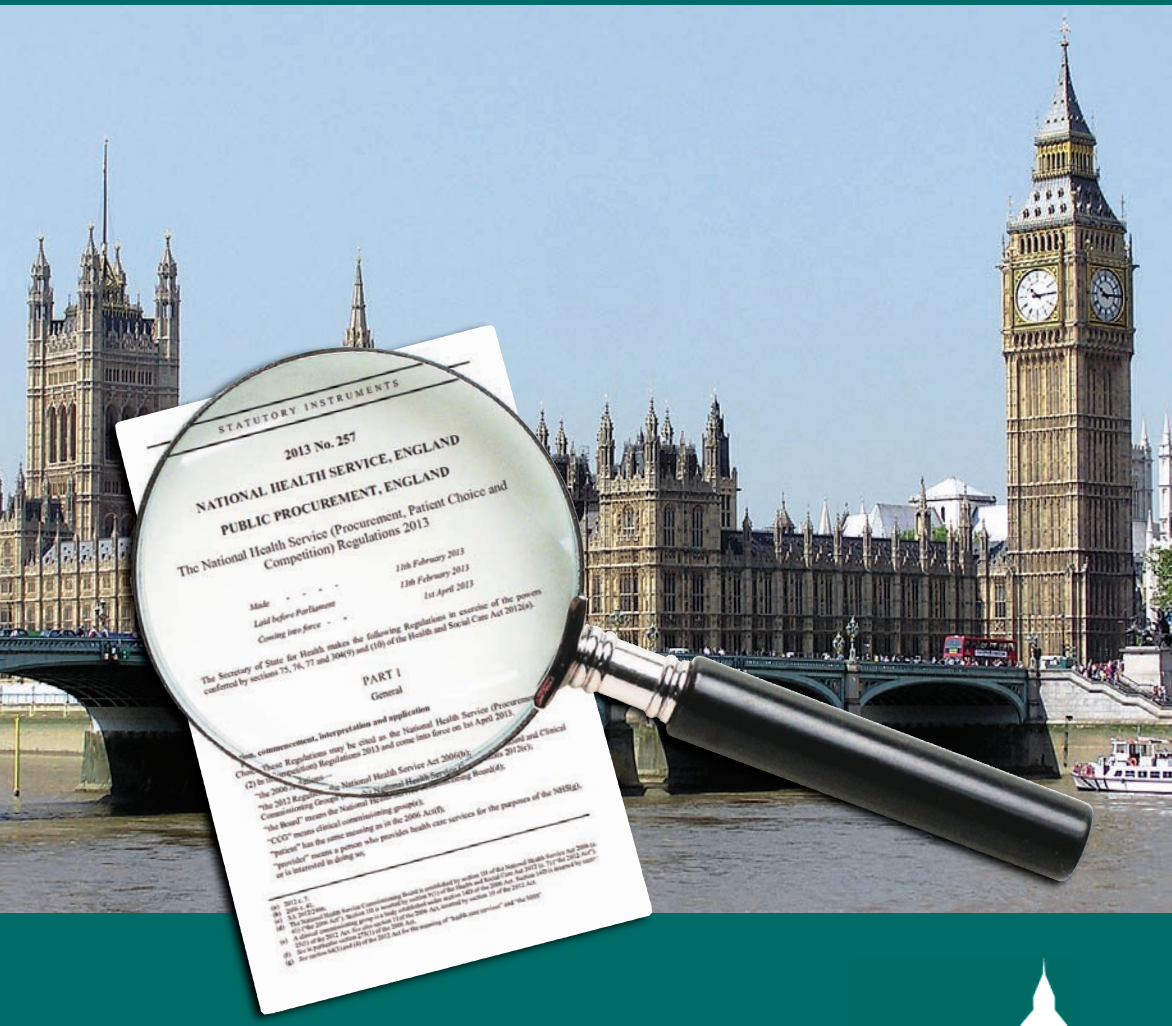
The Devil is in the Detail: Parliament and Delegated Legislation



By Ruth Fox and Joel Blackwell

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Executive Summary

What is delegated legislation?

- Most of the United Kingdom's general public law is made not through Acts of Parliament but through delegated (or secondary or subordinate) 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 that 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.
- Unlike primary legislation delegated legislation is subject to judicial review.
- The scope of delegated legislation varies considerably, from the very technical power that is procedural in character to the wide-ranging Henry VIII power that can, for example, abolish quangos.
- 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 in recent years.
- How Parliament deals with this legislation is unsatisfactory. The way in which delegation and its scrutiny is treated is neither systematic nor consistent.
- Too much of the process relies on 'gut feeling' and 'judgement' rather than objective criteria.
- The procedures are complex and often illogical, and many parliamentarians willingly admit they don't understand them.
- The nomenclature – 'made' and 'laid', 'negative', 'affirmative' and 'super-affirmative', 'prayers' and 'Henry VIII powers' – is confusing and undermines parliamentary and public understanding of the legislation.

Beyond the boundary of reasonableness and acceptability

- The factors taken into account when deciding on whether to seek delegated powers in a bill may include: the volume of technical detail; readability;

administrative convenience; an incomplete policy process; unpredictability; and time management.

- Historically, acceptance of the system of delegated powers and legislation has been predicated on its reasonable use and application by ministers coupled with trust in Parliament's system of scrutiny.
- However, the use of delegated legislation by successive governments has increasingly drifted into areas of principle and policy rather than the regulation of administrative procedures and technical areas of operational detail.
- It is used extensively, for example in areas such as the criminal law – with clear implications for civil liberties – that in the view of many parliamentarians and external observers can hardly be regarded as technical or inconsequential.
- Ministers also use delegated powers in ways that were not originally intended by Parliament, for example through recourse to old laws passed in a different era or through very broad, ambiguous wording of the primary enabling Act, which can then be open to wide interpretation when delegated powers are later used.
- Governments seek delegated powers that they do not subsequently use, 'reserve' powers that are stored up to give them freedom to act in the future, even if they have no plans to do so at the time they are taking the legislation through Parliament.
- Ministers also seek powers to amend or repeal primary legislation by Order, commonly known as Henry VIII powers, with little or no scrutiny. These undermine the constitutional principle of parliamentary sovereignty; namely that Parliament is the supreme, sole legislative authority with the power to create, amend or repeal any law.
- In recent years, for example, ministers have sought the power by Order to *'make provision for reforming legislation'*, to repeal legislation deemed to be *'no longer of practical use'*, to *'disapply or modify the effect of a provision'* in any Act of Parliament, and to make provisions with retrospective effect if they *'consider it necessary or desirable'*.
- There has been such an expansion in the scope and application of powers and procedures that a precedent could arguably be found to justify almost any form of delegation a minister might now desire.
- Increasingly, rather than removing such powers, the focus of parliamentary debate is on reining them in using strengthened scrutiny procedures. Members focus on the form (the scrutiny procedure) rather than the substance (the power) of a bill.

Unsatisfactory scrutiny procedures

- There is no clear and consistent pattern between the subject matter of a delegated power and the scrutiny procedure to which the SI arising from it is allocated.
- Several levels of parliamentary control have been created and tweaked over time to reflect the different types of delegated power available to ministers. This incremental approach has produced a patchwork of procedures, resulting in a system of scrutiny that is overly complex and confusing.
- Some SIs are not subject to any form of parliamentary scrutiny at all. The majority of SIs are simply signed off ('made') by ministers; they are not 'laid' before Parliament for scrutiny purposes and they are therefore not subject to debate or a vote.
- Some SIs are 'laid' before Parliament after being signed off by the minister ('made') but they are also not subject to scrutiny.
- But for those SIs that are subject to parliamentary scrutiny, they are assigned to one of three forms of scrutiny procedure: the negative resolution procedure; the affirmative resolution procedure; or a strengthened procedure.
- There are no fewer than 16 variations on these three procedures, including 11 forms of strengthened procedure alone.
- Scrutiny procedures are bartered to buy off opposition during a bill's passage through Parliament but, in doing so, the fundamental reasons for pursuing delegation in the first place are undermined.
- It can take between 11 and 18 months, for example, to complete a Public Bodies Order or a Legislative Reform Order, negating the advantages of legislating with speed and flexibility rather than putting the matters on the face of a bill.
- Only 25 Legislative Reform Orders have been laid since 2007 and one Localism Order since 2011. Only 29 Public Bodies Orders have been laid to date; it is estimated that there will be 30% fewer Orders than estimated.
- Government departments now acknowledge that these Orders consume too much time and resource and that, wherever possible, it is better to use a primary legislative vehicle. Knowing this, Parliament should resist any further attempt by government to include such models in future bills.

Scrutiny by the numbers

- Between 1950 and 1990, the number of general and local SIs produced each calendar year rarely rose above 2,500. Since 1992 it has never dipped below 3,000. Around 1,200 of these are subject to parliamentary scrutiny each year.
- MPs wanting to debate a negative SI must 'pray' against it. Since the1997-98 session just 411 prayer motions have been tabled in the House of Commons amounting to just 2.5% of the total number of negative instruments laid in that period.
- In the 2013-14 session, 882 negative instruments were laid but only 10 prayer motions were tabled against them by MPs (1.13% of the total).
- Of these 10 prayer motions, just two were actually considered, one in the Chamber and one in a Delegated Legislation Committee.
- In only one session in the last decade (2007-08) has the House of Lords considered motions against more than 1% of all negative instruments.
- MPs can debate affirmative SIs for up to 90 minutes in Delegated Legislation Committees. In the 2013-14 session, the average length of a debate was just 26 minutes, two minutes less than in 2012-13. But they can be much shorter – the debate on the Draft Contracting Out (Local Authorities Social Services Functions) (England) Order lasted just 22 seconds.
- Statutory Instruments, with just a few exceptions cannot be amended by MPs or Peers, in keeping with the principle of delegation. But both Houses of Parliament rarely reject an SI. This 'take it or leave it' proposition does nothing to encourage effective scrutiny and Member engagement with the issues.
- Just 16 SIs out of over 169,000 – or 0.01% – in nearly 65 years have been rejected. Since 1950 the House of Commons has rejected just 11 instruments and the House of Lords has rejected five.
- The House of Lords rarely votes on a fatal motion; there have been only 21 such motions in the last decade and on only two occasions was the government defeated. This leaves the House reliant on non-fatal motions of regret as a way to express dissatisfaction with an SI.
- There have been only 79 non-fatal motions between 2004 and 2014, and the government has been defeated on only 12 occasions.
- The quality of consultation and Explanatory Memorandums for SIs is highly variable. In 2013-14 the government had to replace 6% of all Explanatory Memorandums.
- In the last eight sessions, the Secondary Legislation Scrutiny Committee has drawn attention to 741 SIs about which it had serious concerns, the majority of those (448 or 60.4%) in relation to drafting.

- The current system whereby many SIs are 'made' and come into effect before they are considered by Parliament permits defective delegated legislation to sit on the statute book until such time as the government revokes the SI and lays an amended version.

Whitehall, Westminster and citizens

- In legal terms ministers make the decision about what goes into primary and what goes into secondary legislation as they 'sign off' any bill that goes to Parliament and must subsequently defend it both in parliamentary debate and in the court of public opinion. In practical terms, however, significant discretion lies with civil servants, the government's legal advisers and Parliamentary Counsel.
- There is a lack of collective memory within the civil service about precedent, the politics of delegated legislation, and where the line that defines the balance between primary and secondary legislation lies.
- Ministerial engagement with the detail of delegated legislation varies from bill to bill but is rarely high.
- MPs are treated as cannon fodder in the process and a huge amount of time and resource is wasted, particularly in Delegated Legislation Committees. Scrutiny procedures are used in which MPs have little faith and confidence and in many cases do not fully understand.
- The House of Lords has the greatest influence on delegated powers and legislation – particularly through the Delegated Powers and Regulatory Reform Committee (DPRRC) – but voluntarily blunts that influence by its reluctance to reject SIs. Its committees are more engaged in the process, more influential with government, and Peers generally have more appetite for the detail and technical scrutiny required than do MPs.
- A key factor in the number and scope of delegated powers being sought is the speed at which successive governments are legislating, often before the detail of policy is pinned down.
- Delegated legislation doesn't make the legislation easier to understand and read in circumstances where so little by way of draft Orders is available to enable Members to appreciate the government's intentions for the scope and use of the powers they seek.
- Thoughtful consultation and preparation underpins effective implementation. Too often, however, consultation is treated as an administrative inconvenience by successive governments.
- The role and interests of the public in the delegated legislation process is almost completely ignored. The confusing nomenclature and procedures, the

inability to find and track information, and the lack of proactive communication all undermine the principle that those subject to the law should have the means to be aware of it.

Recommended reforms

An independent inquiry into the legislative process

- It is impossible to separate consideration of delegated legislation from that of primary legislation. The issues with delegated legislation are now so serious that **an independent expert inquiry is needed along the lines of that undertaken in 1975 by David Renton on the 'Preparation of Legislation' or our own Commission on 'Making the Law' chaired by Lord Rippon in 1993**.
- This should review the entire legislative process looking at:
  - how both primary and delegated legislation is prepared in Whitehall and scrutinised at Westminster;
  - issues of principle and practice, and where the balance should lie between administrative and political convenience and good legislative process;
  - rationalisation of scrutiny procedures - exploring what criteria and principles define what Members want to look at again in the area of delegated legislation and how this can best be achieved;
  - whether the burden on Members to scrutinise delegated legislation should be reduced through the introduction of individuals or independent advisory bodies with genuine technical expertise in particular policy areas;
  - whether the scrutiny system should be re-designed such that the greater burden of work falls on the House of Lords in future.
- The review should be established as soon as possible after the 2015 general election.
- If such an inquiry is not held, then there are a number of areas where reforms could be implemented to ameliorate the problems with delegated legislation. These are key areas for consideration, not a blueprint.

A 'circle of learning' in Whitehall

- It is incumbent upon departments to better plan and co-ordinate the production of SIs. A central co-ordinating unit to plan and promote awareness of the production and implementation of upcoming SIs across government should therefore be established.

Scrutiny reforms

- **A new, clearer annulment motion should be adopted**; praying against a negative instrument in the House of Commons should be decoupled from the Early Day Motion system.
- **Government control over annulment debates should be lessened.** Annulment motions laid by the opposition should have an improved chance of debate; time could be set aside each session for their consideration. Backbenchers should be able to seek a debate on an annulment motion if they can demonstrate some level of support for it; here, the decision-making power about whether time should be allocated for such a debate on the Floor of the House could be accorded, for example, to the Backbench Business Committee or even to the Speaker. A select committee should also be able to request a debate if it is concerned about an instrument and believes it warrants consideration by the House.
- **Delegated Legislation Committees should be reformed along the lines of the European scrutiny committee system in the House of Lords.** A committee should be appointed, supported by a number of sub-committees allocated to deal with particular policy areas. Some of the members should be drawn from the relevant departmental select committees. A committee secretariat would support Members, providing briefing material and advice to the participants.
- **A new conditional amendment provision should be introduced** to enable Members who have concerns to indicate what changes are required to bring an SI within the bounds of acceptability.
- **The House of Lords should make greater, albeit judicious, use of its power of veto** in the future, particularly in respect of any SIs emerging from framework legislation that cannot be effectively scrutinised at the primary bill stage. This would be in keeping with the House of Lords' revising function and its power of delay.
- **The strengthened scrutiny models should be rationalised.** One variant might have provision for drafts, consultation, supporting documents, committee determination of the scrutiny procedure, and consideration for up to 60 days (perhaps formalised as the 'enhanced affirmative' procedure); the other might have all these and additionally a veto power for judicious application in the most contentious cases only (to be known as the 'super-affirmative' procedure). Both variants should statutorily require that the

minister consider committee recommendations and explain in writing to the relevant committee if the government does not plan to adhere to those recommendations.

Committee reforms

- **The remit of the Delegated Powers and Regulatory Reform Committee should be changed so that it can report on bills immediately**, when they begin their passage through one of the Houses, whether that be Lords or Commons. This would push at the commonly understood boundaries of bi-cameral scrutiny and require an increase in committee resources, but it would ensure that the House of Commons is better advised on the nature of delegated powers in bills than is the case at present.
- The DPRRC should also consider how it might establish a more systematic process for checking past delegations of power and an accountable framework against which to test the decisions that it makes and to which government departments should then have regard when drafting powers and procedures.
- **A Legislative Standards Committee should be established**, ideally on a bi-cameral basis, to assess bills against a set of minimum technical preparation standards that must be met before a bill is introduced. **The DPRRC should confirm whether or not it is content with the quality of the Delegated Powers Memorandum** and its response should be incorporated into the Committee's review of each bill. If such a Committee is not established, **the DPRRC should be vested with the authority to reject a memorandum that it believes is inadequate** resulting, if necessary, in a delay to consideration of the relevant parts of the bill until such time as an improved memorandum is provided to the Committee.
- The DPRRC should call both ministers and Permanent Secretaries to account at oral evidence hearings in the future when the quality of any memorandum falls well below what Members expect.
- **The House of Commons should observe the 'scrutiny reserve'** that exists in the House of Lords in relation to decisions of the Joint Committee on Statutory Instruments (JCSI). The House should not debate an SI before the Committee has concluded its deliberations on an instrument.
- In the event of an egregious breach of the 21-day convention or six-week recommendation, MPs on the JCSI or who otherwise have an interest in the issue should seek a backbench business debate. Alternatively, the JCSI and Secondary Legislation Scrutiny Committee (SLSC) plus any relevant departmental select committees should consider holding an extraordinary

joint meeting at which they invite the responsible minister to appear and account for what has happened.

- **The government should be formally required to respond to all reports** from the Delegated Powers and Regulatory Reform Committee, the Joint Committee on Statutory Instruments and the Secondary Legislation Scrutiny Committee.

Defective SIs

- **The government should be required to remedy defective SIs within four weeks.** A convention should be agreed whereby defects and any transitional consequences must be addressed within this period unless there are exceptional reasons not to, circumstances that must then be justified to the JCSI.
- **The government should also be required to publish departmental statistics accounting for the number of SIs that are revoked each session, and the number of corrective instruments that are produced**, and to do so in a uniform way for the purpose of analysis and comparison.

Tackling complexity and improving knowledge

- **Parliament should undertake a review of the language and terminology used in the delegated legislation process**, as well as the presentation of information about it on the parliamentary website in order to improve curation of material with a view to making the process more accessible and understandable.
- **The government should review the Statutory Instruments Act 1946** with a view to replacing it with new legislation that takes account of modern forms of digital communication and developments arising from the 'Transforming Legislation Publishing' and 'Good Law' initiatives. Importantly, it should also set out clear, minimum standards (of a high level) for publicity and consultation concerning delegated legislation in the future.

Abbreviations

ACPO	Association of Chief Police Officers
BoE	Bank of England
DCLG	Department for Communities and Local Government
DCMS	Department for Culture, Media and Sport
DfE	Department for Education
DLC	Delegated Legislation Committee
DPRRC	Delegated Powers and Regulatory Reform Committee
DWP	Department for Work and Pensions
ECA	European Communities Act
EDM	Early Day Motion
EM	Explanatory Memorandum
ESA	Employment Support Allowance
EU	European Union
FCA	Financial Conduct Authority
FSA	Financial Services Authority
FSCS	Financial Services Compensation Scheme
GLS	Government Legal Service
HMT	HM Treasury
IA	Impact Assessment
JCSI	Joint Committee on Statutory Instruments
JCHR	Joint Committee on Human Rights
LRO	Legislative Reform Order
NPPF	National Planning Policy Framework
OPC	Office of the Parliamentary Counsel
PASC	Public Administration Select Committee
PBC	Public Bill Committee
PBL	Parliamentary Business and Legislation Committee
PBO	Public Bodies Order
PCRC	Political and Constitutional Reform Committee
PIP	Personal Independence Payment
PRA	Prudential Regulation Authority
RRC	Regulatory Reform Committee
SI	Statutory Instrument
SLSC	Secondary Legislation Scrutiny Committee
SO	Standing Order
SRR	Special Resolution Regime
SSAC	Social Security Advisory Committee

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.

Amendments: As legislation passes through Parliament, MPs and Peers may suggest changes that they believe will improve its quality.

Annulment motion: A proposal for a debate and decision to reject a negative Statutory Instrument.

Backbencher: MPs and Peers who do not have ministerial posts in the governing party or shadow ministerial or spokesperson roles in the opposition party.

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.

Clauses: Every bill is made up of a number of clauses containing the provisions of the proposed legislation. Clauses are debated in numerical order during committee and report stage scrutiny of a bill, along with selected amendments relating to it.

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.

Consolidation bill: This brings together a number of Acts that deal with the same subject into a single Act of Parliament. It will not, as a rule, seek to significantly change the policy represented by the original pieces of legislation.

Crossbenchers: Peers who are not representatives of a political party sit on the crossbenches in the House of Lords and are referred to as crossbenchers.

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.

Gold plating: Implementation of an EU directive that goes beyond the minimum provisions necessary for compliance.

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.

Hansard: The full transcript of proceedings of both Houses of Parliament. Also known as the Official Record. Not to be confused with the Hansard Society.

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

Hybrid instruments: An affirmative SI deemed to affect some members of a group more than others in the same group and subject to a special procedure in the House of Lords.

Immigration Rules: A type of delegated legislation (but not technically a Statutory Instrument) that sets out the practices to be followed in the administration of immigration law in the UK.

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 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.

Office of the Parliamentary Counsel (OPC): The group of government lawyers responsible for drafting all government bills, advising departments on the rules and procedures of Parliament, reviewing orders and regulations which amend Acts of Parliament, and assisting government on a range of legal and constitutional issues. Based in the Cabinet Office, the team is headed by the First Parliamentary Counsel/Permanent Secretary to the Cabinet Office.

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.

Parliamentary Business and Legislation Committee (PBL Committee): A cabinet committee, chaired by the Leader of the House of Commons, that decides which bills will be included in the government's programme for each parliamentary session. The bills approved by the Committee are then prepared for introduction. (Previously known as the Legislation Committee.)

Parliamentary Counsel: Specialist lawyers who draft the text of bills.

Part affirmative/part negative instruments: A Statutory Instrument laid before Parliament that includes provisions that are subject to the affirmative procedure and parts that are subject to the negative procedure.

Post-legislative scrutiny: Assessment of the implementation and operation of legislation after it has been approved by Parliament. The government department responsible for an Act will publish a memorandum on its implementation three to five years after Royal Assent for a parliamentary committee to scrutinise.

Prayer: The name given to a Motion tabled by an MP or Peer calling for the annulment of a negative Statutory Instrument.

Pre-legislative scrutiny: Consideration of a draft bill by a parliamentary committee, including scrutiny of consultative documents and supporting materials.

Public Bill Committee (PBC): A cross-party committee in the House of Commons appointed to carry out line-by-line scrutiny of a bill. Each committee is named after the bill it considers.

Public Bodies Order: 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.)

Select committees: In the House of Commons these examine the expenditure, administration and policy of each government department and associated public bodies. They have the power to take evidence and issue reports. They are made up of MPs from across the parties, the numbers of which are reflective of their party's representation in the Commons. In the House of Lords, select committees do not mirror government departments but cover broader issues such as science and technology, the economy, the constitution and the European Union.

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.

Sunset clause: A provision that sets an expiry date on part of a bill once it becomes law. These are included in legislation if Parliament feels it should have an opportunity to revisit the issue again after a fixed period.

Ultra vires: Beyond the legal power or authority conferred upon a minister or body.

Usual channels: The term used to describe the relationship between the whips' offices of the government and the opposition parties.

Whips: MPs or Peers appointed by each party to maintain party discipline. Part of their role is to encourage Members of their party to vote in the way their party would like in all important votes.

List of Figures and Boxes

1. Introduction

Most of the United Kingdom's general public law is made not through Acts of Parliament but through delegated (or secondary or subordinate) legislation.[1] 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 that framework of powers delegated to ministers by Parliament in the parental Act.[2] They can be used to fill out, update, or sometimes even amend existing primary legislation without Parliament having to pass a new Act.

Delegated legislation is crucial to the effective operation of government and affects almost every aspect of both the public and private spheres: individuals, businesses, charities and public bodies are all affected by the regulations it creates, often financially in terms of major new cost burdens. It deals with major areas of public policy such as immigration rules 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 dissolution of NHS foundation trusts, 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. It facilitates the organisation of major sporting events such as the London 2012 Olympics and the *Grand Depart* of the Tour de France in Yorkshire in 2014. Much European Union (EU) legislation is also transposed into domestic law through delegated legislation.

It encompasses both the most controversial and mundane aspects of government policy-making. For every delegated power that permits ministers to freeze the assets of terrorists there is one that amends the certification requirements for fodder plant seed. For every set of Universal Credit Regulations, there is the Baking and Sausage-Making (Christmas and New Year) Regulations. For every set of

[1] Throughout this report, for the purposes of simplicity, and in order to avoid confusion, we have chosen to use the term 'delegated' legislation (with 'secondary' legislation utilised when seeking to distinguish the balance with primary legislation). We do not use the term 'subordinate' legislation as such nomenclature might convey to the general reader that it is of lesser importance than primary legislation, a view this report seeks to dispel. However, we recognise that it is commonly used in a legal context. For example, *Craies on Legislation* states, 'delegated legislation is a real synonym for subordinate legislation, since it is the delegation of power by primary legislation that gives authority to legislation subordinate to it.' See D. Greenberg (Ed.) (2012), *Craies on Legislation, A Practitioners' Guide to the Nature, Process, Effect and Interpretation of Legislation*, 10th Edition (London: Sweet and Maxwell), para.1.1.8, p.8.

[2] The Interpretation Act 1978 is often used to help define that 'subordinate legislation' means 'Orders in Council, orders, rules, schemes, warrants, byelaws and other instruments made or to be made under any Act'.

immigration rules, there are the Lawnmowers (Harmonisation of Noise Emission Standards) Regulations. And for every set of National Health Service (Procurement, Patient Choice and Competition) Regulations one can find the Apple and Pear Orchard Grubbing Up Regulations or the Imitation Dummies Regulations. It is the legislation of everyday life.

A deficient system

But how Parliament deals with this legislation is widely regarded as deficient. 'Palpably unsatisfactory'[3], 'close to preposterous'[4], and 'woefully inadequate'[5] are just some of the phrases used over the years to describe it. Yet despite such criticism it is an area of the legislative process that has seen little reform.

As demand for the scope of delegated powers in bills has broadened and the volume of Statutory Instruments has risen inexorably over the years, conversely the amount of time that Parliament spends actively scrutinising it has declined, raising questions about democratic accountability.[6] To its critics, the excessive use of delegated legislation, giving wide discretion to ministers, amounts to government by ministerial diktat, providing a blank cheque for ministers to legislate with limited oversight by Parliament.

As the nature and scope of policy has become more complex, the role of government has changed. But Parliament, unlike government, has not fundamentally altered the way it deals with delegated legislation to respond to these changes. Consequently modern legislation and regulation is being shoe-horned into an increasingly out-of-date scrutiny framework.

As the following chapters demonstrate, the way in which delegation and its scrutiny is treated is neither systematic nor consistent. Too much of the process relies on 'gut feeling' and 'judgement' rather than objective criteria that can be tested in public view. New scrutiny procedures have been created but these have become a focus for bartering in order to placate and buy-off opponents during the examination of bills. Committees can raise objections to government proposals but the government does not have to listen and respond. When government is required to consult it can do so in an utterly inadequate manner knowing that there will be few if any parliamentary consequences. It is of course a different matter for the public who are on the sharp end of the defective law that often emerges from this process. As

3 House of Commons Procedure Committee (1999-2000), *Delegated Legislation*, HC 48.

4 Professor The Lord Norton of Louth (Chair), (2000), *Strengthening Parliament: Report of the Commission to Strengthen Parliament* (Conservative Party).

5 House of Commons Liaison Committee (1999-2000), *Shifting the Balance: Committees and the Executive*, HC 300.

6 This study encompasses both the delegation of powers to create delegated legislation in the parental Act, and the scrutiny of delegated legislation in the form of SIs. For ease of reference we have therefore used the term 'delegated legislation' in the title of this study to encompass the entire life-cycle of delegation as explored in the following chapters.

delegated, unlike primary legislation, is subject to judicial review, the legal system often has to make up for the inadequacies of parliamentary scrutiny.

The language of delegated legislation – 'made' and 'laid', 'negative', 'affirmative' and 'super-affirmative', 'prayers' and 'Henry VIII powers' – has eluded reform. It confuses and intimidates in equal measure, serving to wrap the process in a fog of obscurity. Business and civil society groups with a real interest in a particular subject are often so baffled by the process that they struggle to make their views known and exercise any influence on the implementation of measures that have a profound effect on the everyday life of all citizens.

The procedures are complex and often illogical, and many parliamentarians willingly admit they don't understand them. But week in week out their participation in the process gives it continuing legitimacy. Yet demands for reform are, given the scale of the problems, strangely muted. It is as if they have surrendered rather than face up to the enormity of the problem. A few Members, particularly in the House of Lords, continue to fight for the principle that legislative power is vested in Parliament alone and delegation should remain under tight parliamentary control but they have few allies in the House of Commons.

In short Parliament's approach to the delegation of powers to ministers and the scrutiny of legislation when they seek to utilise those powers is utterly inadequate and inappropriate. It is not what a legislature committed to modernisation should accept.

Emerging from obscurity?

Given the complexity of delegated legislation it is perhaps not surprising that it has long been regarded as a 'tedious corner of the constitutional edifice'.[7] As a result, despite its central importance to the political and governmental process, most delegated legislation operates under the radar of parliamentary, media and public scrutiny. In recent years, however, there have been some notable exceptions to this obscurity. A number of government bills have hit the headlines because of the far-reaching nature of the powers they have given to ministers to make delegated legislation. The 2006 Legislative and Regulatory Reform Bill for example, was colloquially known as the 'Abolition of Parliament Bill' such was the scope and constitutional significance of the delegated powers contained within it. Only after Parliament somewhat belatedly realised what was happening and asserted itself in opposition to the proposals, was the scope of these powers circumscribed in the final Act. More recently, the original delegated powers outlined in the 2011 Public Bodies Bill, allowing ministers to change, sell off, or abolish quangos by order were

7 J. D. Hayhurst & P. Wallington (1998), 'The Parliamentary Scrutiny of Delegated Legislation' in M. Zander (1994), *The Law Making Process* (London: Butterworths), p.95.

widely condemned and the government was persuaded to rewrite whole swathes of the Bill (see chapter five).

A number of individual Statutory Instruments have also attracted rare attention and criticism. In 2008 a diplomatic dispute broke out when it was revealed that the government had used its 'freezing' order powers under the 2001 Anti-Terrorism, Crime and Security Act to freeze all Icelandic bank assets in the UK following the collapse of the bankrupt bank, *Landsbanki*. The use of anti-terrorist powers angered the Icelandic government and people: a formal complaint was submitted to NATO and almost 25% of the population signed an online petition entitled 'Icelanders are not terrorists'. A Treasury Select Committee review subsequently concluded that the use of the legislation 'inevitably stigmatises those subject to it' and a less blunt instrument would be more appropriate in future.[8]

In July 2011 an SI authorised a £9.5 billion loan to the International Monetary Fund, thereby almost doubling the UK's contribution to the institution. This prompted much political and media soul searching about the efficacy of providing a loan to bail out other European economies at a time when significant financial cuts were being imposed at home.[9]

The Secretary of State for Pensions had to introduce new regulations to 'clarify' the impact of the Welfare Reform Act in 2013 when it was discovered that foster carers and the families of armed services personnel serving in Afghanistan might be detrimentally affected by provisions in an SI to change housing benefit (popularly labelled the 'bedroom tax' or the 'spare room subsidy'). The political controversy escalated when the matter was raised during Prime Minister's Questions. However, the concern had not emerged fully during scrutiny of the original Bill largely because so much was skeletal in form and lacked detail regarding how the powers might be used (see chapter eight).

And in November 2014, the House of Commons debate to approve the draft Criminal Justice Protection (Protocol No.36) Regulations 2014, an SI transposing 11 of 35 EU-wide criminal justice measures into UK law, descended into what some commentators described as the worst shambles witnessed in the House of Commons in 20 years. MPs believed that the Prime Minister and the Home Secretary had promised them a vote on whether to re-join the European Arrest Warrant. However, when it became clear that it was not mentioned in the Regulations (because it had previously been legislated for), the government was accused of broken promises, chicanery and deception. The House found itself in the unusual position of being asked by the government, in one vote, to give legal authority to 11 measures but political authority to all 35. The Speaker had no option but to make clear to Members that the vote could only be on the Regulations before the House.

8 House of Commons Treasury Committee (2008-09), *Banking crisis: the impact of the failure of the Icelandic banks*, 5th Report, HC 402, para.51, p.23.

9 International Monetary Fund (Increase in Subscription) Order 2011, No. 1766.

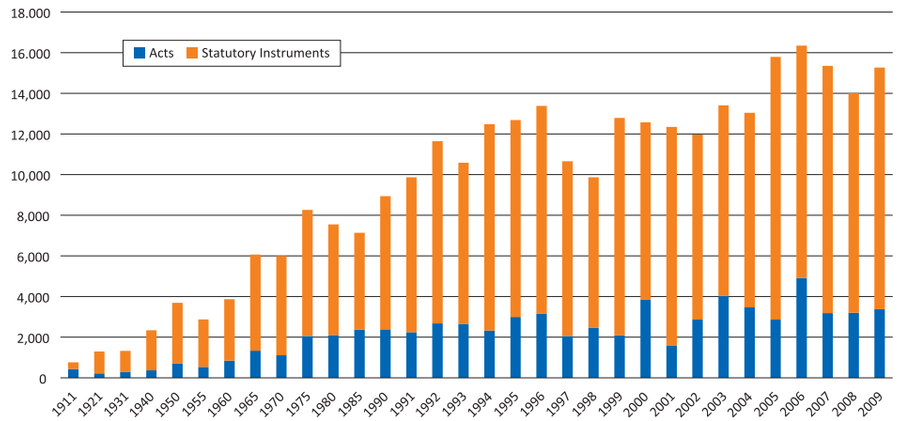
But these examples tend to be the exception not the rule. By and large, given the sheer volume and importance of such legislation, remarkably little public and media attention is paid to it. This is not because it is secret; rather, it is hiding in plain sight. As Baroness O'Neill of Bengarve observed, delegated legislation 'intimidates and is ignored in equal measure'.[10]

Increasing 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 in recent years.[11]

Although the number of pages of legislation is an imperfect measure, it does give some sense of the scale of the increase over the decades. In 1970 primary legislation (both public and general Acts) stretched to 1,100 pages; by 1990 to 2,390 pages, and by 2009, to 3,384 pages. The number of pages of Statutory Instruments has also increased sharply. In 1970 Statutory Instruments filled 4,880 pages of legislation. By 1990 that had risen to 6,500 pages, by 2000 to 8,712 pages, and by 2009 (the last available set of statistics) it stood at 11,888 pages.[12]

Figure 1: Number of pages of Acts and Statutory Instruments (selected years) 1911-2009 [13]



10 Interview, 24 October 2007, cited in A. Brazier, S. Kalitowski & G. Rosenblatt with M. Korris (2008), *Law in the Making: Influence and Change in the Legislative Process* (London: Hansard Society), p.196.

11 Statistics about delegated legislation can be drawn from three core sources: the Office of Public Sector Information, www.legislation.gov.uk, and Sessional Returns for both the House of Commons and House of Lords. However, it is important to note that the data does not always match due to differences in definition and scope. Care must therefore be taken in making comparisons.

12 R. Cracknell, *Acts and Statutory Instruments: The Volume of UK legislation 1950 to 2014*, House of Commons Library Standard Note, SN/SG/2911, 19 March 2014.

13 *Ibid*.

Between 1950 and 1990 the number of individual SIs produced each calendar year rarely rose above 2,500. From 1992 onwards, however, it has never dipped below 3,000 and in 2001 reached a high of 4,150.[14] The trend is inexorably upwards: there is no marked difference in the output of delegated legislation between governments of different political complexion (see also chapter 11).

Reasonable use and application?

Historically, acceptance of the system of delegated powers and legislation has been predicated on its reasonable use and application by ministers coupled with trust in Parliament's system of scrutiny.[15] However, this settlement is increasingly under pressure as the use of delegated legislation by successive governments is perceived to have drifted into areas of principle and policy rather than the regulation of administrative procedures and technical areas of operational detail.

a) Adaptability and flexibility

Traditionally, the justifications for delegated legislation have centred on the need to elaborate complex and technical detail (particularly in the sphere of rule-making) that cannot easily be done on the face of a bill; the need for flexibility and adaptability; the advantage of involving external expertise; and the capacity to act in times of crisis and emergency. The debate about its use has tended to focus on the limitations of Parliament in the legislative process; what it should and shouldn't be concerned with, and what it realistically can and can't do in terms of the availability of finite parliamentary time and resources.

Indeed, in 1993 the Hansard Society concluded in our report, *Making the Law*, that

> *'The main advantages of making greater use of delegated legislation outweigh the very real disadvantages…[it] makes Acts easier for the user to follow, helps Parliament to focus on the essential points…[and keeps] the legislative process flexible so that statute law can be kept as up to date as possible… [and eases] pressure on the parliamentary timetable.'* [16]

These advantages of flexibility and managing legislation still hold true. Yet the changes in the volume and scope of delegated legislation mean that it is necessary to ask whether corresponding changes are now urgently needed both to the ways that it is used by government and scrutinised and approved by Parliament.

[14] *Ibid*.

[15] The concept of 'reasonable use and application' was a phrase used in a series of lectures on delegated legislation given in 1921. See C.T. Carr, (1921), *Delegated legislation*, (London: Cambridge University Press).

[16] Rt. Hon. Lord Rippon of Hexham (Chair), (1993), *Making the Law: The Report of the Hansard Society Commission on the Legislative Process* (London: Hansard Society), p.65.

b) Powers used in ways Parliament did not intend

There is growing concern that ministers now use delegated powers in ways that were not originally intended by Parliament, for example through recourse to old laws passed in a different era (for example, pre World War Two) to justify the introduction of new SIs, or through very broad, ambiguous wording of the primary enabling Act, which can then be open to wide interpretation when delegated powers are later used, as in the Icelandic case. Similarly, powers established for national security purposes have been used domestically in ways that were not originally intended by Parliament. In 2010 it was revealed that a number of local authorities had been covertly spying on local residents to tackle dog fouling, track use of litter bins and check eligibility for school catchment areas using powers delegated to them in the Regulation of Investigatory Powers Act 2000. Such investigations were criticised as going well beyond the intention of the legislation.[17]

c) Reserve and holding powers

Conversely, ministers are also criticised for seeking delegated powers that they do not subsequently use, 'reserve' powers that are stored up to give them freedom to act in the future, even if they have no plans to do so at the time they are taking the legislation through Parliament. Such powers may remain dormant for long periods but there is always a risk they might, at a later date, be activated by ministers with radically different policy objectives from those who sought the powers in the first place.

And 'holding' powers are also claimed in instances where policy proposals are not fully formulated. In November 2013, for example, the government announced that it intended

> *'to take advantage of the opportunity offered by the Children and Families Bill, which is currently being considered in the House of Lords, to table a Government amendment to take enabling powers now which would allow regulations to be made to introduce standardised tobacco packaging later, if it is decided to proceed with this policy.'* [18]

In such circumstances, ministers assume substantial powers with insufficient consideration given to how they will actually be used.

d) Retrospective action

Precedent is generally an important constraint on the law-making process but in some recent bills the import of this principle has also been diluted when ministers

[17] Following a review, the coalition government subsequently curtailed the ability of local councils to use these powers by introducing a 'seriousness' threshold and making the powers subject to approval by magistrates in the Protection of Freedoms Act 2012.

[18] Written Statement from the Parliamentary Under-Secretary of State for Health, Jane Ellison MP regarding Tobacco Control, House of Commons, *Hansard*, 28 November 2013, col.24WS.

have sought to obtain powers with retrospective effect if they consider it 'desirable' to do so (see chapter 10). In these instances the executive is demanding a huge burden of trust be placed on it by Parliament, stretching the elasticity of the flexibility concept beyond what many consider appropriate.

e) Despotic power?

An increasingly regular feature of the legislative process – the power of ministers to amend or repeal primary legislation by Order, commonly known as Henry VIII powers – has raised great constitutional concern in recent years. Enabling ministers to amend or repeal primary legislation by delegated legislation with little or no scrutiny undermines the constitutional principle of parliamentary sovereignty; namely that Parliament is the supreme, sole legislative authority with the power to create, amend or repeal any law. There is now increasing concern in Parliament and among the judiciary that successive governments are close to, if not beyond, the line of reasonableness in claiming and applying such powers.

In a hard-hitting speech before the judiciary in July 2010, Chief Justice Lord Judge, noted that 120 Henry VIII powers had been included in legislation in the previous parliamentary session, beyond what had been previously claimed in times of war and emergency. He condemned the 'pernicious habit' of successive governments in claiming such powers and called for them to be condemned to the 'dustbin of history'.[19]

Serious questions are therefore being asked about the democratic acceptability of key elements of the delegated legislation system and whether the balance between primary and secondary legislation has tipped too far in favour of the latter.

Beyond the concepts of 'principle' and 'detail' there is little clarity about what should go into primary and what should go into secondary legislation. Indeed, the definitions of 'principle' and 'detail' are themselves hardly clear-cut.

Furthermore, there is no clear and consistent pattern between the subject matter of a delegated power and the scrutiny procedure to which the SI arising from it is allocated. Some SIs are designated to receive the comparatively close, if far from perfect, scrutiny using the affirmative procedure, while others of equal or more obvious importance may be consigned to much lesser scrutiny using the negative procedure.

Concepts such as 'significant' and 'controversial', 'broad', and 'wide' powers that help define the scrutiny hierarchy are widely quoted in parliamentary debate but there is no clear consensus about what they mean in practical terms. From the government's perspective it is best to avoid such a discussion in order to ensure that each power is dealt with on a case-by-case basis although there is a developing

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

corpus of jurisprudence arising from the decisions of the Delegated Powers and Regulatory Reform Committee in the House of Lords that helps police the boundary of acceptable powers and scrutiny mechanisms.

Delegated legislation, unlike primary, is subject to judicial review. This remains an important legal back-stop, but the courts can only intervene in relation to vires and compliance: whether a minister is acting within their powers as delegated in the parental Act and in accordance with the procedure laid down by Parliament. They cannot question the validity of an SI on policy grounds. Consideration of the merits remains a parliamentary function. But the system for this is byzantine.

An *ad hoc* rather than systematic approach

Often ministers will say during a debate on primary legislation that something will be dealt with in regulations or guidance, but they are rarely available for MPs and Peers to scrutinise in draft form. As a consequence, if there is a concern about the potential use of a power in the future this can only be picked up at the Statutory Instrument stage. A robust scrutiny process for the 1,000 or so SIs that pass through Parliament each year is therefore required. However, this does not exist.

What is needed is a robust, rigorous and systematic approach to scrutiny, and one that is seen to be such by the outside world. What we have is a weak, *ad hoc* system replete with anomalies and flaws.

Some SIs come into force before they are scrutinised by Parliament, in other cases parliamentarians have up to 28, 40 or 60 days to raise concerns. These timescales for scrutiny are somewhat arbitrary, particularly when SIs can be laid during the parliamentary recess. And it is questionable whether further debate, drafts, public consultation, and consideration by a committee with few sanctions can make much of a difference in either 40 or 60 days if the delegation of power itself is beyond what ought to be acceptable.

To request a debate on a negative SI (deemed, according to the scrutiny hierarchy to be non-controversial), MPs must 'pray' against it, calling for it to be annulled using an Early Day Motion. But whether time is provided for a debate is entirely in the gift of the government; there is no requirement that they do so. Members may debate an SI for up to 90 minutes yet if it concerns a Northern Ireland instrument they can be considered for a further hour. The debate will be held on a 'take note' motion; MPs' concerns can be highlighted but they cannot stop the SI becoming law.

The House of Commons considers all affirmative SIs, deemed according to the scrutiny hierarchy to be of political importance and potentially controversial, with scrutiny usually taking place in a Delegated Legislation Committee. But if a debate is sought on a negative (less controversial) instrument it takes place on the Floor of

the House. The relationship between the seriousness of the issue and the place of debate is curious at best, illogical at worst.

The House of Lords considers most affirmative SIs on the Floor of the House or in Grand Committee but, as the unelected House and revising chamber, it has long operated a self-denying ordinance and has rejected only five SIs since 1968. Therefore it, too, rarely stops an SI becoming law even if it has serious concerns.

SIs arising from 10 Acts of Parliament are accorded a form of strengthened scrutiny procedure the key features of which generally involve extended scrutiny for up to 60 days, consideration by a designated committee, consultation, recommendations for amendment, and in some cases a veto power over an instrument. The number of SIs considered through this process is actually a very small proportion of the overall total number of instruments produced each year, but parliamentarians disproportionately focus on them.

The enhanced scrutiny process also negates one of the principle reasons to put the powers in delegated legislation rather than on the face of a bill in the first place. A core rationale for delegated legislation is that it reduces the workload and time pressures on Parliament and enables government to act expeditiously. But SIs that have to be considered through strengthened scrutiny procedures can take up to 18 months from start to finish which is longer than it often takes for a primary bill to receive Royal Assent.

The Joint Committee on Statutory Instruments (JCSI) considers all SIs and instruments subject to the affirmative procedure laid before Parliament [20], and the Secondary Legislation Scrutiny Committee (SLSC) considers all SIs and instruments subject to a parliamentary procedure, examining the technical and policy merits respectively. But the Committees are entirely advisory: if the government breaches their good practice conventions there are no sanctions. Critical reports may be issued but these do not invalidate an SI and there is no requirement for the government to respond to their concerns. Ministers can simply redraft and resubmit an SI without explanation and amend it in the future if necessary.

Without the power to amend SIs (there are only three exceptional cases where amendment is possible [21]), both Houses of Parliament are confronted with a 'take it or leave it' proposition. As long as the government can bring SIs into force without parliamentary scrutiny, muster a majority of disengaged Members in the House of Commons for any requiring scrutiny and the House of Lords maintains its self-denying ordinance in not vetoing an instrument then many SIs will proceed through the system

[20] This includes all SIs with a parliamentary scrutiny procedure attached and those laid before Parliament but which require no formal consideration by Parliament.

[21] Amendment of SIs is possible in relation, for example, to powers in the Census Act 1920, the Government of India Act 1935, and the Civil Contingencies Act 2004.

regardless of whether there may be problems with them. Proof of this can be found in the amount of defective law on the statute book awaiting amendment and the number of correcting SIs the government consequently brings forward each year to correct its earlier work. This is clearly not satisfactory in legal terms but it also means a huge amount of precious parliamentary time – of Members and staff – is wasted each year because of lazy consultation and sloppy drafting in Whitehall.

Calls for reform

Many of the criticisms levelled against delegated legislation today are exactly the same criticisms identified by the Donoughmore Committee when it considered the delegated legislation process in the early 1930s.[22] The problem has long been intractable. In the last 20 years the House of Lords has significantly enhanced its capacity for scrutiny by establishing its Delegated Powers and Secondary Legislation (formerly the Merits) committees. Under parliamentary pressure the government has also introduced variants on the scrutiny procedure (super-affirmatives and enhanced procedures), providing in some cases for more statutory control by Parliament and more opportunity for amendment, but only after efforts to widen the scope of delegated powers in the first place.

Proposals to regulate and scrutinise delegated powers and the resulting SIs have been made repeatedly by parliamentary committees and other outside bodies, including the Hansard Society,[23] but the essential architecture of the system has remained largely unchanged since the Statutory Instruments Act was passed in 1946. Given the modernisation and reform of the legislative process for primary legislation that has been undertaken in the last 15 years, the absence of any significant changes in relation to delegated legislation, particularly in the House of Commons, is quite stark.

So many features of the delegated legislation process are now so incongruous – as well as perfunctory – that it is difficult to maintain the argument that it helps Parliament focus on the essential points and makes Acts easier for users, in or outside Parliament, to be consulted upon and follow.

Key issues and questions

Given the scope and volume of delegated powers and SIs no single report could hope to address every aspect of this element of the legislative process, nor explore all the issues in detail. Although we have adopted a broad canvas, we have

[22] The Earl of Donoughmore (Chair), (1932), *Report of the Committee on Ministers' Powers*, Cmd. 4060.

[23] See for example, Rt. Hon. Lord Rippon of Hexham (Chair), (1993), *Making the Law: The Report of the Hansard Society Commission on the Legislative Process* (London: Hansard Society).

necessarily had to constrain the scope of our study in order to do justice to those areas we perceive to be the most critical.

Our immediate objective is to provide an accessible introduction to delegated legislation such that interested observers, both in and outside Parliament, might have a better understanding of the process, its flaws, and the possibilities for reform. The last time a comprehensive study of delegated legislation was produced was by the House of Commons Procedure Committee in 1996, so an updated account of the system is long overdue.

Beyond this, we have looked at the process with five key themes and questions in mind.

1. Are delegated powers now beyond the boundary of reasonableness and acceptability?

Are ministers seeking delegated powers that are beyond the boundary of what parliamentarians (and the general public if they were aware) consider democratically appropriate? And if so, how and why, given that this threatens to undermine confidence in the whole system of delegated legislation? If they are doing this, how might the system be reformed in order to constrain an over-mighty executive and assert democratic control in this area of law-making?

2. Are the issues of concern in relation to delegated legislation confined within the parameters of that system alone, or are they intrinsically rooted in wider questions about how primary legislation is drafted and scrutinised?

It is widely accepted that the process by which we make laws in this country is deeply flawed. There is no single cause of deficient legislation. The explanation lies in a complex confluence of factors primarily related to volume, attitude, preparation and deliberation.[24] But if the problems with delegated legislation are intrinsically linked to those with primary, then that would suggest that reform of the former should not be treated in discrete isolation but as part of a more radical reform of the entire legislative process.

3. Bi-cameral scrutiny: differing roles for the House of Commons and House of Lords?

Scrutiny of parental primary legislation by both Houses of Parliament takes place sequentially. However, scrutiny of SIs is largely conducted in parallel. Given that Peers tend to have more interest, appetite and time for the detailed scrutiny work that delegated legislation requires would it be better to reform the system in a way

[24] See for example, R. Fox and M. Korris (2009), *Making Better Law: Reform of the Legislative Process from Policy to Act* (London: Hansard Society) and House of Commons Political and Constitutional Reform Committee, 1st Report of the 2013-14 Session, *Ensuring Standards in the Quality of Legislation*, HC 85, May 2013.

that recognises this fact, vesting them with the greater burden of responsibility for scrutinising delegated legislation and providing them with the mechanisms and powers to do this effectively?

4. Knowledge and expertise in Whitehall and Westminster: are civil servants and parliamentarians equipped to perform their assigned roles in the delegated legislation process?

Delegated legislation is often technically complex and requires a degree of policy knowledge and expertise to reach a real understanding of its application and consequences. In Whitehall, working on legislation is a rite of passage for career progression but not something that civil servants specialise in outside the Government Legal Service or the Office of the Parliamentary Counsel. Looking beyond policy, given the complex legal and parliamentary issues to which delegated legislation gives rise, does this hinder the process and undermine the quality of legislation that emerges as a result? And at Westminster, on the whole, parliamentarians – certainly MPs – tend to be generalists and lack the aptitude or time for the detailed analysis and scrutiny work that SIs demand. So are they the right people to scrutinise them or might other, independent scrutiny models, but democratically accountable to Parliament, offer a better way forward?

5. Is the scrutiny system fit for purpose and if not, why not and what can be done about it?

Given that the parliamentary process confers authority on ministerial action and limits the scope for legal intervention, is it still fit for this purpose? With 1,000 or so SIs passing through Parliament each year, is the system capable of spotting all the problematic needles in the legislative haystack? And if not, what might a reformed scrutiny system look like?

Sources and method

To explore these questions our research has focused on six legislative case studies from this and the previous Parliament to explore the delegation of powers. These are the Banking Act 2009; the Policing and Crime Act 2009; the Public Bodies Act 2011; the Localism Act 2011; the Welfare Reform Act 2012; and the Draft Deregulation Bill 2012. They may be atypical pieces of legislation but it is in relation to bills like these – which arouse concerns regarding their political significance and constitutional import – that pressure for improved scrutiny is most acute.

We chose these in order to capture an understanding of the process in areas of controversy and conflict, but also to look at the issues across a number of departments – the Department for Communities and Local Government (DCLG), the Home Office and the Department for Work and Pensions (DWP) for example –

that are among the most prolific producers of delegated legislation each year. We also included a bill dealing with financial policy in a time of emergency to capture the debate about the role of delegation in circumstances of urgent policy controversy. Finally, the sixth case study, the Draft Deregulation Bill, was a late addition to this research when it was published in 2013. It provided a rare opportunity to look at proposals for extensive delegated powers when legislation is in draft form.

We have also examined the key elements of the parliamentary scrutiny of SIs, in order to assess its anomalies, strengths and weaknesses. We have interrogated the latest data, examined the reports of the main committees over this and the previous Parliament, and followed some case study SIs in order to see what lessons can be gleaned from their experience. Some were relatively anodyne in their subject matter, others much more controversial, but each tells us something of the Westminster aspect of the delegated legislation life-cycle.

To supplement our desk research, we undertook an interview programme with key players in the process, including 34 MPs and Peers, of whom several were former ministers, and some of whom had been involved in more than one of our case study bills. We met with eight current and former members of the Office of Parliamentary Counsel and held a round-table discussion involving half a dozen of them and several departmental lawyers and Treasury Solicitors. We also met with a dozen managers and members of the departmental bill teams. The issues were discussed with 15 current and former parliamentary clerks as well as current and past chairs, Members, clerks and legal advisers of the specific committees involved in the delegated legislation process. Finally, we met with a number of academics and journalists with an interest in this aspect of the legislative process to ascertain their perspective on the issues.

In addition to being interviewed many of these participants provided us with access to private correspondence and papers that shed light on the decisions made during the bill development process. However, these case studies constitute contemporary political history and given that they concern controversial pieces of legislation many of the decisions remain sensitive. A significant number of people we interviewed – particularly civil servants – agreed to speak to us only on condition of anonymity and in some cases off the record. Some were extraordinarily frank, and all of them were generous with their time and enthusiastic to tell the story of their bill as they saw and understood it from their particular place in the process. But the number of people involved in each bill, particularly in Whitehall, is relatively small. To have openly identified one or two, even if they were content that we do so, would make it much more obvious who other, anonymous interviewees might be. We have therefore decided not to identify the interviewees by name or by reference to their specific position. Instead we simply refer to their role – member of the bill team, departmental

lawyer, Parliamentary Counsel – in generic terms. This means that we are not in a position to publicly acknowledge their contribution; they know who they are and we are grateful to them all.

We also attended a number of Delegated Legislation Committee debates in the House of Commons and viewed others online. And we are particularly grateful to the Chair, Members and clerks of the House of Lords Delegated Powers and Regulatory Reform Committee and the Joint Committee on Statutory Instruments who invited us to sit in on a private session of their committees in order to observe how they worked and enhance our understanding of their role and function. It was a fascinating experience and greatly improved our appreciation of the approach they took to their remit and both the mechanics and politics of the process. Our presence was agreed on condition that we did not report specifically on the discussions that took place at the meetings. Our comments are therefore confined to general observations of the process; they do not touch on any particulars of the legislative business discussed at the meetings we attended.

Finally, we consulted a number of external organisations about their views on the delegated legislation process. An 'issues and questions' paper was produced and disseminated to a range of bodies including legal firms, government agencies, professional associations, campaign groups and other non-governmental organisations. The response was modest (14 responses out of just over 150 formal invitations to submit views) with a few additional responses secured after we publicised the consultation via the Society's monthly newsletter. Nonetheless, the submissions we received were useful, but again, a number of the contributors requested anonymity given the sensitivities involved. However, by way of example, and to illustrate the range involved, contributions were received from bodies such as the Chartered Institute of Taxation, the Corporation of London, Hogan Lovells, the Social Security Advisory Committee, the Association of the British Pharmaceutical Industry as well as a number of former parliamentarians and parliamentary officials.

A small number of case studies alone cannot reliably guarantee to highlight all aspects and nuances of the issues but through this combination of desk research, consultation, interviews and attendance at committees, we have sought to capture both the public and private view of delegated legislation in the round.

It has limitations, however. It was initially our intention to include a comparative chapter exploring how delegated legislation is dealt with by other legislatures and any lessons that Westminster might consequently learn from them. Indeed, to this end we did considerable desk research and conducted interviews with officials at the Northern Ireland Assembly, the Scottish Parliament, and the National Assembly for Wales, as well as a few parliamentary clerks and government lawyers in Australia, Canada and New Zealand. However, we concluded that explaining the individual approach of their government and legislatures to delegation and scrutiny added a

layer of complexity – and potential confusion – to what is already a difficult subject to render accessible to the lay reader. We have therefore omitted it from this report but may publish a separate paper at a later date outlining this research.

Similarly, a criticism could be levelled at us that we have not focused on the transposition and scrutiny of EU directives into UK law through delegated legislation. Again, that would have meant exploring broader issues related to the production and scrutiny of European legislation that would have further added to the length and complexity of this study. We have therefore pursued a more limited scope and focus. We acknowledge it has its weaknesses but it has the merit of studying the way in which the vast bulk of delegated legislation is produced and scrutinised in the UK today.

Structure of the report

In opening up the delegated legislation process through an analysis of bills from drafting to Royal Assent and a detailed examination of how Parliament scrutinises Statutory Instruments, we hope to facilitate greater understanding of some of the key decisions in the process.

This study looks at the entire delegated legislation life-cycle exploring how decisions are made about what provisions go into primary and what go into secondary legislation and who makes them. It explores how and why delegated legislation is committed to the negative, affirmative, or a strengthened scrutiny procedure in the parental act, focusing, in particular, on how decisions are reached about the most significant delegations of power. A corollary of the controversial nature of some of these case studies is that new procedures and bodies have been set up as part of the process of scrutiny and oversight: for example, Public Bodies Orders and a new Banking Liaison Panel. We explore how and why these came about and what they tell us about the developing nature of the delegated legislation process in Whitehall and Westminster. We then examine in detail how effective Parliament's scrutiny process is for delegated legislation, and whether the allocation of particular scrutiny procedures to powers continues to be appropriate and effective. Exploring the strengths and weaknesses of the process, a number of SIs are highlighted that illustrate different aspects of the flaws and defects in the current system.

Chapter two explores the history of delegated legislation, setting out its evolution over time and the emergence of the procedural architecture of the system we recognise today. It sets the context for understanding how and why we have arrived at the model of legislative incorporation, consultation, scrutiny and approval currently in operation.

Chapter three explores the life-cycle of delegation in relation to the parental Act, encompassing the decision to delegate, the inclusion of powers in bills, the allocation of parliamentary scrutiny procedures, the preparation of bill documentation, the role

of the House of Lords Delegated Powers and Regulatory Reform Committee and the different approach taken to debating the issues in both the House of Commons and the House of Lords.

Chapter four then looks at the next stage of the process, setting out how Statutory Instruments are dealt with under the negative, affirmative and strengthened scrutiny procedures. It considers the role of the Joint Committee on Statutory Instruments and the Secondary Legislation Scrutiny Committee, and the different ways in which the House of Commons and the House of Lords scrutinise SIs.

Chapters five to ten explore our legislative case studies, looking at the preparation and scrutiny of each bill in relation to their delegated powers content. They explore the extent to which the explanations given in Parliament about the need for and scope of delegated legislation provisions reflect the internal departmental debates about the rationale for the balance struck between primary and secondary legislation. What is the political/ministerial involvement in shaping decisions about delegated powers, the provisions of which have to be defended by the minister in Parliament? How much role and influence do civil servants and government lawyers have on the process? Where and what is the discretion and how is it utilised? How is the need for effective government balanced against the need for parliamentary scrutiny? To what extent do the needs of Parliament and parliamentarians feature in the thinking and decision-making process in Whitehall?

The case studies are not examined in chronological order but rather grouped.

Chapters five and six concern the Public Bodies Act and the Draft Deregulation Bill because they both involved significant Henry VIII powers, were heavily re-written as a result of the scrutiny process, and both emanated from the Cabinet Office.

Chapters seven and eight cover the Localism and Welfare Reform Acts: these were large, skeleton bills with lots of delegated powers in areas – local government and social security – that traditionally produce a significant share of the overall volume of delegated legislation each year.

Chapters nine and ten, covering the Policing and Crime and Banking Acts, concern policy areas of considerable sensitivity and controversy that were dealt with under circumstances of some urgency. Each in their own way reveals different aspects and nuances of the delegated legislation process.

Chapter eleven explores the anomalies, strengths and weaknesses of the parliamentary scrutiny process for SIs.

The final chapter then revisits the key themes and questions and sets out a range of recommendations drawing on our findings. We conclude that a number of incremental reforms of varying degrees of radicalism could be implemented that would ameliorate but not eradicate the problems with delegated legislation. But

ultimately, we deduce that the problems are now so serious, so deep-rooted, that further patchwork reform may in the end cause more difficulties than it solves.

