

Westminster Lens

Parliament and Delegated Legislation
in the 2015-16 Session



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Insight

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EXECUTIVE SUMMARY

After the EU referendum claims have been made that the Brexit process will enable the country to ‘take back control’ and ‘reclaim parliamentary sovereignty’.

A key element of this process will be the proposed Great Repeal Bill which will transpose EU law on to the UK statute book on Brexit day with powers to ‘repeal, amend and improve’ this body of EU-related law in the future if desired. Delegated legislation will be central to the delivery of the objectives of the Great Repeal Bill.

However, the delegated legislation scrutiny procedures, particularly in the House of Commons, are not fit for purpose, and the use of ‘Henry VIII’ delegated powers to repeal or amend primary legislation without future recourse to Parliament is contrary to the principle of parliamentary sovereignty.

This report looks at the delegated legislation process in the 2015-16 parliamentary session through a statistical lens, challenging assertions and assumptions made about it by Ministers and Members of both Houses alike. Drawing on our Statutory Instrument Tracker as well as parliamentary data sources, the report shines a light on key aspects of the process and analyses it in the context of the procedural and political arguments being made about it in recent years.

In the 2015-16 parliamentary session:

Henry VIII powers

- Of 23 government Bills, 16 contained a total of 96 Henry VIII powers to amend or repeal primary legislation.
- 65 of these powers were included in Bills on introduction. A further 31 were added during their progress through Parliament.
- 98 statutory instruments (12.9%) amended primary legislation. Over half of which were subject to the least stringent form of parliamentary control, the negative scrutiny procedure.

Volume

- Contrary to opposition assertions following the Tax Credits debate, the number of SIs laid by the government in the last session does not suggest that it was seeking to legislate by stealth using SIs. Only 757 SIs were laid during the 2015-16 session, the lowest total number of SIs laid in a single session in 20 years.
- The government adopts a ‘peak and trough’ approach to the production of delegated legislation. 106 SIs were laid in March 2016. The next busiest months were February, July and December as departments rush to table them before parliamentary recess.
- 757 SIs comprised 7,783 pages of legislation.
- 130 (17.2%) SIs were derived from EU law.

Type of instrument

- 585 SIs (77.2%) were subject to the negative scrutiny procedure. 151 (19.9%) were subject to the affirmative procedure.
- Just 4 SIs (0.5%) were subject to 1 of the 11 strengthened scrutiny procedures. All of them were Legislative Reform Orders.
- 81 SIs (10.7%) were considered by the House of Commons only. The Strathclyde Report’s recommendation of a review of the principles underpinning Commons-only procedures for financial instruments has yet to be taken up. Many Brexit-related SIs could become the subject of dispute between the two Houses about whether they should be subject to scrutiny only by MPs.
- 8 SIs (1%) were certified as England only instruments under the English votes for English laws procedure. 10 SIs (1.3%) were certified as England and Wales only.

The scrutiny process

- MPs spent 7 hours and 49 minutes debating

affirmative and negative SIs in the Chamber. Peers spent 34 hours and 11 minutes debating SIs in the Chamber.

- MPs debated just 3% of the 585 negative SIs laid before them. 19 prayer motions were tabled by MPs, 10 of them by the Leader of the Opposition and 2 by opposition frontbenchers. Contrary to ministerial assertions, prayer motions laid by the opposition front bench on SIs subject to negative scrutiny procedures are not automatically debated – just 5 (26.3%) were accepted for debate.
- The House of Lords debated 5 motions to annul an SI, all in the Chamber.
- 27 (4.6%) negative SIs breached the convention that negative instruments should not come into force less than 21 days after being laid before Parliament. 103 (17.7%) came into effect on the 21st day after being laid.
- 468 (80%) negative SIs came into force within 40 days of being laid and therefore before the scrutiny period had expired. This puts parliamentarians off challenging this legislation.
- 114 (75.4%) affirmative SIs were considered in committee and 13 (8.6%) on the Floor of the House of Commons.
- The average Delegated Legislation Committee debate on affirmative SIs lasted just 26 minutes.
- Of the 151 affirmative SIs, 12 approval motions (7.9%) went to a division in the Commons.
- 28 affirmative instruments (18.5%) were considered and debated in the Upper Chamber. The average length of debate on affirmative instruments in the House of Lords was just two minutes longer than in the

Commons at 28 minutes.

- Peers approved 19 affirmative SIs (12.5%) before the House of Commons had debated them. These challenge the Strathclyde Review's preferred option of a new process designed to provide the House of Commons with an opportunity to 'think again' if the House of Lords rejects an instrument, because the House of Commons had not (yet) 'thought at all' in these cases. This will be a deficiency in the reform should the government ever choose to revisit it.

Rejecting instruments

- Since 1950, the House of Commons has rejected just 11 SIs, and the House of Lords has rejected 6. This is a rejection rate of 0.01% of the total number of SIs considered in over six decades.
- 30 non-fatal motions were tabled in the House of Lords, the highest number on record. 2 led to government defeats on Tax Credits and Universal Credit. Successful amendment motions to these 2 regulations have introduced confusion into the Upper House's procedures by suggesting that Peers have a 'delaying' power over SIs. Previously, it had been accepted that the Upper House either accepts or rejects an SI outright. There is no evidence that the government accepts the idea of a Lords' 'delaying' power, as it appears to have implemented the Universal Credit regulations, and ministerial commitments to report back to the House have not been observed.

Withdrawn and correcting instruments

- 35 (4.6%) correcting instruments were laid in the session. 19 SIs (2.5%) were withdrawn by the government during their passage through Parliament.

INTRODUCTION

How many ‘Henry VIII powers’ does the government seek each parliamentary session, granting powers to ministers to amend or repeal primary legislation by statutory instrument with little or no scrutiny?

The claiming of such powers has been described by the former Chief Justice, Lord Judge, as a ‘pernicious habit’ that should be consigned to the ‘dustbin of history’,¹ but the short answer is that no one actually knows how many there are because no one formally counts them.

After the EU referendum, when claims about ‘taking back control’ and ‘reclaiming parliamentary sovereignty’ are being widely bandied about, such data is important because it goes to the heart of the debate about the constitutional principle that Parliament is the sole legislative authority with the power to create, amend or repeal any law. In reality, successive governments have regularly challenged this principle by claiming such powers, and Parliament acquiesces by granting them. But until now, the debate has been predicated on rough estimates of the number of these powers in bills and Acts; as such, it has been difficult to hold successive governments properly to account.

This report, based on new research data collected by the Hansard Society over the last year, seeks to plug the statistical hole in our understanding of this and other aspects of the delegated legislation process. It builds on our earlier study, *The Devil is in the Detail: Parliament and Delegated Legislation*, which laid bare the complexity, weaknesses, and contradictions in the scrutiny process, in the first comprehensive study of this process in decades.

What is delegated legislation?

Regarded as tedious and mundane, delegated legislation has long operated under the radar of parliamentary, media and public scrutiny despite the fact that most of the United Kingdom’s general public law is made not through Acts of Parliament but through delegated legislation. Acts of

Parliament provide a framework into which much of the real detail and impact of the law will subsequently be added through delegated legislation. The majority of delegated legislation is made in the form of statutory instruments (SIs) that exist within the framework of powers delegated to Ministers by Parliament in the parental Act. They can be used to fill out, update, or sometimes even amend existing primary legislation without Parliament having to pass a new Act.

The purpose of delegated powers was originally to provide for administrative convenience and flexibility in matters that were technical, inconsequential and procedural in character. However, in recent years successive governments are widely perceived to have gone beyond the bounds of reasonableness and acceptability in their use of such powers. Our legislative case studies in *The Devil is in the Detail* – the Public Bodies Bill, the Localism Bill, the Welfare Reform Bill, and the Banking Bill – provide examples of this.

Any distinguishing line between legislative principle and detail has long since been obscured, and convenience all too often overrides good practice. In particular, there is concern that in some bills Ministers are seeking ever broader, ill-defined powers that maximise their flexibility for interpretation and action, and provide legislative precedents that enable them to expand the scope of ministerial action ever wider.

The Statutory Instruments that flow from these powers are the legislation of everyday life and are crucial to the effective operation of government, affecting almost every aspect of public and private life. They deal with major areas of public policy such as immigration and the social security system, as well as a wide range of specific laws on issues as varied as rubbish bin collections, legal aid, food labelling, rail passenger regulations, the organisation of the NHS, data retention, ‘fracking’ for shale gas, the national curriculum and metric measurements. It is through delegated legislation that pension and welfare benefit levels and

increases in the national minimum wage are established. It authorises the compensation payments to victims of violent crime and sets out how child maintenance and parental leave entitlement will be calculated. It classifies new drugs, specifies the circumstances when sensitive personal data may be disclosed, and imposes financial sanctions on other countries. Much European Union (EU) legislation is also transposed into domestic law through delegated legislation.

But, as we set out in *The Devil is in the Detail*, how Parliament deals with this legislation is utterly deficient. The complexities of the process are little understood by many MPs and Peers, let alone the public, and this hinders reform.

Since our report was published, however, a series of high profile and contentious SIs have hit the headlines, bringing the little-known procedures into sharp focus.

