resources arising from this system each year – in both Government and Parliament – is indefensible.

Why does this matter?

The subject of delegated legislation matters because it raises fundamental questions about the future of the UK's parliamentary democracy and democratic control of political power.

As the supreme authority in making the law, Parliament should not readily delegate its responsibilities to Ministers, unless it is willing to put in place a system of scrutiny and accountability that guarantees democratic legitimacy.

Parliamentary scrutiny can improve policy and law-making because it forces the Government to explain, evidence and defend its decisions and the effect its proposals will have on people. A lot can be achieved through technocratic scrutiny of SIs by policy and legal experts, but parliamentarians bring two unique ingredients to the mix: political judgement and constitutional legitimacy.

When Parliament is unable to perform its essential scrutiny function, laws made by Ministers are subject to insufficient test and challenge, and omissions and unintended consequences are not (or not sufficiently) explored. Ultimately, the price of poorly-conceived, poorly-drafted, and poorly-scrutinised legislation is paid by citizens across the country who are subject to its detrimental effects. And it should not be left to the courts to act as a safety net when Ministers have exceeded their powers or applied them inappropriately.

Our approach to reform

In thinking through our approach to reform of the system, we have been mindful of the need to balance controls with incentives to best practice.

In our constitution it is Parliament, not the Crown, that makes legislation. The delegation of that power to Ministers has always been controversial. There are, however, convincing arguments of efficiency for the use of delegated legislation. There is the potential for it to be used to enhance the effectiveness as well as the efficiency of the law-making process. Avoiding some of the cumbersome processes of primary law-making may make for a better use of the scarce resource of both governmental and parliamentary time. Delegated legislation is not going to go away and nor should it, but it has now become so dominant a part of the statute book that Parliament can no longer rely complacently on time-worn procedures devised in very different circumstances to ensure its legitimacy. It has a duty to ensure that such legislation is coherent, clear in its meaning and application, and justified by those proposing it on the basis of reasonable evidence. Reform is not just desirable, it is necessary.

We have therefore focused not just on the democratic imperatives that should drive change, but also on the opportunities to make better, more effective use of the precious time and resources of all those involved in the process.

This does not mean that the system under our proposals will be cheaper. Effective scrutiny requires appropriate resourcing, and this will require investment: despite

its vital importance, legislative scrutiny is the 'poor relation' in Parliament in contrast to that of Select Committee policy scrutiny.

The majority of SIs are not contentious; and while there may be some need for questioning and challenging of Ministers, the bulk of SIs should be disposed of relatively straightforwardly if they have been well-prepared and well-drafted.

Ministers are entitled to promote the legislation they want to see on the statute book. But when that legislation is contentious – when it gives rise to legal or political issues of interest and concern – then parliamentary attention and resource needs to be focused on it, and MPs and Peers must have a genuine opportunity properly to discharge their duty as legislators, to check and challenge Ministers, and to try to improve the operation of the legislation so that it works as effectively as possible for citizens – and sometimes to stop it in its tracks.

An objection raised to our Review, from some in the civil service as well as a few officials in the House, has been that reform is really a lost cause because MPs do not have the time or interest to scrutinise SIs.

It is true that MPs' time is stretched, and they must juggle many competing obligations both in their constituencies and in Parliament. But fundamentally MPs lack the opportunity and the capacity as much as the motivation to scrutinise SIs.

MPs receive no support in identifying the legal and political significance of any SI. They cannot conceivably be expected to read every one of the dozens of SIs laid before Parliament each week. But they have no institutional support to separate the wheat from the chaff. Even if they are alerted to a political or legal issue, they can't command a debate on an SI subject to the negative procedure, regardless of their policy importance; yet they can be pressganged by their whips into a Delegated Legislation Committee debating an issue in which they have no interest – constituency or political – and no expertise.

A lot of what MPs want to achieve in politics depends on the content and implementation of regulations. Reform the scrutiny system to focus on the issues that matter and to provide more effective procedures and powers, and it will incentivise MPs to take more interest in SIs.

Growing pressure for change

Concern about the delegated legislation system is now widely shared across the political spectrum. Common worries about the undermining of parliamentary democracy are now shared by some unusual political bedfellows.

This is reflected on our own Advisory Panel, where MPs with such divergent views as Steve Baker MP (Conservative) and Dame Angela Eagle MP (Labour) found common ground. In the House of Commons, MPs as different as John McDonnell (Labour), David Davis (Conservative) and Kirsty Blackman (SNP) all draw attention to the risks associated with the growth in ministerial powers in Bills and inadequate scrutiny procedures for SIs.

Out of Government, recent former Ministers and advisers are also alive to the problem:

- Former Prime Minister Theresa May has pointed to the constitutional implications of the "shift in emphasis from primary to secondary

legislation" and warned that "secondary legislation … should not be used to avoid the scrutiny of Parliament".[6]

- Former Lord Chancellor Robert Buckland MP has referred to an "abandonment of parliamentary involvement" in areas of law (particularly privacy law) that are considered "too hard".[7]
- The former Director of Legislative Affairs in 10 Downing Street, Nikki da Costa, has warned that "Whitehall is addicted [to delegated legislation]".[8]
- And Jacob Rees Mogg MP, former Leader of the House of Commons, has acknowledged that the House's scrutiny of Statutory Instruments "is not all that it should be … that is an issue we must face as a House to decide how we want to improve it".[9]

Expressions of discontent in the House of Lords are also growing. The House's two Committees dedicated to delegated legislation – the Delegated Powers and Regulatory Reform Committee (DPRRC) and the Secondary Legislation Scrutiny Committee (SLSC) – ramped up their criticism of current practice with hard-hitting reports published in Autumn 2021. The titles of those reports – 'Democracy Denied' and 'Government by Diktat' – are a clear indicator of their concerns.[10] There are also growing demands – led by the Convenor of the Crossbench Peers, Lord Judge – for the House of Lords to bite the bullet and reject an SI when Peers have serious reservations about its content and its consequences for citizens are potentially grave.

The future policy landscape is likely to herald more interest in the delegated legislation system. Post-Brexit, the UK now has greater control over its own laws and regulations. Changes to Retained EU Law, new trade agreements, and 'common framework' policies affecting the devolved nations will all be heavily reliant on delegated legislation for implementation. These changes will throw a fresh spotlight on the system and its weaknesses; the call for reform is unlikely to recede as growing demands are placed on the system.

It is in the interests of future Governments as well as future legislators in all parts of the UK that the system is reformed to make delegated legislation and the processes by which it becomes law more legitimate, transparent, efficient and effective. This is what our Review aims to achieve.

The structure of this paper

We make 13 principal proposals that are grouped into three Parts:

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[6] May, T. (7 July 2022), *Restoring Faith in Politics* (The James Brokenshire Lecture delivered at Institute for Government). Available at https://www.instituteforgovernment.org.uk/events/james-brokenshire-lecture
[7] Buckland, R. (4 April 2022), *Constitution and Governance in the UK: Keynote* (The UK in a Changing Europe conference). Available at https://youtu.be/XLsN2zBLZ_A?t=2121
[8] 'Can – and should – Parliament take back control from the executive?' (The UK in a Changing Europe panel discussion, 4 April 2022, @57:18). Available at https://youtu.be/iEZNZ0guVys?t=3438
[9] In debating the *Retained EU Law (Revocation and Reform) Bill* – House of Commons, *Hansard* (25 October 2022), vol. 721, cols. 200-201.
[10] See DPRRC, (2021-22), *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive,* HL Paper 106, and SLSC (2021-22), *Government by Diktat: A call to return power to Parliament*, HL Paper 105.

- Part 1 explores a solution to the problem posed by the shifting boundary between what should go in primary and what in delegated legislation (Proposal 1).
- Part 2 sets out our proposals for reform of the scrutiny system for SIs, organised in four distinct phases through the process (Proposals 2-11).
- Part 3 looks at how the preparation and publication of Statutory Instruments could be improved (Proposals 12 and 13).

Wherever possible we have sought to work with the grain of the existing system, rooting our proposals in procedural precedents by building on existing elements of the delegated legislation system that work, and drawing ideas from other areas of parliamentary activity.

The proposals we set out in this paper comprise a package: while it may be possible – and indeed sometimes necessary – for some of the recommendations to be adjusted and filled out in their details, and / or phased for implementation, a 'pick and mix' approach will not work, because the proposals flow from an analysis of the flaws in the whole system and are intimately inter-connected.

We have erred on the side of reforms that do not require legislation; but some statutory elements are unavoidable. Alongside our final report, we therefore intend to publish a draft Statutory Instruments Act, as well as draft Standing Orders setting out the changes required to implement the proposals in each House.

Part 1: The boundary between primary and delegated legislation

A. The current situation

1. Unlike some other jurisdictions, the UK has no binding rules that govern what delegated legislation can be used for. In practice, the boundary between primary and delegated legislation seems defined more by politics and pragmatism than by principle.[11] In determining what should go into primary legislation and what into delegated legislation, political and media imperatives, time pressures and the exigencies of managing parliamentary business appear to loom larger in the Government's decision-making processes than do the constitutional balance of power between the legislature and the executive or the conditions in which Parliament can best perform its scrutiny obligations. In particular, over the last few decades there has been an increase in the number of 'skeleton' or 'framework' Bills that leave the real operation of the law to delegated legislation.

2. As a consequence of these trends, the dividing line between primary and delegated legislation has shifted to the extent that Parliament no longer has effective control over the content of the statute book. When debating Bills, Parliament – and in particular the House of Lords – is too often caught up in a 'meta-debate' about whether powers which are proposed to be delegated are or are not appropriate rather than debating the actual policy for which the Government wishes to legislate.

3. While there are no binding rules, there are two important means through which some political and administrative constraint is applied to the delegated powers sought and taken in Bills:

    - **House of Lords Delegated Powers and Regulatory Reform Committee (DPRRC) 'Guidance for Departments'**. The DPRRC – which scrutinises the delegated powers in Bills which are before the Upper House – advises Government departments when they are considering what should go in delegated legislation, to have regard to the constitutional principles of "parliamentary sovereignty, the rule of law and the accountability of the executive to Parliament".[12] The Committee considers that the appropriate threshold between primary and delegated legislation "should be founded on the overarching principle that the principal aspects of policy should be on the face of a Bill and only its detailed implementation left to delegation".[13]

    - **Cabinet Office 'Guide to Making Legislation'**. The Guide, which is used by Parliamentary Counsel and departmental Bill teams, states that delegation will be inappropriate for a matter that "goes to the heart of the bill [and is]

[11] DPRRC (2021-22), *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive,* HL Paper 106, paras. 125-126. The argument made by the DPRRC has been disputed by the Government.
[12] DPRRC (November 2021), *Guidance for Departments on the role and requirements of the Committee*, p.4.
[13] DPRRC (2021-22), *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive,* HL Paper 106, para. 65.

part of the policy story set out in the bill".[14] The Guide advises that delegated legislation should be used where there is a need to legislate for matters that are detailed, technical and/or frequently updated. Conversely, however, it also notes that the fact that a matter is technical, or that there has been a lack of time to develop the policy detail, is not likely on its own to be "sufficient justification for the inclusion of a delegated power in a bill".[15]

4. If civil servants and Ministers followed this guidance more consistently, a considerable portion of what is currently included in delegated legislation would not make the cut; significantly more legislative provisions would be found on the face of Bills.

5. Despite the efforts of legislative drafters and parliamentary scrutineers, the growing reliance of successive Governments on increasingly wide delegated powers has not been stemmed. Indeed, the situation is worsening because the normalisation of such wide powers has created a 'ratchet effect'. As the number of wide delegated powers on the statute book has increased, it has become easier for the Government to argue for even broader powers by pointing to the precedent set by earlier powers.

6. The way in which the balance between primary and delegated legislation should be struck is thus contested by Whitehall and Westminster: what is the dividing line between policy on the one hand and administrative and operational detail on the other, and who decides and how?

7. Clearer rules with more bite – based on mutually agreed principles governing legislative preparation and delegation – are now needed. Without them, the legislative relationship between Government and Parliament is likely to become increasingly fractious.

B. The Review's proposals: A Concordat on Legislative Delegation

Proposal 1: A Concordat on Legislative Delegation should be agreed between Parliament and Government to reset the boundary between primary and delegated legislation.

8. To reset the boundary between primary and delegated legislation, Parliament and the Government should negotiate and agree a Concordat on Legislative Delegation to define what matters are appropriate to be done in delegated legislation and what should be reserved for primary legislation. At present Government and Parliament often seem to be talking past each other about legislative delegation and constitutional propriety. The Concordat would help identify shared ground and provide common language around which to frame a mutually agreed and more constructive approach to legislation.

9. At the heart of the Concordat should lie:

[14] Cabinet Office (August 2022), *Guide to Making Legislation*, para. 15.2.
[15] Cabinet Office (August 2022), *Guide to Making Legislation*, para. 15.4.

(i) a set of 'Principles of Legislative Practice' for the preparation, production and scrutiny of delegated powers and Statutory Instruments;

(ii) a list of matters that should not be legislated for by delegated legislation.

10. While we do not underplay the challenges that negotiation and adoption of such a Concordat would pose, the step would constitute a serious demonstration on the part of both Government and Parliament that they recognise that the current way in which legislation and regulations are made is deficient; that they are committed to the process of reform; and that they are determined to ensure the making of better law in the future.

Principles of Legislative Practice

11. The proposed 'Principles of Legislative Practice' should codify best-practice expectations about the way in which legislation should be prepared, drafted and scrutinised.

12. What might such a set of Principles look like? One possible model is the Seven Principles of Public Life (the 'Nolan Principles' established by the Committee on Standards in Public Life in 1995), namely high-level principles that are widely applicable, understood and accepted.

13. Below is an example of what a set of high-level legislative principles *might* cover:

> ***Preparation***
> *All legislation should be thoroughly prepared, detailed and evidenced before it is introduced to Parliament. Delegated powers should not be proposed simply because potentially difficult policy decisions are yet to be taken.*
>
> ***Accountability***
> *Parliament makes the law and delegates powers to Government ministers to make further law to give effect to primary legislation. But Ministers remain democratically accountable to Parliament for how they use the powers conferred on them. Parliament must therefore have effective scrutiny mechanisms to hold Ministers to account and Ministers must respect those scrutiny mechanisms.*
>
> ***Suitability***
> *Government policy should be implemented through the legislative vehicle that is best suited to the nature of the policy. For example, delegated legislation should not be used to implement the principal aspects of policy, and non-legislative instruments ('disguised legislation') should not be used to create legal obligations. An important factor in determining suitability is the extent of legislative scrutiny that would be proportionate to the legal significance of, and degree of political consensus around, the measure in question.*
>
> ***Predictability***
> *Legislation should not give rise to undue uncertainty. For example, delegated powers should be precisely worded and should not be drafted such that they*

could be used in ways that would have profoundly differing consequences from their intended and anticipated use.