The issues in relation to the production and quality of legislation, the relationship between primary and secondary legislation, the nature of bi-cameral scrutiny, and the capacity of parliamentarians to undertake the kind of technical analysis required all point to the need for a more radical approach. These, coupled with new questions about our role in Europe (and the impact this may have on the legislative process), the future of the devolution settlement and the proposed 'English votes for English laws', will all have significant repercussions for delegated legislation as much as primary, although the political, media and public debate is focused almost entirely on the latter.

The current coalition government has made some commendable efforts to improve the legislative process, notably through the Red Tape Challenge and the Good Law Initiative, but nonetheless delegated legislation is, as ever, the bridesmaid. These initiatives do little to address the wider, fundamental questions of principle that the system of delegated legislation raises nor resolve the problems created by continuing to shoe-horn an ever increasing volume of delegated legislation into an out-dated parliamentary scrutiny system.

We conclude then that what is needed is a new, independent, committee of inquiry, not dissimilar to that undertaken by David Renton on the 'Preparation of Legislation' in 1975 or our own Rippon Commission on 'Making the Law' in 1993 to look anew, and radically, at how primary and delegated legislation should be prepared in Whitehall and scrutinised at Westminster.[25] No shibboleth should be left untouched; the system we have for making laws is no longer fit for purpose. Deeply flawed, it needs to be recast.

[25] See Report of a Committee appointed by the Lord President of the Council and chaired by the Rt. Hon. Sir David Renton, *The Preparation of Legislation*, Cm.6053 (London: Her Majesty's Stationery Office) 1975 and Rt. Hon. Lord Rippon of Hexham (Chair), (1993), *Making the Law: The Report of the Hansard Society Commission on the Legislative Process* (London: Hansard Society).

2. Context and history: delegated legislation through the years

Delegated legislation is not a modern phenomenon. The term was first coined in 1901 but the delegation of legislative power is a device that has been used regularly throughout British parliamentary history.[26] In a brief review of that history, as set out in this chapter, a number of key themes can be discerned that still mark the debate about delegated legislation today. First, the inexorable rise in the demand for and volume of delegated legislation. Second, the concomitant failure of Parliament to scrutinise it adequately; there has never been a systematic approach. Third, as a consequence reform has been piecemeal and *ad hoc* with new forms of scrutiny mechanism proliferating from time to time, patching over problems but fundamentally failing to address the underlying weaknesses in the system. And fourth, the House of Lords has generally been more proactive in adopting improvements designed to enhance its scrutiny than has the House of Commons. Overall, however, as this chapter demonstrates, for a century and more the system of delegated legislation has been marked by serious defects but relatively little has really been done about them.

Social reform

The most notorious example of delegation is the 1539 Statute of Proclamations during the reign of Henry VIII and from which the current concept of 'Henry VIII powers' in legislation can be dated. Following repeal of the Act on the King's death in 1547, Parliament continued to delegate legislative powers in some matters to the Crown by Order in Council until the early part of the 18th century. During the 1700s, however, there was a marked reduction in the prerogative powers to legislate, reflecting the constitutional battles of the times. Acts of Parliament contained minute matters of detail during this period and legislative powers were conferred on the Monarch only during periods of emergency, when Parliament was deemed unable to respond quickly enough, as for example during the 1710 and 1832 plague and cholera epidemics.

The systematic and routine use of delegated legislation – in a manner we would recognise today – can be dated to the extension of the franchise in 1832 and the growth of legislation in pursuit of social reform. For much of the 19th century, delegated legislation was therefore particularly associated with social progress. The social reformer, Sir Edwin Chadwick, for example, was such a keen supporter and

[26] The term was first coined by Parliamentary Counsel, Sir Courtenay Ilbert. He subsequently served as Clerk of the House of Commons 1902-21. He is the great grandfather of the former Conservative Cabinet Minister (Leader of the House of Commons), Sir George Young MP.

user of delegated legislation to achieve his aims that he was described as making it 'his life's business to wash everyone in England all over by Executive Order'.[27] But support for the legislative tool was not unequivocal. The Poor Law Amendment Bill in 1834 was so replete with wide-ranging powers delegated to Poor Law Commissioners to manage the poor that it was attacked by MPs as unconstitutional.

But as the volume of social legislation gradually increased, and the number and workload of government departments multiplied, the Order in Council system was superseded by what became known as the Departmental Order system. In 1877 First Parliamentary Counsel, Lord Thring, wrote that 'the adoption of a system of confining the attention of Parliament to material provisions only and leaving details to be settled departmentally was probably the only way in which parliamentary government could, as respects its legislative functions, be carried on'.[28] Prime Minister William Gladstone noted in 1874 that 'We must welcome every improvement in the organisation of local and subordinate authority which under the unquestioned control of Parliament, would tend to lighten its labours and expedite public business.' [29]

By the early 1890s on average 1,000 statutory rules and orders were being passed each year but the chief characteristic of the practice was the lack of any system to underpin it. There was no requirement for them to be laid in Parliament and there was no systematic record of publication.

This changed in 1892 when the Statutory Rules Committee published an index of statutory rules and orders to improve the haphazard approach to publicising delegated legislation. The following year the Rules Publication Act created an official system for the publication of statutory rules and orders. It required that departments give 40 days notice in the London Gazette of their intention to make a rule or order. The Act placed importance on the practice of consultation by trying to prevent legislation being made without regard to the interests concerned. It also introduced requirements that statutory orders be printed to a methodical plan with a serial number, a brief summary and be placed on sale.

It is here that one can begin to see the emerging architecture of the delegated legislation system that we know today. By the turn of the 20th century, the jurisdiction of the courts, a comprehensive system of publicity and the laying before Parliament of statutory rules and orders were seen as adequate safeguards against the abuse of delegated power by the executive.

From 1900 to 1930 the delegation of legislative powers to the executive proceeded at a rapid pace. The complex and broad reform programme of the 1906-1914 Liberal

27 E. C. Page (2001), *Governing by Numbers: Delegated Legislation and Everyday Policy-making*, (Oxford: Hart Publishing), p.13.

28 W. Graham-Harrison (1931), *Delegation by Parliament*, (London: Oxford University Press), p.3.

29 C.M. Chen (1933), *Parliamentary Opinion of Delegated Legislation*, (New York: Columbia University Press), p.24.

government particularly benefited from its use. Then, as today, a prevalent critique of the legislative process was that Westminster was overwhelmed by the weight of legislative business, lacked the time to properly scrutinise lengthy and complex bills, and that MPs often did not have the expertise to deal with technical matters of policy.

Emergency and despotism

The outbreak of the First World War proved to be a turning point in the practice of delegated legislation. Firstly, there was a noticeable increase in volume: the average number of statutory orders rose to 1,500 per year and it would grow further to 2,275 in the inter-war years. Secondly, unprecedented powers were conferred on the government to address the national emergency, most notably in the 1914 Defence of the Realm Act. It provided for almost unrestricted delegation by imposing only two conditions on the government: that regulations must be made during war and that they must be made for the purpose of securing public safety and defence of the realm. Similar powers would later be incorporated in the Emergency Powers (Defence) Act 1939 which accorded the government almost limitless powers.

But it was the continuation and expansion of the emergency regulations in peacetime that turned the tide of public and parliamentary opinion against the delegation process with a number of the regulations subjected to legal challenge. Concern about the application of wartime legislative tools to peacetime problems led one MP to warn in debate in 1918 that 'we shall never escape this bureaucratic octopus which is likely to cling to us after the war'.[30] His remarks proved prescient when in 1920 the government passed the Emergency Powers Act and the War Emergency Laws (Continuation) Act. Together these statutes were viewed as extensive and drastic delegations of legislative power with both MPs and Peers denouncing the conferment of 'despotic' powers on the executive.

The following year, in a series of three lectures delivered at Cambridge University, Cecil Carr delivered a comprehensive analysis of the problem.[31] Whilst acknowledging that more than half of modern Acts were 'incomplete statements of law' [32] he contended that there were undeniable advantages to be found with delegated legislation: not least in the elaboration of detail, the flexibility and elasticity it facilitated, the provision it made for greater input by experts, and perhaps most importantly, in the meeting of unforeseen contingencies and crises. Nonetheless, he acknowledged that safeguards were required to protect against the 'germ of arbitrary administration'.[33] Thus delegation must be to a trustworthy authority,

30 James Mason MP, House of Commons, *Hansard*, 17 June 1918, col.77.

31 C.T. Carr, (1921), *Delegated legislation*, (London: Cambridge University Press).

32 *Ibid*.

33 *Ibid*.

particular interests affected by delegated legislation must be consulted, a clear system of publicity should exist, the limits within which the delegated power was to be exercised ought to be definitely laid down, and there should be machinery for amending and revoking delegated legislation as required.[34]

Importantly, he argued that the system of delegation was built upon the principle of ministerial responsibility.

> *'Parliament would not delegate legislative power to administrative departments unless those departments asked for it' he said. 'If that power were abused, Parliament would hesitate to grant it when it asked for it. Our departments know that the continued acceptability of this invaluable administrative device depends upon its reasonable use and application.'*[35]

A strong counter-argument was promulgated eight years later in a book entitled *The New Despotism* by Lord Hewart.[36] In it, he articulated a robust attack on what he deemed the encroaching power of state bureaucracy and 'administrative lawlessness'.[37] A despotic power was, he argued, placing government departments above the sovereignty of Parliament and the jurisdiction of the courts.

The House of Lords leads the way

When the House of Lords decided in 1925 to establish the Special Orders Committee it constituted, according to Lord Norton, the first parliamentary attempt at systematic scrutiny, albeit limited to Special Orders subject to the affirmative resolution procedure.[38] Special Orders were usually (although not solely) the subject of public works and indeed the procedure began under powers granted under the 1919 Electricity (Supply) Act and the 1920 Gas Regulation Act. The Committee examined each Order and reported on whether the provisions raised important questions of policy or principle and the extent to which they were founded on precedent. It was not empowered to inquire into the merits of the Order, but to report if further consideration was warranted. In such cases, the House could then refer the Order to a select committee.

The Donoughmore Report

Amid growing disenchantment, particularly in the House of Commons, with the parliamentary safeguards put in place to protect against the abuses of delegation,

34 C.T. Carr, (1921), *Delegated legislation*, (London: Cambridge University Press).

35 *Ibid*.

36 The Rt. Hon. the Viscount Hewart, 7th Lord Chief Justice of England (1922-40), Attorney General (1919-22), Solicitor General (1916-19).

37 Lord Hewart of Bury (1929), *The New Despotism*, (London: Ernest Benn Limited).

38 House of Commons Select Committee on Procedure, 4th Report of the 1995-96 Session, *Delegated Legislation*, HC 152, p.12.

the Labour Government announced an inquiry in 1929, chaired by the Earl of Donoughmore.[39] The Committee on Ministers' Powers was appointed to consider:

> *'the powers exercised by or under the direction of Ministers of Crown by way of delegated legislation and judicial or quasi-judicial decision, and to report what safeguards are desirable or necessary to secure the constitutional principle of the sovereignty of Parliament and the supremacy of Law.'*[40]

Even today, over 80 years later, the fundamental conclusions of the Committee remain relevant.

In its final report it stressed the inevitability of the practice of delegated legislation but acknowledged that the system was open to abuse and attacked what it called the 'abandonment by Parliament of its legislative functions'.[41] 'There is at present no effective machinery for parliamentary control' it noted, 'and the consequence is that much of the most important legislation is not really considered and approved by Parliament.'[42] The Committee went on to denounce the 'haphazard' system of delegated legislation 'without plan or logic'. 'It is impossible' it concluded, 'to discover any rational justification for the existence of so many different forms of laying or on what principle Parliament acts in deciding which should be adopted in any particular enactment.'[43]

The absence of a clearly defined system laid the door dangerously wide open for potential abuse and implicitly much of the responsibility for this was laid at the feet of parliamentarians themselves. The Committee doubted 'whether Parliament itself has fully realised how extensive the practice of delegated legislation has become, or the extent to which it has surrendered its own functions in the process, or how easily the practice might be abused'.[44] Having diagnosed the problems, it recommended a number of reforms, some of which, highlighted in Box 1 (overleaf), are, as the following chapters will demonstrate, still outstanding today.

It was hoped that the bi-partisan nature of the exercise would help smooth its path to implementation. In practice, however, as so often in this area of legislative process, reform was stymied and there would be no changes for more than a decade.

1946: Statutory Instruments Act

One of the most significant reforms, again one that remains highly relevant today, occurred in 1946 with the passing of the Statutory Instruments Act. The main

39 Richard Hely-Hutchinson, 6th Earl of Donoughmore, Under Secretary of State for War (1903-05), House of Lords Lord Chairman of Committees (1911).

40 The Earl of Donoughmore (Chair), (1932), *Report of the Committee on Ministers' Powers*, Cmd. 4060, p.v.

41 *Ibid*, p.6.

42 *Ibid*.

43 *Ibid*, p.42.

44 *Ibid*, p.58.

Box 1

Areas for reform recommended in the Donoughmore Committee* in 1932 that remain issues of concern today

- The simplification of the nomenclature for different types of delegated legislation.
- Changes to increase the standard of drafting of both bills and statutory orders to ensure that powers were clearly defined.
- The use of Henry VIII clauses be abandoned in all but exceptional cases (for bringing an Act into operation only and subject to a one-year time limit).
- The introduction of a uniform procedure for all regulations required to be laid before Parliament (open to annulment within 28 days), except for the affirmative resolution procedure.

*The Earl of Donoughmore (Chair), (1932), *Report of the Committee on Ministers' Powers*, Cmd. 4060.

objective of the Act was to eliminate 'anomalies in the parliamentary control of delegated legislation' [45] by securing some uniformity in the procedures for laying delegated legislation before Parliament. Brought into force in 1948, the Act gave the generic name 'Statutory Instrument' to most, but not all,[46] delegated legislation and defined an SI as:

> *'(a) Any document by which is exercised power under the Act of 1946 or by any Act passed after the 1st January 1948, to make, confirm or approve orders, rules, regulations or other subordinate legislation conferred on Her Majesty's Council to be exercised by Order in Council or on any Minister to be exercised by statutory instrument.'* [47]

Any instrument made after 1947, under an Act passed before 1948, is also defined as a Statutory Instrument, provided that it is of a legislative and not executive character. The Act also drew a distinction between local and general instruments and repealed the Rules Publication Act 1893 by providing that all general instruments, once made, are numbered, printed and published preferably before coming into force.

Sections five and six of the Act introduced a degree of uniformity to the negative resolution procedure by prescribing 40 days as the period during which Parliament

45 J. T. Craig (1961), *The Working of the Statutory Instruments Act, 1946*, Public Administration, Vol. 39, p.181.

46 For example, Immigration Rules, alterations to the Highway Code, draft Codes of Practice on Industrial Relations, and Recommendations for the Welfare of Livestock are not technically SIs but are subject to parliamentary procedure.

47 House of Commons Select Committee on Delegated Legislation, 1952-53 Session, *Report*, HC 310-I, p.144.

can take action to annul an instrument that has either been 'made and laid' or 'laid in draft' (with no account to be taken of any time during which Parliament is dissolved, prorogued or adjourned (both Houses) for more than four days). Almost immediately, the praying time set out in the Act was criticised for not being long enough to co-ordinate scrutiny by committee with debate in Parliament, a criticism that is still heard today.

Apart from instruments that were required to be laid before Parliament after being made, these were the only two procedures considered in the Act. Strangely, no mention was made of the affirmative resolution procedure. Some argued that in requiring government time and parliamentary action, affirmative instruments already had in some respects a 'built-in uniformity'.[48] Nevertheless, an Act that aimed to introduce order and remove the anomalies inherent in the system of parliamentary control still left a lot of scope for variation.

Indeed, by 1953, seven different procedures for parliamentary control of delegated legislation could be identified, of which only three were covered in the 1946 Act.[49] But throughout the late 1940s and early 1950s the most common form of parliamentary control continued to be the negative resolution procedure. Despite the implementation of the 1946 Act, criticism of the procedure grew stronger as party political obstruction began to discredit Parliament's use of prayers. Subsequent committee inquiries – particularly the 1952 House of Commons Select Committee on Delegated Legislation – would consequently focus on the quality of SI debates in Parliament but to little effect.[50] But it would be another two decades before there was any further significant reform of the delegated legislation system.

Joint Committee on Statutory Instruments

Then in 1971 a Procedure Committee inquiry into the legislative process recommended that a more detailed look at delegated legislation be undertaken and, as a consequence, a Joint Committee of both Houses was appointed to examine the issues under the chairmanship of Lord Brooke of Cumnor the following year.[51]

Noting the extensive duplication of effort expended by two committees, one in each House, scrutinising the technical aspects of affirmative instruments, its most significant recommendation would prove to be the establishment of a Joint Scrutiny Committee to consider all general instruments (including drafts).[52]

48 J. T. Craig (1961), *The Working of the Statutory Instruments Act, 1946*, Public Administration, Vol. 39, p.184.

49 House of Commons Select Committee on Delegated Legislation, 1952-53 Session, *Report*, HC 310-I, p.17.

50 *Ibid*.

51 Joint Committee on Delegated Legislation, 1971-72 Session, *Report*, HC 475/HL 184, p.xv.

52 *Ibid*.

The introduction of the Joint Committee on Statutory Instruments in 1973 was to be the last significant reform of the parliamentary system of scrutinising delegated legislation for a further two decades.

The House of Lords Delegated Powers and Regulatory Reform Committee

Again it was the House of Lords that pushed forward reform when, in 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, recommended the establishment of a delegated powers scrutiny committee. Noting that 'in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion' it argued that scrutiny of such matters would be particularly well suited to the House's revising function in the context of its wider finding that scrutiny in the House of Lords should complement rather than duplicate that in the Commons.[53]

A Select Committee on the Scrutiny of Delegated Powers was duly established on a pilot basis in 1993, and formally established as a sessional committee in the 1994-95 session. Its role and name has changed several times in the intervening years in response to new regulatory legislation. This Committee has been one of the rare success stories in the reform of delegated legislation in the last half century. The speed and quality of its work is widely admired and it is largely responsible for bringing to public and parliamentary notice the extent to which successive governments have sought broad order-making powers, much of which previously went unnoticed.

House of Commons Procedure Committee inquiry

From the mid 1960s until the late 1980s, the number of general Statutory Instruments reached a plateau of between 1,100 and 1,300 per year. It was not until 1990 that the number of Statutory Instruments consistently began to grow and at a rapid pace, from 2,953 in 1991 to 4,150 just a decade later, and consequently so, once again, did calls for reform.[54] Given widespread concern at the growing volume and complexity of delegated legislation, and 'the obvious deficiencies in its consideration and scrutiny of Parliament' the Procedure Committee initiated an inquiry in December 1995 to explore the problems.[55]

53 House of Lords Select Committee on the Committee Work of the House ('the Jellicoe Committee'), *Report*, Session 1991-92, HL Paper 35-I.

54 R. Cracknell, *Acts and Statutory Instruments: The Volume of UK Legislation 1950 to 2014*, House of Commons Library Standard Note, SN/SG/2911, 19 March 2014.

55 House of Commons Select Committee on Procedure, 4th Report of the 1995-96 Session, *Delegated Legislation*, HC 152.

In his evidence to the inquiry, the Clerk of the House, Donald Limon, stated that the decision about what form of parliamentary control would be used for any particular SI was 'very much a matter of chance' and 'grounded as often as not on the fortuitous outcome of past debate on the parent legislation'.[56] The Committee noted that Parliament appeared to be too willing to delegate wide legislative powers to ministers, but opted not to consider ways of limiting the granting of such powers. The Committee concluded: 'We have arrived at a situation where the nature of parliamentary control…is being dictated by a notoriously inadequate system of scrutiny and control itself, rather than by nature of the powers to be delegated.' [57] And it was particularly critical of the House of Lords for 'operating a self-denying ordinance in this field'.[58]

The Procedure Committee's report remains the last substantial examination of the delegated legislation system and its findings and recommendations continue to shape the debate about reform today. It is therefore worth reflecting at some length on its findings.

It expressed concern that it was 'very much a matter of chance as to which negative instruments are debated'.[59] Despite the establishment of delegated legislation standing committees in 1973, prayers were frequently disregarded, a situation it deplored. The Committee argued that backbenchers had given up tabling prayers against instruments, leaving the procedure almost entirely to the opposition, whose own prayers were often left un-debated. While the party business managers (known as the 'usual channels') decided which negative SIs were debated, the opposition were more inclined to use prayers for politics and publicity. It concluded that 'the dramatic growth in the number of negative instruments and the virtual disappearance of the backbench prayer have led us and a number of those who gave evidence to us to propose that there should be some sort of systematic sift of negative instruments'.[60]

In his evidence to the Committee, Professor Philip Norton (later Lord Norton of Louth) highlighted the difference in the way in which the House of Commons dealt with EU legislation and SIs.[61] He proposed that the anomaly should be addressed by introducing a two-stage process for delegated legislation, not dissimilar to that utilised for European Union law: one committee should perform a sift of all SIs and report to the House any that raised political issues warranting further attention. Another committee would then consider these referred SIs.

56 House of Commons Select Committee on Procedure, 4th Report of the 1995-96 Session, *Delegated Legislation*, HC 152.

57 *Ibid*.

58 *Ibid*.

59 *Ibid*.

60 *Ibid*.

61 *Ibid*.

The Procedure Committee broadly agreed and suggested that a sifting committee should consider all negative instruments and identify those that 'raised matters of sufficient political importance to draw attention to Members and which might justify debate'.[62] The Committee recognised that the input of departmental select committees would be useful but recommended that a central committee would be more appropriate given the workload facing existing committees. The Committee conducted a mock scrutiny of one week's worth of SIs to test the practicalities of a sifting system and proposed that a sifting committee would require formal access to the opinion of Speaker's Counsel as well as the power to hear oral evidence and communicate with other committees. Once the sifting committee had identified an instrument for debate, the Committee proposed that it be referred to a scrutiny committee for such a debate, held before the expiry of praying time, on a motion moved by the sifting committee Chair (a motion that could be opposed and defeated).

With regard to affirmative instruments, the Committee noted that the requirement that all affirmatives should be debated for up to a minimum of 90 minutes was a 'significant irritation', as a large number were scarcely worth debating at all. It therefore recommended that the proposed sifting committee should be empowered to identify affirmatives that did not require debate or could at least be grouped for sequential debate in committee.

The Committee also proposed an amendment to the 1946 Statutory Instrument Act to provide for a standard 60-day praying time. It noted that despite the existence of an informal agreement a number of SIs were considered by the House before the Joint Committee reported. It therefore reiterated previous calls for the creation of a Standing Order to prohibit a decision on an SI being taken before the Committee had reported its view. It also suggested that the workload of the Joint Committee could be improved by excluding consideration of instruments not subject to parliamentary proceedings. It also proposed that the time limit for committee debates should be raised to 2½ hours with 45 minutes devoted to a statement by and questions to the relevant minister.

The Committee also noted the fact that as debate took place on a 'meaningless and un-amendable motion' this was 'certainly one principal cause of members' disenchantment with delegated legislation proceedings'.[63] It called for debate in a standing committee to be held on a substantive motion, either 'that the Committee recommends that the SI be approved' or 'that the Committee recommends that the SI be annulled'.[64]

62 House of Commons Select Committee on Procedure, 4th Report of the 1995-96 Session, *Delegated Legislation*, HC 152.

63 *Ibid*.

64 *Ibid*.

The case for amendment of Statutory Instruments was also considered and ultimately rejected as it would replicate the process for primary legislation, but the Committee did suggest that there was some scope for amendment to the substantive motions proposed for committee proceedings. It proposed that 'take note' motions could be amended to annulment motions and that reasoned and conditional amendments (approval subject to conditions such as specified amendments to instruments) could be made to approval motions. Amendment motions such as these could then be debated for a further hour on the Floor of the House if defeated.

A further proposal was considered in relation to the scrutiny mechanisms. In their evidence to the Committee, the Study of Parliament Group proposed the abolition of the distinction between negative and affirmative SIs in favour of a new uniform category of instruments, and the creation of a new mechanism to determine which SIs required positive approval based on their significance. This 'would provide a more comprehensible and arguably more rational approach to the parliamentary scrutiny of delegated legislation'.[65] The Procedure Committee chose to be less radical in their recommendations but did propose the adoption of a new 'super-affirmative' procedure for instruments of particular significance. Under this procedure a proposal for a draft order would be laid and examined in detail by the relevant departmental select committee within a 60-day timescale. Amendments could then be proposed.

The Government did not respond to the Procedure Committee's report for three years. But in 1999 the Leader of the House, Margaret Beckett MP, asked the Committee to look again at the report and consider if any of the recommendations proposed could now be implemented as a matter of urgency. It determined that the 1996 recommendations largely remained valid and should be implemented.[66]

The Royal Commission on Reform of the House of Lords

In the same year the Wakeham Commission considered delegated legislation from the point of view of the other House and concluded similarly that there was a strong case for enhanced parliamentary scrutiny and that the House of Lords had a key role to play in improving the system.[67] The Commission made clear that its findings were in line with the spirit of the 1996 Procedure Committee report and should be read in parallel with it. It proposed that more SIs should be published in draft and be subject to pre-legislative scrutiny to allow detailed comment by interested parties;

65 House of Commons Select Committee on Procedure, 4th Report of the 1995-96 Session, *Delegated Legislation*, HC 152.

66 House of Commons Select Committee on Procedure, 1999-2000 Session, *Delegated Legislation*, HC 48.

67 Royal Commission on Reform of the House of Lords (2000), *A House for the Future*, (London: The Stationery Office).

that a sifting mechanism should be established to look at the significance of every SI via a joint sifting committee; that neither House should consider an SI until the Joint Committee on Statutory Instruments had reported; that praying time should be extended to 60 days; and that it should not be possible to amend SIs. Again, however, there was little progress made with its recommendations with one key exception: the creation of the Merits of Statutory Instruments Committee (now known as the Secondary Legislation Scrutiny Committee). The Commission proposed that the Committee was needed in order to complement the work of the Joint Committee on Statutory Instruments: so that the merits of SIs would be considered in addition to their technical legality. It would be another four years before the Merits Committee was established to sift SIs for political and legal significance, but it again demonstrated how the House of Lords was more advanced in its approach to delegated legislation than was the House of Commons.

Latest calls for reform unheeded

Recognising the inadequacy of parliamentary scrutiny, a plethora of reform proposals have also been mooted by a range of non-parliamentary bodies over the years, including the Hansard Society. In 1993, our Commission report on the legislative process, *Making the Law*, acknowledged that the increased use of delegated legislation over recent decades was inevitable, and indeed perhaps necessary, given the complexity of modern government and the constraints on parliamentary time. However, the report warned that the mechanisms for achieving effective parliamentary scrutiny were absent and needed to be improved.[68]

In 2003 the all-party Parliament First group of MPs also argued for urgent changes to the way that Parliament deals with delegated legislation. And in 2000 and again in 2007 two Conservative Party inquiries also explored the issues and recommended significant changes to little effect.[69]

More recently in 2006 the House of Lords Merits Committee explored the management of secondary legislation, particularly focusing on provisions for post-implementation review of SIs by government and Parliament, and made a series of recommendations to improve the technical quality of them.[70] And the Speaker of the House of Commons indicated in a speech in 2009 that he regarded

[68] Rt. Hon. Lord Rippon of Hexham (Chair), (1993), *Making the Law: The Report of the Hansard Society Commission on the Legislative Process* (London: Hansard Society).

[69] Professor the Lord Norton of Louth (2000), *Strengthening Parliament: The Report of the Commission to Strengthen Parliament* (London: Conservative Party) and Conservative Democracy Task Force (2007), *Power to the People: Rebuilding Parliament* (London: Conservative Party).

[70] See House of Lords Merits of Statutory Instruments Committee (2005-06), *The Management of Secondary Legislation, Vol. I: Report*, HL Paper 149-I; House of Lords Merits of Statutory Instruments Committee (2007-08), *The Management of Secondary Legislation: Follow-up*, HL Paper 70; House of Lords Merits of Statutory Instruments Committee (2009-2010), *What Happened Next? A Study of Post-Implementation Reviews of Secondary Legislation: Government Response*, HL Paper 43.

reform of the scrutiny of delegated legislation as a significant priority, suggesting, for example, the introduction of a sifting committee for the House of Commons and reform of the way in which SIs are debated, modelled on the system used for consideration of EU legislation.[71]

But beyond the introduction of the super-affirmative and 'enhanced' procedures, the key aspects of the scrutiny process for delegated legislation, particularly in the House of Commons, remain much the same as in 1946, despite the breadth and depth of criticism levelled at it. And the broad thrust of the arguments for change as long ago as 1932, remain equally valid today.

[71] Rt. Hon. John Bercow MP, 'Parliamentary Reform: From Here To There', lecture delivered on 24 September 2009, published in Hansard Society (2010), *The Reform Challenge – Perspectives on Parliament: Past, Present and Future* (London: Hansard Society), p.19.

3. The life-cycle: delegating power in the parental Act

The extent to which a bill will be divided between primary and secondary legislation is a matter for the government. But who, within government, makes that decision, how and why is rarely clear; it is taken in Whitehall, well away from parliamentary or public scrutiny. This chapter looks at how this process works and the implications for delegated legislation and the scrutiny it receives.

It begins at the point at which ministers, having secured a slot in the legislative programme, must decide how much of the detail of the policy it is converting into legal form should appear on the face of the bill and how much should be dealt with at a later date through the delegation of power to ministers. It explores how the balance between primary and secondary legislation is reached, and what factors are predominant in this decision-making process, such as politics, departmental culture, administrative necessity and legal pressures. It then sets out which scrutiny committees examine the bills and the delegated powers they contain.

Drafting and the bill team

Once a decision has been made to legislate[72], a bill team is created within the relevant government department. The manager of the bill team is responsible for co-ordinating work on the bill and monitoring and managing its progress against the agreed legislative delivery plan. In the words of one holder of the post, their responsibility is 'to keep everyone focused on the original purpose and objectives'. The team will provide regular updates to ministers and other officials, departmental lawyers, the departmental parliamentary branch and the Parliamentary Business and Legislation (PBL) Secretariat in the Cabinet Office. The bill team manager will also report to a departmental project board made up of senior officials with an interest in delivery of the bill.

Drafting of a bill can begin only once collective agreement has been reached and the PBL Cabinet Committee has granted drafting authority. Then the lead policy officials within the department will draft instructions for their departmental lawyer or Treasury Solicitor assigned to the bill who in turn will convert that into a legal drafting instruction for Parliamentary Counsel.

One bill team manager we interviewed described the process thus:

> *'there's a sort of three-stage process in getting the clauses down. The bill team, the policy team will provide a policy intention to a Treasury Solicitors*

[72] It should be noted that with effect from the start of the 2014-15 session the government has determined that powers to make secondary legislation by Statutory Instrument should generally take the form of a power to make regulations rather than an order. At the time of writing it was very late for us to amend this text. We therefore continue to refer to order-making powers given that our research concerns bills that pre-date this change.

lawyer here who will put it in legal terms for Parliamentary Counsel who will then attempt to draft something in legislation that meets your policy requirements and it sort of comes back round to you to see if it meets your case and it goes through that process each time.'

The Cabinet Office *Guide to Making Legislation* makes clear that the purpose of the departmental legal instruction is to say what is 'wanted', but also to inform Parliamentary Counsel of the reasons underpinning the proposals.[73] Instructions should identify the basic legal concepts, particularly with a bill breaking new ground; set out the existing state of the law; reference relevant cases decided in the courts as well as any related statutory provisions; and highlight any new criminal offences, delegated powers, new duties or decision-making powers.

They may also serve a useful development purpose as the conversion of policy into instructions can often highlight points which may not have been considered or help identify any inconsistencies in the policy.

Our case study interviews suggest that the discussion of policy is usually conducted by ministers and policy officials at one remove from the draftsmen with departmental lawyers acting as intermediaries. The extent to which there is direct contact between bill teams and policy officials on the one hand and Parliamentary Counsel on the other is driven just as much by the personalities or time pressures involved as by the complexity of the policy or legal issues at stake.

As one bill team official described the process, 'our main contact is through Treasury Solicitors. They are the ones formally instructing Parliamentary Counsel and they're the ones who help us interpret it as they are our lawyers.' It would be very, very rare to go direct to Parliamentary Counsel, said another, 'Your lawyers will instruct Parliamentary Counsel on your behalf.'

As a member of a departmental legal team put it:

'In each policy area you will have policy people and lawyers working together to get the policy developed, to get the instructions written for Parliamentary Counsel. These are then sent off. Parliamentary Counsel draft that bit of the bill and it's an iterative process. They draft, we comment, they ask questions, we rethink and it develops in team working between policy, us and Parliamentary Counsel, and indeed other departments because it doesn't just affect us.'

As the head of the Parliamentary Business and Legislation Secretariat, described it, 'When bills are being drafted, there is a real stress-testing process, with iterative drafting, going to and from Parliamentary Counsel – "Did you mean this? Did you

[73] Cabinet Office, *Guide to Making Legislation*, July 2014, chapter 10.

want this? Have you thought about that?"'[74] As a departmental lawyer explained, 'The role of Parliamentary Counsel is, from the departmental perspective, to challenge all aspects of the instructions to make sure that you get the perfect bill.'

In the words of an experienced Parliamentary Counsel,

'the starting point is the department's instructions and the department are responsible for the policy ….our job is to give effect to it but what we'll do is we'll challenge and make sure people have thought through the issues and if the initial instructions don't seem entirely appropriate to use we might suggest that the negative procedure might be more appropriate or vice versa in particular cases but the starting point must be department's instructions and their policy wishes.'

The balance between primary and secondary legislation: why seek a power?

In legal terms ministers make the decision about what goes into primary and what goes into secondary legislation as they 'sign off' any bill that goes to Parliament and must subsequently defend it both in parliamentary debate and in the court of public opinion. In practical terms, however, significant discretion lies with civil servants, the government's legal advisers and Parliamentary Counsel. But as some of our case studies in the chapters that follow illustrate, there is some inconsistency in approach.

But what factors do they take into account when deciding on the balance and the powers that should be sought in a bill? Our interviews suggest that there is no one definitive factor in play; there are lots of competing considerations both principled and practical including technicalities, the likelihood of regular changes being needed, and the readability of the bill. Legislative drafting is an art not a science and every team working on a bill will deploy a signature approach.

The Cabinet Office *Guide to Making Legislation* describes the factors that should be taken into account. It suggests that:

- 'the matters in question may need adjusting more often than it would be sensible for Parliament to legislate for by primary legislation;
- there may be rules which will be better made after some experience of administering the new Act and which it is not essential to have as soon as it begins to operate;
- the use of delegated powers in a particular area may have strong precedent and be uncontroversial;

[74] House of Commons Political and Constitutional Reform Committee, 1st Report of Session 2013-14, *Ensuring Standards in the Quality of Legislation*, HC 85, EV84.

- there may be transitional and technical matters which it would be appropriate to deal with by delegated powers.' [75]

However, it also warns that 'the matters, though detailed, may be so much of the essence of the bill that Parliament ought to consider them along with the rest of the bill' and 'the matters may raise controversial issues running through the bill which it would be better for Parliament to decide once in principle rather arguing several times over (and taking up scarce parliamentary time in so doing)'.[76]

Technical detail

For areas of legislation that are particularly technical and detailed such as social security or anything involving fees the decision to opt for secondary legislation is relatively straightforward. As a Parliamentary Counsel described it, 'anything that involves algebra' or things 'which tend to change over time' are obvious candidates for powers rather than a bill. So too are procedural rules or administrative matters – for example, forms – where 'the nature of them is not really significant enough to warrant the time in Parliament'. In such circumstances, the test applied by many drafters is whether it's 'really worth having a stand-part debate in committee in Parliament, arguing about a form'. As another Parliamentary Counsel clarified, 'there's probably lots of things where you need to have something but it doesn't really matter what it is that you have. The nature of the rule might be like that. It doesn't matter where the box is on the form, but it has to be somewhere on the form.'

Beyond this, however, it's often practical matters rather than any issue of principle that dictates the balance. As one Parliamentary Counsel described it, the most fundamental point is whether 'it is all going to work technically so whether as a whole the bill plus exercise of any powers that you've given it will produce the result that is wanted'.

Readability

Others pointed to the importance of readability encouraging them to confer a power so that some of the detail is left off the face of the bill, which may make the bill and the main principles easier to understand and for politicians to debate. Alternatively, they might conclude that it would be more helpful to put the story all in one place, on the face of the bill.

Administrative convenience

Convenience may also be a factor. You might know, argued one Parliamentary Counsel, that there are hundreds of changes to make and it's 'just not appropriate

[75] Cabinet Office, *Guide to Making Legislation*, July 2014, p.124.
[76] *Ibid*.

to put them in a bill because it would take up unnecessary time and pages'. Alternatively, if a drafter was not absolutely convinced that they had managed to include all the consequential amendments arising from a change – for example, reconstructing a public body – then they might take a power in a bill in order to sort that out subsequently. As a Henry VIII power this would be deemed by most critics as highly objectionable, but in practical terms it might be quite anodyne in its application and, in the words of one Parliamentary Counsel 'just involve going around changing a few names'.

Incomplete policy process

Another scenario is where policy is not sufficiently thought through or in an advanced stage of preparation. Several former House leaders and Chief Whips that we spoke to who had served on the PBL Committee indicated that such a scenario might arise, for example, when two or more departments are at loggerheads with each other and officials in Downing Street are not yet sufficiently focused on the issues to be able to resolve the dispute. If the business managers' timetable requires the bill to go forward then forcing it through can have the advantage of focusing minds. But if it is not really ready on introduction then Parliamentary Counsel might have to draft a power 'as the only way of getting something in the bill so that it is within scope' with the opportunity to amend it later and flesh things out further. However, this can create additional difficulties because the drafter has not really 'got a target to aim at so you don't quite know the extent to which you do need to hedge it in or you might end up with something that is far broader than it actually turns out you need'. This then causes handling difficulties at a later stage for the scrutiny procedures assigned will likely take up more parliamentary time because they've asked for a much greater power than they required.

Unpredictability

Conversely, it may not be possible for policy-makers, lawyers and drafters to predict what is going to be needed when a power is being exercised in a new policy context. One of the difficulties with drafting powers is, said one Parliamentary Counsel, that 'they can be a bit of a stab in the dark because you do your best to try and work out what's needed but you don't really know until someone has drafted the regulations by which time its possibly too late'. One example of such a scenario would be where an entirely new system is being established – as with the move to individual electoral registration – and perhaps implemented in stages. Here the interaction between all the different provisions and transitional arrangements cannot entirely be foreseen. It is not necessarily clear how it will work in practice as opposed to theory: providing powers in secondary legislation therefore helps by giving officials the flexibility to react to how things work in practice, compared to how they worked when piloted.

Time management

Time pressures also play their part. One bill manager noted that 'holding' clauses often occur when there is a rush to legislate as a result of particular media and political pressure. A 'giant' power would be drafted such that it would look like 'the government may by order do the following things…' and thus give the appearance of taking clear action. But while such powers might arouse opposition, they are often a signal – a flag to Parliament – that the government wants to do something but wants time to talk to Members or others about it. When there is no pre-legislative scrutiny, the opportunity to buy time and come back during Public Bill Committee with a more detailed clause that reflects the concerns expressed to government can be useful.

One Parliamentary Counsel described how on more than one occasion they had suggested taking delegated powers, contrary to the original plan of departmental lawyers, because it had proven impossible to do something that was meant to be on the face of the bill and be confident that they would get it right in the time available. Given pressure on the annual legislative programme, there may also be a drive to seek powers because of the likely future lack of opportunities for a primary bill. Historically, for example, there has been a charities bill every 10 years or so. If a new charity policy is likely to require regular changes, then drafters may be driven to take a power because if the implementation of the policy requires adjustment then secondary legislation, in the absence of a primary vehicle, may be the only way to do it.

If business managers want to smooth the passage of a bill, and / or keep it as short as possible, they might also suggest the use of secondary legislation as a way of reducing the number of clauses by taking out some detail and putting it into a power. Our interviews suggest that it is rare, but not entirely unknown, for business managers to intervene in this way, indirectly indicating to Parliamentary Counsel that a bill might have no more than 30 clauses, for example. But such intervention is naturally constrained by the countermanding desire not to take up unnecessary amounts of parliamentary time in the future debating affirmative resolution instruments. Whilst not impossible, using secondary powers to take the heat off a bill by hiding controversial issues would be similarly unproductive. If something is genuinely controversial it is likely that the scrutiny procedure will need to be affirmative rather than negative in which case the inevitable controversy is merely postponed. A minister may survive discussion of the powers at the primary stage but as one bill team member noted, 'they are not going to thank you when they have an affirmative resolution debate, which reopens everything up after they've got the bill through'.

Parliamentary 'handling'

How the legislation will need to be 'handled' in Parliament also helps shape decisions, particularly in relation to the Delegated Powers and Regulatory Reform

Committee whose views, as set out in their reports, constitute the nearest thing there is to a form of jurisprudence for delegation. Right at the start of the process, for departmental lawyers working on drafting instructions for Parliamentary Counsel how convincing their argument looks in the Delegated Powers Memorandum that will have to go to the DPRRC informs their thinking. The officials we interviewed all said that they put a lot of effort into the writing of the Memorandum and found the process to be a useful backstop. One departmental lawyer admitted that on occasion they had changed their minds about the allocation of procedures to powers in the course of drafting the document: 'It makes you question have you applied the same standards consistently through the bill.' As one departmental lawyer put it, 'we're so conscious of the fact that we don't want an adverse report by them that we do really try and explain things as well as we can and if we think we're on slightly dodgy ground with it then it's probably where you're going to actually put more detail in than may be needed'.

For Parliamentary Counsel, the DPRRC's perspective on matters such as framework legislation and consequential amendment powers, and the Committee's attitude to any departure from the rules and conventions about how these are set out is of high import. 'If something is going to cause difficulty we will be thinking back, what's caused difficulty', argued one Parliamentary Counsel. In any team working on a bill Parliamentary Counsel are the ones likely to be most knowledgeable about the on-going attitudes of Members to delegated powers, as well as parliamentary process and precedent. But while they can advise along these lines it's ultimately a matter for the departmental team as to whether they accept the advice. As a Parliamentary Counsel noted, if something 'is just the sort of thing the Lords hate then it's a fair enough point for us to make but it's not our decision and if they, having thought about that, are intent on steaming ahead nonetheless, well it's up to them'. It is not a question of making a right or wrong decision, or of making a proper judgement on the balance, it's just, argued another, 'whatever people want and the parliamentarians are the people who have ultimate control'.

Ultimately, in the absence of clearly defined principles about where the line between primary and secondary should lie, decisions about the balance are often a matter of 'feel' and 'judgement'. 'You'll just kind of have a feel for whether it looks right for there to be a distinct lack of any detail and it's set out in secondary legislation. Or that looks like you're trying to hide something and actually it needs to go on the face of the bill,' said one Parliamentary Counsel. 'But it's one of those you'll know it when you see it type things for a lot of it.' Admitted another Parliamentary Counsel, 'a lot of this is actually quite hard to write down because a lot of it is feel as to what is right to go in delegated legislation, what is likely to cause trouble in Parliament and so a lot of it does just come down from having spent a while doing this and seeing the things that have caused trouble and so on'.

Assigning scrutiny procedures to powers

Having made the decision about what aspects of the policy will go into delegated legislation, a further, equally important decision has to be made about what form of parliamentary scrutiny – negative, affirmative or strengthened – will be proposed in the parental act for each particular delegation of power. Again, what emerges is a haphazard approach, with no coherent system to shape decision-making.

As with deciding on the primary/secondary distinction, the decision-making process that underpins the assigning of the correct parliamentary procedure varies across departments and a range of actors are involved; including the bill team, departmental lawyers, Parliamentary Counsel, senior civil servants and ministers.

Here again, when discussing the decision-making behind assigning procedures, departmental lawyers and Parliamentary Counsel often referred to it being based on a 'gut feeling' that was hard to put down in words but that 'you just know' what type of procedure is relevant for a particular power 'when you see it'. For example, a wide power intended to be used to create criminal offences, 'is the sort of thing that feels as if it ought to be an affirmative power' and so Parliamentary Counsel would likely query any bill drafting instructions that asked them to assign it to the negative procedure. Several departmental officials described the decision-making process as working through 'osmosis', with a range of people having an input and the decision being checked at various levels even before the bill is introduced.

There were a couple of basic rules that both departmental lawyers and Parliamentary Counsel readily recognised in the process. Firstly, that welfare policy related powers – usually highly technical – would generally be accorded the negative procedure. And conversely, fees or charges will tend to be allocated to the affirmative procedure. Secondly, that any Henry VIII clauses will be subject to the affirmative procedure and any deviation from this presumption must be explained clearly to the DPRRC in the Delegated Powers Memorandum.

The Cabinet Office *Guide to Making Legislation* makes clear that in 'exceptional cases' provision may be made for the super-affirmative procedure but departments 'should avoid including such provision in bills (or conceding amendments to that effect), since this adds to the complexity of parliamentary handling and has a considerable impact on future business management'.[77] As our case studies in the following chapters illustrate, however, such provisions are sometimes conceded regardless, in order to buy off opposition.

It was evident from our interviews with bill team members, departmental lawyers and Parliamentary Counsel that the decision on the procedure is usually taken initially

[77] Cabinet Office, *Guide to Making Legislation*, July 2014, p.125.

by officials rather than ministers. As one member of a departmental legal team put it, 'ministers have been actively involved in all aspects of development of the policy. I wouldn't say that what goes into regulations has featured highly on their radar. There's no particular reason, I think, why they'd be interested.' It would be rare for a minister, particularly in the House of Commons, to discuss let alone instruct, officials as to what form of parliamentary scrutiny would be most appropriate for each delegated power, although several key players told us during our interviews that this did happen with the Localism Bill (see chapter seven).

Which official initially decides on the allocation of the parliamentary procedure to the power may differ from bill to bill. It was clear in our interviews that the highly iterative nature of the drafting process meant the officials were themselves not always entirely clear as to who had first suggested the relationship between some of the more controversial clauses and the respective scrutiny procedure allocated to them. In some cases the proposal would be set out in the drafting instructions sent to Parliamentary Counsel. However, in other cases the lawyer might have consulted Parliamentary Counsel before starting to draft the instructions and therefore the proposal might have been suggested to them. The lawyers might also from time to time consult the House authorities on whether a procedure would be deemed appropriate or not. But all were clear that if Parliamentary Counsel thought the proposed allocation of procedure to power was inappropriate they 'will let you know'.

The drafting and scrutiny process is also subject to the strange game of 'legislative bluff'. As a Parliamentary Counsel described it:

> *'there's an awful lot of horse-trading with bills so I think sometimes you will start with something that looks pretty outrageous but you know you're going to trade-off things and it's just a question of who you'll need to trade it off with and what bits that you'll be able to keep'.*

But all the Parliamentary Counsel we spoke to were firm that they would not put something in a bill solely for the purpose of negotiation, as that would be improper. One deemed it a dangerous strategy: 'you never quite know, suddenly the whips will say you can't have any more amendments and you're unable to amend it so I can't imagine doing that'. But a number of bill team officials acknowledged that they might go for the most desired option in a bill in policy terms, but conscious that they might have to concede a point during the parliamentary process: the scrutiny procedure assigned to a power might therefore often be an important point of concession. One of the problems with this strategy, however, is that it helps drive a process that focuses on the form (the scrutiny procedure) rather than the substance (the power) of a bill.

Cabinet Committee: Parliamentary Business and Legislation (PBL)

Once the bill is agreed internally within the department it must receive final approval from the PBL Committee. As the Cabinet Office *Guide to Making Legislation* makes clear, the Committee is concerned 'with questions of timing, handling and the resolution of outstanding issues'.[78] It is served by a small team in the Cabinet Office's Economic and Domestic Affairs Secretariat that provides advice to the Leader of the House of Commons on the clearance of legislative proposals, as well as advice to other ministers about the legislative programme. The complement of staff usually consists of a senior official who advises ministers and the business managers on the progress with the legislative programme, an officer who does much of the administrative work, and a parliamentary clerk on secondment from the House of Commons who advises on parliamentary procedure.

Staff in the secretariat will work with departmental bill teams to help prepare each piece of legislation. The current head of the secretariat, Adam Pile, described the process thus in evidence to the Political and Constitutional Reform Committee in the House of Commons: 'Before bills go in, we make sure that they (secretariat staff) are having the right conversation with the right people so, for example, that they are engaging with the devolved administrations and they are working with the law officers on drafting and constitutionality.' [79]

Theoretically this Committee could veto a bill because of drafting concerns, inappropriate delegation of powers, or erroneous assigning of scrutiny procedures. In practice, once a bill reaches the Committee it is assumed that it is 'ready'. As the then Leader of the House of Commons, Andrew Lansley MP, noted in evidence to the Political and Constitutional Reform Committee inquiry into the quality of legislation, 'My objective is that bills should not be presented to the Parliamentary Business and Legislation Committee that are not fit for purpose… Our job is not to sit there and say no.' [80]

Once a bill is ready for consideration, about two weeks before the scheduled meeting of the PBL Committee ministers must circulate a mandatory set of documents to the Committee members for consideration. The PBL documentation includes a covering memorandum, the bill, explanatory notes, the impact assessment, and confirmation of compliance with the European Convention on Human Rights. It also includes two other documents that are critical to understanding the delegated legislation process.

78 Cabinet Office, *Guide to Making Legislation*, July 2014, p.144.

79 House of Commons Political and Constitutional Reform Committee, 1st Report of Session 2013-14, *Ensuring Standards in the Quality of Legislation*, HC 85, EV84.

80 *Ibid*, EV82.

First, is the parliamentary 'handling' strategy, described in the Cabinet Office Guide as 'a living document, helping the bill team to crystallise its approach and prioritise resources towards those areas where poor handling would be most likely to have the greatest impact'.[81] This sets out areas of the bill that are believed likely to be contentious (based on the mood of each House and the particular interests of individual MPs and Peers), identifies those Members of both Houses likely to take a particular interest in the legislation, and outlines what engagement it is proposed will be undertaken to address their concerns. It also outlines possible approaches should the government suffer any defeats. The strategy is then to be updated during the passage of the bill.

The second crucial document is the Delegated Powers Memorandum drawn up for the DPRRC explaining the purpose and justification of any powers contained in the bill and the proposed form of parliamentary scrutiny for each of them. Produced by the departmental lawyer, with support from the bill team and Parliamentary Counsel, it has introduced at least a basic system to guide the decision-making process on delegation, as departments are required to set out why they have assigned a proposed procedure to each particular power. But explanations given in the Memorandum vary across departments with some providing a lot of detail whilst other departments appear to be participating in a cut and paste exercise. Indeed, such has been the variable quality in recent years that the DPRRC was moved to hold an inquiry into the subject in 2014 (see chapter 11).[82]

But first the minister responsible will have to defend the legislative proposal to colleagues at the PBL committee for up to an hour. The Parliamentary Counsel that drafted the bill will usually attend in an observational capacity but it is unusual, although not unknown, for members of the bill team to attend. The key people at the meeting are the Leaders and Chief Whips in both Houses and usually it will be the junior minister(s) responsible for shepherding the bill through Parliament who will be grilled on the content and preparation of the bill. One former long-term member of the Committee described the process as 'often brutal' and like 'going into the headmaster's study'.

This Committee is the gateway to Parliament: only when its approval is given can a bill be introduced at Westminster. But it's clear that at this meeting the issue of delegated legislation occupies a low rung on the ladder of important issues as far as ministers are concerned. From our interviews with those who attended relevant PBL meetings for our case study bills, it is clear that limited time and attention was focused on the detail of the Delegated Powers Memorandum even when it was

81 Cabinet Office, *Guide to Making Legislation*, July 2014, p.140.

82 See House of Lords Delegated Powers and Regulatory Reform Committee, 7th Report of Session 2014-15, *Special Report: Quality of Delegated Powers Memoranda*, HL Paper 39.

clear from the outset that the delegated powers – particularly the Henry VIII clauses – would prove to be a significant obstacle in the passage of the bills. Much greater attention was paid to the handling strategy: if any issues concerning the delegation of powers could be 'handled' then the bill would proceed. There was, it seems, no discussion about whether the powers being sought were unacceptable from the outset. In part this is because the focus of the PBL Committee is, in the words of one official, on 'whether things are ready', not whether the provisions in the bill –specifically in our area of interest the delegation of powers and proposed scrutiny mechanisms for them – are appropriate.

Care will be taken to ensure that the minimum requirements needed to get the bill past the relevant parliamentary committees – consulting with them in advance in order to assure a clean bill of health – are met, but ultimately officials as much as ministers are focused on one outcome and one alone: delivering the policy. Any other demands are secondary to this.

As one official put it, 'the discussion in the department around parliamentary procedure would be at the bottom end of the process. We are only concerned with the policy outcome.' One senior official, and former manager of a bill team clarified the thought process. Officials, he argued, would consider what is the most reasonable precedent for the procedure, but of course government may take a very different view from Parliament of what that should be. 'Parliament fears government will use the powers for dreadful purposes', he contended. Government on the other hand 'fears Parliament will turn their reasonable intent into a catastrophe. Ministers don't intend to use it (the delegated power) inappropriately themselves and can't see why anyone else would.'

Our interviews also suggest that two other factors bear heavily on the impact of this Committee as far as matters of delegation are concerned.

Priorities and knowledge

Firstly, how parliamentary time will be managed in relation to the bill determines what is considered 'important'. As one official described it, 'the level of what's important varies according to where you sit in the process and management of time constraints governs thinking around importance'. In this context, delegated legislation, designed in principle to save time, is rarely of great importance because it is rarely a priority.

Secondly, and not unrelated, most ministers do not have enough knowledge of the delegated legislation process to engage in any kind of detailed discussion about the issues pertaining to other colleagues' bills that they are asked to examine at the Committee. One official who had sat in on PBL meetings recalled witnessing, on more than one occasion, a minister seeking clarification: 'Tell me what secondary legislation is.'

Many Secretaries of State over the last 20 years have also never served as a junior minister and therefore shepherded a bill through Parliament themselves. They may turn up to give the set-piece speech in the second reading debate but they rarely dirty their hands with the more combative committee and report stages. Add to this the lack of knowledge among Commons ministers about proceedings in the House of Lords, a concern that caused particular problems in several of our case study bills, and it is a recipe for confusion and error.

Once the PBL Committee has approved the bill, the government business managers must decide when and in which House to introduce the legislation. As one former member of the Committee described it, they have to decide 'when to take the train out of the sidings'. If there are any direct financial considerations then this will point in the direction of the Commons, if not it will be for the business managers to determine based on which House has the lighter business programme at any given time. This decision is important because the House of Lords takes a more detailed interest in the delegated powers and scrutiny mechanisms contained in bills than does the elected House of Commons and the DPRRC has a strong role in shaping attitudes to the delegated powers in bills from the point at which the legislation arrives in the Upper House.

A circle of learning: addressing civil service collective memory

It is relatively rare for a civil servant to be a member of a bill team more than once in their careers. During the course of our interviews we came across two who had managed two bills but both admitted this was unusual; working on one bill was necessary for career development but working on another was generally frowned upon. Internally, the prevailing attitude within the civil service seems to be, having done it once, what more is there to learn? When one of these former bill managers considered doing a third bill, the subject of which they thought was interesting, they were firmly steered away from it by their line manager who thought applying for it would be a bizarre decision in career terms. Accused of trying to pigeonhole themselves as a bill specialist, they were warned that if they did so they would never get on in the civil service.

Across Whitehall this means most members of bill teams are completely inexperienced in the legislative process, lack a detailed understanding of the way the parliamentary scrutiny process works, and have little knowledge of precedent. There is a clear tension between career development and knowledge management of the legislative process. Managing a bill requires the application of informed judgement, but members of most bill teams are learning the ropes as they go along and, by and large, by the time they've learnt any lessons from the process, it is far too late to put any of them to use. Training is minimal for new bill team members;

the PBL Secretariat runs a day's training for bill teams and managers and there are civil service courses. But in practice the staff generally steer their way through the process using the Cabinet Office *Guide to Making Legislation*.[83] One of the two more experienced bill managers admitted they preferred parliamentary guidance to Cabinet Office guidance – particularly the DPRRC reports – but most bill managers we interviewed relied on the government's in-house manual.

Because bill teams and managers turn over each session, the PBL Secretariat undertakes an annual 'lessons-learned exercise' with Parliamentary Counsel, bill teams, ministers, departmental lawyers and business managers.[84] At this stock-take session, they discuss what worked well and what did not, identifying examples of best practice in an effort to pass the knowledge on to other staff working on future bills, including the sharing of draft SIs and guidance during bills.

However, as the case studies that follow demonstrate, there is a distinct lack of collective memory within the civil service about precedent, the politics of delegated legislation, and where the line that defines the balance between primary and secondary legislation lies. The system is consequently heavily dependent on the legal teams – departmental lawyers and Parliamentary Counsel. Unlike in Parliament with the clerks' service in each House, there is no fast stream specialism for civil servants to develop an expertise in legislation, despite the fact that this is core to the delivery of government policy. This needs to be rectified.

Producing good quality legislation, which properly reflects the developing will of Parliament in respect of both primary and secondary legislation should be a priority issue for Whitehall. It is not unreasonable to expect those responsible for the drafting and preparation of bills and SIs to have a sound working knowledge of what Parliament needs and expects with regard to satisfactory consultation processes, safeguards, scrutiny procedures and their application.

The Government Legal Service (GLS) is currently being reformed, with more departmental teams brought directly under the purview of the Treasury Solicitor's Department in order, in the words of its head, Jonathan Jones, to achieve 'more systematic control of the quality of legal work'.[85] Both the GLS and the OPC have recently affirmed a greater commitment to monitoring the work of the DPRRC and disseminating its recommendations and feedback on best practice on the delegation of powers to departments. This is welcome, although it remains to be seen whether it will have the desired effect across government.

83 Cabinet Office, *Guide to Making Legislation*, July 2014.

84 House of Commons Political and Constitutional Reform Committee, 1st Report of Session 2013-14, *Ensuring Standards in the Quality of Legislation*, HC 85, EV21.

85 House of Lords Delegated Powers and Regulatory Reform Committee, 7th Report of Session 2014-15, *Special Report: Quality of Delegated Powers Memoranda*, HL Paper 39, para.36, p.14.

However, this reform programme may not go far enough. There is certainly a need to improve legal provisions across government; but there is also an urgent need to raise awareness of and commitment to quality and standards in legislation among the wider civil service, not just its legal teams. It is evident from our own interviews, and largely confirmed in evidence given to the DPRRC inquiry on the Delegated Powers Memoranda, that those officials working on bill teams do not systematically consider past experience and best practice when developing legislation.[86] Further, we also heard little evidence to suggest that when producing SIs they look back and reflect on what happened during the passage of the parental Act or at what was said in the Delegated Powers Memorandum, even though these are crucial to any understanding of the purpose and intended use of the power. In so far as legal teams and civil servants looked back at past history, this was only ever likely to be with regard to their own department; there was little appreciation of the wider landscape of debate and recommendations about delegation and scrutiny procedures across government more widely.

Establishing a specialist, fast-stream group within the civil service dedicated to legislative preparation – both primary and secondary – would raise the profile of the issue and engage the commitment of the wider civil service, including at the Permanent Secretary level, in a much needed way. Given that the legislative burden on government departments varies considerably, rather than establishing a group within each department, this might most usefully be set up at the centre, to work across Whitehall, deploying experts in the bill development process to each department to advise them as and when the need arises. The PBL Secretariat is not big enough to do this at present, and the emphasis of the Committee it serves is too focused on the management of the parliamentary timetable to adequately perform the function we propose.

Scrutiny Committees

The Delegated Powers and Regulatory Reform Committee (DPRRC)

All bills, when they reach the House of Lords, are considered by the DPRRC. The Committee was first set up as an experiment following a recommendation in the 1992 Jellicoe report on the use of committees by the House but just two years later was placed on a permanent footing. A committee focused on delegated powers in legislation was considered necessary in light of 'considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion'.[87]

86 House of Lords Delegated Powers and Regulatory Reform Committee, 7th Report of Session 2014-15, *Special Report: Quality of Delegated Powers Memoranda*, HL Paper 39, para.36, p.14.

87 House of Lords Select Committee on the Committee Work of the House ('the Jellicoe Committee'), *Report*, Session 1991-92, HL Paper 35-I, para.133.

The Committee's terms of reference are to examine 'whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny'.[88] In addition, it also examines a range of Orders [89] subject to strengthened scrutiny procedures, foremost among them draft Legislative Reform Orders (see also chapter five). Here it assesses whether the statutory tests set out in the Legislative and Regulatory Reform Act 2006 appear to have been met and whether the proposal is appropriate to be delivered using an LRO.

The Committee's 10 Members are supported by a secretariat consisting of a clerk, administrator and two legal advisers. The frequency of meetings is heavily dependent on the business going through the House of Lords; it will tend to meet weekly or fortnightly but more regularly if the weight of business requires it. The Committee considers all public bills (except supply and consolidation bills) when they reach the House of Lords, including Private Members' Bills. Time permitting, they also consider government amendments tabled in the Lords that include significant delegated powers, and amendments tabled in the Commons when a bill returns to the Upper House. However, as our case study on the Localism Bill illustrates, in instances where time does not permit it to consider report stage amendments problems can occur: here important provisions were made subject to a new variant on the super-affirmative procedure that was different to another variant on the procedure included elsewhere in the same bill. Had the DPRRC had an opportunity to look at the amendments then it is likely it would have picked up and reported the anomaly; instead the government had to rectify the anomaly after Royal Assent by agreeing that the procedure within the Act should be regularised (see also chapter five).