Delegated legislation hits the headlines

In July 2015 the government was forced to postpone its attempt to relax the fox-hunting ban in England and Wales via an SI after the Scottish National Party said it would vote against the changes. The following December, Parliament voted to approve a controversial SI to allow fracking under English National Parks and World Heritage Sites. Contentious instruments relating to student maintenance grants, individual electoral registration and winter fuel payments also attracted increased parliamentary and media attention.

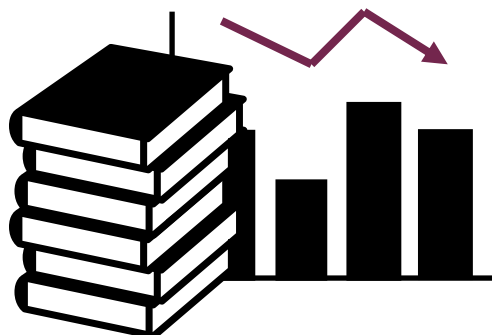
The most significant incident occurred in October 2015, when Peers, in a very rare move, declined to consider an approval motion for an SI relating to Tax Credits. This prompted a constitutional stand-off between the government and House of Lords, with ministers arguing that the unelected Upper Chamber had no right to hold up a financial measure already approved by MPs. Downing Street responded by setting up the first government-initiated review into delegated legislation since

1929. Led by Lord Strathclyde, it considered the role and powers of the House of Lords in relation to SIs. Completed in just 8 weeks, the Strathclyde Review set out 3 options 'to provide the House of Commons with a decisive role on statutory instruments', with the preferred option being the creation of a new procedure that would provide the House of Commons with an opportunity to 'think again' in the event of disagreement, and ultimately override any House of Lords vote to reject an SI.²

Since its publication, the Review has come in for intense criticism and the government has confirmed that it has no plans to implement Lord Strathclyde's proposals 'at this time'.³ But, as with the debate about Henry VIII powers, the review revealed a stark lack of data about the delegated legislation process that hinders debate about effective ways to bring about reform. The Review's recommendation that the Commons be given an opportunity to 'think again' on SIs that Peers reject, implies that the elected House will already have taken a view on an SI before it gets to the Upper House. The data in this report shows that, in a significant number of cases, this is not true, highlighting an immediate deficiency in the proposed reform should it ever be introduced.

Why the statistical data matters

As SIs cannot be amended, MPs and Peers are faced with a 'take it or leave it' proposition to accept or reject them outright. However, in the House of Commons the procedures are so weak that the government is under no obligation to accept demands for a debate on certain SIs if it does not wish to do so. During a discussion on the

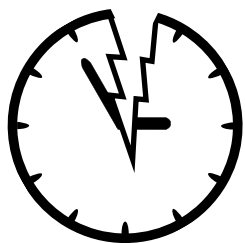


INTRODUCTION

Strathclyde Review, the Leader of the House of Commons claimed before a House of Commons Committee that he was not aware of any recent instance where a request made by the opposition front bench had been declined. But the data, as revealed in this report, shows this to be inaccurate; in the 2015-16 parliamentary session the government declined a debate on an SI requested by the opposition more than 50% of the time.

Similarly, the data does not substantiate claims by the opposition, made in the aftermath of the Tax Credits debacle, that the government was increasingly seeking to push through policy changes via delegated rather than primary legislation, and thus avoid proper parliamentary scrutiny. The number of SIs produced and laid before Parliament in the first session of the 2015-16 Parliament was not unusual.

We have also looked at how time is used in the delegated legislation process. When confronted with the case for reform of parliamentary processes, Ministers frequently resort to the 'we do not have time' excuse; changes cannot be made because there



is not enough time in the process to accommodate them. But to what extent do current procedures make effective use of the time available? The data in this report reinforces our finding in *The Devil is in the Detail*, that time is used ineffectively, particularly in the House of Commons, and that there is now a serious mismatch between the allocation of scrutiny time and the SIs that MPs actually want to consider.

In recent years, particularly with the rise in data journalism, the media has begun to focus on how government uses the parliamentary timetable to rush out important announcements in the form of written statements on Fridays when most MPs have returned to their constituencies, or the day the

House of Commons rises for recess which means Ministers cannot be properly held to account for them at the despatch box. The same is true of delegated legislation: as we showed in *The Devil is in the Detail*, ministers rush out SIs prior to recess periods which impact on the timetable and effectiveness of parliamentary scrutiny for many important laws. The data in this report reveals the peaks and troughs in the last parliamentary session.

Westminster Lens: consistent and comparative data

This report is the first output from our new Westminster Lens legislative data project which seeks to enhance the current data available on the way Parliament works so that we can provide a more accurate picture of the scrutiny process, and its limitations and weaknesses, in relation to both primary and secondary legislation.

This first report focuses on delegated legislation. Since the beginning of the 2015-16 parliamentary session the Hansard Society has produced a weekly subscription-based Statutory Instrument Tracker, responding to a need identified in our research for improved knowledge and access to the delegated legislation process by people outside Parliament. This monitoring provides the Society with a rich seam of data touching upon key aspects of the process – such as the number of Henry VIII powers, the use of parliamentary time, and breaches of procedural rules - that is not available via other sources.

In addition to generating our own data, we have sought to add value to existing data provided in the House of Commons Sessional Returns, the House of Lords Sessional Statistics and the House of Lords Secondary Legislation Scrutiny Committee (SLSC) reports. These provide statistical evidence but rarely set it in context, provide comparison with other sessions, or analyse it in the context of the procedural and political arguments being made about the delegated legislation process.

The statistics currently available regarding delegated legislation are patchy and inconsistent, the result of being drawn from a number of competing sources, with each source taking a different approach in terms of definition and scope. For example, some are collected on a calendar year, others on a sessional basis, thus making comparison difficult. Considerable care must therefore be taken in the use of the data.

The Society's focus is on SIs laid before Parliament and which are subject to some form of parliamentary scrutiny. Importantly, this differs from the statistics provided by the National Archive powered legislation.gov.uk website, as the latter's dataset is based on a much broader definition of 'UK statutory instruments', namely all general instruments, affecting matters of public concern, including SIs from Welsh government ministers, orders from the Highways Agency which authorise changes to specific trunk roads and motorway junctions, instruments that restrict flying during airshow displays and commencement orders bringing into force all or part of an Act of Parliament. None of these is laid before the UK Parliament. Of the average 3,000 SIs per year identified by the legislation.gov.uk site, only around 1,000 instruments are subject to some form of parliamentary scrutiny. It is the latter which is the focus of this report.

We will be updating and publishing the statistics after the end of each parliamentary session. Over time we will expand the project to cover key areas of the primary legislative process as well.

Successive governments in recent years have resisted the case for significant reform of the legislative process, despite the extensive research evidence base provided by us and others (e.g. the Constitution Unit at UCL) about its problems and weaknesses. We hope that by augmenting our qualitative case studies with quantitative analysis of the process and procedures we will help drive a new debate about how government produces and Parliament scrutinises legislation, not least by

ensuring the debate is evidence based rather than predicated on false assumptions and assertions by Members and Ministers alike.

HENRY VIII POWERS TO AMEND OR REPEAL PRIMARY LEGISLATION

The inclusion of Henry VIII powers in bills is among the most controversial aspects of the legislative process. As highlighted in the Introduction, in recent years increasing concern has been expressed over the continued delegation of Henry VIII powers by Parliament to ministers to amend or repeal primary legislation by statutory instrument (SI) with little or no scrutiny.

For example, in the last decade ministers have sought broad, ill-defined powers to ‘make provision for reforming legislation’,⁴ to repeal legislation deemed to be ‘no longer of practical use’,⁵ and to make provisions with retrospective effect if they ‘consider it necessary or desirable’.⁶

Despite serious questions being asked about the practice, particularly by the House of Lords, data on the number of Henry VIII powers produced in each parliamentary session has been unavailable, until now.

Our research shows that in the 2015-16 session, of the 23 government Bills that achieved Royal Assent (a further three were carried over to the following session), 16 of them contained a total of 96 Henry VIII powers to amend or repeal primary legislation.

65 Henry VIII powers were included in these 16 Bills on introduction with a further 31 powers added during their progress through Parliament (Figure 1).

Henry VIII powers may be added during the course of a Bills consideration because gaps are revealed during the scrutiny process or they flow as a consequence of other amendments that are made to the legislative text. Sometimes they are included as a backstop because the government cannot be sure it has included all the consequential amendments arising from a change and the power will enable them to resolve any problems if they occur.

Some Henry VIII clauses are explicitly stated on the

face (or text) of the bill. For example, clause 11 of the Enterprise Bill 2016 stated the Secretary of State may, by regulations, ‘amend or repeal this Part or any provision made by or under any other enactment’ for the purposes of giving effect to the abolition of the office of Small Business Commissioner. Such powers may be widely drawn by virtue of little or no accompanying definition or hemmed in by conditions. But other Henry VIII clauses come in the form of powers to ‘otherwise modify’ primary legislation. For example, clause 27 of the same Enterprise Bill allowed ministers to make regulations to ‘amend’ or ‘otherwise modify’ the Freedom of Information Act 2000, in consequence of another provision in Paragraph 17 of Schedule 1 of the Bill which provided for the Small Business Commissioner to be a public authority for the purposes of the earlier 2000 FoI Act.

