



## BRIEFING PAPER

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# Statutory Instruments

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## Summary

This Briefing Paper looks at statutory instruments (SIs). In particular, it describes what they are and also the parliamentary procedures related to them.

Acts of Parliament (primary legislation) often confer powers on Ministers to make more detailed orders or regulations by means of statutory instruments (SIs), also known as secondary, subordinate or delegated legislation. They are as much a part of the law as an Act.

In the region of 3,500 SIs are made each year. Many SIs are not subject to any parliamentary procedure, and simply become law on the date stated. Whether they are subject to parliamentary procedure, and if so which one, is determined by the parent Act.

The majority of SIs subject to parliamentary control automatically come into force but Parliament has the power to annul them within a particular period after they are laid (the negative resolution procedure). A smaller number of SIs require the approval of Parliament before they can be made and brought into force (the affirmative resolution procedure).

On 22 October 2015, the House of Commons amended its Standing Orders to give MPs representing seats in England or England and Wales the power to veto Government legislation that affected only those parts of the country, and was the subject of devolved legislative competence. The House agreed that SIs which the Speaker certified affected only England or only England and Wales and were within devolved legislative competence would be subject to double majority voting, if the question on any motion relating to the instrument was the subject of a division. The Standing Orders state that a motion relating to a certified SI

... shall be agreed to only if, of those in the division-

- (a) a majority of Members, and
- (b) a majority of Members representing qualifying constituencies, vote in support of the motion.

# 1. Statutory instruments

## 1.1 What is a statutory instrument?

Major laws in the UK pass through Parliament in the form of bills. Once bills have progressed through all of their stages they become Acts of Parliament. Acts of Parliament often confer powers on Ministers to make more detailed orders, rules or regulations by means of statutory instruments. The scope of SIs varies greatly, from the technical (e.g. to set or vary the dates on which different provisions of an Act will come into force, to change the levels of fines or penalties for offences or to make consequential and transitional provisions) to the much wider-ranging, such as filling out the broad provisions in Acts. Often, Acts only contain a broad framework and SIs are used to provide the necessary detail that would be considered too complex to include in the body of an Act. In certain circumstances, secondary legislation can also be used to amend, update or enforce existing primary legislation.

Statutory instruments are just as much a part of the law of the land as an Act of Parliament. However, there is a difference: statutory instruments are subject to judicial review. The courts can question whether a Minister, when issuing an SI, is using a power he or she has actually been given by the parent Act; whether the purported exercise of the power is unreasonable, or insufficiently certain; or that there has been a procedural deficiency or irregularity.<sup>1</sup>

### Forms

Statutory instruments are made in a variety of forms, described in *Statutory Instrument Practice* (in addition to orders, regulations and rules, there are also a few statutory instruments called 'schemes' and some other rarer designations):

#### *Orders in Council*

1.5.2 Some Orders in Council are primary legislation made under the prerogative ... or made under s.85 of the Northern Ireland Act 1998 or paragraph 1(1) of the Schedule to the Northern Ireland Act 2000, but most are secondary legislation, being made under statutory powers. They are used for a wide variety of purposes, and particularly where an ordinary statutory instrument made by a Minister would be inappropriate, as in the case of an Order which transfers ministerial functions, or sub-delegates power to a Minister to make subordinate legislation; or where the Order is in effect a constitutional document extending legislation to, say, the Channel Islands or the Isle of Man, or legislating for United Kingdom dependencies. They are prepared by the Department of the responsible Minister .... The making of the Order, when it is submitted to Her Majesty in Council is a formal step.

#### *Orders of Council*

1.5.3 Orders of Council are made by the Privy Council in exercise of powers conferred on them alone. ...

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<sup>1</sup> *De Smith's Judicial Review*, Seventh Edition, 2013, paras 3-011, 3-012

### *Regulations, rules and orders*

1.5.4 In 1932 the use of the terms 'regulation', 'rule' and 'order' was the subject of a recommendation in the *Report of the Committee on Ministers' Powers* (Cmd 4060, page 64) – 'the Donoughmore Committee' – as follows:

The expressions 'regulation' 'rule' and 'order' should not be used indiscriminately in statutes to describe the instruments by which law-making power conferred on Ministers by Parliament is exercised. The expression 'regulation' should be used to describe the instrument by which the power to make substantive law is exercised, and the expression 'rule' to describe the instrument by which the power to make law about procedure is exercised. The expression 'order' should be used to describe the instrument of the exercise of (A) executive power, (B) the power to take judicial and quasi-judicial decisions.<sup>2</sup>

On 20 March 2014, in a written statement, the Leader of the House, Andrew Lansley, announced that the Office of Parliamentary Counsel had published new guidance recommending that "powers to make delegated legislation conferred by Government Bills should generally take the form of regulation-making powers and not order-making powers". Mr Lansley noted that one area where the new practice would be "particularly noticeable" would be that bills would provide for commencement regulations rather than commencement orders.<sup>3</sup>

## 1.2 Numbering

Each is given a number in the SI series, which runs from number 1 each calendar year, and is quoted in the form: SI 2005/1234. There are about 3,500 SIs each year, varying in size from a single sheet to several hundreds of pages. SIs that require the approval of both Houses of Parliament before they can be made are published in draft form. These cannot be made and do not have a number until this approval is given (see below, 'Affirmative Procedure', sections 2 and 2.2). Similarly, a few instruments subject to negative procedure are required to be published in draft form and are made later (see below, 'Parliamentary Procedure', sections 2 and 2.1).

## 1.3 Drafting

Statutory instruments are usually drafted by the legal office of the Government Department concerned, often following consultations with interested bodies and parties whilst the SI is in draft. They are then "made" in the name of the person (usually a Secretary of State or Minister) authorised by the parent Act.