The Committee's scrutiny is entirely document-based using the Delegated Powers Memorandum (and any supplementary memoranda at later stages) provided by the government when a bill arrives in the Lords. This identifies each of the delegations of power contained in the bill, their justification and purpose, sometimes with an example of the circumstances in which the power might be used, and it explains why the proposed level of parliamentary control is thought appropriate.

The Cabinet Office's *Guide to Making Legislation* states that the Delegated Powers Memorandum must be available to both Houses of Parliament *on introduction* of the bill.[90] However, the DPRRC's own guidance makes clear that where a bill begins in the House of Lords the Memorandum should be available to the Committee on

88 House of Lords Delegated Powers and Regulatory Reform Committee, *Guidance for Departments on the Role and Requirements of the Committee*, July 2014, para.3, p.4.

89 These include documents and draft orders laid before Parliament under or by virtue of section 7(2) or section 19 of the Localism Act 2011; section 5E(2) of the Fire and Rescue Services Act 2004; section 85 of the Northern Ireland Act 1998; section 17 of the Local Government Act 1999; section 9 of the Local Government Act 2000; section 98 of the Local Government Act 2003; and section 102 of the Local Transport Act 2008.

90 Cabinet Office, *Guide to Making Legislation*, July 2014, p.15.

or before introduction to the House, and where a bill begins in the Commons the Committee will not consider the Memorandum until the bill reaches the Lords (unless it is emergency legislation), at which time it requires an updated Memorandum that reflects any changes made as a result of the bill's passage through the Commons.[91] As a consequence of the legislative timetable the Committee often has only a short timeframe in which to consider the evidence and report to the House. It aims to report on bills no later than the start of committee stage in the House and it reports on amendments on a 'best endeavours' basis.[92]

The Committee is careful to restrict its consideration to the delegation in question, and not the merits of the overall policy. It plays an advisory role providing information on which the House may act if it chooses, and does not generally enter into correspondence or negotiation regarding its recommendations.

Over the years the Committee has built a formidable reputation, not unrelated to the constitutional and legal expertise of many of its members. The Committee estimates that between 80 and 85% of its recommendations for changes to bills are subsequently introduced through government amendments.[93] It was also the first committee dealing with delegated legislation to introduce 'Guidance for Departments on the Role and Requirements of the Committee' which constructively helps inform the process in Whitehall; an approach that is now also utilised by the Secondary Legislation Scrutiny Committee.[94]

Such is its influence that in the Cabinet Office *Guide to Making Legislation* specific and repeated reference is made to the recommendations of the Committee and the need for departmental bill teams to take this into account when drafting items such as the Explanatory Notes and the Delegated Powers Memorandum. It makes clear that it is usual for the government to accept most, if not all of the Committee's recommendations, and consequently there 'is, therefore, benefit in departments anticipating the views of the DPRRC when drafting a bill to avoid the need for amendments' and the DPRRC's advisers are willing to be consulted informally before introduction.[95]

The creation of the Delegated Powers and Regulatory Reform Committee is perhaps the biggest success story in the delegated legislation process in recent decades. Its impact on the process is considerable, and it is often cited as an example of best practice in the scrutiny of delegated legislation for other jurisdictions.

91 House of Lords Delegated Powers and Regulatory Reform Committee, *Guidance for Departments on the Role and Requirements of the Committee*, July 2014, para.9, p.5.

92 *Ibid*, para.11, p.5.

93 M. Russell (2013), *The Contemporary House of Lords: Westminster Bicameralism Revived*, (Oxford: Oxford University Press), pp.219-220.

94 House of Lords Delegated Powers and Regulatory Reform Committee, *Guidance for Departments on the Role and Requirements of the Committee*, July 2014. This document is updated periodically.

95 Cabinet Office, *Guide to Making Legislation*, July 2014, p.127.

The Constitution Committee

Established in 2001 on the recommendation of the Royal Commission on House of Lords Reform, the Committee acts as a 'constitutional long-stop' to ensure constitutional reforms are not undertaken without adequate debate and consideration.[96] The 12 Member Committee is generally supported by a clerk, a policy analyst, two committee assistants and a legal adviser. It has two key objectives: 'to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution'.[97] As such it focuses on those aspects of bills that raise 'significant constitutional issues' which it defines as being 'one that is a principal part of the constitutional framework and one that raises an important question of principle'.[98]

As with the DPRRC, the Constitution Committee is regarded as one of Parliament's heavyweight committees, highly respected for its scrutiny and judgement, all of which is underpinned by the legal and constitutional expertise of its members. It has 'not only carved out a role for itself as a constitutional guardian, but is also gradually helping shape notions of 'constitutionality' in the UK'.[99] Its influence and status deriving from, 'its ability to articulate, interpret and develop the norms of the British constitution that are relevant to the scrutiny process'.[100]

Complementary to the work of the DPRRC, the recommendations of the Constitution Committee police what parliamentarians consider acceptable in relation to the use and application of delegated powers in primary legislation, particularly the use of Henry VIII powers. Its reports make clear that where a delegation of power is sought in a bill it should be framed as narrowly as possible, that vital aspects of policy should be included on the face of a bill not left to ministerial assurances about delegated provisions, and that the inclusion of widely drawn delegated powers in a bill cannot be justified purely by ministerial need for speed of action. Time and again its reports have made clear that Henry VIII powers should only be permitted in exceptional circumstances and for very specific purposes, and should be accompanied by adequate procedural safeguards. Such powers should not be used to amend constitutional provisions, and where they relate to any constitutionally sensitive subject matter the super-affirmative scrutiny procedure should be used.

96 Royal Commission on Reform of the House of Lords (2000), *A House for the Future*, (London: Her Majesty's Stationery Office), p.48.

97 House of Lords Select Committee on the Constitution, 1st Report of Session 2001-02, *Reviewing the Constitution: Terms of Reference and Method of Working*, HL 11, para.1.

98 *Ibid*, para.23.

99 M. Russell (2013), *The Contemporary House of Lords: Westminster Bicameralism Revived*, (Oxford: Oxford University Press), p.216.

100 J. Simson Caird, D. Oliver and R. Hazell (2014), *The Constitutional Standards of the House of Lords Select Committee on the Constitution*, (London: The Constitution Unit, University College London), p.6.

4. The life-cycle: Statutory Instruments and their parliamentary scrutiny

This chapter explores the scrutiny process in Parliament once a power in primary legislation is activated in the form of a Statutory Instrument.[101] It sets out the parliamentary process for negative, affirmative, enhanced and super-affirmative instruments, and explores how MPs and Peers can raise their concerns in relation to them. It details the different roles of the two committees – the Joint Committee on Statutory Instruments and the Secondary Legislation Scrutiny Committee – and how they go about their work. What is set out here is an introduction to the parliamentary process and needs to be read in conjunction with chapter 11; this analyses the strengths and weaknesses of the process, its anomalies and defects in detail. However, what will become immediately clear in this chapter is how limited the scope of parliamentary scrutiny is given the volume of SIs – upwards of 1,000 – that are squeezed through the process each year. Both Houses are also limited in the effect they can have on the process when they cannot amend SIs and generally do not reject them, although Peers have marginally stronger procedures in place than are found in the House of Commons.

Statutory Instruments: the drafting process

SIs are generally drafted by legal officers in each government department, sometimes, but not always, with the support of the Office of the Parliamentary Counsel.[102] They are then 'made' in the name of the person, usually the departmental minister, authorised in the parental Act. Each SI is numbered sequentially by calendar year (for example SI 2014/1005). As with primary legislation, SIs vary in length and complexity and can apply across the UK or to just one or more of its constituent territorial parts.

A preamble to each Order makes clear the primary legislative authority from which the SI springs: for example, the 2008 Landsbanki Freezing Order states:

> *'The Treasury believe that action to the detriment of the United Kingdom's economy (or part of it) has been or is likely to be taken by certain persons who are the government of or resident of a country or territory outside the United Kingdom. The Treasury, in exercise of the powers conferred by sections 4 and 14 of and Schedule 3 to the Anti-terrorism, Crime and Security Act 2001(1), make the following Order:'* [103]

101 There are other forms of delegated legislation but our focus for the purpose of this study is on SIs as they make up by far and away the greatest proportion of this form of legislation. However, brief examples of other forms of delegated legislation are set out in Box 4.

102 Parliamentary Counsel, for example, will draft Legislative Reform Orders and Public Bodies Orders.

103 The Landsbanki Freezing Order 2008, SI 2008/2668.

Most SIs (except when they are in draft form) also include a date when it was 'made' (signed off by the minister), where relevant the date when it was 'laid' before Parliament, and the date when it comes into force (commencement).[104]

All SIs that are subject to parliamentary scrutiny must be accompanied by an Explanatory Memorandum. This should set out, in plain language, the scope and purpose of the SI. It should address matters of cost arising from the proposed measure(s), the results of any public consultation process, and reference any relevant Regulatory Impact Assessment.

Once an SI has been issued it is then recorded in The Stationery Office Daily List. All SIs subject to parliamentary scrutiny are also listed the following day in an appendix to the daily Votes and Proceedings of the House of Commons. MPs are then able to keep track of the number of remaining scrutiny days using the Weekly Bulletin provided by the Journal Office. Similarly information about SIs can be found in the daily House of Lords Business bulletin which also shows which SIs are subject of a report from the SLSC or a prayer laid by a Member.

Scrutiny procedures

As with the decision-making behind what should be provided in primary legislation and what provisions should be left to secondary legislation, there is no discernibly rigorous system for determining what type of scrutiny procedure should be assigned to a Statutory Instrument resulting from a delegated power. Currently, the enabling piece of primary legislation indicates the level of parliamentary control to be assigned to a particular Statutory Instrument. The decision therefore rests with the appropriate government department, although final approval is granted by Parliament and cannot be changed once Royal Assent is secured.

The scope of delegated legislation varies considerably, from the very technical power that is procedural in character to the wide-ranging Henry VIII power that can, for example, abolish quangos.

In response, several levels of parliamentary control have been created and tweaked over time to reflect the different types of delegated power available to ministers. This incremental approach has produced a patchwork of procedures and has resulted in a system of scrutiny that is complex and confusing to both parliamentarians, lawyers and the wider public.

Some SIs are not subject to any form of parliamentary scrutiny at all. The majority of SIs are simply signed off ('made') by ministers; they are not 'laid' before Parliament for scrutiny purposes and they are therefore not subject to debate or a vote.

[104] Some, but not all draft SIs, include the date when they come into force.

Box 2

Wide and narrow powers

Example of a wide power: Section 75 Banking Act 2009 – Power to change the law

'(1) The Treasury may by order amend the law for the purpose of enabling the powers under this Part to be used effectively, having regard to the special resolution objectives...'

This gives the Chancellor of the Exchequer the power to amend any law to enable the powers in this section of the legislation to be used effectively in relation to the objectives of the Special Resolution Regime. It is very wide in its scope with little constraint other than the reference to the special resolution objectives.

Example of a narrow power: Schedule 2, section 5 of the Energy Act 2012 – Investment contract counterparty

'5(1) The Secretary of State may by order made by statutory instrument designate an eligible person to be a counterparty for investment contracts.
(2) A person is eligible if the person is –
(a) a company formed and registered under the Companies Act 2006, or
(b) a public authority, including any person any of whose functions are of a public nature.
(3) A designation may be made only with the consent of the person designated.'

This provides the Secretary of State with a tightly defined power to designate a person to be a counterparty and then defines what constitutes an eligible person. Unlike the Banking clause, it clearly sets a boundary around ministerial freedom of action.

Some SIs are 'laid' before Parliament after being signed off by the minister ('made') but they are also not subject to scrutiny.

But for those SIs that are subject to parliamentary scrutiny, they are assigned to one of three forms of scrutiny procedure:

- the negative resolution procedure;
- the affirmative resolution procedure;
- or a strengthened procedure (enhanced and super-affirmatives).

There are no fewer than 16 variations on these three procedures (see Box 3). For example, some negative instruments are 'laid' before Parliament in draft and a small number of affirmative instruments can take effect ('coming into force') before being laid. The strengthened procedure has 11 variations alone. The case studies that

Box 3

Variations in scrutiny procedure

Negative procedure

(i) The instrument is laid in draft and cannot be made if the draft is disapproved within 40 days.

(ii) The instrument is laid after making, subject to annulment if a motion to annul (known as a 'prayer') is passed within 40 days.

Affirmative procedure

(i) The instrument is laid in draft but cannot be made unless the draft is approved by both Houses (the Commons only for financial SIs).

(ii) The instrument is laid after making but cannot come into force unless and until it is approved.

(iii) The instrument is laid after making and will come into effect immediately but cannot remain in force unless approved within a statutory period (usually 28 or 40 days).

Strengthened procedures

(i) Northern Ireland Act 1998 (section 85) orders.

(ii) Human Rights Act 1998 (Schedule 2) orders.

(iii) Local Government Act 1999 orders.

(iv) Local Government Act 2000 orders.

(v) Local Government Act 2003 orders.

(vi) Fire and Rescue Services Act 2004 (section 5E) (as inserted by the Localism Act 2011) orders.

(vii) Legislative and Regulatory Reform Act 2006 (sections 12 to 19) orders.

(viii) Local Transport Act 2008 (section 102) orders.

(ix) Public Bodies Act 2011 (section 11) orders.

(x) Localism Act 2011 (section 7) orders.

(xi) Localism Act 2011 (section 19) orders.

No procedure

(i) The instrument is required to be laid before Parliament after being made but does not require parliamentary scrutiny.

(ii) The instrument is not required to be laid (and is therefore not subject to parliamentary procedure).

follow on the Public Bodies Act 2011 and the Localism Act 2011 explore how some of these variations came about, often as a result of bartering to buy off opposition to the policy proposals, rather than any underpinning principles in relation to scrutiny. But, as chapter 11 explains, they have served to add an unhelpful layer of complexity to an already complex process.

The negative procedure

The vast majority of Statutory Instruments are subject to the negative resolution procedure. Parliamentary Counsel drafting guidance provides an example of the form of words used in an enabling bill to indicate that a delegated power is subject to the negative procedure:

> *'A statutory instrument containing regulations under this Act is subject to annulment in pursuance of a resolution of either House of Parliament.'* [105]

The Joint Committee on Statutory Instruments operates an informal convention known as the '21-day rule'. This states that, wherever possible, a negative instrument (and a very small number of affirmatives) is to be 'laid' at least 21 days before it comes into effect to allow for adequate scrutiny by Parliament.

Instruments subject to this procedure become law on a stated date (usually included on the introductory text of an SI) unless a motion is passed in either House annulling the instrument. 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. This 40-day period includes the day on which the instrument was laid and weekends, and it does not take into account any time during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days.

Negative instruments comprise the vast majority of all SIs subject to parliamentary scrutiny; 74% in the 2013-14 session (for an analysis of the data see chapter 11). The negative procedure is in effect the default procedure for scrutiny of delegated legislation and its defects and flaws disproportionately affect the entire system.

The majority of negative instruments are 'laid' before Parliament after they have been signed off ('made') by the relevant minister. A small number of instruments are 'laid' in draft and cannot be signed off if they are annulled within 40 days. But under the Statutory Instruments Act 1946, a successful annulment does not prejudice the immediate making of a new instrument of similar effect. With delegated legislation, rejection need not last long.

[105] Office of the Parliamentary Counsel, *Drafting Guidance*, 20 March 2014, p.73.

Motions for annulment of a negative SI: 'prayers' and 'regret'

In order to reject a negative instrument, either House must table and then pass a motion calling for its annulment. This motion is known as a 'prayer' because of the precise wording used in the formal motion:

> *'That an humble address be presented to Her Majesty praying that the [relevant SI] be annulled'.*[106]

In the House of Commons, any Member can table a 'prayer' by putting it down as an Early Day Motion (EDM). These are motions for which no fixed parliamentary time has been allocated. Of all the types of EDM, 'prayers' are the only one that can potentially lead to a debate.

If time is allocated to debate a prayer on the Floor of the House of Commons, MPs have up to 90 minutes to debate the instrument. Debates on prayers can be moved or referred to a Delegated Legislation Committee if a motion of referral is made. However these debates are held on a non-fatal motion 'that the Committee has considered the instrument' so the prayer still has to be moved to the Floor of the House for the annulment question to be put without debate after the moment of interruption. This almost never happens. It is incumbent on the opposition to use one of their allotted debate days for this to occur. After the 40-day praying period has ended, a negative instrument can still be debated. A motion is tabled in the same way as a prayer calling for the instrument to be revoked (or withdrawn if a draft) rather than annulled.

Members of the House of Lords can table three types of motion in relation to negative instruments and these will usually be debated:

- Fatal 'prayer' motions to annul;
- Non-fatal motions, critical of the instrument but without annulling it, usually worded as a *'This house regrets'* motion;
- Neutral 'take note' motions (which can be taken in Grand Committee).

Although proposed motions on negative instruments usually find time for debate in the House of Lords, votes on fatal motions rarely occur. The Parliament Acts do not apply to delegated legislation; therefore rejection in the House of Lords cannot be over-ridden by the House of Commons after a period of delay. Mindful of the primacy of the elected House, the Lords therefore rarely vote on a fatal motion, leaving it entirely reliant on non-fatal motions of 'regret'. In the last decade there have been only 79 such motions and the government has been defeated on only 12 occasions.

[106] House of Commons Information Office, *Statutory Instruments*, Legislative Series Factsheet L7, 2008, p.4.

In the absence of any right to amend SIs, the Lords' self-denying ordinance in declining to reject SIs means it can express dissatisfaction but will not stop the legislation even if it believes it is fundamentally flawed. This is a significant weakness at the heart of the scrutiny process that is analysed further in chapter 11.

The affirmative procedure

The most substantial and important pieces of delegated legislation are subject to a more stringent form of control than negative instruments and require the active approval of both Houses of Parliament (unless it is a financial instrument and therefore requires only the approval of the House of Commons) before they can come into (or remain in) effect.

There are three variants of this affirmative procedure:

- Laid in draft and cannot be made unless approved by both Houses;
- Laid after being signed off ('made') by the relevant minister but cannot come into force until/unless approved;
- Laid after making and in effect immediately but cannot remain in force unless approved within a certain period of time (usually 28 or 40 days).

Laying in draft is by far the most common affirmative instrument. The third type is frequently used in the field of taxation. And, as noted in Erskine May, the government has agreed 'in normal circumstances' to avoid the use of the second type in future Acts.[107]

In the House of Commons, under Standing Order 118[108] affirmative instruments are referred to a Delegated Legislation Committee for debate unless a motion for the instrument to be debated on the Floor of the House of Commons rather than in committee is tabled. An exception to this is any regulation relating to terrorism and security; these are automatically considered on the Floor of the House. More usually, however, the bulk of affirmative instruments are debated in committee.

Delegated Legislation Committees (DLCs)

Delegated Legislation Committees are composed of 18 Members nominated by the party whips to reflect the composition of the House. Nominated Members are usually given just a few days' notice of a DLC but are provided with very little material to help in preparation for the debate.

Debates last no longer than 90 minutes (or two and half hours for instruments exclusively related to Northern Ireland) and are conducted on the motion that 'the

[107] Erskine May (2011), *Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 24th edition, p.676.
[108] Standing Orders of the House of Commons (2013), *Public Business*, (London: The Stationery Office), p.123.

committee has considered the instrument'. The debate must not deviate from the contents of the instrument. Usually, the responsible minister will introduce and briefly explain the instrument and the relevant shadow minister will provide the opposition's response. Following the debate in Committee, an approval motion is put formally to the House without debate on a separate day.

Only nominated Members can vote on the Committee but any Member can attend and speak and this can have a useful impact. For example, during the debate on the Draft Renewable Transport Fuel Obligations (Amendment) Order in the 2012-2013 session, Alan Reid the MP for Argyll and Bute, was not a member of the DLC but raised concerns about a potential drafting error during the debate. The responsible minister promised to take the Order away and look at it again.[109]

Generally speaking, however, DLC debates are often a waste of parliamentary time. As chapter 11 sets out, Members are ill-prepared for the debates, they can often be seen dealing with constituency correspondence, and they may have no knowledge at all of the often technical issues under discussion. The average length of a debate in the 2013-14 session was just 26 minutes, but can be as short as 22 seconds. They make a mockery of the concept of effective scrutiny.

House of Lords scrutiny of affirmative instruments

In the House of Lords a motion to approve an affirmative instrument can be taken in either Grand Committee or on the Floor of the House. An approval motion is tabled by the responsible minister, but the motion cannot be moved until the Joint Committee on Statutory Instruments has reported on the instrument. This is a scrutiny reserve that the House of Commons does not observe; another weakness in its scrutiny armoury compared to that of the Lords in this field.

In addition to speaking in the debate, Members can also express their opposition or concern by making an amendment to the approval motion (this effectively withholds the agreement of the House) or by tabling a separate motion:

- Calling on the government to take a specific action in relation to the instrument (this does not prevent approval of the instrument);
- Inviting the House to put on record a particular point of view with regards to the instrument

If several instruments are closely related they can be moved together in both Houses.

[109] House of Commons, 1st Delegated Legislation Committee, *Draft Renewable Transport Fuel Obligations (Amendment) Order 2013*, 4 March 2013.

Strengthened scrutiny procedures

There are currently 10 Acts of Parliament that provide for certain powers contained within them to be subjected to a higher level of parliamentary scrutiny than the affirmative procedure (see Appendix F). They confer upon a minister a *significant* power to amend primary legislation. Parliament therefore has the opportunity to comment and recommend changes to proposals made under these powers and in some cases to veto the proposed instrument. However, there is not one uniform procedure. Each Act provides for a slightly different variant of the procedure but all usually involve extended scrutiny by an assigned committee that can, in some cases, make recommendations for amendment or even veto of an instrument if required. Some are rarely used, so below we have set out the process and procedure for three of the most commonly used super-affirmative models: Legislative Reform Orders; Public Bodies Orders; and Remedial Orders.

The super–affirmative procedure has its origins in the Deregulation and Contracting Out Act 1994 which provided for deregulation orders to be made by a minister to remove regulatory burdens in previous Acts of Parliament. The procedure was confined to the repeal or amendment of primary legislation that imposed 'an unnecessary burden in the carrying on of any trade, business or profession or otherwise' so long as necessary protection in the original Act was not removed. These provisions were subsequently extended by the Regulatory Reform Act 2001 and the Legislative and Regulatory Reform Act 2006, which enabled the government, using a Legislative Reform Order, to amend or repeal a provision in primary legislation that imposed a burden on business or others.

Legislative Reform Orders (LROs)

The Legislative and Regulatory Reform Act 2006 provides ministers with the power to make Legislative Reform Orders that remove or reduce any burden resulting directly or indirectly from any legislation. They are subject to a complex parliamentary procedure that begins with the relevant minister laying a draft Order and explanatory document before Parliament to support the scrutiny process. The minister must recommend that the draft Order follow one of the three procedures: negative, affirmative or super-affirmative. The Regulatory Reform Committee in the House of Commons and the Delegated Powers and Regulatory Reform Committee in the House of Lords then have 30 days to consider the draft instrument and decide whether or not the procedure proposed by the minister is appropriate or should be upgraded.

The merits of the policy in question are not considered. The committees examine whether the tests set out in the 2006 Act have been met, for example, a requirement for thorough consultation, and whether the proposal is appropriate to be delivered

by a Legislative Reform Order. The scrutiny committees have 30 days to consider whether the instrument is subject to the appropriate procedure and may make recommendations up to the 40th day, including that the instrument should not proceed. Only after the 40 day period has elapsed, if there has been no adverse comment, can the Minister make the negative instrument, or arrange the debates proposing that the affirmative instrument be approved. If the LRO is upgraded or already subject to the super-affirmative procedure, both committees have 60 days (from the date it was laid) to consider it (against certain criteria) and produce a substantive report. The committees can recommend changes to the LRO but cannot amend them directly. The power to amend an LRO lies only with the minister, but they are required to have regard to these recommendations and any other representations that have been made by either House. If the minister decides not to lay a revised Order but to progress with the un-amended LRO, then they must lay a written statement in both Houses explaining why.

Irrespective of the Delegated Powers and Regulatory Reform Committee's recommendations, the House of Lords debate all LROs that are subject to an approval motion. However, the House of Commons take a different approach. If the House of Commons Regulatory Reform Committee recommends the LRO for approval without a division, then the formal approval motion is put to the House without debate. If the Committee is divided then a debate can be heard on the Floor for up to 90 minutes. If the Committee recommends that the LRO be disapproved, but the government decides to progress anyway, then the government is required to table a motion disagreeing with the Committee and this can then be debated for up to three hours. During the 60-day period either Committee can recommend that no further proceedings be taken on the Order, in effect vetoing the proposed LRO. This veto has immediate effect but can be rejected if a resolution is passed in the relevant House within the same session.

Public Bodies Orders (PBOs)

The Public Bodies Act 2011 (see chapter five) gives ministers the power to abolish, merge and modify the functions of public bodies by amending primary legislation via a Public Bodies Order (PBO).

The PBO procedure requires that a draft Order is laid before both Houses with an explanatory document 12 weeks after the start of a consultation period. This is subject to the Joint Committee on Statutory Instruments scrutiny in the normal way; it is also referred to the Secondary Legislation Scrutiny Committee in the House of Lords and usually the relevant departmental select committee in the House of Commons. The Liaison Committee can also appoint the Public Administration Select Committee or another committee to consider the Order. Either House can resolve, or a committee charged with reporting on the draft can recommend, within 30 days that the enhanced

affirmative procedure be used. If no such resolution or recommendation is made, after 40 days a motion to approve the draft can be moved. The enhanced affirmative trigger extends to 60 days the period before a motion to approve can be moved (from the date on which the draft was laid). Ministers are required to have regard to any representations or recommendations made and, after 60 days, can either move the original Order or lay a revised Order with a statement summarising the changes. The revised Order is then subject to the affirmative procedure.

Remedial Orders

A variant of the super-affirmative procedure under the Human Rights Act 1998, if a court declares a statute, or part of it, 'incompatible' with the European Convention on Human Rights, the government can amend or repeal the primary legislation via a Remedial Order to ameliorate the incompatibility.

Here, a minister must lay the proposal for a draft Order with an explanation as to why an amendment to primary legislation is required. There is then a 60-day period for representations to be made to the minister about the proposal and the Joint Committee on Human Rights is required to report to both Houses on whether the draft Remedial Order should be laid. After 60 days the minister can lay the draft Order. It must be accompanied by a statement setting out whether any representations have been made and detail any changes since submission of the proposal. There is then a further 60-day period when the Joint Committee on Human Rights can report on whether or not the Order should be approved. Only following this second 60-day period can an approval motion be moved.

There is also an 'urgent' procedure in which Remedial Orders can be 'laid' and 'made' at the same time. After an initial 60 day period, the relevant minister must respond to any representations made and can choose to make and lay a replacement Order. The original Order will cease to have effect if it is not approved by both Houses within 120 days.

Scrutiny Committees

Secondary Legislation Scrutiny Committee (formerly the Merits of Statutory Instruments Committee)

In 2003, the House of Lords appointed what is now known as the Secondary Legislation Scrutiny Committee in response to numerous calls for a sifting mechanism for SIs.[110] The establishment of this Committee represents one of the few significant improvements in recent times to the way that Parliament deals with delegated legislation. Before the Committee was established, government

[110] For more information, see chapter two.

departments provided Explanatory Memoranda only for affirmative SIs. But as a result of pressure by the Committee, since 2004 departments have provided them for negative instruments as well.

The 11 members of the Committee are drawn from across the House and are supported by a clerk, a committee assistant and two advisers. The Committee performs a sifting function – assisted by the advisers – by considering the policy merits and implications of all SIs subject to parliamentary scrutiny and identifying to the House those instruments that may warrant further consideration. Through its reports, the Committee draws to the attention of the House any SI in the previous week that it considers may be interesting, flawed or inadequately explained by the government.

The grounds on which an instrument, draft or proposal[111] may be drawn to the special attention of the House are:

- that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
- that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;
- that it may inappropriately implement European Union legislation; and
- that it may imperfectly achieve its policy objectives.

Additionally, since the start of the 2014-15 session, it looks at whether:

- the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation; and
- there appear to be inadequacies in the consultation process which relates to the instrument.[112]

These new provisions were added by the House to the Committee's remit in response to what it described as a 'noticeable drop in the quality of Explanatory Memoranda (EM) and the utility of consultation exercises conducted'.[113] Members wished to make a clear distinction between instruments where they considered the policy to be flawed, and instruments where they simply had insufficient information to form a clear view. The Committee noted that EMs are 'generally good at explaining what an instrument does but weaker when it comes to explaining why

111 There are a few exceptions: Remedial Orders, and Draft Remedial Orders, under section 10 of the Human Rights Act 1998; draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006 and orders made under the Regulatory Reform Act 2001; and measures under the Church of England Assembly (Powers) Act 1919.

112 House of Lords Secondary Legislation Scrutiny Committee, *Guidance for Departments on Secondary Instruments*, August 2014, para.7, p.2.

113 *Ibid*, para.8, p.2.

the legislation is required (the policy intention) or what the impact will be (the cost/benefit analysis)'.[114]

Deficiencies in the production of EMs by the government undermines the consultation process on SIs and makes it more difficult than it should be for many external groups to engage with the delegated legislation process (see chapter 11). To try and push the government to improve standards, the Committee has since 2006 published its 'Guidance for Departments on Statutory Instruments', setting out its expectations regarding the content of Explanatory Memoranda including examples of best practice, the timetabling of SIs and the areas that are of particular interest to the Committee.[115]

At each meeting the Members consider those instruments included in that week's circulation, in particular those that have been highlighted by the advisers. The most controversial are brought to the 'special attention' of the House; others are highlighted in an 'information paragraph' for the attention of any Peers who are interested; and the remainder are listed but attract no comment.

On average they look at around 30 SIs per week (or around 1,200 per year). Having had an opportunity to privately observe the Committee in action on one occasion, what we witnessed suggests the meetings are often a relatively straightforward 'signing off' process and Members by and large endorse the judgement of the advisers. It is not unusual for some Members to speak on instruments that are of particular, personal interest to them, even if the advisers have not highlighted them as a matter of concern. Both our own experience in observing the Committee, and the comments of former Members we interviewed, suggests that Members may sometimes inevitably stray from the Committee's focus and delve into areas of personal interest that may more properly be the remit of the Joint Committee on Statutory Instruments. A lot of the work is often tedious or, as one former Member put it, 'some of it is mind blowingly boring'. An effective Chair, trying to sustain the energy and engagement of the Members, will therefore look to maintain a reasonable momentum in getting through the raft of paperwork for each meeting, looking at each one quite quickly, but stopping if a Member wants to discuss a particular SI.

The Committee's role is entirely advisory. It normally comments on Statutory Instruments within 12-16 days of their being laid before Parliament. If the Committee is not happy with the explanation in the Explanatory Memorandum accompanying the SI, it may delay the instrument for a week while it seeks further information. If the concerns are significant it may write to the minister, or ask officials or the minister

114 House of Lords Secondary Legislation Scrutiny Committee, *Guidance for Departments on Secondary Instruments*, August 2014, para.9, p.2.

115 *Ibid*, para.9, p.2.

to give oral evidence. It also welcomes evidence from the public and any groups affected by an SI but given the short timescales for comment (usually no more than a week) it is generally organisations rather than individuals that respond.

When the Committee publishes its weekly report, it may draw attention to an SI in order to:

- 'commend or criticise how the Government's policy is being implemented, their explanatory information, or the process behind the SI (for example how they consulted, estimates of costs or how clear guidance for users is);
- invite the House to pursue some line of questioning; or
- draw an important instrument to the attention of the House in neutral terms.' [116]

It is then for Members of the House to decide what action to take. The timescales should, in theory, leave plenty of time for any Member of the House to pursue the issues raised by asking a question or tabling a motion for debate within the 40-day 'Prayer' period for rejecting negative instruments. Unlike the JCSI, there is no formal scrutiny reserve, but by convention the government tries to avoid scheduling a debate to approve an SI before the SLSC has had an opportunity to consider and report on it.

The government does sometimes withdraw an instrument in response to criticism from the Committee as it did in 2006 in relation to Home Information Packs, laying an amended, diluted version of the original SI at a later date. If the government presses ahead with an SI despite criticism from the Committee, and particularly if it has been drawn to the 'special attention' of the House, then a Peer can seek a debate and vote of censure but these generally take place on non-fatal motions (an exception being, for example the fatal motion on the 2007 Supercasino Order). Thus the House may express regret but it does not prevent the Order taking effect.

Since 2012 the Committee has also been tasked with reporting on Public Bodies Orders. From the day on which the draft Order is laid, the Committee has 30 days to consider the draft. It looks at whether the Order conforms with the statutory tests set out in the parental Act and whether it serves the purpose of improving the exercise of public functions. If the Committee clears the Order then, after the 40th day it can be debated like any ordinary affirmative instrument. However, if the Committee has questions or concerns, it can apply the enhanced affirmative procedure, increasing the scrutiny period by a further 30 days in order to make recommendations to the minister. At the expiry of the 60th day, the draft of the Order may be either amended by the minister or debated.

[116] House of Lords Secondary Legislation Scrutiny Committee, *Guidance to the public on making submissions to the House of Lords' Secondary Legislation Scrutiny Committee*, May 2012, para.2, p.1.

The Committee takes a particular interest in the way in which government departments handle consultation related to a prospective SI and requires full information about this to be provided in the Explanatory Memorandum. In July 2012 the government announced new consultation principles which, among other things, guided departments away from general use of 12-week consultation periods and towards what was termed a more proportionate approach. The Committee conducted an inquiry into the new principles in autumn 2012 which generated a large number of evidence submissions from outside organisations expressing concern about the government's change in approach. Because of the short-time scales involved, the SLSC is rarely able to initiate a formal consultation on an individual SI; providing a second bite at consultation is not its role. It is therefore imperative that the government's own consultation processes are thorough and this is then fully and accurately conveyed to the Committee.

Joint Committee on Statutory Instruments (JCSI)

The work of the JCSI is comprehensive and entirely technical. Established under Standing Order 151 in the House of Commons and Standing Order 74 in the House of Lords, the Committee consists of up to 14 Members drawn equally from both Houses (with a quorum of two from each).[117] It is supported by a clerk from each House and a committee assistant, as well as a number of legal advisers drawn from the Legal Services Office in the House of Commons and Counsel to the Chairman of Committees in the House of Lords. This legal advice has been described as 'the real quality control on delegated legislation'.[118]

The Committee meets each week that Parliament is sitting to consider SIs that have been laid in the sitting days prior to the meeting. It is responsible for considering all general SIs laid before Parliament; all local SIs that have a parliamentary scrutiny procedure; and any other document subject to the affirmative procedure and which does not fall within the remit of the Regulatory Reform Committee or the Human Rights Committee. Any instruments subject to Commons scrutiny only – generally in relation to taxation matters – are considered by the MPs on the Joint Committee who sit as the Select Committee on Statutory Instruments for this purpose.

The role of the JCSI is to assess the technical qualities of each instrument that falls within its remit and to decide whether to draw the special attention of each House to any instrument on one or more of the following grounds:

- that it imposes, or sets the amount of, a charge on public revenue or that it requires payment for a licence, consent or service to be made to the

[117] The quorum used to be higher but it was lowered a few years ago because of the difficulties with Member attendance, particularly by MPs.

[118] A. Kennon, 'Legal advice to Parliament' in A. Horne, G. Drewry and D. Oliver (Eds.), (2013), *Parliament and the Law*, (Oxford: Hart Publishing), p.135.

Exchequer, a government department or a public or local authority, or sets the amount of the payment;

- that its parent legislation says that it cannot be challenged in the courts;
- that it appears to have retrospective effect without the express authority of the parent legislation;
- that there appears to have been unjustifiable delay in publishing it or laying it before Parliament;
- that 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;
- that there appears to be doubt about whether there is power to make it or that it appears to make an unusual or unexpected use of the power to make;
- that its form or meaning needs to be explained;
- that its drafting appears to be defective;
- any other ground which does not go to its merits or the policy behind it.[119]

It is not unusual for a department to send a draft of its affirmative instrument to the Committee's legal adviser before it is laid, thus building in an extra 'anticipatory' check in the hope of avoiding difficulties and delays at a later stage. However, the Committee's advice note makes clear that 'this advance scrutiny is not a substitute for internal Departmental checks'.[120]

Once an SI has been formally 'laid', if the Committee finds nothing wrong with it then no action is taken beyond listing the instrument in the Committee's report that week. However, if the Committee thinks there might be something wrong with the SI then it will submit any questions arising to the relevant government department. It is then required to submit a memorandum in response, which the Committee will consider at its next meeting, usually a fortnight later. To ensure a smooth process, each department will have a Joint Committee liaison officer tasked with co-ordinating with the committee clerks and legal advisers.

If the response is deemed satisfactory then no further action is taken and the instrument will be listed with the rest of the batch of SIs that have passed the Committee in the next weekly report. If the response is deemed incomplete then further questions may be directed to the department with the response considered again at the next meeting. However, if the department's position is deemed unsatisfactory then the SI will be drawn to the 'special attention' of Parliament in the Committee's report (the government's memorandum is also generally published).

119 Standing Orders of the House of Commons (2013), *Public Business*, (London: The Stationery Office), Standing Order 151, pp.172-173.

120 Joint Committee on Statutory Instruments, *Pre-scrutiny of Affirmatives: Supply of Affirmative Instruments to the Committees*, para.4.

Box 4

Other forms of delegated legislation

Commencement Orders: Commencement provisions in most Acts of Parliament give power to ministers to set the date on which the operative provisions of the Act come into force: they may allow for different dates to be set for different provisions.

Local SIs: About half the SIs laid are local, rather than general, in character. Many are made under powers contained in private acts that are exercised by local authorities or other non-ministerial authorities. The most common form of local SI is a road order, which is required to close roads temporarily, classify them and to regulate traffic along them.

Orders in Council: These require Royal Assent to be signified in the presence of the Privy Council: they may sometimes reflect the use of prerogative powers as well as delegated powers.

Part Affirmative/Part Negative Instruments: Since 1999, there have been three Statutory Instruments laid before Parliament that have included parts that were subject to the affirmative procedure and parts that were subject to the negative procedure. For example, The Census (England and Wales) Order 2009 combined elements requiring affirmative and negative procedure as well as provisions that were amendable. Neither House looks favourably on these SIs as they uncomfortably join together regulations already accepted with others subject to annulment.

Special Procedure Order: Special Procedure Orders are subject to a special parliamentary procedure set out in the Statutory Orders (Special Procedure) Act 1945. They are created by a body such as a local authority or the Infrastructure Planning Commission and are mainly used to get permission for the compulsory purchase of protected areas of land. The special parliamentary procedure allows for interested and affected people to petition against the Order. The petitioning period is for 21 days and petitions are considered by a specially formulated joint committee. This has wide powers and can reject, amend, or approve the Order. There is no time limit; it can sit for as little as a day and as long as a month. They are relatively rare: there have been just 12 Special Procedure Orders in the past 15 years.

The Committee regularly draws attention to a number of SIs that propose an unusual or unexpected exercise of powers, doubtful *vires*, the need for elucidation and procedural defects. But the most common area of concern picked up by the

Committee in recent years arises from defective drafting and the linked failure to observe proper drafting and legislative practice (for detailed analysis see chapter 11). Under Standing Order 73 of the House of Lords a resolution to approve an affirmative instrument may not be moved until the relevant report of the Joint Committee has been laid before the House. Conversely, however, no such resolution exists in the House of Commons, again underscoring the relative weakness of the elected House compared to the Lords when scrutinising delegated legislation.

Chapter 11 explores the strengths and weaknesses of this scrutiny system in more detail, utilising data from each aspect of the process to illustrate the anomalies and flaws, strengths and weaknesses. Fundamentally, however, the key point is that it is unnecessarily complex and the nomenclature is baffling to many parliamentarians, let alone those outside Westminster. This undermines public access to delegated legislation: for example, any outside body wanting to track the emergence and scrutiny of an SI through this life-cycle may, depending on its content and scrutiny procedure, have to look at up to 14 different online sources of information, the majority of them on Parliament's website but not in locations immediately obvious to the viewer. Secondly, in the absence of either the ability to amend or the willingness to reject an SI, as chapter 11 explores, these procedures do little to prevent flawed legislation reaching the statute book. The procedures in the House of Commons compared to those in the House of Lords are somewhat weaker; indeed, so inadequate is the elected House's approach that it is hard to sustain the proposition that it scrutinises delegated legislation at all seriously. And finally, as the following legislative case studies demonstrate, if a power in the parental Act is beyond the boundaries of acceptability and reasonableness, these scrutiny procedures cannot render them acceptable.

5. Public Bodies Act 2011

The Public Bodies Bill was presented in the House of Lords in October 2010 as the main vehicle for implementing the coalition government's review of public bodies as published by the Cabinet Office earlier that month. It was the most prominent piece of enabling legislation since the Legislative and Regulatory Reform Act in 2006 (popularly known as the Abolition of Parliament Bill) and proved as controversial. In a series of Henry VIII clauses, the Bill allowed ministers to abolish, merge or amend the constitutional and funding arrangements of a number of public bodies listed in the Bill's schedules by Order. It was heavily criticised for the 'wide and ill-defined' legislative powers delegated to the executive and as a consequence procedural safeguards were added in the House of Lords, creating Public Bodies Orders (PBOs), a new variant on the strengthened scrutiny procedure.[121] By the time Royal Assent was achieved on 14 December 2011, a number of government defeats and high profile U-turns meant that the final Act was a shadow of the original Bill.

This chapter analyses how the Bill was produced, scrutinised, and amended, and what can be deduced from this process in relation to the treatment of delegated legislation by both government and Parliament. It then examines the progress made with PBOs and the extent to which their implementation reflects the government's original policy objectives in bringing forward the Bill.

Enabling legislation

Concerns about the size and cost of the 'quango state' had long concerned successive governments, each in turn pledging to review and reduce their number. In 2010, there were over 900 public bodies in the UK, performing tasks ranging from regulating industry to providing guidance and advice to the public and government.[122] Following a number of commitments made by the Conservative Party in the years preceding the 2010 general election, the coalition's 'Programme for Government' made plain its intention to make savings by reducing the number and cost of quangos.[123] The Cabinet Office subsequently conducted a review of all public bodies and concluded that 188 should be abolished, 118 merged, 171 reformed, 380 retained and 40 subject to further review.

The Cabinet Office's Memorandum to the Delegated Powers and Regulatory Reform Committee stated that it was an established convention that statutory authority was

121 House of Lords Delegated Powers and Regulatory Reform Committee, 5th Report, *Public Bodies Bill*, HL 57, 12 November 2010.

122 House of Commons Public Administration Select Committee, 5th Report of Session 2010-11, *Smaller Government: Shrinking the Quango State*, HC 537.

123 Cabinet Office, *The Coalition: Our Programme for Government*, May 2010.

required where governments confer public functions on public bodies.[124] The accompanying Impact Assessment explained that the decision to reform public bodies by delegated legislation was made,

> *'…because it only requires one piece of legislation thereby saving time on the Floor of the House…Departments can affect the changes they need, through the less time-consuming process of secondary legislation…Using one enabling bill also sets up a coherent framework for change giving strength to the government's reform agenda.'* [125]

The Delegated Powers Memorandum justified the use of enabling legislation by stating that powers to make changes to, including abolition of, public bodies, by delegated legislation was not unprecedented. Indeed it had occurred three times previously in the Child Poverty Act 2010, the Energy Act 2006, and Tribunals, Courts and Enforcement Act 2007. It argued that delegated legislation would provide departments with the flexibility to determine how functions were best delivered and that it would be inappropriate to include the precise detail of constitutional arrangements in primary legislation.

The original Bill contained 13 delegations of power. Clauses 1 to 6 and 11 lit the 'bonfire of the quangos' by conferring general powers on ministers to abolish, merge or modify the arrangements of public bodies. Clauses 13 and 14 conferred powers on Welsh ministers in relation to environmental bodies in Wales. Clauses 17 and 18 focused on forestry and delegated powers to the minister in relation to the Environment Agency and Forestry Commission. And clauses 23 and 25 provided for schemes to transfer the property, rights and liabilities of these bodies as well as vary tax provisions as required.

The Delegated Powers Memorandum stated that, 'the Government considers that the Bill contains significant substantive and procedural safeguards that apply to the use of the order-making powers'.[126] When making an Order, ministers were to have regard to the objectives of efficiency, effectiveness and economy and securing accountability to ministers. The powers of clauses 1 to 6 could only be viewed in the context of the existing entries on the relevant schedules. Furthermore an Order under clauses 1 to 6 could not be made if it removed a necessary protection and if it prevented a person from continuing to exercise any right or freedom. Clause 9 also limited the powers of ministers in relation to devolved matters by requiring consent of the relevant devolved government minister before an Order was made

124 House of Lords Delegated Powers and Regulatory Reform Committee, 5th Report, *Public Bodies Bill*, HL 57, 12 November 2010, Appendix 2: Memorandum by the Cabinet Office, p.22.

125 Cabinet Office, *Public Bodies Bill Impact Assessment*, IA No. CO1001, 1 September 2010, p.1.

126 House of Lords Delegated Powers and Regulatory Reform Committee, 5th Report, *Public Bodies Bill*, HL 57, 12 November 2010, Appendix 2: Memorandum by the Cabinet Office, p.17.

that contained provisions within the legislative competence of Scotland, Wales or Northern Ireland.

The government recommended that all 13 delegations of power be subject to the affirmative resolution procedure (laid in draft). Throughout the Memorandum it argued that the level of scrutiny was appropriate and consistent with the Delegated Powers and Regulatory Reform Committee's own recommendation that Henry VIII clauses should be subject to the affirmative procedure.

Committee scrutiny

But in its report on the Bill, published on 4 November 2010, the House of Lords Constitution Committee was heavily critical of the Henry VIII clauses, contending that the government had not adequately justified the use of such powers to reform public bodies rather than ordinary legislative amendment and debate. It argued that the affirmative procedure was far from sufficient by itself and commented on the Bill's departure from the safeguards provided in the 2006 Legislative and Regulatory Reform Act: namely the super-affirmative procedure and the requirement for consultation before an Order was laid in draft.

The Committee also expressed concern over the Bill's use of 'omnibus orders' to cover a disparate range of bodies and offices and the difficulties these posed for effective scrutiny. It concluded, in a trenchant manner considered by many to be unprecedented in both word and tone, that the Bill,

> *'strikes at the very heart of our constitutional system, being a type of framework or enabling legislation that drains the lifeblood of legislative amendment and debate across a very broad range of public arrangements. In particular, it hits directly at the role of the House of Lords as a revising chamber…We fail to see why such parliamentary debate and deliberation should be denied to proposals now to abolish or to redesign such bodies.'* [127]

Six days later the Delegated Powers and Regulatory Reform Committee echoed these concerns. The powers contained in clauses 1 to 5 and 11 were 'not appropriate delegations of power' as they would grant to ministers 'unacceptable discretion to rewrite the statute book, with inadequate parliamentary scrutiny of, and control over, the process'.[128]

Chief amongst the Committee's concerns were that many of the functions and arrangements of a number of public bodies included in the schedules courted

127 House of Lords Select Committee on the Constitution, 6th Report of Session 2010-11, *Public Bodies Bill*, HL 51, p.5.

128 House of Lords Delegated Powers and Regulatory Reform Committee, 5th Report, *Public Bodies Bill*, HL 57, 12 November 2010, p.3.

controversy and had been subject to extensive debate when originally presented to Parliament in primary legislation. The Members were also concerned that the Orders proposed in the Bill could amend or repeal Acts that had not yet been passed by Parliament. There was considerable disquiet that the Bill did not specify what would happen to the functions of the abolished bodies, the decision being left entirely to ministers.

It also highlighted that the safeguards contained in the Legislative and Regulatory Reform Act – that the Order be proportionate to the policy objective and not be utilised in respect of policies with constitutional significance – were not included in this latest Bill. And there was concern that the ability of ministers to add to schedules 1 to 6 any of the 150 bodies listed in schedule 7 made the powers in clauses 1 to 6 'remarkable in their potential scope'.[129] The Committee also had 'grave concerns' about whether all the bodies in schedule 7 (including Channel 4 and the Law Commission) could be abolished. In relation to the devolved aspects of the Bill, concern was expressed about clause 13 and the apparent ability of Welsh ministers to amend Acts of Parliament in matters where the National Assembly did not have legislative competence, with no parliamentary control or scrutiny from Westminster.

Whilst not making specific recommendations, it suggested a number of potential solutions to the problems including:

- More detail being put on face of the Bill about how the powers were to be exercised;
- Enhancing the procedures for the scrutiny of the Orders;
- Including a requirement for public consultation;
- And the introduction of a sunset clause to time-limit the powers made available to ministers.

However, the Committee also made a point of emphasising the reluctance to allow Parliament to amend Orders and made clear its lack of confidence in the super-affirmative procedure:

> *'This Committee has emphasised before that "the insertion of a super-affirmative procedure cannot bring a misconceived delegated power within the bounds of acceptability." A single stage of consultation is clearly no substitute for the detailed scrutiny afforded by the use of a bill.'* [130]

But appearing before the House of Commons Public Administration Select Committee (PASC) the Cabinet Office minister responsible for the Bill, Francis Maude

129 House of Lords Delegated Powers and Regulatory Reform Committee, 5th Report, *Public Bodies Bill*, HL 57, 12 November 2010, p.7.

130 *Ibid*, p.10.

MP, continued to justify the use of Orders, arguing 'ministers can be held accountable in Parliament for how that function is carried out, how the policy is set out and how the policy is administered…call me old-fashioned: I believe in parliamentary government.' [131]

PASC published its report on the proposed legislation on 7 January 2011.[132] Concluding that the Bill contained insufficient safeguards to prevent the misuse of powers by ministers, it indicated that it favoured a sunset clause for the schedules in the Bill. That same month the Joint Committee on Human Rights also reported on the Bill. Echoing the concerns of the other committees it claimed: 'The excessive use of delegated powers may reduce the effectiveness of parliamentary scrutiny for human rights compatibility of proposed legislation.' [133]

Journalists and bloggers had by now also began to take an interest in the Bill. Afua Hirsch, legal correspondent for *The Guardian*, described it as a 'vampire law'.[134] *The Daily Telegraph*'s Geoffrey Lean suggested the Prime Minister had discovered a new role model in Henry VIII, grabbing arbitrary power on a scale worthy of the tyrannical Tudor monarch.[135] *The Guardian*'s Patrick Wintour picked up on the attack made on the Bill by Lord Chief Justice, Lord Judge, during his appearance before the House of Lords Constitution Committee, where he condemned the use of Henry VIII clauses and described the public bodies plans as 'astonishing and a threat to the entire way in which the judiciary works'.[136]

House of Lords scrutiny

Having introduced the Bill in the House of Lords on 28 October 2010, over the course of the next seven months the minister, Lord Taylor of Holbeach, played the leading role in shepherding it through scrutiny in the Upper House, a process he would later describe as a 'thrilling experience….a fairground thrilling experience'.[137]

Throughout these months, debate focused on the wide executive powers conferred in the Bill and the specific references to the individual public bodies included within the schedules.

The second reading debate on 9 November concentrated heavily on the skeletal nature of the Bill, the Henry VIII powers and the inadequacy of the affirmative

131 House of Commons Public Administration Select Committee, 5th Report of Session 2010-11, *Smaller Government: Shrinking the Quango State*, HC 537.

132 *Ibid*.

133 Joint Committee on Human Rights, 7th Report of 2010-11 Session, *Legislative Scrutiny: Public Bodies Bill and Other Bills*, HL Paper 86 and HC 725.

134 A. Hirsch, 'The Public Bodies Bill - A vampire law', *Guardian Unlimited*, 9 November 2010.

135 G. Lean, 'Is this Cameron's new role model?', *The Daily Telegraph*, 22 January 2011.

136 P. Wintour, 'Lord Chief Justice hits out at ministers' quango plans', *The Guardian*, 17 December 2010.

137 Lord Taylor of Holbeach at a Parliament Week event, 'From Bill to Act: getting legislation through the UK Parliament', Cabinet Office, 19 November 2013.

procedure. So trenchant was the criticism across the House that Lord Taylor subsequently described the experience as 'like Zulu', with the opposition appearing on all sides.[138]

Baroness Royall, Opposition Leader in the House, set the tone: 'this is a bad Bill. It is badly thought out, badly structured, badly executed, bad for the constitution, bad for public bodies and bad for government.' [139] And she challenged the government to accept the Merits Committee's recommendation that the convention of not voting down delegated legislation in the House of Lords should not apply to framework bills.

Above all, Peers were clearly uneasy about the constitutional implications of the Bill. Lord Liddle condemned it as an act of 'institutional vandalism,' [140] Lady Pitkeathley argued that it was 'an insult to the House' [141] whilst Baroness Meacher concluded it was 'the most extraordinary breach of this country's democratic traditions'.[142] Lord Clark echoed her concerns describing the Bill as 'one of the most antidemocratic moves that there has been in either House'.[143]

The list of bodies included in schedule 7 elicited particular concern. As Lord Pannick noted during the Constitution Committee inquiry, the problem with the Schedule was that 'it is not concerned about scrapping quangos that ought to be removed; it is about bodies in respect of which the Government has no current intention to do anything, but they may wish to at some undefined stage in the future'.[144] It amounted, as Baroness Crawley described it, to a quango version of 'Room 101', with ministers consigning them to a fate worse than death.[145]

Peers were particularly concerned about the lack of adequate safeguards to protect the independence of these public bodies against unnecessary ministerial interference. Former Lord Chief Justice, Lord Woolf, highlighted the implications for those bodies responsible for justice including the Criminal Cases Review Commission, the Legal Services Board, the Legal Services Commission and the Judicial Appointments Commission, all of which had been established using primary legislation. Similar concerns arose in respect of those bodies included in schedule

138 Lord Taylor of Holbeach at a Parliament Week event, 'From Bill to Act: getting legislation through the UK Parliament', Cabinet Office, 19 November 2013.

139 House of Lords, *Hansard*, 9 November 2010, col.71.

140 *Ibid*, col.82.

141 *Ibid*, col.138.

142 *Ibid*, col.89.

143 *Ibid*, col.127.

144 House of Lords Select Committee on the Constitution, 9th Report of Session 2010-11, *Meetings with the Lord Chief Justice and the Lord Chancellor*, HL Paper 89, p.43.

145 The term 'Room 101' appears in George Orwell's novel, *Nineteen Eighty-Four*. It is a torture chamber in the Ministry of Love where the Party attempts to subject a prisoner to their worst nightmare, fear or phobia. More recently, in the BBC television comedy series 'Room 101', celebrities are invited to discuss their pet hates and persuade the host to consign them to a fate worse than death.

5, such as the Equality and Human Rights Commission, with ministers seeking powers to modify or transfer their functions. Winding up for the opposition, Lord Hunt of Kings Heath questioned how bodies such as the Independent Police Complaints Commission were supposed to operate independently of political pressure from the government, when ministers would have the ability to cut funding, change the constitution of the Commission or even abolish it.

Throughout the debate, and clearly influenced by the Constitution Committee's report, there were calls for the introduction of a statutory consultation clause, the super-affirmative procedure as a minimum concession, and for more detail about how the powers were to be used to be included on the face of the Bill. Lord Hunt of Kings Heath asked that the Bill be referred to a select committee in order to consider the constitutional implications but this was rejected.

A new strengthened scrutiny procedure emerges

Recognising that the passage of the Bill through the House of Lords was in serious doubt given the scale and passion of the concerns expressed, the speech Lord Taylor planned to give in winding up the debate had to be ripped up and rewritten because of the number of concessions that he had to promise to allay Peers' fears. Foremost among them he promised that:

- When making an Order (under clauses 1 to 6 or 18), safeguards would be introduced to preserve the independence of public bodies from ministerial interference;
- A statutory public consultation requirement would be introduced before Orders could be made;
- And a revised procedure for enhanced parliamentary scrutiny for clauses 1 to 6, 11 and 18 would be introduced.

Just a couple of weeks earlier the government had categorically ruled out the use of the super-affirmative procedure in its response to the PASC report describing itself as 'strongly opposed' to the 'disproportionate' proposal and relaying its concern that the procedure would risk 'delaying or halting efforts to deliver on the coalition commitment to reduce the number and cost of public bodies'.[146]

However, the promised revised parliamentary procedure took the form of a super-affirmative procedure of sorts:

- A draft Order would be laid with an explanatory document at least 12 weeks after start of the consultation period;

146 Cabinet Office, Government *Response to the Public Administration Select Committee Report 'Smaller Government: Shrinking the Quango State'*, Cm. 8044, March 2011, para.60, p.14.

- The draft Order would wait 30 days, during which either House might resolve that the Order wait another 30 days;
- If no resolution was made the Order would wait another 10 days and could then proceed as an ordinary draft affirmative;
- If a resolution had been passed for a further 30 days, the minister would have to have regard to any recommendations, representations and resolutions made by either House;
- At the end of the 60 days, the minister could then proceed with the draft affirmative procedure unaltered or lay a revised Order.

The Delegated Powers and Regulatory Reform Committee, reporting on the government amendments on 22 November, was highly critical, stating that they did not go far enough.[147] The Committee argued that the amendments invited further comparison with the Legislative and Regulatory Reform Act, and questioned why key elements of the scrutiny requirements in the 2006 Act were not incorporated in the newly proposed procedure. These included:

- That the 60-day period could be triggered by a recommendation from a committee rather than a resolution of the whole House;
- That if a committee recommended that no further proceedings should take place on a draft Order, any further proceedings were automatically stopped unless a veto recommendation was rejected by the House;
- That if a minister wished to proceed with an Order unaltered he must lay a statement explaining the decision;
- That the provisions of the 2006 Act could not be used for highly controversial matters.

Lord Taylor contended that comparisons with the 2006 Act were inappropriate because, 'the powers under the 2006 Act apply at large, whereas the powers under the Bill can only be exercised in relation to the bodies specified in it'.[148] The Committee disagreed, arguing that the key powers in the Bill did not specify any purpose for which the powers might be exercised whereas section 2 of the 2006 Act did. The report concluded by recommending the removal of clause 11 and schedule 7 from the Bill entirely.

The Bill spent nine days in committee in the House of Lords and three days at report stage. Before the first Committee day on 23 November 2010, 181 amendments were tabled. Many of the arguments voiced in the second reading debate were rehearsed during the committee stage. But not all amendments sought to limit the

147 House of Lords Delegated Powers and Regulatory Reform Committee, 6th Report of Session 2010-11, *Government Amendments and Response: Public Bodies Bill*, HL Paper 62, 23 November 2010.

148 *Ibid*, Appendix 2, para.11, p.13.

scope of the Bill; many of those tabled sought to add certain bodies to the schedules such as the Food Standards Agency, Audit Commission, and Church Commissioners. Why? Peers by this stage were acting tactically: if they didn't like one body they would seek to remove it and insert another, all of which enabled the House to have a debate about the powers and their use multiple times, the scale of debate reinforcing their message to ministers. But some Peers simply used the opportunity to have a debate on a pet body of personal interest: pursuing an amendment to insert the name of a new body in the Bill enabled them to have a debate on it that they couldn't secure by other means, even when the government had never indicated any intention to reform it, as with the Church Commissioners.[149] As a result, the government later had to consider whether, as part of its bill handling process, it should go to the trouble of removing some bodies from the Bill which it had never wanted in the first place.

The Government response

A number of substantive concessions were made by the government at both committee and report stage. Following behind the scenes meetings between the minister and concerned Peers it became clear that the scale of opposition to some of the proposals was likely to result in a defeat for the government. Lord Norton tabled a motion to remove schedule 7 (and the corresponding power in clause 11 which gave effect to it) entirely from the Bill but a few days before it was due to be debated the Minister announced that he was adding his own name to the motion, thereby supporting its removal.[150] Several other clauses were also removed entirely, including those relating to plans to dispose of half the woodland run by the Forestry Commission, which had attracted significant public opposition. A requirement to consult with ministers in the devolved governments was replaced with one to consult with the relevant devolved legislatures. An enhanced affirmative procedure that could be triggered by a recommendation by committee was added, as desired by the DPRRC, as was a requirement for Orders to be laid with a reasoned explanatory document. And a sunset clause was incorporated whereby the entries in schedules 1 to 5 would cease to have effect five years after commencement.

At the conclusion of the report stage Lord Newton of Braintree quipped:

> *'My noble friend (Lord Taylor) has brought it (the Bill) limping into port with its superstructure destroyed and most of its cargo dumped, but at least he has got it here. He has contributed to the worst defeat of Henry VIII at the hands*

149 This approach was later mirrored, albeit for very different reasons, in the House of Commons by the MP for Dover, Charlie Elphicke. He pursued an amendment to insert the Dover Harbour Board into the Bill despite there being no government proposals for reform of the body. By redefining it as a public body, he hoped this would allow the government to assume control of the Board and thus end a long, drawn out and controversial privatisation process.