Critics of Henry VIII powers have a tendency to treat them as intrinsically bad. However, some of these powers can, in practical terms, be quite anodyne in their application – for example, the renaming of a public body. Treating them as a uniform problem misses the key point: what, exactly, do the powers give rise to in terms of ministerial authority and is this something that Parliament is comfortable Ministers should be able to do without scrutiny?

The Society’s SI Tracker data also provides information on the number of SIs laid before Parliament that amend primary legislation. In the 2015-16 session, 98 instruments (12.9%) did so, over half of which were subject to the least stringent form of parliamentary control, the negative scrutiny procedure.

Government Bill	Number of Henry VIII powers	
	Introduction	Royal Assent
Bank of England and Financial Services Bill	4	5
Childcare Bill	1	1
Cities and Local Government Devolution Bill	2	5
Education and Adoption Bill	2	2
Energy Bill	2	3
Enterprise Bill	5	6
European Union Referendum Bill	3	3
Finance Bill	13	13
Housing and Planning Bill	12	18
Immigration Bill	7	22
Northern Ireland (Stormont Agreement and Implementation Plan) Bill	2	2
Northern Ireland (Welfare Reform) Bill	1	1
Psychoactive Substances Bill	2	3
Scotland Bill	6	8
Trade Union Bill	2	3
Welfare Reform and Work Bill	1	1
TOTAL	65	96

In relation to SIs laid before the UK Parliament, the only data available begins from the 1997-98 session and is recorded by parliamentary session rather than by calendar year. While the volume of general SIs has largely increased over the years, the number laid before Parliament has fluctuated but remained broadly stable.

As Figure 2 shows, the first parliamentary session of a new Parliament is marked by a higher number of SIs being laid compared to other sessions (2010-12 should be treated with caution as it was an extended 23-month session). There is no marked difference in the output of delegated legislation between governments of different political complexion.

During the final two sessions of the last Parliament (2010-15) there was a steady rise in the number of SIs laid by the government. However, in the first session of the current Parliament (2015-16) only 757 SIs were laid; this was 621 SIs lower than the previous session and the lowest total number of SIs

Figure 1

Number of Henry VIII powers included in government Bills during the 2015-16 session: introduction vs Royal Assent⁷

VOLUME

A range of factors – the expansion of the regulatory state, the wide range of social security provision, the rapidly changing nature of technology, the growth in EU legislation – have all contributed to a significant increase in the volume, technicality and complexity of delegated legislation from the late 1980s onwards.

Between 1950 and 1990 the number of general UK statutory instruments produced each calendar year rarely rose above 2,500. Between 1992 and 2015 it never dipped below 3,000 and in 2001 it reached a high of 4,150.

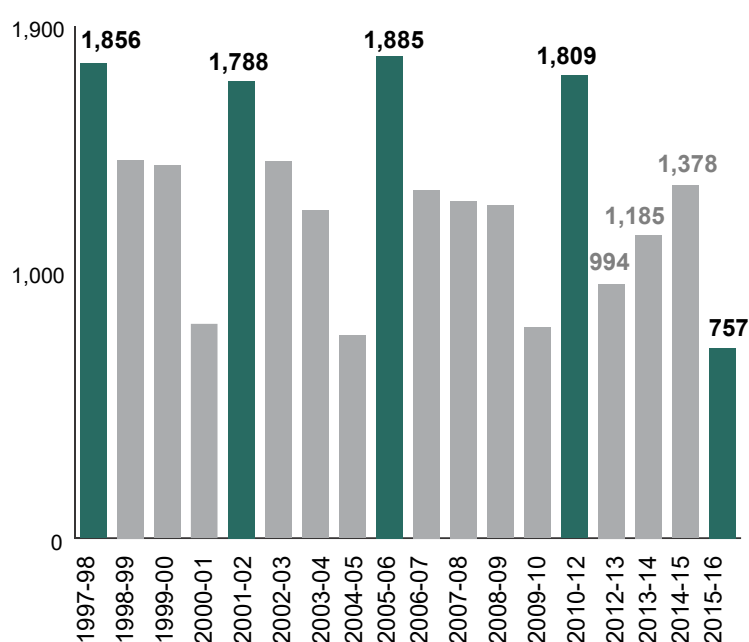


Figure 2

Statutory instruments laid in the House of Commons by session (1997-2016)⁸

DELEGATED LEGISLATION IN THE 2015-16 SESSION

laid in a single session in 20 years.

On the face of it, these numbers challenge the common argument made during the Tax Credits controversy that the government was actively seeking to increase the number of SIs in order to legislate by stealth.

However, regard must always be paid to the context of parliamentary time in relation to the number of SIs produced and laid before Parliament. The opening 2015-16 session of this Parliament was the shortest first session in terms of the number of sitting days since 1997-98 and therefore one would expect fewer SIs to be laid.

In most parliamentary sessions, the greatest number of instruments will be laid in March in advance of the start of the new financial year. As Figure 3 illustrates, the 2015-16 session was no different, with 106 SIs laid in March 2016, with the next busiest months being July, February and December as departments rush to table them before the parliamentary recess. In *The Devil is in the Detail* we warned against this 'peak and trough' approach to the production of delegated legislation

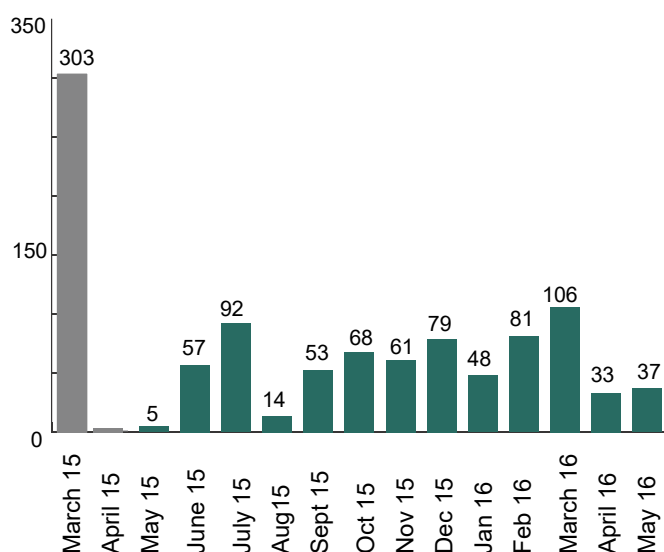


Figure 3

Statutory instruments laid in the House of Commons by month (2015-16)⁹

and the congestion problems it creates in relation to effective scrutiny.

As noted in the House of Lords Secondary Legislation Scrutiny Committee's (SLSC) first report of the 2015-16 session, despite knowing the last possible date for dissolution for four years, departments laid 303 SIs (or 22% of all SIs laid in the 2014-15 session) in March 2015, just before the general election was called, of these 121 were laid in the final few days before dissolution. This clearly has a delaying effect on the scrutiny process and meant that most SIs could not be considered by the Committee until it was convened again in the new Parliament in June 2015.

For example, the Misuse of Drugs Act 1971 (Temporary Class Drug) Order 2015 was made whilst Parliament was dissolved but lapsed before Parliament had time to approve it and had to be replaced, because the government's approval motion was not debated within the required 40 days.

Do such delays matter? We know that SIs can be missed because of the difficulties in tracking SIs. In late 2014, the government introduced changes to general election campaign limits via SI, a move that the Labour Party had wanted to vote against but was unable to do so because it 'had not been spotted by them at the time'.¹⁰ Any backlog increases the chances of important policy changes going undetected and may also lead to mistakes.

Number of pages

Although the number of pages of legislation is an imperfect measure, it does give an indication of the scale of the increase in volume and complexity.

The number of pages of SIs has increased sharply over the years. In 1970 general and local SIs filled just under 5,000 pages of the statute book. By 2009



7,783

the figure stood at just under 12,000 pages.

pages of diagrams setting out what traffic signs must look like with prescriptive details about how they are to be placed and illuminated.

Figure 4

Pages of delegated legislation in 2015-16 session¹¹

Data on the number of pages of delegated legislation has not been collected and

published since 2009. However our SI Tracker data enables us to do this. In the 2015-16 session, 757 SIs comprised 7,783 pages of legislation.

The largest individual SI of the last session was the Traffic Signs Regulations and General Directions 2016 which ran to 547 pages, larger than most Acts of Parliament. The Directions include pages and

By department

The Treasury, the Department for Business, Innovation and Skills (now the Department for Business, Energy and Industrial Strategy), the Home Office and the Ministry of Justice produced the most SIs in the 2015-16 session (Figure 5). This is in keeping with the pattern of previous sessions. It is no surprise that the Treasury is top of the list - it produced the most Bills in the 2015-16 session and its legislation often contains figures that require adjustment on a regular basis.