Accessibility
The public should be able to easily access the law and the evidence and rationale for its existence. Law should be published in a timely way so that the relevant authorities and the public know what the law is going to be in advance of it coming into force.

Openness
Government Ministers should be active and responsive in explaining, defending and improving all aspects of their legislation both before and after it has been introduced to Parliament. This includes consulting in advance of introducing legislation, in particular with relevant devolved executives and affected stakeholders. Parliamentarians should be constructive legislators, acting in good faith to improve the Government's legislation.

Criteria on the Use of Delegated Legislation

14. The Concordat should also set out what delegated legislation should – and should not – be used for. This can be conceived of as adding greater flesh to the bones of 'Suitability' in the Principles of Legislative Practice. In a list of Criteria on the Use of Delegated Legislation, the Concordat should include both hard-edged tests and more general principles to help define the boundary between primary and delegated legislation.

15. Based on legislative practice over the last 20 years, it might be possible to agree, for example, that delegated legislation should not be used:

- to legislate for the principal aspects of policy that go to the heart of a legal framework;
- to alter constitutional arrangements;
- to sub-delegate a power to legislate;
- to infringe or otherwise change human rights or equalities protections;
- to create (or alter) a criminal offence or to establish (or adjust) penalties associated with those offences (subject to a certain threshold);
- to impose a financial penalty over a set amount (for example, £10,000);
- to impose a tax, fee or charge;
- to create or abolish a statutory body; and
- with retrospective effect.

Operation of the Concordat

16. It is envisaged that the Concordat would be enforced politically and administratively. We have considered whether – given its constitutional and legal importance – the Concordat should be placed on a statutory footing, for example in a new Statutory Instruments Act. However, our provisional view is that this would be both unnecessary and impractical, not least because of potential difficulties relating to justiciability. We believe the codification of

what is in effect a constitutional convention would be the most practicable approach.

17. Some form of committee model will be needed to negotiate and oversee the Concordat on behalf of Parliament. Among existing Committees, the House of Lords Constitution Committee and the Delegated Powers and Regulatory Reform Committee (DPRRC) and in the House of Commons the Procedure Committee are potential candidates for involvement. An alternative would be to establish a Joint Legislative Standards Committee, an option which has been previously proposed by the Hansard Society and others.[16]

18. Once the Concordat had been agreed, a Minister introducing a Bill to Parliament, or laying an SI, should be required to make a statement that the terms of the Concordat had been adhered to. The statement could take the form of:

    - a Written Ministerial Statement;
    - a paragraph in the relevant accompanying documentation; or
    - a statement on the face of the Bill (as with human rights compatibility statements and environmental statements).

19. If the Minister were unable to make such a statement, they would be under an obligation to explain to Parliament why the Concordat had been breached. This obligation to state whether the Concordat had been complied with would require both Ministers and civil servants to carefully consider whether a delegated power (or an SI) extended into the list of restricted matters and, if so, to explain to Parliament why this had occurred.

20. Inevitably, there would remain occasions when Parliament and Government disagreed about how to weigh the balance between primary and delegated legislation – about whether something should be on the face of the Bill or could be left to regulations at a later date. This would occur both for matters not captured by the Principles of Legislative Practice or the Criteria on the Use of Delegated Legislation, and in areas which unavoidably leave room for differing interpretations.

21. In the event of a disagreement, Parliament should be able to identify and 'badge' provisions of Bills that it considers incompatible with the Concordat, both during a Bill's passage and once an Act has been given Royal Assent. This task could be given to a parliamentary committee responsible for overseeing the ongoing operation of the Concordat (for example, the DPRRC in the House of Lords, which has made a similar recommendation that the Government ought to make a "skeleton legislation declaration" for relevant legislation[17]).

22. The 'badging' of provisions in Bills (and therefore the Acts that they become) would help inform later scrutiny of SIs laid under powers in that legislation.

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[16] See House of Lords Leader's Group on Working Practices (2010-12), *Report of the Leader's Group on Working Practices*, HL Paper 136, paras. 97-98; Fox, R. and Blackwell, J. (2014), *The Devil is in the Detail: Parliament and Delegated Legislation* (London: Hansard Society); House of Lords Select Committee on the Constitution (2017-19), *The Legislative Process: Preparing Legislation for Parliament*, HL Paper 27, paras. 177-182; House of Lords Select Committee on the Constitution (2017-19), *The Legislative Process: The Passage of Bills Through Parliament,* HL Paper 393, para. 46.

[17] DPRRC (2021-22), *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*, HL Paper 106, paras. 66-74.

There would be opportunities in our proposed new SI scrutiny system for MPs and Peers to consider the 'badged' nature of the parent power when deciding on the form of scrutiny to which an SI should be subject (see Part 2.1).

23. The existence of the Concordat would also provide a counterweight to the current 'ratcheting-up' of delegated powers. There might be circumstances in which it is not possible for the Concordat principles to be met: for example, on grounds of urgency. But the Concordat would serve as a reminder that such practice is abnormal. Having been agreed between Government and Parliament, the Principles would carry considerable political and moral force.

24. Parliamentary history demonstrates that a non-statutory approach to reform can have the desired effect and stand the test of time.

25. The exemplar of what we propose is the 1932 Concordat reached between HM Treasury and the House of Commons Public Accounts Committee (PAC) (sometimes also known as the Baldwin Convention).[18] That Concordat established that "where possible, the authority for government expenditure should flow from a specific Act of Parliament rather than the general authority of the Appropriation Acts or the use of the Contingencies Fund".[19] This agreement was rooted in the PAC's concern (dating back 70 years to its founding in 1862) that the customary approach of successive Governments to securing parliamentary authority for some areas of expenditure was unacceptable, as it was not rooted in a specific request for powers for such expenditure. As such, it undermined parliamentary control of the purse.

26. Today, over 90 years after the Concordat was agreed via a Treasury Minute, it remains in force: the Treasury undertakes that Departments will not spend without adequate legal authority. The Treasury guide 'Managing Public Money' states explicitly that the Treasury takes the Concordat requirement "seriously", as "it is fundamental to the trust and understanding between the government and parliament on which management of the public finances is founded".[20] The 1932 Concordat's longevity appears to rest in part on both the measure of discretion it permits to the Government and the Treasury's ongoing commitment to "continue to aim at [its] observance".[21] Factors such as these should be at the heart of the negotiation and operation of any new Concordat on Legislative Delegation.

C. Selected questions for feedback

- What should be included in the Concordat – particularly in the Principles of Legislative Practice and the Criteria on the Use of Delegated Legislation?
- How might adherence to the Concordat be overseen by Parliament?

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[18] See *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 25th edition, 2019 (London: Butterworths/LexisNexis), para. 33.11.
[19] See House of Lords Select Committee on the Constitution (2012-13), *The pre-emption of Parliament*, HL Paper 165, para. 11.
[20] HM Treasury (March 2022), *Managing Public Money*, para. 2.5.2.
[21] HM Treasury (March 2022), *Managing Public Money*, annex 2.3, para. A2.3.6. See also *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 25th edition, 2019 (London: Butterworths/LexisNexis), para. 33.11, footnote 1.

Part 2: Scrutiny of Statutory Instruments

2.1: A new standard scrutiny procedure for SIs

A. The current situation

27. The problems with the current parliamentary scrutiny system can be grouped broadly into five areas.

28. **First, there is no sensible correlation between the content or significance of an SI and the rigour of its scrutiny procedure**. The scrutiny procedure to which an Instrument is subject is determined not by the SI's legal or political salience or by the demand among parliamentarians to debate it but by the scrutiny provisions set out in the parent Act under which the SI is made. There is often a mismatch between the degree of scrutiny an SI merits and the degree of scrutiny it actually receives. The parent Act may be decades old: decisions taken by parliamentarians in one Parliament, perhaps many years earlier, thus determine how MPs and Peers in the current Parliament can scrutinise decisions taken by current Ministers. MPs and Peers therefore have to spend time debating anodyne SIs that raise few - if any - concerns in relation to legal or policy matters, simply because the SIs have been assigned to the affirmative scrutiny procedure in the parent Act. Conversely, SIs that warrant more scrutiny given their potential legal and political significance, and that parliamentarians actively want to debate, cannot readily be considered because they are subject to the negative scrutiny procedure.

29. **Second, scrutiny is often superficial, as a result of inadequate procedures and a lack of expert resource, particularly in the House of Commons.** In the House of Commons, the majority of debates on SIs take place in Delegated Legislation Committees (DLCs). These SI debates are low-profile and seldom represent an effective or efficient use of an MP's time. Although 90 minutes are set aside for an SI debate, the proceedings generally last less than 30. DLCs are temporary committees whose Members are, in practice, determined by the party Whips. DLCs have no permanent staff so MPs receive no detailed briefing on the SI being debated, unless such briefing is produced by their party or the House of Commons Library, or MPs receive it from external organisations. There is also little incentive for MPs to engage with DLC debates when the SIs they scrutinise there cannot be amended and the debates are held on 'take note' motions rather than substantive ones. If a 'take note' motion were to be defeated in a DLC, it would have no procedural consequences: the relevant SI could still be approved in the Chamber without further debate. On the whole, DLCs are widely considered by Members to be an inconvenient waste of time.

30. Scrutiny of SIs by the House of Lords is more through and robust than in the Commons. The Upper House has a specialist SI scrutiny committee (the Secondary Legislation Scrutiny Committee, SLSC) which sifts and reports on every SI subject to procedure before the House. As a result, Peers have access to specialist legal and policy advice and expertise. As the Government does not control the agenda of the House of Lords in the way that it does in the Commons, Peers also have greater opportunity to debate SIs if there is a

demand to do so. However, the constitutional position of the Lords as the unelected revising chamber means that Peers are reluctant to reject SIs if this were to place them in conflict with the elected House. Instead, the Lords make use of 'regret' motions – but, while these can communicate concerns about an SI, they have no substantive effect on an SI and do not stop it becoming or remaining law.

31. **Third, Parliament is unable to amend SIs.** With negligible exception,[22] SIs cannot be amended once they have been laid before Parliament. They come as a 'take it or leave it' proposition: concern about one part of an SI, however modest, can only be addressed via the rejection of the entire SI. The only alternative is to approve the entire SI, the concern notwithstanding. For MPs and Peers this disincentivises the scrutiny process: what is the point of spending time in Committee debates if problems remain unaddressed or unresolved, and if there is little prospect that they as Members can influence the legislation?

32. **Fourth, there is Government control of the House of Commons agenda.** The House of Commons has little say over how an SI is scrutinised once the parent Act has been passed. While SI debates can be held in the Chamber rather than in a DLC, and (separately) can be extended beyond the normal 90-minute limit, the decision on whether to do so effectively rests in the hands of the Government. The same is true for the scheduling of debates on 'prayer' motions (whereby MPs seek to annul 'made' SIs subject to the negative scrutiny procedure).

33. **Fifth, the scrutiny system is confusing and overly complex.** The scrutiny system for delegated legislation is couched in procedural language – 'made' and 'laid', 'negative' and 'affirmative', 'prayer motions' and 'regret motions' - that even the most seasoned observers of Parliament struggle to understand. And there are also now so many variations on delegated legislation procedure that many MPs say that they do not understand them. 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".[23] Working out what procedure applies to an SI, and the consequent timing constraints, can absorb considerable time and effort among civil servants and parliamentary staff, and a lack of familiarity with the array of procedures can be detrimental to the ability of stakeholders to engage with the process.

[22] See the *Civil Contingencies Act 2004* section 27(3), the *Census Act 1920* section 1(2), and Greenberg, D. (Ed.) (2012), *Craies on Legislation*, 10th edition (London: Sweet & Maxwell), paras. 3.8.8 and 6.3.
[23] House of Lords Select Committee on the Constitution (2017–19), *The Legislative Process: The Delegation of Powers*, HL Paper 225, para. 89.

B. The Review's proposals: A new scrutiny procedure

Proposal 2: A new Statutory Instruments Act should remove the existing scrutiny procedures applied by parent Acts to the use of delegated powers. In their place, a new single scrutiny procedure should apply to all SIs, in which Parliament can calibrate the level of scrutiny to the content of the Instruments.

34. The current scrutiny procedures ('negative', 'affirmative' and the various 'strengthened' procedures) should be abolished and replaced with a single procedure for all SIs that are subject to parliamentary procedure.[24] This single procedure would have different 'pathways' that allow Parliament to determine the degree of scrutiny to which an SI should be subject, through a triaging process.

35. Legislation would be required to break the current statutory link between an SI and the scrutiny procedure which is assigned to it by the parent Act. This should be a core provision in a new Statutory Instruments Act resetting how Parliament scrutinises SIs. The new procedure would apply to all future SIs – that is, to those made under both existing and new powers.

36. Once this link is broken, it would then be for current parliamentarians – through a Joint Sifting Committee (see Proposal 5 below) – to decide how each SI is scrutinised. This decision would be informed by the legal and political salience of the actual text of the Instrument before them, and the extent to which, if at all, they and other Members wish to debate the SI.

37. This proposed approach would improve Parliament's ability to ensure that scrutiny of SIs is effective, proportionate and responsive to the actual content of an SI. It would also make for greater efficiency, by avoiding needless debates on uncontroversial measures; and would aid management of the pipeline of SIs coming before Parliament, as they would all be subject to the same procedure.

38. A standardised system would also put a stop to the current practice whereby the Government responds to parliamentary concerns over wide delegated powers in Bills by agreeing to apply a (theoretically) more rigorous scrutiny procedure. This has had the undesirable effect of shifting debate away from whether a power is justified in the first place to the second-order one of the scrutiny procedure that should apply (a matter that may be better resolved once the actual text of the SI is available in any case).

Proposal 3: All SIs should be laid before Parliament in draft, other than in exceptional circumstances.

39. To this end, we propose that SIs would normally be laid in draft form. Other than in the exceptional circumstances detailed in Part 2.2.1 below, SIs could only be made law once the scrutiny requirements imposed by the new Joint

[24] Throughout this Part 'all SIs' should be read as meaning all SIs subject to parliamentary procedure (that is, excluding made-only and laid-only SIs, which would be unaffected by our proposed new system). There would also be exceptions to our proposed standard procedure for other reasons, as set out in Part 2.2 below.

Sifting Committee had been met. This change would have a number of benefits:

- It would put the onus on the executive to seek approval for its legislation, rather than assume it can regulate at will.
- It would open the way to a process of indirect amendment (see Proposal 7) where Ministers could amend an SI in response to objections raised by Members.
- It would facilitate the correction of minor errors discovered during parliamentary scrutiny before an SI is made into law, so obviating the need for the making of a subsequent correcting or substituting SI.
- It would enhance accessibility by ensuring that parliamentarians and the public had an opportunity to learn, analyse and comment on what the law will be in advance.
- It would bring greater clarity for the public about which SIs were currently being considered by Parliament and which were already the law (see also Proposal 13).