## 1.4 Preamble

Each Order has a preamble stating the authority (usually primary legislation) for its production. For example the *Community Infrastructure Levy (Amendment) Regulations 2012* states:

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<sup>2</sup> Office of Public Sector Information, *Statutory Instrument Practice*, 4th edition, November 2006, paras 1.52-1.54

<sup>3</sup> See, for example, *Childcare Payments Act 2014* (chapter 28), [section 75](#)

... the Secretary of State, in exercise of the powers conferred by sections 205(1) and (2), 209(5), 211(5) and (6), 214(2), 216(1), (4)(a) and (7)(d) and (f), 217(1) to (3) and (5), 220(1), (2)(a), (d), (e) and (j) and (3) and 222(1) of the Planning Act 2008, and with the consent of the Treasury, makes the following Regulations

### 1.5 Content

The provisions of the SI then follow in numbered articles, regulations or rules (in the case of Orders, Regulations and Rules, respectively). The provisions begin with a citation clause, which enacts the title, and in most there is a commencement clause to bring the instrument into effect.

Like Acts of Parliament, some SIs apply to the whole of the UK, some to the individual countries only. (See section 4.5 for information on the implications for the House of Commons when considering motions relating to instruments applying to different parts of the UK.)

### 1.6 Explanatory Notes

All general (i.e. not local (see section 5.7 for further information about local SIs)) statutory instruments have an **explanatory note**, which explains their scope and purpose. The explanatory note has no legal force; an SI's legitimacy rests on what is stated in the originating Act of Parliament where the power to make secondary legislation is granted (the citation clause).

## 2. Parliamentary procedure on statutory instruments

Whether an instrument is subject to parliamentary procedure is determined by the parent Act. Some SIs are not laid before Parliament and as such are not subject to any parliamentary procedure (other than scrutiny by the Joint Committee on Statutory Instruments) and simply become law on the date stated in them. Such instruments are, in general, not contentious. Commencement Regulations (see below) generally fall into this category, as do Orders of Council.

### Box 1: Frequently used terms

**Made** - a statutory instrument is 'made' when signed by the Minister (or person with authority under the Act).

**Laid** - the procedure that constitutes the laying of a statutory instrument is set out in House of Commons Standing Order No 159. For an SI to be laid before the House of Commons a copy of the Instrument must be 'laid on the table of the House'; this actually means delivering two copies of the instrument to the Journal Office. Most SIs are laid in both Houses and a similar procedure applies in the House of Lords.

**Coming into force** – when the provisions in the statutory instrument take effect.

**Henry VIII powers** – delegated powers that enable ministers to amend primary legislation via secondary legislation.<sup>4</sup>

Many SIs are subject to parliamentary control; the type of parliamentary control will be prescribed in the parent Act (and, in the case of negative procedure, further details are laid down in the *Statutory Instruments Act 1946*). An instrument is laid before Parliament (or the Commons only, in the case of certain instruments dealing with financial matters), either in draft form or after the instrument has been made. Most SIs fall into one of the classes shown below:

### Instruments subject to negative resolution procedure

#### Such instruments become law unless there is an objection from the House

- (i) The instrument is laid in draft and cannot be made if the draft is disapproved within 40 days (draft instruments subject to the negative resolution are few and far between).
- (ii) The instrument is laid after making, subject to annulment if a motion to annul (known as a 'prayer') is passed within 40 days.

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<sup>4</sup> The Delegated Powers and Regulatory Reform Committee has asked the Government to identify Henry VIII powers in explanatory memorandums the Government produces for the committee's consideration of the delegated powers in bills (see Delegated Powers and Regulatory Reform Committee, [Guidance for Departments on the role and requirements of the Committee](#), July 2014, paras 35 and 37)

### **Instruments subject to affirmative resolution procedure**

#### **These instruments cannot become law unless they are approved by both Houses.**

- (i) The instrument is laid in draft but cannot be made unless the draft is approved by both Houses (the Commons alone 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).

### **Other Procedures**

- (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).<sup>5</sup>

There are also some order-making powers which are, in the parent Act, made subject to 'special parliamentary procedure'.<sup>6</sup> Not all of these are classified as statutory instruments.

It is important to note that SIs cannot, except in extremely rare instances where the parent Act provides otherwise (such as the *Census Act 1920*), be amended or adapted by either House. Each House simply expresses its wish for them to be annulled or approved, as the case may be. The *Civil Contingencies Act 2004* also provides for emergency regulations to be amended by Parliament, but these regulations are not statutory instruments.

## **Explanatory Memoranda**

All statutory instruments that are subject to parliamentary procedure must now be accompanied by an **explanatory memorandum** (EM). This is a short document which explains in plain English what the SI does and why. Where an SI is linked to other SIs or fulfils the requirements of an Act the EM should set this out. The EM is made freely available to the public on the [legislation.gov.uk](http://legislation.gov.uk) website (via the "More Resources" tab).

The EM should also include consideration of the costs of the measure and the outcome of the public consultation exercise, although to do this it may simply refer to an **Impact Assessment** (IA) which should also be available to the public. For SIs that implement European legislation a **Transposition Note** may be available, setting out which piece of UK legislation implements each of the provisions of the Directive.

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<sup>5</sup> Office of Public Sector Information, *Statutory Instrument Practice*, 4th edition, November 2006, p9 – Table B and para 1.6.3

<sup>6</sup> See the [Special Procedure Orders](#) page on the parliamentary website

## 2.1 Negative Procedure

Some SIs become law on the date stated on them but will be annulled if either House (or the Commons only, in the case of instruments dealing with financial matters) passes a motion calling for their annulment within a certain time. This time period is usually 40 days *including* the day on which it was laid. No account is taken of any time during which Parliament is dissolved or prorogued, or during which both Houses are adjourned for more than four days. A motion calling for annulment is known as a *prayer*, couched in such terms as:

That an humble address be presented to Her Majesty praying that the Asylum Seekers (Interim Provisions) Regulations 1999 ... be annulled.