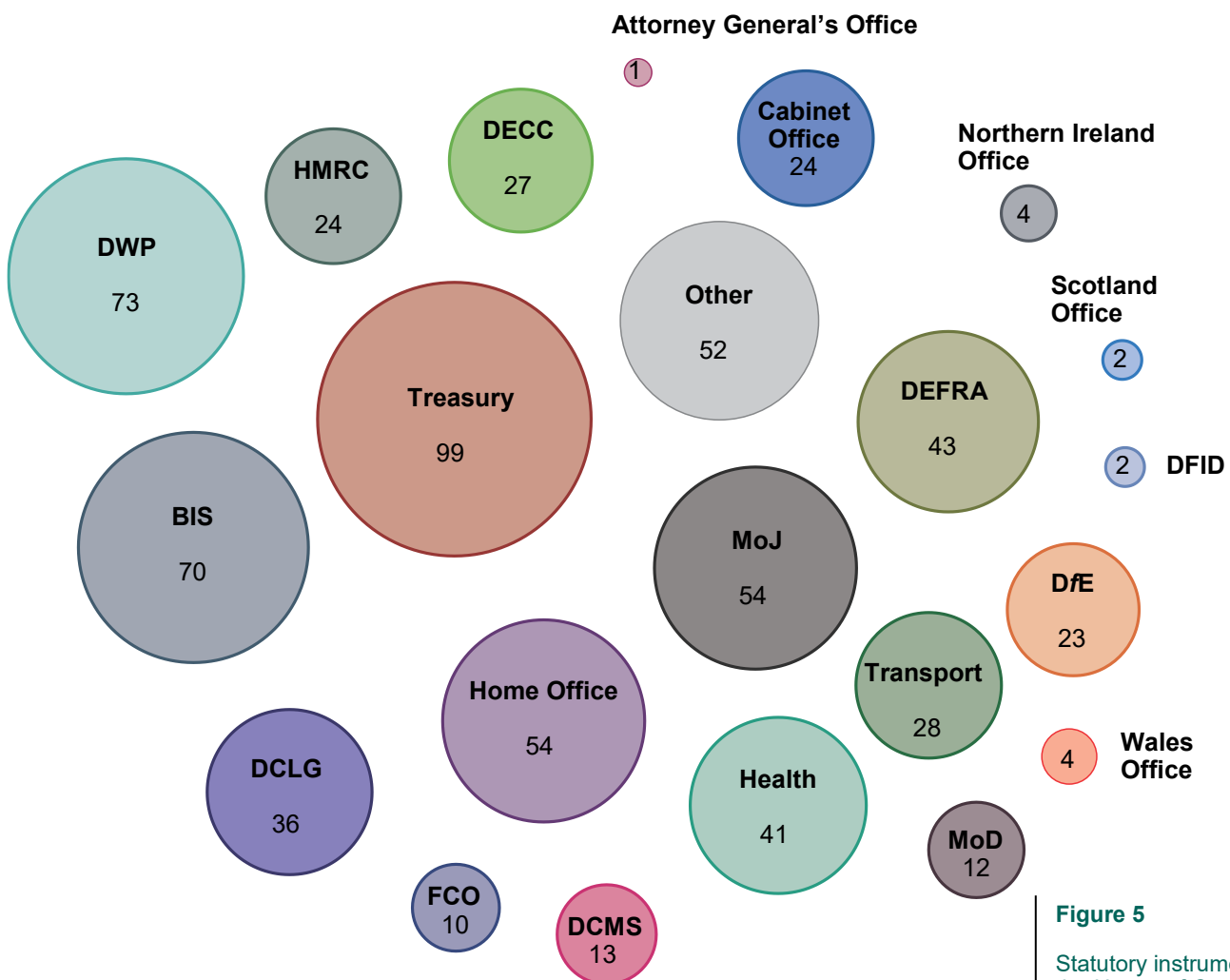


Figure 5

Statutory instruments laid in the House of Commons by department (2015-16)¹²

The SLSC notes in its review of 2015-16 that legal aid, immigration, justice and the NHS were the subjects on which they received most correspondence from the public. The Department for Work and Pensions also produced a notable number of SIs, although a high proportion of these were Northern Ireland Statutory Rules made on behalf of the Department for Social Development as a result of the Northern Ireland (Welfare Reform) Bill, a piece of enabling legislation arising from the inability of the Northern Ireland Assembly to implement the UK government's welfare reform programme.

Over 50 SIs (6.6%) were laid by non-departmental public bodies and/or executive agencies such as the Local Government Boundary Commission for England and Wales, the Health and Safety Executive, the Intellectual Property Office and the Medicines and Healthcare Products Regulatory Agency.

EU-related instruments

SIs are used to implement EU directives using powers conferred under section 2(2) of the 1972 European Communities Act. EU directives lay down certain European policy objectives that need to be adapted into national law by each member state by a certain date.

During the EU referendum campaign there was much debate about the proportion of UK law influenced by the EU and the difficulties in

generating an accurate calculation. The House of Commons Library found that between 1993 and 2014, an average of 12.9% of statutory instruments were EU-related but the true figure is thought to be much greater once EU regulations (which do not require Acts or SIs to be implemented) are factored in.¹⁴

In previous sessions the percentage of EU-based SIs has reached 16%, but the 2015-16 session exceeded this with 17.2% of SIs (130) laid before Parliament being derived from EU law.

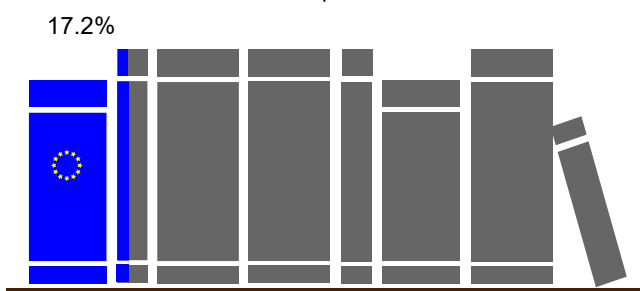
Following the vote to leave the EU, decisions will have to be taken about whether to keep, amend or repeal all the regulations made under Section 2.2 of the 1972 Act. Otherwise, they will automatically lapse on its repeal. (Under the Interpretation Act 1978, any 'right, privilege, obligation or liability acquired, accrued or incurred' under delegated legislation made by the 1972 Act will not be lost but will cease to accrue in the future.)

Given the volume of legislation involved, much of the heavy lifting will be done through statutory instruments. The government has indicated that it will introduce a Great Repeal Bill in the 2017 Queen's Speech in order to transpose all EU legislation into domestic law thus avoiding a legal cliff edge on the day the UK formally leaves the EU, and provide a legal means to 'repeal, amend or improve' all such legislation in the future following an as-yet-unspecified review process.¹⁵ As the government will not be in a position to know what it wants to do with all the EU-related legislation, it is likely that the Bill will be a skeleton piece of legislation designed to maximise flexibility for ministers in the future, and replete with Henry VIII powers allowing ministers to repeal or amend primary legislation without future recourse to Parliament.

The legislative review exercise – widely believed to be the biggest ever undertaken by Westminster – will almost certainly lead to an increase in the

Figure 6

EU-related SIs laid in 2015-16 session¹³



volume of SIs laid before Parliament in the years to come. This raises challenging questions about how both Houses of Parliament will cope; as we set out in *The Devil is in the Detail*, current procedures, particularly in the House of Commons, are inadequate for the scale of the current volume of SIs, let alone an increase on the likely scale we will see in the coming years.

TYPE OF INSTRUMENT

Of the 757 SIs laid before Parliament during the 2015-16 session, 585 instruments (77.2%) were subject to the negative procedure. This is the default scrutiny procedure. Instruments subject to this route become law on a stated date unless a ‘prayer’ motion to annul the instrument is passed in either House within 40 days of the instrument being

151 SIs (19.9%) were subject to the affirmative procedure, which is usually assigned to more substantial and important pieces of delegated legislation. SIs laid under the affirmative procedure require both Houses of Parliament actively to approve them before their provisions can come into effect. Usually around 20% of SIs are subject to this procedure, although the 2014-15 session witnessed an abnormally high proportion, at 27.6% affirmative instruments. The SLSC suggested this peak was largely attributable to the high number of correcting instruments received in that session.

A further 21 SIs (2.7%) were laid but subject to no parliamentary scrutiny procedure at all (see Figure 7).

There are currently 10 Acts of Parliament that subject certain powers to a higher level of parliamentary scrutiny than the affirmative procedure; these powers usually amend primary legislation.

In the 2015-16 session just 4 SIs (0.5%) were laid under one of the 11 strengthened scrutiny procedures, a little below the average of 7 SIs per session. All of them were Legislative Reform Orders (LROs) arising from the 2006 Legislative and Regulatory Reform Act, which permits a minister to remove regulatory burdens in primary legislation. An identical number of LROs were laid in the 2014-15 sitting. 31 LROs have now been laid since the legislation received Royal Assent in 2006.

In *The Devil is in the Detail* we examined the Public Bodies Act 2011, the vehicle for implementing the 2010-15 coalition government’s review of public bodies. This Act allows ministers to abolish, merge and modify the functions of public bodies by amending primary legislation. The Act garnered much attention during its progress through Parliament and the government originally envisaged that 58 Public Bodies Orders (PBOs) would be laid before the Act ceases to have effect in 2017.