40. Laying SIs in draft will have an impact on how Departments plan and manage their SI workflow, but it should not give rise to insurmountable difficulties. Departments already submit monthly reports to the Cabinet's Parliamentary Business and Legislation (PBL) Committee detailing the SIs they plan to lay in the following three months.[25]

41. While time can be of the essence for SIs, in our proposals the overall period of time between the laying of an SI and its entering into force would not deviate significantly from existing practice. The non-statutory '21-day rule' requires that most made SIs come into force no less than 21 days after they are laid before Parliament. Compliance with the rule is routine (although not universal). Our proposed scrutiny system would allow for the majority of SIs to be made (and to come into force) within a few weeks of being laid. It is only when a significant concern about an SI had been identified that progress would slow. But if the Government had a compelling need to accelerate the progress of these SIs, it could schedule them for debate in both Chambers, or make use of the Urgent Procedure (see Part 2.2.1).

42. There might be value in retaining the '21-day rule' to prevent SIs that rapidly complete their scrutiny from coming into force before the relevant authorities and public have had time to find out what the law is going to be. However, our proposed system would better ensure that the principle behind the rule – namely that SIs should not normally come into force too soon after being laid – is better observed, and in a more transparent and accountable fashion.[26]

43. A simple change to Standing Orders of both Houses would allow draft SIs to be laid when Parliament is not sitting.[27] Situations where an SI needed to be

[25] Letter from then-Leader of the House of Commons Mark Spencer contained in SLSC (2022-23), *Losing Impact: why the Government's impact assessment system is failing Parliament and the public*, HL Paper 62, Appendix 2
[26] For problems with the current approach, see JCSI (2017-19), *Transparency and Accountability in Subordinate Legislation. First Special Report of Session 2017-19*, HL 151, HC 1158, paras. 2.15-2.23.
[27] Standing Order No. 159 in the Commons and No. 70 in the Lords.

made and come into force during a parliamentary recess are dealt with in Part 2.2.1.

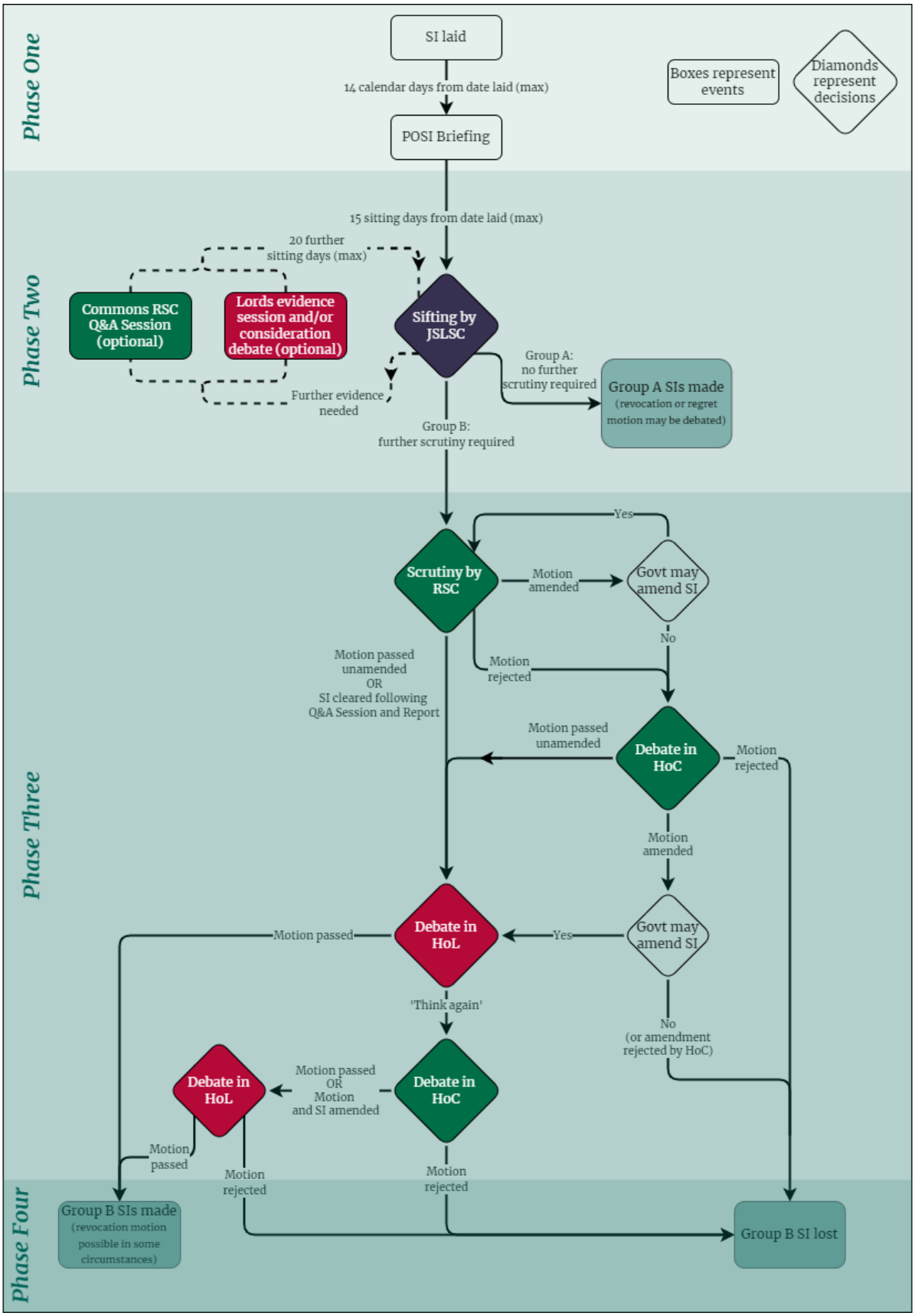
The new scrutiny procedure

44. Our proposed scrutiny procedure for all SIs has four main phases. These are summarised in the following flowchart, outlined in more detail in the remainder of this section, and also presented in summary form after paragraph 94 below. The phases are:

    - Phase One: Analysis of SIs by a new joint Parliamentary Office for Statutory Instruments (POSI);
    - Phase Two: Triage – Sifting of SIs by a new Joint Secondary Legislation Sifting Committee (JSLSC) to identify those requiring further scrutiny;
    - Phase Three: Consideration and approval of SIs identified as requiring further scrutiny by the JSLSC;
    - Phase Four: Approval and revocation motions.

45. The following flowchart sets out the proposed phasing of the major components of SI scrutiny. The indicative timeframes suggested for the various phases broadly align with existing timeframes (such as the 21-day rule, and the 40-day scrutiny period under the negative procedure).

Figure 1: Overview of proposed new scrutiny procedure



Phase One: Analysis of SIs by a new Parliamentary Office for Statutory Instruments (POSI)

Proposal 4: A Parliamentary Office for Statutory Instruments (POSI) should be established as a joint department of both Houses of Parliament to analyse and produce briefings on SIs for MPs and Peers.

46. A core feature of our proposed system is that Parliament should be able to sift all SIs after they are laid and determine the degree of scrutiny each one merits (see Phase Two below). However, expert legal and policy analysis is required to inform and support the sifting and scrutiny process.

47. Given the increasingly complex legal and policy detail contained in SIs, parliamentarians are heavily reliant on expert legal advisers, clerks and policy analysts. The Joint Committee on Statutory Instruments (JCSI) and the House of Lords Secondary Legislation Scrutiny Committee (SLSC) currently provide most of this expert support. More detail about the role of these two Committees is set out in Appendix B, but in summary the JCSI undertakes 'quality control' in relation to specified legal and drafting matters, and the SLSC identifies legal and policy issues that are likely to be of interest and concern to the House of Lords.

48. In order to maximise the use of the expert resource available to parliamentarians in both Houses, we propose that the staff-led analysis currently undertaken for the JCSI and SLSC be undertaken by a new joint Parliamentary Office for Statutory Instruments (POSI), and that this be augmented by further staff resource (particularly in policy analysis) as required. The POSI would have four core functions. These are further detailed in Appendix C, but in summary, they would be:

    (i) pre-laying scrutiny of SIs;

    (ii) a legal and policy briefing to be produced for all SIs within 14 calendar days of it being laid. This briefing would in particular support the Committee tasked with sifting SIs (see Proposal 5);

    (iii) resolving minor textual and presentational errors with an SI; and

    (iv) reviewing and reporting on general trends and practice relating to SIs.

49. Each of these functions would be focussed on legal and policy analysis. Like the JCSI and the SLSC, the POSI would challenge policy decisions and have an advisory role. Decisions would remain with MPs and Peers.

50. Other than in exceptional circumstances, no further parliamentary scrutiny of an SI should be undertaken until the POSI briefing (function (ii)) had been published.

51. The JCSI and SLSC committee structure would therefore be replaced (see also Proposal 5 below). The JCSI's legal and drafting scrutiny and the SLSC's policy scrutiny would both be undertaken by the new POSI, in support of the new sifting and scrutiny committees that we propose below. There is already considerable collaboration between the JCSI and SLSC, and some sharing of staff. There is also precedent in Parliament for a single body to undertake both the legal and policy analysis of SIs, for this is what the Joint Committee

on Human Rights (JCHR) does in relation to Remedial Orders, and what the Business, Enterprise and Industrial Strategy (BEIS) Committee in the Commons and the Delegated Powers and Regulatory Reform Committee (DPRRC) in the Lords do in relation to Legislative Reform Orders (LROs).

52. Establishing a Parliamentary Office for Statutory Instruments would raise the visibility and status of SI scrutiny both inside and outside Parliament and enhance the resourcing currently available for this task (in particular for the House of Commons, which is significantly under-resourced compared to the unelected House). It would streamline a process that currently engages multiple Committees across both Houses into one Office, providing a central focal point for SI scrutiny. In short, it would simplify things.

An Officer for Statutory Instruments

53. The POSI would benefit from having an identifiable public figurehead at the helm who could speak on its behalf, for example at Committee evidence sessions. This 'Officer for Statutory Instruments' would be appointed by and accountable to Parliament.

54. In determining the responsibilities and accountability of an Officer for Statutory Instruments, a range of other positions that support UK legislatures with different forms of scrutiny may offer useful lessons and guidance. The Northern Ireland Assembly, for example, has an 'Examiner of Statutory Rules' who assists committees with their legal scrutiny of delegated legislation. The Examiner is an officer of the Assembly whose responsibilities are set out in Standing Orders.[28] And at Westminster the Comptroller and Auditor General (C&AG) of the National Audit Office (NAO) is an officer of the House of Commons overseen by The Public Accounts Commission, who supports MPs with financial scrutiny.[29]

Phase Two: Triage – Sifting of SIs by a new Joint Secondary Legislation Sifting Committee (JSLSC)

Proposal 5: A Joint Secondary Legislation Sifting Committee (JSLSC) should be established to determine which SIs require further scrutiny and approval by Parliament.

55. A new joint sifting committee comprised of MPs and Peers should be established to perform the essential triage function of sifting SIs to determine what further parliamentary scrutiny is desirable. This sift would apply to all SIs.[30] Its decisions on the appropriate procedures should be binding.

56. At present, there are a number of Committees that perform some form of 'sifting' of SIs. Details of these can be found in Appendix B, but the most relevant example is the sifting of certain regulations made under the *European Union (Withdrawal) Act 2018* and the *European Union (Future Relationship) Act 2020*. Under this system, Committees in both Houses (the European Statutory Instruments Committee (ESIC) in the Commons and the

[28] The Examiner's remit is comparable to that of the JCSI. See Standing Orders of the Northern Ireland Assembly, as amended 14 March 2022, Standing Order No. 43.
[29] See https://committees.parliament.uk/committee/207/public-accounts-commission/membership/
[30] See footnote 24 above.

SLSC in the Lords) can recommend SIs to be upgraded from the negative to the affirmative procedure.

57. Building on current practice, we propose that a new Joint Secondary Legislation Sifting Committee (JSLSC) should be established to triage all SIs. This new Joint Committee would be an evolution of the existing SLSC: undertaking a functionally comparable task, but with greater procedural consequence and cross-House prominence for its findings.

58. Our proposal builds on existing sifting models in a number of important ways:

- All SIs subject to parliamentary procedure would be sifted.
- Sifting would be conducted on a joint basis. A Joint Committee would make most efficient use of the resources available and ensure that decisions on further scrutiny are informed by the different – but complementary – perspectives offered by Members of each House. This would be unusual. However, there is precedent for a Committee of one House determining procedure in the other, for certain Instruments where the scrutiny procedure can be upgraded. It would also still be possible for existing processes in each House - for example Opposition Day debates in the Commons and Grand Committee debates in the Lords – to be used to debate any SI.
- Decisions of the Sifting Committee would be binding rather than advisory (although the Government could table a motion in both Houses to overturn a Sifting Committee decision).

59. The JSLSC should be chaired by an Opposition MP, as is currently the case with the JCSI[31] and the House of Commons Public Accounts Committee.[32]

The sifting process

60. The JSLSC would have 15 sitting days from the date of laying to assign each SI to one of two possible Groups outlined below. Its decision would be informed by the POSI briefing.

(i) Group A: no further scrutiny required

- SIs that raise no issues of legal, policy, drafting or procedural importance or concern, and which are deemed to be of low political salience, will be placed into this category.
- The Government would be able to make an SI into law immediately after a JSLSC Report had placed the SI in Group A (subject to any other statutory requirements having been met). No further Parliamentary debate or approval would be needed.
- There would be a 30-sitting-day 'safety window' after the SI is made during which any MP or Peer could seek a debate on a motion to revoke the Instrument (see Phase Four below).

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[31] *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 25th edition, 2019 (London: Butterworths/LexisNexis), para. 31.32.
[32] House of Commons (2 December 2021), *Standing Orders – Public Business,* HC 804, Standing Order No. 122B(8)(f).

(ii) Group B: further scrutiny required

- SIs which the JSLSC considers merit further scrutiny would be placed in Category B. Rather than a set of prescriptive or formal tests, we propose that the JSLSC would simply seek to identify those SIs that raise legal or political issues likely to be of interest to the House(s).[33]
- For example, SIs may be placed in Category B where the JSLSC has identified:
    - A political appetite to question, test, debate, check and/or critique Government policy (even if the SI itself is impeccably drafted), or
    - A legal, drafting, policy or procedural issue raised by POSI that merits political attention and/or rectification (in particular where errors have been identified that are too major to be corrected via a Correction Slip-style process).
- SIs in Group B would require further scrutiny and active approval by both Houses[34] before the SI could be made. The form we envisage for this scrutiny is set out in 'Phase Three' below.