150 House of Lords, *Hansard*, 28 February 2011, col.798.

of the barons in 500 years, but unfortunately I do not think that it is yet the Waterloo. Henry is regrouping in Whitehall, hoping to find some mercenaries and commoners to come to his aid, and your Lordships may yet have more work to do.' [151]

Leading legal commentator, Joshua Rozenberg, applauded the work of Peers in trying to keep the Henry VIII powers in check. But as he noted, the decision to improve parliamentary safeguards was a pragmatic rather than a principled one, lying not in a sudden appreciation for the constitution but in the realisation that the Bill would not leave the House of Lords in time.[152]

House of Commons scrutiny

The Bill had its second reading in the Commons on 12 July 2011. The government emphasised that no more concessions would be forthcoming, made clear that they intended to revisit some of the original proposals including reintroducing the Chief Coroner and Youth Justice Board into the Bill's schedules, and insert new clauses to protect the funding of S4C and abolish the Regional Development Agencies. The opposition argued that the Bill gave ministers too many powers with insufficient parliamentary scrutiny. In total the Bill would have eight Public Bill Committee (PBC) sittings, and both report stage and third reading were dealt with in a day on 25 October 2011. Many MPs were very critical of the lack of time for scrutiny.

The Public Bill Committee stage began on 8 September and first decided not to hold any public evidence sessions. A number of Members of the Committee came under considerable pressure from stakeholders and several we interviewed admitted that the lack of any expertise on the issues in the Committee was a problem that was exacerbated by this failure to take public evidence.

Leading for the opposition, Jon Trickett MP raised concerns about the use of delegated legislation and specifically Henry VIII clauses for the abolition of public bodies. But unlike in the House of Lords, much of the debate focussed on the role and merit of individual public bodies, legal definitions of them and the cost savings to be accrued from abolishing or merging them rather than the proposed delegation of powers, their constitutional implications, and the scrutiny mechanisms that might constrain them. Indeed, the enhanced affirmative procedure was debated only briefly at the eighth and final PBC sitting.

At that sitting, Nick Hurd MP, Parliamentary Secretary at the Cabinet Office, and leading for the government, confirmed that changes would be made to the commencement provisions to 'prevent an unnecessary delay in Parliament starting

151 House of Lords, *Hansard*, 9 May 2011, col. 709.

152 J. Rozenburg, 'The House of Lords is keeping ministers' Henry VIII powers in check', *The Guardian*, 9 March 2011.

the important process of scrutinising draft orders'.[153] As a consequence of the amendment, ministers would be required to conclude consultation before laying an Order and would be able to lay draft Orders immediately after Royal Assent. For the government it was vital that they complete the order-making process, and thereby make the proposed savings, by the end of the financial year, hence the haste. The advantage for Parliament was that the Orders would start to emerge immediately after Royal Assent and be spread over a period of months thereby facilitating proper scrutiny rather than face a glut after commencement that might compromise effective consideration of each one. He sought to assure Members, however, that whilst draft Orders might be laid and scrutiny initiated, Parliament and the public would still be afforded the usual two-month period for consultation on the new legislation as ministers would not have the power to commence implementation earlier.

Trickett questioned the underlying strategy, arguing that the government's position was contradictory. On the one hand, when grilled about why certain bodies were being included in the schedules to the Bill, the government, he argued, had defended its position by saying that it was not for them to explain at the bill stage as there was to be a period of consultation. However, to suggest that Orders would emerge immediately after Royal Assent suggested consultation had begun before the Bill had been approved and judgements on the fate of the public bodies concerned had already been reached.[154]

The Public Bodies Order procedure

In order to introduce the Orders, agreement had to be reached on how Parliament would scrutinise this new enhanced affirmative procedure. The government thus submitted its proposals at the end of October based on the new provisions set out in the Bill.

1. Ministers would lay a draft Order before both Houses with an explanatory document after the 12-week consultation period;

2. The draft Order would be subject, as with other SIs, to scrutiny by the Joint Committee on Statutory Instruments in the normal way, as agreed by the House of Lords Procedure Committee; [155]

3. Draft Orders would also be referred to the Merits of Statutory Instruments Committee in the House of Lords and, usually, the relevant departmental select committee in the House of Commons. It was subsequently agreed that

153 House of Lords, 8th Sitting, Public Bill Committee, *Public Bodies Bill*, Tuesday 11 October 2011, cols.284-285.

154 *Ibid*, col.286.

155 House of Lords Procedure Committee, *Orders laid under clauses 7(2) and 9 of the Localism Bill; Orders laid under the Public Bodies Bill*, 31 October 2011, HL 206.

the Liaison Committee could also appoint PASC or another committee to additionally consider the Order;

4. Either House could resolve, or a committee charged with reporting on the draft could recommend, that the enhanced affirmative procedure should apply, providing this was done within 30 days of the laying of the draft Order;
5. If no such resolution or recommendation was made, then after 40 days a motion to approve the draft could be moved;
6. The enhanced affirmative trigger would extend the period before a motion to approve could be moved to 60 days (from the date on which the draft was laid). Ministers would be required to have regard to any representations, committee recommendations or resolutions of either House during the 60-day period;
7. At the conclusion of the 60 days, the minister could then either move that the original draft Order be approved, and if it was, to make an Order in the terms of the draft, or, alternatively, lay a revised draft Order and an explanatory statement setting out the changes. If this revised draft was approved by a resolution of each House then the minister could make an Order in the terms of the revised draft.

Importantly, the scrutiny arrangements set out here were to apply across both Houses, so if one House triggered the enhanced procedure that decision would also apply in the other House.

The Standing Orders governing the new procedures were due to be approved at the time of Royal Assent on 14 December but were rescheduled as there had not been enough time for the Liaison Committee to consider the proposals. They were subsequently approved on 19 January 2012 with a commitment that they be reviewed a year later.

Reflections

Knowing the view of the House of Lords regarding delegated powers, and particularly Henry VIII clauses, why did the government proceed with the Bill in the form it did at the outset, both in terms of the powers and the proposed scrutiny procedure for them?

One factor influencing the extent of the framework of order-making powers was the speed at which the policy was developed and converted into legal form. Ministers and officials were wary of the fact that previous governments' efforts to legislate had been a barrier to public body reform; some departments – Health, Education or the Home Office, for example – regularly had bills going through Parliament to which they could tag public body reform. But it was a much bigger challenge for departments such as Culture, Media and Sport, or Environment, who would not

have annual legislative vehicles they could use for such changes. So, rather than try and legislate for bodies at a departmental level they wanted a collective, government-wide bill that would deliver their reform objectives.

As the Minister, Ken Clarke MP, candidly explained before the Lords Constitution Committee,

> *'The purist in me says that every one of these should be addressed by some distinct Act of Parliament in the relevant field – you could bundle all the Ministry of Justice ones together – but we know that would take years and every lobby group would hold them all up…we are trying to be sensitive to how far the administrative convenience of getting it over with and doing it reasonably quickly can be reconciled with proper parliamentary process.'* [156]

Ministers and officials were ultimately concerned not with policy process but delivery: they wanted a legacy outcome in which ministers would, in future, have an order-making power on the statute book that would enable them and successor governments to bring forward proposals for reform of other public bodies. This legacy power – a legislative instrument to curb the quango state – did not, in the end, make it to the statue book, but that was the initial objective.

The government concluded that the only way to bring forward measures for so many bodies was by secondary order-making powers within such a bill. However, it was a very tight sequence of events: the election took place in May after which the coalition was formed; the review of public bodies commenced almost straight away within a couple of weeks of the government arriving; by July decisions on what to do with the public bodies had been made; by early September the proposals were firmed up and a draft bill was being considered, with the final version introduced in the Lords in October. The extensive range of powers was a symptom of the fact that policy proposals were, in truth, not fully formed in respect of many of the areas and institutions for which reform was proposed. It was inconceivable that firm legislative proposals could be agreed for over 250 different bodies within that timeframe.

An important factor in the scrutiny process was also the apparent ignorance among newly-minted ministers about the workings of the House of Lords. Interviews with officials suggest that in the early days of the new coalition government there was significant pressure from business managers to bring forward the Bill. Ministers were reportedly told that there would be problems in the House of Lords with the Bill in its proposed form but, relatively new to office, they ignored this advice. As one official described it, ministers were 'green' and had no concept of how the House of Lords operated. They believed that the legislation could be simply pushed through; that

[156] House of Lords Select Committee on the Constitution, 9th Report of Session 2010-11, *Meetings with the Lord Chief Justice and the Lord Chancellor*, HL Paper 89, pp.43-44.

the unelected House would just have to 'lump it'. Indeed, had the Bill been introduced in the Commons it is interesting to speculate whether the outcome might have been different: that it was not was because the Bill did not have direct financial considerations and therefore did not need to go to the Commons first. In contrast, a lot of the coalition government's early legislation did have financial requirements attached and so had to begin in the Commons, leaving the Lords with a lighter legislative schedule and therefore more scrutiny capacity at that time.

But since Conservative ministers were last in office much had changed in the Lords, whereas controversial aspects of a Bill could be programmed in the House of Commons to force them though after a set time, in the other House debate could not be similarly curtailed. Only after the hostility of the second reading debate did ministers realise the problem they faced and make concessions which were negotiated by the Leader of the House, Lord Strathclyde, the minister Lord Taylor, and a couple of officials. But even these concessions proved to be insufficient. As the scrutiny process advanced, more and more time was taken up debating individual public bodies, prompting increasingly worried business managers to jettison further bodies from the schedules of the Bill.

Officials claimed during our interviews that they appreciated from the outset that it was always going to be 'a very tricky bill' and that ministers 'probably knew what they were letting themselves in for'. As a bill manager in another department reflected, to take a series of powers to abolish bodies and then designate them by Order rather than actually specifying them 'looked ambitious' from the outset. Officials and ministers anticipated that concessionary amendments would therefore be needed, some potential options for which were set out in the Lords handling strategy. Criticism by the parliamentary committees was not unexpected but as one official noted, a committee 'would have to come up with something fairly fundamental' to knock a bill off track because of the number of formal agreements across government that are required to get it to the starting gate.

As for the initial adoption of the affirmative procedure rather than an enhanced or super-affirmative procedure modelled on the Legislative and Regulatory Reform Act, as Lord Norton noted there was an apparent lack of any cycle of learning in Whitehall. 'Given the debates we had on the Legislative and Regulatory Reform Bill and before that on the Regulatory Reform Bill, it is remarkable', he argued, 'that the Government have sought to rely solely on the affirmative resolution procedure…it is surprising that officials appear unaware of the constitutional import of what is proposed.' [157] That both bills had their origins in the Cabinet Office only compounded the failure.

The powers were absolutely not suitable for the negative procedure so they were left with the affirmative as the only option, as our interviews suggest that officials

[157] House of Lords, *Hansard*, 9 November 2010, col.152.

did not want to lead off with a strengthened scrutiny procedure as a starting position in the Bill. Their experience with the Legislative Reform Order procedure was that it was difficult and unwieldy and the existence of a committee veto problematic and therefore not something they would willingly embrace from the outset. But in terms of handling, they knew that some form of strategy was needed if Members challenged various aspects of the Bill and quickly realised that concessions would have to be made but, 'if you start off with where you might end up it doesn't give you any room for manoeuvre'. Or, as a bill team member subsequently put it waspishly: 'civil servants provide to ministers something that they think will do the job'.[158]

The opposition tabled amendments modelled on the LRO and committee veto, and much of the debate that followed was thus essentially around where to draw the line between what one official described as 'this middle ground procedure that was more than an affirmative but not quite with the full committee veto'. The enhanced procedure, a PBO – involving some form of committee scrutiny and consultation – was thus a significant concession, but one that stopped short of an LRO model.

Implementation of Public Bodies Orders

Three years on since the Public Bodies Act passed into law, it is possible to make an initial assessment of the extent to which the powers sought by ministers in the Act have been utilised, and the effectiveness of the parliamentary scrutiny of the Orders that followed.

In terms of its overall Public Bodies Reform Programme, the government states that 95% of all planned abolitions and mergers are now complete, achieving a cumulative reduction in administrative spending of £2 billion since 2010.[159] However, only a small proportion of this is due to Public Bodies Orders.

Having taken advice from the Department for Business, Innovation and Skills regarding how they handled LROs, the Cabinet Office set up a central unit to co-ordinate the production of PBOs across government. It reached an informal agreement with both Houses that it would not submit more than two draft orders per week in Order to manage the flow and ensure parliamentary scrutiny was not overwhelmed, but as the numbers below illustrate, the production of PBOs has been below expectations so this has never been a significant issue.

PBOs are drafted by government lawyers, most of whom will only ever draft one in their lifetime. Many are therefore, as one bill team member put it, quite 'nervous'

[158] David Howarth at a Parliament Week event, 'From Bill to Act: getting legislation through the UK Parliament', Cabinet Office, 19 November 2013.

[159] Cabinet Office, *Public Bodies 2014*, 10 November 2014.

about doing so. The Cabinet Office has produced a guide to using the Public Bodies Act to support departments, and before submitting an Order they are often informally checked by the JCSI.[160]

The government originally indicated that it would need 60 PBOs in order to achieve its objectives. By the end of the first year the Secondary Legislation Select Committee reported that just 19, relating to 37 public bodies, had been laid in draft before Parliament.[161] This was a rate of output below what the relevant committees in both Houses of Parliament had been led to expect. In the second year, it reported that a further six, concerning eight public bodies, had been laid.[162] At this point, the Committee noted that the total number of PBOs amounted to 40% of the total envisaged within the timeframe and was therefore on track.

However, it concluded that, based on Cabinet Office assessments of forthcoming Orders, there would likely be a maximum of 42 Orders laid, 30% below what had been anticipated. The government had either decided not to pursue its proposed action against the remaining bodies, or had decided to use another mechanism. The Committee was understandably critical of the outcome:

> *'That a third of the proposals have been dropped within two years of the 2011 Act receiving Royal Assent may be seen as a significant waste of parliamentary time: better consultation prior to legislating might have avoided this.'* [163]

At the time of writing, nearing the end of the third year since PBOs became operational, 29 have now been laid, suggesting that the Committee's assessment of progress remains broadly accurate. Of these 29, 27 have been approved, one is currently under consideration and one has been withdrawn. Of the 27 approved, seven had their scrutiny period extended to 60 days.

It is not yet clear exactly how much money has been saved as a result of changes to public bodies brought about by PBOs although the government's assessment of the changes at the end of the first year was that a net saving of £29.6 million had been made.[164]

The House of Commons decided that select committees would scrutinise PBOs, but the House of Lords allocated the task to its Secondary Legislation Select Committee. As a consequence, the Lords Committee, because it looks at all of the Orders, has a more comprehensive grasp of the PBO scrutiny landscape than can

160 Cabinet Office, Using the Public Bodies Act 2011, *A Guidance and Best Practice Note for Officials*, September 2013.

161 House of Lords Secondary Legislation Scrutiny Committee, 19th Report of Session 2012-13, *Special Report: Public Bodies Act 2011: One Year On*, HL Paper 90, p.3.

162 House of Lords Secondary Legislation Scrutiny Committee, 22nd Report of Session 2013-14, *Special Report: Public Bodies Act 2011: Two Years On*, HL Paper 98, p.3.

163 *Ibid*, p.5.

164 *Ibid*, p.7.

be found in the House of Commons and has been clear from the outset about how it approaches its scrutiny responsibilities.

It looks at whether the statutory tests in section 8 of the Act have been applied. Namely, a PBO can only be made if the Order: 'serves the purpose of improving the exercise of public functions, having regard to: a) efficiency, b) effectiveness, c) economy, and d) securing appropriate accountability to ministers. The Order does not remove any necessary protection. The Order does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.'

It also explores whether the statutory consultation requirements set out in sections 10 and 11(3) have been met. Ministers are required to consult the body or holder of the office to which the proposal relates, other persons representative of interests substantially affected by the proposal, where relevant, ministers in the devolved nations, the Lord Chief Justice if the functions involve the administration of justice, and any other persons the minister considers appropriate.

In addition to considering whether the statutory requirements have been met, including the need to wait for 12 weeks from the date the consultation starts before laying a draft Order, the Committee considers the effectiveness of this consultation. It reflects on the debate during the passage of the Bill to determine whether the proposed Order takes account of ministerial reassurances and commitments, takes account of interest from MPs and the public and any formal submissions received.

Looking at scrutiny of the draft Orders laid so far, the process is marked by two particular challenges. Firstly, as with SIs generally the quality of government consultation – despite being statutorily required – is patchy. For example, the Ministry of Justice did not consult the Administrative Justice and Tribunals Council until after the decision had been taken to abolish it. And in the case of the Disability Living Allowance Advisory Board no consultation was undertaken by the Department for Work and Pensions. The Order did go through after the minister submitted an explanation but the Committee was sufficiently concerned to note that the department's stance was not 'in keeping with the spirit of the consultation requirement'.[165]

Secondly, the quality of the explanatory documentation supporting the Orders has sometimes been poor. Again, as with SIs, some departments fail to provide a detailed evidence base to enable the Committee to reach an informed judgement. The Act provides a checklist of tests that have to be met but still departmental submissions manage to omit important elements, particularly in relation to the

165 House of Lords Select Committee on the Constitution, 9th Report of Session 2010-11, *Meetings with the Lord Chief Justice and the Lord Chancellor*, HL Paper 89, pp.43-44.

requirement for 'economy' as set out in section 8 of the legislation. For example, the Office of Fair Trading provided no information about the economy of the decision to transfer the functions of the Consumer Advice Scheme.

Overall, the picture is mixed. The number of PBOs has not overwhelmed Parliament but problems in relation to consultation and provision of evidence persist. It is far from clear that the level of economic savings made as a result of PBOs justifies their existence; the number of Orders and therefore the savings that might accrue, are certainly considerably below what was anticipated. And the numbers are such that it remains arguable that the bodies could have been dealt with more straightforwardly in primary legislation, without the need to complicate an already complex process by creating a new scrutiny procedure.

6. Draft Deregulation Bill 2013

In July 2013 the government published the draft Deregulation Bill, described as the 'latest step' in its ongoing drive 'to remove unnecessary bureaucracy'.[166] The legislation had three core objectives: to reduce the burden on public and private sector organisations as well as individual citizens; to place a duty on certain regulatory bodies to have regard to the promotion of economic growth when exercising their functions; and to introduce a new power to enable a minister, by Order, to repeal legislation deemed to be 'no longer of practical use'.

At 65 clauses and 16 schedules, covering 15 policy areas and the work of 10 government departments, the Bill was described by the Minister, Ken Clarke MP as a 'slight mountain' of a Bill.[167] Among the provisions for delegated powers, it was the inclusion of a very wide power to give ministers the right to repeal legislation set out in clause 51 that proved the most controversial. A Henry VIII power, it was at the 'top end of the range' of such provisions in terms of the challenge to parliamentary authority, ranking alongside similar broad provisions in the original Legislative and Regulatory Reform Bill in 2006 and the Public Bodies Bill in 2010. The Bill demonstrated the way in which government seeks to utilise delegated legislation as an instrument of deregulation to tidy up the statute book as well as powerfully illustrating the complete lack of consistency that is applied in relation to the allocation of scrutiny procedures and safeguards. But, as a relatively rare example of a bill published in draft form, this case also demonstrated the value of pre-legislative scrutiny being brought to bear in tackling the issues surrounding delegated legislation inherent in bills prior to their formal introduction to Parliament.

Context: the Legislative and Regulatory Reform Act 2006

In order to understand the concerns about the order-making provision in this 2013 Bill, it is first necessary to appreciate the context provided by earlier efforts to provide for deregulation, particularly the Legislative and Regulatory Reform Act.

This statute built upon the earlier 1994 Deregulation and Contracting Out Act which allowed deregulation Orders to be introduced to amend or repeal existing legislation that imposed burdens on business. The Labour government subsequently reframed the approach, with deregulation replaced by an emphasis on better regulation and the passing of the Regulatory Reform Act 2001. This introduced Regulatory Reform Orders with wider scope for removing burdens on business. In 2004, following a review by the Better Regulation Task Force exploring ways to further reduce burdens

166 Draft Deregulation Bill (2013), Cm 8642, (London: The Stationery Office), p.3.

167 Joint Committee on the Draft Deregulation Bill (2013-14), *Evidence Volume I*, HL Paper 101 and HC 925, Q517, p.317.

on business, an urgent review of the 2001 Act was recommended with a view to widening the provisions to enable a greater number of reforms to be delivered via Regulatory Reform Orders. Following a further review and consultation process what emerged was the Legislative and Regulatory Reform Act.

Introduced to Parliament in January 2006, this 'bill to end all bills' was widely criticised by opponents for proposing, in effect 'the abolition of Parliament'. Section 1 of the Bill provided that 'a Minister of the Crown may by Order make provision for reforming legislation'. If the minister wished to reform legislation, an Order could thus be used to amend, repeal or replace any legislation on the statute book, including the Legislative and Regulatory Reform Act itself. Such an Order could also abolish any rule of law or confer a legislative function on another minister of the Crown. The only safeguards were that an Order could not impose or increase taxation or create a new punishable offence if the penalty was greater than two years in prison.

The government had expected that the Bill, as a piece of technical legislation, would interest few inside or outside Parliament and would therefore pass almost unnoticed through the scrutiny process. However, so wide were the powers that a widespread campaign of opposition developed in the media and online against what was deemed creeping ministerial authoritarianism and an undermining of the democratic process.[168]

The government claimed that it would not be used for 'controversial' matters but there was nothing in the drafting of the Bill to restrain and restrict its use in such a way. But as a result of robust parliamentary scrutiny, substantial changes were made to reduce the breadth of the proposed power. In the final Act, Orders in section 1 could only be made for the purposes of removing or reducing burdens. The clauses allowing Orders to amend the Act itself were removed and six safeguards were added to the face of the Bill so that Orders could be used only if:

- the policy objective cannot be satisfactorily secured by non-legislative means;
- the effect of the provision is proportionate to the policy objective;
- the provision, taken as a whole, strikes a fair balance between the public interest and the interests of any person adversely affected by it;
- the provision does not remove any necessary protection;
- the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise;
- the provision is not of constitutional significance.

168 For an account of how this Act was scrutinised and amended see the legislative case study in A. Brazier, S. Kalitowski & G. Rosenblatt with M. Korris (2008), *Law in the Making: Influence and Change in the Legislative Process* (London: Hansard Society), pp.99-123.

This legislation has left an indelible mark on the delegated legislation process. On the one hand it set a precedent regarding what Parliament deems acceptable in terms of the 'bottom line' of delegation and in so doing it provided considerable scope for executive action in the future beyond what many parliamentarians and indeed the public may consider appropriate.[169] On the other hand, it also provided a strengthened scrutiny process to constrain the use of such powers using what has become known as the super-affirmative procedure, marked in the case of Legislative Reform Orders by the provision of a committee veto. In the years since, as set out in the other case studies in this report, the use of such strengthened scrutiny safeguards set out on the face of a bill have increasingly become the centre of Parliament's focus: it works to rein in delegation rather than to resist it, even where it believes the proposed power is beyond what should be acceptable.

Clauses 51-57: repeal of legislation 'no longer of practical use'

The Cabinet Office minister, Ken Clarke MP, described the intention underpinning the proposed power in the draft Deregulation Bill as providing 'a quick and tidy dustbin into which we can take clutter out of the statute book and get rid of it'.[170] However, the phrase 'no practical use' on the face of the Bill appeared entirely subjective with no restraint on ministerial interpretation. As Lord Norton of Louth commented in evidence to the Joint Committee scrutinising the Bill, the lack of any definition of the phrase 'no practical use' meant that it was 'whatever the Minister wishes it to mean'.[171] The Joint Committee on Human Rights concluded that it was a Henry VIII clause 'of extraordinary breadth' and that legislation of no further practical use should be repealed by statute not by Order.[172]

The power in the Bill was more limited in its scope than that in the earlier Legislative and Regulatory Reform Act for it provided for ministers only to disapply, not amend legislation. However, Part 1 of the 2006 Act defined what a 'burden' was whereas this draft Bill did not define what 'no practical use' meant.

Schedule 16 of the Bill indicated the kind of provisions that would likely be disapplied using the proposed order-making power. It set out a wide range of policy areas to which it might extend, but the crucial issue was not the subject matter of the policy

169 D. Greenberg (2011), *Laying Down The Law: A Discussion of the People, Processes and Problems That Shape Acts of Parliament* (London: Sweet and Maxwell), p.214.

170 Joint Committee on the Draft Deregulation Bill (2013-14), *Evidence Volume I*, HL Paper 101 and HC 925, Q533, p.326.

171 Joint Committee on the Draft Deregulation Bill (2013-14), *Evidence Volume 2*, HL Paper 101 and HC 925, Q482, p.998.

172 Joint Committee on the Draft Deregulation Bill (2013-14), *Evidence Volume I*, HL Paper 101 and HC 925, p.708.

area but that the provision no longer be of practical use. The Explanatory Notes accompanying the Bill suggested the context in which ministers intended to utilise the power, namely in relation to legislation that was passed for a limited purpose that had now been achieved, that had been superseded by another statute, or where it regulated an activity which, due to social or economic development, no longer took place.[173] However, these were not set out on the face of the Bill. As Lord Norton made clear in his evidence to the Joint Committee 'the government's intentions have no legislative force: they may be superseded by other intentions, indeed, there is nothing to stop the current government revisiting and indeed ignoring its stated intentions'.[174]

The government itself recognised that whether legislation met the test of no practical use may be 'contestable' and 'does not invariably have an obvious answer'.[175] The DPRRC was not convinced by any of the government's arguments, concluding that the government's tests 'appear to us to be where provisions are thought to be spent, superseded or redundant. But the 'no practical use test' is wider than that, and there is no express provision in clause 51 confining its scope to those three categories, or in any other way whatever.'[176] It was, it concluded, a 'startlingly wide and vague' power.[177]

The government proposed a draft negative procedure with statutory safeguards, set out in clauses 54 to 56, which it claimed were modelled on the LRO procedure enshrined in the Legislative and Regulatory Reform Act. Where it was deemed 'appropriate' the minister would be required to consult the Law Commission and other persons 'considered appropriate'; if the consultation led to any amendment of the proposals then further consultation must be undertaken if the minister considered it 'appropriate'. If, following consultation, it was deemed appropriate to proceed, then a draft of the Order must be laid before Parliament with an explanatory document. During the 40-day scrutiny period, if a committee of either House responsible for considering the draft Order recommended that it not be 'made' then the minister must not make the Order in the terms of the draft unless the committee's recommendation was rejected by a resolution of the same House.

The procedure laid out by the government, however, was at best a misguided effort to disguise the reality that what they were proposing was a new form of strengthened scrutiny which was, in the words of Lord Norton, 'distinct

173 Draft Deregulation Bill (2013), Cm 8642, (London: The Stationery Office), Explanatory Notes, para.212, p.35.

174 Joint Committee on the Draft Deregulation Bill (2013-14), *Evidence Volume 2*, HL Paper 101 and HC 925, p.989.

175 Cabinet Office (2013), *Delegated Powers Memorandum on the Draft Deregulation Bill*, para.326, p.69.

176 Joint Committee on the Draft Deregulation Bill (2013-14), *Evidence Volume I*, HL Paper 101 and HC 925, para.23, p.630.

177 *Ibid*.

and less rigorous than that utilised for other measures subject to enhanced scrutiny processes'.[178]

A new scrutiny procedure

The constant reference to the LRO process was interesting for it was what the government did not say about the LRO procedure that is most revealing. In the Delegated Powers Memorandum it described the parliamentary procedure for the draft Bill as 'a special form of procedure' based on section 16 of the Legislative and Regulatory Reform Act 2006. However, in doing so, the government automatically assigned the use of the negative procedure for scrutiny purposes and did not give the committees in each House that would examine the Orders the option to recommend an upgrade in the scrutiny procedure. This was provided for in the 2006 Act.

Under an LRO the minister decides the procedure to be assigned once they know the nature of the power – they make the recommendation as to whether it should follow the negative, affirmative, or super-affirmative route – and then the scrutiny committee decides whether they agree. If not, they can recommend an upgrade and this will generally be accepted. Here, at least, Parliament has some degree of influence in the process. This context and provision for the use of the affirmative or super-affirmative procedures is set out in sections 15, 17 and 18 of the statute; but these sections of the LRO procedure were not referenced at all in this latest draft Bill. It focused only on section 16 of the 2006 Act. The government's interpretation of the LRO procedure and translation of this into the draft Bill was partial at best, a deliberate attempt to mislead at worst.

In the scrutiny hierarchy, regardless of how it was reinforced, a draft negative procedure would not have reflected the potential significance of Orders made under this power. The procedure was being assigned at the outset to a process of legislative appeal that no one knew the detail of in advance, with no way of knowing how widely or narrowly it would be applied and whether it would be in relation to important or controversial areas of law. Ken Clarke MP suggested to the Joint Committee that the proposed procedure was 'stronger' than an affirmative procedure but the Committee concluded that whilst this was true of the more usual draft affirmative (under which an Order can only be made if approved by both Houses), it was not true of the affirmative procedure as set out in the 2006 Act.[179]

In the 2006 Act there is also provision for ministers to come back with a revised draft and it was subsequently agreed that the government would not force LROs

178 Joint Committee on the Draft Deregulation Bill (2013-14), *Evidence Volume 2*, HL Paper 101 and HC 925, p.988.

179 Joint Committee on the Draft Deregulation Bill (2013-14), *Report*, HL Paper 101 and HC 925, para.36, p.20.

through committees. The government's new procedure in the draft Deregulation Bill did not provide for this; the only option was for one of the committees to reject the Order, which the minister could then seek to overturn in the same session. It was also incongruous that the procedure in the draft Bill was deemed important enough to be considered by a committee of both Houses, but then not approved by both Houses, as would be the case with an affirmative instrument.

In considering an LRO, the relevant parliamentary committees will consider the six safeguards or tests set out in Section 3 of the 2006 Act (highlighted above). Clearly, 'no longer of practical use' could be applied to contentious or constitutionally significant legislation, but unlike the 2006 Act there was no suggestion that such tests should constrain the government. There was understandable concern that this new legislation might therefore provide for disapplication in areas that Parliament had explicitly decided should be outside the scope of LROs.

Furthermore, the lack of any conditions defining the test – the vagueness at the heart of this section of the draft Deregulation Bill – meant it would have been difficult for parliamentary committees to scrutinise as there would be no real structure to which they could apply their scrutiny work.

An inconsistent approach to consultation

There were also serious constitutional concerns that if ministers made a mistake and disapplied a law that was subsequently found to have some practical use to someone, somewhere, then it would be subject to judicial review. If a surviving interest was discovered, the process would enter a legal minefield, particularly if the consultation process was deemed inadequate. Given the potential for legal uncertainty, worryingly the consultation processes provided for in the new procedure were flawed and inconsistent with past practice.

Firstly, the use of consultation as a safeguard was undermined when this was a matter solely for the minister to decide what would be appropriate.

Secondly, there were no specific stipulations about consultation other than in relation to the Law Commission and the devolved administrations. In contrast, the 2006 Act set out more detailed requirements beyond the Law Commission and the devolved administrations, namely involving 'such organisations as appear to him to be representative of interests substantially affected by the proposals'. The Law Commission explicitly rejected ascribing any value to its role as a statutory consultee; it was, it said, an 'illusory' safeguard, as they had rarely been consulted on LROs.[180] As for devolved matters, the 2006 Act provided for consultation with the devolved

[180] Joint Committee on the Draft Deregulation Bill (2013-14), *Evidence Volume 2*, HL Paper 101 and HC 925, Q56, p.772.

legislatures not just the administrations as set out in the draft Bill. Similarly, during scrutiny of the Public Bodies Bill, the House of Lords had insisted that the proposal to consult only the devolved administrations be extended to the legislatures if the measures were within its legislative competence. Yet again, lessons from earlier legislation were not carried forward from one bill to another.

Thirdly, what was set out in the draft Bill was also somewhat vague. Clause 53 said ministers 'may not make an Order under section 51 unless...the Minister has consulted in accordance with section 54'. However, section 54 was less clear; the minister must only consult in such cases as they thought 'appropriate'. As shown in relation to Public Bodies Orders, circumstances do arise in which ministers simply decline to undertake a consultation.

Joint Committee recommendations

The Joint Committee concluded that the order-making powers in clauses 51-57 were too wide and the safeguards inadequate as drafted and recommended they be removed completely from the Bill. It expressed disappointment that the government proposed a new strengthened procedure rather than utilising an existing model but made clear that, regardless of the scrutiny procedure proposed, the nature of the order-making power was unacceptable in principle. In this it echoed the DPRRC, which had concluded that the procedural arrangements did not in any way mitigate 'the unacceptability of the power'.[181] However, it proposed that Schedule 16 of the Bill be referred to the Law Commission for confirmation, prior to committee stage, that the proposals were indeed 'no longer of practical use'.

In its response to the Committee the government made clear that they believed a power to disapply legislation no longer of practical use would be 'a useful additional tool for tidying up the statute book'.[182] However, recognising that there was 'insufficient appetite for such a measure at this time' they accepted the Committee's recommendation and agreed to remove clauses 51-57 from the Bill entirely, but rejected the proposed referral of Schedule 16 to the Law Commission.[183]

Reflections

Was the power and procedure set out in the draft Bill necessary? The government claimed that it needed an 'accessible mechanism' to disapply legislation but given that there are three existing routes to achieve this – through the Law Commission

[181] Joint Committee on the Draft Deregulation Bill (2013-14), *Evidence Volume I*, HL Paper 101 and HC 925, para.27, p.631.

[182] Government Response to the Report of the Joint Committee on the Draft Deregulation Bill (2014), Cm 8808, (London: The Stationery Office), para.14, p.3.

[183] *Ibid*.

process, LROs and the ability to revoke an SI by the same procedure – its claim was somewhat dubious. It was also a high-risk mechanism given that disapplying legislation by SI exposed the process to judicial review. In contrast, the Law Commission route offered the greater security and confidence provided by repeal through primary legislation.

Publicly, the government resisted the use of the Law Commission because it dealt only with the repeal of primary legislation whereas the draft Bill was also intended to provide for disapplying delegated legislation. This however, was somewhat nonsensical as delegated legislation can be disapplied with another SI using existing order-making powers.

Privately the relationship between government and the Law Commission can be somewhat antagonistic, some evidence of which began to seep out during the public sessions before the Joint Committee. The Law Commission understandably guards its independence zealously, but for those in government – ministers and officials – its work programme is often perceived to lack a sense of political priority. The government did not want to pursue the Law Commission route in part because of the timescales involved.

Scrutiny of Law Commission bills tends to be swift, they take up only a modest amount of parliamentary time, but the overall process for repeal of statutes is thorough and can take up to four years from start to finish. This was clearly too long for the government. As it made clear in the Delegated Powers Memorandum, one of the reasons for its approach was that it would enable departments to 'follow a timeframe which meets their own priorities', and it would give departments the scope to focus on areas of law not being considered by the Law Commission.[184] However, the government does from time to time refer issues to the Commission; if it was concerned about particular areas of the statute book needing to be tidied up it could have referred the provisions to the Commission and asked it to consider them.

From Parliament's perspective, the Law Commission route would have afforded greater opportunity for scrutiny and influence if it wished to assert itself in the process. Law Commission bills are rarely amended but there is no formal prohibition against it. If a Member of either House thus wished to amend such a bill they could do so via the usual bill scrutiny process. In contrast, if Members were concerned about any measures in any future Deregulation Order using clause 51-57 of the draft Bill, they would only have had the option of accepting or rejecting the provisions. Amendment would not have been an option.

If the government wanted an alternative to the Law Commission route, it could also have thought more imaginatively about the parliamentary options. For example, the

[184] Cabinet Office (2013), *Delegated Powers Memorandum on the Draft Deregulation Bill*, para.325, p.69.

Regulatory Reform Committee in the House of Commons focuses on deregulation but is significantly under-utilised. It has scope for doing further targeted work in this field.

The government indicated that its objective was to regularly rationalise the statute book 'in a way which is not unduly burdensome'.[185] However, had it pressed ahead with the Bill in its draft form, it is likely that the scrutiny procedure would have been upgraded to something more akin to a PBO or LRO procedure; this would probably have been insisted upon in the House of Lords and possibly traded by ministers in order to get the Bill through. But as we have seen in the previous chapter, the procedure for PBOs is somewhat burdensome and can take many months, as can LROs.

The post-legislative review report on the Legislative and Regulatory Reform Act suggests that the LRO process has proven more resource intensive than anticipated, as a result of which there have been fewer Orders than expected. The procedure was intended to be easier to use than Regulatory Reform Orders; but while there were 28 such Orders introduced between 2001 and 2006, at the time of writing there have been only 25 LROs since 2007 (of which 1 was subsequently withdrawn). As the report concludes, 'it is easier to rely on being part of a wider bill team to deliver deregulatory measures though a bill, where that option is available'.[186]

This begs the question why the government thought the clause 51 power in the draft Deregulation Bill was a good idea in the first place; the only explanation can lie in trying to get a wide, flexible power onto the statute book to deal with all eventualities. If so, this raises important questions about democratic accountability and suggests the government is seeking powers beyond what Parliament should accept. Rightly, in this case, Parliament therefore reined in the executive.

Although theoretically it should only take up to nine months to complete an LRO, in practice it is taking up to 18 months or longer due to delays arising from pressures on policy, economic and legal resources in departments, as well as the demands of the consultation process. In terms of scrutiny, only two LROs have used the negative procedure route; most are either allocated to or upgraded by committee to the affirmative procedure, and only one LRO has been vetoed.

In the context of the draft Deregulation Bill many of the lessons regarding the 2006 Act were already known at the time the Bill was drafted in 2013. Hence the reason the government did not actually adopt the full LRO procedure in the Bill; it was widely

[185] Cabinet Office (2013), *Delegated Powers Memorandum on the Draft Deregulation Bill*, para.324, p.68.

[186] Memorandum to the Business, Innovation and Skills Committee (2014), *Post Legislative Assessment of the Legislative and Regulatory Reform Act 2006*, Cm 8948 (London: The Stationery Office), para.42, p.7.

known how long an LRO can take and therefore why departments are averse to using them. Given that it was clear at this stage that most LROs did not take the negative route, to offer only this route in the draft Bill was wholly inconsistent with existing practice; but based on what happened in our other case studies it would not be unreasonable to conclude that this baseline approach provided scope for 'trading up' the procedure during the course of its passage through Parliament. Indeed, our interviews suggest that ministers were prepared to make concessions up to an LRO procedure, but not to adopt the full LRO model as the provision of a veto dilutes their utility from the government's perspective. As one member of a bill team put it, 'if an LRO can be thrown out, why invest time for an uncertain outcome?' The provision of the veto means no one will use it so 'you may as well bin it'.

Ministers and officials involved in the draft Bill appear to have been of like mind: that a scrutiny procedure modelled on the LRO offered adequate safeguards. However, they did not grapple with the reality that in the House of Lords the DPRRC had recently published its special report on strengthened scrutiny procedures and urged departments to rationalise the scrutiny process and not add to the complexity by creating new variants. In response, the Leader of the House of Lords, Lord Strathclyde, had given an undertaking the previous year that the government would not seek to create new procedures unless absolutely necessary and if they did, they would explain why. In the case of this draft Bill, however, the government did create a new variant but did not even attempt to justify its decision, choosing instead to cloak its intentions by utilising a very partial account of the LRO model. As Lord Norton said of the Bill, the provisions were not only deficient in respect of the powers proposed, but in the way they were brought before Parliament, whether 'advanced in ignorance, or defiance of the recommendations of the Delegated Powers Committee'.[187]

[187] Joint Committee on the Draft Deregulation Bill (2013-14), *Evidence Volume 2*, HL Paper 101 and HC 925, p.992.

7. Localism Act 2011

Introduced in the House of Commons on 13 December 2010, the Localism Bill was a legislative leviathan running to 483 pages. Its 241 clauses and 25 schedules covered not just localism, but all key policy areas falling under the Department for Communities and Local Government's (DCLG) remit: planning, housing, the fire service, local government and London governance. It was in effect three and a half bills, bolted together to give effect to the coalition government's flagship localism policy by introducing measures to empower local authorities and communities and end the era of 'top-down' government. However, the scope of the delegated powers in the Bill, including a number of Henry VIII clauses, prompted accusations of centralism and ministerial diktat, and resulted in the creation of two new strengthened scrutiny procedures as parliamentarians sought to constrain the executive.

This chapter analyses how the Bill was drafted and amended, particularly focusing on the differing perspectives ministers and officials had towards the production of the Bill, and the different approaches taken in the Commons and Lords to scrutiny of it. It particularly demonstrates how there is a lack of consistent application of scrutiny procedures to powers within government, even within one departmental policy area, as well as the inadequacies of government consultation and the inability of Parliament to secure redress in such circumstances. It also explores how and why Parliament managed to approve two new, but different strengthened scrutiny procedures within the same bill, despite there being no obvious reason why the powers concerned needed to be treated differently. And finally it examines implementation using the new Localism Orders.

The drafting challenge

From the outset, according to those departmental officials we interviewed, there appears to have been a high degree of ministerial involvement looking not just at the policy framework but also, unusually, at the drafting. There was intense debate between ministers and officials about the best way to bring forward the legislation. The key, for ministers, was momentum: they had a clear manifesto commitment, a broad reform agenda and didn't want a sequence of smaller bills if it could be avoided.

But some within government argued that the Bill was so big it was undeliverable. The government was thus faced with a choice: have one catch-all legislative juggernaut – a 'basket case bill' as described by bill team managers – or have two or more separate bills. The government knew that there would be a huge amount of work to be undertaken to implement the policy once the legislation was agreed so it was willing to expend political capital early on to get it on the statute book. The conclusion reached was that it would be better to deal with one large, unwieldy bill

that would at least have the benefit of enabling people to see everything, and the connections that arose between the various different reforms, than to have multiple bills and be forced to say in the first that a certain policy for 'x' would be included in the later bill so interested parties would just have to wait and see how it turned out. There were deemed to be important inter-dependencies in the various reforms that would be of interest to MPs and Peers and they would therefore want to know how these reforms would fit together and what the implications were.

Ministers wanted to ensure that the draft clauses delivered exactly what they wanted and, concerned that some of the legislation they'd seen before had been difficult to read, they wanted their bill written in plain English. But in this objective ministers were to be largely frustrated. One subsequently described during our interview how shocked they were at the extent to which high-level civil servants – including at Permanent Secretary level – pushed for an enabling bill against their wishes and the extent to which draftsmen pushed for the use of Henry VIII powers.

The OPC, a 'cagey monopoly' in the words of the minister, simply spoke a different language to politicians when it came to drafting. So frustrated were ministers with their approach that a personal meeting with Parliamentary Counsel was sought and on one occasion they were reportedly threatened that external drafters would be brought in (from the legal firm Bircham Dyson Bell), to better deliver what ministers wanted.

Some ministers also pushed for other forms of expertise to be brought to bear: on planning issues, for example, the department had access to an independent practitioners' group but ministers were frustrated by what they perceived to be a reluctance on the part of civil servants to let them anywhere near the process. As a minister described it, 'Despite our best efforts there was a lack of external input – it would have benefited much more from end-user input into drafting.' In contrast, some officials were concerned that ministers wanted a version of the legislative process more akin to that in the US Congress where they would sit down and write the bill themselves.

The ministerial team in the Commons and Lords would regularly sit around the ministerial board table with the bill team, while relevant policy officials – about 32 of them all told - filed in to go through the draft clauses one by one in each policy area, as well as the scrutiny procedure to be assigned to each power. For an inexperienced ministerial team new to office, and more familiar with their previous role as opposition spokespersons, it was an invaluable introduction to the departmental policy process and an attempt to join up any disconnect between the political and legal processes involved in putting a bill of this kind together. In turn it helped bridge, though not entirely eradicate, the gulf in understanding between the politicians and lawyers involved in developing the legislation. Ministers, frustrated

with the experience, met separately to the bill team on a few occasions to discuss the proposals and decide on a required course of action.

Throughout the passage of the Bill two intertwined themes dominated parliamentary and public debate: that the policy was under-cooked and that rather than empowering local government the legislation actually empowered the Secretary of State. It was claimed that the Bill was rushed, the policy was not properly formulated, and Parliamentary Counsel therefore had little option but to make considerable use of secondary powers in the absence of sufficiently clear policy instructions. Consequently, despite the decentralising theme of the Bill it conferred upon the Secretary of State a large number of powers to prescribe, through regulations, Orders and guidance, how local authority powers were to be used. As academics George Jones and John Stewart opined, 'centralism is entrenched by many new, or reaffirmations of existing powers, regulations and Orders proposed for ministers to exercise. Central government advocates localism, but only if it can ensure local authorities to do what it wants.' [188]

Delegated powers in the Bill

The Bill conferred over 100 powers on the Secretary of State to specify the detail of many of the provisions by regulations, orders and guidance. Throughout the scrutiny process few participants in the debates seemed entirely sure of the exact number of delegated powers contained in it. MPs variously referred to both 126 and 156 powers during the debate but, as the Delegated Powers Memorandum made clear, in fact the former reflected only the powers conferred on the Secretary of State and Welsh ministers, while the latter included those plus the reaffirmation of existing powers.[189]

Such was the sheer weight of delegated powers that the opposition tabled a reasoned amendment at second reading in the House of Commons criticising the volume of it and the overall quality. The motion called on the House to decline to give the Bill a second reading because, among other reasons, the devolution of power to local authorities proposed in the Bill was undermined by the extent to which power was handed to the Secretary of State to over-ride those devolved powers and by the extent of the powers granted to the Secretary of State to direct local authorities in their governance arrangements.

The Secretary of State, Eric Pickles MP, responded by highlighting the precedents.

> *'Preserve us from the wickedness of delegated powers…I do not recall those concerns being raised by the current Opposition during the passage of the*

188 G. Jones & J. Stewart, *'Local Government: the past, the present and the future'*, Public Policy and Administration, Vol.27, 2012, pp.356.

189 Localism Bill: Memorandum by the Department for Communities and Local Government to the Delegated Powers and Regulatory Reform Committee.

Local Government and Public Involvement in Health Act 2007, which in a mere 176 clauses, contained 86 delegated powers. The number of such powers in this Bill is, therefore, entirely the norm and entirely in keeping with the way in which legislation has been put together, with one important difference: this is a deregulating Bill.' [190]

The first eight clauses in the Bill introduced a general power of competence for local councils and parishes. Under the provisions, local authorities would be empowered to take any action that 'an individual with full capacity' can do, so long as it was legal. This power of competence had been Conservative Party policy since 2009 and replaced the 'general power of well-being' introduced by the previous Labour administration in the Local Government Act 2000. The general power of well-being gave local authorities the power to do anything that would promote or improve the economic, social and environmental well-being of their area. The premise behind the power was that it would encourage local authorities to be more responsive to the particular needs of their area and at the same time encourage innovation in the provision of services so as to save money without having to seek new legislation.

The scope of the power in the 2000 Act was widely regarded as unclear and thus rarely used for fear of legal challenge. It was hoped that by broadening the scope of the power to a general power of competence, the legal teams within local authorities would be more confident about using it. However, concern was raised that it was difficult to identify examples of what an authority might now do that it could not do before under the well-being power. A number of authorities cited their preference for using specific powers to achieve their goals. The Local Government Association acknowledged that 'It is difficult to consider in a vacuum how the new power will be used given that this will inevitably flow from particular local needs in specific local circumstances…' [191]

The general power of competence provision was accompanied by two significant Henry VIII powers. Clause 5(1) provided the Secretary of State with the power to amend, repeal, revoke or disapply, by Order, any statutory provision deemed to prevent or restrict local authorities from using the general power of competence. In the Delegated Powers Memorandum the government argued that,

'given the complexity of the existing framework of powers and associated restrictions that local authorities operate under, it is not feasible to rely solely on primary legislation to bring about these changes. Indeed, as the purpose

190 House of Commons, *Hansard*, 17 January 2011, col. 558.

191 Local Government Association (2011), *The Localism Act 2011: a general power of competence*.

of the power is to encourage innovation, it is not possible to say at this stage what these restrictions might be.' [192]

The government also highlighted past precedents, noting that the power was modelled on a similar provision included in the Local Government Act 2000.

However, accepting that this was a very broad power it acknowledged that 'Parliament will rightly expect its use to be subject to an appropriately high degree of scrutiny.' [193] Accordingly, it had set out a procedure modelled on the Legislative and Regulatory Reform Act 2006 provisions for an LRO. As the Bill's explanatory notes made clear, 'This means that the procedure to be followed (negative, affirmative or super-affirmative) can be determined by Parliament.' [194] As a deregulating bill the ministerial team argued throughout that they needed flexibility, as they did not know what the burdens to be removed in the future might be. As the legislation shared, on the face of it, many similarities with the burden removing powers of the Legislative and Regulatory Reform Act the proposed Legislative Reform Order procedure was deemed appropriate.

Under this procedure, Orders were to be laid in draft after consultation, with the appropriate level of parliamentary scrutiny determined by the Regulatory Reform Committees in both Houses. The committees could also veto the Order and the legislation placed a statutory obligation on the minister to consider any recommendations made by them. At report stage in the Commons a number of additional safeguards were incorporated. These followed the same model of safeguards included in the Legislative and Regulatory Reform Act. The provision must be proportionate to the intended policy objective; it must strike a fair balance between the interests of the public and anyone adversely affected; it could not remove any necessary protection; it should not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to exercise; and it would not apply to any matter deemed constitutionally significant.

The Bill also enabled the Secretary of State to amend, repeal, revoke or disapply, by Order, any statutory provision that overlapped with the general power of competence. The government originally proposed that whenever this power was exercised in conjunction with the earlier power it would be subject to the strengthened form of scrutiny provided by the Legislative and Regulatory Reform Act procedure. But when the power was exercised on its own it would be subject to the lower negative procedure on the basis that the power would only be used to

192 Localism Bill: Memorandum by the Department for Communities and Local Government to the Delegated Powers and Regulatory Reform Committee, para.11, p.5.

193 *Ibid*, para.12, p.5.

194 Localism Bill as introduced in the House of Commons, 13 December 2010 (Bill 126), Explanatory Notes, para.56, p.8.

simplify and would not have an actual impact on the local authority to do things. Here, however, the government's stance was inconsistent. A parallel power provided in the Bill to amend Acts in relation to fire and rescue authorities was subject to the affirmative procedure and it was well known that the DPRRC recommendation was that all Henry VIII powers should be subject to this. Unsurprisingly, this was exactly what the DPRRC recommended and the government therefore had to amend the Bill to reflect this once it got to the House of Lords.

Those clauses that provided for the Secretary of State to prevent local authorities, by Order, from doing certain specified things under the general power of competence as well as, conversely, empowering the minister to impose certain conditions on the use of the power proved to be among the most controversial in policy terms.

MPs' concerns

Throughout the committee stage, MPs asked for draft regulations in order to see how ministers proposed to use the power. Said Nick Raynsford MP,

> *'Why do we not know, when we are debating this in Committee, exactly what the Secretary of State intends to do under that hugely extensive power? … Without sight of the draft regulations, we would be foolish indeed as a Parliament – and certainly as an opposition – to accept the Minister's blandishments about the Government's good intentions when we simply do not know clearly how the Secretary of State intends to use those wide-ranging powers.'* [195]

The ministerial team sought to ease Members' concerns by arguing that the power was a reserve 'just in case' power, both residual and benign, but draft regulations were not forthcoming.

The relevant clauses included a statutory consultation requirement and were subject to the affirmative procedure, although Orders under this power that were used to amend an earlier Order so as to apply its application to more authorities were to be subject only to the negative procedure. Again, as with the earlier power, this too was changed to the affirmative procedure in the House of Lords following the recommendation of the DPRRC. The same situation similarly applied later in the Bill in relation to the general power of competence given to fire and rescue authorities and the provisions made to enable them to charge for services. Again the powers afforded to the Secretary of State were broadly equivalent to those in respect of other parts of the Bill but the initial proposal from the government was a lesser form of scrutiny procedure. Throughout discussion of these clauses and sub-sections, no mention was made by MPs of the fact that one of the powers was subject to the

[195] House of Commons, *Hansard*, 1 February 2011, col.185.

comparatively rigorous Legislative and Regulatory Reform Act procedure but others were not. Consideration of the procedures and their appropriateness during committee stage went unremarked. Only when the issues arrived in the House of Lords were the anomalies picked up and addressed.

The Bill also provided for local authorities to make changes to their governance arrangements including the option to revert back to the committee system abolished by the previous Labour government, to discharge certain functions jointly with other authorities, or to delegate functions to another authority. The Secretary of State was given the power to specify, in regulations, the functions that were not to be delegated. The Secretary of State could also make regulations prescribing new forms of governance arrangements if requested by an authority. During the Bill committee stage, Labour MP and Shadow Communities and Local Government Minister Barbara Keeley moved an amendment to require the Secretary of State to present this power in primary rather than secondary legislation as had happened in the Local Government Act 2000 when previous changes to the governance arrangements of local authorities had been made. Here, however, ministerial demands for flexibility and expeditious action outweighed legislative precedent.

Mayoral referendums

One of the more controversial aspects of the Bill provided for Mayoral referendums in 12 of the largest cities in the UK.[196] Making provision through delegated legislation for the conduct of referendums is common and regulations for the conduct of Mayoral referendums had precedent in the Local Government Act 2000. Orders under the 2000 Act were subject to the affirmative procedure. However, in this Bill the government proposed the use of the negative procedure. Again, unsurprisingly, the DPRRC recommended this be upgraded to the affirmative procedure and this was accepted. Two further provisions relating to the Mayoral system were also removed at a late stage in the Lords. One provided for the Secretary of State to compel a local authority to confer a 'public service function' of any person or body on its elected Mayor if the Mayor in question applied to the Secretary of State for such a function in their first year in office. The DPRRC considered this to be an inappropriate delegation of legislative power.

> *'This is a remarkably wide power. It would appear to cover many activities carried out in the voluntary sector and other public services (e.g. the NHS, policing, and those relating to the environment), including those carried on by other elected authorities…There are no criteria in the Bill by reference to*

[196] In fact only 10 referendums were held.

which the power may be exercised and no restrictions on the local public service functions that may be transferred.' [197]

The public service function assigned to Mayors was consequently removed, but at report stage in the Lords a new section was included in Part 1 of the Bill that looked remarkably similar. It allowed the Secretary of State, by Order, to transfer a local public function to a 'permitted authority'. Such an Order would be allowed to modify Statutory Instruments for the purpose of making such a transfer. The procedure assigned to it was remarkably similar to the LRO procedure but with two differences: there was no requirement to lay supporting documents and no power for a relevant committee to determine the level of parliamentary scrutiny. And a sub-clause was included stating that any Order made under this power did not have to follow the hybrid-instrument procedure even if it had public and private elements.

Produced as it was late on during report stage, the Delegated Powers and Regulatory Reform Committee did not have an opportunity to scrutinise this new power and procedure. Had it done so it would almost certainly have reported the fact that the Bill now contained two new strengthened scrutiny procedures (in Sections 7 and 19 of the final Act), both modelled on an LRO but different to each other for no obvious reason given the powers concerned. This anomaly would eventually be addressed following Royal Assent when the government agreed to remedy it by providing supporting documentation for any Orders pursued using the Section 19 power. However, the incident demonstrated both Parliament's reliance on the expertise of the DPRRC to spot such anomalies, and the wider weakness of the scrutiny system whose procedures enabled government to introduce a strengthened scrutiny power at such a late stage.

The House of Lords was, however, successful in removing the proposal to make local authority codes of conduct voluntary instead of mandatory, and the precise details of a provision introducing a new criminal offence for a member of a local authority failing to disclose a relevant interest was moved from secondary powers onto the face of the Bill.

Community rights

Part 5 of the Bill focused on community rights, seeking to shift power away from Whitehall and empower communities to shape and run their local services. It proposed to strengthen the ability to hold non-binding local referendums on issues of community interest by requiring a local authority to hold a local referendum on a local issue if 5% of local electors for the area signed a petition, one or more members

197 House of Lords Delegated Powers and Regulatory Reform Committee, 15th Report of Session 2010-12, *Education Bill and Localism Bill Parts 1-3*, HL Paper 163, p.9.

of an authority requested it, or if the authority passed a resolution. Regulations governing the conduct of these referendums were to be prescribed by the Secretary of State, including the power to increase or decrease the threshold for a valid petition by Order. Regulations could also be varied for different areas and type of authority but these provisions were removed from the Bill at report stage.

The Bill also introduced a requirement to hold a council tax referendum when a local authority was deemed to have introduced an 'excessive' council tax increase. The principles governing excessiveness were to be determined by the Secretary of State and any authority deemed to have set such an excessive council tax would be required to prepare an alternative. During the parliamentary process the Department confirmed that these regulations were to be modelled on the Local Authorities (Conduct of Referendums) (England) Regulations 2007 a copy of which was made available during the Lords stages. Although not draft regulations, the model provided MPs and Peers with some guidance as to how ministers proposed to use the powers. However, the government did not propose to utilise the same scrutiny mechanism as was used for the 2007 regulations and yet again the DPRRC recommended an upgrade to the affirmative procedure.

The concept of a community 'right to challenge' was also included in the Bill. This would enable local community groups to challenge the way their local authority delivered services and ultimately seek to take over the running of that service by submitting an 'expression of interest'. The local authority could either accept or reject the expression of interest but would have to do so based on guidance and regulations set out by the Secretary of State. Ministers were also to specify by Order what services were to be excluded from the right to challenge.

Why were the grounds for rejection to be dealt with in secondary legislation rather than on the face of the Bill? A weak explanation was given in the Delegated Powers Memorandum: 'at the time when the primary legislation is introduced, the consultation exercise which we intend to undertake which will consider what these grounds should be has not been…completed' argued the government.[198] Unsurprisingly the DPRRC did not consider 'that this justification carries weight'.[199] The Bill had been introduced six months prior to the DPRRC meeting and yet consultation responses were only published half way through the Lords Committee stage.

The Bill also gave community groups the opportunity to bid for assets of 'community value' that were due to be sold and the Secretary of State was given the power to

198 Localism Bill: Memorandum by the Department for Communities and Local Government to the Delegated Powers and Regulatory Reform Committee, para.222.

199 House of Lords Delegated Powers and Regulatory Reform Committee, 16th Report of Session 2010-12, *Localism Bill: Parts 4-8 & Government Amendments*, HL Paper 173, p.7.

define the term 'community value'. As the definition of the concept was central to the principle of the provision it could be argued that it ought to have been included on the face of the Bill. However, it was provided as a delegated power and one for which the government recommended the use of the negative procedure. Again, the DPRRC urged this be upgraded to the affirmative procedure and once again this was duly accepted by the government.

The planning clauses contained in the Bill were accompanied by a major change to planning policy. In December 2010, the Minister, Greg Clark MP, announced that the government would be reviewing and consolidating all planning policy statements, circulars and guidance for England into one National Planning Policy Framework (NPPF) with sustainable development at its core. Although not part of the Localism Act, the two were explicitly connected as Clark confirmed that the NPPF would ensure that the majority of planning decisions would be made at local level. A draft NPPF was submitted for consultation on 27 July 2011, more than six months after the Localism Bill had been introduced in the House of Commons. Among the provisions, the precise details of the neighbourhood planning regime and community right to build power were to be left to regulations and guidance from the Secretary of State. With the NPPF still out for consultation, many Peers argued for draft regulations without success. The DPRRC drew to the attention of the House a clause conferring upon the Secretary of State the right to provide for the imposition of charges to meet the expenses of local planning authorities in connection with the neighbourhood planning regime. The government proposed that this power should be subject to the affirmative procedure but only in the House of Commons. There was no provision for a scrutiny procedure in the House of Lords and no explanation as to why. The DPRRC was left to speculate that this was because of financial privilege but, disregarding this, it recommended that any Orders made under the power should be subject to the affirmative procedure in both Houses.

Reflections

Only one Localism Order has been forthcoming since 2011. In March 2014, the Draft Harrogate Stray Act 1985 (Tour de France) Order 2014 was laid before Parliament. The finish of the first 'Grand Depart' stage of the Tour was to take place adjacent to a large open area in the town known as the Stray, an open stretch of land protected by the Harrogate Stray Act 1985. Only by temporarily overriding this Act was it possible for Harrogate Borough Council to erect the grandstands and large TV screens for the event. Thus, the powers in the Localism Act were used to temporarily disapply the statutory provision that would otherwise have prevented the Council from welcoming the Tour to the town. Both the Commons and the Lords agreed that the Order should be subject to the negative resolution procedure and the matter was rapidly dispatched without debate. This was, certainly for sports fans, a useful application of delegated legislation. But that there has been only one

Localism Order so far suggests that there is a lack of enthusiasm, or perhaps even awareness of them in local government.

Turning back to the Bill, the number of secondary powers in it was not just a matter of convenience and timing but these factors certainly played an important part.

Ministers were, from the outset, privately concerned with some of the delegated power provisions, fearing that the balance between the powers and what went on the face of the Bill was driven by process and handling issues rather than policy. One minister suspected that Parliamentary Counsel and business managers were acting in tandem when on more than one occasion he was told that something couldn't go on the face of the Bill because they wouldn't have time to draft it.