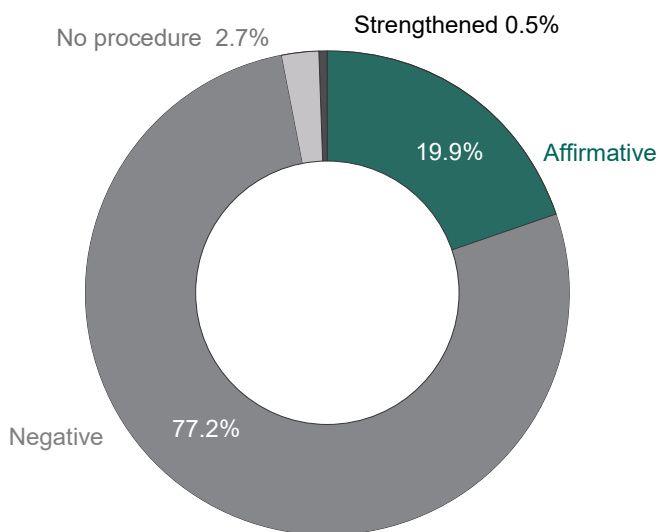


Figure 7

Number of SIs laid before Parliament during 2015-16 session by procedure¹⁶

laid. The vast majority are laid before Parliament after being signed off or ‘made’ by the relevant minister. Just 22 (2.9%) were laid in draft, meaning they could not be signed off if annulled within 40 days.

No Public Bodies Orders were laid in the 2015-16 session, and the total number of PBOs laid since enactment in 2011 is barely more than half those envisaged. Our research has shown that it can take just as long to steer instruments subject to some of the 11 variants of strengthened scrutiny procedure through Parliament as it does a piece of primary legislation. Given this, in relation to Public Bodies Orders, the SLSC rightly reiterated its concern 'that a significant amount of parliamentary time was wasted arguing over the inclusion in the Bill that became the 2011 Act of organisations which have since been handled another way.'¹⁷

It is possible that if the government seeks broad and highly flexible powers to 'repeal, amend and improve' EU-related law in the Great Repeal Bill then Parliament - and the House of Lords in particular - will seek to hem these powers in by means of a strengthened scrutiny procedure akin to what it did with the Legislative and Regulatory Reform Act and the Public Bodies Act. The data above should act as a warning of the consequences of such an approach. Any new Great Repeal Order process along these lines may well fail to achieve its objectives; those looking for Parliament to 'take back control' and 'restore sovereignty' through the Great Repeal Bill are likely to be highly disappointed by the parliamentary process itself.

House of Commons only instruments

The government can and does introduce SIs on financial issues that are to be considered only by the House of Commons. Previously, data has not been collected on House of Commons-only SIs. However, our new SI Tracker data shows that in the 2015-16 session 81 SIs (10.7%) were considered by the House of Commons only.

During the October 2015 Tax Credits controversy, various ministers and backbenchers took to the airwaves claiming that the unelected House of Lords had no right to hold up a finance/tax

measure. The government had the option of including the measures in the Finance Bill which would have excluded the Lords from the process and allowed for broader scrutiny in the Commons, including consideration by the Treasury Select Committee. But it chose the SI route instead, using the powers delegated to Ministers in the Tax Credits Act 2002, which explicitly states that the matter should be approved by both Houses. The Strathclyde Report recommended a review¹⁸ – by the government in consultation with the Procedure Committees – to determine the principles that should underpin Commons-only procedures for financial measures, with a view to developing a protocol to apply to the drafting of all bills with delegated powers. As yet there is no indication that this is being addressed. Given that it concerns 10% of SIs laid before Parliament, it needs to be dealt with, particularly as many Brexit related SIs may get caught up in this process in a couple of years' time.

English votes for English laws (EVEL)

In October 2015, MPs voted to approve changes to the House of Commons Standing Orders that implemented the principle of 'English votes for English laws' (EVEL). EVEL attempts to address the perceived imbalance between the voting rights of MPs from Scottish, Welsh and Northern Ireland constituencies and those of MPs from English constituencies following devolution. The changes require that England or England and Wales-only legislation has the support of a majority of both England or England and Wales-only and UK-wide MPs.

Divisions on SIs to either annul a negative instrument or approve an affirmative instrument are subject to the double-majority vote, whereby both English or English and Welsh and UK-wide MPs must vote for the motion to pass. Unlike primary legislation, where parts of the Bill can be certified, delegated legislation is only certified by the Speaker if all of its provisions relate to England or

England and Wales only.

In the 2015-16 session, 8 instruments (1%) were certified as England only and 10 instruments (1.3%) were certified as England and Wales only. Only one SI, the Education (Student Support) (Amendment) Regulations 2015, was subject to the new double majority vote procedure. In this instance the annulment was defeated and the SI was implemented as both a majority of the House and English MPs voted against the prayer motion.

An interesting point has been raised by Professor Michael Kenny and Daniel Gover from Queen Mary University London who argue that the double veto principle is based on the concept that both UK wide MPs and English or English and Welsh-only MPs vote in support of a motion. This principle works for affirmative instruments where the motion seeks approval, but not for prayer motions to annul a negative instrument, as in this case the SI remains in force unless both UK-wide MPs and English or English and Welsh-only MPs oppose it.

As Gover and Kenny state, ‘the real possibility exists that English MPs could in future be prevented from rejecting England-only secondary legislation due to the votes of UK-wide MPs (or vice versa)’.¹⁹ They suggest amending the standing orders so that negative instruments are annulled if a majority of either group of MPs votes in support of the motion. The House of Commons Procedure Committee has since concluded a review of the EVEL standing orders and has recommended a number of changes to the system.²⁰

THE SCRUTINY PROCESS

Many of the problems outlined in *The Devil is in the Detail* are rooted in the parliamentary scrutiny process for SIs. Complex and little understood by

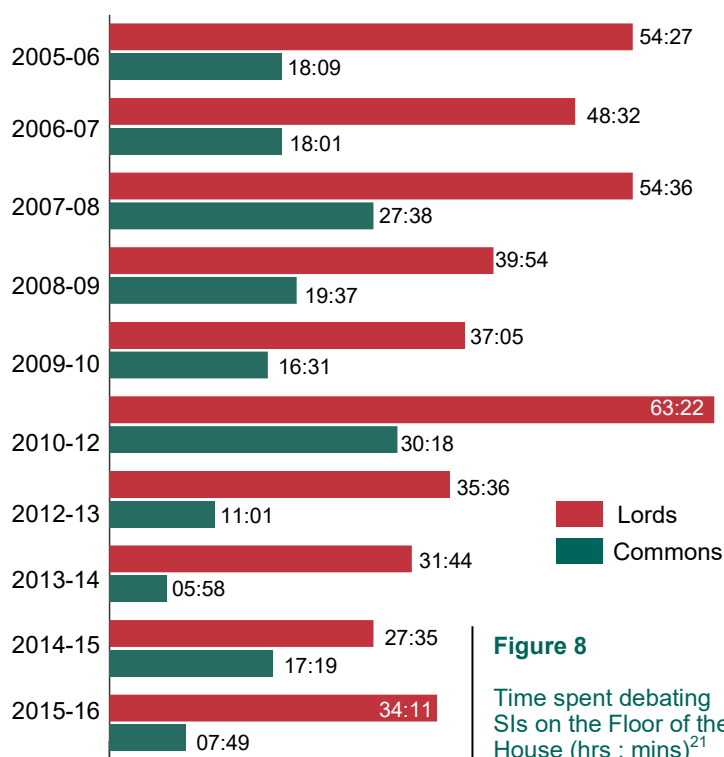


Figure 8

Time spent debating SIs on the Floor of the House (hrs : mins)²¹

parliamentarians and public alike, the procedures, particularly in the House of Commons, are neither rigorous nor rational.

Scrutiny time

Data suggests that there is a disconnect between the volume of SIs and the willingness or capacity of Parliament to spend time scrutinising them.

Although the number of SIs laid before Parliament has remained broadly stable, the amount of time Parliament – particularly the House of Commons – spends considering them in debate on the Floor of the House has declined. As Figure 8 shows, the decline has been marked, but not consistent. In the last session MPs spent 7 hours and 49 minutes debating affirmative and negative SIs in the Chamber. This was well below the time recorded in the previous 2014-15 session, when MPs considered SIs on the Floor for 17 hours 19 minutes, yet sat for 15 fewer days.

In the House of Lords, Peers spent 34 hours and 11 minutes debating SIs in the Chamber, an

increase of nearly 7 hours on the 2014-15 session. The Upper House generally sits for fewer days than the Commons, but its approach to considering SIs differs in some important respects, as outlined below.

Scrutiny of negative instruments

If a member of either House wishes to reject a negative instrument they have to do so within 40 days of the instrument being laid before Parliament. In the House of Commons, any member can table a 'prayer' as an Early Day Motion (EDM). These are motions for which no fixed parliamentary time has been allocated. Whether they are heard is therefore entirely in the hands of the government. If the official opposition tables a prayer motion there is some chance that it will be debated, as the whips and business managers can seek to negotiate time for debate through the 'usual channels'.²²

There has been a marked decline in the number of prayer motions tabled against negative instruments in the House of Commons over the last 25 years. In the 2014-15 session, 9 negative instruments were prayed against in the House of Commons.