61. If the JSLSC concluded that it did not have enough information about an SI to place it in Group A or Group B it within 15 days, it could extend its sifting period by up to a further 20 days and require that more evidence be provided by the Government during that period. This could involve both written material and/or oral evidence given to the JSLSC or another relevant Committee.

What proportion of SIs are likely to be placed in Group A and Group B?

62. We anticipate that the majority of SIs would be placed into Group A and therefore require no further scrutiny.

63. The likelihood of the JSLSC allocating an SI to Group A would be greatly enhanced if the Government had complied with the Concordat on Legislative Delegation (see Proposal 1), undertaken stakeholder consultation and / or pre-laying engagement with the POSI and provided all the necessary supporting documentation. Where an SI is well-drafted and well-evidenced, further parliamentary scrutiny is unlikely to be needed (further detail about our proposals in relation to supporting documentation for SIs is set out in Part 3).

64. To get a sense of a ballpark figure, it is instructive to consider that the SLSC currently draws about 7% of the SIs it considers to the special attention of the House of Lords.[35] The JCSI reports on around 5% of the SIs it considers.[36] ESIC has recommended that around 18% of the SIs it has considered should be

[33] Akin to the SLSC's most frequently relied-on ground – see Appendix B.
[34] Or only the Commons, for Commons-only SIs. The same disclaimer holds elsewhere throughout this paper.
[35] SLSC (2021-22), *What next? The Growing Imbalance between Parliament and the Executive: End of Session Report 2021-22*, HL Paper 200, para. 49.
[36] The National Archives (November 2017), *Statutory Instrument Practice*, 5th edition, para. 5.2.6.

upgraded.[37] And in an average parliamentary Session, around 20-25% of SIs are generally subject to the affirmative scrutiny procedure.

65. The intention of our proposal is that as long as SIs and their supporting documentation are properly prepared (including in accordance with the Concordat), then fewer SIs ought to be debated than at present. Parliamentarians should focus debate on the most important SIs. However, it will also be in the JSLSC's interest to exercise a degree of restraint such that the number of SIs being debated is sensible and proportionate.

Phase Three: Consideration and approval of SIs identified as requiring further scrutiny (placed in 'Group B' by the JSLSC)

66. SIs placed in Group B by the JSLSC would need to undergo further scrutiny and be approved by one or both Houses.[38] We propose to alter both how and where this takes place in three ways, set out in Proposals 6-8 below.

Proposal 6: In the House of Commons, a set of permanent Regulatory Scrutiny Committees (RSCs) should be established to scrutinise, debate and – in some circumstances – approve SIs placed into 'Group B' by the JSLSC.

67. We propose that a set of permanent 'Regulatory Scrutiny Committees' (RSCs) should be established to undertake the bulk of SI scrutiny in the House of Commons. The remits of RSCs would correspond to clusters of Government Departments. Unlike the temporary DLCs, RSCs' permanent nature would provide informed and ongoing oversight of the Government's SI programme. RSCs would be supported by staff drawn from the POSI.

68. RSC Members would be appointed for the duration of a Parliament. It would be open to all MPs to attend and speak (but not vote) in RSC meetings, as is currently the case for House of Commons European Committees and DLCs.

69. RSCs would combine elements of both Select Committee- and legislative committee-style scrutiny. They would have the flexibility to tailor their scrutiny to the nature of the concerns about an SI including:

- formal debates; and / or
- Q&A sessions with the Minister, and potentially also departmental civil servants and stakeholders, to seek further elucidation of an SI or its impact. A precedent for this can be found in the Commons European Committees, which hold Q&A sessions and debates on EU documents as required by the European Scrutiny Committee.[39]

70. An RSC would need to hold at least one of a Q&A session or a debate for each 'Group B' SI. It could decide to hold both – a Q&A session first and then a debate.

71. RSC debates would be held on an amendable substantive motion to approve the SI (see also Proposal 7 below). To enable the Government to make an SI

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[37] ESIC (10 May 2022), *Analysis of our work*, p. 2, available at https://publications.parliament.uk/pa/cm5803/cmselect/cmesic/work-analysis/European-Statutory-Instruments-Analysis-of-our-work.pdf

[38] See footnote 34 above.

[39] However, RSCs would be quite different from European Committees in other respects.

more quickly, the House could agree that RSC approval of an SI without division (indicating low political salience of the SI) would constitute approval by the House. While this would be a significant departure from current practice, it would inject efficiency into the process and save time in the Chamber.

72. In the event that an approval motion in an RSC were amended or rejected, the SI would then need to be debated in the Chamber. Alternatively, the Government could amend the SI in response, in which case it could then ask the RSC to approve the amended Instrument.

73. RSC scrutiny could therefore take a number of different routes as shown in the Figure 1 flowchart after paragraph 45:

    a) The RSC holds a Q&A session with the Minister and then reports that no further debate is needed. If the Report was agreed without division, then the SI could then be approved by the House without further debate.[40]

    b) The RSC formally debates the Instrument (with or without a prior Q&A session) and agrees the approval motion unamended:

        i) if the approval was without division, it would constitute approval of the House;

        ii) if the Committee divided, approval of the House would be needed, which could be taken without further debate (this outcome is not shown on the flowchart for simplicity);

    c) The RSC agrees an amended approval motion (see Proposal 7):

        i) The Government may amend the SI and bring it back to the RSC for approval;

        ii) The Government rejects the RSC view. It may table the unamended SI for debate and approval in the Chamber.

    d) The RSC rejects the approval motion. The Government would still be able to table the SI for debate and approval in the Chamber.

74. RSCs would be the default vehicle for Commons scrutiny and approval of SIs. While some SIs can be debated in the Chamber, pressure on the use of time makes it impractical to hold more than a handful of SI debates there each month, at most. The political theatre of the Chamber is also not well suited to the detailed forensic examination that scrutiny of the majority of SIs requires.

75. The JSLSC might nonetheless wish to identify SIs in Group B that it considered would benefit from debate in the Chamber rather than in Committee. It would also remain open to the Government to schedule SIs for debate in the Chamber rather than an RSC if it wished to do so[41] (the Government could indicate this preference in the supporting documentation when it laid the SI). The Opposition would also be able to press for a Chamber debate through the Usual Channels. For debates taking place in the Chamber,

[40] For precedent, a Legislative Reform Order can be approved by the House without debate if the BEIS Select Committee recommends its approval without division; House of Commons Standing Orders, Standing Order No. 18(1)(a). See also section 16(4) and (5) of the *Legislative and Regulatory Reform Act 2006*, which allows a Committee to block the making of an SI.

[41] Subject to the restriction that SIs should not ordinarily be debated before the POSI has published its briefing.

we propose removing the current default 90-minute cap on the length of the debate to reflect the potential level of interest in such SIs.

Proposal 7: In the House of Commons, motions to approve SIs should be amendable so that MPs can propose changes to an SI before it is approved.

76. It has often been suggested (see Appendix D) that Parliament should be able to amend SIs and that only this incentive – the genuine ability to change the detail of an SI - will drive more engagement with the SI process on the part of Members, particularly MPs.

77. However, direct textual amendment of SIs by Parliament raises some difficult problems:

- it undermines the principle of the delegation of legislative power;
- it detracts from the character of SIs as being made by Ministers rather than by Parliament;
- it risks the creation of legal text that has not been checked and scrubbed for errors by Government lawyers; and
- it raises the spectre of some form of legislative 'ping-pong' requiring a procedure for securing the agreement of both Houses to a single text. This would present practical difficulties in relation to the management of parliamentary time and the legislative programme.

78. Rather than direct textual amendment of an SI, we therefore propose that when an Instrument is debated in the Commons (whether in an RSC or in the Chamber), MPs should be able to table amendments to the *approval motion* (rather than to the SI).

79. These amendments to the approval motion would outline in narrative form the Members' concerns with the SI that must be addressed and / or the changes that must be made to the SI *before* it could be made into law. Any narrative amendment would need to be sufficiently precise to give a clear instruction to Ministers about how the SI ought to be amended. Amendments would also have to fall within the scope of the relevant power(s).

80. Amendments to the approval motion that constituted outright rejection of the Instrument would not be permitted. To reject the Instrument, Members would have to vote against the approval motion. This would prevent any prospect of uncertainty about whether a motion had been rejected.

81. The narrative nature of the amendments to SI approval motions would be comparable with reasoned amendments to motions for the Second Reading of Bills. However, an amended approval motion for an SI would not mean that the measure was lost. Rather than outright rejection of the SI, an amended motion would instead indicate conditional approval of the Instrument – that is, approval provided that the modifications identified in the amended motion were implemented.

82. The Government could respond to an amended approval motion by:

(i) amending the text of the SI in accordance with the terms set out in the amended motion, and then seeking final approval of the amended Instrument in an up-or-down vote (that is, without further amendments permitted);

or

(ii) withdrawing the SI if the proposed changes identified in the amended motion were not acceptable to Ministers.

83. While we envisage that amendments to SI approval motions would be the exception rather the rule, this form of conditional, non-textual amendment would have a number of advantages:

- it would provide a genuine incentive for MPs to engage to a greater extent with the scrutiny of SIs;
- it would allow Government legislative propositions to be properly tested, and for Members to outline alternative approaches and support for these to be similarly tested;
- the possibility of amendment and the avoidance of language such as 'reject' 'fatal' and 'nuclear option' should help Government better manage the political temperature that sometimes develops around SIs; and
- technical errors identified in an SI could be corrected before the Instrument is made into law, rather than being left to an unspecified later date. The Government would be able to table its own amendments to the approval motion to do so. As long as they were politically uncontroversial, such amendments could be dealt with as a formality at the start or end of an RSC debate.[42]

Proposal 8: In the House of Lords, a new 'think again' procedure should be introduced so that Peers can ask the House of Commons to consider their concerns before an SI is approved.

84. Given the flexibility the House of Lords has to determine its own procedures and the generally well-functioning nature of current SI scrutiny in the Upper House, we do not consider it necessary to detail how the Lords should organise the final phases of the scrutiny process. Peers could continue to hold both consideration debates (in Grand Committee) and approval debates (in the Chamber). Nothing in our proposals would prevent the Lords from also scheduling consideration debates on SIs placed in Group A by the JSLSC. If there were appetite for creating a Lords SI scrutiny Committee system modelled on the RSCs then this could be done, but we consider the need for change is less pressing than in the Commons.

[42] Minor errors could be dealt with even more swiftly via a 'Correction Slip'-style procedure – see function (iii) of POSI in Appendix C. Technical problems identified by the JCSI (and so by the POSI under our system) are not always addressed by Government in a timely way. Defective Instruments remain on the statute book because the errors are too serious to be rectified by a Correction Slip and no opportunity to lay another SI has been identified. See JCSI (2017-19), *Government response to parliamentary scrutiny of statutory instruments. Third Special Report of Session 2017-19*, HL 311, HC 2057; JCSI (2010-11), *Scrutinising Statutory Instruments: Departmental Returns, 2009*, HL Paper 24, HC 402, para. 9 and Annex 1, Table 5.

85. However, to enable the House of Lords to properly perform its revising function in relation to SIs, we do think it needs a power that is more effective than a non-fatal motion expressing regret, which Ministers can simply ignore. But such a power must still be a more refined option than the nuclear rejection of an Instrument.

86. We propose that a new procedure be introduced to enable Peers to provisionally withhold their approval / disapproval of an Instrument while they ask the House of Commons to consider their concerns. This is effectively a delaying power, with some very broad similarities to the arrangements invoked under the Parliament Act when a Bill is sent a second time from the Commons to the Lords.

87. These 'think again' motions might be similar to regret motions in form, with a narrative setting out the nature of the Lords' concerns. However, unlike regret motions, they would have a practical political and procedural impact. We anticipate that the Lords would show restraint in using such motions.

88. If a 'think again' motion were agreed by the Lords:

- their concerns would be conveyed to MPs by means of a 'message' between the two Houses;
- MPs would have to hold a debate to respond to those concerns;
- MPs could reject the Peers' concerns or, if they agreed with the arguments put forward, they could seek to amend their own approval motion in similar terms and ask the Government to make the specified changes to the SI;
- the matter would then return to the Lords who would face a final 'take it or leave it' approval vote either on the SI as amended in accordance with their suggestions, or on an unamended SI;
- to avoid a drawn-out cycle of 'ping-pong', no further proceedings would then be permitted.

89. This 'think again' procedure would ensure that Peers' concerns about an SI are put before the elected House and would require that MPs (and the Government) responded to those concerns, but without a requirement to agree an identical text and with the Lords restricted to only one exchange with the Commons. To take full advantage of their new power, the Lords would be expected to normally hold their approval debates *after* the Commons had approved an Instrument.

90. A benefit of this proposed new procedure is that it should reduce the prospect of a future constitutional clash between the two Houses over SIs: although the Lords would retain the power to reject an Instrument, the ability to put their case to MPs and ask them to 'think again' places the onus on the elected House to make the final decision about an SI's prospects, having taken account of Peers' concerns. For their part, Peers would have a more potent option than their current regret motions, reducing to an even lower level than at present the likelihood of them going for the constitutionally nuclear option of rejecting an SI. Our proposal would bring welcome clarity about the relative roles of the two Houses with respect to Statutory Instruments.

Phase Four: Making and revoking an SI

Proposal 9: A 30-sitting-day 'safety window' should be introduced during which any parliamentarian could table a revocation motion against an SI after it had been made.

91. Under our proposed system an SI can be made after:

    (i) the Sifting Committee has placed it in Group A;

    or

    (ii) both Houses have approved an SI placed in Group B.

92. However, a 'safety window' of 30 sitting days (starting from the day the SI is made) would apply to protect the rights of parliamentarians who were not involved in the scrutiny process (for example, as a Member of the relevant RSC) but who wished to seek a debate on an SI and possibly to try to overturn it. In this period a 'revocation motion' could be tabled by any MP or Peer against SIs other than those which had been approved following a debate in the Commons Chamber. The text of the motion would have to set out the reasons for the proposed revocation. Any revocation motion receiving substantial support would be expected to be debated, either in Committee or in the Chamber of the relevant House. A revocation debate could not take place more than 10 sitting days after the end of the 'safety window'.

93. If a motion to revoke an SI were passed in the Commons, the SI would automatically be revoked after a fixed period of time (for example, six weeks). The gap would be in order to enable Ministers to consider whether further legislation were required to fill the legal gap created by the revocation and / or to inform users and stakeholders about the legislative change.

94. If a motion to revoke an SI were passed in the Lords, this would have the effect of asking the Commons to 'think again' about the Instrument. The Lords would only be able to agree a revocation motion after the Commons had debated and rejected a revocation motion on the same SI.