Nonetheless, unlike the Public Bodies Bill, the government's proposals to reform organisations and governance structures in the local government field appeared in clauses on the face of the Bill rather than in schedules. However, several key criticisms can be levelled at the legislation.

Firstly, policy consultations – for example on social housing and community empowerment – were rushed or not completed in adequate time for Parliament to consider the responses, a consequence of which was that regulations were provided for in the Bill because the outcome of the proposed policy direction was not yet known at the time of drafting and parliamentary scrutiny.

Secondly, despite repeated requests for draft regulations – which might otherwise have acted as a useful brake on the convenience of the department saying 'our policy is not ready, please give us a power' – only one set was ever produced. Yet, despite parliamentarians being unhappy with both these circumstances, there were no sanctions that they could apply against the executive.

Thirdly, there was inconsistent drafting of powers and the scrutiny procedures assigned to them but these were only ever picked up in detail and dealt with in the House of Lords not the Commons. Despite past precedent in other legislation such as the 2000 Local Government Act, and the known views of the DPRRC, a number of upgrades to the scrutiny procedure had to be requested by the Committee.

Conversely, however, it could be said that the DPRRC's approach was too focused on precedent and scrutiny procedures to the detriment of addressing whether or not the substantial powers in the Bill were appropriate in the first place. Indeed, the Committee's own words acknowledged as much.

> *'The power given to the Secretary of State is very broad as is acknowledged in the memorandum. Were it not for the precedent…and the substantive and procedural safeguards in clauses 6 and 7 of the Bill, we might have found it unacceptable.'* [200]

[200] House of Lords Delegated Powers and Regulatory Reform Committee, 15th Report of Session 2010-12, *Education Bill and Localism Bill Parts 1-3*, HL Paper 163, para.16, p.6.

Can precedent and scrutiny procedure alone render an unacceptably broad power acceptable? Agreement with this premise would suggest that the executive might ride roughshod over Parliament in bringing forward wide powers but little will be done as long as a precedent can be cited and the proposed scrutiny procedure contains some enhanced safeguards.

But it is doubtful whether some of the provisions were within the boundary of acceptability. For example, in the section of the Bill dealing with Mayoral Development Corporations, powers were accorded to the Mayor of London not the Secretary of State. A broad range of functions and responsibilities were transferred to the Development Corporation once the Mayor approved its designation and the only obligation placed on the Mayor was to consult on the proposal. Ostensibly, the government's purpose here was to create a general power that would enable it to transfer the Olympic Park to the London Legacy Development Corporation rather than having to do so through a normal designation procedure that would raise complex questions of hybridity in relation to future scrutiny. In practice, however, it means there is a general power on the statute book that could now be applied anywhere.

Unlike the Public Bodies Bill, the Localism Bill began its passage in the House of Commons but it was still in the House of Lords that the detailed changes to the Bill in respect of delegated powers and scrutiny procedures emerged. It was the DPRRC that picked up inconsistencies in the drafting of the powers and the assigned procedures for each one. But it was also towards the House of Lords that many of the remarks at the Commons committee stage were directed: Members of the Public Bill Committee knew that, facing an in-built government majority they could not win many of the arguments. But they could highlight and encourage the House of Lords to take up their issues of concern. In total, the Bill received 70 hours of scrutiny in the House of Commons and 105 in the House of Lords.

Finally, at different stages of the Bill process, the lack of understanding among parliamentarians and other interested parties about the process of law-making, and delegated legislation in particular, was powerfully demonstrated.

At the drafting stage in Whitehall, there was a profound clash between politicians and lawyers in respect of their understanding of how law is produced. Ministers wanted plain English and more detail on the face of the Bill. But the nature of the UK's legislative system means that, in practice, it is rare that a bill explicitly delivers the policy principle asked for; rather, it amends other legislation to give effect to what is wanted. Or as one bill team official put it, 'politicians want to legislate on principles, whereas legislation legislates to change the law'. Local government is a creature of statute so to achieve the government's aims this Bill required substantial amendment of existing local government legislation. The result is that much gets lost in translation: politicians have a vision of achieving certain objectives, but what

they get is a tweak to legislation dating back decades which does what they wanted but does not look like what they expected.

The impact of devolution also complicated the drafting process and caused confusion among external groups, if not parliamentarians themselves. The Bill sought to reform the way local government worked including re-introducing the committee system. However, there was a problem as the government proposed only to re-introduce the system in England; but the original legislation that required amendment referred to both England and Wales. As such, dozens of 'England but not Wales' amendments were required throughout the Bill. One solution would have been an annex to the Bill that simply amended the existing legislation. However, early consideration of this option demonstrated that it would border on the incomprehensible and not meet the objective of legislative readability. Ministers therefore opted for what they believed to be a more transparent approach: to draft the Bill in such a way that it would strike out the existing system from the statute book, re-write the legislation and re-insert it back into law via the Bill.

This, however, had the effect of artificially inflating the number of secondary powers that it appeared the Secretary of State was claiming for himself. The powers in respect of local government organisation already existed – they were not new – they were simply tweaked in respect of their territorial application. Despite supporting the principle underpinning the change, however, bodies like the Local Government Association struggled to appreciate the context and criticised the government for the number of centralising powers being hoovered up by the Secretary of State, double-counting in some instances the number of powers actually set out in the Bill.

Outside bodies were not the only ones to misunderstand the powers that were being proposed. The parliamentary debates on the Bill reveal a worrying lack of understanding among Members – both MPs and Peers – about the concept of Henry VIII powers and their scrutiny processes. One opposition MP referred a number of times to the existence of 142 Henry VIII powers in the Bill when in fact there were only five. The others were delegated powers but they were not Henry VIII clauses that would have conferred extensive powers on ministers to amend or repeal primary legislation without further recourse to Parliament. And in the House of Lords debate it was evident that some Peers did not appreciate the different roles and functions of the Delegated Powers and Regulatory Reform Committee and the Joint Committee on Statutory Instruments.

Similarly, when Andrew Stunell MP, Parliamentary Under-Secretary of State at DCLG, argued in the Commons that 'If we are going to bust any barriers, going through primary legislation really is not the way to do it', it suggested that ministers did not really appreciate the true nature and implications of the super-affirmative procedure

they proposed to adopt.[201] At the time of the debate on the Localism Bill only 20 LROs had been passed since the 2006 Act and a memorandum by the Department for Business, Innovation and Skills suggested that departments might need to allow up to 11 months for them, from gestation to implementation.[202] Suggestions by ministers that the LRO model was a tried and tested method that could be applied in the circumstances now anticipated in the Localism Bill to drive through policy changes in quick time were thus somewhat wide of the mark. If the Orders were to take potentially a year to come to fruition, it could be argued it would have been just as quick to put the powers on the face of the Bill and dealt with the issues in primary legislation from the outset.

201 House of Commons, *Hansard*, 27 January 2011, col.241.

202 Department for Business, Innovation and Skills, *Legislative Reform Orders: Guide for Officials*, p.11.

8. Welfare Reform Act 2012

Running to 177 pages, the Welfare Reform Bill contained 374 delegated powers. It was an enabling bill in keeping with the settled regime of delegation in the highly complex and technical area of social security law. But the volume and scope of the powers was of such a scale that many parliamentarians as well as external stakeholders were united in their concern about the lack of detail, fearing that regulations were being used to mask incomplete policy formulation.

This chapter sets out how Parliament sought to scrutinise a skeleton bill where so much detail about the application of policy in key areas was missing. It explores the extent to which the views of the government and the Delegated Powers and Regulatory Reform Committee diverged in relation to the allocation of scrutiny procedures, and how the government sought to assert a first-time affirmative approach in the future use of many of the powers. It illustrates the difficulties caused when draft regulations are not available and how highly controversial areas of policy in relation to the Universal Credit, housing benefit, and the Personal Independence Payment thus received little detailed scrutiny in Parliament.

A skeleton bill

The detailed and complex character of welfare legislation results from successive administrations seeking to provide for a whole range of personal circumstances, particularly when concerned with means-tested benefits. Parliamentarians have neither the time nor expertise to scrutinise the vast amount of complex rules and regulations governing social security. Not only do the detailed rules and procedures governing the benefits system seem inappropriate to be included on the face of a Bill, but the changing nature of social security, and in particular the setting of fees and rates, requires a degree of freedom and flexibility so that they can be altered for differing economic and administrative circumstances.

The enabling character of social security legislation is therefore widely recognised and accepted. The National Insurance Act 1946 was described as a ‘skeleton Act’ and contained so many statutory rules and Orders that an external body, the National Insurance Advisory Committee, was established to scrutinise and analyse all proposed regulations resulting from the legislation and advise the minister accordingly.[203] In modern times, the Welfare Reform Acts of 2007, 2009, and 2012 and the Welfare Reform and Pensions Act of 1999 provided for a total of nearly 1,000 delegated powers.

203 The National Insurance Advisory Committee was the precursor to the Social Security Advisory Committee that was established as a statutory body in 1980.

In this context, the coalition government's welfare reform legislation – and its heavy reliance on delegated legislation – was not out of sync with past practice. Promising the greatest change to the welfare system in over 60 years, it sought to improve incentives to work, simplify the complex benefits system and reduce what ministers regarded as excessively high administrative costs. The central reform underpinning the Bill was the introduction of a new, integrated Universal Credit. It also created the legislative framework for the provision of a new Personal Independence Payment to replace the existing disability living allowance; changes to the administration of social security; new powers to deal with benefit fraud and the establishment of the Social Mobility and Child Poverty Commission. Within three months of taking office the coalition government produced a consultation paper *'21st Century Welfare'*, which was quickly followed by a White Paper, *'Universal Credit: welfare that works'* in November 2011, and a bill just two months later.

Ann McGuire MP described the Bill as 'skeletal in the extreme'; the clauses, she said 'have definitely been drafted with a broad brush, declaring an intent rather than giving details of what will happen' [204], while Liam Byrne MP warned, 'When so many details are unclear, the danger is that the Bill will unravel progressively as it comes into effect.' [205] Ministers were refreshingly candid about the lack of detail but assured Members that they would be provided at a later stage. But turning the oft-heard logic of the executive back on itself, the SDLP member, Mark Durkan, observed acidly that the government often said they agreed with the principle and stated objectives of a Private Members' Bill, but because they could see serious difficulties with how it might work in practice they voted it down.[206]

A legislative bookcase: but what about the shelves and books?

The Minister, Chris Grayling MP, defended the government's approach using the analogy of a bookshelf during committee stage consideration of the first two clauses of the Bill.

> *'For want of a better way of explaining it', he argued, 'they will create a bookcase on which we can lodge the books of the detail of the future benefits system … The Bill and the debate are about building that bookcase. We will do our best to explain our initial intentions about what should be put on the shelves, but …the debate is not about the detailed content of every single book.'* [207]

204 House of Commons, *Hansard*, 9 March 2011, col.979.
205 *Ibid*, col.936.
206 *Ibid*, col.1002.
207 House of Commons, *Hansard*, Welfare Reform Bill, Public Bill Committee, 29 March 2011, col.171.

For the opposition however, the problem was not the content of every book, but the lack of any sense as to where on the bookshelf ministers intended to position the shelves.

Summing up the position during committee stage, Labour's Stephen Timms concluded the Committee could not scrutinise the legislation, 'because Ministers have not yet decided what the legislation is'. [208]

The government's case for using delegated legislation to implement its proposed changes was set out in its Delegated Powers Memorandum:

> *'the proposed delegated powers will enable delegated legislation to provide the detailed rules of the new benefits, the way they are administered and appropriate transitional arrangements…this will provide the Secretary of State with the flexibility to amend the detailed rules easily, and within appropriate timescales, in the light of operational experience and other developments – while still ensuring that Parliamentary scrutiny is maintained'.* [209]

During the fifth sitting of the Public Bill Committee, the Minister Chris Grayling emphasised the need for flexibility. 'It is not always possible to provide everything that one could possibly wish to provide in a timely way', he said. 'It is also desirable to wait until measures are further down the track before finalising the details of how to deal with what can sometimes be complex circumstances.' [210]

Scrutiny concerns

Parliamentary debate about the delegation of power in the Bill was marked by three key themes. First, whether or not it was appropriate, given the sheer number of powers in the Bill, to observe past precedent in welfare legislation and accord most of the powers the negative procedure for parliamentary scrutiny. Second, the adoption of an approach begun under the previous Labour government of ascribing an affirmative procedure for the first exercise of the power and a negative for any subsequent use. And third, Members' desire to see draft regulations to help inform their discussions.

The government proposed that as most of the provisions dealt with technical or procedural detail all the powers would be subject to the negative procedure unless otherwise stated. The DPRRC acknowledged that in the social security arena, 'the great majority of delegated powers have by long-standing practice required only negative procedure scrutiny'. When considering recent social security bills the

208 House of Commons, Hansard, Welfare Reform Bill, Public Bill Committee, 29 March 2011, col.169.
209 House of Lords Delegated Powers and Regulatory Reform Committee, 17th Report of Session 2010-12, *Welfare Reform Bill*, HL Paper 182, Appendix 1, para.12.
210 House of Commons, *Hansard*, 9 March 2011, col.170.

Committee's approach had been to consider new powers and their level of scrutiny 'against the settled regime of wide delegation and a presumption in favour of the negative resolution procedure departing from that only where a new power seemed very significantly out of line with an existing comparator'.[211] However, due to the significant revision to the benefits system proposed in the Bill, the Committee concluded it need not afford the same significance to precedent as it had done previously.

First-time affirmative procedure

But during the course of the Commons scrutiny stages, as it became clear how unhappy Members were about the lack of detail regarding the proposed powers, the government adopted a new course, introducing amendments providing for the introduction of an 'affirmative in the first instance' procedure. This provided for a number of provisions to be subject to the affirmative procedure only on the first exercise of that power and then subject to the negative procedure thereafter. The DPRRC accepted that 'the first-time affirmative procedure is most obviously capable of being an effective control where a new regime is being established in subordinate legislation and is unlikely to change in any essential way'. However, it concluded that it might not necessarily be appropriate 'where there is no constraint on the opportunities for subsequent amendment, and particularly where the scale and impact of later changes could have a significant effect'.[212] Thus, throughout its report, if the Committee felt that the first-time affirmative was not necessarily inappropriate but had the potential to be significant, it recommended that, 'the House may wish to be satisfied by the Minister that the exercise of this power on the first occasion will sufficiently define the Government's approach, and that subsequent uses of the power will make only minor adjustments'.[213]

Draft regulations

There were constant calls for draft regulations to be provided throughout the Bill's passage through Parliament. Maeve McGoldrick of Community Links, giving evidence to the Public Bill Committee, argued that it was 'hard to judge the success of [the simplification of the process], because the regulations are not there at this stage and that is something that we have really tried to urge the Committee [PBC] to push for, because it is very hard to assess a number of the different clauses because of the lack of regulations'.[214] At the beginning of the PBC in the Commons,

211 House of Lords Delegated Powers and Regulatory Reform Committee, 17th Report of Session 2010-12, *Welfare Reform Bill*, HL Paper 182, p.5.

212 House of Lords Delegated Powers and Regulatory Reform Committee, 17th Report of Session 2010-12, *Welfare Reform Bill*, HL Paper 182, p.5.

213 *Ibid*, p.7.

214 House of Commons, *Hansard*, Welfare Reform Bill, Public Bill Committee, 22 March 2011, col.56.

Labour's Stephen Timms asked the Secretary of State to 'confirm that the Committee will see each set of regulations referred to in the Bill, or at least a summary of what those regulations will do, before we reach that clause in the Committee's debates?'[215] The minister confirmed that it was his intention, 'as far as is humanly possible, to make sure that when you reach that stage of the Bill, I can give you all this information. The commitment I make throughout is that, before the Committee stage is over, all this information that we are referring to should be available.'[216] However, his junior minister, Chris Grayling, attached a warning caveat: 'We will set out intentions right the way through, but this is still fundamentally an enabling Bill and we are discussing measures that create the framework and not the detail itself.'[217]

For MPs serving on the Public Bill Committee it was, in the words of one Conservative member, a 'frustrating experience' because of the lack of detail. Committee members had an interest in the subject and were being lobbied by interested groups, but the only response they could get from the government was that the detail would be provided at a 'later stage'. Members were being asked to approve a concept, 'but there was no explanation as to how it would work in practice – how it was to be implemented was a big question mark'. As a consequence, while there was a lot of debate for the first six or seven sessions, after this the mood on the Committee reportedly changed as Members concluded that the lack of detail rendered it a 'waste of time' and real engagement with the issues petered out.

The government did provide a considerable amount of supporting information throughout the process. For example, 15 Impact Assessments were published a day before first reading. However, given the number of changes made to the Bill during its passage through Parliament, many MPs were concerned by the department's failure to produce amended IAs. Some draft regulations were published at Public Bill Committee stage and notes were submitted by the DWP before each session but often Members felt it should have been done in a more timely fashion. On occasion regulations appeared only the night before they were to be discussed, and sometimes not at all. On three occasions the opposition spokesman, Stephen Timms MP, asked ministers for draft regulations during committee stage before they were forthcoming. Other Members often complained about the 'thinness' of the briefings provided by the Department in relation to the regulations.

Part one: Universal Credit

Universal Credit was a new benefit that would replace six existing benefits, namely income support, working tax credit, child tax credit, housing benefit, income-based

215 House of Commons, *Hansard*, Welfare Reform Bill, Public Bill Committee, 24 March 2011, col.160.

216 *Ibid*, col.161.

217 *Ibid*, col.162.

jobseeker's allowance and income-related employment support allowance. The twin aims of the new benefit were to simplify an overly complex benefit payments system and to smooth the transition into work with the introduction of a taper rate. A number of basic qualifying conditions were set out and an assessment period was stipulated before payment of the credit could be made. Income thresholds were to be set out in regulations and the Secretary of State was to have the power to place certain restrictions on entitlement. The Bill also provided for the Secretary of State to add to the list of basic conditions at any time by regulation. The DPRRC viewed this as a significant power that, 'on its face amounts to an unlimited delegation' and duly recommended that it be subject to the affirmative procedure that the government accepted.

In order to be entitled to Universal Credit, a claimant would have to accept and sign a 'claimant commitment' that set out their work-related requirements. In most cases this would mean being available to start work immediately, attend periodic interviews and apply for suggested vacancies. Failure to comply with these work-related requirements could result in sanctions including a reduction in Universal Credit for up to three years. Regulations governing this claimant commitment were originally made subject only to the negative procedure. The DPRRC again argued that this should be changed to the affirmative procedure and the government accepted this.

The award of Universal Credit would depend on a calculation whereby a 'maximum amount' was reduced by deductions. The detail of the formula for this calculation was to be left to regulations and the elements that might constitute the maximum amount could also be modified by regulations subject to the affirmative procedure in the first instance. However, exceptions to the elements contained in the calculation were to be subject only to the negative procedure. The DPRRC concluded that the exception powers were as significant as the modification powers and thus recommended the affirmative procedure in the first instance; again, this was accepted by the government. The Committee further criticised the fact that the principles governing the regulations were not set out in the government's Delegated Powers Memorandum, but somewhat weakly it did not ask for elucidation.

Part one of the Bill included a Henry VIII power to make consequential, supplementary, incidental or transitional provision in relation to any provision about Universal Credit. This was to be subject to the negative procedure. Unlike earlier welfare reform bills, this provision could include the amendment of Acts whenever passed. The government had originally suggested that when a power to amend a 'devolved' Act was exercised by ministers in the Scottish or Welsh government, this should require the affirmative procedure. However, when the power was exercised by the Secretary of State to amend an Act of the Westminster Parliament, only the negative procedure would be required. The department argued in the Delegated

Powers Memorandum that this was because it would be the first time either the Scottish Parliament or Welsh Assembly had exercised a power of this type. The DPRRC, unimpressed by the reasoning, recommended that the affirmative procedure should be used. On this occasion, however, the government stood firm and declined to accept the recommendation citing 'time issues' as necessitating the use of the negative procedure.

A number of external bodies also raised concerns about the housing costs element of the new credit. This effectively removed a 1992 piece of legislation that defined housing benefit and the principles that should underlie it. By removing this and replacing it with regulations, it laid a significant amount of power in the hands of a Secretary of State to reform housing benefit as they saw fit in the future. Shelter, for example, argued that rather than utilising regulations, the principles should be re-laid in the Bill, 'so that for future changes, we have to come back to a Committee such as this, rather than it just go through secondary legislation'.[218]

Part two: working age benefits

Provision was made in the Bill for changes to the responsibilities of claimants of jobseeker's allowance, employment support allowance and income support in the interim period before the introduction of Universal Credit. In essence it introduced the claimant commitment set out in part one for Universal Credit in which claimants placed in the work-related activity group would be subject to a work preparation requirement. The Bill also introduced an entitlement time limit to contributory employment support allowance (ESA) of 12 months for those in the work-related activity group. Welfare rights and disability organisations heavily criticised the proposal to time limit the contributory ESA which, they argued, would further undermine the contributory principle. The Bill also amended the 2009 Welfare Reform Act to provide that income support for lone parents be restricted to those with children under five rather than seven. Immigration status would not affect eligibility for those benefits that depended on National Insurance contributions. However, the Bill introduced a new requirement for claimants of certain benefits to a right to work in the UK and the Bill conferred a power on the Secretary of State, by regulation, to provide for exceptions to this rule.

The Bill also contained a clause that proposed to amend the current affirmative procedure for regulations made under the Jobseekers Act 1995. These regulations were quite extensive in that they affected the working requirements a claimant must satisfy when applying for jobseeker's allowance. The government's Delegated Powers Memorandum said it viewed the regulations as 'generally advantageous to JSA claimants' and that the affirmative procedure 'makes implementing…changes

[218] House of Commons, *Hansard*, Welfare Reform Bill, Public Bill Committee, 22 March 2011, col.136.

more onerous than it needs to be'.[219] However, as the DPRRC report noted, the Memorandum did 'not seek to explain why the powers are affirmative nor why it is thought that the objections of the Committee in 1995 to the negative procedure (after first exercise of the powers) no longer hold good. It is also not explained why it is thought that the powers might not now be exercised in a way that is disadvantageous to claimants.' [220] Here again, however, the government rejected the DPRRC recommendation. The change was, it argued, absolutely necessary. In 1995 the regulations had been ground-breaking and therefore the affirmative procedure was completely justified. However, 15 years of subsequent case law and administrative experience rendered the procedure unnecessary.

Part three: other benefit changes

The Bill also provided for the amendment of the Social Security Contributions and Benefits Act 1992. It conferred on ministers, by regulation, the power to restrict housing benefit for working age social tenants who occupy a larger property than their family size warrants and the power to re-set local housing allowance rates without reference to determinations from rent officers. The government proposed that the regulations should be subject to the negative procedure to allow legislation to be made as necessary to adapt to changing rental markets. The DPRRC concluded that the proposals would 'extend very significantly the Secretary of State's legislative powers in relation to housing benefit, so that he may, without any apparent constraint on the face of the Bill, provide that the amount of (for instance) a claimant's rent liability is to be treated as if it were some other amount entirely – which could be an amount significantly lower than the actual amount'.[221] The government accepted its recommendation that the regulations should thus be upgraded to the affirmative procedure on first exercise of the power.

Part four: Personal Independence Payment (PIP)

The Bill also replaced disability living allowance with a new cash benefit called the Personal Independence Payment (PIP). This was intended to support the extra costs incurred by long-term disabled people in overcoming the barriers they faced in trying to lead a full and active life. PIP was to comprise two separate components: one in respect of daily living, the other in respect of mobility. The key concepts – 'daily living activities' and 'mobility activities' – were to be defined in regulations and made subject to the negative procedure. However, the DPRRC concluded that the terms went 'to the very root of entitlement to the Personal Independence Payment' and

219 House of Lords Delegated Powers and Regulatory Reform Committee, 17th Report of Session 2010-12, *Welfare Reform Bill*, HL Paper 182, p.8.

220 *Ibid*, p.8.

221 *Ibid*, pp.8-9.

therefore recommended they be subject to the affirmative procedure.[222] In this instance the government compromised and agreed that they be subject to the affirmative procedure in the first instance only.

For each component there would be two rates; a standard and an enhanced rate. Entitlement to PIP would involve a new objective assessment the details of which would be set out in secondary legislation. The new assessment would determine the ability of an individual to perform specified activities, taking into account the impact of physical, sensory, mental, intellectual and cognitive impairments on the individual in undertaking the specified activities. Claimants would have to satisfy the conditions for six months before they could receive the benefit and there would be no automatic entitlement for people with particular conditions.

The government consulted on these proposals in December 2010 and confirmed that the responses would inform the secondary legislation that would detail the design of the benefit, including the requirements for the assessment. They were very candid about the reasons for this: a public consultation on the reform proposals had run until 14 February and the results were still being evaluated by the government. This was one of the key reasons why the PIP provisions included a range of regulation-making powers on the face of the Bill. In short, the policy was not yet fully formulated and therefore ministers proposed to take reserve powers to enable them to deliver it at a later date.

Schedule 9 gave the Secretary of State the power to amend, appeal or revoke other Acts of Parliament that were consequential on the PIP provisions. The government acknowledged that these were broad amending powers but were not unusual in circumstances where it is difficult to identify all the consequential amendments. A new benefit to replace Disability Living Allowance would have wide-ranging consequences and thus broad powers were deemed necessary. However, MPs were concerned at the lack of supporting information with regard to implementation of the PIP, believing this restricted their ability to properly test how the principles would be applied.

Part five: Social security

Finally, in the fifth part of the Bill provision was made to cap, by reference to the average earnings of working households in the UK, the amount of welfare benefit a household could receive. The benefit cap details were entirely prescribed in regulations, including how the amount of benefit in excess of the cap was to be calculated, how the benefits were to be reduced, and exceptions to the cap. In the

222 House of Lords Delegated Powers and Regulatory Reform Committee, 17th Report of Session 2010-12, *Welfare Reform Bill*, HL Paper 182, p.9.

DPRRC's view, this was a novel provision in social security law. As such the minister should explain to the House why more detail about the cap mechanism could not be included in the Bill itself with the regulations made subject to the affirmative procedure. The government accepted the upgrade to the affirmative procedure but didn't explain its position to the House.

Reflections

The government's welfare reforms have been beset by problems since the legislation was passed, with significant delays in implementation and resulting cost increases. It is doubtful whether these problems would have been avoided if the Bill had contained more detail – ultimately if the policy and implementation plans are flawed putting them on the face of a bill will not render them effective. But certainly, although skeleton legislation in the social security realm has been widely accepted in the past, this Bill did give rise to concern that it had stepped beyond the boundary of acceptability. As one of our consultees put it,

> *'in the past the government at least knew what the final body would look like when the skeleton was being constructed. That meant that when the Bill was being debated, ministers were in a position to give satisfactory answers to specific questions as to what the regulations would contain. More recently, it has become evident that the final body is somewhat different from what was originally envisaged, and that sometimes the skeleton has been drawn without any clear vision as to what it will eventually look like.'*

If government wants to push ahead with enabling powers on this scale there ought, at least, to be a greater commitment to providing draft regulations so that Members can make a more informed judgement about whether what is proposed will deliver the policy objective. Again this Bill also demonstrates how the government was inconsistent in its allocation of scrutiny procedures to powers, and how ultimately, if the government will not accept DPRRC recommendations there is little that can be done.

In March 2013, the Secretary of State for Pensions had to introduce new regulations to 'clarify' the impact of the changes to housing benefit set out in an earlier SI just a few weeks before they were due to be implemented when a political row broke out because foster carers and the families of armed services personnel serving in Afghanistan were to be detrimentally affected by the provisions.

And little more than two years after the legislation received Royal Assent, a Private Members' Bill was going through Parliament – with the active support of the Liberal Democrat members of the coalition – to introduce further changes to these housing benefit provisions popularly known as the 'bedroom tax'.[223] Since April 2013 council

[223] The Affordable Homes Bill (2014-15), a Private Members Ballot Bill sponsored by Andrew George MP.

and social housing tenants who have surplus bedrooms for their needs have had their housing benefit cut by 25%. The Affordable Housing Bill proposed that those tenants who cannot find a smaller home will be exempted form the cuts, as will disabled tenants who need a spare bedroom to house their mobility equipment or who have adapted homes. The Bill also required that the Secretary of State undertake a review of the availability of affordable and intermediate housing and make the report available to Parliament.

It is also too early to assess the impact of the order-making process in relation to this Act across such a wide policy landscape. At the time of writing 34 SIs have been laid before Parliament – 21 in relation to Universal Credit, jobseeker's allowance and employment and support allowance; five in relation to the Personal Independence Payment, disability living allowance, attendance allowance and carers allowance; four in relation to housing costs and one on council tax benefit; with a further three in miscellaneous areas. Already, however, the opposition has 'prayed' against one of the housing benefit Orders, using its opposition day debate to force a five-hour discussion on the Floor of the House rather than a debate in committee on the 12 November 2013.[224]

Many informed commentators in the social security field, including some of those who submitted responses to our consultation, fully expect that Parliament will be asked to approve repeated amendments to some SIs because a lack of scrutiny means the emergence of unforeseen consequences.

The Universal Credit and the bedroom tax are the two most widely recognised and controversial elements of the government's welfare reforms and the National Audit Office estimates that it will cost £2.4 billion to implement the Universal Credit programme alone.[225] Given the skeletal nature of the Welfare Reform Act much of the implementation is provided for in regulations, powerfully demonstrating how important delegated legislation is.

The Office of National Statistics reported that there were 1.22 million claimants of jobseeker's allowance in January 2014 [226], most of whom would be covered by Universal Credit as and when it is fully implemented. This gives a further sense of scale: minor errors in drafting of the regulations could potentially affect hundreds of thousands of people across the UK on any given day if government and Parliament do not get it right.

[224] House of Commons, *Hansard*, 12 November 2013, cols.823-920.
[225] National Audit Office, *Universal Credit: Early Progress*, HC 621, 5 September 2013.
[226] Office of National Statistics, *Labour Market Statistics: Claimant Count*, February 2014.

9. Policing and Crime Act 2009

The Policing and Crime Bill introduced to the House of Commons on 18 December 2008, covered a diverse range of Home Office related responsibilities. In 202 pages, the Bill's 91 clauses and 7 schedules introduced new powers to close brothels; created a new offence of paying for sex with someone who is controlled for gain; modified the law on soliciting; tightened up the regulation of lap-dancing clubs; amended police powers to deal with young people drinking in public; introduced a new mandatory code of practice for alcohol sales; amended the criminal asset recovery scheme established under the Proceeds of Crime Act 2002; and changed the arrangements for airport security and policing. And following publication, during the course of parliamentary scrutiny, its remit was extended still further to include gangs' injunctions and DNA sample regulations.

Widely criticised as a 'rag-bag' and a 'hotch-potch containing ingredients on matters that are barely related',[227] the nature of the legislative powers delegated to the executive and the insufficient parliamentary scrutiny for some of the statutory instruments also attracted considerable criticism. In total, there were 31 delegated powers included in the Bill, of which four were Henry VIII powers. This chapter explores some of the most controversial of those powers, detailing the differing perceptions of them in terms of their administrative and political importance and the role of the DPRRC in this debate. It sets out the difficulties Members face when they do not have access to draft regulations when considering framework powers, and how delegated legislation is used as a backstop when the government wants to introduce late changes to a bill.

Perceptions of importance: administrative or political change?

Of the Bill's four Henry VIII powers two, clauses 9(1) and 9(2)[228] concerned the definition of 'relevant service' in relation to police officers engaged on service outside their force. The clauses granted power to the Secretary of State to amend, by Order, the definition of 'relevant service' and the descriptions of service to which the Police Pensions Act applied. These were technical changes to provide for more flexible provision of secondments to a wider range of organisations in the future. Hitherto if the police service wished to add a type of service to those defined as 'relevant' for the purpose of secondments, then primary legislation was needed. A working party of the Police Advisory Board for England and Wales had identified this as a barrier to secondments and recommended the change. The changes were wide enough

227 House of Commons, *Hansard*, 19 January 2009, col.536.

228 Clauses 10(1) and 10(2) in the final Act.

to 'enable transitional, consequential, incidental and supplemental provision or savings to be made'. Normal practice is to use the affirmative procedure for Henry VIII powers, but the government recommended – and neither House objected – to the use of the negative procedure as the proposals were administrative and technical, and deemed non-controversial.

The Bill also established a statutory Police Senior Appointments Panel to advise the Secretary of State in connection with the appointment of senior officers. This panel was to replace the existing, non-statutory panel. The arrangements for the setting up and functioning of the Panel were to be established by Order through a delegation of power to the Secretary of State, although before making an Order the Secretary of State would be required to consult the current Panel. Laying out its case in the Delegated Powers Memorandum, the government argued that although the key functions of the Panel were set out in the Bill, as a new body it was important that sufficient flexibility be retained for any necessary additional functions to be conferred on it.[229] The DPRRC largely endorsed this view. There was a case for the arrangements to be set out in an SI subject to the negative procedure, but given that the functions of the Panel were purely advisory, then on balance it did not consider the absence of any parliamentary control inappropriate. However, in the event of any new functions being added, these would be exercisable only through a negative SI, at which point both Houses could consider whether these new functions were suitable to be conferred on a body established in accordance with arrangements decided by ministers rather than through regulations.[230]

However, the issue of the Panel's independence sparked vigorous debate in both Houses and among wider interested stakeholders. The government proposed that it would include members appointed and nominated by the Secretary of State and persons nominated by the Association of Police Authorities and by the Association of Chief Police Officers (ACPO). Liberty, (the civil liberties and human rights campaign organisation), in its evidence to the Joint Committee on Human Rights, for example, highlighted the undefined status of ACPO, whom the clause sought to include on a statutory basis. It was concerned that ACPO was being given a statutory role advising on the appointment of senior police officers that in turn raised important questions about its constitutional role which the legislation did not answer: was it an external reference group for ministers or a professional association protecting the interests of senior officers? [231]

229 House of Lords Delegated Powers and Regulatory Reform Committee, 9th Report of Session 2008-09, *Policing and Crime Bill*, HL Paper 110, Appendix 1, Memorandum by the Home Office, p.7.

230 *Ibid*, p.3.

231 Joint Committee on Human Rights, 10th Report of Session 2008-09, *Legislative Scrutiny: Policing and Crime Bill*, HC 395 and HL Paper 68, Memorandum from Liberty, Ev.33.

MPs complained during the Commons scrutiny stages that the Panel should have a genuine tripartite balance in its membership. And when the Bill arrived in the House of Lords on 20 May 2009, despite the DPRRC's apparent contentment, many Peers had serious reservations about the provisions. Baroness Harris of Richmond questioned whether 'the balance of responsibility for ensuring that police authorities get the right chief of police for their area could be skewed away from them and towards the Secretary of State'. The wording of the clause 'is so wide' she argued, 'that it could allow a future Home Secretary to appoint more government representatives and so upset that very delicate balance'.[232] On a similar note, Baroness Henig sought to amend the clause to make clear that 'the make-up of the panel needs to be balanced so that the Home Secretary's appointees cannot outnumber the appointees nominated by police authorities and chief officers'.[233] Viscount Bridgeman also tabled an amendment to remove the relevant sections of the clause arguing that the power was too wide, potentially opening up a much larger role for the Panel in the future.[234] Fellow Conservative Baroness Neville-Jones accepted the need for panel functions to be flexible but questioned why any changes were to be made by negative instrument.[235]

The minister, Lord West of Spithead, sought to defend the provision by praying in aid the position of the DPRRC noting that it did not consider the absence of parliamentary control to be inappropriate.

This defence was reiterated in respect of clause 3. Under existing legislation, ministers had the power to make regulations concerning the government, administration and conditions of service of police forces. Ministers proposed to amend this power in order for it to be used in connection with the appointment or promotion of senior officers and payments to those senior officers who ceased to hold office before the end of a fixed appointment. The government proposed that as the power was, in effect, a technical amendment to an existing power dating back to 1996, the scrutiny provisions should reflect those in the earlier legislation, namely a negative procedure. Throughout the second reading debate in the House of Lords the phrase 'steps to be taken in connection with the appointment of senior officers' was criticised as very wide-ranging and non-specific. As Baroness Harris again queried, 'This clause is not precise and could be interpreted in many ways. What are the limitations on these powers? How might they be used in future? Could they be used in ways that are not intended? How many of these powers are truly necessary and, if they are so important, why are they not placed in primary

232 House of Lords, *Hansard*, 22 June 2009, col.1372.

233 Ibid, col.1371.

234 Ibid, col.1376.

235 House of Lords, *Hansard*, 3 November 2009, col.188.

legislation?'[236] She sought to amend the clause to constrain the delegation of power to the Secretary of State by making it subject to the advice of Her Majesty's Chief Inspector of Constabulary. Again, however, the minister cited the DPRRC in defence of the government's position: 'our highly respected Delegated Powers and Regulatory Reform Committee has scrutinised the Bill and did not find the powers to make secondary legislation inappropriate' he argued.[237]

Twice, then, the influence and authority of the DPRRC was used as a defensive shield by ministers to both avoid engaging with the policy concerns and changing their position on the order-making powers and scrutiny mechanisms.

Draft regulations -vs- trust

Under the Proceeds of Crime Act a restraint order did not provide for a general power to retain property. In clause 50 the government therefore proposed a new power to enable the Secretary of State to add to the list of seizure powers in relation to which a restraint order might authorise the retention of seized property. Conferring power on ministers to amend existing primary legislation, the clause was a Henry VIII power that the government proposed should be subject to the affirmative resolution procedure.

In the House of Commons, the Conservative MP David Ruffley tabled an amendment arguing that 'given the nature of this proposed new power, it seems inappropriate for its potential scope to be expanded, rather than pursued into primary legislation'.[238] The minister Vernon Coaker responded that if the government did not have the necessary powers of search and seizure it would have no property to detain, thereby undermining the purpose of the policy.[239] He stressed that the order-making power would only enable the Secretary of State to add or remove a reference to a provision in an Act. It would not allow the minister to qualify a statutory provision or otherwise provide for any exceptions. If any future legislation created a new power of seizure then the power to amend the definition of a relevant seizure power to take account of this could be done by Order subject to the affirmative scrutiny procedure.[240]

The related clause 53 provided for a new power to be conferred on the Secretary of State to make a code of practice in connection with the exercise of the proposed new search and seizure powers. As the code would contain lengthy detailed provisions that are more suited to secondary legislation than primary legislation, it was included

236 House of Lords, *Hansard*, 3 June 2009, cols. 241-242.
237 House of Lords, *Hansard*, 3 November 2009, col.193.
238 House of Commons, 12th Sitting, Public Bill Committee, *Policing and Crime Bill*, 12 February 2009, col. 451.
239 *Ibid*, col.452.
240 *Ibid*, col.455.

as a delegated power subject to the affirmative procedure.[241] The code was to be published in draft, ministers were to be required to consider any representations on the draft, and it had to be laid before Parliament before the Secretary of State could bring it into operation by Order. The same procedure would apply to any proposed revisions to the code in the future and the government made clear that the detailed code was one of the safeguards to ensure that the powers were exercised proportionately in compliance with the European Convention on Human Rights. Nonetheless, the Joint Committee on Human Rights raised concerns about whether the 'safeguards which accompany these powers are adequate to ensure that the interference with human rights is proportionate to the legitimate aim pursued'.[242] The Committee asked the minister to provide details of the contents of the new code of practice as 'specific details of what that code will cover are not included in the Bill or Memorandum'.[243] It recommended that the draft code of practice 'be published without delay', so that parliamentarians might have an opportunity to look at it in conjunction with the Bill before completion of the scrutiny process.[244]

The Committee also expressed concerns about whether search and seizure of property would interfere with the right of 'peaceful enjoyment', for clause 53 in essence extended the power to seize property before conviction on suspicion of reasonable cause by police officers. Another area of concern was the level of judicial oversight of police in exercising their powers to seize or search property. It was proposed that Magistrates Courts might, by order, extend the period for which the property or any part of it might be detained under the regulations. Under the 2002 Proceeds of Crime Act only the Crown Court could make a restraint order. The Bar Council and Criminal Bar Association pointed to the precedent, arguing that the appropriate level of judicial oversight in any case of prolonged detention was the Crown Court and therefore it, not the Magistrates Court, should therefore oversee the power. They were further dissatisfied that such oversight might be dealt with in the code of practice.[245]

Liberty also criticised the use of a code of practice as an inadequate means of ensuring the proposed powers were exercised proportionately. They were 'too broad in scope' and undermined the presumption of innocence. Parliament should therefore oversee their exercise and they 'should not be left to be regulated by secondary instruments'.[246] During a public evidence session at the committee stage, Liberty's Anita Coles, reinforced the point: 'I do not think that it is appropriate that

241 House of Lords Delegated Powers and Regulatory Reform Committee, 9th Report of Session 2008-09, *Policing and Crime Bill*, HL Paper 110, Appendix 1, Memorandum by the Home Office, p.12.
242 Joint Committee on Human Rights, 10th Report of Session 2008-09, *Legislative Scrutiny: Policing and Crime Bill*, HC 395 and HL Paper 68, p.29.
243 *Ibid*, p.30.
244 *Ibid*, p.32.
245 *Ibid*, Memorandum from the General Council of the Bar, Ev.23.
246 *Ibid*, Memorandum from Liberty, Ev.32.

monitoring should be left to this sort of secondary mechanism. Parliament should consider the matter carefully before giving extra powers.' [247]

Defending the clause, the minister concurred that new seizure powers were potentially 'invasive and intrusive' and that the police and others must exercise them with caution. However, he argued that there were numerous safeguards 'to ensure that the powers are used proportionately'.[248] The seizure power would be exercisable only if the officer has reasonable grounds for it, there would be judicial oversight of any seizure of property, and defendants would have the right to apply for variation or discharge of the order. In this context the code of practice 'will be issued to provide further details on the exercise of the powers, with an emphasis on the proportionality requirements'.[249] He also noted that the law required that everything that the Secretary of State did must be compatible with convention rights.[250] The same principle applied to whoever exercised those powers, whether they be police officers or constables. Thus the government would not put into statute, on the face of the Bill, that enforcement agencies act in a way that is compatible with the European Convention on Human Rights 'because they are automatically required to do so'.[251]

In correspondence with the Joint Committee on Human Rights however, the minister made clear that the government would 'consider the need for further safeguards for possible inclusion in the code in the light of parliamentary scrutiny of the new powers'.[252] A draft skeleton code was sent to the JCHR in May but this was after the completion of the committee stage scrutiny in the House of Commons meaning that MPs did not have an opportunity to look at it when they were considering the relevant clauses. Indeed, throughout the committee stages, MPs across the House expressed concern that they were being asked to take ministerial reassurances about the content of the code on trust. The Conservative MP, James Brokenshire, summed up the position of many Members:

> *'One of the problems is that the Government's assurance always seems to be based on something that is not published, or is not available when we are considering significant and substantive powers sought in a Bill. It is difficult for members of the Committee to accept the Government's assurance when we have not seen the document and do not know what is in it.'* [253]

247 House of Commons, 3rd Sitting, Public Bill Committee, *Policing and Crime Bill*, 29 January 2009, col.97.

248 House of Commons, 12th Sitting, Public Bill Committee, *Policing and Crime Bill*, 12 February 2009, col. 453.

249 *Ibid*, col. 454.

250 House of Commons, 4th Sitting, Public Bill Committee, *Policing and Crime Bill*, 29 January 2009, col.126.

251 House of Commons, 12th Sitting, Public Bill Committee, *Policing and Crime Bill*, 12 February 2009, col. 453.

252 Joint Committee on Human Rights, 10th Report of Session 2008-09, *Legislative Scrutiny: Policing and Crime Bill*, HC 395 and HL Paper 68, Letter from Vernon Coaker MP, Minister of State, Home Office, to the Chair of the Committee, 9 February 2009, Ev.12.

253 House of Commons, 13th Sitting, Public Bill Committee, *Policing and Crime Bill*, 24 February 2009, col. 470.

The concerns were reiterated in the House of Lords some weeks later when the draft code was unavailable to Peers for consideration. Baroness Neville-Jones asked to view the draft before she took a final view on the proposed amendments.[254] The minister, Lord West, assured his colleagues that it was available and attempted to convey a picture of it by reading a passage from the draft. But as he then clarified,

> *'Your Lordships will note that the quote I have just given is not in full, grammatical English. That was not because I read it incorrectly, but because the skeleton code was drafted with bullet points rather than full sentences.'* [255]

He stressed that Peers would have an opportunity to scrutinise it before the powers came into force as the Order bringing the code into force would be subject to an affirmative resolution of both Houses.

Delegating inappropriately in haste

The most controversial clauses in the Bill were those conferring powers on the Secretary of State to make provisions related to the retention, use and destruction of DNA samples. The UK had a huge database of samples, the retention of which was indefinite rather than time-limited. Following a judgement in the European Court of Human Rights which found existing policy to be in breach of the right to respect for private life, the government argued that it had to respond without further delay.[256] In the unanimous judgment announced in December 2008 the Court held that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected, but not convicted, of offences failed to strike a fair balance between the competing public and private interests.

The new clauses to address this were introduced to the Bill at a very late stage, thereby leaving little time for detailed scrutiny and consideration of possible amendments. The Liberal Democrats' spokesman, Chris Huhne MP, described the inclusion of the provisions as 'one of the worst examples of bad practices that have grown up in the Chamber'.[257] But according to the government, the complexity of the case made it impossible to have proposals for primary legislation ready any earlier in response to a judgment that had been made just three months before.[258]

The new provisions conferred wide powers on the Secretary of State to make regulations on the retention, use and destruction of biometric data such as

254 House of Lords, *Hansard*, 20 October 2009, col.597.

255 House of Lords, *Hansard*, 20 October 2009, col.600.

256 The case of S and Marper-vs-United Kingdom, Judgement of the European Court of Human Rights, 4 December 2008.

257 House of Commons, *Hansard*, 19 May 2009, col.1351.

258 House of Commons, 16th Sitting, Public Bill Committee, *Policing and Crime Bill*, 26 February 2009, col.629.

fingerprints and DNA or other samples taken in the course of a police investigation of a criminal offence. The new clause allowed ministers to set time limits on keeping DNA information but did not set out how long these would be. The minister argued that the government was not in a position to provide detailed proposals at this stage but that the regulations would be subject to the affirmative resolution procedure allowing for parliamentary scrutiny at a later stage.

The government stated in the Delegated Powers Memorandum that the new powers would enable it to create a statutory framework setting out limits on the maximum retention periods for biometric data. Ministers said they had 'carefully considered' whether the governance of biometric samples was such an important issue that it could only be properly dealt with in primary legislation. However, they concluded that their approach, requiring a full consultation exercise before setting out the detail of the policy in regulations subject to the affirmative resolution procedure, 'has considerable advantages over the two principal alternative approaches, namely setting out the detail of the policy in this Bill or waiting to do so in future primary legislation'.[259] Since the European Court's judgement raised complex issues, setting out the detail of the policy in the Bill would result in 'fatally rushed' legislation.[260] But addressing the issues through delegated powers would provide for flexibility and consultation.

The Joint Committee on Human Rights responded with alarm that the substance of the new proposals 'will not be contained in primary legislation, subject to the usual scrutiny by both Houses. We strongly urge the Government to think again and to ensure that there is sufficient time for scrutiny of measures which, as the European Court has held, substantially interfere with the right to respect for private life.' [261] A number of organisations, in written evidence to the Committee, argued that primary legislation should be enacted when the government had finalised its plans. But the government's view was that any delays would simply lead to uncertainty for both the public and police, and raise the prospect of a legal challenge either in the UK or potentially in Strasbourg. The Home Office contended that relevant provisions might not reach the statute book for several years to come if the primary legislation route was followed.

The House of Lords Constitution Committee was not persuaded by the government's arguments declaring it 'wholly unacceptable that the important matter of retention of samples is to be dealt with by delegated legislation'. [262] It noted that

259 House of Lords Delegated Powers and Regulatory Reform Committee, 9th Report of Session 2008-09, *Policing and Crime Bill*, HL Paper 110, Appendix 1, Memorandum by the Home Office, pp.18-19.

260 *Ibid*, p.19.

261 Joint Committee on Human Rights, 10th Report of Session 2008-09, *Legislative Scrutiny: Policing and Crime Bill*, HC 395 and HL Paper 68, p.41.

262 House of Lords Select Committee on the Constitution, 16th Report of Session 2008-09, *Policing and Crime Bill*, HL Paper 128, p.5.

if the proposed powers and scrutiny mechanism were agreed, parliamentarians would not be in a position to amend the government's provisions; only primary legislation would facilitate this. 'Unamendable delegated legislation will not provide a sufficient opportunity for parliamentary oversight and control over the legal framework for the Government's policy', it concluded.[263]

Finally, the Delegated Powers and Regulatory Reform Committee also concluded that provisions for such a complex issue should be included in primary legislation and scrutinised in detail by Parliament.[264] It considered the powers to be extremely wide and recommended that they be removed from the Bill. However, if the House was convinced by the government's argument that there was not time for the matter to be left to future primary legislation then it suggested a strengthened scrutiny procedure as a last resort to constrain the power. But it noted that:

> *'though a super-affirmative procedure would allow both Houses to propose amendments, it would be up to the Government what changes it included in the draft instrument laid before Parliament for final approval, and that (unlike Bills) there is no mechanism for reconciling differences of view between the two Houses'.* [265]

During an earlier committee stage debate in the House of Commons, James Brokenshire MP had similarly argued that the affirmative resolution procedure would not allow for amendment of the regulations and the members of the DLC to which the SI would be referred would have only 90 minutes to discuss the fundamental issues at stake. The Home Secretary was asking Parliament to approve a wide-ranging authority on the basis of a promised consultation which, if the opposition agreed, would be tantamount to giving the government 'blank-cheque authorisation'.[266]

Paul Holmes MP echoed the concerns in similar terms:

> *'In asking us to pass the new clauses, the Government are asking us simply to trust them. They are saying, "We will get it right and will come back with the detail later this year, which you will not be able to amend, reject or throw out. You will have to like it or lump it, so trust us." Unfortunately, on this issue, we cannot do that.'* [267]

263 House of Lords Select Committee on the Constitution, 16th Report of Session 2008-09, *Policing and Crime Bill*, HL Paper 128, p.5.

264 House of Lords Delegated Powers and Regulatory Reform Committee, 9th Report of Session 2008-09, *Policing and Crime Bill*, HL Paper 110.

265 *Ibid*, p.5.

266 House of Commons, 16th Sitting, Public Bill Committee, *Policing and Crime Bill*, 26 February 2009, col.618.

267 *Ibid*, col.622.

Chris Huhne MP warned against the use of statutory instruments 'for a change that is of such significance and controversy that it should be properly debated on the Floor of the House and implemented through primary legislation'.[268]

Throughout the debate the Home Office minister, Alan Campbell MP, argued that the government had to respond within 12 months and 'the clock was ticking', all the while emphasising that Parliament would have the final say after a public consultation process.[269] James Brokenshire noted that the process might be acceptable if the mechanism allowed for amendments to which the minister responded that whilst an SI could not be amended it could be voted down. This triggered a debate about the value of SI committees, particularly given that the whips selected the members. The Conservative MP, Simon Burns, accused the minister of being 'slightly disingenuous if he is suggesting that members of statutory instrument committees are not hand-picked'.[270] The membership was picked by whips, he argued, thus reducing any serious prospect that the provisions would be rejected in the future.

When the Bill reached the House of Lords, Baroness Miller argued that the way the government treated the Bill in the House of Commons made 'a mockery of the democratic process [since] issues of major principle were not even debated at all, including the retention of DNA samples, profiles and fingerprints'.[271] Baroness Harris urged that the proposals be removed from the Bill, as it was imperative that Parliament properly scrutinise the provisions. The crux of the difficulties was summed up by Baroness Neville-Jones: 'The problem was that we were presented with nothing more than a framework power, giving the Secretary of State the power to introduce whatever he wanted via secondary legislation. It is not surprising that this has come in for criticism from all sides.' [272]

During the October committee sessions it became clear that the proposals would not get through the House of Lords without heavy amendment and possibly even rejection and the government consequently conceded defeat. The minister, Alan Campbell concluded, 'given the strength of feeling on this issue, and the importance of ensuring that we move forward with consensus, we accept the view that the issue would be dealt with more appropriately in primary legislation'.[273] The clauses were withdrawn and the provisions were subsequently introduced in the next session as part of the Crime and Security Bill. This legislation was laid before Parliament on 20 November 2009 just a week after the Policing and Crime Bill received Royal Assent.

268 House of Commons, *Hansard*, 19 May 2009, col.1371.
269 House of Commons, 16th Sitting, Public Bill Committee, *Policing and Crime Bill*, 26 February 2009, col.623.
270 *Ibid*, col.625.
271 House of Lords, *Hansard*, 3 June 2009, col.235.
272 House of Lords, *Hansard*, 20 October 2009, col.666.
273 House of Commons, *Hansard*, 12 November 2009, col.411.

Reflections

The debate on this Bill reveals the difficulties at the heart of the delegated legislation process when there are significant differences of view about whether or not a proposal is purely administrative in its effect. Such judgements depend on where one stands in the policy and political process. Issues such as the appointment of members to the Police Appointments Panel and the introduction of a code of practice were treated, in legislative terms, as administrative functions suitable to be dealt with through delegated powers. However, the application and implementation of such functions in an area such as crime and policing – for example, the implications of the code of practice in relation to civil liberties – is intensely political and therefore of great interest to parliamentarians.

Linked to this problem, the Bill also demonstrates the extent to which there may be dangers in excessive reliance on the recommendations of the DPRRC. The approach and findings of the Committee are not always in tandem with the concerns of MPs and Peers and its position is not infallible. When the Committee reported on the Bill, once the Commons stages were complete, it did not comment adversely on four of the clauses (2, 3, 50 and 53) that had clearly exercised MPs during their consideration of the legislation, one of which (clause 50) was a Henry VIII power. But, conversely, it did register a concern about one clause (95) that was never debated by MPs. Here it encouraged Peers to invite the government to explain the absence of any parliamentary control in instances when ministers wanted to use the power to alter information in relation to criminal records applications but the matter was not taken up.

Although the Committee does valuable work, excessive reliance on its recommendations as the key mechanism to constrain government overreach in the use and application of delegated powers means that some issues of intense political concern may be missed. At the same time, there is a risk that Peers, taking their cue from earlier debate in the House of Commons, may miss things that are technically and procedurally important if they focus on this rather than the DPRRC's concerns. Debate on this Bill also shows how the view of the DPRRC can sometimes be used by ministers to try and limit discussion and questions on issues they would rather avoid.

This Bill also usefully demonstrates how the tendency to treat Henry VIII powers as an intrinsically bad thing can be misplaced. Granting power to ministers to amend legislation by Order is not necessarily a bad thing: it is the potential scope and impact of the proposed amendment that should be of concern and in this legislation, the scope and perceived impact was limited.

Finally, the late addition of the DNA clauses to the Bill reveals a vitally important aspect of the delegated legislation process. Where clauses are laid very late, often

at report stage, the issues they concern will, in practice, receive little scrutiny if placed on the face of a bill, particularly in the House of Commons where debate is programmed. However, if the amendments provide for delegated powers then there is at least the prospect that the Secondary Legislation Scrutiny Committee or the Joint Committee on Secondary Instruments might exercise some influence on the SI that subsequently emerges, and there is the possibility of a debate.

So the system of delegation provides for some form of scrutiny that under the current scrutiny system for primary legislation would otherwise be absent in these circumstances. Fundamentally, however, it is an inadequate backstop when Members do not have the ability to amend SIs. It is grasping at straws to argue that a flawed system of scrutiny for delegated powers is an appropriate, let alone effective solution to the wider systemic flaws of the primary legislative process that permits the government to introduce clauses at such a late stage in the first place. That the government withdrew the clauses and subsequently brought them forward as primary legislation in a new bill illustrates that the government's desire to legislate quickly does not necessarily amount to 'emergency' circumstances that justify the use of delegated powers.

10. Banking Act 2009

The Banking Bill was introduced in the House of Commons in October 2008 as part of the government's legislative response to the global financial crisis of 2007-2008. It sought to rectify the legal and procedural deficiencies that had been exposed by the financial crisis and the government's efforts to deal with failing banks. The subject of extensive consultation and consideration by the Treasury Select Committee, the Bill extended the temporary emergency powers that had been set out in the Banking (Special Provisions) Act 2008 following the collapse and nationalisation of Northern Rock Bank and which were due to expire on 20 February 2009. It provided what were known as the Tripartite Authorities (the Bank of England (BoE), the Financial Services Authority (FSA) and HM Treasury (HMT)) with a number of powers to deal with banks in serious financial difficulty, in order to maintain financial stability and protect depositors.

This chapter highlights the far-reaching powers provided in the Bill, including significant delegations of power to the Bank of England. It details how, throughout the scrutiny process, the government emphasised that these were extraordinary powers for an extraordinary time, to be used as a last resort, if at all, and the efforts made by parliamentarians to constrain them. Exploring the Bill's heavy reliance on secondary legislation, it sets out how external organisations sought to influence key aspects of the complex and highly technical legislation, and looks at the emergence of a new advisory body, the Banking Liaison Panel, to advise ministers on the secondary legislation in light of banking and market developments in the future.

Background: The Banking (Special Provisions) Act 2008

At the height of the financial crisis the government concluded that normal insolvency and administration procedures would fail to cope with the imminent collapse of a failing bank without substantive intervention by the state and its associated authorities. The procedures were simply too lengthy and gave rise to too much uncertainty. The Banking (Special Provisions) Bill was therefore published on 17 February 2008 and, reflecting the emergency nature of the situation, it passed into law in just two days. The Bill crucially provided a mechanism by which the Treasury could bring Northern Rock Bank into temporary public ownership. It did not specifically identify Northern Rock in order to avoid the parliamentary complications of private legislation, but assurances were given by the government that specified conditions would have to be met before a financial institution could be brought into public ownership, and that the powers would not be used for other banks in financial difficulty. Nevertheless, concern was raised during the course of parliamentary scrutiny of the Bill that the powers conferred were too broad for an emergency piece

of legislation. A sunset clause was therefore agreed whereby the powers would expire a year later on 20 February 2009.

A key aspect of the Bill was the development of what was known as the Special Resolution Regime. During the passage of the Bill, the Treasury confirmed that permanent legislation for safeguarding financial stability was being developed and this duly appeared in the form of the 2009 Bill. However, a number of key players in the process were sceptical about the legislative timetable for this new Bill, believing that there was insufficient time for the policy provisions to be worked through properly before the sunset clause expired. The Governor of the Bank of England, Mervyn King, a strong advocate for the legislation, was nevertheless cautious about the need to get it right.[274] The British Bankers' Association summed up the choice facing parliamentarians: 'The fundamental issue here is whether the overriding priority is to get this right or whether the need for legislation before the scheduled dissolution of the temporary powers obtained under the Banking (Special Provisions) Act 2008 should be the principal determining factor.' [275] The Treasury Select Committee was not convinced that it would be possible for the government to 'prepare a polished and complete Bill in time for publication' in October.[276]

Nonetheless, despite these concerns, the new Bill received its first reading in the House of Commons that month. But to enable the House of Lords to have sufficient time for scrutiny, an unusual No.2 Bill procedure was adopted whereby an identical bill to that in the Commons – the Banking No.2 Bill – was brought before the House of Lords and on 16 December received its second reading. Once the Banking Bill arrived from the House of Commons later in the week, the No.2 Bill was dropped and committee consideration continued on the original Bill. The procedure enabled the House of Lords to begin its committee scrutiny immediately after the Christmas recess.

Comprising seven substantive parts and 265 clauses, the Bill was heavily dependent on secondary legislation that ministers envisaged might need to be first exercised in a time of urgency and therefore was deliberately designed to make heavy use of the draft affirmative procedure. 'In preparing the permanent replacement to the Special Provisions Act, considerable attention has been given to refining the broad powers conferred in that Act' the Treasury argued. 'The provisions of the Bill balance this refinement with the need to have powers fit for the purpose of resolving the extremely complex and varied affairs of failing banks.' [277]

274 Oral evidence to the House of Commons Treasury Select Committee, 22 July 2008, in House of Commons Treasury Select Committee, 17th Report of Session 2007-08, *Banking Reform*, HC 1008, Ev.16.

275 Memorandum from the British Bankers' Association to the House of Commons Treasury Select Committee, 30 July 2008, para.48.

276 House of Commons Treasury Select Committee, 17th Report of Session 2007-08, *Banking Reform*, HC 1008, para.18, pp.7-8.

277 House of Lords Delegated Powers and Regulatory Reform Committee, 1st Report of Session 2008-09, *Banking (No.2) Bill*, HL Paper 12, Appendix 1, A Memorandum by HM Treasury, p.28.

Some of these powers were conferred not on ministers but on the Bank of England. The Treasury's detailed Delegated Powers Memorandum for the DPRRC accepted that the Bank was not directly accountable to Parliament but argued that the important operational functions present in the Bill required the Bank's technical expertise. All the broad delegated powers in the Bill were, it contended, subject to ministerial and parliamentary control and the powers conferred on the Bank of England were safeguarded by the decision to enhance the Bank's governance and accountability mechanisms in the Bill.