Of those, only one secured debate and that was moved on the Floor of the House.

During the 2015-16 session, MPs wished to debate just 3% of the 585 negative instruments laid before them (Figure 9).

19 prayer motions were tabled by MPs via EDM, 10 of them by the Leader of the Opposition.

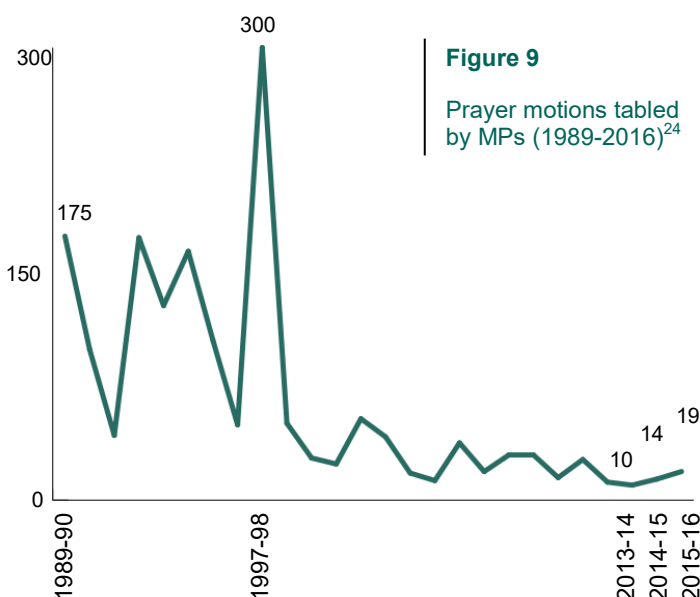
Of these 19 prayer motions, just 5 (26.3%) were accepted for debate. All the debates took place in Delegated Legislation Committees rather than on the Floor of the House.

On 10 December 2015, the then Leader of the House of Commons, Chris Grayling, told MPs, 'I am not aware of any recent precedent where a prayer made by the Leader of the Opposition and his shadow Cabinet colleagues has not led to a debate in this House.'²³

Our data shows that this statement was certainly wrong in respect of the 2015-16 session which he oversaw: all 5 prayer motions that were debated were tabled by the Leader of the Opposition, but a further 5 motions tabled by Mr Corbyn were not accepted for debate by the government. A further 2 prayers laid by members of the opposition front bench were also not accepted for debate.

If the government chooses to refer a prayer motion to a Delegated Legislation Committee it means that the debate can only be held on a non-fatal consideration motion. Even if the consideration is negated, the instrument can only be rejected if a further substantive vote annulling the SI is held (without debate) on the Floor of the House. This almost never happens because there is no requirement for a subsequent motion to be tabled.

However, the Education (Student Support) (Amendment) Regulations 2015 provide an interesting exception to the rule, although only because the opposition was able to use a range of



other procedures, not related to the delegated legislation process itself. Having already been considered in committee, the Labour Party decided to use an upcoming allocated opposition day debate to table the formal vote to annul the instrument themselves. Labour also preceded the formal vote with a two and a half hour debate on the subject. Usually, any formal vote to annul an instrument must be put forthwith without debate if it has already been considered in a Delegated Legislation Committee. The opposition was able to circumvent this by debating a related e-petition that had reached 100,000 signatures, calling on Parliament to prevent the removal of the maintenance grant.

Unlike in the House of Commons, prayer motions on negative instruments tabled by Peers usually find time for debate in the House of Lords. In general terms, a heavy burden of scrutiny responsibility falls upon the Upper House. Its scrutiny committees are more engaged in the process, more influential with government, and Peers generally have more time and appetite than MPs for the detailed technical work required to look at a thousand SIs per year.

In the 2015-16 session, the House of Lords debated 5 motions to annul an SI, all in the Chamber. This contrasts with the single prayer motion debated in the previous session, 2 in 2013-14, 1 again in 2012-13 and 8 in 2010-12.

The 21-day rule

It is a convention that negative instruments should not come into force less than 21 days after being laid before Parliament. As regards the share violating this convention, the SLSC has previously stated that, '5% ought to be a realistic ceiling to cater for genuine emergencies that do not require urgent action'.²⁵

In the 2015-16 session the government managed to fall just below that ceiling, with 27 (4.6%) negative SIs breaching the rule, although 103 (17.7%) came

into effect on the 21st day after being laid.

Our SI Tracker data also shows that of 585 negative SIs (excluding drafts) laid in the 2015-16 session, 468 (80%) came into force within 40 days of being laid and therefore before the scrutiny period had expired.

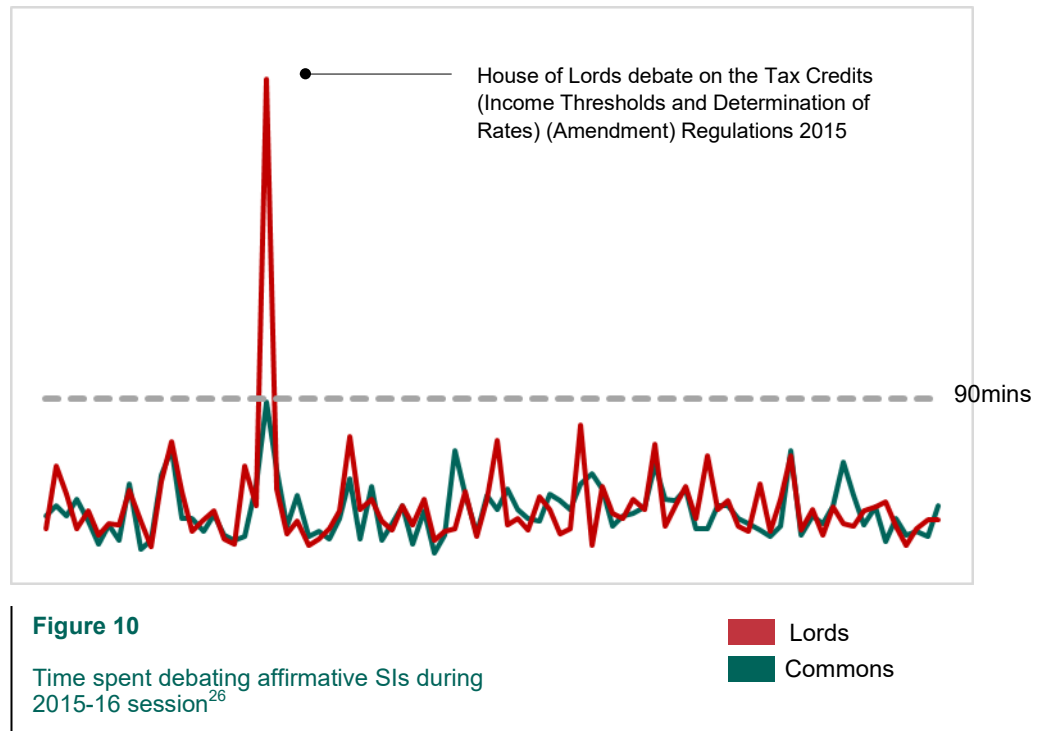
This figure highlights a significant problem in the scrutiny process; knowing that 80% of negative instruments are already on the statute book actively dissuades parliamentarians from seeking to challenge the legislation and disrupt the implementation of its provisions in the field.

Scrutiny of affirmative instruments

The artificial nature of parliamentary scrutiny of delegated legislation is encapsulated in the way the House of Commons considers affirmative instruments. In the House of Commons, these are automatically referred to a Delegated Legislation Committee (DLC) for debate unless a motion for the instrument to be debated on the Floor of the House is tabled. Regulations relating to terrorism and security are automatically considered on the Floor of the House, but usually the bulk of affirmative instruments are debated in committee.

In the 2015-16 session, 114 (75.4%) affirmative SIs were considered in committee and 13 (8.6%) on the Floor of the House. The previous session had seen an unusually high number of affirmatives laid and consequently a high number were considered on the Floor.

As noted in *The Devil is in the Detail*, the majority of debates held within Delegated Legislation Committees are poor. Traditionally, being assigned to a DLC is seen as punishment and a number of the MPs we spoke to confirmed that their party whips had told them that it was perfectly acceptable – indeed preferable – to get on with their constituency correspondence during a DLC meeting.



Debates in these committees can last up to 90 minutes and are conducted on a motion that ‘the committee has considered the instrument’. In the 2015-16 session, the average debate in DLC lasted for just 26 minutes. With no opposition to the legislation, MPs considered the draft Modern Slavery Act 2015 (Consequential Amendments) (No. 2) Regulations 2015 for just 60 seconds.

That MPs are unable to debate what they want when it comes to prayer motions tabled on negative instruments, yet have plenty of time allocated to affirmative instruments in DLCs which they do not utilise, suggests that the alignment of parliamentary time to the scrutiny of different types of SI is now out of kilter and ripe for review.

There were 10 divisions on consideration motions in committee, with the government undefeated on each one. Following the debate in committee, an approval motion is put formally to the House without debate on a separate day. If a debate is held on the Floor of the House, the question to approve the motion is put immediately after the debate. Of the 151 affirmative instruments laid in

the last session, 12 approval motions (7.9%) went to a division in the Commons, 8 of which were deferred divisions, whereby MPs vote using a ballot paper at a more convenient time on a separate day.