C. Summary: Proposed scrutiny procedure and its benefits

Phase 1 (POSI)

- A Parliamentary Office for Statutory Instruments (POSI) would provide a central resource for conducting non-partisan legal and policy analysis of all SIs.
- POSI briefings would be produced within 14 calendar days of laying and would inform later scrutiny in both Houses.
- The Office would be a 'one-stop-shop' for both parliamentarians and external stakeholders seeking to engage with SIs.

Phase 2 (Sift)

- The Joint Secondary Legislation Sifting Committee (JSLSC) triages SIs to identify those that need further scrutiny, debate and approval in both Houses.
- This would ensure that SI debates are informed and worthwhile, and reduce the number of unnecessary debates.
- It would also likely result in an overall reduction in the amount of time spent debating delegated legislation in both Houses.

Group A

- SIs that can be made without further parliamentary procedure.
- The 'smooth sailing' offered by Group A would provide an incentive for Government Departments to ensure that SIs are only laid once they have been fully prepared, tested and evidenced.

Group B

- SIs that merit further scrutiny and approval.
- This process would differ considerably from the current system, in order to incentivise more thorough and engaged scrutiny by Parliament (see Phase 3).

Phase 3 (Commons)

- In the Commons, SIs would normally be scrutinised and debated in new Regulatory Scrutiny Committees (RSCs), which would provide a permanent specialised forum for debate and facilitate more engaged scrutiny.
- SI debates would be on amendable approval motions, allowing MPs to propose improvements and test levels of support for their proposals.

Phase 3 (Lords)

- Peers could ask the Commons to 'think again' about an SI, laying out their concerns for consideration by MPs.
- This power would make better use of the generally good-quality scrutiny that takes place in the Lords, in line with its role as the revising chamber.

Phase 4

- SIs could be made once the requirements of the JSLSC had been met.
- A 'revocation motion' could be tabled against any SI that had been made without having been debated in the Commons Chamber. This would provide a longstop for those SIs that slip through the net or are of interest to only a small number of MPs.

D. Selected questions for feedback

Parliamentary Office for Statutory Instruments

- Should the remit of the Parliamentary Office for Statutory Instruments extend to scrutiny of all forms of delegated legislation, not just Statutory Instruments?
- For example:
    - Financial-sector regulations made by the Financial Conduct Authority, Prudential Regulation Authority and Bank of England and scrutinised by the Treasury Select Committee and Financial Services Scrutiny Unit.[43]
    - Immigration Rules.
    - Certain Codes of Practice laid before Parliament and scrutinised by the SLSC.
- Are there any lessons to be drawn from other 'officer of Parliament' roles (in the UK or elsewhere) that could helpfully inform development of the role, responsibilities and accountability of the Officer for Statutory Instruments?

Sifting

- Is 15 sitting days an appropriate length of time for the sift to be undertaken?
- Are any 'legacy' safeguards needed for SIs that are currently subject to the affirmative procedure and/or strengthened scrutiny procedures? For example:
    - Should extended scrutiny periods and/or the involvement of specialist committees (such as the Joint Committee on Human Rights for Remedial Orders) be retained?
    - Should SIs formerly subject to the affirmative procedure still require a vote even if not a debate?
- Should the JSLSC have the power to require (rather than simply recommend) that an SI ought to be debated in the Chamber of the House of Commons?

Regulatory Scrutiny Committees

- Should RSCs in the House of Commons be chaired by members of Government or Opposition parties?
- Is it appropriate for an RSC to approve an Instrument on behalf of the House rather than an approval motion being taken in the Chamber (bearing in mind that MPs may seek a revocation debate on SIs approved by RSC)?

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[43] House of Commons Treasury Select Committee (2022-23), *Future Parliamentary scrutiny of financial services regulation*, HC 394, para. 24.

- Are safeguards needed to protect the interests of MPs who are not members of the relevant RSC? (note that any MP would be able to attend an RSC debate, as now with DLCs). For example:
    - Should MPs be able to table and/or move an amendment during RSC debate? If so, why?
    - If, after a Q&A session, the RSC determined that a debate on an SI was not required, should an MP who is not a Member of the RSC be able to secure one? If so, how?
- Should civil servants and/or a representative from the POSI attend and speak at RSC Q&A sessions? What would be the advantages/disadvantages of doing so?
- Are there any other scrutiny options that should be available to an RSC?

Amendment

- How – and by whom – should amendments to the approval motion for an SI be selected: (a) in the RSC; and (b) in the Chamber?
- What process is needed to check and approve an Instrument that has been changed by the Government in response to an amendment made to the approval motion? Where should that process take place (for example, in RSC or in the Chamber)?

The Lords 'think again' power

- Should a new Lords delaying power supplement, or replace, the Lords unilateral veto?
- What is the best mechanism by which to communicate the Lords' concerns to the Commons?
- Should a minimum period of time have to elapse between the Lords asking the Commons to 'think again' and the subsequent debate being held in the Commons? If so, how long should that minimum period of time be?
- Should Commons debates following a request from the Lords to 'think again' be in RSC or the Chamber?

Revocation motions

- What should be the criteria – if any – for deciding whether a revocation motion would be debated? Should this be left to the Usual Channels?
- Should debates on revocation motions be held in the Chamber of the House of Commons or in the relevant RSC?

2.2: Variations on the standard procedure

2.2.1: Urgency

A. The current situation

95. There are times when the Government needs to draft, lay, make and implement an SI at great speed in response to emerging and / or urgent circumstances. Some Acts of Parliament include a power providing for an accelerated or urgent parliamentary scrutiny procedure to deal with such eventualities. SIs made under these powers are typically subject to the 'made affirmative' procedure – that is, the Minister can make the SI first and submit it for parliamentary approval only retrospectively.

96. Use of the urgent procedure undermines Government accountability to Parliament because the relevant SIs become law before being scrutinised and require only retrospective parliamentary approval. Legislation that is rushed may also be of poorer quality and attract lower levels of public awareness of the relevant legislative changes.

97. The Government is not inconvenienced when using the urgent procedure: the Minister usually only has to 'declare' that the matter is urgent. There is rarely an objective test of urgency that must be met, and the Minister is not required to explain their decision to use the procedure, for example through an oral or written statement to Parliament.

98. Ministers made extensive use of urgent procedures during Brexit. But the use of the procedure came to public attention most notably during the Covid pandemic.[44] While the use of the procedure at the start of the pandemic was justified, its continued used for many months was not – as, for example, when the Government laid an SI to introduce mandatory face coverings using the made affirmative procedure, despite trailing the policy in the media for months beforehand. Other dubious claims of 'urgency' are made by the Government each Session: for example, the urgent procedure was used for an SI to implement the 'Way to Work' campaign in March 2022, to much criticism from both the SLSC and the Social Security Advisory Committee (SSAC).[45]

99. SIs subject to the made affirmative procedure have to be retrospectively approved by one or both Houses usually within 28 sitting days. In the Commons, the point during that 28-day period at which the debate and

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[44] Sinclair, A. and Tomlinson, J. (October 2020), *Plus ça change? Brexit and the flaws of the delegated legislation system* (Public Law Project), p. 23; House of Lords Select Committee on the Constitution (2021-22), *COVID-19 and the use and scrutiny of emergency powers*, HL Paper 15; Ghazi, T. (12 February 2021), *Coronavirus regulations and the abuse of the "urgency procedure"* (Constitution Society blog), available at https://consoc.org.uk/coronavirus-regulations-and-the-abuse-of-the-urgency-procedure/; de Londras, F., Lock, D. and Grez Hidalgo, P. (14 December 2021), *Covid passes and the ongoing abuse of "urgent" law-making* (UK Constitutional Law blog), available via https://ukconstitutionallaw.org/

[45] The *Universal Credit and Jobseeker's Allowance (Work Search and Work Availability Requirements – limitations) (Amendment) Regulations 2022* (SI 2022/108); see SLSC (2021-22), *33rd Report of Session 2021-22*, HL Paper 176, paras. 6-9, 13 and Letter from the SSAC to Secretary of State for Work and Pensions (23 June 2022), available at https://www.gov.uk/government/publications/uc-and-jsa-work-search-and-work-availability-requirements-limitations-amendment-regulations-2022

approval vote is scheduled is a matter for the Government, because the Government controls the agenda of the House. When urgent made affirmative regulations are laid during the parliamentary recess the situation is exacerbated because the SI cannot be scrutinised until Parliament reconvenes. (There is statutory provision for a recall of Parliament only if Instruments are laid using the emergency powers in the *Civil Contingencies Act 2004*, but these powers have never been used).[46]

B. The Review's proposals: Greater safeguards on the use of urgent SIs

Proposal 10: A new urgent procedure should be introduced for use only in exceptional circumstances when the Government needs an SI to be made and come into force more quickly than is possible under the new standard scrutiny procedure.

100. In genuinely urgent circumstances, it may be necessary for SIs to bypass the standard scrutiny procedure so that they can be made and come into force quickly. However, in exchange for the temporary sacrificing of normal parliamentary scrutiny processes in advance of an Instrument being made, Parliament must have effective procedures to ensure accountability of ministerial action after the Instrument has become law.

The proposed new urgent procedure

101. The urgent procedure could be used in two types of circumstance:

- first, to respond rapidly in an emergency; and
- second, for statutorily defined circumstances in which an SI must come into force soon after being laid.

102. In cases of emergency, SIs under *any* power could be made (and if necessary, come into force) in advance of laying, subject to the following conditions:

- The Minister must lay a written statement explaining the urgency at the time (s)he lays the SI.
- The Minister must make an oral statement within two calendar days of laying the SI. If one or both Houses is not sitting, the Speaker or Lord Speaker would determine whether a recall of their House is necessary and if not, the date by which the oral statement must be made.
- The SI would automatically expire unless approved by both Houses within 14 calendar days of it being laid.
- A debate on a revocation motion could be sought by any MP for any SI approved via the urgent procedure.

[46] See House of Lords Select Committee on the Constitution (2 December 2020), *Corrected oral evidence: Constitutional implications of Covid-19*, Q211-Q228. Available at https://committees.parliament.uk/oralevidence/1359/html/.

- Any urgent SI would automatically expire three months after coming into force, unless its operation is extended by further affirmative votes in both Houses.

103. In circumstances pre-defined by statute which do not constitute an emergency but where the Government nevertheless needs regulatory measures to come into force quickly, SIs could be made before being laid and come into force shortly afterwards. Such circumstances would include, for example, measures imposing or changing sanctions, indirect taxes, or health and safety measures such as those required to control contaminated foodstuffs.[47] However, the full set of scrutiny conditions imposed in cases of emergency would not apply. Instead, the SI would be reported on by the POSI and JSLSC as normal and automatically placed in scrutiny Group B. However, such SIs would still be subject to automatic expiry after three months, during which time the Department could make provision to extend their operation through the standard scrutiny procedure.

C. Selected questions for feedback

- Are there any existing urgent powers, such as in the *Civil Contingencies Act 2004*, where the bespoke parliamentary procedures attached to the use of the powers should be retained?
- Are the proposed conditions on the use of the urgency procedure appropriate?
- Is an alternative process needed to cover circumstances where the Government needs new regulations to come into force during a parliamentary recess, but which do not warrant a recall of the House?

[47] For example, the *Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) Order 1999* (SI 1999/1005).

2.2.2: Devolution

A. The current situation

104. Acts of Parliament can contain powers for UK Ministers to make SIs in areas of devolved competence. Such powers are being sought, granted and used – and also questioned – increasingly often, in large part because of the repatriation to the UK of policy-making in devolved areas that were previously governed at the EU level.[48]

105. Some Acts require UK Ministers to consult with – or seek the consent of – the relevant devolved government(s) when they exercise such powers. In other instances, no statutory requirements are imposed on UK Ministers before they lay an SI that impinges on devolved competence. Even where statutory requirements are imposed, there is no standard approach taken and there are a range of bespoke requirements.

106. Each of the devolved legislatures has devised mechanisms to hold the relevant Minister in its own devolved executive to account when the Minister's approval is required for certain UK SIs. This has been the case particularly in response to provisions of the *European Union (Withdrawal) Act 2018.* However, these mechanisms tend to be limited in scope and / or formal standing.[49]

B. The Review's proposals: Clearer requirements on UK Ministers when legislating by SI in areas of devolved competence

Proposal 11: The UK's legislatures should agree a hierarchy of conditions that must be met before a UK Minister can lay and / or make an SI that engages a devolved competence.

107. An inter-parliamentary working group should be established – comprising Members and officials of each of the five legislative chambers and four executives in the UK – to negotiate an agreement about the conditions under which a UK Minister can lay and / or make an SI in areas of devolved competence.

108. The conditions imposed could be structured hierarchically to reflect the range of powers and Instruments involved. Potential conditions might include:

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[48] See Constitution, Europe, External Affairs and Culture Committee (2022), *The Impact of Brexit on Devolution,* SP Paper 223, paras. 120ff.

[49] See Welsh Parliament (December 2021), *Standing Orders of the Welsh Parliament,* Standing Orders No. 30A, 30B and 30C; Legislation, Justice and Constitution Committee (March 2021), *Fifth Senedd Legacy Report*, paras. 77-104; Dellow-Perry, E. and McCaffrey, R. (25 September 2020), *Legislative Consent Motions* (NI Assembly: Research and Information Service Research Paper), pp. 12-13, 16-18, 20; Hayward, K. (17 March 2021), *Written evidence submitted to Procedure Committee inquiry on the procedure of the House of Commons and the territorial constitution*, para. 3, available at https://committees.parliament.uk/writtenevidence/23572/pdf/; *Protocol on scrutiny by the Scottish Parliament of consent by Scottish Ministers to UK secondary legislation in devolved areas arising from EU Exit* (V2, updated 1 June 2021), available at https://www.parliament.scot/-/media/files/committees/statutory-instrument-protocol.pdf; Delegated Powers and Law Reform Committee (2022), *Legislative Consent Memorandum: delegated powers relevant to the Building Safety Bill,* SP Paper 121, paras. 52-53; Adam, G. (21 October 2021), *Legislative Consent Memorandum Police Crime Sentencing Courts and the Health and Care Bills response* (Letter from the Minister for Parliamentary Business to the Convener), available at https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-delegated-powers-and-law-reform-committee/correspondence/2021/legislative-consent-memorandum-police-crime-sentencing-courts-and-the-health-and-care-bills-response

- A requirement to consult with a devolved executive by at least a specified deadline in advance of laying the SI;
- A requirement to obtain written consent-in-principle from a devolved executive in advance of laying the SI;
- A requirement to obtain the consent of a devolved executive before making the SI;
- A requirement to obtain the consent of a devolved legislature before making the SI; and
- A safeguard that an SI will not apply in a devolved nation unless it has the approval of the relevant executive or legislature.

