



Delegated Legislation: the Procedure Committee report and proposals for change

Standard Note: SN/PC/469
Last updated: 13 February 2002
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This note discusses the role of Parliament in the scrutiny of delegated legislation. It concentrates particularly on the Procedure Committee report on Delegated Legislation in March 2000 (HC 48, 1999-2000), and subsequent developments. A reading list at the end of this note provides sources for further details on statutory instrument procedure.

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A. Introduction

The term delegated legislation encompasses rules, orders, regulations - usually made by means of **statutory instrument** (SI), which form the largest category of delegated legislation – and other forms of secondary legislation such as orders in council, departmental orders, Church of England Measures and codes of practice. Some SIs are not subject to any parliamentary procedure and simply become law on the date stated in them. Other SIs are required by the parent act to be laid before Parliament, under one of three procedures, which could be described very briefly as follows:

1. those which are laid before Parliament for information but are subject to no further procedure;
2. those subject to the **negative resolution procedure** whereby the SI will come into force on the date specified in the instrument unless either House passes a motion (colloquially known as a “prayer”) calling for its annulment;
3. those subject to the **affirmative resolution procedure**, which includes most instruments laid “in draft” (although the text is not amendable), where Parliament’s approval is required before they can come into force.

General (as opposed to local) SIs are examined by the **Joint Committee on Statutory Instruments** (sometimes known as the *Scrutiny Committee*) to ensure that the powers are in accordance with the provisions in the parent act. This committee does not look at the merits of the instruments.

In the House of Commons most debate on SIs takes place in one of the **Standing Committees on Delegated Legislation**.

B. The Procedure Committee Report

The Procedure Committee published a report on Delegated Legislation¹ in March 2000 (copy of the summary of recommendations attached as Appendix 1). The Procedure Committee had previously considered this subject in 1996 and concluded that there were defects in the system for considering such legislation.² However, no changes had followed. The Chairman of the Modernisation Committee asked the Procedure Committee in May 1999 to look again at its 1996 report and to consider whether any of the recommendations should now be implemented.

¹ 7 March 2000, HC 48 1999-2000 (on the intranet at - <http://pdvnsco.parliament.uk/homepage.html>)

² *Delegated Legislation*, 5 June 1996, HC 152 1995-96

The Procedure Committee's 2000 report supported the recommendations in the earlier report, with minor modifications, and reproduced the 1996 summary of conclusions and recommendations (also appended). The Committee looked at subsequent procedural developments such as devolution, Westminster Hall sittings and the establishment of the House of Lords Select Committee on Delegated Powers and Deregulation and the European Scrutiny Committee. It also took into consideration the report of the Royal Commission on the Reform of the House of Lords (the Wakeham Commission),³ which included a chapter on scrutinising statutory instruments and recommendations thereon (recommendations attached as Appendix 2).

Some of the main issues arising from the Procedure Committee report and the Wakeham Commission report could be summarised as follows:

- **the growth in the volume of statutory instruments** – see figures in the Procedure Committee report⁴ (reproduced in Appendix 3 attached) and the Wakeham Commission report⁵
- **the case for a “sifting” committee** - to consider and assess the significance of instruments, making recommendations on which negative instruments merit debate and identifying which affirmative instruments did not merit debate.⁶ (At present, many affirmative SIs get only a few minutes' consideration in committee, and only a small proportion of negative SIs ever get debated).⁷
- **the case for “pre-legislative scrutiny” of proposed statutory instruments** – The Committee endorsed the 1996 Procedure Committee proposal for a new category of “super-affirmative” orders to deal with complex SIs in draft.⁸ (At present, some instruments are required to be laid before Parliament “in draft”, generally under the affirmative procedure, but the text of draft affirmatives is still not subject to amendment).
- **extension in praying time from 40 to 60 days**⁹ - linked with the recommendation that ...
- **neither House should consider an instrument until the Joint Committee on Statutory Instruments has reported on it** - (At present, only the House of Lords has such a standing order.)¹⁰