In the House of Lords, a motion to approve an affirmative instrument can be taken either in Grand Committee or on the Floor of the House. In a similar vein to the House of Commons, if an affirmative instrument is debated in Committee, an approval motion is put formally to the House without debate on a separate day. In the 2015-16 session, 28 affirmative instruments (18.5%) were considered and debated in the Upper Chamber, 15 more than the number considered on the Floor in the Commons.

Interestingly, however, the average length of debate on affirmative instruments in both Grand Committee and the Chamber of the House of Lords during the 2015-16 session was just two minutes longer than in the Commons at 28 minutes. Unlike primary legislation, the scrutiny stages for statutory instruments in both Houses run concurrently. The majority of affirmative

instruments are approved by the House of Commons before the House of Lords considers them.

In the 2015-16 session, however, Peers approved 19 affirmative SIs (12.5%) before the House of Commons had debated them. These challenge the Strathclyde Review's preferred option of a new process designed to provide the House of Commons with an opportunity to 'think again' if the House of Lords rejects an instrument because the House of Commons had not (yet) 'thought at all' in these particular cases.

Cabinet Office guidance advises government departments to allow around 6 sitting weeks for the passage of an affirmative instrument through all its parliamentary stages. This allows for the House of Lords Secondary Legislation Scrutiny Committee to consider the instrument and report on it within 12 to 16 days of it being laid. However, the 2015-16 sessional data suggests the government's guidance needs to be updated as the average passage of an affirmative SI took 8 weeks.

REJECTING INSTRUMENTS

Statutory instruments, with just a few exceptions, cannot be amended by Parliament, in keeping with the principle of delegation of power to Ministers. But both Houses of Parliament, as a rule, do not reject SIs either. Since 1950 the House of

Commons has rejected just 11 instruments and the House of Lords has rejected 6. This equates to a rejection rate of 0.01% of the total number of SIs considered in over more than six decades.

The inadequacies of the procedures and the government's in-built majority ensure that few SIs are defeated in the House of Commons. In the House of Lords, Peers are mindful of the primacy of the elected House and rarely vote on fatal motions.

Members of the House of Lords can table 3 types of motion in relation to negative instruments:

- Fatal 'prayer' motions to annul.
- Non-fatal critical amendments or motions, inviting the House to call on the government to take action, without annulling the instrument itself.
- Neutral 'take-note' motions.

With regard to affirmative instruments, Peers can also table three amendments or motions:

- Direct opposition by means of an amendment to the approval motion, withholding agreement of the House.
- A motion or amendment calling upon the government to take specified action but which will not prevent the approval.
- A motion or amendment putting on record a particular point of view but without calling on the government to take any specific action.

These options for expressing opposition have worked well in the past but they can also add a level of ambiguity and confusion to the process.

Because the Upper House rarely votes on a fatal motion (it has only divided on 37 occasions since 1997), it is reliant on non-fatal motions as a way to express dissatisfaction with an SI, encouraging the government to think again without compelling it to do so. Since 2004 there have been 117 non-fatal motions (Figure 11) and the government has been defeated on 19 occasions. In the 2015-16 session, 30 non-fatal motions were tabled, the highest

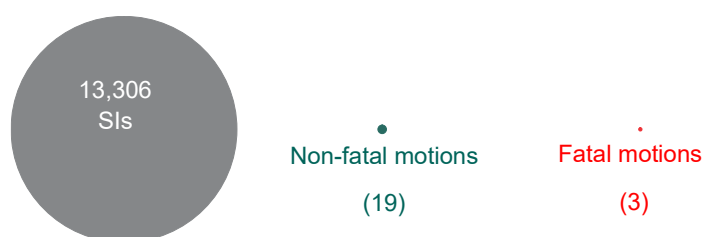


Figure 11

Government defeats on fatal and non-fatal motions in the House of Lords (2004-2016)²⁷

number on record, two of which led to government defeats on Tax Credits and Universal Credit.

In July 2015, the House of Lords called on the government to delay the enactment of a negative instrument, the Universal Credit (Waiting Days) (Amendment) Regulations 2015.

The SI, which allowed for the introduction of 7 days of non-entitlement at the beginning of certain claims for Universal Credit, had previously been considered by the government's own Social Security Advisory Committee, which recommended that the proposal should not proceed. Peers responded to these concerns and voted to call for the delay of the SI, 'until Universal Credit is fully rolled out',²⁸ which at the time was expected in 2017 (full roll-out is now forecast for March 2022). Given that the SI was due to come into force in August 2015, Peers believed the decision they had taken would prove fatal for the instrument. Immediately after the vote, Welfare minister Lord Freud stated that he would 'come back to the House at the appropriate time' to explain how the government proposed to handle the vote to delay.²⁹ At the time of writing, this is yet to happen, despite the fact that the government's own website suggests the 7 day non-entitlement period is now in force, contrary to the expressed will of the Upper House.

Confusion also surrounded the draft Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015. The debate in the House of Lords on the Tax Credits SI was taken on the usual approval motion laid by the government and was accompanied by 4 amendment motions. The 2 amendment motions that passed, delayed or 'declined to consider' the SI until a particular action was met. Again there was some discussion as to whether the 2 amendments could accurately be defined as fatal, as the instrument was not rejected outright, but did ultimately lead to the SI's withdrawal.

The House of Lords Library subsequently classified

the 2 motions as 'delaying motions' and indeed many Peers emerged from both debates believing that a new, delaying provision had been created by their actions. Because the Tax Credits SI was withdrawn by the government, the stance of Peers was not challenged; the fate of the earlier SI regarding Universal Credit, however, would suggest that the government has not accepted the concept of delay. Further clarity will therefore be required in the House of Lords Companion to the Standing Orders if confusion is to be avoided in the future, not just for Members of both Houses but also for all those with an interest in the legislation.

WITHDRAWN AND CORRECTING INSTRUMENTS

One of the more worrying developments of recent years has been the increase in the number of 'correcting instruments' issued to rectify defectively drafted SIs. In 2014, the SLSC reported an error rate of just under 10% which 'represented a significant waste of time and resources and increased the risk of confusion amongst those required to comply with the law'.³⁰ In response the government created the Statutory Instruments Hub, based in the Cabinet Office, to improve the drafting of SIs across departments. This seems to have had the desired effect as only 35 (4.6%) correcting instruments were laid in the 2015-16 session. A further 19 SIs (2.5%) were also withdrawn by the government, fewer than the 39 SIs withdrawn in the previous 2014-15 session.

ENDNOTES

¹ The Rt. Hon. the Lord Judge, Lord Mayor's Dinner for the Judiciary, *The Mansion House Speech*, 13 July 2010.

² Cabinet Office, *Strathclyde Review: Secondary legislation and the primacy of the House of Commons*, Cm 9177, Dec 2015.

³ House of Commons, *Hansard*, 17 November 2016, col. 395.

⁴ Legislative and Regulatory Reform Bill 2006.

⁵ Draft Deregulation Bill 2013.

⁶ Banking Act 2009.

⁷ Hansard Society *Statutory Instrument Tracker* data 2015-16.

⁸ House of Commons *Sessional Returns* 1997-98 to 2015-16.

⁹ Hansard Society *Statutory Instrument Tracker* data 2015-16.

¹⁰ D. Boffey, 'Tories accused of 'trying to buy election' with 23% hike to campaign spending', *The Guardian*, 13 December 2014.

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¹² Ibid.

¹³ Ibid.

¹⁴ V. Miller, *EU Obligations: UK Implementing Legislation Since 1993*, House of Commons Library Research Paper, SN07092.

¹⁵ Department for Exiting the European Union, *Government announces end of European Communities Act*, 2 October 2016.

¹⁶ House of Commons *Sessional Returns* 2015-16.

¹⁷ House of Lords Secondary Legislation Scrutiny Committee, 35th Report of Session 2015-16, *Work of the Committee in Session 2015-16*, HL 147.

¹⁸ Cabinet Office, *Strathclyde Review: Secondary legislation and the primacy of the House of Commons*, Cm 9177, Dec 2015.

¹⁹ Prof M. Kenny & D. Gover, *English Votes for English Laws*, written evidence to the House of

Commons Procedure Committee, 21 April 2016.

²⁰ House of Commons Procedure Committee, 3rd Report of Session 2016-17, *English votes for English laws Standing Orders: report of the Committee's technical evaluation*, HC 189.

²¹ Data based on calculations using House of Lords *Sessional Statistics* 2004-05 to 2014-15 and Hansard Society *Statutory Instrument Tracker* data 2015-16.

²² The term used to describe the relationship between the whips' offices of the government and the opposition parties. See Hansard Society (2002), '[Opening Up the Usual Channels](#)'.

²³ House of Commons, *Official Report*, 10 December 2015, col. 1154.

²⁴ Data based on calculations using House of Commons *Sessional Returns* 1989-90 to 2015-16 and the House of Commons Early Day Motions database.

²⁵ Merits of Statutory Instruments Committee, 60th Report of Session 2010-12, *The Work of the Committee in Session 2010-12*, , HL 290.