The DPRRC acknowledged that the 'model of conferring important operational functions, especially where they are based on technical expertise, to an appropriate independent agency is well-established in the UK'.[278] However, mindful that the powers could be used without a parliamentary procedure, Members, particularly in the House of Lords, focused on the scope of the powers and sought on occasion to narrow them if they felt they ranged too widely.

The Special Resolution Regime

The Bill established a permanent Special Resolution Regime (SRR) that would allow the Bank of England, the Treasury, or the FSA to deal swiftly with banks in financial difficulty by exercising one of three stabilisation options:

1. to transfer all or part of the failing bank to a private sector purchaser;
2. to transfer all or part of the failing bank's business to a 'bridge bank' owned by the Bank of England;
3. to transfer the failing bank, or its holding company, into temporary public ownership.

The SRR was to be governed by five statutory objectives which had to be considered before any powers were exercised: to protect and enhance the stability of the financial systems of the UK; to protect and enhance public confidence in the stability of the banking systems of the UK; to protect depositors; to protect public funds; and to avoid interfering with property rights in contravention of the Human Rights Act 1998.[279] The Bill conferred 'stabilisation powers' that were to be used to implement the stabilisation options and these could only be exercised over a deposit-taking institution or investment firm if the Prudential Regulation Authority (PRA), or in some cases the Financial Conduct Authority (FCA) was satisfied that the following 'general conditions' were met: that the firm was failing, or was likely to fail, to satisfy the

278 House of Lords Delegated Powers and Regulatory Reform Committee, 1st Report of Session 2008-09, *Banking (No.2) Bill*, HL Paper 12, Appendix 1, A Memorandum by HM Treasury, para.50, p.21.

279 These were subsequently augmented when the Act was amended in the Financial Services Act 2012 to include two new objectives: to protect client assets and to minimise adverse effects on institutions that support the operation of financial markets, such as investment exchanges and clearing houses.

threshold conditions; and having regard to timing and other relevant circumstances, it was not deemed reasonably likely that, ignoring the stabilisation powers, action would be taken that would enable the firm to satisfy the threshold conditions.

The operation of the Special Resolution Regime was heavily reliant on extensive consultation and communication between the Tripartite Authorities. The FSA was to have overall responsibility for deciding whether a bank had failed, as measured by the troubled bank's ability to meet a series of threshold conditions set out in the Financial Services and Markets Act 2000. Once it had determined that a bank had failed, the Bank of England would be responsible for deciding which of the three stabilisation options to use. The Treasury would be responsible for any decisions involving public money. The implementation of the private sector purchaser and bridge bank options rested with the Bank of England whilst the Treasury would be responsible for taking a failing bank into public ownership.

The stabilisation options would be exercised through a number of stabilisation transfer powers conferred upon the relevant responsible authority (the Bank of England or Treasury). In the case of the first stabilisation option, the Bank of England had the power, via instrument, to transfer securities in a failing bank or transfer some or all of the failing bank's property (including rights and liabilities). Under option two, the Bank of England again had the power to transfer, via instrument, some or all of the failing bank's property and if temporary public ownership was required, the Treasury had the power, by Order, to transfer securities in a bank.

These transfer powers raised concern for if the safeguards were all placed in secondary rather than primary legislation, then it could, potentially, result in a situation whereby a transfer instrument or Order was implemented before the safeguards had been published.

Additionally, any SIs made by the Bank of England would not be subject to parliamentary scrutiny whilst ministerial Orders would be subject to the negative procedure. As the government's Delegated Powers Memorandum explained:

> *'the negative procedure is deemed appropriate for two key reasons: speed and certainty…The government considers it appropriate to select the procedure that will provide purchasers and other bank counterparties with the maximum possible amount of certainty in the transaction while recognising the need for the transfer orders to be subject to parliamentary procedure.'* [280]

The Delegated Powers and Regulatory Reform Committee recommended that the House of Lords should seek a justification for the absence of parliamentary procedure relating to Bank of England transfer instruments, but accepted that the

[280] House of Lords Delegated Powers and Regulatory Reform Committee, 1st Report of Session 2008-09, *Banking (No.2) Bill*, HL Paper 12, Appendix 1, A Memorandum by HM Treasury, p.38.

Committee had approved the negative procedure for Treasury instruments in the Banking (Special Provisions) Act and would not consider the matter again.

The Bill also conferred powers on both the Bank of England and HMT to make the property and share transfer powers more effective. Clause 71 provided that a transfer instrument or Order may make provision in relation to a pension scheme owned or employed by the failing bank. Clause 74 conferred powers on the Treasury to make regulations to modify or disapply tax provision in an enactment or to extend, restrict or modify a charge to tax. This power was subject to the draft affirmative procedure. Importantly, as a fiscal instrument it would also be considered only by the House of Commons.

A Code of Practice

In recognising that the Special Resolution Regime powers were to be used in extraordinary circumstances, two 'general' and three 'specific' conditions were to be satisfied and were laid in statute, namely that:

- the bank is failing or is likely to fail (based on the Financial Services and Markets Act 2000 'threshold conditions');
- it was not likely that action will be taken by the bank to satisfy the 'threshold conditions';
- exercise of the power is necessary for the stability of the financial systems in the UK;
- exercise of the power is necessary for the maintenance of public confidence in the stability of the banking systems in the UK; and
- exercise of the power is necessary for the protection of depositors.

The key procedural elements of the Special Resolution Regime, including the general principles, were to be set out in non-binding guidance that was to cover:

- how the objectives of the regime were to be understood and implemented;
- the choice between different options;
- advice about how the powers were to be used;
- how to determine whether tests and conditions were met;
- compensation; and
- transfer power safeguards.

A number of stakeholder groups questioned the appropriateness of relying on a code of practice to implement the Special Resolution Regime, foremost among them the British Bankers' Association. During the consultation period it had raised concerns about the legal status of the code and the extent to which, if it took the form of non-binding guidance, it would mitigate any legal uncertainty in a crisis

situation. For example a law firm, it argued, would not be able to place any reliance upon it when drawing up a legal opinion. It was also concerned at the idea of the policy intentions of the safeguards being articulated in a code rather than on the face of the Bill. It wanted the principles governing the safeguards to be enshrined in the legislation itself. [281]

The Bill's heavy dependence on the code was repeatedly brought up in the Commons during second reading and committee stage debates. Concerns were expressed both about those that it was envisaged would be consulted, and the need for wider input from practitioners to ensure that it was practical and avoided unintended consequences. Requests were made for a draft code to be made available during consideration in committee. The Chancellor indicated that it had been agreed in principle by the usual channels that the special resolution regime would be considered at the very end of the parliamentary process in order to allow sufficient time for a draft code of practice to be made available and to enable the general principles behind some of the secondary legislation associated with the regime to be considered alongside the Bill and the code. A draft was eventually presented but was heavily criticised for a lack of detail. The Conservative MP, Mark Hoban concluded,

> *'if the use of invasive powers in the Bill is perceived to be unconstrained, markets will make their own judgments on whether they should invest in British banks. If the code as redrafted does not provide significantly greater detail on how and when the powers will be used, there will be demand for the constraints to be in the Bill rather than the code.'* [282]

But his concerns were not to be satisfied: the code was not redrafted and the constraints were not moved to the face of the Bill. Again, as on so many other occasions, despite the perceived importance of the regulations or codes, the government either resisted completely, or produced incomplete and inadequate draft examples of how they intended to use the extensive powers they sought.

The Financial Services Compensation Scheme

The Financial Services Compensation Scheme (FSCS) was a fund of last resort that was called on to protect investors and depositors when an institution could no longer meet its liabilities. Income streams for the FSCS came from levies and recoveries from insolvent firms. This section of the Bill streamlined the procedure whereby payments would be made with a view to speeding up the process such that payments could be made within a week of a bank closing.

281 British Bankers' Association, Response to the Tripartite Authorities consultation, *Banking Reform – Protecting Depositors*, 2007.

282 House of Commons, 11th Sitting, Public Bill Committee, *Banking Bill*, 6 November 2008, col.341.

The opposition questioned the scope of this wide-ranging power, probing specifically to confirm whether it would apply just to banking or to other areas of regulated financial services activity. Beyond this, the future funding of the FSCS and the proposal for a pre-funded contingency element were the focus of parliamentary scrutiny. Unsurprisingly, the banking industry was opposed to the proposals to pay up front to build a fund when many were struggling to rebuild their balance sheets. The government sought a compromise and legislated for the Treasury to make regulations allowing for the pre-funding of the FSCS if this was deemed appropriate at the time. Given the conditions of urgency that would attract to any use of the power, and the fact that it related to a new levy, the DPRRC recommended that the scrutiny mechanism be upgraded to the 28-day affirmative procedure, which was duly accepted by the government.

Precedent and the power to change the law if ministers 'desire'

Beyond the code of practice debate, the most controversial element of the Bill proved to be the inclusion of a very broad Henry VIII power which conferred power on ministers to 'disapply or modify the effect of a provision' in any Act of Parliament (except the Banking Act itself) or delegated legislation by Order, subject to the draft affirmative procedure. Both the Constitution Committee and the DPRRC described it as 'an extremely wide power'. [283]

The Treasury justified it on the grounds that the Special Resolution Regime would operate against a complex background of legal rules in other statutes and that it was not possible to foresee how these would interact and affect each other. It cited a number of precedents where a Henry VIII power had been used to similar effect including the Criminal Justice and Immigration Act 2008 and the Safeguarding Vulnerable Groups Act 2006. The power sought was not, it argued, a general one but was targeted and restricted to the special resolution regime objectives and stabilisation options. [284]

At committee stage in the House of Commons the opposition were concerned that the power was insufficiently constrained which would in itself create uncertainty for financial institutions. The requirement that the Treasury, in utilising the power, must 'have regard to the special resolution objectives' was deemed an 'insufficiently strong' test. 'The wording is so weak' argued David Gauke MP for the Conservatives, 'that it seems to attempt to avoid any kind of judicial review of

283 See House of Lords Delegated Powers and Regulatory Reform Committee, 1st Report of Session 2008-09, *Banking (No.2) Bill*, HL Paper 12, para.6, and House of Lords Select Committee on the Constitution, 3rd Report of Session 2008-09, *Banking (No.2) Bill*, HL Paper 19, para.2, p.3.

284 House of Lords Delegated Powers and Regulatory Reform Committee, 1st Report of Session 2008-09, *Banking (No.2) Bill*, HL Paper 12, Appendix 1, A Memorandum by HM Treasury, p.49.

decisions made under the clause. It needs to be toughened up, so that the Treasury is at the very least "satisfied" that there is systemic risk before using the powers.' He expressed concern that the powers might be used as a routine way to improve the legislation. 'It is the purpose of the Committee to examine and improve the Bill, and it is not appropriate for the Government subsequently to be able to do so by producing an unamendable order.' [285]

In an effort to assuage Members' concerns, the minister set out the two ways in which the Treasury envisaged using the power. Firstly, it could make a specific amendment to a piece of legislation for the purposes of making effective the resolution of a specific bank. But this would only apply to that specific bank and would be localised to the particular resolution. Alternatively, the second approach would be for the Treasury to amend legislation that applied to all resolutions or class of resolutions under the SRR. Here it might, for example, disapply a provision in the Companies Act in relation to bridge banks. This would therefore apply in each resolution in which the Bank of England used the bridge bank tool but it would not apply to other banks. This power to amend was sought to ensure that the special resolution regime was 'future-proofed' as financial markets and the banking sector developed over time.

In practice however, the wording of the provisions in the Bill would, if desired, enable ministers to go far beyond this approach at any point in the future and once the Bill reached the House of Lords this section consequently ran into some opposition.

Despite the nature of the power, the DPRRC made no recommendation as to its scrutiny, it merely drew the matter to the attention of the House so that Members might satisfy themselves that the unusual context justified the provision. The Constitution Committee also accepted the need for the power given the circumstances, but was keen to stress that it not be used as a precedent for justifying the inclusion of the power in future bills. It was particularly concerned that the provision in sub-section three of the clause would,

> *'enable the Treasury to "make provision which has retrospective effect in so far as the Treasury consider it necessary or desirable for giving effect to the particular exercise of a power under this Act in connection with which the Order is made".'* [286]

There was no known model of a parallel power in existing legislation based on a minister's perception of what was 'desirable' rather than necessary.

285 House of Commons, 15th Sitting, Public Bill Committee, *Banking Bill*, 13 November 2008, col.462.

286 House of Lords Select Committee on the Constitution, 3rd Report of Session 2008-09, *Banking (No.2) Bill*, HL Paper 19, para.6, p.4.

When asked to explain during the report stage debate how the Order might be used in a context deemed 'desirable' but where the phrase 'necessary' was insufficient for ministerial purposes the minister, Lord Davies of Oldham, struggled.

> *'Where a drafting error has been identified, leading to confusion and uncertainty as to whether the intended result has been achieved, it may be difficult to say that it is "necessary" to amend the instrument retrospectively', he said. 'It may be possible for the parties to muddle through on the basis of the existing wording, in many cases living with the possibility of litigation on the point. However, that is not desirable; it is far better to put the parties in the position that they thought they were in. The amendment [to remove the word desirable] would probably prevent us achieving the security for the parties involved so that no one could challenge their position.'* [287]

In later correspondence with Lord Goodlad, the Chair of the Constitution Committee, the Treasury minister, Lord Myners, sought to elucidate the position still further:

> *'It may well be that overall it is in the public interest to legislate with retrospective effect notwithstanding that it cannot be clearly said that it is "necessary" to do so. The test included in the Act – "necessary or desirable" – ensures that the Government can take appropriate action to ensure that the transfers affected under the Act operate in an effective manner.'* [288]

A number of Peers, unconvinced by the arguments, brought forward a series of amendments. In addition to removing the term 'desirable' altogether, others proposed to limit the use of the power by the addition of the phrase 'if there are compelling reasons to do so'. But the Treasury resisted; given the complexity of banking business, it might not be possible to identify all the statutory barriers in any given circumstance before making a transfer. Thus 'in a fast-burn situation there is the unavoidable risk that the due diligence to identify the impediment may not be completed until after the transfer has in fact taken place'.[289] The Constitution Committee was not persuaded, arguing that there must be a 'compelling reason in the public interest for a departure from the general principle that retrospective legislation is undesirable'.[290] The government had not, in its view, made that case and ministers were asked to re-examine the provisions and explore ways to target

287 House of Lords, *Hansard*, 3 February 2009, col.567.

288 House of Lords Select Committee on the Constitution, 11th Report of Session 2008-09, *Banking Act 2009, Supplementary Report on Retrospective Legislation*, HL Paper 97, Letter from Lord Myners to Lord Goodlad, 19 March 2009, p.7.

289 House of Lords Delegated Powers and Regulatory Reform Committee, 1st Report of Session 2008-09, *Banking (No.2) Bill*, HL Paper 12, Appendix 1, A Memorandum by HM Treasury, para.232. p.50.

290 House of Lords Select Committee on the Constitution, 11th Report of Session 2008-09, *Banking Act 2009, Supplementary Report on Retrospective Legislation*, HL Paper 97, para.10, p.4.

the power more narrowly. In correspondence with ministers, the Chair of the Committee, Lord Goodlad, made their position clear:

> *'We accepted that, in the particular context of this Bill, powers to change the law retrospectively where it is necessary to do so are constitutionally acceptable; what we did not accept is that it can ever be constitutionally appropriate for the executive branch of government to impose retrospective changes in the law on the basis that it is merely desirable to do so.'* [291]

The government's solution was to bring forward an amendment to augment the clause by adding, at the end, the following: '(but in relying on this subsection the Treasury shall have regard to the fact that it is in the public interest to avoid retrospective legislation)'.[292] Having failed to offer Peers any substantive and compelling example of a precedent for retrospective legislation, it recognised the constitutional concerns of such legislation on the face of the Bill. The Constitution Committee, however, took the unusual step of issuing a follow-up report on the power in which it concluded,

> *'It remains our view that "desirability" should not be a basis on which to allow ministers to change the law retrospectively. We note Lord Myners' statement that section 75(3) of the Banking Act 2009 "does not set a precedent for the use of retrospective powers". The fact of the matter is, however, that a precedent has been set. It is not, in our view, an acceptable precedent.'* [293]

The Banking Liaison Panel

In October 2008 the Treasury set up an Expert Liaison Group consisting of representatives from the Tripartite Authorities, persons it believed were 'able to represent banks and persons that have expertise in financial services and insolvency law'.[294] The purpose of the group was to advise the government on the development of delegated legislation conferred in parts 1 to 3 of the Bill and to, 'help review secondary legislation in light of practical experience and developments in the financial markets'.[295] The Group's existence was formalised in the Bill itself following consultation and introduced through a new clause at committee stage in November.

Throughout the consultation process there was some concern in the City, particularly among trade associations and law firms, 'that the new powers introduced under the

291 *Ibid*, Letter from Lord Goodlad to Lord Myners, 16 February 2009, p.5.

292 Banking Act 2009 Section 75, subsection 2(c).

293 House of Lords Select Committee on the Constitution, 11th Report of Session 2008-09, *Banking Act 2009, Supplementary Report on Retrospective Legislation*, HL Paper 97, para.10, p.4.

294 House of Lords Delegated Powers and Regulatory Reform Committee, 1st Report of Session 2008-09, *Banking (No.2) Bill*, HL Paper 12, Appendix 1, A Memorandum by HM Treasury, p.20.

295 *Ibid*, p.20.

Act might be used in a draconian manner'.[296] The combination of the consultation process on secondary legislation facilitated by the Banking Liaison Panel coupled with the code of practice were the key ways in which the Treasury sought to offset these fears. The concern was also recognised by the Bank of England. 'I recognise that we have to keep a very careful eye on striking the right balance between having the discretion to deal with problems and ensuring that banks and markets know as much as they can about what we would, and would not, do in a resolution', said Andrew Bailey, the Bank's Executive Director of Banking Services and the Chief Cashier. 'This is why the code and the Liaison Panel are important parts of the machinery.'[297]

It was in the delegated powers that the key safeguards against any prospect of draconian use were to be found and therefore, for the banking industry, it was vital that the SIs be right. The Banking Liaison Panel was therefore an important development in this field of legislation, but there was fairly minimal discussion of it throughout the parliamentary process. Ministers made clear that it would not have input into any areas where consultation might be 'inappropriate due to the market-sensitive nature of such Orders and the potential need to exercise these powers on a very urgent basis'.[298] Specifically, the government highlighted that it would not be involved with Orders for stabilisation powers, compensation schemes, the resolution fund and third-party compensation Orders. However, they anticipated it having a role in developing the code of practice and reviewing the operation of the special resolution regime.

Beyond its remit, Members focused on its membership and function. The Panel was to be chaired by a Treasury official 'consistent with its role in formulating government policy'.[299] Liberal Democrat MP, John Pugh, questioned whether the group would genuinely reflect the concerns of the banking and financial services industry. Other Members enquired as to whether and how it would publish its advice to the government but there was little elucidation. Indeed the Treasury minister, Ian Pearson suggested that this would be a matter for the Panel: 'if it wants to publish its minutes in full or in a truncated version, it should be allowed to do so'.[300] But there was clearly no enthusiasm to require it. Given that it would provide advice direct to ministers on both the creation of new SIs and post-implementation review of SIs arising from the Bill from the perspective of the City, this should have been treated more seriously and perhaps would have been if there had been more time for

296 P. Brierley, *The UK Special Resolution Regime for Failing Banks in an International Context*, Bank of England Financial Stability Paper No.5, July 2009, p.4.

297 'The UK Bank Resolution Regime', speech by Andrew Bailey, Executive Director for Banking Services and Chief Cashier, Bank of England, ICAEW Financial Services faculty breakfast, London, 26 November 2009.

298 House of Commons, 17th Sitting, Public Bill Committee, *Banking Bill*, 18 November 2008, col.530.

299 *Ibid*.

300 House of Commons, *Hansard*, 10 February 2009, col.1303.

scrutiny. But the pressing nature of the legislative timetable to ensure that the Bill was in place before the 2008 Act expired meant that important details related to the ambit, structure and governance of the Panel were not pinned down.

Reflections

In the years since the Banking Liaison Panel was established, it has published some of its quarterly minutes and an annual report but its thoughts on individual SIs largely have to be deduced from whatever reference is made to it by the Treasury in its Explanatory Memoranda for each relevant SI. No formal response is provided by the government to the Panel's advice and therefore it is difficult, at least in respect of SIs, to be certain of its influence and impact unless it is mentioned during a Delegated Legislation Committee debate on the SI. By and large those we spoke to in and around this area of banking legislation – both Members and external financial experts – thought it had been a useful addition to the advisory system for delegated legislation in the field. However, at the time of writing it has not yet published its annual report for 2013-14 and the minutes of its meetings for the last year are not publicly available.

Why does this matter? Well, the Panel includes representatives of a number of leading players in the sector: the Association of British Insurers, the British Bankers' Association, the Building Societies Association, the City of London Law Society, the International Swaps and Derivatives Association and the Investment Management Association to name just a few. As such they have a degree of privileged access to the policy process. The Bill's provision for the Panel and a draft code of practice open up opportunities for further lobbying on certain provisions by key voices in the sector. It is therefore important that such access is transparently accounted for.

Thus far, 17 Statutory Instruments (not including drafts) have been produced. One of the first Orders brought forward following Royal Assent was an SI to exclude insurers from the definition of 'bank' in the Act, the drafting of which 'unintentionally allowed' for the possibility that the special resolution regime would cover insurers, which had never been the government's intention.[301] It therefore brought forward the Draft Banking Act 2009 (Exclusion of Insurers) Order 2009 in order to provide clarity.

Although the need for the banking legislation had been known for a year, there was a sense among parliamentarians and external experts that the Bill was rushed and policy was inadequately formulated in some areas. Drafting problems such as that brought to light in this Order illustrated the legitimacy of the concern.

The justifications for the use of delegated legislation in the Bill were well rehearsed and understood by most Members; but there was still a lack of clarity as to what

[301] House of Lords Merits of Statutory Instruments Committee, 1st Report of Session 2009-10, *Instruments of Interest*, HL Paper 4, para.1, p.1.

should be included in the primary and what in the secondary legislation and there were concerns about how widely some of the proposed powers were drawn. One clause, for example, required the Bank of England, via banknote rules, to 'do anything that banknote regulations may do'. While clearly designed to maximise the benefits of flexibility for the Bank, the provisions were so widely drawn that without the benefit of parliamentary oversight they risked providing a blank cheque.

Throughout, the government was frank about the proposed use of the negative scrutiny procedure in the Bill because it provided for absolute certainty. Conversely, it could be argued that, despite the very wide powers sought in some parts of the Bill, there was no discussion of the merit of deploying a strengthened scrutiny procedure, specifically a super-affirmative, at any point because of the time pressures.

However, given that the Banking Bill was promoted as emergency legislation, it is marked in its use of the draft affirmative instrument procedure. The JCSI will usually consider these SIs between seven and 20 days after they are laid before Parliament. Because of the scrutiny reserve, the House of Lords will not approve them until they have been considered by the Committee. If, in emergency circumstances, such as a banking crisis, the SI therefore needed to be expedited, this can be done in only two ways. The minister may write to the JCSI and request that it be considered urgently, which may or may not be accepted, or the government may move a motion to dispense with Standing Order 73 and thus circumvent the JCSI's scrutiny, moving an approval motion shortly after the SI has been laid. This happens very rarely but the number of draft affirmatives in the Bill seems somewhat odd in a Bill designed for potential implementation in emergency circumstances.

Ministers were keen to stress that the powers set out in the Bill were those of 'last resort'. However, despite the breadth of these powers, there was no provision for sunset clauses to restrict their use over a set period of time. Nonetheless, as the Bill passed through Parliament a number of encouraging practices can be discerned: there was extensive consultation and valuable select committee input. And during scrutiny of the legislation, Members in both Houses variously called for draft codes and Orders, expert bodies and post implementation reviews, all curbs of the kind regularly sought when urgent legislation was being discussed.

The government did provide detailed supporting documentation (the Explanatory Memorandum and Impact Assessment); and a lot of technical information about how the Special Resolution Regime would work in practice was provided to Members. However, it struggled to get draft statutory instruments and a code of practice to the Public Bill Committee in adequate time and when it did, what it produced was widely regarded as inadequate.

The absence of any parliamentary procedure for Bank of England instruments (share and property transfer instruments) raises concerns about the democratic control

exercised in this area. The powers were used in the case of the Dunfermline Building Society whose deposits were moved to the Nationwide Building Society in 2009. However, the Bank of England subsequently admitted that the powers would not offer an effective solution in the event that a large, complex bank failed, and the use of the transfer powers does carry a risk and potential cost to the taxpayer.[302] The Bank is accountable to Parliament via the Treasury Select Committee. But given the very heavy workload of that Committee, and the general lack of appetite for scrutiny of SIs by select committees, it is questionable whether Parliament really has sufficient oversight of the powers it has delegated should they need to be used in the future.

[302] See, for example, 'Resolution through the lens of corporate restructuring', a speech by Andrew Gracie, Director, Special Resolution Unit, Bank of England, to the International Association of Deposit Insurers' conference, Russia, 5 June 2012.

11. The efficacy of the parliamentary scrutiny process

The legislative case studies set out in the previous chapters demonstrate that there is no consistency in the way government seeks and Parliament approves the delegation of powers and the scrutiny procedures utilised in relation to them. A consistent lack of detail and draft regulations, coupled with poor consultation, means that there is a lack of effective scrutiny throughout the primary stage of the legislative process.

Scrutiny procedures for delegated legislation are regularly converted, higher up the hierarchy, as a way of off-setting concerns about the underlying policy and extent of delegation being sought by ministers. Scrutiny procedures are bartered to buy off opposition but, in doing so, the fundamental reasons for pursuing delegation in the first place are undermined, particularly the future advantages of legislating with speed and flexibility. But while the content and application of Henry VIII powers are hedged in by new strengthened scrutiny procedures, in reality the underlying policy objectives remain largely untouched. Parliament places immense trust in whomever the power is granted to not to abuse it, but without any means of assuring itself that constraints on the ambit and exercise of the powers will not be eroded in the future.

Collectively, the inadequate nature of scrutiny of primary legislation, particularly of framework bills, serves to transfer a considerable scrutiny burden on to the Statutory Instrument stage if any policy or operational problems are to be addressed. However, as outlined in chapter four, and detailed further in this chapter, the scrutiny process for SIs is neither rigorous nor rational. Indeed, as this chapter will illustrate, many of the same problems – lack of detail and poor consultation, for example – are repeated in the delegated legislation process, including in relation to powers derived from framework or skeleton Acts.

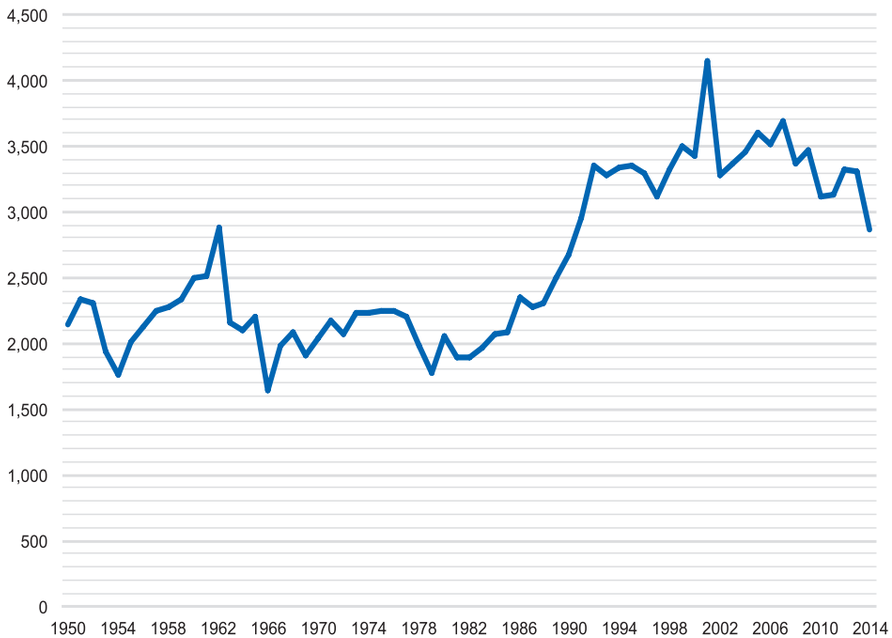
This chapter sets out the strengths and weaknesses of the parliamentary scrutiny process for SIs. It explains how the volume of delegated legislation has increased in recent years but, while the number of SIs laid before Parliament has remained broadly stable, the amount of time Parliament spends scrutinising them has declined. It examines the effectiveness of the committees, predominantly in the House of Lords, and how they help to impose some semblance of discipline and order on the process.

But it also explores what it is about the design of the system that enables dozens of pieces of defective legislation to make it to the statute book each year. And it sets out why and how the approach to scrutiny should be radically reformed in order to address the deficiencies in the process and modernise the system for the 21st century.

Volume and scrutiny time

As Figure 2 shows, between 1950 and 1990, the number of general and local SIs produced each calendar year rarely rose above 2,500. From 1992 onwards, however, it has never dipped below 3,000 and in 2001 reached a high of 4,150.[303] At the time of writing, the last full calendar year, 2013, produced 3,314 SIs.

Figure 2: The Number of UK Statutory Instruments (Local and General), 1950-2014 [304]



An examination of those SIs laid before the House of Commons illustrates how the electoral cycle has an impact on the production process. As Figure 3 shows, since 1997 the first sessions following a general election – 1997-98, 2001-02, 2005-06 and 2010-12 – are all marked by a significantly higher number of SIs being laid compared to other sessions. And conversely, the last, usually short session before a general election sees the production of the fewest number of SIs.

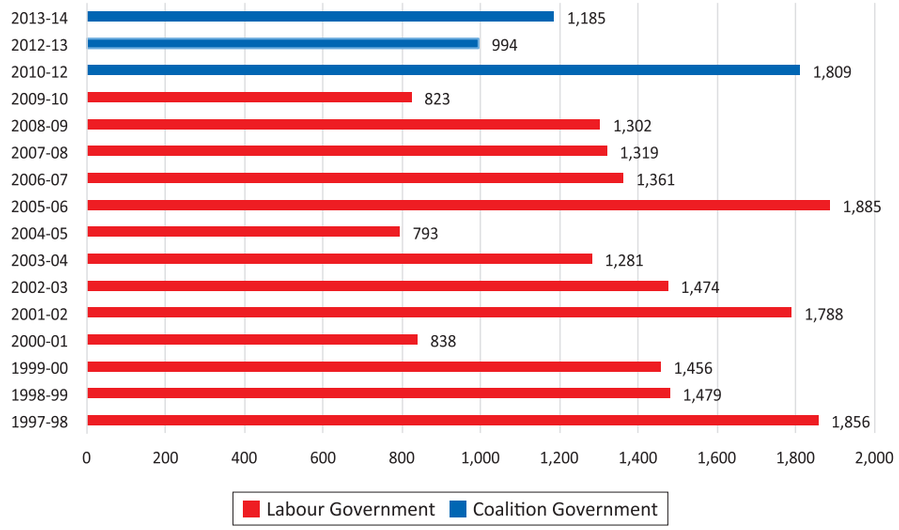
Although an imperfect measure, the Conservative-Liberal Democrat coalition government's laying of 1,809 SIs in its first session after the general election, compares favourably with the first sessions of the previous Labour administrations

303 R. Cracknell, *Acts and Statutory Instruments: The Volume of UK legislation 1950 to 2014*, House of Commons Library Standard Note, SN/SG/2911, 19 March 2014.

304 *Ibid*.

(1,856 in 1997-98; 1,788 in 2001-02; and 1,885 in 2005-06) given that the coalition's first session extended over two years.[305]

Figure 3: Statutory Instruments Laid in the House of Commons by Session 1997-2014 [306]



Within this volume of delegated legislation are SIs that are used to implement EU directives using the powers conferred under section 2(2) of the 1972 European Communities Act (ECA). EU directives lay down certain European policy objectives that need to be adapted into national law by each member state by a certain date. In the UK, these SIs are subject to the negative procedure as a minimum and can be subject to the affirmative procedure if minsters wish.

Figure 4.1 sets out the number of SIs made under EU law between the 1997-98 and 2008-09 sessions. It should be noted that it is notoriously difficult to generate an accurate calculation of exactly how many EU measures have been implemented. However, best estimates by the House of Commons library, as in Figure 4.2, would suggest that on average 9.4% of the total SIs *laid* before Parliament in each session since the last general election derive from the transposing into UK law of our EU obligations.

305 The Merits Committee noted in its annual report that in the unusually long first session of the 2010 Parliament, 'the pattern of flow of instruments over the session has been significantly different from that in recent sessions. The first six months of this session were a period of low activity for the Committee while the Coalition Government agreed its programme of primary legislation; and the volume of SIs picked up from early 2011. This profile is typical of any new administration. Over the session as a whole the number of SIs considered was still lower than in previous sessions.' See House of Lords Merits of Statutory Instruments Committee, 60th Report of Session 2010-12, *The Work of the Committee in Session 2010-12*, HL Paper 290, p.7.

306 House of Commons *Sessional Returns* 1997-98 to 2013-14.

Figure 4.1: Statutory Instruments Made Under EU Law 1997-2009 [307]

Session	Total SIs	ECA SIs	Non-ECA SIs	% of SIs EU based
1997-98	2,028	139	113	12.4%
1998-99	1,606	152	74	14.1%
1999-00	2,133	173	137	14.5%
2000-01	1,175	102	37	11.8%
2001-02	2,369	243	111	14.9%
2002-03	1,567	121	77	12.6%
2003-04	1,403	132	99	16.5%
2004-05	883	79	39	13.4%
2005-06	2,122	236	99	15.8%
2006-07	1,540	132	91	14.5%
2007-08	1,476	153	65	14.8%
2008-09	1,595	172	55	14.2%

ECA = European Communities Act

Figure 4.2: Statutory Instruments Made Under EU Law 2010-2013 [308]

Calendar Year	Total SIs	EU based SIs	% of SIs EU based
2010	1,190	66	5.5%
2011	987	102	10.3%
2012	1,099	79	7.2%
2013	1,165	170	14.6%

But as the volume of SIs has increased over the years, the number laid before Parliament has remained broadly stable. However, the amount of time Parliament – particularly the House of Commons – spends considering them in debate has declined. Of the 3,314 local and general SIs published in the 2013-14 session, 1,185 were laid in the House of Commons. But the average length of a Delegated Legislation Committee in that session was just 26 minutes, two minutes less than the previous session, (despite the fact that Members could spend up to 90 minutes debating instruments if they so wished).

307 V. Miller, *How Much Legislation Comes From Europe?*, House of Commons Library Research Paper 10/62, 13 October 2010, p21.

308 *'How much legislation comes from Europe?'*, Second Reading - the House of Commons Library blog, 2 June 2014 (http://commonslibraryblog.com/2014/06/02/how-much-legislation-comes-from-europe/). The blog notes that 'for a number of reasons it is impossible to achieve an accurate measure of the number of EU laws that are implemented in the UK or their overall impact'. The data set out in the blog post is based on a calculation using internal parliamentary search records.

In the last full session (2013-14), the House of Commons spent 74 hours 7 minutes debating SIs in DLCs and the House of Lords a further 56 hours 57 minutes in committee scrutiny.[309] However, Peers routinely scrutinise SIs on the Floor of the Chamber whereas in the House of Commons, Chamber scrutiny is largely reserved for those SIs that raise greatest concern. But as Figure 5 shows, there has been a marked, although not a consistent, drop in the amount of time spent debating SIs on the Floor of the House over the last decade. This is mirrored, albeit not to the same degree, in the House of Lords.

Figure 5: Time Spent Debating SIs on the Floor of the House of Commons and House of Lords by Session 2004-2014 (hours: minutes) [310]

	2004 -05	2005 -06	2006 -07	2007 -08	2008 -09	2009 -10	2010 -12*	2012 -13	2013 -14
House of Lords chamber	25:15	54:27	48:32	54:36	39:54	37:05	63:22	35:36	31:34
House of Commons chamber	09:30	18:09	18:01	27:38	19:37	16:31	30:18	11:01	05:58

** Note that 2010-12 was a two-year (23 month) session.*

The data suggests that there is a disconnect between the volume of SIs and the willingness or capacity of Parliament to spend time scrutinising them. However, it's necessary to dig a little deeper into the data to understand why this is the case.

Types of instrument

In the 2013-14 session, of the 1,185 SIs laid in the House of Commons, by far the greatest proportion, 882 SIs (74%) were subject to the negative procedure. 267 SIs (23%) were subject to the affirmative procedure, and 13 (1%) to a strengthened scrutiny procedure. And a further 23 SIs (2%) were laid but subject to no parliamentary scrutiny procedure at all (see Figure 6).[311]

As Figure 7 shows (see also Appendix H), this pattern is largely reflected in previous sessions. Looking at the number of SIs laid in the House of Commons since 1997,

309 Data based on calculations using House of Commons *Hansard* records of DLC debates and House of Lords Sessional Statistics.

310 House of Commons *Sessional Returns* 2004-05 to 2013-14 and House of Lords *Sessional Statistics* 2004-05 to 2013-14.

311 House of Commons *Sessional Returns* 2013-14. Appendix G also sets out the data for the number of draft affirmative and negative SIs laid each year since 1997.

Figure 6: SIs Laid in the House of Commons by Scrutiny Procedure, 2013-14 Session [312]

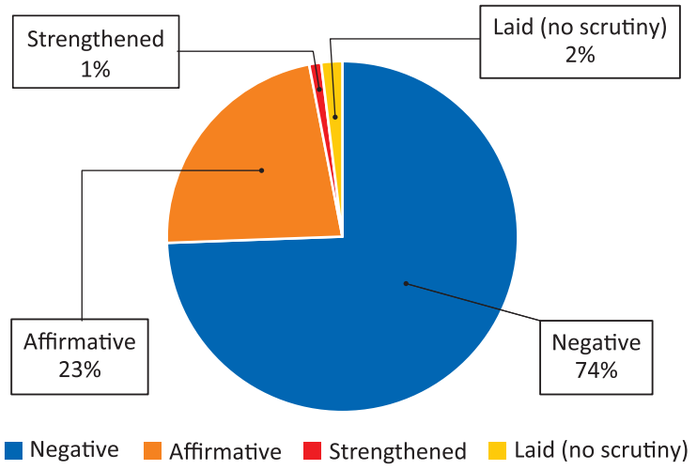
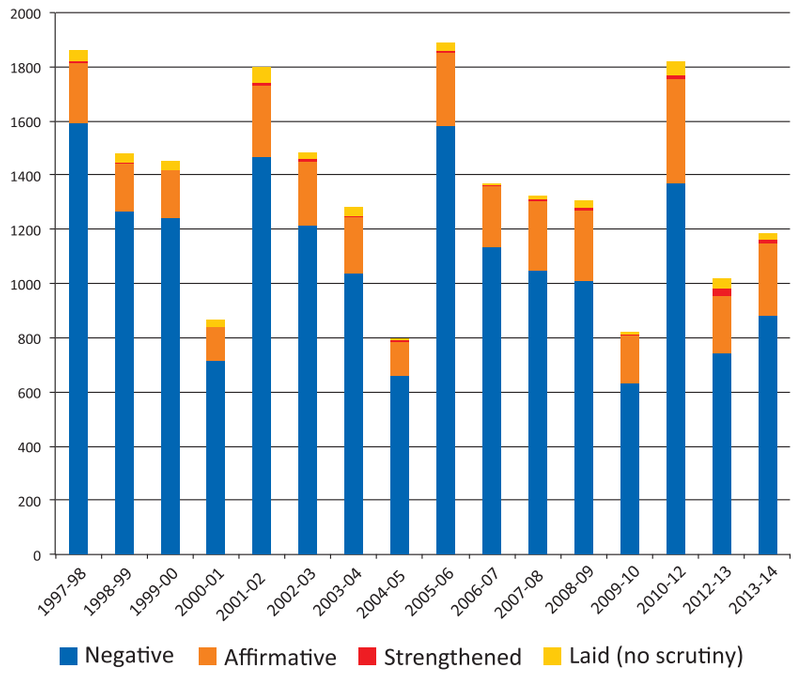


Figure 7: SIs Laid in the House of Commons by Scrutiny Procedure, 1997-2014 [313]



312 House of Commons *Sessional Returns* 2013-14.

313 House of Commons *Sessional Returns* 1997-98 to 2013-14.

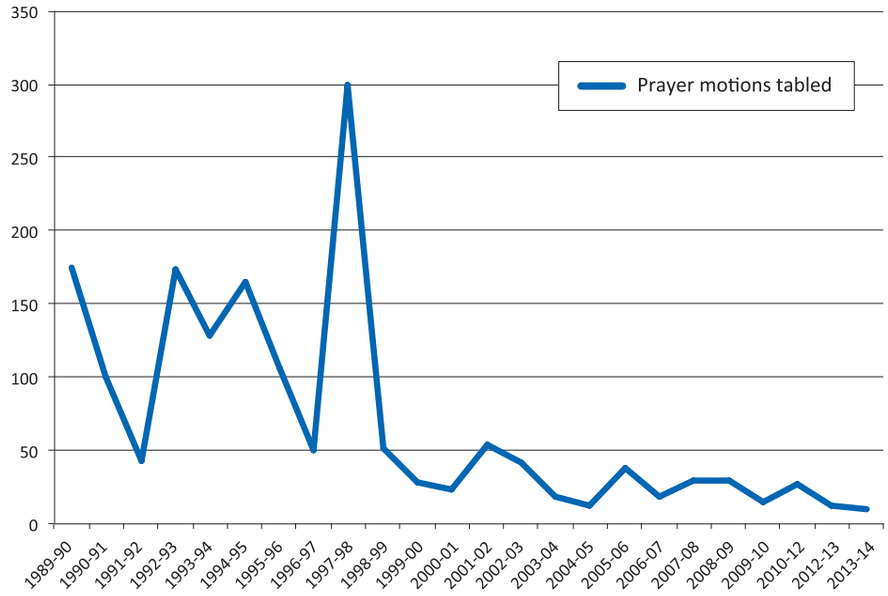
the dominance of the negative procedure is clearly evident, as is the occasional use of a strengthened (enhanced or super-affirmative) procedure in particular sessions. The number of affirmative instruments is broadly consistent (with the exception of 2010-12 but that was an unusual two-year session).

The inadequacy of EDM prayer debates for negative instruments

Given the dominance of the negative procedure one would expect to see the number of negative instruments debated by MPs and Peers to be broadly consistent each year. However, the opposite is true.

As Figure 8 shows, there has been a marked decline in the number of prayer motions tabled against negative instruments in the House of Commons over the last quarter century, and particularly in the last 15 years.

Figure 8: Prayer Motions against Negative SIs tabled in the House of Commons by Session, 1989-2014 [314]



The number of prayers that have been tabled fluctuates but has been in consistent decline since the 1997-98 session. Following the 1997 general election, part of the

314 Data based on calculations using House of Commons *Sessional Returns* 1989-90 to 2013-14 and the House of Commons Early Day Motions database.

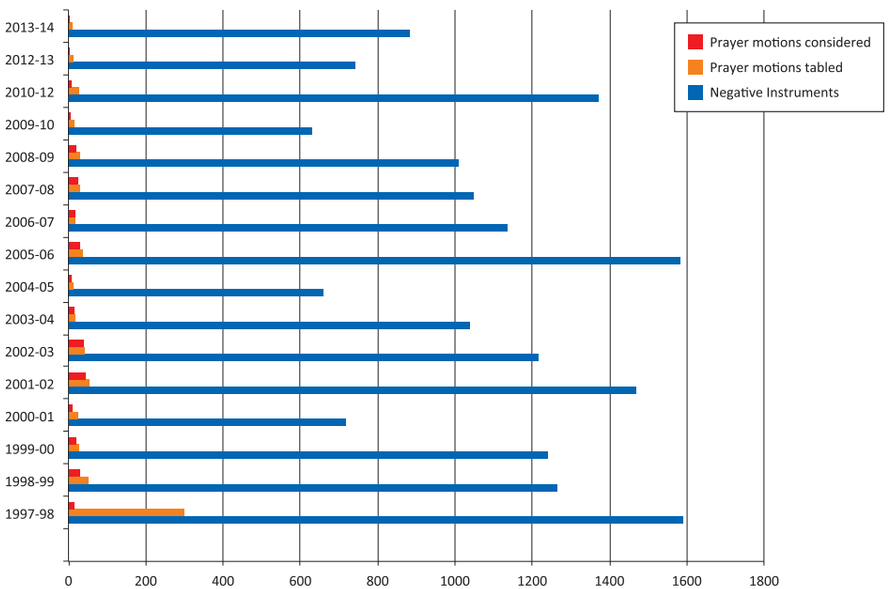
opposition's parliamentary strategy in the face of an overwhelming government majority was to table prayer motions as a matter of course. Three hundred were tabled in just one session, 279 of them in the name of the Leader of the Opposition, William Hague MP. But in practice only 15 were actually debated, a success rate of just 0.05%.

Since then, however, the tabling of prayers has flat-lined at consistently well below 50 prayer motions per session. Indeed, since that 1997-98 session, there have been 411 prayers tabled in the House of Commons; amounting to just 2.5% of the total number of negative instruments laid in that period.

In the 2013-14 session, 882 negative instruments were laid but with only 10 prayer motions tabled against them in the Commons, MPs wished to debate just 1.13% of all these negative instruments. And of these 10 prayer motions, just two were actually considered, one in the Chamber and one in a Delegated Legislation Committee. Even in the two-year session in 2010-12, when 1,371 negative instruments were laid before the House, MPs tabled a prayer motion to debate just 27 of them, and on only eight were the prayer motions actually considered, all of them in committee rather than on the Floor of the House.

Figure 9 illustrates how few prayer motions are actually considered in the House of Commons.

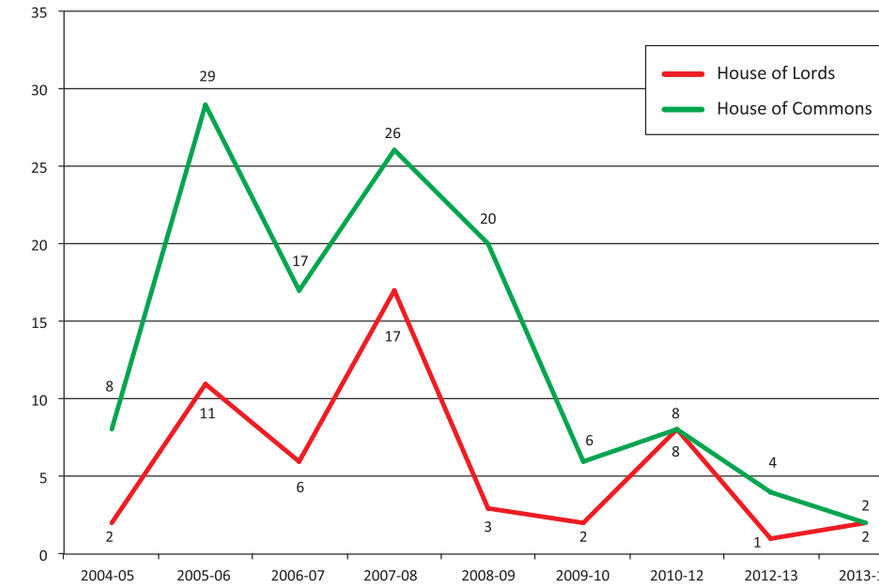
Figure 9: Negative SIs Prayed against in the House of Commons by Session, 1997-2014 [315]



[315] Data based on calculations using House of Commons *Sessional Returns* 1989-90 to 2013-14 and the House of Commons Early Day Motions database.

In other areas of the delegated legislation system, the House of Lords makes up some ground for the lack of interest and inadequate procedures in the House of Commons. However, as Figure 10 shows, in the House of Lords there is even less debate on negative instruments. In only one session in the last decade (2007-08) has the House of Lords actually considered motions against more than 1% of all negative instruments.

Figure 10: Negative SIs Prayed against in the House of Commons and House of Lords by Session, 2004-2014 [316]



If the official opposition tables a prayer motion in the House of Commons there is some chance that it will be debated but no guarantee. The shadow frontbench team is responsible for monitoring all Statutory Instruments laid by their shadow department. In theory, from the Public Bill Committee stage of the enabling Act, a shadow minister should be aware of the proposed delegations of power that could prove controversial and may warrant scrutiny and debate in the future. They are then responsible for making the opposition's 'central hub' – the whips and business managers – aware of any potential SI that is of political importance.

If it is of sufficient political importance, the whips and business managers will decide whether to table a prayer under the Leader's name and seek debate on the SI

[316] Data based on calculations using House of Commons *Sessional Returns*, the House of Commons Early Day Motions database and House of Lords *Sessional Statistics* 2004-05 to 2013-14.

through the 'usual channels'. If the 'central hub' does not wish to take the SI any further, a shadow minister or backbencher can table the prayer themselves if they wish. In practice, responsibility rests with opposition frontbenchers to continually monitor and scrutinise all the delegated legislation that is produced by the department they shadow. For those departments that produce a lot of delegated legislation (for example the Ministry of Justice, DCLG, DWP and the Home Office), shadow ministers have their work cut out. They do not have the resources of the civil service at their disposal and are therefore reliant on the support of their parliamentary staff. In addition to the difficulties associated with tracking the emergence of SIs, and understanding the scrutiny procedures that apply to them, the frequent reshuffling of frontbench teams means there is a constant loss of knowledge in each policy area that exacerbates the problems. Given the volume of SIs being produced, as an interview with one shadow minister revealed, consideration of affirmative instruments inevitably takes precedence, as they require a response in a Delegated Legislation Committee. Negative instruments, therefore, are viewed as less of a priority, so 'things get missed'.

A number of MPs we interviewed simply weren't aware of the practicalities; they did not know that they could table a motion against a negative instrument using an Early Day Motion. And when they realised, they were bemused, for EDMs are widely regarded by Members as a waste of time and money and tantamount to 'political graffiti'. On these grounds alone this element of the system is no longer fit for purpose. It is not acceptable that the House should continue to allocate a procedure that its Members have so little faith and confidence in.

Reforming the way the House of Commons considers negative SIs

Two changes should be considered. Firstly, praying against a negative instrument should be decoupled from the Early Day Motion system in favour of a new, clearer annulment motion model. For example, replacing *'That an humble address be presented to Her Majesty praying that the [relevant SI] be annulled'* with, *'That this House resolves that the [relevant SI] be annulled.'*

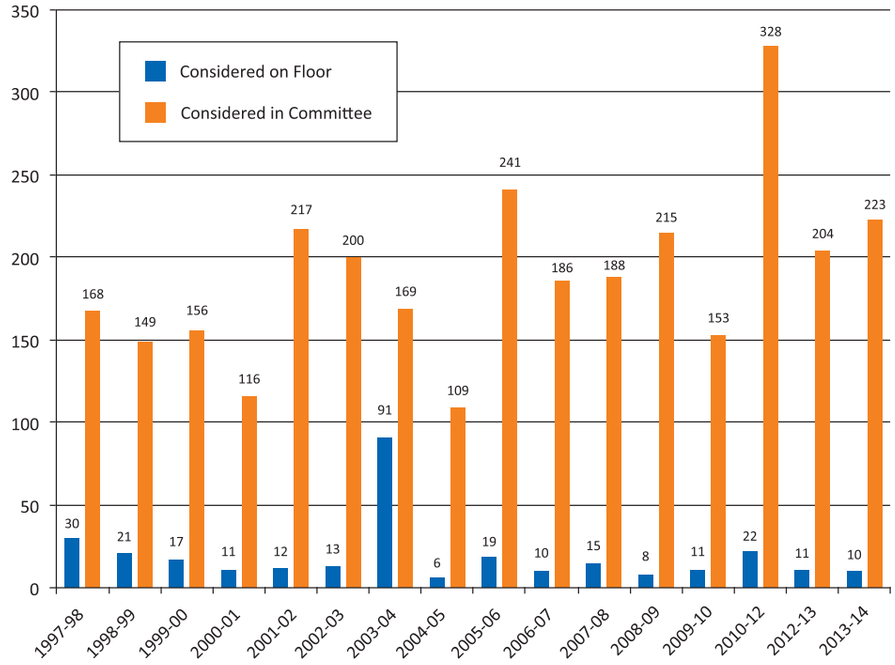
EDMs are motions for which no fixed parliamentary time has been allocated, and therefore whether they are heard is entirely in the hands of the executive. Secondly, government control over annulment debates should be lessened. Annulment motions laid by the opposition should have an improved chance of debate. To avoid the prospect of their laying motions at will in order to disrupt business, specific time could be set aside each session for consideration of such motions, as with opposition day debates. It would be for the opposition to decide how it was apportioned but the cap on time would require them to make judicious choices; and if they did not use the time they could re-allocate it for general debate. Similarly,

backbenchers might seek a debate on an annulment motion if they can demonstrate some level of support for it; here, the decision-making power about whether time should be allocated for such a debate on the Floor of the House could be accorded, for example, to the Backbench Business Committee or even to the Speaker. A select committee should also be able to request a debate if it is concerned about an instrument and believes it warrants consideration by the House.

The inadequacy of Delegated Legislation Committee debates for affirmative instruments

The artificial nature of parliamentary scrutiny of delegated legislation is encapsulated in the way the House of Commons considers affirmative instruments. As Figure 11 shows, the majority of affirmative instruments are considered in committee rather than on the Floor of the House of Commons Chamber.

Figure 11: Consideration of Affirmative SIs in Committee or on the Floor of the House of Commons by Session, 1997-2014 [317]



But although they are the key way in which affirmative instruments are considered, in practice the majority of debates held within Delegated Legislation Committees

[317] House of Commons *Sessional Returns* 1997-98 to 2013-14.

are poor. There are rare exceptions but as one MP stated, 'You can count on your hand the number of MPs who take them seriously.' In the interviews we conducted with MPs, Delegated Legislation Committees were variously described as 'farcical', 'an absolute joke' and 'a waste of time'.

During the debate on the Localism Bill in 2010, Labour MP Barbara Keeley reflected candidly:

> *'I served in the Whips Office for some time, and I know that a debate goes on when one tries to get members to serve on SI committees. The debate hinges on members asking "How long will it be for? Is it only five or 10 minutes?" We should dispel here and now the notion that that constitutes rigorous scrutiny.'* [318]

Traditionally, being assigned a place on a Delegated Legislation Committee is seen as a 'punishment' or Members reluctantly volunteer on the basis of 'buggins' turn'. One MP made clear that if they actively contributed to DLC debates they were perceived as a 'nuisance' by the whips and other senior people within their party. Another Member recalled that he had been told to attend but to expect that it would be over in 30 minutes or less.

This is not far off the mark, for the average time taken to conduct a DLC in the 2010-2012 session was just 29 minutes and lower still in the 2013-14 session at just 26 minutes.[319] But they can be much shorter – as little as a minute – as the Draft Contracting Out (Local Authorities Social Services Functions) (England) Order 2014 case study (see Box 5) demonstrates.[320]

Several of the MPs we interviewed 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.

When DLC debates do take place they often focus on the general subject matter of the instrument rather than the specific provisions contained within the SI even though the scope of debate is supposed to be confined to the instrument at hand.

Government influence on the membership and the involvement of party whips stifles effective scrutiny: in the words of one MP, 'you are told to sit quietly at the back and make sure you vote'.

The lack of time available for MPs and shadow ministers to prepare also affects the quality of DLC debates. It is common for an MP to receive an email from his or her

318 House of Commons, *Hansard*, 1 February 2011, col.241.

319 Data based on calculations using House of Commons *Hansard* records of DLC debates.

320 House of Commons, 5th Delegated Legislation Committee, Draft Contracting Out (Local Authorities Social Services Functions) (England) Order 2014, 18 March 2014.

Box 5

Draft Contracting Out (Local Authorities Social Services Functions) (England) Order 2014

Hansard records that debate on this Order lasted just one minute, although video of the committee suggests that it actually lasted only 22 seconds.*

The Committee was quorate with eight MPs present, as well as the chair, two clerks, the *Hansard* reporter and at least three other staff. The report of the debate simply records that it was resolved that the Order was considered and the Committee then rose. The video, however, captures the short, informal discussion that took place before the formal proceedings began.

The problem was that the shadow opposition spokesperson had not appeared and the only opposition MP in the room was the Labour Whip, Bridget Phillipson. As the start-time for the committee nears, the chair, Nadine Dorries MP indicates to the government minister, Norman Lamb MP that at 8:55am the committee will be sitting and quorate. She suggests that, if they agree, she could leave the room thereby abandoning proceedings, or alternatively they could just continue. Norman Lamb can be heard to say, 'I think we want to get this through', another colleague indicates that the matter is not controversial and Bridget Phillipson indicates that she has no objections. Norman Lamb enquires whether that means he can just move the motion formally without giving a speech; the chair indicates this is correct. At 8:55am the clerk stands to read the name of the draft order, Norman Lamb moves it formally, the chair invites those present to indicate their support and when no objections are raised she confirms 'the ayes have it, order' and brings the proceedings to a rapid close.

The farcical outcome was greeted with bemused hilarity by everyone present. Beyond the obvious question of why the opposition was not present, this situation raises wider concerns about the validity of the DLC process. The Order was deemed to be sufficiently serious that it warranted scrutiny using the affirmative procedure, and therefore the allocation of parliamentary debating time. The time of eight MPs and at least five House of Commons officials was wasted attending the meeting, not to mention the time spent by officials in the department preparing the briefing materials and the additional administrative time spent preparing for the debate, including securing the committee room allocation, booking *Hansard* reporters and audio-visual staff support and preparing and printing the business papers for the debate. One can reflect on the outcome in two ways. Either the instrument should never have been an affirmative in the first place, in which case the scrutiny procedure allocation process was faulty, or, if it was correctly an affirmative instrument, then Parliament implied by this that it wished to look at the issue in detail in which case it should have been properly scrutinised.

* See http://www.parliamentlive.tv/Main/Player.aspx?meetingId=15129

party whip informing them that they are to sit on a DLC about four to five days before the committee meets. The email rarely provides them with any further details, so it is up to the MP to find a copy of the Statutory Instrument and associated documents to prepare for the debate. One MP we spoke to said they would perhaps pick up a copy of the instrument on the day 'if the subject interested them'. A shadow minister confirmed that they usually have three to four days to prepare for debate on an instrument that falls within their shadow departmental remit. Unlike government ministers who lead the debate in committee, shadow ministers do not have the resource of civil servants and rely solely on their parliamentary staff to help them prepare for it.

This difficulty is often exacerbated by the absence of external briefing material. Many outside bodies with a keen interest in the policy area struggle to keep track of secondary legislation in their area. The lack of understanding of the process, the short notice given for committee debates, and the degree to which information about them on Parliament's website is buried so deep it is effectively hidden from public view, all combines to mean that many organisations don't submit briefing papers or lobby Members in the way they do for primary legislation. This is detrimental to the policy process in terms of providing expert input at a crucial stage of the scrutiny process, particularly given that for many of these external organisations it is the technical, operational detail contained in the SIs that is vital to their work. But the absence of briefing material can also be misunderstood by Members, who, used to being heavily lobbied on bills, assume that a lack of consultation material or briefing for DLC debates means stakeholders are satisfied with the proposed instrument. In fact, our external consultation would suggest that more often than not it is likely that organisations simply did not know about it or did not have time to prepare material.

As DLC members are selected by the whips, it is unlikely that any MP who subjected the parental Act to detailed scrutiny and raised questions about the proposed delegation of powers will be selected to sit on the DLC. The lack of external input and briefing therefore means that there will be few people involved in the process who are aware of what, if any, assurances or concessions were previously promised. As a consequence important questions may go unasked.

The lack of understanding of the delegated legislation process among parliamentarians and their staff has an inevitable effect on their preparation for DLC meetings. One shadow minister we interviewed asserted that DLCs would work better if MPs had ready access to information about where the power originally came from and what it was originally intended for. However, this information is already available to MPs and indeed anyone else with an interest in it. The Statutory Instrument will indicate on the first page the section of the enabling Act from which it comes and the explanatory notes accompanying the instrument will provide a good

indication as to the intention of the power when it was provided for in the parental legislation. Various reports from the relevant committees will also be available to inform the debate still further. The question is perhaps thus not one of resource but one of understanding, political will, interest and appetite for detail, although undoubtedly support could be improved significantly, not least if Parliament's website were to curate all the relevant material in one place for each DLC debate.

The DLC process is such that there is little imperative for ministers to master the process either. They simply turn up and read out their brief in the knowledge that it will all be over in 30 minutes or less; there is little incentive for them to actually understand and engage with the issues. The procedure thus unhealthily feeds a culture in government that it is acceptable to take little or no interest in delegated legislation and it treats Members, particularly government backbenchers, as 'cannon fodder', instructed to turn up on the day and simply go through the motions. It is a wholly unsatisfactory way to consider legislation of any kind and a waste of Members' valuable time and resources.