In the House of Commons any Member may put down a motion to annul an SI subject to the negative procedure. In practice such motions are now generally put down as Early Day Motions (EDMs), which are motions for which no time for debate has been fixed and, in the vast majority of cases, for which no time is likely to be available. If a motion is put down by the Official Opposition, the SI mentioned in the motion is usually debated, although there is no absolute certainty of this. An annulment motion put down by a backbencher is unlikely to lead to a debate, unless there is a large number of signatories to the EDM.<sup>7</sup> In the House of Lords prayers can be tabled by an individual Member and are usually debated, although rarely put to the vote.<sup>8</sup> A motion to annul was successful on 22 February 2000, when the House of Lords rejected the *Greater London Authority Elections Rules* (SI 2000/208). The House of Commons last annulled a statutory instrument on 24 October 1979 (the *Paraffin (Maximum Retail Prices) (Revocation) Order 1979* (S.I. 1979/797)). Further information about the rejection of SIs can be found in section 3.4, and in the Appendix.

## 2.2 Affirmative Procedure

Statutory instruments subject to the affirmative procedure are less common than those subject to the negative procedure.<sup>9</sup> The affirmative procedure provides more stringent parliamentary control, since the instrument must receive Parliament's approval before it can come into force or to remain in force.

Most SIs subject to the affirmative procedure are laid in the form of a draft instrument, which is later made and added to the numerical run of SIs when it has been approved by both Houses. Such orders cannot be

<sup>7</sup> For information on the number of prayers tabled in recent sessions, please see House of Commons Library Briefing Paper, [Prayers against Statutory Instruments in the House of Commons since 1997](#), SN02569, 5 December 2016

<sup>8</sup> In a 2009 report, the Merits of Statutory Instruments Committee stated that: "The Government Chief Whip endeavours to find time for any Member who tables a prayer in the "Motions relating to delegated legislation" section of the House of Lords Business document and contacts his office with fair notice before the expiry of the 40-day period". [Merits of Statutory Instruments Committee, [Fourteenth Report](#), 30 April 2009, HL 80 2008-09, Appendix 2]

<sup>9</sup> Approximately ten per cent of instruments subject to Parliamentary procedure are subject to the affirmative procedure

**made** unless the draft order is approved by Parliament. To do this, a motion approving it has to be passed by both Houses (or by the Commons alone if it deals with financial matters). The responsibility lies with the minister, having laid the instrument, to move the motion for approval.

Some instruments are **laid** after making and will come into effect immediately but require subsequent approval within a statutory period, usually 28 days (or occasionally 40 days) to remain in force. This again excludes periods when Parliament is dissolved, prorogued or when both Houses are (or, rarely, either House or the House of Commons only, is) adjourned for more than four days. Again, the motion is generally prepared by the relevant minister, who is also responsible for ensuring that the motion is discussed and approved within the necessary time limit.

In the House of Commons, the last time a draft Statutory Instrument subject to affirmative procedure was not approved was in July 1978 when the draft *Dock Labour Scheme 1978* was defeated by 301 votes to 291.<sup>10</sup>

The House of Lords has rarely refused to approve draft SIs but in October 2015, its decision to decline to consider the *Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015* prompted the Government to ask Lord Strathclyde to examine “how to protect the ability of elected governments to secure their business” and “how to secure the decisive role for the elected Commons in relation to its primacy on financial matters and secondary legislation”.<sup>11</sup> Lord Strathclyde’s report, *Secondary legislation and the primacy of the House of Commons*, was published on 17 December 2015. He identified three approaches to provide the House of Commons with a decisive role on SIs:

- Remove the House of Lords from SI procedure altogether;
- Retain the present role of the House of Lords and “revert to a position where the veto is left unused”; or
- Create a new statutory procedure “allowing the Lords to invite the Commons to think again when a disagreement exists and insist on its primacy”.

Lord Strathclyde recommended the third option.<sup>12</sup>

In reports, following inquiries on the conclusions of Lord Strathclyde’s review, the Constitution Committee, the Delegated Powers and Regulatory Reform Committee, the Secondary Legislation Scrutiny Committee and the Public Administration and Constitutional Affairs Committee all concluded that the review and the decisions of the House

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<sup>10</sup> HC Deb 24 July 1978 cc1289-1325

<sup>11</sup> [HLWS285](#)

<sup>12</sup> [Strathclyde Review: Secondary legislation and the primacy of the House of Commons](#), Cm 9177, December 2015, Summary

of Lords that prompted it were not sufficient to change the way in which Parliament scrutinised secondary legislation.<sup>13</sup>

The Government responded to Lord Strathclyde’s report on 1 December 2016. Like Lord Strathclyde, the Government considered that the first two options should not be pursued. It said that it had decided not to introduce primary legislation to implement Lord Strathclyde’s recommendation “in this parliamentary session”.<sup>14</sup>

## 2.3 Determining which procedure is followed

The parent Act (sometimes referred to as enabling Act) indicates which of the above procedures will apply to an SI. Box 2, below, gives examples of the forms of words in the parent Act that indicate whether an SI is subject to the affirmative or negative procedure.

### Box 2: Affirmative or negative procedure

#### Wording in legislation

(1) A statutory instrument containing an Order in Council, order or regulations under this Act is subject to annulment in pursuance of a resolution of either House of Parliament.

(3) No order, regulations or recommendation to make an Order in Council, within subsection (2)(a) or (b), may be made unless a draft of the order, regulations or Order in Council has been laid before, and approved by a resolution of, each House of Parliament.

#### Procedure

Negative resolution procedure applies

In these cases, the affirmative resolution procedure applies

An appendix to the *Votes and Proceedings* of the House of Commons records the day on which an Instrument is laid and the procedure that will apply. There is also a weekly list on the Parliamentary website of instruments awaiting approval and those for which the praying time has not expired.<sup>15</sup>

## 2.4 Rejection of Statutory Instruments

The Joint Committee on Conventions produced a report, in October 2006, in which it discussed the extent to which both Houses can reject an instrument:

The Parliament Acts do not apply to delegated legislation. So delegated legislation rejected by the Lords cannot have effect even if the Commons have approved it.