109. These conditions would apply to all SIs engaging devolved competence, whether made under existing or new powers.

110. The UK Government should be required to inform and update Parliament about its engagement with the devolved institutions about an SI, with requirements to lay relevant documents and / or make written or oral statements.[50]

C. Selected questions for feedback

- How might an inter-parliamentary working group to consider SI processes best be established?
- How should the membership be comprised? Which individuals/office holders/bodies should be involved?
- Should the conditions under which a Minister can make an SI in areas of devolved competence be set out in statute?

[50] See House of Lords (2022), *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords*, para. 8.156.

Part 3: The preparation and publication of Statutory Instruments and supporting documentation

A. The current situation

111. Ministers must ensure that Parliament can effectively scrutinise the exercise of their law-making powers, since it is incumbent on them to exercise these powers in conformity with Parliament's expectations.

112. SIs often contain dense, complex and technical legal and policy detail. Effective scrutiny therefore requires the Government to explain – and provide the evidence base for – its legislative decisions in supporting documentation. However, the Government at present faces no penalty for late or poor-quality supporting documentation. Parliament cannot reject inadequate supporting documents or, certainly in the Commons, easily delay the approval of an SI until problems with such documents are rectified.

113. The Government publishes an Explanatory Memorandum (EM) to explain the purpose and provide evidence to support the policy for every SI that it lays before Parliament. It may also produce an Impact Assessment (IA) for the SI, although it is only required to do so if the cost/benefit analysis of the regulation is that it will exceed the ±£5 million annual net direct cost to business (EANDCB) threshold. Ministers may also consult the wider public or specified stakeholders about the SI – sometimes voluntarily in the preparation of policy, and at other times to meet statutory requirements – and these exercises may generate written materials such as formal Government responses. All these documents are critical to help parliamentarians as well as citizens understand the policy purpose, operational implications, and potential costs of an SI as well as assess whether the Instrument might give rise to unintended consequences.

114. A range of public bodies have a role in reviewing the preparation of some SIs and their related materials prior to their laying before Parliament. For example:

- The Social Security Advisory Committee (SSAC) is a non-departmental public body that scrutinises certain draft regulations produced by the Department for Work and Pensions and HMRC.[51]
- The Regulatory Policy Committee (RPC) reviews and rates all Government IAs.

[51] As per the *Social Security Administration Act 1992* and SSAC (19 January 2021), *Memorandum of understanding between HM Treasury, HM Revenue and Customs and the Social Security Advisory Committee.* Available at https://www.gov.uk/government/publications/memorandum-of-understanding-between-hm-treasury-hm-revenue-and-customs-and-the-social-security-advisory-committee. The SSAC does not assess the policy merits of SIs, but looks at whether the policy objective is clear and is likely to be achieved and how the proposals intersect with the wider social security system (see SSAC (1 April 2022), *Regulations subject to SSAC statutory scrutiny: 2021,* available at https://www.gov.uk/government/publications/regulations-subject-to-ssac-statutory-scrutiny-2021/regulations-subject-to-ssac-statutory-scrutiny-2021. Those SIs the SSAC considers require closer examination can be taken on a 'formal reference' process through which the Committee may consult with stakeholders and then submit a report to the Secretary of State, who must respond to the report. The SSAC's report must also be laid before Parliament by the Secretary of State as required by section 174 of the *Social Security Administration Act 1992*).

- The advice of the Climate Change Committee (CCC) must be sought and taken account of before certain SIs are laid under powers in the *Climate Change Act 2008*.[52]

115. Government lawyers may also engage in informal dialogue with the staff of the JCSI to identify and resolve potential issues with a draft affirmative SI before it is formally laid before Parliament.[53]

116. However, the set of supporting materials that must be produced when an SI is laid is generally a matter only of guidance issued by Government and parliamentary committees.[54] Supporting papers are normally laid by 'Command' of His Majesty (that is, on a voluntary basis).[55] This matters because there are consequently no penalties if Ministers lay an EM or IA late, or in some cases fail to lay it at all.

117. The SLSC produces 'Guidance for Departments' which states that "the purpose of an EM is to provide the Houses and the public with a plain English, free-standing, explanation of the effect of an instrument and how it is intended to operate. It is not meant for lawyers".[56] However, the quality of EMs is highly variable: they do not always help elucidate the purpose of an SI or the way in which that purpose is to be achieved.[57] In the 2021-22 parliamentary Session, for example, the SLSC drew the House's attention to SIs that were laid to address court proceedings or judgments, but for which the EMs failed to refer to the cases or explain how the SI would address the legal concerns. In its end of Session report, the Committee said that it "continued to see examples of poorly drafted EMs" and asked for a number of EMs to be revised "to include additional information for the benefit of all readers".[58]

118. Other documents that would aid scrutiny – such as reports by the expert bodies listed above – are not laid before Parliament, and critical responses they have made to SIs have been tucked away or, in the words of the SLSC, "downplayed" in EMs.[59] Similarly, when IAs are produced, the RPC has judged that they can be limited in scope, lacking in detail, and delivered in too short a timescale to be useful.[60] The SLSC also has a "long-standing concern about

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[52] See *Climate Change Act 2008* ss. 3(1), 7(1), 9(1), 11(7), 22(1), 24(3), 31(1).
[53] JCSI (28 September 2020), *Informal pre-laying scrutiny of affirmative instruments*. Available at https://committees.parliament.uk/committee/148/statutory-instruments-joint-committee/content/119581/informal-prelaying-scrutiny-of-affirmative-instruments/
[54] There are some exceptional cases where supporting documents are statutorily required prior to laying. For example, for SIs under the 'proposed negative' procedure under Schedule 7, Part 1, paragraph 3 of the *European Union (Withdrawal) Act 2018*.
[55] Compare with papers laid 'by Act': see House of Commons, *Journal Office Guide to Laying Papers*, September 2022, para. 10, p.5. Available at https://www.parliament.uk/globalassets/documents/upload/laying-papers.pdf
[56] SLSC (May 2021), *Guidance for Departments Laying Instruments*, Part 2, para. 4. Available at https://www.parliament.uk/globalassets/documents/lords-committees/secondary-legislation-scrutiny-committee/guidance-documents/guidance_departments_slsc-_may-2021.pdf. See also The National Archives (November 2017), *Statutory Instrument Practice,* 5th edition, para. 2.9.1.
[57] SLSC (2021-22), *What next? The Growing Imbalance between Parliament and the Executive: End of Session Report 2021-22*, HL Paper 200, paras. 25-34, 38-43.
[58] SLSC (2021-22), *What next? The Growing Imbalance between Parliament and the Executive: End of Session Report 2021-22*, HL Paper 200, para.38.
[59] See SLSC (2022-23), *Tenth Report,* HL Paper 56, para. 13.
[60] Regulatory Policy Committee (August 2020), *Impact Assessments: Room for Improvement?* Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/906260/RPC_Impact_Assessments_Room_for_Improvement.pdf

the provision of impact information" and noted in 2021 that "issues relating to the provision of timely impact assessments continue to arise".[61]

119. The SLSC has sought to impose some upstream pressure by, in the most egregious cases, calling some Ministers and Permanent Secretaries to give oral evidence to publicly explain and account for the poor quality of EMs and IAs.

B. The Review's proposals: Incentivising consultation and preparation

Proposal 12: The Joint Secondary Legislation Sifting Committee (JSLSC) should be able to delay Parliament's approval of an SI where the Parliamentary Office for Statutory Instruments (POSI) finds that important information and / or supporting documentation has not been provided by Ministers. POSI and the National Audit Office should report regularly on the relative performance of Departments in relation to the preparation of SIs.

120. The Government should not be able to lay an SI with missing or incomplete accompanying documentation without consequence. We propose reforms that would incentivise a change in attitude and behaviour within Government and so bolster parliamentarians' ability to conduct effective scrutiny.

121. We propose that the Parliamentary Office for Statutory Instruments (POSI) would notify the Joint Secondary Legislation Sifting Committee (JSLSC) when an SI had been laid without what the POSI deemed to be the necessary supporting documentation for that particular Instrument (the documentary requirements for each SI will differ according to the legal and policy content). All SIs[62] should have an EM produced and laid alongside them; depending on the case, the POSI might also deem necessary reports from expert advisory bodies, Keeling Schedules,[63] consultation analysis[64] and correspondence with the devolved institutions.

122. In response to POSI advice about missing documentation, the JSLSC could pause the clock on the timetable for the Office to produce its briefing on an SI. This would delay the Government's ability to make the Instrument. To override this decision, the Minister would have to make an oral statement explaining why the supporting documentation had not been laid and why nevertheless the Government needed to progress the SI without a POSI briefing. To make the SI, the Government would then have to schedule the Instrument for debate and approval on the floor of both Houses, taking up valuable time in each Chamber.

123. Reform of the scrutiny procedure as set out in Part 2 would incentivise Government engagement in pre-laying consultation and scrutiny (especially, but not exclusively, with specialist expert bodies and the POSI) because of the

[61] SLSC (2021-22), *Government by Diktat: A call to return power to Parliament*, HL Paper 105, para. 69. See also SLSC (2021-22), *Thirty Fifth Report*, HL Paper 187, para. 19.
[62] Except those that do not need to be laid before Parliament.
[63] A Keeling Schedule is a document that shows for illustrative purposes how legislation will look if proposed amendments to it are made. The proposed modifications are usually shown in 'track changes'.
[64] See SLSC (2022-23), *15th Report of Session* (HL Paper 82), paras. 1-2.

increased likelihood that this would create of a clear report by the POSI. This would in turn enhance the prospects of the SI being assigned to Group A - no further scrutiny required - by the JSLSC at the triage stage (Phase Two scrutiny, see paragraphs 55-65). SIs placed in Group A could be made immediately after the JSLSC reported, with no further parliamentary debate or approval needed. Greater effort made upstream in Whitehall in preparing the SI would thus pay dividends downstream after the Instrument had been laid before Parliament.

124. More broadly, a positive report from an independent expert advisory body such as the SSAC or CCC, or a well-evidenced report of a pre-legislative consultation process, would be a compelling factor in the JSLSC's triage decision about whether further scrutiny was required. It would therefore be in the interests of Government to consider whether each Department would benefit from establishing such a body. Each Department will have its own unique needs, but as the SSAC has noted, the way it operates "has demonstrated that it is possible to use this process to strike an appropriate balance between, on the one hand, adding independent constructive challenge and transparency to the detail of legislative proposals which supports Parliament's scrutiny role and, on the other, doing it in a way which allows the Government of the day to proceed to implement its business in a timely way".[65]

125. Government Departments should also ensure that they are meeting their commitment to have a designated SI Minister.[66] That Minister, along with the Department's Permanent Secretary and SI Senior Responsible Owner (SRO), must have responsibility for the Department's SI programme, with clear objectives relating to the quality of SIs and accompanying documents.

126. A proposed function of the POSI is to report on general trends and practice relating to SIs (see Appendix C), monitoring the Government's overall performance in the production and publishing of SIs and their supporting documentation. To help drive improvements in departmental performance the National Audit Office should also conduct regular systematic analysis of each Department's internal resources and processes for preparing and making SIs and their supporting documentation. This could form part of the NAO's annual departmental overviews.

Proposal 13: Parliament should publish draft SIs together with related materials on its website, bringing the SI publication process in line with that for primary legislation.

127. The National Archives publishes all SIs at legislation.gov.uk. This includes both SIs that have been made and are now law, and draft SIs which are not law at the point they are published. This is an historic anomaly and can be

[65] SSAC (3 October 2017), *SSAC response to the Commons Procedure Committee inquiry on the scrutiny of delegated legislation related to exiting the EU.* Available at https://www.gov.uk/government/publications/exiting-the-european-union-scrutiny-of-delegated-legislation-inquiry-ssac-response/ssac-response-to-the-commons-procedure-committee-inquiry-on-the-scrutiny-of-delegated-legislation-related-to-exiting-the-eu

[66] Some Departments do not appear to have designated a Minister with responsibility for SIs according to the latest List of Ministerial Responsibilities. See Cabinet Office, *List of Ministerial Responsibilities, including Executive Agencies and Non-Ministerial Departments*, December 2022.

confusing for non-experts. Under our proposed reforms, all SIs – with exceptions only for matters of genuine urgency – would be laid in draft (see Proposal 3). To reflect this change, Parliament's website should become the primary repository for SIs (and their supporting documentation) until such time as an Instrument is made. This would be analogous to the approach taken for primary legislation, in which Bills appear on parliament.uk and only Acts on legislation.gov.uk.

128. At present, all SIs are listed by Parliament once they are laid, with each individual SI having a dedicated webpage which sets out the parliamentary stages for the SI but is limited in the links to related content which it provides. To improve transparency, these website pages should be augmented so that they become a 'one-stop-shop' for related information about each SI and are regularly updated as further materials are made available (along the lines of the much-improved Bill pages on the website).

129. Such improvements would help buttress ministerial accountability to Parliament. For example, during debates on SIs, important questions may be raised that the Minister is unable to respond to immediately. Common practice is for Ministers to commit to write to the Member(s) concerned with the information requested. These 'will write' letters are placed in the Commons or Lords Libraries and made available via Parliament's deposited papers database.[67] But this is not a particularly accessible way to make the information available for anyone other than the Member who is in receipt of the letter. It is equally difficult for interested parties to track whether any commitments given by Ministers in those letters are met in the future. Such letters could in future be housed on the SI 'one-stop-shop' webpage.

130. The website page for each SI would, for example, include one or more of the following documents:

- Explanatory Memorandum;
- Impact Assessment;
- Keeling schedules;
- reports from advisory bodies;
- reports of departmental or parliamentary consultations;
- correspondence with the devolved executives / legislatures;
- POSI briefings;
- Committee reports;
- Hansard transcripts;
- 'will write' letters from Ministers; and
- Correction Slips.

131. Once an SI is made it should then be made available on legislation.gov.uk, alongside the final EM and other useful resources, including a link back to the

[67] The Deposited Papers Database contains all deposited papers dating back to 1987. See: https://depositedpapers.parliament.uk/

relevant page about the SI on Parliament's website. In the exceptional circumstances arising from a genuine emergency, where an SI must be made (and possibly come into force) before it is laid before Parliament, this system should work in reverse: the SI must be made available online at legislation.gov.uk without delay and an SI page established subsequently on Parliament's website.

132. Improvements are needed in the naming of SIs to ensure that their title presents a fair description of the content. For example, the SI introducing mandatory vaccination for care home workers was called the *Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021*. Many would be unaware that this SI was about the controversial issue of mandatory vaccination. As with Bills, "an argumentative title or slogan"[68] should not be permitted, but greater description and the reduced use of bracket series would be helpful.