³ *A House for the Future*, Jan 2000, Cm 4534

⁴ HC 48 1999-2000, pp 26 and p ix of report

⁵ Cm 4534, pp 68, 70

⁶ HC 48 1999-2000 paras 11-14

⁷ see evidence to Procedure Committee, HC 48 1999-2000, table 3 on p 27

⁸ *ibid*, para 20

⁹ *ibid*, para 14

¹⁰ *ibid*, para 21

- **the fact that statutory instruments cannot be amended during debate** – The Procedure Committee recommended no change on the grounds that the complications that would ensue would greatly outweigh any likely benefits.¹¹
- **the fact that debate on statutory instruments in committee does not take place on a substantive amendable motion** – The motion in a Delegated Legislation Committee is “That the Committee has considered the instrument”. Even if the Committee votes against the motion, the Chairman’s report to the House is still “That the Committee has considered the instrument” and no debate or further procedural consequences follow.¹²
- **the role and power of the second chamber** – Since 1968¹³ the House of Lords had by convention not rejected statutory instruments. However, on 22 February 2000 the Lords voted against the *Greater London Authority Order 2000* and the *Greater London Authority Election Rules 2000*. The Wakeham Commission did not favour a power of veto for the second chamber but did recommend a power of delay of three months.¹⁴

Many of these points arose during the two debates in the House of Lords on delegated legislation, on 7 December 1999 and 29 March 2000.¹⁵

C. Changes implemented since the report

The report was not debated and no Government reply to it was made. It is understood the Committee has made representations to the Government about this, but little action has yet been forthcoming. However, one consequence, further to para. 16 of the 1995-96 report, was **Explanatory Notes**. The Leader of the House announced that affirmative resolution instruments would henceforth, as with Bills, be accompanied by an Explanatory Memorandum¹⁶:

Mr. Nicholas Winterton: To ask the President of the Council whether the Government intend to improve the explanatory material supplied with statutory instruments.

Mr. Robin Cook: I am pleased to announce that, with effect from 1 March, all affirmative statutory instruments laid before the House will be accompanied by an explanatory memorandum, which will be a fuller document than the existing explanatory note. This is intended to assist Parliament in considering the instrument. The new memoranda will be in addition to the explanatory notes, which will continue to be printed with statutory instruments.

¹¹ *ibid*, para 17

¹² *ibid*, para 16-17

¹³ when the House of Lords voted not to approve the *Southern Rhodesia (United Nations Sanctions) Order 1968*

¹⁴ Cm 4534, p 77

¹⁵ HL Deb 7 Dec 1999 Vol 607 c1243-70; HL Deb 29 Mar 2000 Vol 611 c 809-46

¹⁶ HC Deb 1 Feb 2002 379 c 585W

D. Further reading

For general background and an explanation of current statutory instrument procedure:

- *Statutory Instruments Act 1946*
- *Erskine May*, Chapter 23 on Delegated Legislation.
- HC [Public] Information Office Factsheet L7 – *Statutory Instruments and Deregulation Orders*
- DR Miers and AC Page, *Legislation*, 2nd ed, 1990 (pp 115-28)
- P Silk and R Walters, *How Parliament Works*, 4th ed, 1998 (pp 146-51)
- JAG Griffith and M Ryle, *Parliament: Functions, Practice and Procedures*, 1989 (pp 244-7, 346)
- S de Smith and R Brazier, *Constitutional and Administrative Law*, 8th ed, 1998 (chapter 17)
- JD Hayhurst and P Wallington, “The Parliamentary Scrutiny of Delegated Legislation”, *Public Law* Winter 1988, (pp 547-76)
- CMG Himsworth, “The delegated powers scrutiny committee”, *Public Law*, Spring 1995, (pp 34-44)
- T St JN Bates, “The Future of Parliamentary Scrutiny of Delegated Legislation: Some Judicial Perspectives”, *Statute Law Review*, Vol 19 (3), 1998 (pp155-76)
- H Barnett, *Constitutional and Administrative Law*, 3rd ed, 2000 (pp 600-3)