<sup>13</sup> Constitution Committee, [Delegated Legislation and parliament: A response to the Strathclyde Review](#), 23 March 2016, HL Paper 116 2015-16; Delegated Powers and Regulatory Reform Committee, [Special Report: Response to the Strathclyde Review](#), 23 March 2016, HL Paper 119 2015-16; Secondary Legislation Scrutiny Committee, [Response to the Strathclyde Review: Effective scrutiny of secondary legislation](#), 14 April 2016, HL Paper 128 2015-16; and Public Administration and Constitutional Affairs Committee, [The Strathclyde Review: Statutory Instruments and the power of the House of Lords](#), 12 May 2016, HC 752 2015-16

<sup>14</sup> Leader of the House of Commons, [Government Response to the Strathclyde Review: Secondary legislation and the primacy of the House of Commons and the related Select Committee Reports](#), Cm 9363, December 2016

<sup>15</sup> Houses of Parliament, [Statutory Instruments &c](#) [weekly list]

## 12 Statutory Instruments

The report included details of the evidence that was submitted and noted that the Clerk of Parliaments had stated that “There is no generally accepted convention restricting the powers of the Lords on secondary legislation”. The report also contained a paragraph in which the Clerk explained what happened when an instrument was defeated:

If it is affirmative, it may be re-laid, though it must be slightly different. If it is negative, it may be re-laid with a new title. If the Lords reject it again (which has never happened), the Government could in the last resort embody it in a Bill.

The Committee concluded that:

On the basis of the evidence, we conclude that the House of Lords should not regularly reject Statutory Instruments but that in exceptional circumstances it may be appropriate for it to do so. This is consistent with past practice and represents a convention recognised by the opposition parties.

And it went on to say:

In the absence of a power to amend SIs, the most constructive way for the Lords, as the revising chamber, to reject an SI is by motion (or amendment) incorporating a reason, making it clear both before and after the debate what the issue is.<sup>16</sup>

The appendix of this paper includes details of the most recent occasions on which the House of Commons has annulled and not approved SIs; and reports the occasions since World War II that the House of Lords has not approved affirmative SIs and the one occasion on which it voted to annul a negative SI.

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<sup>16</sup> Joint Committee on Conventions, *Conventions on the relationship between the two Houses of Parliament*, 31 October 2006, HC1212/HL 265, 2005-06

## 3. Parliamentary consideration of statutory instruments

### 3.1 Joint Committee on Statutory Instruments

Most statutory instruments subject to parliamentary procedure are examined by the Joint Committee on Statutory Instruments.<sup>17</sup> The Commons Members of this committee sometimes sit separately (as the Select Committee on Statutory Instruments) to consider instruments laid before the Commons alone (usually dealing with financial matters). The Joint Committee has the services of Counsel to the Speaker and the Counsel to the Lord Chairman of Committees available during its deliberations. They may, like other Select Committees, take oral or written evidence, but only from the responsible Government Department on instruments they are considering. Some SIs (e.g. local orders not laid before Parliament) are not scrutinised by either Committee. Other instruments, which are not technically SIs but which may need an affirmative resolution, such as reports on local government finance special grants, draft codes of practice which have legislative effect and orders subject to special parliamentary procedure under the *Statutory Orders (Special Procedure) Acts* of 1945 and 1946 are examined.

These Committees do not consider the merits of any SI. They are responsible for ensuring that a Minister's powers are being carried out in accordance with the provisions of the enabling Act. They report to the House any instance where the authority of the Act has been exceeded, or any which reveal an "unusual or unexpected" use of the powers, or have been drafted defectively, or where the instrument might require further explanation. These Reports are printed as House of Commons and House of Lords papers and are available on the websites of the two committees.<sup>18</sup>

### 3.2 The Secondary Legislation Scrutiny Committee (House of Lords)

The House of Lords Secondary Legislation Scrutiny Committee was first appointed on 17 December 2003, as the Merits of Statutory Instruments Committee.<sup>19</sup> It has eleven members. Its work complements that of the Joint Committee on Statutory Instruments. Whereas the JCSI considers

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<sup>17</sup> Instruments not laid before Parliament are included within the Committee's remit; but local instruments are not considered by JCSI unless they are subject to parliamentary procedure and instruments made by devolved administrations are not to be considered by JCSI unless they are required to be laid before Parliament [Joint Committee on Statutory Instruments, [Role](#)]

<sup>18</sup> [Joint Committee on Statutory Instruments](#) and [Statutory Instruments Committee \(Commons\)](#)

<sup>19</sup> It was known as the Merits of Statutory Instruments Committee until the end of the 2010-12 Session

technical matters about the legality of proposals, the Committee's task is to consider the policy implications of SIs.

The Committee's terms of reference are wide-ranging. Its remit is to consider whether the special attention of the House of Lords should be drawn to an SI on any of the following grounds:

- 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;
- that it may imperfectly achieve its policy objectives.

Like the JCSI, the Committee meets weekly, both to ensure that consideration of negative instruments is undertaken within the 40 day "praying time" and to enable the Committee to keep pace with the volume of documents it is required to consider. The Committee is advisory. The full text of all reports is placed on the website.<sup>20</sup>

The Committee meets on a Tuesday and its reports are generally published two days later. As well as alerting the House of Lords to any interesting instruments or instruments on which there may be concerns, the Committee's reports often publish additional information presented in response to the Committee's questions, which may be of wider interest in the House.

