Proposals for a New System for Delegated Legislation

A Working Paper of the Hansard Society Delegated Legislation Review

Executive Summary

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.

For further information please contact:

Dr Tom West (Researcher & DLR Manager) - tom.west@hansardsociety.org.uk
Dr Brigid Fowler (Senior Researcher) - brigid.fowler@hansardsociety.org.uk
Dr Ruth Fox (Director) - ruth.fox@hansardsociety.org.uk

The Hansard Society

1.17, 1st Floor Millbank Tower,
21-24 Millbank,
London, SW1P 4QP

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)