Reforming the way the House of Commons considers affirmative SIs

In its current form the DLC system for consideration of affirmative instruments is such a waste of time, effort and resource that one might consider abolishing them and adopting a new means of scrutinising such SIs altogether. Select committees, for example, are tasked with considering both bills and Statutory Instruments but, in practice, do little of the latter.[321] One approach could be to ask them to consider the most contentious instruments and report to the House. Their membership would bring a level of commitment and policy expertise to such work that DLCs currently lack. Enabling select committees to move a motion, or, for example, seek a debate via the Backbench Business Committee on an instrument of concern would serve to focus minds in Whitehall. They need only do so once or twice a session and it would have an impact on how departments treat SIs.

Our discussions with past and present committee chairs suggests, however, that there is unlikely to be much appetite for significantly expanding their work on delegated legislation when there are other more interesting, media-friendly policy inquiries to undertake.

So if DLCs are to be retained, how might they be improved? One option would be to model them on the European scrutiny committee system in the House of Lords: here a 19-strong select committee is appointed, and it in turn appoints Members

[321] Select Committee Core Tasks, approved by the House of Commons 31 January 2013. Number 5: 'To assist the House in its consideration of bills and statutory instruments, including draft orders under the Public Bodies Act'.

to six sub-committees, each of which deals with a particular policy area. A permanent Delegated Legislation Committee, with a number of sub-committees focused on particular departments or broad policy areas, could develop expertise in the area. Membership could be drawn from relevant departmental select committees – they might, for example, nominate one or two of their number to sit on the relevant sub-committees. As with other permanent committees, this DLC system would have a secretariat to support Members in their work and provide more material and advice to the participants than they currently enjoy.

However, the problem with DLCs currently is not just one of process but also of appetite. Until Members feel that DLCs matter – that their presence can make a difference and they can have an impact – then the culture will not change regardless of the committee system in place. To this end, a new 'conditional amendment' provision (explained below) should be introduced to enable Members who have concerns to indicate what changes are required to bring it within the bounds of acceptability. [322]

Amending and rejecting SIs

Statutory Instruments, with just a few exceptions, [323] cannot be amended by MPs or Peers, in keeping with the principle of delegation. But both Houses of Parliament, as a rule, do not reject SIs either. Since 1950 the House of Commons has rejected just 11 instruments (six negative and five affirmative) and the House of Lords has rejected five. In total that means 16 SIs out of over 169,000 – or 0.01% – in nearly 65 years have been rejected. [324]

In the House of Commons, the inadequacies of prayer motions and Delegated Legislation Committees coupled with the government's in-built majority ensure that few SIs are defeated.

In the House of Lords, however, Peers are mindful of the primacy of the elected House; the Parliament Act does not apply to delegated legislation and therefore, unlike primary legislation, rejection in the House of Lords cannot be over-ridden by the House of Commons after a delay. The House therefore rarely votes on a fatal

322 This proposal has previously been recommended a number of times. See, for example, Professor The Lord Norton of Louth (Chair), (2000), *Strengthening Parliament: Report of the Commission to Strengthen Parliament* (Conservative Party).

323 There are currently three Acts that confer powers on Parliament to amend delegated legislation, the last enabling Act to do so being the Civil Contingencies Act 2004. This gives a senior minister the power to make emergency regulations if certain conditions (i.e. in respect of an emergency) have been met. The regulations are 'made' and 'laid' and lapse unless Parliament approves them within seven days. Amendments can be made and have to be agreed by both Houses. According to Erskine May, 'if the two Houses differ in their amendments, machinery must be improvised for reconciling the differences'. See Erskine May (2011), *Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 24th edition, p.676.

324 See Appendix E for a list of all SIs rejected in the House of Commons and House of Lords since 1950.

motion; there have been only 21 such motions in the last decade and on only two occasions was the government defeated. This leaves the House reliant on non-fatal motions of regret as a way to express dissatisfaction with an instrument. But while regret motions may encourage a government to think again, they do not compel it to do so. Nonetheless, non-fatal motions are also utilised quite sparingly. There have been only 79 such motions in the 10 sessions between 2004 and 2014, and the government has been defeated on only 12 occasions.

However, even when regret motions are used they are not particularly helpful. The House may regret the instrument but the government is not obliged to take any notice. It is therefore faced with an unpalatable choice; where an affirmative instrument is deemed to have flaws, Peers can either accept those flaws, without any opportunity to iron them out or, in serious cases, remove them altogether, or it can press the nuclear button and reject the SI entirely, even if some elements of it are acceptable. This 'take it or leave it' proposition does nothing to encourage effective scrutiny and Member engagement with the issues.

The introduction of a right of amendment for SIs would undermine both the principle and practice of delegation and result in the policy debate that should have been settled at the bill stage being opened up again. It has always been feared that giving Members the power of amendment would merely invite those who failed to defeat a policy in the parental Act to then attempt to stop the policy going into effect by defeating the SI. Given that many SIs are already law when they are considered by Parliament this has long been deemed an unsatisfactory prospect.

However, two important reforms short of amendment would enhance the process.

First, the concept of a 'conditional amendment' should be introduced in both Houses. Members should be given the power to delay instruments about which they have concerns, combined with the ability to indicate what steps the government might take that would render the instrument acceptable in the future. This would force the government to take a step back and think again, but would not preclude them coming back to one or both Houses with the same instrument if they so wished.

Second, the House of Lords should consider making greater, albeit judicious, use of its power of veto in the future, particularly in respect of any SIs emerging from framework legislation that could not be effectively scrutinised at the primary bill stage (as previously recommended by the Merits (now the SLSC) Committee).

A convention used to exist between the two frontbenches (but not the crossbenchers and Liberal Democrats) not to oppose regulations for which there was support in the House of Commons but this broke down following reform of the House in 1999. The House has since affirmed 'its unfettered freedom to vote on

Figure 12.1: Non-fatal Motions on SIs in the House of Lords, Sessions 2004-2014 [325]

Session	Non-fatal motions	Government defeats
2004-05	3	2
2005-06	7	0
2006-07	5	1
2007-08	6	0
2008-09	9	3
2009-10	9	3
2010-12	21	0
2012-13	10	3
2013-14	9	0
TOTAL	**79**	**12**

Figure 12.2: Fatal Motions on SIs in the House of Lords, 2004-2014 [326]

Calendar Year	Fatal motions	Government defeats
2004	2	0
2005	0	0
2006	3	0
2007	5	1
2008	1	0
2009	2	0
2010	5	0
2011	0	0
2012	1	1
2013	2	0
2014	0	0
TOTAL	**21**	**2**

325 Data calculated using House of Lords *Sessional Statistics* 2004-05 to 2013-14, N. Newson and M. Purvis, *Delegated Legislation in the House of Lords since 2000*, House of Lords Library Note, LLN 2011/031, 25 October 2011, and the database of government defeats in the House of Lords maintained by the Constitution Unit, University College London (see http://www.ucl.ac.uk/constitution-unit/research/parliament/house-of-lords/lords-defeats).

326 *Ibid*.

any subordinate legislation submitted for its consideration'.[327] In practice, however, unless and until it rejects a few more instruments it cannot be surprised that the executive – of any political stripe – continues to bring forward defective Orders. A consistent refusal to vote against an SI defeats the purpose of subjecting them to parliamentary control. Just one or two rejections in a session would have a seismic impact upstream in Whitehall, forcing departments to pay more attention – including at the most senior levels – to delegated legislation. As former chair of the Merits (now Secondary Legislation) Committee, Lord Filkin, put it in a debate on the scrutiny of delegated legislation in March 2013, 'if the House thinks it is flawed, it ought to have the guts to do something about it and reject it.' [328]

Such an approach would be entirely in keeping with the House of Lords' power of delay and its revising function as confirmed by the Joint Committee on Conventions in 2006 (see Box 6). But in the absence of the Parliament Act backstop, a convention could be agreed, as previously suggested in the Goodlad report on the House's Working Practices, that if the instrument was subsequently approved by the House of Commons the Lords would not obstruct it a second time.[329]

Reforming strengthened scrutiny procedures

As our legislative case studies show, Acts of Parliament emerge from the scrutiny process in Parliament with very marked differences in the type of scrutiny procedures proposed for delegated powers. There are now 11 different forms of strengthened scrutiny procedure, each one a little different from the other (see Appendix F). The DPRRC has made clear that 'the number of variations in these statutory scrutiny procedures has led to a level of complexity that is unhelpful for both Parliament and the public'.[330]

The key differences are found in relation to the power of the relevant committee to determine the level of parliamentary scrutiny and to veto an Order, the statutory obligation on a minister to consider the committee's recommendations, and whether or not the instrument should be first laid as a proposal or a draft Order.

The majority of the procedures require ministers to consult before a draft Order can be laid. And all of them require the government to provide supporting documents to support the scrutiny process. As set out in the Localism Act 2011 case study, this was not originally the case in respect of orders under section 19 of that

327 House of Lords (2010), *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords*, para. 10.02.

328 House of Lords, *Hansard*, 5 March 2013, col. 1480.

329 House of Lords Leaders' Group on Working Practices, Session 2010-12, *Report of the Leaders' Group on Working Practices*, HL Paper 136, p.40.

330 House of Lords Delegated Powers and Regulatory Reform Committee, 3rd Report of Session 2012-13, *Special Report: Strengthened Statutory Procedures for the Scrutiny of Delegated Powers*, HL Paper 19, para.1, p.3.

Box 6

Defeating an SI: the House of Lords as a revising chamber

The Joint Committee on Conventions concluded in 2006 that there are situations in which it is consistent with the Lords' role as a revising chamber to threaten to defeat an SI. It suggested a number of examples (not a prescriptive list):

a) 'where special attention is drawn to the instrument by the Joint Committee on Statutory Instruments or the Lords Select Committee on the Merits of SIs (now the Secondary Legislation Scrutiny Committee)

b) when the parent Act was a "skeleton Bill", and the provisions of the SI are of the sort more normally found in primary legislation

c) orders made under the Regulatory Reform Act 2001, remedial orders made under the Human Rights Act 1998, and any other orders which are explicitly of the nature of primary legislation, and are subject to special "super-affirmative" procedures for that reason

d) the special case of Northern Ireland Orders in Council which are of the nature of primary legislation, made by the Secretary of State in the absence of a functioning Assembly

e) orders to devolve primary legislative competence, such as those to be made under section 95 of the Government of Wales Act 2006 and

f) where Parliament was only persuaded to delegate the power in the first place on the express basis that SIs made under it could be rejected.'

Joint Committee on Conventions, Report of Session 2005-06,
Conventions of the UK Parliament, Vol. 1, HL Paper 265-I, HC Paper 1212-I, p.62, para.229.

legislation even though the documentation provision was made for orders under section 7 of the same Act. Section 19 was incorporated into the Bill following a report stage amendment, as a result of which there was very limited scrutiny of it, the DPRRC was unable to report on it at such a late stage and therefore no one dealt with the anomaly. The government did subsequently agree to remedy this the following year when the difference was pointed out by the DPRRC. But that it occurred at all demonstrates the difficulty of maintaining a systematic approach to the inclusion of strengthened procedures in legislation if the government itself is not prepared to be mindful of the need for consistency.

The growth in the range of strengthened scrutiny mechanisms is largely a result of the government's desire to avoid conceding a power of veto to a scrutiny committee during a bill's passage. In addition to the Legislative and Regulatory Reform Act 2006, a form of veto power exists only in the Localism Act. Thus far, however, the latter provision has not been tested as only one Localism Order has been

forthcoming, the Draft Harrogate Stray Act 1985 (Tour de France) Order 2014 which was deemed to be suitable for the negative scrutiny procedure only.

The then government in 2006 agreed that LROs would not be used for highly controversial matters, such as constitutional changes. However, this was an undertaking, not a promise. And as the Draft Deregulation Bill case study shows, the coalition government was willing to offer a scrutiny procedure in an area of great constitutional importance that they argued was modelled on the LRO but they did not recognise the need to include the accompanying procedural safeguards. While the concession on constitutional and otherwise controversial matters was important, its value is questionable if it is subject to the changing whim of successive governments.

Five of the procedures require the government to lay a draft Order and then lay a revised draft after the scrutiny period is complete. In contrast, the remaining six procedures require that the government lay a proposal, containing a draft Order, and then lay the draft Order following the completion of the scrutiny process. The wording and process is utterly inconsistent although, in practical terms, the end result is the same as each approach enables the government to revise its intention in response to the consultation process without having to initiate a new scrutiny procedure.

In this case, differences in wording may have an anodyne effect. But in seven of the scrutiny procedures phrases such as 'consider', 'have regard to' and 'take account of' are all used in relation to the government's response to recommendations by the relevant scrutiny committees.[331] Do these have the same meaning and effect? And why, in the other four procedures, is the government bound only by a general provision to consider representations made to it?

The DPRRC recommended in 2012 that if the government proposed to include a strengthened scrutiny procedure in future bills it should use an existing model rather than create a new variant.[332] The Leader of the House of Lords subsequently gave an agreement to this effect. However, again, as the Draft Deregulation Bill demonstrated, this was ignored when the government proposed a new variant on the LRO procedure, and failed to adequately explain why.

The anomalies in the process are now so great, and are exacerbating the complexity of delegated legislation to such an unhelpful extent, that it raises the question of whether the system should be rationalised.

If strengthened scrutiny procedures are to continue to be used, it would be better if there were no more than one or two variants. Parliament should decide the principal features of the strengthened scrutiny model and require the government

331 House of Lords Delegated Powers and Regulatory Reform Committee, 3rd Report of Session 2012-13, *Special Report: Strengthened Statutory Procedures for the Scrutiny of Delegated Powers*, HL Paper 19, para.20, p.10.

332 *Ibid*, para.25, p.11.

to adhere to it. One variant might have provision for drafts, consultation, supporting documents, committee determination of the scrutiny procedure, and consideration for up to 60 days (perhaps formalised as the 'enhanced affirmative' procedure); the other might have all these and additionally a veto power for judicious application in the most contentious cases only (to be known as the 'super-affirmative' procedure). Both variants should statutorily require that the minister consider committee recommendations and explain in writing to the relevant committee if the government does not plan to adhere to those recommendations. Rationalising the system in this way would require primary legislation but it would be a relatively short, straightforward bill whose benefits would outweigh the cost in legislative time. It would also have the additional advantage of prompting a much-needed debate in both Houses about the nature of delegation and the scrutiny of it for there is now a strong case for a much wider review and rationalisation of all scrutiny procedures.

Rationalisation of powers and procedures

As our case studies demonstrate, there is no consistent pattern between the content of a power and the procedure to which any SIs resulting from it are allocated. Too often it is about 'feel' and 'judgement' rather than principles and objective criteria. As the First Parliamentary Counsel, Sir Richard Heaton noted during a recent DPRRC evidence session, even he was not sure 'that there are really clear principles yet that everyone is agreed on'.[333]

And so many concessions are now being made to get bills through that the procedures no longer make sense in terms of usability. It could take longer to get a draft negative instrument through than some forms of affirmative instrument because the former will face a 40-day scrutiny period before it can come into effect whilst some of the latter can come into effect immediately and remain so unless disapplied within 28 or 40 days.Yet the draft affirmative route is sometimes chosen, as in the case of the Banking Bill, for circumstances of potential emergency. And SIs subject to the super-affirmative procedure can take between 11 and 18 months, longer than for primary legislation. One could also end up in a situation in which two related powers, utilised in conjunction with each other, are subject to highly different scrutiny procedures that may then make implementation difficult.

Beyond concern about Henry VIII powers and legislative handling at the parental bill stage of the process, there is no consistent or systematic justification underpinning why some powers are now deserving of some form of strengthened scrutiny but others are not.

333 House of Lords, Delegated Powers and Regulatory Reform Committee, 7th Report of Session 2014-15, *Special Report: Quality of Delegated Powers Memoranda*, HL Paper 39, 31 July 2014, para.33, p.13.

For example, it could be argued that a number of affirmative instruments are sufficiently controversial as to justify a form of strengthened scrutiny greater than the inadequate process offered through Delegated Legislation Committees. The affirmative Draft Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) (Amendment) Regulations 2014 sound relatively anodyne. However, as they concern applications for fracking they are highly contentious, politically controversial and are of enormous importance for those citizens living near the proposed sites. Similarly, is the affirmative procedure appropriate to control significant changes in taxation arrangements? Might such regulations not benefit from drafts, extended committee scrutiny, and a requirement that ministers have regard to the consultation process, perhaps even the provision of a veto power?

Some negative instruments are equally controversial. The National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations (see Box 7) were particularly contentious and generated a huge level of interest among NHS staff, stakeholders and patients. A form of strengthened scrutiny might have been beneficial in this case as well.

The debate about which delegated legislation should be subject to strengthened scrutiny is already beginning to push at the boundaries of previously understood practice. The Parliamentary Commission on Banking Standards, for example, proposed in 2012 that there should be provision for 'enhanced scrutiny' of new delegated legislation in the banking sector in the form of a 'small *ad hoc* joint committee of both Houses of Parliament, to be established on each occasion subsequent to the first use of each delegated power when the Treasury proposes to exercise one of those delegated powers'.[334] It proposed that the Chair of the Commons Treasury Select Committee should be an *ex officio* member of the committee, the government should be required to publish its case for the proposed new use of the power, alongside a provisional version of the SI, which would then be subject to public consultation. The joint committee would report on the proposal within a specified time after which the government would proceed with the SI in the normal way using the affirmative procedure.

The Commission's proposals have not yet been acted upon. It may be right to assert that the banking regulations require 'enhanced' scrutiny, but if the provisions are adopted without any regard to the rationality of the wider scrutiny process there is a danger that it will unnecessarily complicate the system still further. There is a risk of a ratcheting-up effect with parliamentary committees unilaterally seeking strengthened scrutiny of certain types of delegated legislation without regard to what procedures already exist.

334 Parliamentary Commission on Banking Standards, 1st Report of Session 2012-13, *Volume 1: Report Together With Formal Minutes*, HL Paper 98, HC 848, p.69.

Box 7

Controversy Surrounding a Negative SI: the NHS (Procurement, Patient Choice and Competition) Regulations

In March 2013 the government had to revoke these regulations arising from section 75 of the Health and Social Care Act 2012. They were designed to open up the system to outside providers by preventing health service commissioners from acting in an anti-competitive manner. During scrutiny of the parental Bill there had been widespread criticism of these proposals; those working in the health sector feared that it would amount to privatisation by the back door. The government had indicated during scrutiny of the Bill that it would not force competition on commissioners but these regulations appeared to do just that. The opposition tabled a 'prayer' motion in the House of Lords to oppose the regulations. The issue had been much debated at the Liberal Democrat's spring conference and it was clear that the government risked defeat if their Peers supported the motion.

Facing the rare prospect of an SI being voted down, the government agreed to revoke them. However, the rules did not permit the original SI to be withdrawn. So they had to be replaced by a substitute SI that was laid on 1 April. The new regulations – The National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013) – addressed the central concern about competition but the guidance which would set out how the regulation was to be interpreted was not available at the time the SI was agreed so many external groups were still unsure how it would work in practice.

A review of powers and their scrutiny procedures is also needed because of a lack of consistency in the approach between the Houses as illustrated by attitudes to Legislative Reform Orders. At the time of writing, 25 LROs have been laid since Royal Assent and one is currently being considered. The government has proposed the affirmative procedure 16 times and the negative procedure on six occasions. It has also proposed the super-affirmative route twice. But Parliament has chosen to upgrade the procedure on eight occasions and the super-affirmative procedure has been triggered six times (including one LRO that was subsequently withdrawn).[335] In one case, the Draft Legislative Reform (Minor Variations to Premises Licences and Club Premises Certificates) laid in 2007, the government proposed the negative scrutiny procedure only for the committees in both Commons and Lords to insist on its upgrade to the super-affirmative procedure. Here, the difference in attitude towards scrutiny was particularly stark. But both Houses do not always agree: on two occasions with LROs alone, they have reached a different conclusion about the appropriate level of scrutiny.

[335] The Draft Legislative Reform (Regulation of Providers of Social Work Services) (England and Wales) Order 2013.

Such differences of view illustrate the difficulty of determining the appropriate level of scrutiny; the process is too subjective and *ad hoc* in the absence of any clear, verifiable and objective criteria against which to make a judgement. A review of the entire process is therefore needed to enable a fundamental question to be asked and answered by Members: what does Parliament want to look at in the realm of delegated legislation? What criteria and principles define what Members want to look at again and how can this best be done? And as part of this review, Parliament must confront the ultimate challenge posed by delegated legislation: do extra drafts, more consultations, committee scrutiny, and consideration for up to 60 days actually ameliorate the issues of concern if the granting of the power was too great in the first place? No amount of consultation and committee discussion can alleviate a difficulty inherent in the extent of delegation.

Extra-parliamentary scrutiny?

Any wide-ranging review should also address the question of whether the burden on MPs and Peers to scrutinise delegated legislation should be reduced through the introduction of individuals or bodies with genuine technical expertise in particular policy areas. In our Banking Act case study, for example, the government concluded that there was value in establishing the Banking Liaison Panel to support it in drafting and implementing delegated legislation relating to banking regulation in the future.
In the field of welfare legislation, there has long been independent provision of expert advice to ministers through the Social Security Advisory Committee (SSAC). Established in 1980 as a statutory body, it provides advice to the Secretary of State for Work and Pensions primarily in relation to social security regulations. The Secretary of State has a duty to refer all relevant proposals to the SSAC for consideration ahead of implementation, thereby guaranteeing its involvement in the scrutiny process. It also has a role in considering equality and diversity issues in proposed regulations, scrutinising the information products produced by the DWP, and generally giving advice on social security matters.

In scrutinising regulations the SSAC may issue consultation documents, hold stakeholder meetings and undertake visits to assist its deliberations. It submits a report to the Secretary of State who will usually publish it along with the government's response at the time the regulations are laid before Parliament. While the government is required to consult the SSAC, it is not compelled to accept its recommendations although those instances where its advice is not followed will often result in the concerns being aired in Parliament, particularly by the SLSC. A flaw in the SSAC model is that its remit does not extend to delegated legislation passed within six months of relevant primary legislation; there have been calls for this constraint to be removed but the government has thus far declined to do so.

The Banking Liaison Panel and SSAC models could be utilised in other policy-making areas where there is a similar reliance on complex delegated

legislation. But rather than reporting to government, they should report to Parliament via departmental select committees or the relevant delegated legislation committees, providing them with valuable technical expertise and informed advice to maximise the effectiveness of the parliamentary scrutiny process. This might result in parliamentarians spending less time overall scrutinising delegated legislation, but being able to focus more efficiently and usefully on the most critical and controversial SIs.

More radically, Parliament might, as part of a wide-ranging review, consider whether it might delegate technical scrutiny of SIs to an independent person or body that would conduct the work on its behalf and then report to relevant committees. In Northern Ireland, for example, the Assembly, in Standing Order 43, has delegated technical scrutiny of SIs (known as statutory rules) to an Examiner of Statutory Rules. The Examiner scrutinises all such rules using criteria not dissimilar to those utilised by the JCSI at Westminster (and to a lesser extent some of the provisions looked at by the SLSC). In many ways, the work undertaken by the Examiner's office is that undertaken by the clerks and legal advisers of the JCSI.

Depending on how the role and remit was structured, an Examiner's office could engage directly with departments, work across both technical and policy issues relating to SIs, and provide training and support to Members and staff, as well as departments. The Examiner would report to Parliament through relevant delegated legislation committees and/or select committees and be available to give evidence to such committees when required, thus enhancing the transparency and accountability of the sifting function.

Alternatively, consideration should be given to reforming the scrutiny system such that Parliament actively decides that the greater burden of this work should fall on the House of Lords in future. Its Members have both appetite and aptitude for such work and they have demonstrably improved their scrutiny procedures over the years in ways that the House of Commons has not. The most effective elements of the delegated legislation scrutiny system can be found in the House of Lords – particularly through its committees – and there would be value in enhancing their influence still further (as detailed in later sections of this chapter) in keeping with the House's wider role as a revising chamber. In doing so, however, two restrictions on its role need to be eased. Firstly, Peers should be able to engage in scrutiny of delegated powers at the earliest possible stage, regardless of where the legislation has reached in the scrutiny process. Secondly, the constraint on Peers' examination of financial, particularly tax matters should be lifted in respect of delegated legislation. Given the nature of the scrutiny procedures in the Commons and the lack of detailed Member engagement with delegated legislation, restricting Peers from examining such SIs consigns them to an inadequate scrutiny process.

Enhancing the work of the Delegated Powers and Regulatory Reform Committee

As the case studies illustrate, the DPRRC is a highly influential committee and provides the nearest thing to a form of jurisprudence in the delegated legislation arena. Around 80% of its recommendations are adopted by the government each session; a high mark when compared to other committees. It has exposed and raised awareness of the way and extent to which government takes powers in bills such that parliamentarians can no longer claim that they do not know what is happening.

Indeed, so valuable is its work that there are good reasons to argue that MPs would benefit if they had access to the kind of information and analysis it provides when they are scrutinising bills. As it stands, MPs only have access to DPRRC findings if the bill has begun its passage in the Lords; if a bill starts in the Commons then the key scrutiny opportunities at committee and report stage are complete before the DPRRC begins its work. Thus, the scrutiny process in the Commons is less well informed about the delegation of powers and proposed scrutiny measures than are Peers. Although the Delegated Powers Memorandum is made available to MPs at the start of the bill, without a process to analyse and interpret its contents in a meaningful way, most MPs will never make much use of it.

In order to ensure that the valuable analysis the DPRRC provides is available as early as possible in the scrutiny process for those bills that start in the Commons, three options present themselves.

A joint DPRRC covering both Houses could be established. However, joint committees do not enjoy great support in the House of Commons and quorums are always a problem, with attendance by MPs tending to be low. This approach would risk damaging the work of the DPRRC with no attendant benefits to outweigh the cost.

The House of Commons could establish its own committee, modelled on the DPRRC, to provide MPs with more information about delegation once a bill begins its passage through the House. However, as can be seen with DLCs, MPs are not particularly engaged with highly technical scrutiny given the myriad number of other responsibilities they face. And setting up another committee is unlikely to find favour at a time when existing select committee work is already straining the resource capacity of the House.

One way around this would be to adapt the remit of an existing Commons Committee. The Regulatory Reform Committee, for example, was specifically set up to consider LROs of which there have been only 25 since the legislation was passed. Although it holds occasional inquiries on issues related to deregulation, it is a much under-used body. In the two-year long session in 2010-12, for example, it met on only four occasions although six of the 14 members managed to attend two or fewer

of those meetings.[336] There is some existing intersection of work with the DPRRC in relation to regulatory reform and LROs so if the Commons were to establish its own DPRRC equivalent, augmenting the remit and resources of this existing committee might offer the best approach. However, there is a risk that the valuable work of the DPRRC would be diluted by the existence of a competitor committee, particularly if the bodies reached different conclusions in relation to specific powers.

An alternative reform, one that we favour, would be to change the remit of the DPRRC so that it can report on bills immediately they begin their passage through one of the Houses, whether that be Lords or Commons. This would require an amendment to Standing Orders and an increase in resources to enable the Committee to report several times on each bill as amended through each House. It would controversially push at the commonly understood boundaries of bi-cameral scrutiny; a process whose features currently have more in common with a firewall than osmosis. But the DPRRC does this scrutiny well and Peers are willing and able to devote more time to it than MPs; there is no good reason for duplication in each House but plenty of merit in a shared approach, to better pool knowledge and expertise. Crucially it would ensure that the DPRRC's role was strengthened rather than diluted.

There are, however, three weaknesses in the DPRRC's work that could beneficially be rectified. First, there is no formal requirement that government should respond to its reports. In practice, departments generally do so; but that leaves open the possibility that they might not. Given the importance of delegation they ought not to have the option.

Secondly, our interviews would suggest that the Committee does not have a systematic process in place for checking past delegations of power and is therefore heavily dependent on its own past reporting and the extensive body of knowledge and experience built up by its staff team. While this does not appear to have caused significant problems hitherto, it does leave the Committee exposed to considerable risk in terms of future knowledge management.

Finally, it would be beneficial if the Committee, building on its now extensive body of work, were to do more to promote awareness of the criteria it utilises to reach its determinations on the delegation of powers and the scrutiny procedures that should apply. The DPRRC is the most effective and influential player in the process but could still do more to exert itself further in policing the boundary of what is and what is not acceptable in delegation.

336 House of Commons Regulatory Reform Committee, *Members Attendance Report 2010-12*, www.parliament.uk/documents/commons-committees/regulatory-reform/Regulatory-Reform-attendance-2010-12.pdf (as accessed on 30 October 2014).

The DPRRC has long argued that each power must be adjudged on its individual merit. But in the summer of 2014 its stance softened and it revised its guidance to departments to include a section on 'Principles' (see Box 8). This revised guidance is useful, but in the circumstances it remains quite limited, and continues to rely on departmental legal teams, the OPC and PBL Secretariat to interrogate and then utilise its findings despite all evidence to the contrary that this actually happens in any systematic way. As the case study bills show, they often disagree or get it wrong and an upgrade in scrutiny provision is often traded as part of the handling process.

The Government Legal Service and OPC have begun to implement reforms to improve knowledge and understanding of the DPRRC's findings and how this should be applied in the production of the Explanatory Memorandum, including the nomination of a member of OPC to provide feedback and disseminate best practice across government. But it remains to be seen whether these changes will have any marked effect on performance. We also recommend that the PBL Secretariat should always include a parliamentary adviser on secondment from the House of Lords, in addition to one from the House of Commons, in order to ensure that the procedures and expectations of this House are factored into the legislative planning, delivery and scrutiny process.

These changes notwithstanding, there is still a case for the Committee going a step further and providing a more detailed analysis of the standards it applies when considering delegated powers, and providing case study examples to illustrate its approach. What is needed is a public, accountable framework against which to test the decisions that the Committee makes and to which departments might have regard when drafting powers and procedures.

The Joint Committee on Statutory Instruments

The purpose of the JCSI is somewhat incongruous when the majority of instruments with which it deals have already been 'made'. Its influence is real but fragile, for it carries weight only if departments wish it to do so; specifically, only if ministers care whether the Committee reports against their particular department. If they do not, then the JCSI is an administrative inconvenience, but not a serious block on the implementation of delegated legislation. Regardless of how critical it may be in its report on an SI, the Committee cannot require that it be withdrawn or prevent it taking effect for it has no formal power over instruments.

The Committee reports on all general SIs (and any local SIs subject to parliamentary scrutiny) primarily in relation to defective drafting or the failure to observe proper drafting and legislative practice, the need for elucidation, doubtful vires, and unusual or unexpected use of powers. Its grounds for reporting also include when an SI imposes a charge on the public revenues, but in practical terms it does not always

observe this requirement as to report all SIs in relation to fees or charges would be ineffective. It therefore takes a discretionary approach to the prioritisation of its reporting functions.

Box 8

'Principles' applied by the DPRRC

Every **Henry VIII** power (that is, a delegated power which enables a Minister, by delegated legislation, to amend, repeal or otherwise alter the effect of an Act of Parliament), including where the power is expressed in terms of "modification", should be clearly identified. Although the Committee recognises that the appropriate level of parliamentary scrutiny for such powers will not be the affirmative procedure in all cases, where a Henry VIII power is subject to a scrutiny procedure other than affirmative, a full explanation giving the reasons for choosing that procedure should be provided in the memorandum.

If a bill is, in effect, **a skeleton bill** (so that the real operation of the Act would be entirely by the regulations, or orders made under it), or if part of a bill is, in effect, **a skeleton part of a bill**, the Committee will expect a full justification for the decision to adopt that structure of powers.

With regard to **any power to make incidental, consequential or similar provision**,

- where it is a **Henry VIII** power, the memorandum should explain why the particular form of wording setting out the power has been adopted. The presumption in respect of Henry VIII powers, that they should be subject to the affirmative procedure, applies. Therefore, where they are not, the memorandum should explain why not. Where the power extends to the **amendment of future Acts**, the memorandum should explain clearly why it is thought such a power is necessary;
- where it is a **non-Henry VIII power** which is included in a commencement order (and which will not therefore be subject to any Parliamentary procedure), the Committee will expect such a power to be covered by the Delegated Powers Memorandum and explained in the usual way.

Where a bill creates a **criminal offence with provision for the penalty to be set by delegated legislation**, the Committee would expect, save in exceptional circumstances, the maximum penalty on conviction to be included on the face of the bill. Therefore, where this is not the case, the memorandum should explain why at the very least the Committee would expect the instrument to be subject to affirmative procedure. Similarly, where the ingredients of a criminal offence are to be set by delegated legislation, the Committee would expect a compelling justification.

House of Lords Delegated Powers and Regulatory Reform Committee, 3rd Report of Session 2012-13, *Special Report: Strengthened Statutory Procedures for the Scrutiny of Delegated Powers*, HL Paper 19, 5 July 2012, para.20, p.10.

There is no clear pattern suggesting a significant increase in the number of SIs being reported by the Committee over the years. However, as Figure 13 shows, there is a clearly discernible pattern of concern in the issues reported by the Committee.

Figure 13: Statutory Instruments to which special attention has been drawn by the Joint Committee on Statutory Instruments by Session, 2005-2014 [337]

	2005-06	2006-07	2007-08	2008-09	2009-10	2010-12	2012-13	2013-14	**TOTAL**
Defective drafting	71	54	54	23	23	145	22	56	**448**
Elucidation required	5	4	5	2	2	9	16	13	**56**
Doubtful vires	11	3	3	3	3	6	12	7	**48**
Unusual or unexpected use of powers	5	8	6	4	4	10	5	1	**43**
Failure to observe proper practice	17	7	10	9	9	12	20	9	**93**
Other grounds	24	5	6	2	2	7	3	4	**53**
TOTAL	**133**	**81**	**84**	**43**	**43**	**189***	**78**	**90**	**741**

**NOTE: The 2010-12 session was of two years duration accounting for the abnormally high number of instruments to which the Committee has drawn attention.*

In the last eight sessions, the Committee has drawn attention to 741 SIs about which it had serious concerns, the majority of those (448 or 60.4%) in relation to drafting (see also Appendix I). In addition to the 448 individual pieces of law that were defectively drafted in some way, 93 also failed to observe proper drafting and legislative practice. The Committee adjudged that a further 293 pieces of legislation required further explanation, were beyond the power provided in the parental Act or sought to use the power in unusual or unexpected ways.

If 448 pieces of law are defectively drafted in some way, then the system for producing such legislation cannot be functioning effectively.

How do the problems with these flawed SIs actually manifest themselves? In drafting terms it often includes something as basic as the failure to actually state what the SI is intended to mean, or a provision that can be ambiguous when read literally, the inclusion of superfluous material that has no legal effect, the use of different terms (for example, 'require' and 'request') to mean the same thing within an Order, wrong cross-referencing, or incorrect use of nomenclature. Minor drafting errors can be addressed through an exchange of correspondence between officials or via

[337] House of Commons *Sessional Returns* 2005-06 to 2013-14.

correction slips. But where the issues are more serious then the Committee will formally report on the instrument in order to draw it to the attention of the House.

SIs that provide for criminal penalties are a matter of obvious concern if defectively drafted. If a citizen is at risk of such a penalty, it must be clear in law – via the SI – what exactly gives rise to the penalty in question.

In the 2005-06 session for example, the Ceramic Articles in Contact with Food (England) Regulations 2006 (S.I. 2006/1179), was reported because of a concern with the ambiguous wording of paragraph 1(5):

> *'given the arrangement of its subdivisions (a), (b) and (c) and the words which link them ("(a) ...; or (b) ...; and (c) ...").'* [338]

In short, it was not clear whether the SI meant (a) alone or (b) and (c) combined; or equally (a) and (c) combined *or* (b) and (c) combined. The department indicated that this was not a problem as the SI was to be interpreted in accordance with the relevant EU Directive. However, the JCSI contended that when the application of the Order could lead to criminal liability in circumstances where the offence was unclear it was unacceptable that further documentation should need to be referred to in order to provide clarity.

More recently, during the 2010-12 session, the Animal Feed (England) Regulations 2010 (S.I. 2010/2503) were reported by the Committee for imposing requirements in relation to the labelling of animal feed but failing to identify the person whose responsibility it was to ensure that these requirements were complied with.[339] Here the Food Standards Agency undertook to amend the SI at the next available opportunity.

SIs that refer to legislation that does not exist are also an obvious candidate for concern. Thus the Committee reported the Immigration and Nationality (Cost Recovery Fees) Regulations 2011 (S.I. 2011/790). It referred to a person who makes an application in relation to a regulation in the Immigration and Nationality (Fees) Regulations 2011. However, these regulations, at the time the Cost Recovery Fees SI came into effect, did not actually exist; they were contained in a draft affirmative instrument that had not yet received parliamentary scrutiny. The Committee expressed concern that the SI was made with no apparent recognition of the possibility that the draft instrument might not be approved. The Home Office defended its stance in relation to timing of the SIs, arguing that in order to meet the 6 April deadline for them to come into effect it had no option but to proceed on this basis, recognising that if the draft instrument was not approved then it would have had to introduce an

338 Joint Committee on Statutory Instruments, 28th *Report of Session 2005-06*, HL Paper 199, HC 35-xviii, 13 June 2006, p.4.

339 Joint Committee on Statutory Instruments, *8th Report of Session 2010-11*, HL Paper 65, HC 354-viii, 30 November 2010, p.2.

emergency amendment to the first set of regulations. The Committee reported the SI for what it charitably described as 'fortunately, an apparently harmless failure to conform to accepted legislative practice'.[340] In practice, legislation lay on the statute book for several weeks referring to other legislation that did not actually exist.

Conversely, where SIs seek to revoke legislation that has already been revoked at an earlier date this is also a worrying development. The School Finance (England) Regulations 2008 (S.I. 2008/228), for example, provided for the revocation of SIs 2004/3131 and S.I. 2005/526. But these had actually been revoked two years earlier on 1 April 2006 under the School Finance (England) Regulations 2006 (S.I. 2006/468).[341]

The Committee will also report SIs where it believes that the technical supporting material is insufficient or not properly verified. In 2009, for example it drew attention to four problems with the Highway Litter Clearance and Cleaning (Transfer of Responsibility) (England) Order 2009 (S.I. 2009/2677). This transferred responsibilities for litter clearing between specified points on roads outside London, but several of the boundary definitions for three trunk roads that should have been included in the SI were missing. The Department for Transport acknowledged that the draft did not provide sufficient clarity and promised to make a correcting instrument at the earliest opportunity. In the meantime, the department assured the Committee that the work was being done 'on the correct parts of the highways and therefore there will be no practical impact on litter duties as a result of these corrections'.[342]

We heard evidence during our interviews that the Committee sometimes struggles to address the issue of unusual or unexpected exercise of powers given that it is prohibited from reporting on the policy and merits of an SI. Some noted that it can also be difficult to separate the scope of the use of powers from defective drafting.

It is important to note that in looking at all SIs, the Committee has to be necessarily selective in what it reports. Historically it has been criticised for lacking discrimination and reporting too many SIs for trivial matters. This affected the respect in which it was held within Whitehall and the willingness of ministers and officials to respond to its findings.

From our interviews with departmental lawyers it is clear that the tide has turned and that the JCSI is held in greater respect than previously. Officials recognised, and spoke positively about the fact that the Committee would generally give them an opportunity

340 Joint Committee on Statutory Instruments, *22nd Report of Session 2010-12*, HL Paper 150, HC 354-xxii, 24 May 2011, pp.4-5.

341 Joint Committee on Statutory Instruments, *13th Report of Session 2007-08*, HL Paper 77, HC 38-xiii, 17 March 2008, p.2.

342 Joint Committee on Statutory Instruments, *1st Report of Session 2009-10*, HL Paper 8, HC 3-i, 8 December 2009, p.8 and pp.20-21.

to respond and explain their position if it intended to report them, even if generally it did not change the final outcome. But some departments were clearly more prepared than others to ride out any criticism the Committee might direct their way.

There was much more engagement around the Committee's concerns in relation to affirmative instruments. A number of departmental lawyers spoke of how they

Box 9

Defective drafting of SIs and the Courts

Statutory Instruments, unlike Acts of Parliament, are subject to judicial review. But the courts can only intervene in relation to *vires* and compliance: whether a minister is acting within their powers as delegated in the parental Act and in accordance with the procedure laid down by Parliament. Delegated legislation can be *ultra vires* on grounds of procedural error, a substantive error, or on the basis of irrationality.

In the case of **R (Kelly) v Secretary of State for the Home Office (Re Gibson)** (2008) three prisoners on five year terms appealed for their conditional licences to be converted into unconditional release due to amendments to the Criminal Justice Act 1991. The applicants were sentenced prior to the application of the Criminal Justice Act 2003 (Commencement No 8 and Transitional Savings Provisions) Order 2005 (SI 2005/950). Following the implementation of the Order in 2005, the appellants were recalled to prison for breaching the conditions of their release and shortly thereafter released on a limited licence.

However, they argued that since the SI had repealed section 39 of the 1991 Act they could not be released under licence, and additionally that they could not be held under section 33(3) of the Act because the SI made no mention of it. Instead they should be released unconditionally under section 37 of the Act that had not been repealed by the Order. The Court concluded that Parliament could not have intended to create a system whereby only long-term prisoners paroled prior to the SI who were then recalled to prison and re-released would receive an unconditional release, while others who were recalled and re-released prior to this date remained on conditional licences. The appeal did not succeed due to the failure of the appellant to offer any 'rational basis on which Parliament might have proposed to effect so bizarre a state of affairs'. The judgement concluded that the problem was a drafting error and the SI was interpreted in such a way as not to lead to an 'absurdity'.

In policy terms this may have been a satisfactory outcome: the SI was interpreted in such a way that the prisoners remained on a conditional licence. However, considerable court time and resources were taken up addressing an SI drafting error that risked the possibility of prisoners being released in ways not intended by Parliament.

R (Kelly) v Secretary of State for the Home Office (Re Gibson) [2008] All England Law Reports, 844.

actively sought pre-clearance of these SIs from the Committee's legal team because, in the words of one of them, 'the idea of laying an affirmative resolution Order for them to say "no – there's massive drafting holes in this" is just unbearable'. Ministers and officials do not want an adverse report from the Committee for fear this may make it more difficult as and when the SI is debated in the House.

The Committee unsurprisingly recommends that its reports 'should be considered essential reading by anyone involved in drafting statutory instruments' but in our discussion with departmental legal staff there was very little evidence of this. Detailed knowledge of the Committee's reports was vague to non-existent.[343] Most admitted they did not read them, reinforcing once again the lack of any knowledge management or circle of learning about the legislative process and Parliament's requirements in Whitehall. The Committee has indicated its intention to publish a series of themed reports on the problems it detects with SIs. The first, published in May 2013 explored the problem of 'inert' content in secondary legislation.[344] Despite these efforts, however, it is doubtful that the key players in each government department are actually listening.

The Committee is seen to do a reasonable job within the constraints in which it operates given the volume of SIs, the resources at its disposal, and the extent of its powers. But there are a number of significant flaws that could be addressed to strengthen its work.

First, the current system whereby many SIs are 'made' and come into effect before they are considered by the JCSI permits delegated legislation deemed defective by the Committee to sit on the statute book until such time as the government responds. However, the government is not required to respond and although in many instances departments do react positively to the Committee's concerns, in practice the JCSI annual reports, which track the progress of the SIs on which it has reported, frequently note that departments are still awaiting an opportunity to amend a particular instrument or that the date for the amending instruction is not yet known.

It is currently extremely difficult to track what percentage of instruments (and draft instruments) correct errors in an earlier SI. Relevant data is not collected in a uniform way and it is extremely difficult to track when instruments are amended or revoked. Departments do not record the information in a consistent way. The Chair of the SCLC has had to resort to asking written questions of each department to try and ascertain the scale of the problem but even here the answers provided by departments are so different in their presentation that it is impossible to properly

343 Joint Committee on Statutory Instruments, 1st Special Report of 2010-11, *Scrutinising Statutory Instruments: Departmental Returns 2009*, HL Paper 24, HC 402, 29 July 2010, para.3, p.5.

344 Joint Committee on Statutory Instruments, 1st Special Report of 2013-14, *Excluding the inert from secondary legislation*, HL Paper 6, HC 167, 21 May 2013.

Box 10

The Community Infrastructure Levy Regulations 2010

One of the most egregious examples of a defective SI being amended and relaid has arisen from a wide power in the Planning Act 2008. These regulations have now been amended four times. The Act provides for the imposition of a charge known as the Community Infrastructure Levy (CIL). The regulations provide for the imposition of this charge on the grant of planning permission for development. They specify who may charge CIL and address how liability to pay the levy is incurred, how it is charged and collected, how it is to be spent, appeals and enforcement.

The last set of amendments – the Community Infrastructure Levy (Amendment) Regulations 2014 – totalled 28 pages.* The reaction of the policy and legal community – who have been widely consulted by the government – was that while this latest set of amendments provided more flexibility, it also introduced new elements of uncertainty. The government has promised to review CIL in January 2015 to assess its effectiveness; some consideration should be given to the effect of the parliamentary scrutiny process on these regulations and their frequent need for amendment.

* See House of Commons, First Delegated Legislation Committee, 10 February 2014, *Draft Community Infrastructure Levy (Amendment) Regulations 2014*

compare and contrast. The only way in which data can currently be obtained is by doing a manual count of every SI to see how many carry the rubric that the instrument is being introduced 'because of a defect in an earlier instrument'. But not all correcting instruments carry such a rubric so this is an imperfect measure.

The system could be amended to require that the JCSI give a clean bill of health to all SIs before they come into effect. In practice, however, the volume of SIs – and the issues of timing for implementation that often arise – would make this impossible to resource. It could also be argued that this would, in effect, give the Committee a veto over SIs, thereby undermining the principle of delegation.

A more effective and less resource intensive reform would be to require ministers to respond to JCSI reports in writing within an agreed timeframe, perhaps a fortnight for made SIs. Although attitudes towards the JCSI have improved it is certainly not feared in Whitehall in the way that the DPRRC is; this is because ultimately its findings do not result in any concrete action that might clip the wings of the executive. Ministers have to respond to select committee reports, e-petitions, and parliamentary questions; there is no reason why they should not be required to respond to legitimate enquiries about the way in which power is being delegated in their name.

Our interviews suggest that it would be unlikely for ministers – and certainly the Secretary of State – to be aware of the detail of JCSI criticisms in relation to individual

negative instruments. The junior minister might see the draft memoranda but not necessarily the Committee's response unless it was in relation to an affirmative SI. Compelling ministers to respond in writing to any reports, confirming whether and why they propose to press ahead with an SI deemed defective, would thus help focus minds in Whitehall, elevating the issue within the department to help ensure that issues such as drafting problems might be taken more seriously in the future.

Additionally, the government should be required to remedy defective SIs within an agreed timeframe. A convention should be agreed whereby defects and any transitional consequences must be addressed within four weeks unless there are exceptional reasons not to, circumstances that must then be justified to the JCSI. This is not an unreasonable demand in exchange for the considerable powers and authority granted to government through delegation.

The government should also be required to publish departmental statistics accounting for the number of SIs that are revoked each session, and the number of corrective instruments that are produced, and to do so in a uniform way for the purpose of analysis and comparison.

Finally, the House of Commons does not observe the 'scrutiny reserve' that exists in the House of Lords in relation to JCSI decisions. Thus the House can debate an SI before the Committee has concluded its deliberations on the instrument in question raising the possibility that the House might approve the SI only for the JCSI to raise serious concerns in relation to something such as defective drafting. This obviates the purpose and value of the Committee's deliberations and risks making a mockery of the entire process. In practical terms the JCSI does all it can to meet urgently to consider an SI when this problem occurs in order to avoid such a situation developing. But it is not a complete fail-safe and if the House of Lords can observe a rule whereby it does not consider SIs in the Chamber before the JCSI has looked at them then there is no reason why the Commons cannot do the same.

Secondary Legislation Scrutiny Committee

Whereas the JCSI looks at the technical qualities of an SI, the SLSC looks at the policy application. As with the JCSI, it too is constrained by the fact that, as a former chair of the Committee described it, the 'horse has already bolted'. It is difficult to add value to the process when the government has already made decisions in primary legislation about the role and scope of an SI. This is then reinforced by the fact that the Committee, like the JCSI, has no formal power over instruments, and by the convention that Peers do not reject an instrument.

With a small secretariat, more than a thousand SIs to look at each year, and only a short period of time in which to consider them, the Committee necessarily has to perform a sift, applying a fair but rigorous test on a selection of instruments. It relies

on Members of the committee acting 'like bloodhounds' in the words of a former chair, to ensure that as many policy areas as possible are covered. It is also heavily dependent on the capacity of the advisers to sceptically analyse the documents provided by departments, and push, challenge, and cajole civil servants for more information, and in some cases to persuade them to withdraw an SI that is deemed unacceptable.

Figure 14: Reporting of SIs to the House of Lords by the Secondary Legislation Scrutiny Committee (formerly the Merits Committee) by Session, 2006-2014[345]

	2006-07	2007-08	2008-09	2009-10	2010-12	2012-13	2013-14	**TOTAL**
Political importance or public policy interest	52	49	51	28	45	46	46	**317**
Imperfectly achieving its policy objective	5	1	2	5	3	8	9	**33**
Public policy interest and imperfectly achieving its policy objective	3	1	0	3	4	6	4	**21**
Being inappropriate in view of changed circumstances since the enactment of the parent Act	0	0	0	0	0	0	0	**0**
Inappropriately implementing European Union legislation	2	3	0	1	1	1	0	**8**
TOTAL	**62**	**54**	**53**	**37**	**53**	**61**	**59**	**379**

The Committee has had some success with SIs withdrawn following the identification of a problem, in some cases to be re-laid in amended form. For example, in 2006 a series of Home Information Pack SIs were withdrawn and re-laid in diluted form following criticism of the implementation plans. In 2008, regulations for licensed premises in alcohol disorder zones were withdrawn and re-laid twice before the problems were addressed. The problems with these SI's were dealt with because of pressure from the Committee, often combined with external criticism from user representatives concerned about implementation. And they are resolved without any formal parliamentary action. But as with the JCSI this is largely due to the willingness of departments to engage with the Committee about the concerns it raises. The Committee cannot stop the SI taking effect, it can only draw the

345 Data calculated from reports of the Secondary Legislation Scrutiny Committee (formerly the Merits Committee) by session, 2006-2014.

attention of the House to it, and any Peer wishing to take it up in debate will almost always do so using a non-fatal motion of regret.

However, the option of a fatal motion which would kill an Order does exist, and so, whilst rare, it acts as a useful buttress to encourage departments to be more responsive to the Committee's concerns. The last occasion a fatal motion was tabled successfully was in 2012 on the Draft Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order. Prior to that, the last one was in 2007 after the Committee (then called the Merits Committee) took the rare step of calling in the minister to give oral evidence on the Gambling (Geographical Distribution of Casino Premises Licences) Order 2007 and issuing a detailed report highlighting its concerns. There were other influential voices opposed to the proposed location of a super-casino in Manchester and the Committee did not recommend rejection of the Order as that was beyond its terms of reference, but its stance was highly influential. In the words of a Committee Member at the time, this was the Committee's 'biggest bang' and brought about a sea-change in attitudes towards it among officials in Whitehall.

But like the DPRRC, the Committee is not infallible. It performs a sieving or sifting process; it cannot hope to capture all potentially defective SIs or every one that might be of political interest to Members, nor does it pretend to do so. In 2012, for example, it did not report a concern with the Criminal Injuries Compensation Scheme SI. The House of Lords approved it but when it was considered in a Delegated Legislation Committee in the House of Commons it faced strident criticism on all sides of the House and the minister decided not to move the motion. The silence of the SLSC ought not to be interpreted as a clean bill of health; but in practice, this is what government and Members often assume it to be.

A sifting committee for the House of Commons?

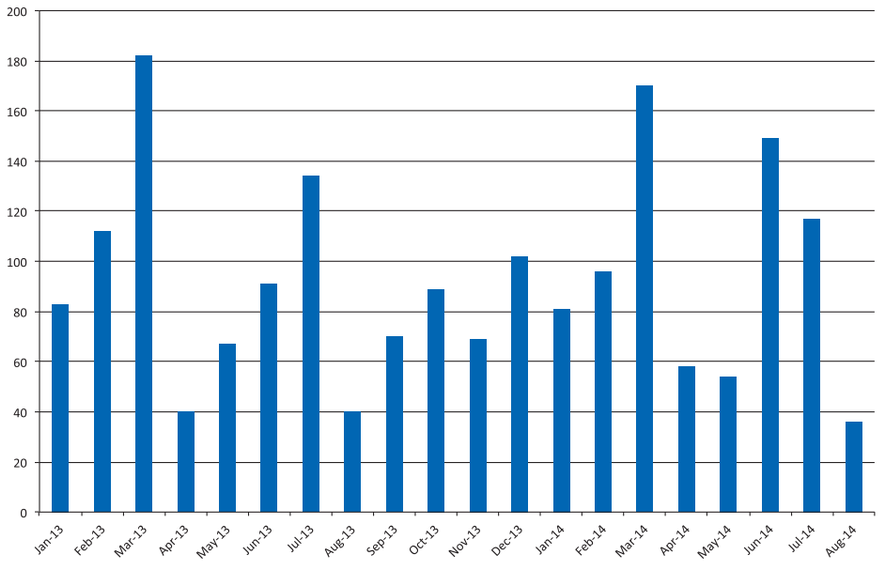
There has long been pressure for an equivalent sifting committee to be introduced in the House of Commons, both to strengthen the democratically elected House's interest in delegated legislation and to ensure an additional political sift of all instruments is undertaken. Given the relative weakness of the Commons compared to the Lords in dealing with delegated legislation this has merit. However, unless it is much clearer what issues such a committee would be sifting for, and how these might differ from what is already done by the JCSI and the SLSC, then there is a real risk of duplication. And there is no benefit in having a new committee if it is simply tied to the existing processes for praying against an instrument and consideration by the ineffective DLCs. If a new committee is to be introduced, it must be linked to robust mechanisms whereby MPs can more effectively scrutinise and exercise influence on the content of an SI deemed defective or otherwise a matter of concern. Simply bolting a new sifting committee on to existing procedures will resolve nothing

but have the detrimental impact of duplicating the work already undertaken by Peers. In the context of a wider review of the legislative process, however, there is a good argument to be made that instead of MPs undertaking the sift, the House, rather than duplicating work, might make use of the existing scrutiny work undertaken by Peers on the SLSC, or it might look to secure external independent support, either through an advisory body or the appointment of an independent examiner of SIs.

Time management of SIs and the 21-day rule

In most parliamentary sessions, as Figure 15 illustrates, the greatest number of instruments will be laid in the month of March in advance of the start of the new financial year and then in June and July as departments rush to table SIs before the summer parliamentary recess, and December before the Christmas recess.

Figure 15: Statutory Instruments Laid by Month, 2013-2014[346]



In the last three full parliamentary sessions, over 140 SIs have been laid each March, amounting to approximately 10% of the total number of SIs laid each year. This 'peak and trough' approach to the production of delegated legislation presents both Houses – particularly the relevant committees – with congestion problems in relation to effective scrutiny.

The then Merits Committee (now the SLSC) undertook an inquiry into the management of secondary legislation in 2005-06 and made a series of

346 Data calculated using *House of Commons Votes and Proceedings* 2012-13 and 2013-14.

recommendations for the better co-ordination of the production of SIs across Whitehall, including annual 'look-ahead' management plans.[347] In practice, however, there has been only limited progress.

Two areas where there have been some improvements are in relation to business and education regulations. For the former, two common commencement dates – the 6 April and 1 October – have been agreed; this gives business some degree of certainty about the emergence and implementation of the huge number of regulations that affect them each year. Similarly, all new SIs affecting schools must come into force by 1 September and schools must have two terms' notice of any changes. In practice this means SIs have to be made at least six months before they are due to come into force in order to take account of any consultation and policy development process.

The House of Lords advises that departments should allow at least six sitting weeks for the passage of an affirmative instrument through all its parliamentary stages but this is regularly ignored. There continues to be considerable divergence between departments when it comes to the timely production of SIs; some are better than others but many departments continue to routinely lay instruments too close to their intended implementation date. In some circumstances, planted parliamentary questions are then used to give advance warning of an upcoming SI to avoid the criticism that Parliament was unaware of what was happening.

If either House is in recess for more than four days, then the scrutiny periods – 40 days for negative instruments, for example – are suspended. Thus if a negative or made affirmative SI is laid just before a parliamentary recess it can come into force and remain so for many weeks before it can be considered by either House. The volume of SIs produced in advance of each recess thus presents a problem because potentially defective legislation can lie on the statute book for some weeks before Parliament even considers it. Departments are discouraged from laying SIs just before the recess but there is nothing either House can actually do about it under the current system.

Conversely, the recess periods, particularly the longer summer break, prevent much-needed SIs being brought forward and delay the amendment of defective regulations already on the statute book. In 2008, for example, the Immigration and Nationality (Fees) (Amendment No.2) Regulations 2008 were set out in a draft affirmative instrument laid before Parliament on 26 June and brought into force four days later. However, problems with the regulations soon emerged and amendments were required. But the summer recess meant that the changes could not be made

347 Merits of Statutory Instruments Committee, 29th Report of Session 2005-06, *The Management of Secondary Legislation*, HL Paper 149-1.

until the end of November, nearly five months after the initial regulations became law.[348] This is just as unsatisfactory an outcome as the laying of regulations late in the day before recess.

It is a convention that negative instruments should not come into force less than 21 days after being laid before Parliament. In its end of session reports, the SLSC notes the breaches of this rule. It takes the view that '5% ought to be a realistic ceiling to cater for the genuine emergencies that do require urgent action'.[349] But the trend in breaches of the rule has been upwards. Throughout 2011 the number never fell below 7.7% and in one quarter in 2012 reached as high as 13.7% of the instruments laid.[350]

There are occasions when it is legitimately necessary to breach the convention. In 2011 for example, the need to place or remove sanctions during the Arab Spring was deemed acceptable circumstances for urgent action. Similarly, in 2006, the Protection of Wrecks (Designation) (England) (No.7) Order 2006 (S.I. 2006/2535) had to be enacted quickly as a recently discovered wreck was deemed at risk of being looted. However, such breaches of the convention should be the exception not the norm, and in fact the majority of breaches are caused by the need to revoke or amend earlier SIs before they came into effect due to drafting errors.

It is incumbent upon departments to better plan and co-ordinate the production of SIs. The Cabinet Office and Department for Business, Innovation and Skills co-ordinate the production of PBOs and LROs respectively; but the timely implementation of other forms of delegated legislation is no less important.

The Merits Committee's 2006 recommendation of a central co-ordinating unit to plan and promote awareness of the production and implementation of upcoming SIs across government remains a useful objective that Whitehall should work towards. Bringing forward SIs – ensuring that any consultation process and production of supporting documentation is properly complete – is a complex process and deadlines will not always be met. But the adoption of common commencement dates for some regulations demonstrates that improvements can be made if there is political and administrative will to make it happen.

However, absent any penalty for failing to bring forward SIs on an appropriate timetable and there is no incentive upstream at the departmental level or among the business managers to improve things. The SLSC and JCSI have regularly expressed their

348 See Immigration and Nationality (Fees) (Amendment No.2) Regulations 2008 (S.1. 2008/1695) and Immigration and Nationality (Fees) (Amendment No.3) Regulations (S.1. 2008/3017).

349 Merits of Statutory Instruments Committee, 60th Report of Session 2010-12, *The Work of the Committee in Session 2010-12*, HL Paper 290, p.10.

350 Merits of Statutory Instruments Committee, 60th Report of Session 2010-12, *The Work of the Committee in Session 2010-12*, HL Paper 290, p.10.

concern but the problems continue. Ultimately two things have the power to focus minds in Parliament and create an impetus for change: ministers called to the House to answer questions about the failings of their department, and the taking up of valuable parliamentary time on the Floor of the House. In the event of an egregious breach of the 21-day convention or six-week recommendation, MPs on the JCSI or who otherwise have an interest in the issue could, for example, seek a backbench business debate. More explosively, the JCSI and SLSC plus any relevant departmental select committees could choose to hold an extraordinary joint meeting at which they invite the responsible minister to appear and account for what has happened. Committees working together to pursue inquiries is not unknown but is sufficiently unusual as to be likely to have a positive impact in shaking up attitudes at the departmental level.

The importance of Explanatory Memoranda

Time and again both the DPRRC and the SLSC have complained about the poor quality of Explanatory Memoranda (EM) provided to them in relation to bills and SIs respectively. Indeed it was because of this that the House, on the recommendation of the Procedure Committee, added a new reporting category – involving criticism of the accompanying explanatory materials – to the SLSC's terms of reference.

In our interviews with departmental officials and Parliamentary Counsel, all stressed the importance of the DPRRC and the Explanatory Memoranda on Delegated Powers prepared for the Committee. However, the quality of departmental memorandums is quite variable and in spring 2014 the DPRRC initiated an inquiry into the issue in an attempt to apply pressure for improvements on the Government Legal Service, the OPC and the PBL Secretariat. It was particularly damning about the quality of the EM for the controversial lobbying bill (The Transparency of Lobbying, Non-party Campaigning and Trade Union Administration Bill 2014) noting that:

> *'Unfortunately, our consideration of the powers in Parts 1 and 2 has been made much more difficult by the very poor quality of the memorandum as it relates to those Parts. From the very first page onwards, many of the references in it to clause and paragraph numbers in the Bill are incorrect; a number of powers have either not been mentioned at all or have been only cursorily explained; and in more than one instance we have found that information provided to us about a power is inaccurate or incomplete. We hope that, for future Bills, the Government will devote much greater care to the preparation of these important explanatory documents.'*[351]

351 House of Lords, Delegated Powers and Regulatory Reform Committee, 7th Report of Session 2014-15, *Special Report: Quality of Delegated Powers Memoranda*, HL Paper 39, pp.36-37.