### 3.3 Debates on SIs in the House of Commons

In recent decades, the number of SIs considered in some form by the House of Commons has risen considerably. As a result the House has found it difficult to make enough time available to debate SIs. Debates, on motions to approve or annul instruments, may take place on the floor of the House (usually late in the parliamentary day), or SIs can be considered in Delegated Legislation Committees (DLCs). Debates on the floor of the House on Statutory Instruments constitute exempted business under Standing Order No 15, and may generally be debated for an hour and a half (unless the House makes other provision by a Business of the House order). In addition, prayers (see above) cannot be debated beyond an hour and a half after the moment of interruption.<sup>21</sup> If an affirmative SI has been debated by a DLC, the motion to approve it is put forthwith (i.e. without debate) on the floor of the House.<sup>22</sup> Under the English votes for English laws procedures, adopted by the House of Commons in October 2015, decisions on some motions relating to SIs are subject to double majority, see section 4.5.

In the House of Lords the length of debate is dictated by the number of speakers putting their name down and discussions by "the usual channels".

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<sup>20</sup> [Secondary Legislation Scrutiny Committee](#)

<sup>21</sup> 10pm on Mondays; 7pm on Tuesdays and Wednesdays; 5pm on Thursdays

<sup>22</sup> Similarly, if a negative SI has been debated by a DLC, a motion to annul it, if taken on the floor of the House, would be taken forthwith

### 3.4 Delegated Legislation Committees (House of Commons)

Delegated Legislation Committees (DLCs)<sup>23</sup> are commonly composed of 16-18 members, though any Member may attend and speak (but only the nominated members of the Committee are entitled to vote).

SIs subject to the affirmative procedure are automatically referred to a DLC. SIs subject to the negative procedure are only referred to a DLC if a Minister puts a Motion to the House of Commons in the form:

*That the Education (Budget Statements and Supplementary Provisions) Regulations 1999 be referred to a Delegated Legislation Committee*

If such a motion is moved as preliminary business, and more than 20 Members object to the Motion, then the SI cannot go to a DLC. In such circumstances, the Government business managers have to decide how to proceed with the SI. In practice, referral motions are usually moved at the end of business.

A DLC can only consider an SI on the motion "That the Committee has considered the instrument". The debate can take up to 1½ hours, or 2½ hours if the instrument relates exclusively to Northern Ireland.

The proceedings of DLCs are recorded by Hansard. The Official Report of the proceedings is published online.<sup>24</sup>

### 3.5 Motions relating to statutory instruments (House of Commons): England-only or England and Wales SIs

On 22 October 2015, the House of Commons amended its Standing Orders to give MPs representing seats in England or England and Wales the power to veto<sup>25</sup> Government legislation that affected only those parts of the country, and was the subject of devolved legislative competence. The House agreed that SIs that the Speaker certified affected only England or only England and Wales and were within devolved legislative competence would be subject to double majority voting, if the question on any motion relating to the instrument was the subject of a division. The Standing Orders state that a motion relating to a certified SI

... shall be agreed to only if, of those in the division-

- (a) a majority of Members, and
- (b) a majority of Members representing qualifying constituencies,

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<sup>23</sup> These were first set up as Standing Committees on Statutory Instruments in the 1973-74 session in order to relieve pressure of time in the House itself. Their title was changed at the beginning of the 1995-96 session to Standing Committees on Delegated Legislation, and again in 2006-07 to Delegated Legislation Committees

<sup>24</sup> [Delegated Legislation Committee debates](#)

<sup>25</sup> There is the exception of negative SIs: on a motion to annul a negative SI, Members representing qualifying constituencies cannot annul it without the support of a majority of all Members due to the double majority rules.

vote in support of the motion.<sup>26</sup>

Under the new procedure, the Speaker has to consider statutory instruments which have to be approved by the House; which are subject to the negative resolution procedure, have been prayed against, and are referred to a DLC; or orders (such as legislative reform orders) subject to the affirmative resolution procedure which the Regulatory Reform Committee has recommended should or should not be approved.

The Speaker has to certify any SI which relates exclusively to England or to England and Wales – this requires that every provision of the instrument being considered relates exclusively to England or to England and Wales and that the instrument is within devolved legislative competence. The Speaker may consult two members of the Panel of Chairs in deciding whether to certify an instrument.

The Speaker has to announce any decision on certification to the House. In a statement on 26 October 2015, the Speaker outlined how the House would be informed:

After a Government Bill has been introduced, a note will be published in the appropriate place on the Order Paper to the effect that I have not yet considered it for certification. The same process will be followed for statutory instruments requiring consideration. If I sign a certificate, the note on the Order Paper will be changed accordingly. Any certification will also be recorded in the Votes and Proceedings. I do not propose to record a decision not to certify. The absence of any note on the Order Paper will indicate that no certification has been made.<sup>27</sup>

### Box 3: The certification of statutory instruments under the EVEL procedures

The first SIs to be certified were certified on 18 November 2015, and the following notification appeared in the *Votes and Proceedings*.

The Speaker has certified, for the purposes of Standing Order No. 83P, and on the basis of material put before him, that, in his opinion, the following draft instrument relates exclusively to England and is within devolved legislative competence, as defined in Standing Order No. 83P.

Draft Non-Domestic Rating (Levy and Safety Net) (Amendment) (No. 2) Regulations 2015.

The Speaker has certified, for the purposes of Standing Order No. 83P, and on the basis of material put before him, that, in his opinion, the following draft instrument relates exclusively to England and Wales and is within devolved legislative competence, as defined in Standing Order No. 83P.