²⁶ Hansard Society *Statutory Instrument Tracker* data 2015-16.

²⁷ Data based on calculations using H. Evennett, *Delegated Legislation in the House of Lords*, House of Lords Research Paper, 2015-0037 and Hansard Society *Statutory Instrument Tracker* data 2015-16.

²⁸ House of Lords, *Hansard*, 13 July 2016, col. 436.

²⁹ House of Lords, *Hansard*, 13 July 2016, col. 438.

³⁰ House of Lords Secondary Legislation Scrutiny Committee, 33rd Report of Session 2014-15, *Work of the Committee in Session 2014-15*, HL 149.

ABBREVIATIONS

BIS	Department for Business, Innovation and Skills (now the Department for Business, Energy and Industrial Strategy)
DCLG	Department for Communities and Local Government
DCMS	Department for Culture, Media and Sport
DECC	Department of Energy and Climate Change (now merged with the Department for Business, Energy and Industrial Strategy)
DEFRA	Department for Environment, Food and Rural Affairs
DfE	Department for Education
DFID	Department for International Development
DLC	Delegated Legislation Committee
DPRRC	Delegated Powers and Regulatory Reform Committee
DWP	Department for Work and Pensions
EDM	Early Day Motion
EVEL	English votes for English laws
EM	Explanatory Memorandum
EU	European Union
FCO	Foreign and Commonwealth Office
Fol	Freedom of Information
HMRC	Her Majesty's Revenue and Customs
HMT	HM Treasury
JCSI	Joint Committee on Statutory Instruments
LRO	Legislative Reform Order
NHS	National Health Service
MOD	Ministry of Defence
MOJ	Ministry of Justice
PBC	Public Bill Committee
PBO	Public Bodies Order
SI	Statutory instrument
SLSC	Secondary Legislation Scrutiny Committee
SO	Standing Order

GLOSSARY

21-day rule: An informal convention by which, wherever possible, a statutory instrument is to be laid at least 21 days before it comes into effect.

Act of Parliament: A piece of legislation that has been approved by Parliament and received Royal Assent.

Affirmative resolution procedure: Parliamentary scrutiny procedure whereby instruments require the active approval of both Houses.

Annulment motion: A proposal for a debate and decision to reject a negative statutory instrument.

Bills: A proposal for a new law is known as a bill once it has been introduced into Parliament at first reading. If it is approved by Parliament and receives Royal Assent it becomes an Act.

Commencement date: The date when the provisions of an Act come into effect.

Commencement Order: A type of statutory instrument that brings into force all, or part, of an Act of Parliament at a date later than that of Royal Assent.

Delegated legislation: Also known as secondary or subordinate legislation. This is law made by ministers (and sometimes other authorised bodies) under powers deriving from Acts of Parliament.

Delegated Legislation Committee (DLC): A temporary committee of MPs that meets to debate an affirmative statutory instrument for up to 90 minutes in the House of Commons.

Delegated Powers Memorandum: The document produced by the relevant government department identifying every delegated power in a bill, its justification, and the proposed form of parliamentary scrutiny procedure for it. It is scrutinised by the House of Lords Delegated Powers and Regulatory Reform Committee.

Delegated Powers and Regulatory Reform Committee (DPRRC): Appointed by the House of Lords to consider all public bills on their introduction to the House, examining whether they contain any inappropriate delegation of power or subjects those powers to an inappropriate level of scrutiny.

Direction: A type of statutory instrument that gives legally binding instructions to a public body

about the way it exercises its functions.

Early Day Motion (EDM): Motion submitted for debate in the House of Commons for which no time is formally allocated.

EU Directive: A legislative Act of the European Union setting out certain goals to be transposed into national law by each member state.

Explanatory Memorandum: A short document accompanying an SI which sets out, in plain language, what the instrument does and why.

Fatal motion: A motion in the House of Lords seeking to reject a statutory instrument.

Financial privilege: The primacy of the House of Commons over the Lords in financial matters.

General instrument: Instruments that affect matters of general concern.

Grand Committee (House of Lords): If a bill is not to be debated on the Floor of the House it will be sent to a Grand Committee. The proceedings are identical to those on the Floor except that voting is not permitted. Thus, decisions must be made unanimously. Any Peer may attend a Grand Committee.

Henry VIII powers: A delegated power that enables ministers to amend or repeal primary legislation by secondary legislation.

Joint Committee on Statutory Instruments (JCSI): A committee made up of Members from both Houses which considers the technical qualities of all general instruments and statutory instruments subject to parliamentary procedure that may warrant further consideration.

Laid: Signifies the beginning of a statutory instrument's progress through Parliament. In practice, copies of the SI are delivered to the Votes and Proceedings Office in the House of Commons and its counterpart in the House of Lords.

Legislative Reform Order (LRO): A power granted by the Legislative and Regulatory Reform Act 2006 that allows a minister to remove regulatory burdens in primary legislation.

Local instrument: One that is local in character in that it affects only a particular group of people or organisations or a specific area of land. Its

GLOSSARY

provisions are in the nature of a personal or private Act, usually with a specific focus such as maintenance of a particular section of road. Few are subject to parliamentary procedure.

Made: When a statutory instrument is signed off by the responsible minister.

Motion: A proposal for a debate or a decision that may be voted upon if contested.

Negative resolution procedure: Parliamentary procedure in which statutory instruments will become law on a stated date unless a motion is passed in either House annulling (rejecting) the instrument. This has to be done within a certain time period (usually 40 days).

Non-fatal motion: A motion in the House of Lords critical of a statutory instrument but not seeking to reject it.

Order: A type of statutory instrument that is an exercise of executive power or a judicial or quasi-judicial decision.

Orders in Council: Issued 'by and with the advice of Her Majesty's Privy Council' these are used in circumstances where an ordinary statutory instrument would be inappropriate, for example to transfer responsibilities between government departments.

Parent Act: Also known as the enabling Act, it is the legislation that grants a delegation of power to ministers or other bodies to make secondary legislation.

Prayer: The name given to a motion tabled by an MP or Peer calling for the annulment of a negative statutory instrument.

Public Bodies Order (PBO): A power conferred upon a minister by the Public Bodies Act 2011 to abolish, merge and modify the functions of public bodies by amending primary legislation.

Regulation: A type of statutory instrument in which substantive and detailed law is made.

Regulatory Reform Committee (RRC): Appointed by the House of Commons to consider and report to the House on draft Legislative Reform Orders under the Legislative and Regulatory Reform Act 2006. (Previously known as the Deregulation and Regulatory Reform Committee.)

Remedial Order: A statutory instrument used to remove an incompatibility in UK law with the European Convention on Human Rights.

Royal Assent: The assent of the monarch to a bill that has been passed by both Houses of Parliament, after which it becomes law. The monarch has not withheld Royal Assent from a bill that has been passed by Parliament since the 18th century.

Rules: A type of statutory instrument that sets out procedural matters.

Scheme: A type of statutory instrument that amends governance arrangements.

Scrutiny reserve: An undertaking by government that it should not take forward or agree a proposal until a designated parliamentary committee has reported on it.

Secondary Legislation Scrutiny Committee (SLSC): Appointed by the House of Lords to examine the policy merits and implications of any instrument (whether or not a statutory instrument) or draft instrument, laid before the House that is subject to parliamentary procedure and may warrant further consideration. It also considers Public Bodies Orders and whether they meet the test set out in the Public Bodies Act 2011. (Previously known as the Merits of Statutory Instruments Committee.)

Skeleton legislation: Bills and Acts that provide a skeleton, setting out the general shape and structure of the intended law, but leave all the detail to be provided in secondary legislation.

Standing Orders: The written rules under which Parliament conducts its business. They regulate the way Members behave, bills are processed, and debates are organised.

Statutory instrument (SI): The form by which most delegated legislation made after the Statutory Instruments Act 1946 is exercised. Statutory instruments have the same force of law as Acts of Parliament.

Strengthened scrutiny procedures: Statutory parliamentary scrutiny procedures for instruments that amend primary legislation. Sometimes referred to as enhanced or super-affirmative procedures.

IMAGES AND ICONS

Icons included on pages 1, 3, 8 and 9 are adapted from the Noun Project. With special thanks to George Vasjagin, Jens Tärning, Ashley van Dyck, James Keuning, jayson lim, NOPIXEL and TDL-LONDON.

Westminster Lens

Parliament and Delegated Legislation in the 2015-16 Session

The **Hansard Society** believes that the health of representative democracy rests on the foundation of a strong Parliament and an informed and engaged citizenry. Founded in 1944, we are a charity working in the UK and around the world to promote democracy and strengthen parliaments. An independent, non-partisan political research and education Society, our work is devoted to:

Exploring the evolution of representative democracy: offering evidence-based ideas for reform of political and parliamentary institutions, processes and culture to help foster democratic renewal.

Educating citizens, particularly young people: so that they have the knowledge and confidence to play an active role in our democracy and be future leaders in civic and political life.

Connecting citizens with parliamentarians and policy-makers: through innovative on and offline initiatives to address the democratic deficit.

Convening debate on topical political issues: providing a non-partisan forum for the exchange of ideas about our democratic future.

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www.hansardsociety.org.uk