C. Selected questions for feedback

- Should correspondence between the Department and POSI arising from pre-laying scrutiny of an SI be published once that Instrument is laid before Parliament? If not, why not?
- Are there any omissions from our list of supporting documents which might need to be laid with an SI?
- Should SIs be officially numbered on being laid rather than being made so that everyone can easily identify and correctly refer to the same Instrument?

[68] *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 25th edition, 2019 (London: Butterworths/LexisNexis), para. 26.6.

Appendix A: Consolidated list of selected questions for feedback

General

- What barriers to practical implementation might these proposals face (and how could we address them)?
- Can you foresee any unintended consequences arising from these reforms?
- What difference – positive or negative – would the proposals in this Paper have made for SIs which met difficulties or raised concerns in the past?

Part 1: The boundary between primary and delegated legislation

- What should be included in the Concordat – particularly in the Principles of Legislative Practice and the Criteria on the Use of Delegated Legislation?
- How might adherence to the Concordat be overseen by Parliament?

Part 2: Scrutiny of Statutory Instruments

Parliamentary Office for Statutory Instruments

- Should the remit of the Parliamentary Office for Statutory Instruments extend to scrutiny of all forms of delegated legislation, not just Statutory Instruments? For example:
    - Financial-sector regulations made by the Financial Conduct Authority, Prudential Regulation Authority and Bank of England and scrutinised by the Treasury Select Committee and Financial Services Scrutiny Unit.[69]
    - Immigration Rules.
    - Certain Codes of Practice laid before Parliament and scrutinised by the SLSC.
- Are there any lessons to be drawn from other 'officer of Parliament' roles (in the UK or elsewhere) that could helpfully inform development of the role, responsibilities and accountability of the Officer for Statutory Instruments?

Sifting

- Is 15 sitting days an appropriate length of time for the sift to be undertaken?
- Are any 'legacy' safeguards needed for SIs that are currently subject to the affirmative procedure and/or strengthened scrutiny procedures? For example:
    - Should extended scrutiny periods and/or the involvement of specialist committees (such as the Joint Committee on Human Rights for Remedial Orders) be retained?

[69] House of Commons Treasury Select Committee (2022-23), *Future Parliamentary scrutiny of financial services regulation*, HC 394, para. 24.

    - Should SIs formerly subject to the affirmative procedure still require a vote even if not a debate?
- Should the JSLSC have the power to require (rather than simply recommend) that an SI ought to be debated in the Chamber of the House of Commons?

Regulatory Scrutiny Committees

- Should RSCs in the House of Commons be chaired by members of Government or Opposition parties?
- Is it appropriate for an RSC to approve an Instrument on behalf of the House rather than an approval motion being taken in the Chamber (bearing in mind that MPs may seek a revocation debate on SIs approved by RSC)?
- Are safeguards needed to protect the interests of MPs who are not members of the relevant RSC, when considering an SI? (note that any MP would be able to attend an RSC debate, as now with DLCs). For example:
    - Should MPs be able to table and/or move an amendment during RSC debate? If so, why?
    - If, after a Q&A session, the RSC determined that a debate on an SI was not required, should an MP who is not a Member of the RSC be able to secure one? If so, how?
- Should civil servants and/or a representative from the POSI attend and speak at RSC Q&A sessions? What would be the advantages/disadvantages of doing so?
- Are there any other scrutiny options that should be available to an RSC?

Amendment

- How – and by whom – should amendments to the approval motion for an SI be selected: (a) in the RSC; and (b) in the Chamber?
- What process is needed to check and approve an Instrument that has been changed by the Government in response to an amendment made to the approval motion? Where should that process take place (for example, in RSC or in the Chamber)?

The Lords 'think again' power

- Should a new Lords delaying power supplement, or replace, the Lords unilateral veto?
- What is the best mechanism by which to communicate the Lords' concerns to the Commons?
- Should a minimum period of time have to elapse between the Lords asking the Commons to 'think again' and the subsequent debate being held in the Commons? If so, how long should that minimum period of time be?
- Should Commons debates following a request from the Lords to 'think again' be in RSC or the Chamber?

Revocation motions

- What should be the criteria – if any – for deciding whether a revocation motion would be debated? Should this be left to the Usual Channels?
- Should debates on revocation motions be held in the Chamber of the House of Commons or in the relevant RSC?

2.2: Variations on the standard procedure

2.2.1: Urgency

- Are there any existing urgent powers, such as in the *Civil Contingencies Act 2004*, where the bespoke parliamentary procedures attached to the use of the powers should be retained?
- Are the proposed conditions on the use of the urgency procedure appropriate?
- Is an alternative process needed to cover circumstances where the Government needs new regulations to come into force during a parliamentary recess, but which do not warrant a recall of the House?

2.2.2: Devolution

- How might an inter-parliamentary working group to consider SI processes best be established?
- How should the membership be comprised? Which individuals/office holders/bodies should be involved?
- Should the conditions under which a Minister can make an SI in areas of devolved competence be set out in statute?

Part 3: The preparation and publication of Statutory Instruments and supporting documentation

- Should correspondence between the Department and POSI arising from pre-laying scrutiny of an SI be published once that Instrument is laid before Parliament? If not, why not?
- Are there any omissions from our list of supporting documents which might need to be laid with an SI?
- Should SIs be officially numbered on being laid rather than being made so that everyone can easily identify and correctly refer to the same Instrument?

Appendix B: Current Select Committees which scrutinise Statutory Instruments

Joint Committee on Statutory Instruments (JCSI)

The JCSI reviews and reports on technical legal aspects of most SIs. It is prevented by its Standing Order from making any assessment of an SI's policy content. Its reports are consequently tightly focussed on specified legal criteria. Its role is one of quality assurance, alerting Parliament to legal errors and risks.[70] In the words of its Chair, it "does not have the highest profile in Parliament":[71] it takes oral evidence - and therefore meets in public - only very rarely, and the input of Committee Members is minimal as there are, by definition, no political decisions to be made. By convention, the JCSI is chaired by an opposition MP.

The JCSI decides whether to draw the special attention of each House to an SI on one or more of the following grounds:

i) it imposes, or sets the amount of, a charge on public revenue or requires payment for a licence, consent or service to be made to the Exchequer, a government department or a public or local authority, or sets the amount of the payment;

ii) its parent legislation says that it cannot be challenged in the courts;

iii) it appears to have retrospective effect without the express authority of the parent legislation;

iv) there appears to have been unjustifiable delay in publishing it or laying it before Parliament;

v) there appears to have been unjustifiable delay in sending a notification under the proviso to section 4(1) of the *Statutory Instruments Act 1946*, where the Instrument has come into force before it has been laid;

vi) there appears to be doubt about whether there is power to make the Instrument, or the Instrument appears to constitute an unusual or unexpected use of the power to make it;

vii) its form or meaning needs to be explained;

viii) its drafting appears to be defective;

ix) any other ground which does not go to its merits or the policy behind it.

European Statutory Instruments Committee (ESIC)

ESIC is a House of Commons Committee which was established to sift certain SIs which the Government propose should be subject to the negative procedure under the *European Union (Withdrawal) Act 2018*. ESIC can recommend that a 'proposed negative' SI be upgraded to the affirmative scrutiny procedure. While the final

[70] Including risks to the rule of law, see Joint Committee on Statutory Instruments (2021-22), *Rule of Law Themes from COVID-19 Regulations*, HL 57, HC 600.
[71] House of Commons, *Hansard* (18 October 2022), vol. 720, col. 657.

decision on the scrutiny procedure is for the Government, every ESIC recommendation to upgrade has been accepted.

The published bases for ESIC's decision-making have gone through several iterations.

In advance of ESIC starting to operate, in July 2018 the House of Commons Procedure Committee identified factors which ESIC might want to consider when deciding whether to recommend a scrutiny upgrade. These were encapsulated as "legal importance", "political importance" and "overall significance"[72] and have been adopted by ESIC.[73]

In November 2018, in its eighth report of Session 2017-19, ESIC set out in more detail the principles on which it was relying in reaching its decisions. These included consideration of whether an Instrument significantly diminished rights; the cumulative impact of large numbers of amendments to primary legislation; when a criminal offence is created or widened in scope; and whether an Instrument disapplied any of the "standard legislative presumptions".[74]

In April 2022, in evidence submitted to the European Scrutiny Committee's inquiry 'Retained EU Law: Where next?', ESIC listed the following criteria as underlying its analysis:[75]

> "Whether the instrument:
>
> **General**
> 1. Amends primary legislation;
> 2. Substantially affects primary legislation;
> 3. Imposes or increases taxation;
> 4. Significantly diminishes rights;
> 5. Imposes significant new duties;
> 6. Creates serious criminal offences;
> 7. Confers significant sub-delegated powers other than a power to legislate;
> 8. Disapplies standard presumptions;
> 9. Makes significantly retrospective provision;
> 10. Confers intrusive powers;
> 11. Has other effects of special importance;
> 12. Previous similar instruments used draft affirmative;
>
> **[Mandatory affirmatives under]** ***European Union (Withdrawal) Act 2018]***
> 13. Creates, or widens the scope of, a criminal offence;
> 14. Creates or amends a power to legislate;
> 15. Provides for any function of an EU entity or public authority in a member State of making an instrument of a legislative character to be exercisable instead by a public authority in the United Kingdom;

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[72] House of Commons Procedure Committee (2017-19), *Scrutiny of delegated legislation under the European Union (Withdrawal) Act 2018*, HC 1395, p. 4.
[73] ESIC (28 April 2022), *Written evidence submission to the European Scrutiny Committee's inquiry: 'Retained EU Law: Where next?'*, REU0028, footnote 2.
[74] ESIC (2017-19), *Eighth Report of Session 2017-19*, HC 1699, paras. 1.1-2.2 and Annex.
[75] ESIC (28 April 2022), *Written evidence submission to the European Scrutiny Committee's inquiry: 'Retained EU Law: Where next?'*, REU0028.

16. Relates to a fee in respect of a function exercisable by a public authority in the United Kingdom;
17. Is made under s.8(3)(b) (deficiency of kind described or provided for in regulations);
18. Is made under para.1(2)(b) of Sched.1 (challenge to retained EU law);
19. Is made under section 12(9) (devolution repeals and modifications);
20. Is made under Schedule 4 (fees and charges) not merely altering to reflect value in money changes;
21. Is made under Schedule 5, para.4 (judicial notice and admissibility);

[Mandatory affirmatives under] ***European Union (Future Relationship) Act 2020*****]**
22. Amends, repeals or revokes primary legislation or retained direct principal EU legislation;
23. Creates a power to legislate;
24. Made under Sch.2, para.18 (power to modify PNR regulations etc.);
25. Made under s.22(7) (meaning of "the relevant time" for entry into force of protocol on VAT and mutual assistance on tax debts;
26. Made under s.32 (powers relating to the start of agreements);

Other
27. Should be recommended for uplift for any other reason."

Despite the range of detailed considerations used by ESIC, the Committee's stated rationale for recommending upgrades has relied on the general criteria originally identified by the Procedure Committee, referring to SIs that are 'legally important', 'politically important' or 'significant enough to require further scrutiny'.

Secondary Legislation Scrutiny Committee (SLSC)

The SLSC is a House of Lords Committee that reviews and reports on all Instruments that are subject to a procedure in the House of Lords. Unlike the JCSI, the SLSC does look at the merits[76] and the policy in SIs. The Committee receives evidence from stakeholders and holds occasional oral evidence sessions with Ministers.

The SLSC may draw an SI to the special attention of the House if it meets any one of a range of criteria, as established in the Committee's terms of reference. These are that:

a) an Instrument is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
b) it may be inappropriate in view of changed circumstances since the enactment of the parent Act;
c) it may imperfectly achieve its policy objectives;

[76] It was previously known as the 'Merits of Statutory Instruments Committee'.

d) the explanatory material laid in support provides insufficient information to gain a clear understanding about the Instrument's policy objective and intended implementation;

e) there appear to be inadequacies in the consultation process which relates to the Instrument;

f) the Instrument appears to deal inappropriately with deficiencies in retained EU law.[77]

For the majority of Instruments which the SLSC draws to the special attention of the House, it does so on the general ground of policy interest.[78] SIs which are drawn to the special attention of the House are often 'prayed' against, or subject to more thorough debate in the Lords.

In its weekly reports, the SLSC also reports SIs that do not meet the criteria for 'special attention' but that it identifies as being 'of interest' to the House.

The SLSC also sifts, on behalf of the House of Lords, 'proposed negative' SIs made under the *European Union (Withdrawal) Act 2018* (so performing the function performed by ESIC in the Commons). After conducting an inquiry into the criteria it should use for this task, the SLSC concluded that it should judge each Instrument on its merits, applying the overarching test of "is the subject matter of this instrument and the scope of any policy change effected by it of such significance that the House would expect to debate it?", and having regard to a range of substantive criteria, including:

- Where an Instrument effects a significant policy change or would have the effect of causing significant divergence from the EU *acquis*.
- Where an Instrument concerns the scope of, and penalty relating to, criminal offences.
- Where an Instrument changes the remit of a public authority.
- Where an Instrument imposes a financial burden.
- Where an Instrument relates to a power conferred on other individuals or bodies to legislate (that is, to make tertiary legislation).
- Where an Instrument seeks to achieve reciprocity.
- Where an Instrument changes standards.
- Where an Instrument imposes an administrative burden.
- Where an Instrument affects equality or human rights.[79]

[77] SLSC (23 October 2020), *Terms of Reference*. Available at https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/content/120278/toref

[78] SLSC (2021-22), *What next? The Growing Imbalance between Parliament and the Executive: End of Session Report 2021-22*, HL Paper 200, para. 49.

[79] See SLSC (2017-19), *Sifting "proposed negative instruments" laid under the European Union (Withdrawal) Act 2018: criteria and working arrangements*, HL Paper 174, paras. 40, 46.

Other Committees

Business, Energy and Industrial Strategy Committee (BEIS Committee) and Delegated Powers and Regulatory Reform Committee (DPRRC)

Legislative Reform Orders (LROs) made under the *Legislative and Regulatory Reform Act 2006* are scrutinised by the BEIS Committee in the House of Commons and the DPRRC in the Lords. Neither the JCSI nor the SLSC scrutinises LROs. In addition to the technical legal checks normally performed by the JCSI, both Committees have additional powers to upgrade the scrutiny procedure, recommend amendments and even block the progress of LROs.

Joint Committee on Human Rights (JCHR)

Remedial Orders (ROs) made under the *Human Rights Act 1998* are scrutinised by the JCHR. The JCSI and SLSC do not scrutinise ROs.