Draft Police and Criminal Evidence Act 1984 (Codes of Practice) (Revision of Code E) Order 2015.<sup>28</sup>

Both of these SIs were subsequently approved by the House without a division, Draft *Non-Domestic Rating (Levy and Safety Net) (Amendment) (No. 2) Regulations 2015* on 1 December 2015;<sup>29</sup> and the Draft *Police and Criminal Evidence Act 1984 (Codes of Practice) (Revision of Code E) Order 2015*, on 7 December 2015.<sup>30</sup>

<sup>26</sup> House of Commons, [Standing Orders of the House of Commons: Public Business, 2016](#), February 2016, HC 2 2015-16, Standing Order No 83Q (2)

<sup>27</sup> [HC Deb 26 October 2015 c23](#)

<sup>28</sup> [Votes and Proceedings](#), 18 November 2015

<sup>29</sup> [HC Deb 1 December 2015 c300](#)

<sup>30</sup> [HC Deb 7 December 2015 c830](#)

The following motions relating to statutory instruments are subject to double majority voting:

- (a) a motion to approve a certified instrument;
- (b) a motion to annul (or of a similar nature) a certified instrument;
- (c) a motion to disagree with a report of the Regulatory Reform Committee that contains a recommendation that an order subject to the affirmative resolution procedure be not approved in relation to a certified instrument;
- (d) an amendment to a motion within sub-paragraph (a) or (b).

**Box 4: Double majority divisions**

The first division subject to a double majority vote took place on 19 January 2016, when the House voted against a motion to annul the *Education (Student Support) (Amendment) Regulations 2015* (SI 2015/1951).

The Speaker had certified that the SI related exclusively to England and was within devolved legislative competence.<sup>31</sup>

Both the whole House (303-292) and the Members representing seats in England (291-203) voted against the motion to annul the SI.<sup>32</sup>

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<sup>31</sup> Certificate issued on 6 January 2016 (see [Votes and Proceedings](#), 6 January 2016)

<sup>32</sup> [HC Deb 19 January 2016 cc1344-1350](#)

## 4. Other types of delegated legislation

In addition to the general procedure described above, SIs are created in a variety of other forms, of which the more common are discussed below. The list below is not comprehensive; there are various types of instrument outside the scope of these notes. These include those by which most primary legislation for Northern Ireland was embodied before the Northern Ireland Assembly was established or whilst it was suspended, and those subject to the *Statutory Orders (Special Procedure) Act 1945*. The Northern Ireland equivalent of an SI is called a statutory rule (SR).

### 4.1 Legislative Reform Orders

The passing of the *Regulatory Reform Act 2001* enabled the Government to make an order, known as a regulatory reform order, to amend or repeal a provision in primary legislation which was considered to impose a burden on business or others, as long as it could be reduced or removed without removing necessary protection. This Act extended the provisions of the *Deregulation and Contracting Out Act 1994* under which the orders were known as deregulation orders.

In 2006, the *Legislative and Regulatory Reform Act* was passed which, like the *Regulatory Reform Act 2001*, gives Ministers certain powers to make orders (legislative reform orders) that remove or reduce burdens resulting directly or indirectly from legislation. Section 2 of *Legislative and Regulatory Reform Act* makes similar provision in relation to orders that promote principles of better regulation. Section 3 of the Act sets out tests that the Minister proposing to make a legislative reform order has to address. They include positive tests (need for legislation, proportionality and fair balance of interests) and negative ones (no removal of necessary protection, no unreasonable interference with rights and freedoms, no constitutional significance). The Minister can only proceed if satisfied that all relevant section 3 tests are passed.

Before a Minister may make a legislative reform order, he or she must:

- consult widely with those affected by the proposals
- lay before Parliament a draft order and explanatory document, and allow time for Parliamentary consideration
- obtain Parliament's sanction for making the order (unless the negative procedure is used).

Only after all of these steps have been successfully completed may the order become law.

When the draft order is laid before Parliament, the Minister must recommend one of three possible parliamentary procedures for dealing with it:

- The negative resolution procedure, under which the order may be made unless Parliament either disagrees within 40 days of laying

or (within 30 days) recommends upgrading either to the affirmative or super-affirmative procedures;

- The affirmative resolution procedure, under which both Houses of Parliament must expressly approve the draft order before the order can be made. They have 40 days to consider it first. They can also (within 30 days) recommend upgrading the procedure to super-affirmative;
- The super-affirmative procedure, which requires the Minister to have regard to representations, House of Commons and House of Lords resolutions, and Committee recommendations that are made within 60 days of laying, in order to decide whether to proceed with the order and (if so) whether to do so as presented or in an amended form.

In practice, the House of Commons delegates the decisions on whether to upgrade the procedure and whether to approve or disapprove the draft order to the Regulatory Reform Committee. The Committee can also go further than disapproval by recommending a veto (which can be rejected by a resolution of the House in the same session).

The Committee considers whether a proposed order meets all the criteria laid down by the *Legislative and Regulatory Reform Act 2006* and by the Standing Order that governs the Committee's work. Once the Committee is satisfied that it has all the information it requires, it makes a substantive report to the House assessing the proposal against all the relevant criteria.

In the House of Lords, legislative reform orders are considered by the Delegated Powers and Regulatory Reform Committee.

## Debates on Legislative Reform Orders

The final stage of the parliamentary process in respect of legislative reform orders that are subject to the affirmative or super-affirmative procedures is the consideration by each House of a motion to approve the draft order. The Lords generally debate all such Orders but procedure in the Commons (which is governed by Standing Order No 18) varies according to the report of the Regulatory Reform Committee:

- if the recommendation of the Committee was for approval, without a division in committee, then the Question for approval by the House must be put forthwith (i.e. without debate);
- if the recommendation of the Committee was for approval, but the Committee divided on the recommendation, then the Motion to approve the Order may be debated by the House for up to one and a half hours;
- if the recommendation of the Committee was that the draft Order should not be approved, but the Government wish to proceed, then: the Government have to table a Motion to disagree with the Committee's report, which may be debated for up to 3 hours. If that Motion is approved by the House, then the Question on the draft order is put forthwith.

Once the draft orders are approved by both Houses, they are made by the Minister responsible and are then printed and published as SIs by the Stationery Office.