It ought to be a matter of course that the government provides to Parliament a high quality memorandum explaining their policy intention. But it particularly matters that they do so in relation to delegated powers because so much responsibility for policing the system of delegation lies on the shoulders of the DPRRC. Most parliamentarians will not advocate for greater scrutiny than the Committee has recommended, and its stance is largely shaped by the memorandums it receives from departments. As long as the quality of EMs are below what Parliament ought to expect, it almost ensures that individual MPs and Peers are unlikely to take up issues of concern because much of the process is impenetrable.

Ultimately, however, government is unlikely to improve the quality of EMs unless forced to do so. The Committee needs to build on the outcome of its special inquiry into the quality of Delegated Powers Memoranda by calling both ministers and Permanent Secretaries to account at oral evidence hearings in the future when the quality of any memorandum falls well below what Members expect.

The Hansard Society has previously recommended that a Legislative Standards Committee should be established, ideally on a bi-cameral basis, to assess bills against a set of minimum technical preparation standards that must be met before a bill is introduced.[352] This recommendation has since been endorsed by the Leader's Group on Working Practices in the House of Lords and by the House of Commons Political and Constitutional Reform Committee.[353] A Legislative Standards Committee could invite the DPRRC to confirm whether or not it is content with the quality of the EM and incorporate the response into its review of each bill.

In the meantime, in the absence of a Legislative Standards Committee, there ought to be a provision for the DPRRC to reject a memorandum that it believes is inadequate resulting, if necessary, in a delay to consideration of the relevant parts of the bill until such time as an improved memorandum is provided to the Committee.

Here the DPRRC can compare notes with the SLSC and its approach to Explanatory Memoranda for SIs. The SLSC (and its predecessor the Merits Committee) has long complained about the long, legalistic, technical drafting style that renders the EMs impenetrable to users. And they frequently fail to provide an evidence base for the legislation, particularly the results of any consultation process prior to bringing forward the instrument.

Among our interviewees and respondents to our external consultation, frequent concerns about EMs related to a lack of cross-referencing of material and clear detail about how what was proposed differed from existing provision.

352 See R. Fox and M. Korris (2009), *Making Better Law: Reform of the Legislative Process from Policy to Act* (London: Hansard Society).

353 House of Lords Leaders' Group on Working Practices, Session 2010-12, *Report of the Leaders' Group on Working Practices*, HL Paper 136 and House of Commons Political and Constitutional Reform Committee, 1st Report of the 2013-14 Session, *Ensuring Standards in the Quality of Legislation*, HC 85, May 2013.

The Committee has sought to address the problems by occasionally calling ministers in for questioning from departments where the failings have been particularly egregious or by engaging in correspondence with a departmental Permanent Secretary in order to raise awareness of and engagement with the problems. Conversely, where it has found evidence of good practice it has brought attention to and praised it. But without the real teeth of being able to stop a defective SI, the Committee is primarily engaged in an attritional relationship with Whitehall; no minister or senior civil servant wants to be called to appear before a parliamentary committee in order to face criticism.

Grinding away at the issue in this way has periodically led to a shift in attitude and the quality of outputs but this has rarely proved durable. In its report on the 2010-12 session it noted that, with some departmental exceptions, 'the quality of EMs is generally improving'.[354] However, just a year later the Department of Health was condemned for producing particularly 'sloppy' material, while the Department for Transport failed to provide the final Impact Assessment and the consultation analysis in relation to an Order, both basic required information for SIs. And the Department for Education was criticised for providing such a partial account of the consultation process on one SI that the Committee was moved to take up the issue with the minister directly.[355]

The perceived quality had declined to such an extent that in its end of session report it confirmed that, rather than providing supplementary information, it now required departments to revise and relay all inadequate EMs.[356] In the session that followed (2013-14), 6% of all Explanatory Memorandums had to be replaced.[357]

Requiring departments to replace EMs is one way of addressing the issue. But our proposal of a permanent unit of specialist civil servants in Whitehall, dedicated to working full-time on legislation – both primary and secondary – would also help. It would provide a central pool of fast stream civil servants whose task would be to learn about and convey Parliament's requirements for legislation and its supporting documentation to departmental teams. One of its core tasks would be to maintain a watching brief on developments at the committee level and ensure that this was reflected in the future work of departments. SIs, and the accompanying documentation, might be certified by this unit to ensure they meet the standards that Parliament expects.

354 House of Lords Merits of Statutory Instruments Committee, 60th Report of Session 2010-12, *The Work of the Committee in Session 2010-12*, HL Paper 290, para.18, p.9.

355 House of Lords Secondary Legislation Scrutiny Committee, 35th Report of Session 2012-13, *Work of the Committee in Session 2012-13*, HL Paper 160, pp.30-31.

356 *Ibid*, p.31.

357 House of Lords Secondary Legislation Scrutiny Committee, 42nd Report of Session 2013-14, *Work of the Committee in Session 2013-14*, HL Paper 186, p.10.

Box 11

Inadequate Explanatory Memoranda: changes in Immigration Rules, April-May 2011

On 6 April 2011 reforms laid down in a Statement of Changes in Immigration Rules (HC863) came into effect 15 days after the statement was laid before Parliament (and one day into the Easter recess) in the form of an SI subject to the negative scrutiny procedure. The new rules made a number of significant changes to tier one and tier two of the points-based system to reduce economic migration from outside the European Economic Area.

The SI was reported by the Merits Committee (now the SLSC) on the grounds that it gave rise to issues of public policy likely to be of interest to the House, and was likely to imperfectly achieve its policy objectives. It was particularly critical of the failure to provide a full evidence base to support the changes. It noted that 3,201 submissions to the consultation had been reduced to a summary of just two and a half pages and an annex listing some but not all the responding organisations.* A motion of regret was laid down in the House of Lords and during the debate Peers were critical of the lack of an evidence base, the timing of the laying of the SI and the failure to adhere to the 21-day rule.**

But just a week later, two further motions of regret were debated in response to a new set of immigration rules (HC908) relating to the victims of domestic violence, this too having been brought to the attention of the House by the Merits Committee. On this occasion, the Home Office failed to lay an Impact Assessment, despite one being required, because it had not been cleared by the Regulatory Policy Committee, even though the immigration changes had already come into effect on 21 April 2011.***

* Merits of Statutory Instruments Committee, 27th Report of Session 2010-11, HL Paper 126, 31 March 2011, pp.5-11.

** House of Lords, Hansard, 3 May 2011, col. 409.

*** Merits of Statutory Instruments Committee, 29th Report of Session 2010-12, HL Paper 137, 5 May 2011, pp.6-9.

Accessibility and complexity

One issue that all the respondents to our public consultation remarked upon was the difficulty they faced in understanding what was happening with delegated legislation in their areas of policy interest. They were often unaware of the consultation process on a proposed SI until it was too late, they often found the information provided during the consultation process to be inadequate, they did not know if or when SIs would be considered by Parliament, they found accessing information about the scrutiny process and the relevant documentation in a timely way to be very difficult, and once an SI was enacted they were often unsure when

it would come into force and how it might interact with other SIs given the frequency of corrected instruments.

That genuinely interested parties struggle to track information and engage in the consultation process demonstrates that it is not fit for purpose in the 21st century.

Anyone wanting to track an SI has to monitor consultation announcements on relevant government department websites. The process is often open-ended giving ministers considerable discretion about who they consult and how. So unless an individual or organisation is on a departmental stakeholder list they are unlikely to be proactively informed of the consultation process. But as departments don't publish a rolling programme of SIs, it is difficult for many sectors and professions to know what is coming up unless they are explicitly approached. The Department for Business, Innovation and Skills has an email service that alerts people to its announcements but it is not an example copied much elsewhere in Whitehall. Departments are also poor at using technology to support effective consultation on delegated legislation. A rare example of better practice can be found at the Department of Health, which established an online forum to support consultation on the draft regulations and guidance arising from Part 1 of the Care Act 2014.[358] But this is the exception not the rule. Too often the nature and scope of consultation appears to be in the gift of the department rather than an accepted norm; much greater effort is needed to raise awareness of and publicise the consultation processes for SIs.

Not all SIs have a consultation process so the first that someone might hear of the legislation is once it reaches Parliament. To track the SI through the parliamentary process in both Houses can involve consulting up to 12 different pages on Parliament's website, none of which are immediately obvious to the user and a number of which are buried below several layers of other information. In addition to tracking the process, they then have to understand the nomenclature of 'made' and 'laid', 'prayers', 'Early Day Motions', 'fatal' and 'non-fatal motions', 'negative', and 'affirmative', 'enhanced' and 'super-affirmative' in order to appreciate what is likely to happen to the SI. Just finding out the date of a Delegated Legislation Committee debate can be tricky for many external organisations.[359] Given that MPs admit to being 'baffled' about how delegated legislation gets debated and what influence can be brought to bear on them, it is not surprising if those outside Parliament are equally confused.

358 See http://careandsupportregs.dh.gov.uk (as accessed on 30 October 2014).

359 For example, in its evidence to the DPRRC inquiry into the quality of Delegated Powers Memoranda the Immigration Law Practitioners' Association noted that it 'had found the House of Lords' Public Information Office helpful in identifying when delegated legislation is to be debated but the House of Commons Public Information Office seems unaccustomed to requests for such information and we have made requests for dates of debates that it was unable to answer although the date had been agreed.'

No one is expected to know the law in detail, but it is a principle of our system that ignorance of the law is no excuse in terms of a person's responsibility and liability for their conduct. It is therefore imperative that the law should be accessible to the public as soon as practicably possible. Once an SI comes into force it is published in accordance with the provisions set out in the Statutory Instruments Act 1946. In addition to being available in print form it is also available online via The Stationery Office and in time at the legislation.gov.uk website. But in practice there can be a delay between the time it comes into force and the time it is publicly available, although this is monitored and any undue delays are reported by the JCSI.

Taken as a whole, access to and knowledge of the delegated legislation process is very difficult for most citizens, organisations and parliamentarians. From consultation to the point at which an SI comes into force, the extent to which the system privileges the convenience of government at the expense of public and parliamentary scrutiny, the arcane nature of the nomenclature and the complexity of the procedures all serves to wrap the system in a fog of obscurity.

The public have a right to expect that Parliament will communicate its work clearly and usefully, and in a way which reaches out to all citizens to invite participation and interaction. It clearly does not do this in respect of delegated legislation. It should therefore undertake a thorough review of the language and terminology used as well as the presentation of information about delegated legislation on the parliamentary website in order to improve curation of material with a view to making the process more accessible and understandable.

The government should also review the Statutory Instruments Act 1946 with a view to replacing it with new legislation that takes account of modern forms of digital communication and developments arising from the 'Transforming Legislation Publishing' and 'Good Law' initiatives. Importantly, it should also set out clear, minimum standards (of a high level) for publicity and consultation concerning delegated legislation in the future.

12. Conclusion

The centrality of delegated legislation to the process of law-making is amply illustrated in this study. Its importance is not in doubt. But as the previous chapters illustrate, the process by which delegated powers are provided in Acts of Parliament and the scrutiny procedures then accorded to them is not systematic and frequently inconsistent.

Too much of the process relies on 'gut feeling' and 'judgement' rather than objective criteria. Short-term pragmatism outweighs longer-term principle with piecemeal solutions cobbled together in individual legislative cases to deal with concerns arising from more fundamental problems in the system.

The process is complex and confusing leaving many of those involved – inside and outside Parliament – baffled and frustrated. Given the impact that delegated legislation has on the lives of millions of people across the country, the deficiencies in the process that can accord ministers extraordinary powers and result in hundreds of defective pieces of legislation reaching the statute book are wholly unsatisfactory.

As the previous chapters indicate, a wide variety of inter-related factors come into play in both Whitehall and Westminster that serve to determine the final legislative outcome. But throughout a number of broad themes can be identified in relation to the five key questions outlined at the beginning of this report.

Beyond the boundary of reasonableness and acceptability

Any line distinguishing between legislative principle and detail has long since been obscured. Delegated legislation is used extensively, for example in areas such as the criminal law – with clear implications for civil liberties – that in the view of many parliamentarians and external observers can hardly be regarded as technical or inconsequential. Yet they are not subject to the more testing process of scrutiny required for primary legislation.

As the legislative case studies in the preceding chapters illustrate, government – of any political hue – regularly seek powers beyond what parliamentarians consider acceptable. At the most acute end of the spectrum, in recent years ministers have sought the power by Order to 'make provision for reforming legislation', to repeal legislation deemed to be 'no longer of practical use', to 'disapply or modify the effect of a provision' in any Act of Parliament, and to make provisions with retrospective effect if they 'consider it necessary or desirable'.

Indeed, there has been such an expansion in the scope and application of powers and procedures that a precedent could arguably be found to justify almost any form of delegation a minister might now desire.

But increasingly rather than removing such powers, the focus of any parliamentary skirmish is on reining them in using strengthened scrutiny procedures. These have consequently become bartering chips used by the government to buy off opposition, particularly in the House of Lords. But this is serving to exacerbate the inherent problems with the system.

The false assurance of strengthened scrutiny procedures

The inclusion of a strengthened scrutiny procedure on the face of a bill affords Members, particularly Peers, a sense of security for it means they will have a second bite at scrutiny, albeit in limited form once an order emerges. But it is a false form of reassurance, for rather than ameliorating the problems with delegated legislation it is feeding the beast: the more that strengthened scrutiny procedures are used to validate the incorporation of unacceptable powers in primary legislation, the more likely it is that key matters, important, controversial and sensitive, will continue to be put into secondary legislation rather than on the face of bills.

However, the government is not consistent in its approach to these scrutiny procedures. In the Localism Bill it included a procedure modelled on the LRO but without a veto; but in the draft Deregulation Bill it didn't do this, offering only one third of the scrutiny elements of an LRO. Similarly, in different bills there are different safeguards but with no obvious explanation about why the distinctions are necessary.

Since the last general election four new scrutiny procedures alone have been created despite the fact that the length of time it takes to utilise PBOs and LROs – up to 18 months in some cases – largely negates the time advantages of using delegated legislation in the first place. Indeed government departments now acknowledge that these Orders consume too much time and resource and that, wherever possible, it is better to use a primary legislative vehicle. Knowing this, Parliament should therefore resist any further attempt by government to include such models in future bills.

Parliament's scrutiny focus also falls heavily on Henry VIII clauses but many Members, particularly in the House of Commons, do not distinguish between them in relation to the breadth of the application of such powers. Treating them as a uniform problem misses the key point about what, exactly, the powers give rise to in terms of ministerial authority. With the exception of the DPRRC there is insufficient consideration given by Members of both Houses to the import of Henry VIII clauses and consequently a failure to distinguish between those that are acceptable and those that are not, and in the case of the latter a willingness to seek their removal from legislation rather than their amelioration using scrutiny procedures.

The lack of constraint

Executive dominance of Parliament means there is only limited scope for removing wide, unconstrained powers sought by ministers. Indeed, the number of times when an unacceptable power is removed entirely from a bill is limited. In the most egregious cases such as the Public Bodies Bill and the draft Deregulation Bill the assault on parliamentary sovereignty is so great that it is possible, through internal and external pressure, to seek significant amelioration perhaps even removal of the offending clauses. But in many other cases, sufficient numbers within Parliament do not mobilise to oppose secondary powers that go beyond what is democratically acceptable. Part of the problem lies in the complexity of the system itself. So few MPs and Peers actually understand the process that it is difficult for them to engage with the detail of it. As a consequence a lot of things are missed, particularly in the House of Commons.

Legislative speed: convenience -vs- good practice

It is impossible to separate consideration of delegated legislation from that of primary legislation. As can be seen in the case studies, a key factor in the number and scope of delegated powers being sought is the speed at which successive governments are legislating, often before the detail of policy is pinned down. Here, there is an inherent conflict between the desire for a purist's approach to effective drafting and scrutiny on the one hand, and the *real politik* of the legislative process on the other. An ideal policy development, consultation and drafting process might take upwards of 12 months, something that no new government will ever agree to. A balance has to be struck between providing for an effective preparation and scrutiny process and being sensitive to the understandable desire of government to make its mark and get a programme of reform underway.

But what is not clear is where Parliament believes that balance should be struck, to what extent it believes the view of that balance should be different at the start as opposed to the middle of a Parliament, and what it should demand from government when broad powers are sought in circumstances where time pressures outweigh basic principles of good preparation, consultation and scrutiny. At the moment, the process is heavily weighted in the interests of and for the convenience of government. A rebalancing is required, but that requires parliamentarians to think afresh about where they think the balance between administrative and political convenience and good legislative practice should lie.

Delegated legislation is supposed to enable Parliament to focus on the essential points; but more often than not it is used in such a way that key issues are obscured from the scrutiny of both Houses. And it doesn't make the legislation easier to understand and read in circumstances where so little by way of draft Orders is

available to enable Members to appreciate the government's intentions for the scope and use of the powers they seek.

When it is utilised in skeleton legislation – as with the Welfare Reform Bill – the more likely it is that the delegated legislation may also be used in the future in ways that were not originally intended. Delegated legislation does not provide the effective scrutiny opportunities necessary to curb policy defects; no amount of consultation and drafts can remedy a flawed policy or its implementation. By the time it reaches the delegated legislation stage it is usually too late and citizens have to deal with the unforeseen consequences.

The power of the Lords

The process of scrutiny for delegated legislation in the House of Commons is weak and the procedures used – particularly those for praying against negative SIs and Delegated Legislation Committee debates for affirmatives – convey a sense that MPs barely take the issues seriously.

A heavy burden of scrutiny responsibility falls in consequence upon the House of Lords. Its committees are more engaged in the process, more influential with government, and Peers generally have more appetite for the detail and technical scrutiny required than do MPs. Where bills are amended in relation to delegated powers and scrutiny procedures this tends to almost always take place in the Lords. But the scrutiny process is not yet aligned in such a way as to maximise its influence. Much more could be done to leverage the experience of the House of Lords to support the scrutiny process in the Commons. Conversely, given the inadequate nature of Commons scrutiny, the Lords should be empowered to scrutinise delegated legislation in the financial sphere.

Knowledge and expertise

There is no effective circle of learning in either Whitehall or Westminster regarding delegated legislation. The civil service does not prioritise the legislative process in career development terms, senior civil servants have little or no engagement with it, and it is largely the realm of junior ministers rather than Secretaries of State, a good number of whom in recent years have never taken a bill through Parliament before.

Parliamentary Counsel and departmental lawyers generally provide the key element of continuity in the process within Whitehall but this is a weakness when it is civil servants on the policy side who must take forward the implementation of the legislation at the SI stage.

Ministerial engagement varies from bill to bill but is rarely high where issues pertaining to delegated legislation are concerned. Bill teams, seeking to 'anticipate' the needs of their ministerial masters may offer more in delegated legislation than

is warranted purportedly in the interests of speed and legislative efficiency. Some ministers, disengaged from the detail and lacking awareness of legal precedent, past parliamentary practice, and the procedures of the House of Lords, accept this, often out of ignorance rather than malign legislative intent. Other ministers who take an interest are simply frustrated by what they perceive to be a byzantine approach to law-making.

Overall, the desire to secure a legislative legacy as quickly as possible envelops both officials and ministers in a procedural web in which delegated legislation is merely a means to that end. The rationality of the system and the scrutiny needs of Parliament are low down on their list of priorities, to be traded as necessary in order to achieve the overall goal of securing the statute.

In Parliament most MPs are utterly baffled by the process, and while Peers are more engaged, this tends to come primarily through those who serve on the relevant committees. There is little appreciation in the House of Commons of the work done in the House of Lords, or the different procedures that apply in their scrutiny work. In so far as MPs take an interest in reform of the process they focus on constraining Henry VIII powers, with little consideration of how strengthened scrutiny procedures have already mushroomed to an unhelpful extent.

Given the scope and complexity of delegated legislation parliamentarians, particularly MPs, would benefit in the future from greater provision of independent advice and technical assistance of the kind that government leans on in the realm of banking and social security legislation, providing that this is open and transparently provided.

A system no longer fit for purpose

The complexity of the process, the lack of understanding among parliamentarians and the public, the uneven application of processes and procedures, and the extent to which the procedures now undermine the principle and time-saving purpose of delegation all point to a system that is unfit for purpose.

The lack of a systematic approach means it is often impossible to determine why one piece of delegated legislation has been subject to a particular method of scrutiny with another, of similar form, subject to an entirely different process. Procedures are accepted with insufficient question by MPs in particular; why, for example, do they accept the continued application of 'affirmative in the first instance' when this is open to abuse and, if important enough to warrant scrutiny in its application the first time, could well warrant such scrutiny on future occasions? But rarely is the procedure challenged; precedent alone is enough to justify its inclusion.

MPs are treated as cannon fodder and a huge amount of time and resource is wasted, particularly in relation to Delegated Legislation Committees. It is not

acceptable that the House of Commons should continue to allocate procedures that its own Members have so little faith and confidence in and which many of them do not fully understand. As legislators, a core function of MPs must be to undertake effective scrutiny of delegated legislation: in this regard the House is failing.

In comparison, the House of Lords has the greatest influence on delegated legislation but voluntarily blunts that influence by its reluctance to reject SIs. Members are faced with an unpalatable choice between accepting an instrument about which they have concerns or rejecting it entirely, even if some elements are acceptable. This 'take it or leave it' proposition does nothing to encourage effective scrutiny and Member engagement with the issues.

The system is not built to meet the interests or convenience of Parliament. Thoughtful consultation and preparation underpins effective implementation. Too often, however, consultation has been treated as an administrative inconvenience by successive governments.

Delegated legislation, if implemented effectively, can be a useful and productive activity; but if done in error it can cause huge problems for those affected by it. The number of defective SIs that end up on the statute book and then have to be replaced highlights the inadequacies of the current approach.

Having said that the system works more in the interest of government rather than Parliament, the role and interests of the public in the delegated legislation process are almost completely ignored. Genuinely interested parties feel they are excluded from the process because of its inherent complexity. The confusing nomenclature and procedures, the inability to find and track information, and the lack of proactive communication all undermine the principle that those subject to the law should have the means to be aware of it.

In short, the system is no longer fit for purpose in the 21st century. Below, we recap how it might be reformed, as outlined in the previous chapters. A number of reforms that both government and Parliament could usefully introduce are detailed. It is important to note, however, that we believe that incremental reform will only ameliorate not fundamentally resolve the difficulties with delegated legislation. Indeed, in some cases, cherry-picking reforms rather than implementing them as a package may simply serve to exacerbate the problems.

In making these recommendations we are very aware of the need to take account of the politics of the legislative process and how political forces affect how even the best designed parliamentary scrutiny procedures may operate in practice. Procedural change in itself will not be enough; culture and attitudinal factors in relation to delegated legislation must play their part in any reform of the system. The challenges posed by volume, speed, resources, knowledge and expertise cannot be ignored or overcome by procedural tinkering. They are intrinsically connected to

the way in which we conduct politics and make law. Ultimately, therefore, we believe what is needed is a complete re-think of why and how delegated legislation is used and what Parliament's role in scrutinising this should be. This cannot be done in isolation; it must be undertaken as part of a wider examination of the legislative process as a whole.

Recommended areas for reform

1) A circle of learning in Whitehall

A specialist, fast-stream group within the civil service dedicated to legislative preparation – both primary and secondary – should be established in order to raise the profile of this important area of work and engage the commitment of the wider civil service, including at the Permanent Secretary level. Given that the legislative burden on government departments varies considerably, this should be set up at the centre, to work across Whitehall, deploying experts in the bill development process to each department to advise them as and when the need arises.

It is incumbent upon departments to better plan and co-ordinate the production of SIs. **A central co-ordinating unit to plan and promote awareness of the production and implementation of upcoming SIs** across government should therefore be established.

2) Procedural reform

Praying against a negative instrument should be decoupled from the Early Day Motion system in favour of a new, clearer annulment motion model. For example, replacing *'That an humble address be presented to Her Majesty praying that the [relevant SI] be annulled'* with, *'That this House resolves that the [relevant SI] be annulled'*.

Government control over annulment debates should be lessened. Annulment motions laid by the opposition should have an improved chance of debate; time could be set aside each session for their consideration. Backbenchers should be able to seek a debate on an annulment motion if they can demonstrate some level of support for it; here, the decision-making power about whether time should be allocated for such a debate on the Floor of the House could be accorded, for example, to the Backbench Business Committee or even to the Speaker. A select committee should also be able to request a debate if it is concerned about an instrument and believes it warrants consideration by the House.

Delegated Legislation Committees should be reformed along the lines of the European scrutiny committee system in the House of Lords. A committee should be appointed supported by a number of sub-committees allocated to deal

with particular policy areas. Some of the members should be drawn from the relevant departmental select committees. A committee secretariat would support Members, providing briefing material and advice to the participants.

A new 'conditional amendment' provision should be introduced to enable Members who have concerns to indicate what changes are required to bring an SI within the bounds of acceptability.

The House of Lords should make greater, albeit judicious, use of its power of veto in the future, particularly in respect of any SIs emerging from framework legislation that cannot be effectively scrutinised at the primary bill stage. This would be in keeping with the House of Lords' revising function and its power of delay.

Pending, or in the absence of a wider review of scrutiny procedures (see below), the strengthened scrutiny models should be rationalised. One variant might have provision for drafts, consultation, supporting documents, committee determination of the scrutiny procedure, and consideration for up to 60 days (perhaps formalised as the 'enhanced affirmative' procedure); the other might have all these and additionally a veto power for judicious application in the most contentious cases only (to be known as the 'super-affirmative' procedure). Both variants should statutorily require that the minister consider committee recommendations and explain in writing to the relevant committee if the government does not plan to adhere to those recommendations.

3) Committee reforms

The remit of the Delegated Powers and Regulatory Reform Committee should be changed so that it can report on bills immediately, when they begin their passage through one of the Houses, whether that be Lords or Commons. This would push at the commonly understood boundaries of bi-cameral scrutiny and require an increase in committee resources, but it would ensure that the House of Commons is better advised on the nature of delegated powers in bills than is the case at present.

The DPRRC should also consider how it might establish a more systematic process for checking past delegations of power and an accountable framework against which to test the decisions that it makes and to which government departments should then have regard when drafting powers and procedures.

A Legislative Standards Committee should be established, ideally on a bi-cameral basis, to assess bills against a set of minimum technical preparation standards that must be met before a bill is introduced. **The DPRRC should confirm whether or not it is content with the quality of the Explanatory Memoranda** and its response should be incorporated into the Committee's review of each bill. If such a Committee is not established, **the DPRRC should be vested**

with the authority to reject a memorandum that it believes is inadequate resulting, if necessary, in a delay to consideration of the relevant parts of the bill until such time as an improved memorandum is provided to the Committee.

The House of Commons should observe the 'scrutiny reserve' that exists in the House of Lords in relation to JCSI decisions. The House should not debate an SI before the Committee has concluded its deliberations on an instrument.

In the event of an egregious breach of the 21-day convention or six-week recommendation, MPs on the JCSI or who otherwise have an interest in the issue should seek a backbench business debate. Alternatively, the JCSI and SLSC plus any relevant departmental select committees should consider holding an extraordinary joint meeting at which they invite the responsible minister to appear and account for what has happened.

The government should be formally required to respond to all reports from the Delegated Powers and Regulatory Reform Committee, the Joint Committee on Statutory Instruments and the Secondary Legislation Scrutiny Committee.

4) Defective SIs

The government should be required to remedy defective SIs within four weeks. A convention should be agreed whereby defects and any transitional consequences must be addressed within this period unless there are exceptional reasons not to, circumstances that must then be justified to the JCSI.

The government should also be required to publish departmental statistics accounting for the number of SIs that are revoked each session, and the number of corrective instruments that are produced, and to do so in a uniform way for the purpose of analysis and comparison.

5) Tackling complexity and improving knowledge

Parliament should undertake a review of the language and terminology used in the delegated legislation process, as well as the presentation of information about it on the parliamentary website in order to improve curation of material with a view to making the process more accessible and understandable.

The government should review the Statutory Instruments Act 1946 with a view to replacing it with new legislation that takes account of modern forms of digital communication and developments arising from the 'Transforming Legislation Publishing' and 'Good Law' initiatives. Importantly, it should also set out clear, minimum standards (of a high level) for publicity and consultation concerning delegated legislation in the future.

All of the above reforms, if implemented, would help to improve how Parliament scrutinises delegated powers and statutory instruments. However, they will only

ameliorate the problems, they will not tackle the fundamental issues at the heart of the system in relation to the scope of powers being sought, the appropriate balance between primary and secondary legislation, the complexity and inconsistent allocation of scrutiny procedures, and the engagement of Members in the scrutiny process. For this, a more wide-ranging review is required.

An independent inquiry into the legislative process

We believe the issues are now so serious that **an independent expert inquiry is needed along the lines of that undertaken in 1975 by David Renton on the 'Preparation of Legislation' or our own Commission on 'Making the Law' chaired by Lord Rippon in 1993. This should review the entire legislative process looking at how both primary and delegated legislation is prepared in Whitehall and scrutinised at Westminster**. It should do so in the context of wider constitutional and parliamentary debates that may affect the legislative process for both primary and delegated legislation in the coming years including the future of the devolved settlement following the Scottish independence referendum. The system we have for making laws is no longer fit for purpose. Deeply flawed, a fundamental review tackling issues of principle and practice, and where the balance should lie between administrative and political convenience and good legislative process is needed.

Specifically in relation to delegated legislation, the remit of any review should enable it to look at (but not be limited to) rationalising the scrutiny procedures. It should explore what criteria and principles define what Members want to look at again in the area of delegated legislation and how this can best be done.

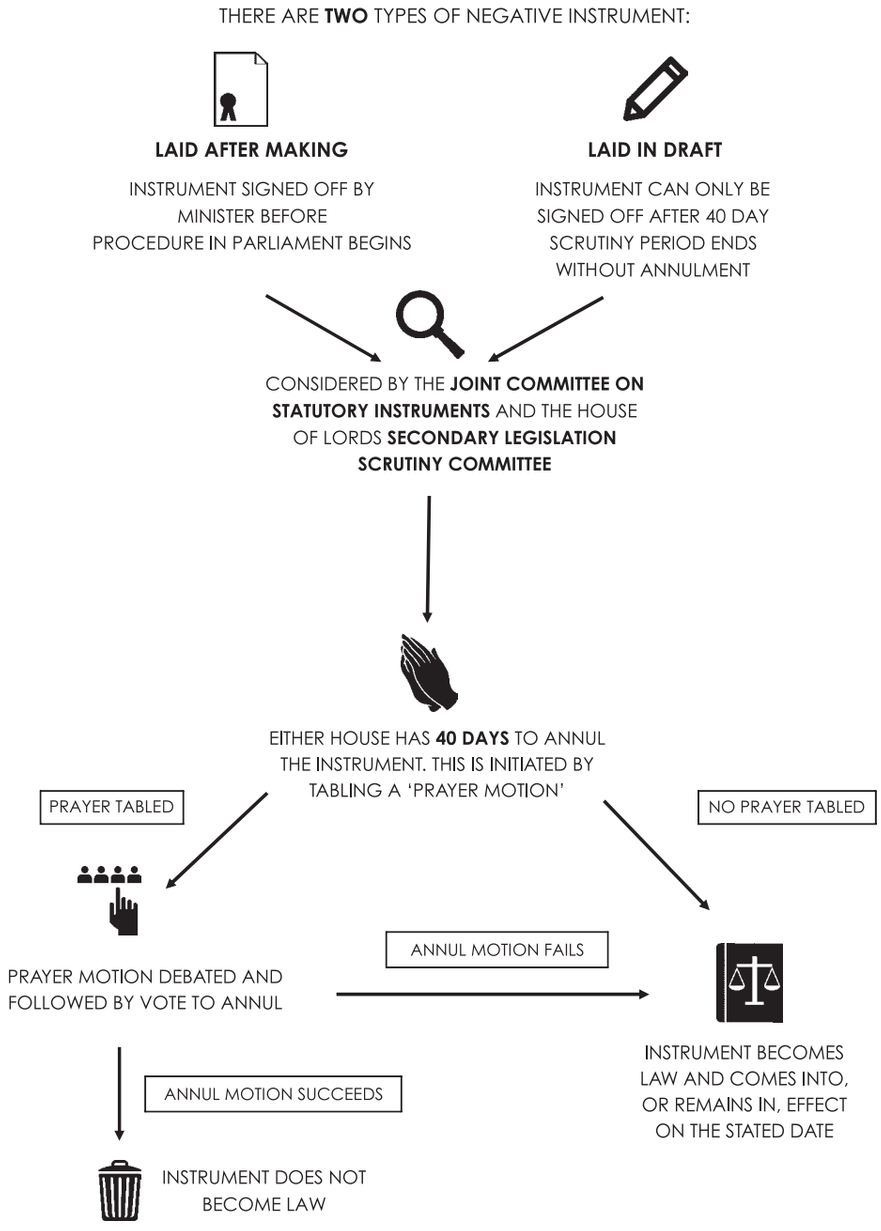
It should also address the question of whether the burden on Members to scrutinise delegated legislation should be reduced through the introduction of individuals or bodies with genuine technical expertise in particular policy areas. These might report to Parliament via departmental select committees or the relevant delegated legislation committees, providing them with valuable technical expertise and informed advice to maximise the effectiveness of the parliamentary scrutiny process.

Consideration should also be given to whether the scrutiny system should be re-designed such that the greater burden of work falls on the House of Lords in future. Its Members have both the appetite and aptitude for such work and they have demonstrably improved their scrutiny procedures over the years in ways that the House of Commons has not. The most effective elements of the delegated legislation scrutiny system can be found in the House of Lords – particularly through its committees – and there would be value in enhancing their influence still further in keeping with the House's wider role as a revising chamber.

The review should be established as soon as possible after the 2015 general election.

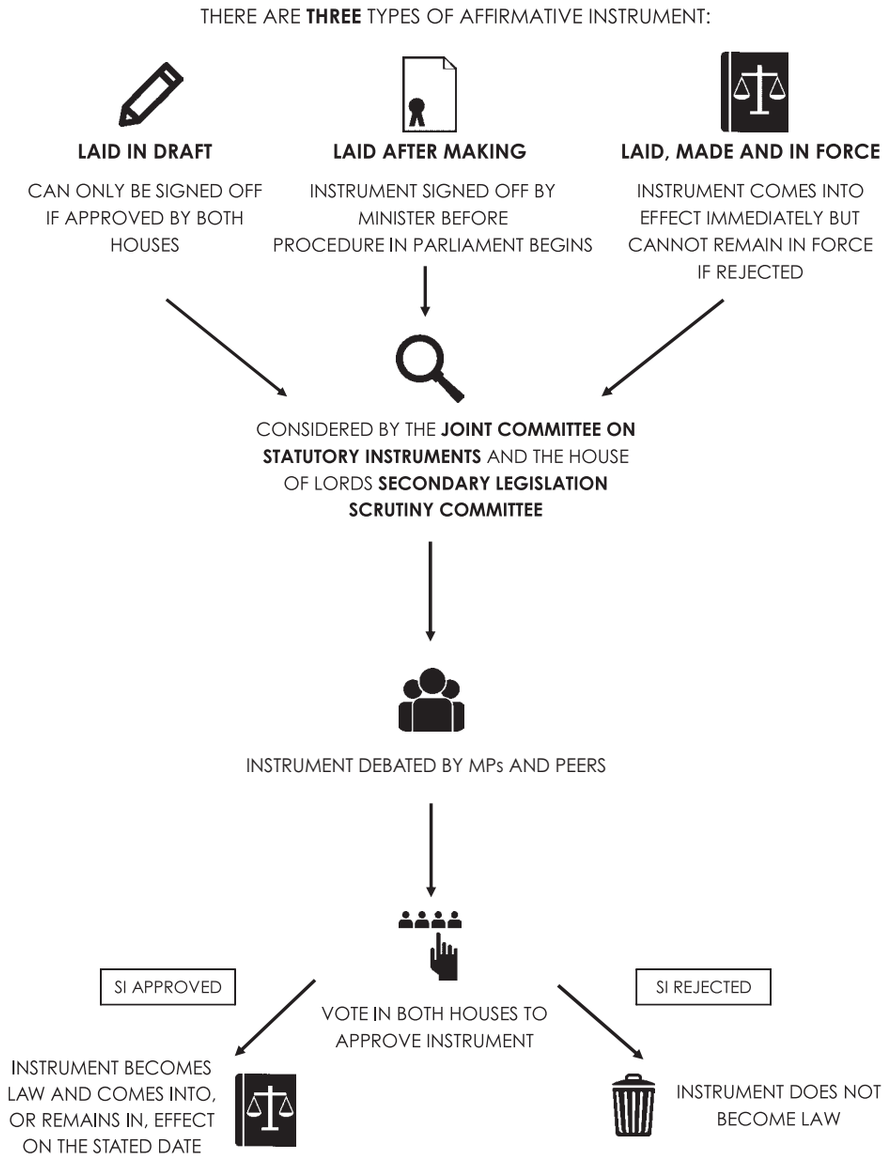
Appendix A

Parliamentary Scrutiny Flowchart: Negative Procedure



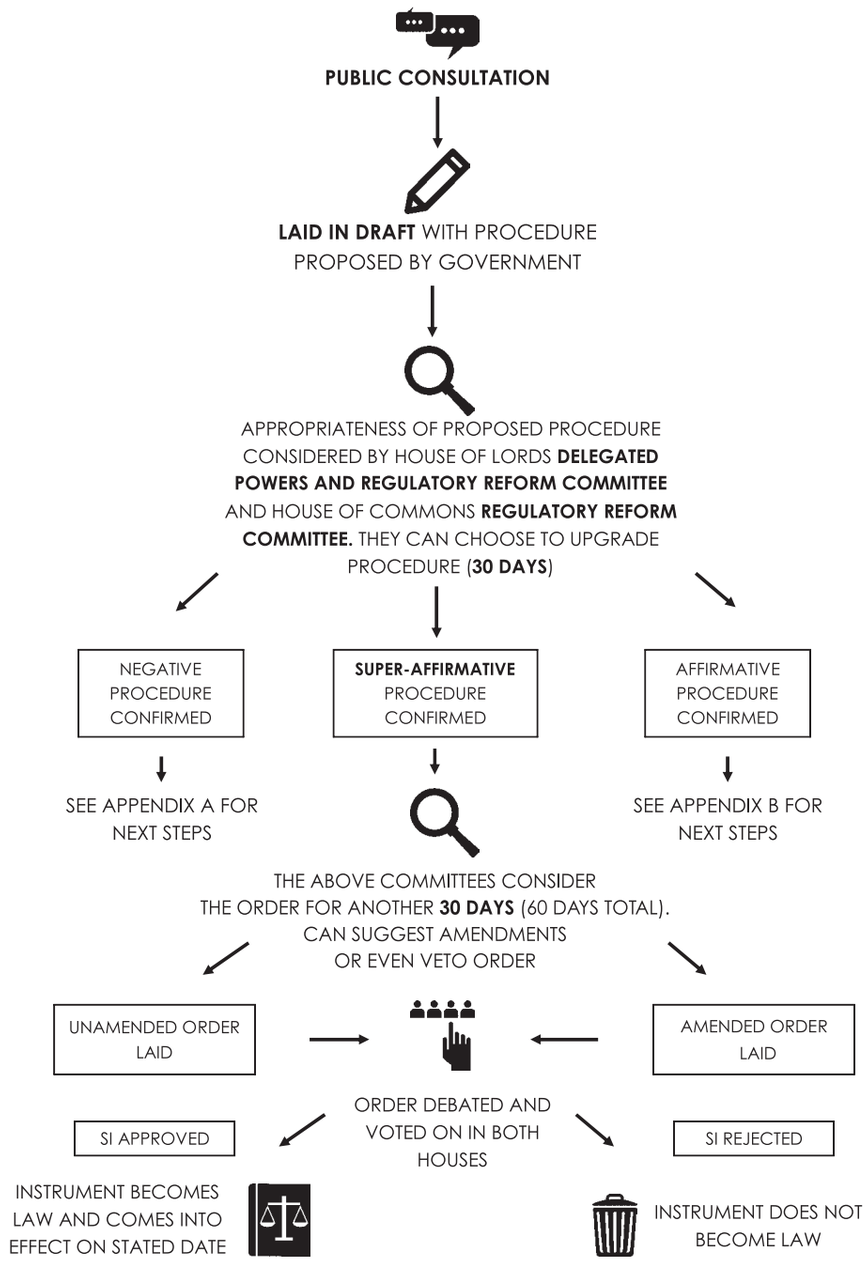
Appendix B

Parliamentary Scrutiny Flowchart: Affirmative Procedure



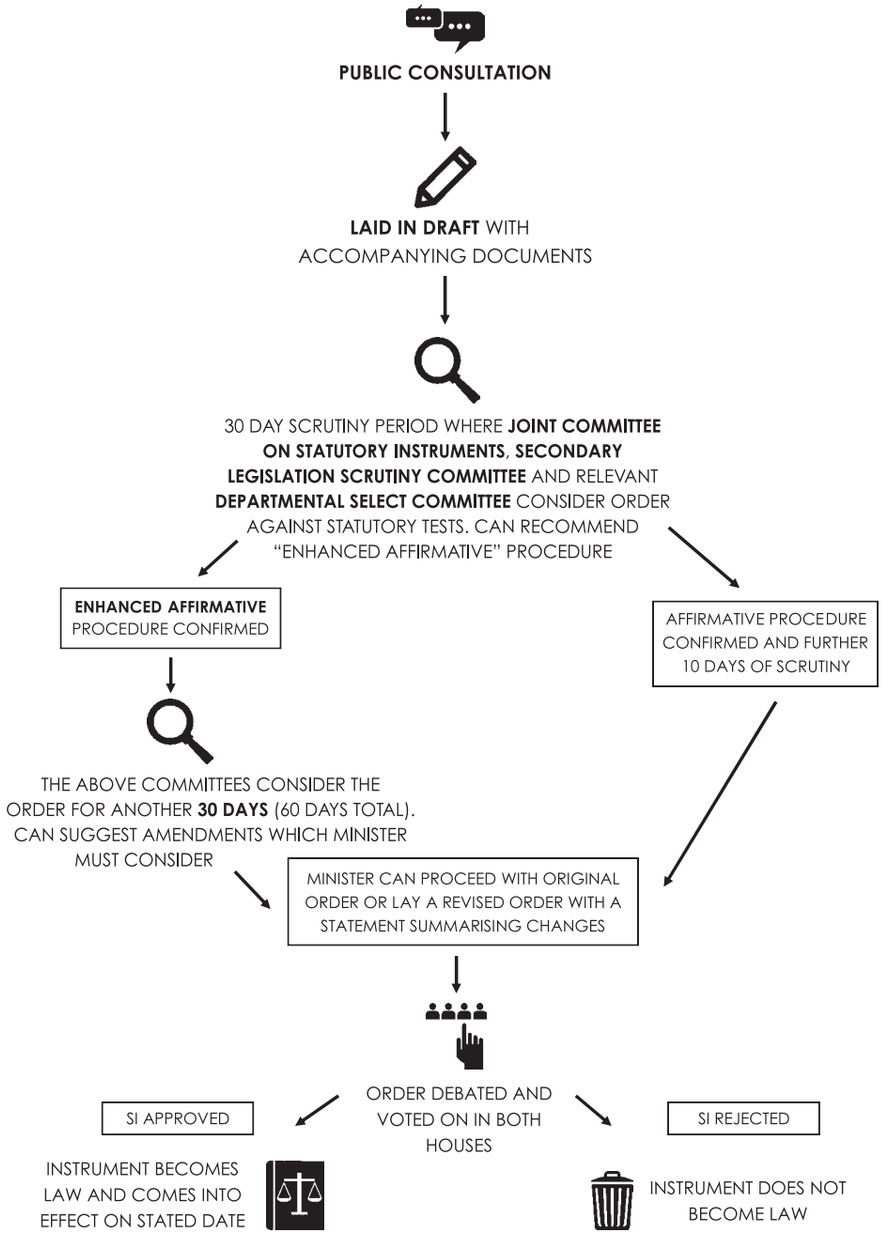
Appendix C

Parliamentary Scrutiny Flowchart: Legislative Reform Order Procedure



Appendix D

Parliamentary Scrutiny Flowchart: Public Bodies Order Procedure



Appendix E

List of rejected Statutory Instruments, 1950-2014

House of Commons Rejections 1950-2014	Procedure
Fats, Cheese and Tea (Rationing) (Amendment No. 2) Order 1951	negative
Plasterboard (Prices) (No. 1) Order 1951	negative
Building Plasters (Prices) (No. 1) Order 1951	negative
Gypsum Rock (Prices) (No. 1) Order 1951	negative
Miscellaneous Controls (Revocation) Order 1953	negative
Draft Parliamentary Constituencies (England) Order 1969	affirmative
Draft Parliamentary Constituencies (Wales) Order 1969	affirmative
Parliamentary Constituencies (Scotland) Order 1969	affirmative
Parliamentary Constituencies (Northern Ireland) Order 1969	affirmative
Draft Dock Labour Scheme 1978	affirmative
Paraffin (Maximum Retail Prices) (Revocation) Order 1979	negative

House of Lords Rejections 1950-2014 (Fatal)	Procedure
Southern Rhodesia (United Nations Sanctions) Order 1968	affirmative
Draft Greater London Authority (Election Expenses) Order 2000	affirmative
Greater London Authority Elections Rules 2000	negative
Gambling (Geographical Distribution of Casino Premises Licences) Order 2007	affirmative
Draft Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2012	affirmative

Appendix F

Table of variations in the strengthened scrutiny procedures

	Requirement to consult	Requirement to lay supporting documents	Power for relevant committee to determine the level of Parliamentary scrutiny	Power for relevant committee to veto order	Statutory obligation for Minister to consider recommendations made by relevant committees	Additional (non-statutory) Ministerial undertakings given in respect of the procedure	Laid in first instance as a proposal (P) or draft order (DO)
Northern Ireland Act 1998 (section 85)	✗	✓	✗	✗	✓	✗	P
Human Rights Act 1998 (Schedule 2)	✗	✓	✗	✗	✓	✗	P
Local Government Act 1999 (section 17)	✓	✓	✗	✗	✗	✗	P
Local Government Act 2000 (section 9)	✓	✓	✗	✗	✗	✗	P
Local Government Act 2003 (section 98)	✓	✓	✗	✗	✗	✗	P
Fire and Rescue Services Act 2004 (section 5E)	✓	✓	✓	✓	✓	✗	DO
Legislative and Regulatory Reform Act 2006 (sections 12 to 19)	✓	✓	✓	✓	✓	✓	DO
Local Transport Act 2008 (section 102)	✓	✓	✗	✗	✗	✗	P
Public Bodies Act 201 (section 11)	✓	✓	✓	✗	✓	✗	DO
Localism Act 2011 (section 7)	✓	✓	✓	✓	✓	✗	DO
Localism Act 2011 (section 19)	✓	✓	✗	✓	✓	✗	DO

Source: House of Lords Delegated Powers and Regulatory Reform Committee, 3rd Report of Session 2012-13, *Special Report: Strengthened Statutory Procedures for the Scrutiny of Delegated Powers*, HL Paper 19.

Appendix G

Statutory Instruments laid in draft in the House of Commons, 1997-2014

	Affirmative		Negative	
	draft	**made**	**draft**	**made**
1997-98	176	49	1568	23
1998-99	139	39	1257	9
1999-00	139	41	1228	13
2000-01	102	21	714	3
2001-02	211	51	1458	10
2002-03	195	38	1214	2
2003-04	191	16	1034	4
2004-05	123	3	659	1
2005-06	265	6	1582	1
2006-07	212	12	1135	0
2007-08	244	13	1049	0
2008-09	238	23	1005	5
2009-10	166	13	628	3
2010-12	350	36	1342	29
2012-13	210	4	731	11
2013-14	251	16	858	24

Source: House of Commons *Sessional Returns* 1997-98 to 2013-14.

Appendix H

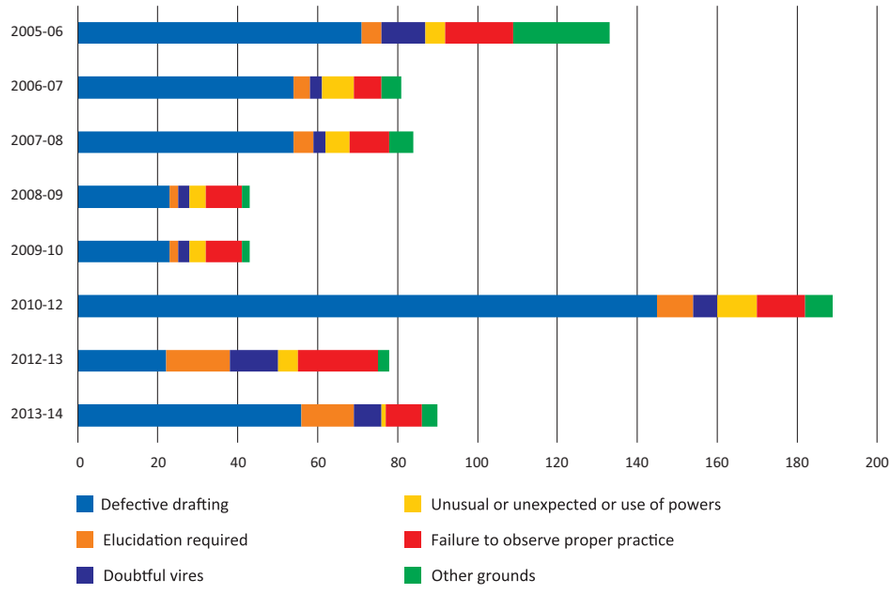
Table of Statutory Instruments laid in the House of Commons by scrutiny procedure, 1997-2014

Session	Negative	Affirmative	Strengthened	Laid (no scrutiny)
1997-98	1591	225	5	39
1998-99	1266	178	4	34
1999-00	1241	180	0	32
2000-01	717	123	2	26
2001-02	1468	262	10	57
2002-03	1216	233	10	24
2003-04	1038	207	4	34
2004-05	660	126	6	6
2005-06	1583	271	4	31
2006-07	1135	224	5	2
2007-08	1049	257	6	13
2008-09	1010	261	8	26
2009-10	631	179	3	10
2010-12	1371	386	11	51
2012-13	742	214	26	37
2013-14	882	267	13	23

Source: House of Commons *Sessional Returns* 1997-98 to 2013-14.

Appendix I

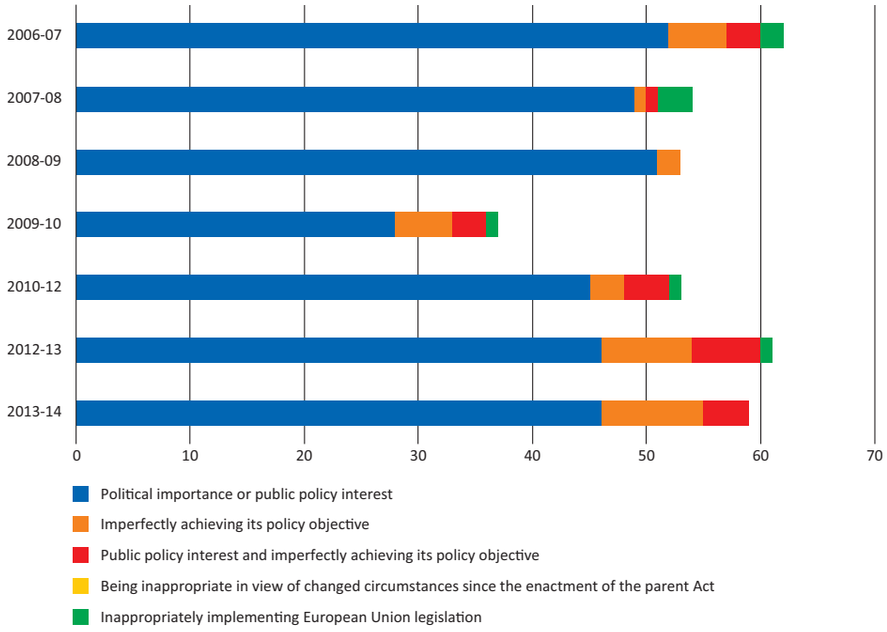
Statutory Instruments to which the special attention of the House of Commons has been drawn by the Joint Committee on Statutory Instruments by Session, 2005-2014



Source: House of Commons *Sessional Returns* 2005-06 to 2013-14.

Appendix J

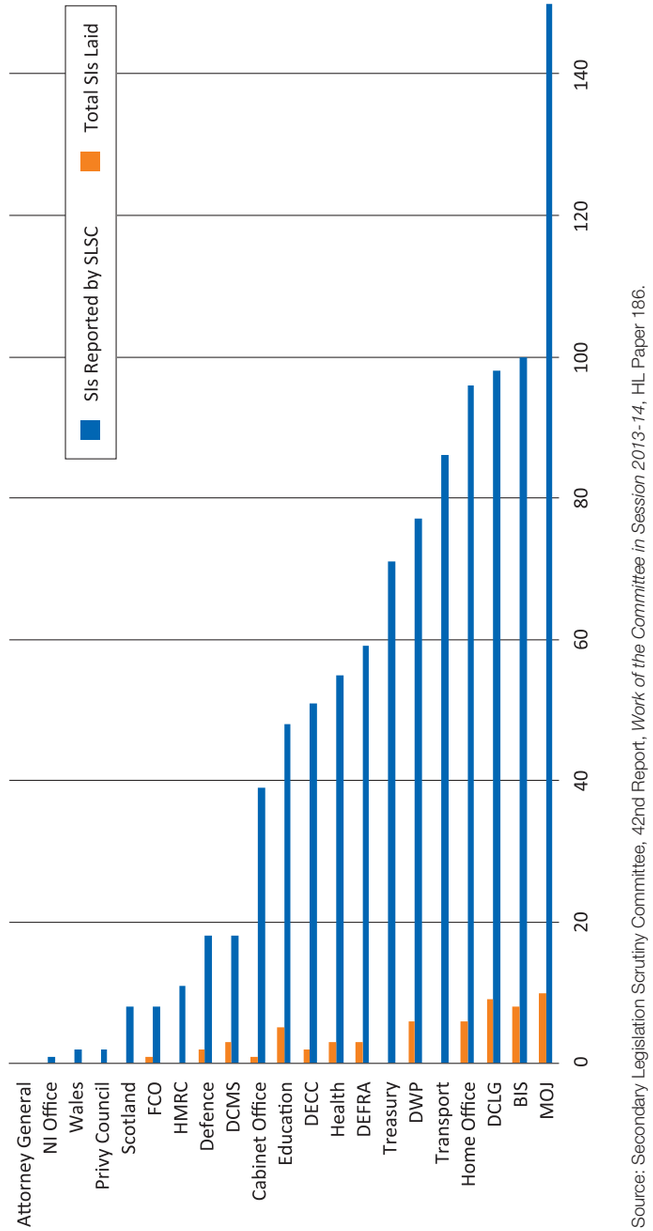
Reporting of Statutory Instruments to the House of Lords by the Secondary Legislation Scrutiny Committee (formerly the Merits Committee) by Session, 2006-2014



Source: Data calculated from reports of the Secondary Legislation Scrutiny Committee (formerly the Merits Committee) by Session, 2006-2014.

Appendix K

Number of Statutory Instruments laid before the House of Commons by government department in the 2013-14 session



Source: Secondary Legislation Scrutiny Committee, 42nd Report, *Work of the Committee in Session 2013-14*, HL Paper 186.

Appendix L

Table of Legislative Reform Orders considered by Parliament, 2007-2014

Session	LRO	Laid	Govt Procedure	DPRRC Procedure	Commons RRC procedure	Approved	Date Approved	Length of Time
2014-15	Draft Legislative Reform (Entertainment Licensing) Order 2014	08/07/2014	affirmative	affirmative	affirmative	–	–	–
2014-15	Draft Legislative Reform (Patents) Order 2014	06/05/2014	affirmative	affirmative	affirmative	Y	14/07/2014	2
2013-14	Draft Legislative Reform (Clinical Commissioning Groups) Order 2014	13/03/2014	affirmative	affirmative	affirmative	Y	30/06/2014	3
2013-14	Draft Legislative Reform (Overseas Registration of Births and Deaths) Order 2014	05/12/2013	affirmative	affirmative	affirmative	Y	10/02/2014	2
2013-14	Draft Legislative Reform (Payments by Parish Councils, Community Councils and Charter Trustees) Order 2013	11/11/2013	negative	negative	negative	n/a	–	–
2013-14	Draft Legislative Reform (Regulation of Providers of Social Work Services) (England and Wales) Order 2013	13/05/2013	affirmative	super affirmative and then order should not proceed	affirmative	Withdrawn	–	–
2012-13	Draft Legislative Reform (Hallmarking)	26/11/2012	affirmative	affirmative	affirmative	Y	04/02/2013	3
2012-13	Draft Legislative Reform (Constitution of Veterinary Surgeons Preliminary Investigation and Disciplinary Committees)	05/11/2012	affirmative	affirmative	affirmative	Y	16/01/2013	2
2012-13	Draft Legislative Reform (Annual Review of Local Authorities)	10/05/2012	negative	affirmative	affirmative	Y	16/07/2012	2
2010-12	Draft Legislative Reform (Industrial and Provident Societies and Credit Unions)	01/12/2009	super-affirmative	super-affirmative	super-affirmative	Y	20/10/2011	22
2010-12	Draft Legislative Reform (Epping Forest)	21/03/2011	affirmative	affirmative	affirmative	Y	14/07/2011	4
2010-12	Draft Legislative Reform (Civil Partnership)	25/10/2010	negative	negative	affirmative	Y	15/02/2011	4
2009-10	Draft Legislative Reform (Insolvency) (Miscellaneous Provisions)	13/05/2009	super-affirmative	super-affirmative	super-affirmative	Y	16/12/2009	7
2009-10	Draft Legislative Reform (Dangerous Wild Animals) (Licensing)	17/06/2009	affirmative	super-affirmative	super-affirmative	Y	09/03/2010	9
2009-10	Draft Legislative Reform (Licensing) (Interim Authority Notices etc.)	10/03/2010	negative	affirmative	affirmative	Y	19/07/2010	4
2008-09	Draft Legislative Reform (Insolvency) (Advertising Requirements)	04/12/2008	affirmative	affirmative	affirmative	Y	02/04/2009	4
2008-09	Draft Legislative Reform (Supervision of Alcohol Sales in Church and Village Halls &c.)	29/01/2009	negative	affirmative	affirmative	Y	18/03/2009	2
2008-09	Draft Legislative Reform (Local Government) (Animal Health Functions)	23/03/2009	negative	negative	negative	n/a	–	–
2008-09	Draft Legislative Reform (Minor Variations to Premises Licences and Club Premises Certificates)	08/12/2008	negative	super-affirmative	super-affirmative	Y	15/06/2009	6
2008-09	Draft Legislative Reform (Limited Partnerships)	02/06/2009	affirmative	affirmative	affirmative	Y	21/07/2009	1
2008-09	Draft Legislative Reform (Revocation of Prescribed Form of Penalty Notice for Disorderly Behaviour)	21/10/2009	affirmative	affirmative	affirmative	Y	16/12/2009	2
2007-08	Draft Legislative Reform (Local Authority Consent Requirements) (England and Wales)	25/07/2007	affirmative	super-affirmative	super-affirmative	Y	23/10/2008	15
2007-08	Draft Legislative Reform (Health and Safety Executive)	30/01/2008	affirmative	affirmative	affirmative	Y	31/03/2008	2
2007-08	Draft Legislative Reform (Consumer Credit) Order 2008	11/06/2008	affirmative	affirmative	affirmative	Y	08/10/2008	4
2007-08	Draft Legislative Reform (Lloyd's) Order 2008	24/07/2008	affirmative	affirmative	affirmative	Y	17/11/2008	4

Source: Data calculated from reports of the Delegated Powers and Regulatory Reform Committee by Session, 2007-2014.

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Most of the UK's general public law is made not through Acts of Parliament but through delegated (or secondary) legislation generally in the form of Statutory Instruments. It is crucial to the effective operation of government from the social security system to immigration rules, legal aid to food labelling, rubbish bin collections to the national curriculum. But despite the volume and importance of such legislation, remarkably little public and media attention is paid to it.

The Devil is in the Detail: Parliament and Delegated Legislation opens up the delegated legislation process, exploring how decisions are made about what goes in to primary and what goes in to secondary legislation and who makes them. It looks at the evolution of delegated legislation, how the process works in both Houses of Parliament, and examines a number of legislative case studies that illustrate different aspects of the flaws and defects in the current system.

The Devil is in the Detail: Parliament and Delegated Legislation concludes that the present system of scrutiny is broken and sets out a range of recommendations for comprehensive reform.

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