Appendix C: Functions of the proposed Parliamentary Office for Statutory Instruments (POSI)

Four functions are envisaged for the new Parliamentary Office for Statutory Instruments (POSI) which is proposed in this report:

(i) Pre-laying scrutiny of SIs

At the Government's request, the POSI could review SIs and accompanying materials before they are laid before Parliament. This pre-laying scrutiny would provide an opportunity to resolve potential problems in advance of the formal parliamentary procedures. Any pre-laying scrutiny materials or correspondence between the POSI and the laying Department should then be published, or at least summarised in the subsequent POSI briefing once the SI has been formally laid.

(ii) A legal and policy briefing to be produced for all SIs within 14 calendar days of it being laid. This briefing would in particular support the Committee tasked with sifting SIs.

Once an SI is laid before Parliament, the POSI would have 14 calendar days to produce a briefing that assessed any legal, drafting, procedural or policy issues or concerns generated by the Instrument. The POSI would not challenge whether the policy objectives of an SI should be pursued, but would address questions such as:

- Is the SI correctly drafted?
- Is the SI within the *vires* of the power?
- Is the policy intention of the SI clear?
- Is the SI supported by adequate evidence?
- What do relevant stakeholders think about the SI?
- Is the SI likely to deliver the stated policy objective(s)?

POSI briefings might also draw on and analyse relevant aspects of the parent Act's Delegated Powers Memorandum and parliamentary passage (including where a power had been 'badged' as being inconsistent with the Concordat on Legislative Delegation, see paragraphs 21-22), and reports by expert advisory bodies and relevant stakeholders.

The POSI would advise the JSLSC on the sifting of SIs into one of the two proposed Groups (A and B), identifying those which merit further scrutiny (for example, where there are clear evidence gaps, stakeholder policy disagreements or unexpected uses of a delegated power). The POSI's recommendations would be advisory, not binding.

(iii) Resolving minor textual and presentational errors with an SI

Errors in SIs are sometimes identified after they have been laid before Parliament, in particular by the JCSI. Analysis by the POSI would similarly identify any such errors and could also make suggestions to Government as to how they could be rectified. Minor errors (such as typographical errors and incorrect cross-referencing) could be dealt with by 'Correction Slips' before an SI is considered by the JSLSC. More significant errors above the threshold at which a 'Correction Slip'

could be used could still be identified by POSI, with the option for the error to be corrected via an amendment to the approval motion during later scrutiny.

(iv) Reviewing and reporting on general trends and practice relating to SIs

The POSI would have an important role in reviewing the way in which Government and Parliament deal with SIs. It should produce Sessional reports analysing key statistical data from the previous Session, building on those currently produced by the SLSC (and by the JCSI until 2009).[80] It could also produce special reports to identify any problematic trends and make recommendations to address them, which could be followed up by Committee inquiries where appropriate.

[80] *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 25th edition, 2019 (London: Butterworths/LexisNexis), para. 31.32.

Appendix D: Past proposals on the amendability of Statutory Instruments

The possibility of introducing some form of amendability for SIs has been considered on a number of occasions in the past. *Craies on Legislation* refers to a "continuing controversy and frustration over the inability to amend statutory instruments".[81] Some examples, from more to less recent, are:

- In 2021, the SLSC contemplated the introduction of "provision for Parliament to propose amendments to draft Statutory Instruments" made under powers contained in Bills or clauses that had been recognised as 'skeleton legislation'.[82]
- In 2018, the House of Lords Constitution Committee considered amendability of SIs but ultimately did not propose it, instead drawing attention to the "greater onus on the Government to respond to the concerns raised by parliamentarians and to withdraw and re-lay statutory instruments where appropriate".[83]
- In 2014, the Hansard Society recommended the introduction of a "conditional amendment provision" that was short of a full right of amendment.[84]
- In 2013, the House of Commons European Scrutiny Committee (ESC) proposed that certain SIs should be considered by European Committees, which hold debates on amendable motions.[85]
- In 1996, the House of Commons Procedure Committee recommended that "motions on instruments be open to specified classes of amendment, including reasoned amendments and conditional amendments".[86] The Committee endorsed these recommendations again in 2000.[87]
- In 1952, the Select Committee on Delegated Legislation considered that an amendment procedure should not be introduced because "provision would have to be made for a committee stage, a report stage, and so on" but that prayers to annul an SI should contain reasons for objection so as to "allow the House to alight upon and concentrate upon the matter in the Statutory Instrument which has aroused objection". [88]

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[81] Greenberg, D. (Ed.) (2012), *Craies on Legislation*, 10th edition (London: Sweet & Maxwell) para. 6.2.1.1.
[82] SLSC (2021-22), *Government by Diktat: A call to return power to Parliament*, HL Paper 105, para. 41.
[83] House of Lords Select Committee on the Constitution (2017-19), *The Legislative Process: The Delegation of Powers*, HL Paper 225, paras. 100-106; Elliott, M. and Tierney, S. (20 November 2018), *House of Lords Constitution Committee Reports on Delegated Powers* (UK Constitutional Law Blog), available at https://ukconstitutionallaw.org/2018/11/20/mark-elliott-and-stephen-tierney-house-of-lords-constitution-committee-reports-on-delegated-powers/
[84] Fox, R. and Blackwell, J. (2014), *The Devil is in the Detail: Parliament and Delegated Legislation* (London: Hansard Society), pp. 9, 186-189.
[85] European Scrutiny Committee (2013-14), *Reforming the European Scrutiny System in the House of Commons*, HC 109-I, para. 240.
[86] Select Committee on Procedure (1995-96), *Fourth Report: Delegated Legislation*, HC 152, para. 55(s); see also paras. 52-53.
[87] Procedure Committee (1999-2000), *Delegated Legislation*, HC 48.
[88] Select Committee on Delegated Legislation (1952-53), *Report from the Select Committee on Delegated Legislation*, 310-I, paras. 100, 102.

Appendix E: Past proposals to reform the House of Lords' powers over Statutory Instruments

Proposals have been made over the years to adjust the House of Lords' powers to provide an option that is stronger than a regret motion but falls short of outright rejection of an Instrument. In particular, from more to less recent:

- In October 2015, the House of Lords agreed a motion to 'decline to consider' a set of regulations relating to tax credits[89] until the Government laid additional information before the House. However, this attempt by the Lords to delay their approval of an SI muddied rather than clarified the waters. The wording of the motion was tantamount to a rejection of the SI, and the Government responded by asking Lord Strathclyde to conduct a Review into 'Secondary legislation and the primacy of the House of Commons'.[90] The Review recommended curtailing the role of the Lords by allowing the Commons to override a vote to reject an SI.[91]
- In the House of Lords, the 2011 Report of the Leader's Group on Working Practices proposed that the Lords adopt a resolution specifying that a rejection by the House of an SI should be understood as an invitation to the Government to 'think again': the Lords would undertake to not block a substantially similar Instrument were it to be approved by the Commons "having considered the issues raised in the Lords",[92] so long as at least one month had passed between the Lords rejecting an Instrument and the Government inviting the House a second time to agree it.
- The 2006 Joint Committee on Conventions considered that "the most constructive way for the Lords, as the revising chamber, to reject an SI is by motion (or amendment) incorporating a reason". The Committee also noted that non-fatal motions might be more satisfactory if the Government were required to respond to them and that "the picture would be very different if Parliament had power to amend SIs".[93]
- In 2000, the Wakeham Commission on reform of the House of Lords proposed that a vote to reject an SI by the Lords be only a 'suspensory veto', resulting in a three-month period during which the Government

[89] The draft *Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015*.
[90] Strathclyde Review (December 2015), *Secondary legislation and the primacy of the House of Commons*, Cm 9177, available at https://www.gov.uk/government/publications/strathclyde-review-secondary-legislation-and-the-primacy-of-the-house-of-commons
[91] For discussion of the Review, see House of Lords Select Committee on the Constitution (2015-16), *Delegated Legislation and Parliament: A response to the Strathclyde Review,* HL Paper 116; DPRRC (2015-16), *Special Report: Response to the Strathclyde Review,* HL Paper 119; SLSC (2015-16), *Response to the Strathclyde Review: Effective parliamentary scrutiny of secondary legislation,* HL Paper 128; House of Commons Public Administration and Constitutional Affairs Committee (2015-16), *The Strathclyde Review: Statutory Instruments and the power of the House of Lords*, HC 752; Fox, R. (13 January 2016), *Reflections on the Strathclyde Review* (Hansard Society blog), available at https://www.hansardsociety.org.uk/blog/reflections-on-the-strathclyde-review; Elliott, M. (1 December 2016), *The House of Lords and secondary legislation: Government declines to implement Strathclyde Review (for now)* (Public Law for Everyone blog), available at https://publiclawforeveryone.com/2016/12/01/the-house-of-lords-and-secondary-legislation-government-declines-to-implement-strathclyde-review-for-now/
[92] House of Lords Leader's Group on Working Practices (2010-12), *Report of the Leader's Group on Working Practices*, HL Paper 136, para. 153.
[93] Joint Committee on Conventions (2005-06), *Conventions of the UK Parliament Volume I,* HL Paper 265-I, HC 1212-I, paras. 232, 233.

could seek to convince the Lords to reconsider its position and/or override the Lords decision by a resolution in the Commons.[94]

[94] Royal Commission on House of Lords Reform (2000), *A House for the Future*, Cm 4534, paras. 7.36-7.38.

Glossary

'21-day rule'
A convention by which, wherever possible, a Statutory Instrument which is subject to the 'made negative' scrutiny procedure is laid before Parliament at least 21 calendar days before it comes into force.

40-day scrutiny period
The period prescribed by the *Statutory Instruments Act 1946* during which Parliament may reject a Statutory Instrument which is subject to the negative procedure. Periods when Parliament is prorogued or dissolved, or adjourned for more than four days, do not count towards the 40 days.

Delegated Legislation Committee (DLC)
A temporary committee of MPs which debates delegated legislation that is subject to the 'affirmative' procedure. Delegated legislation which is subject to the 'negative' procedure may also be referred to a DLC for debate, although this is rare. Under Standing Order No. 118, which governs DLCs, a DLC debate is capped at 90 minutes (except in the case of an Instrument relating exclusively to Northern Ireland, in which case the debate is capped at two-and-a-half hours).

Delegated Powers and Regulatory Reform Committee (DPRRC)
A House of Lords Select Committee appointed to examine almost all Bills on their introduction to the House of Lords, to determine whether they contain any inappropriate delegation of power or subject those powers to an inappropriate level of scrutiny. In certain circumstances, the DPRRC may consider some Bills that start in the House of Commons before they are introduced to the Lords.

Draft Statutory Instrument/Draft Instrument
A Statutory Instrument (SI) which has not yet been made – signed – into law. Depending on the scrutiny procedure to which it is subject, a draft SI may have been laid before Parliament, or it may only have been published for consultation. If an SI is still in draft and has not yet been made, the Government is under no obligation to make it; the Government may formally withdraw the draft SI, if it has been laid before Parliament, or simply never make it.

Explanatory Memorandum (EM)
A document produced by the government department responsible for a Statutory Instrument and laid together with the SI when the latter is laid before Parliament. An EM contains certain standard sections of information about the SI, in a standard order – such as a statement of the purpose of the Instrument, a brief presentation of its legislative and policy context, a note of any matters of special interest to Parliament, and information on whether it was subject to consultation or is accompanied by an Impact Assessment. The EM also includes any statutory statements that are required about the SI.

Fatal motion
In the House of Lords, the name given to all types of motion which – if agreed by the House – would amount to a rejection of a Statutory Instrument.

Grand Committee
In the House of Lords, some business may be taken in Grand Committee instead of in the Chamber. Any Peer may attend a Grand Committee and proceedings there are

identical to those in the Chamber except that voting is not permitted. Any decisions must therefore be made unanimously.

‘Henry VIII power’
A type of delegated power. A ‘Henry VIII power’ enables Ministers to amend, repeal, or otherwise alter the effect of primary legislation by delegated legislation.

In a Bill, a clause that contains a ‘Henry VIII power’ is a ‘Henry VIII clause’.

Lay/laying/laid
'Laying' is formally presenting a Statutory Instrument (SI) or other document to Parliament. When an SI is subject to a parliamentary scrutiny procedure, laying is the start of the process. Some SIs are laid before Parliament but are not subject to a parliamentary procedure; in this case, they are ‘laid only’ SIs. The date on which an SI is laid is its ‘laid date’.

Make/making/made
A Statutory Instrument (SI) is made when a Minister or other authorised individual or group of individuals signs it into law. The date on which this takes place is an SI’s ‘made date’. Once an SI has been made, it may come into force: there is no minimum or maximum period between an SI being made and it coming into force. However, there is a convention – the '21-day rule' – by which, wherever possible, a Statutory Instrument which is subject to the ‘made negative’ procedure is laid before Parliament at least 21 calendar days before it comes into force.

Motion
A proposed decision or expression of opinion that is tabled for consideration in Parliament.

Non-fatal motion
A motion about a Statutory Instrument (SI) in the House of Lords which, while it may be critical of the SI, does not seek to reject it. Examples include ‘take note’ and ‘regret’ motions.

Parent Act/parent legislation
Legislation that grants a delegation of power to Ministers or other individuals or bodies to make delegated legislation. It may also be known as an ‘enabling Act’ or ‘enabling legislation’.

Parliamentary Business and Legislation Committee (PBL Committee)
A Cabinet Committee, chaired by the Leader of the House of Commons, which decides which Bills will be included in the government’s programme for each parliamentary Session. Bills are approved by the Committee before they are introduced to Parliament.

Prayer/prayer motion
A motion tabled by an MP or Peer calling for the annulment of a Statutory Instrument which is subject to the ‘made negative’ procedure. Such motions are called 'prayers' because they 'pray' that the SI in question be annuled. Such motions may also be known as an 'annulment motions'.

In the House of Lords, such motions are among those known as 'fatal motions' (because, if passed, they would be ‘fatal’ to the piece of delegated legislation in question).

Skeleton Bill
A Bill, or part of a Bill, that consists entirely of delegated powers, meaning that the real operation of the Bill, or part of the Bill, would be entirely by delegated legislation.

Standing Orders
The written rules under which each House of Parliament conducts its business. They regulate the way that Members behave, debates are conducted, and consideration of legislation and other business is organised.

Strathclyde Review
A Government review of the relative roles of the two Houses of Parliament with respect to delegated legislation. It was initiated after the House of Lords declined to consider the *Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015*. The Review reported in December 2015 and identified three approaches by which to provide the House of Commons with a decisive role on Statutory Instruments.

Usual Channels
The Usual Channels is the term used to describe the working relationship between the government and opposition parties through which business in each House is organised by the Whips. The operation of the 'Usual Channels; at Westminster contrasts with the practice in many other legislatures where parliamentary business is arranged through a Business Committee.