## 4.2 Remedial Orders

Under the *Human Rights Act 1998*, if a court makes a declaration of incompatibility with the European Convention on Human Rights in relation to a statute, the Government is able to propose draft Orders or make Orders to amend primary legislation in order to remove any incompatibility. The procedure followed is similar to that for regulatory reform orders.

First, a Minister must lay a proposal for a draft remedial order before Parliament. The proposal must be accompanied by an explanation of the circumstances that led to the need for the proposal. There then follows a 60-day period during which representations may be made on the order. Also, during this period, the Joint Committee on Human Rights must report on whether an order in the same terms as the proposal should be laid.

At the end of this first 60-day period, the Minister may lay a draft remedial order. This must be accompanied by a statement on representations received and any changes made to the proposal following these representations. There is then a further 60-day period (calculated in the same way) after which a motion may be moved to approve the draft order. Again, the Joint Committee must report on whether the draft order should be approved.

Once this order is approved by both Houses, it may be made and brought into effect.

There is also an urgent procedure for remedial orders where the order is made at the same time as it is laid before Parliament. There then follows a 60-day period where representations including any report from the Joint Committee may be submitted. After this period, the Minister must report any representations to both Houses and may choose to make and lay a replacement order.

The original order or the replacement order must then be approved by motions of both Houses within 120 days of the making of the original order (including usual adjustments) otherwise it will cease to have effect. If the Joint Committee reported that the original order should be replaced by a new one, it is expected to report on the replacement order as well.

## 4.3 Public Bodies Orders

The *Public Bodies Act 2011* gives ministers the power to abolish, merge, modify the constitutional arrangements of, modify the funding arrangements of, and modify or transfer the functions of public bodies.

### **Box 5: Sunset provisions to the *Public Bodies Act 2011***

Relevant bodies are listed in schedules 1-5 of the Act. However, the powers in the Act are time-limited as section 12 provides that an entry in schedules 1-5 ceases to have effect five years after commencement of the entry. The original entries in these schedules were commenced on 14 February 2012 (two months after Royal Assent).<sup>33</sup>

Before a Minister can lay a draft order under this Act, a consultation process must have been completed. Once the consultation process is completed a Minister may lay a draft order. If, within 30 days of the laying of the draft order, either House resolves or a committee charged with reporting on the draft order (usually the relevant departmental select committee in the Commons and the Secondary Legislation Scrutiny Committee in the Lords) so recommends, then the “enhanced affirmative procedure” should apply. If no such resolution or recommendation is made, after 40 days, a motion to approve the draft order can be moved.

The enhanced affirmative procedure:

- 1 Extends the period before a motion to approve a draft order can be approved to 60 days (from the date on which the draft order was laid);
- 2 Requires the minister to have regard to any representations, any resolution of either House of Parliament and any recommendations of a committee of either House charged with reporting on the draft order made during the 60-day period.
- 3 At the end of the 60-day period the minister can either:
  - a. Move that the original draft order be approved and, if it is, make an order in the terms of the draft order; or
  - b. Lay a revised draft order and a statement giving a summary of the changes proposed. If the revised draft order is approved by a resolution of each House of Parliament, the minister may make an order in terms of the revised draft order.

## **4.4 Commencement regulations**

Commencement regulations (or appointed day orders), formerly commencement orders, are a form of SI designed to bring into force the whole or part of an Act of Parliament which for some reason it is not desired to put into effect immediately upon Royal Assent. There may be more than one per Act (the *Town and Country Planning Act 1971* had 75 such Orders) and there is in general no requirement as to the time after Royal Assent in which they must be brought in - e.g. the *Easter Act 1928* (which stipulates a fixed date for Easter) has not yet had a commencement order made, though it is open to the Home Secretary to make one if general agreement on fixing a date is reached. These are generally not subject to parliamentary procedure and are simply made.

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<sup>33</sup> *Public Bodies Act 2011* (chapter 24), section 38; [HC Deb 14 December 2011 c807](#)

## 4.5 Orders in Council

Orders in Council are issued “by and with the advice of Her Majesty’s Privy Council”, and are usually classified as secondary legislation (although some can be primary legislation), and are made under powers given in a parent Act. They can be used for a wide variety of purposes but most frequently when an ordinary SI would be inappropriate such as transferring responsibilities between Government Departments or where it affects the constitution by extending legislation to the Channel Islands, for example. An example of the former is the *Transfer of Function (International Development) Order 1997*, which transferred responsibility for international development from the Foreign and Commonwealth Office to the Department of International Development (SI 1997/1749). An example of the latter is the *Afghanistan (United Nations Sanctions) (Channel Islands) Order 1999* (SI 1999/8134), which gave the Channel Islands legal authority to implement sanctions on Afghanistan.

Orders in Council were also used to transfer powers from Ministers of the UK Government to those of the devolved governments. Examples of these are the *Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc) Order 2006* SI 2006/304 and the *Welsh Ministers (Transfer of Functions) Order 2008*.

## 4.6 Orders of Council

Orders of Council are made by the Privy Council in exercise of powers conferred upon them alone and usually relate to the regulation of professions or professional bodies. An example of this type of SI is the *General Optical Council (Maximum Penalty) Order 1994* (SI 1994/3327) which increased the maximum penalty that could be made by the Disciplinary Committee of the General Optical Council from £1,000 to £1,600.

## 4.7 Local SIs

Some SIs are local in character and are classified as such if their provisions are in the nature of a local and personal or private Act. Very few are subject to parliamentary procedure but this does not mean that a local SI is only issued under the authority of a local and personal or private Act; many public and general Acts have provisions which result in a local SI. This has had major implications with respect to publishing and distribution of the SI (see below).

## 5. Finding out about SIs

The issue of an SI is noted on the day following its publication in the Stationery Office Daily List. SIs laid in the House of Commons appear in an Appendix to the daily *Votes and Proceedings* and a list of them, compiled by the Journal Office. The list is compiled weekly when the House is sitting. It records draft SIs awaiting approval; draft SIs approved by the House, since the last edition of the list; and the number of 'praying' days remaining for SIs subject to the negative procedure. Both of these are available on the parliamentary website<sup>34</sup> or the House of Commons Public Enquiries Team can make information available from them on request.

Forthcoming debates on SIs are announced each week. Debates may take place on either the floor of the House or in a Delegated Legislation Committee.<sup>35</sup> The timing of formal motions to approve SIs (without debate) is not normally given in advance.

### 5.1 Publication and Bibliographic Control

Until 1891, there was no formal arrangement for the printing and publication of delegated legislation. In 1891, an official volume was produced that contained all the public and general rules and regulations made in 1890 under the title Statutory Rules and Orders (SR & O). This was the first of an annual series that is still in production today which, since 1948, is published under the title Statutory Instruments.

Generally, all instruments other than local instruments, are required to be printed and put on sale by the Stationery Office. Some local SIs are, however, sold by the Stationery Office. Drafts of SIs laid under the affirmative procedure are also usually on sale at the Stationery Office but these are not included in the numbered series until after approval by Parliament.

The full texts of all SIs from 1987 are now available at the web address:

<http://www.legislation.gov.uk/uksi>

### 5.2 House of Commons statistics

Details of the number of SIs laid in the House of Commons; the number considered by the Joint Committee on Statutory Instruments; and the number of instruments to which the special attention of the House has been drawn are reported, by Session, in the *Sessional Returns*.

The *Sessional Returns* also reports the number of and title of each SI considered by a Delegated Legislation Committee. Information on Legislative Reform Orders and Remedial Orders is also reported in the *Sessional Returns*.<sup>36</sup>

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<sup>34</sup> [List of Statutory instruments](#) and [Votes and Proceedings](#)

<sup>35</sup> Details of future business can be found on the [Parliamentary calendar](#)

<sup>36</sup> House of Commons, [Sessional Returns](#)

## Appendix – Statutory instruments not approved or annulled

### House of Commons

Erskine May reported eight examples of statutory instruments subject to the negative procedure being annulled in the House of Commons since World War II.<sup>37</sup> Most recently, in the Commons, the *Paraffin (Maximum Retail Prices) (Revocation) Order 1979* was successfully prayed against. Following a debate, the Deputy Speaker declared that the motion was agreed to “on the voices”.<sup>38</sup>

According to *Griffith and Ryle on Parliament – Functions, Practice and Procedures*:

It is very rare for an affirmative statutory instrument to be defeated in the House, the last occasion of this happening being in 1978.<sup>39</sup>

Then, the *Dock Labour Scheme 1978* was defeated by 301 votes to 291 on 24 July 1978.<sup>40</sup>

### House of Lords

Since World War II, the House of Lords has not approved five statutory instruments subject to the affirmative resolution procedure, and voted that one statutory instrument subject to the negative resolution procedure should be annulled.

#### **SIs subject to the affirmative resolution procedure that were not approved**

On 18 June 1968, the House of Lords negated the motion to approve the *Southern Rhodesia (United Nations Sanctions) Order 1968*: there voted Contents, 184; Not Contents, 193.<sup>41</sup>

On 22 February 2000, the House of Lords amended a motion to approve the draft the *Greater London Authority Elections Election (Expenses) Order 2000*. The amendment which stated “this House declines to approve the draft order laid before it on 3rd February and calls on Her Majesty’s Government to lay an order which provides that candidates are allowed one freepost delivery per household” was agreed by 215 Contents to 150 Not-Contents.<sup>42</sup>

On 28 March 2007, an amendment to “decline to approve” the draft *Gambling (Geographical Distribution of Casino Premises Licences) Order 2007* was agreed by the House of Lords by 123 to 120.<sup>43</sup>

<sup>37</sup> Erskine May, *Parliamentary Practice*, 24th edition, 2011, p678, n58

<sup>38</sup> HC Deb 24 October 1979 Vol 972 cc561-586

<sup>39</sup> Robert Blackburn and Andrew Kennon, *Griffith and Ryle on Parliament – Functions, Practice and Procedures*, 2nd edition, 2003, pp469-470

<sup>40</sup> HC Deb 24 July 1978 cc1289-1326

<sup>41</sup> HL Deb 18 June 1968 cc515-597; debate had begun the previous day: HL Deb 17 June 1968 cc321-344, cc426-510

<sup>42</sup> [HL Deb 22 February 2000 c179](#); debate cc136-182

<sup>43</sup> HL Deb 28 March 2007 cc1658-1695

On 3 December 2012, the draft *Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2012* was not approved. An amendment that “this House declines to approve the draft Order ...” was agreed to: Contents – 201; Not-Contents – 191.<sup>44</sup>

On 26 October 2015 the House of Lords passed two separate amendments to the Government’s motions to approve a statutory instrument to implement their policy on tax credits. The two amendments passed to the motion to approve the *Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015* were as follows:

- An amendment tabled by Baroness Meacher that the House declined to consider the draft regulations “until the Government lay a report before the House, detailing their response to the analysis of the draft regulations by the Institute for Fiscal Studies, and considering possible mitigating action” was passed by 307 to 277.
- An amendment moved by Baroness Hollis of Heigham that the House declined to consider the draft Regulations unless transitional arrangements were put in place for three years and that a report was made in response to the IFS analysis was also passed by 289 to 272.<sup>45</sup>

**SIs subject to the negative resolution procedure that the House of Lords resolved should be annulled**

On 22 February 2000, the House of Lords agreed a motion to annul the *Greater London Authority Elections Rules (SI 2000/208)* by 206 contents to 143 Not-Contents.<sup>46</sup>

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<sup>44</sup> HL Deb 3 December 2012 cc489-494

<sup>45</sup> [HL Deb 25 October 2015 cc976-1042](#)

<sup>46</sup> [HL Deb 22 February 2000 cc182-184](#)

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