Appendix 1 – Procedure Committee, *Delegated Legislation*, HC 48 1999-2000

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

- (a) In June 1996, the Procedure Committee laid before the House a report on delegated legislation. ... With minor modifications, we support the recommendations in the 1996 report [printed as an Annex, at page xix below], and are strongly desirous of seeing them implemented. We believe that this package of recommendations is a modest and workable attempt to tackle the deficiencies of the existing system. We do not consider that the recommendations, if implemented, will add to the overall workload of the House or necessarily result in longer sitting hours. The recommendations should be seen, we believe, as an integral part of the programme of modernising the work of the House (paragraphs 1 and 4).
- (b) In our view the trends revealed by [recent] statistics reinforce the case for the reform of the existing system of scrutiny (paragraph 28).
- (c) The extent of any changes in the pattern and quantity of delegated legislation arising from devolution is a matter which we will continue to monitor. However, there is no reason to think at this stage that changes attributable to devolution require any re-assessment of the conclusions and recommendations in the 1996 report (paragraph 31).
- (d) Even if SIs of a kind which are currently taken in committee or on the Floor were to be transferred to Westminster Hall, we do not believe that this would constitute a "solution" to the problems relating to scrutiny of delegated legislation which our predecessors identified, or that it would weaken the case for a sifting process to assess the appropriate level of scrutiny for individual instruments; at best it would transfer the problems themselves to a new setting (paragraph 33).
- (e) We very much welcome the support of the Royal Commission on the Reform of the House of Lords for the recommendations in the 1996 report (paragraph 40).
- (f) With regard to the Royal Commission's proposal that the sifting of SIs should be entrusted to a Joint Committee, we consider that this might be a sensible way of avoiding duplication of effort, but measures would need to be taken to ensure that recommendations relating to Commons business were taken by the Commons members of any such committee alone (paragraph 41).
- (g) The activities of the European Scrutiny Committee, European Standing Committees, the Deregulation Committee and the House of Lords Delegated Powers and Deregulation Committee have continued to develop during the four years since our predecessors reported, and form a valuable contribution to the effectiveness of Parliament. Almost every element of the 1996 report's proposed reforms in the field of delegated legislation has been pioneered in one or other of these committees and shown to be eminently workable (paragraph 51).

- (h) The package of proposals first put forward in 1996 was deliberately designed to be realistic, not Utopian (paragraph 52).
- (i) The existing system of scrutinising delegated legislation is urgently in need of reform. We concur with our predecessors' description of that system as "palpably unsatisfactory" (paragraph 53).
- (j) We endorse the package of proposals put forward in the 1996 report. [These are] aimed not at increasing the burden on the House but, by means of the sifting mechanism, at targeting the House's existing resources more effectively. As several of our witnesses pointed out, they do not represent a radical departure from the existing procedures of the House but rather seek to build on them (paragraph 53).
- (k) Our inquiry has raised a number of major issues relating to Parliament's treatment of delegated legislation. Some of these remain to be explored more fully (paragraph 54).
- (l) In the interim, however, we believe that the most important thing is to make rapid progress in implementing the 1996 proposals (paragraph 55).
- (m) In two respects those proposals, as originally advanced, would require primary legislation. We do not believe that the implementation of the other, very important, changes which our predecessors proposed ... should be delayed while time is found for appropriate bills to be brought forward (paragraph 56).
- (n) We note that there is no reason for the Government to await primary legislation before initiating a "super-affirmative" procedure, at least on experimental lines. We recommend that such an experiment be conducted (paragraph 57).
- (o) We support our predecessors' recommendation (never implemented) that there should be a full day's debate on those proposals (paragraph 58).
- (p) The written and oral evidence we have received supported the 1996 proposals strongly. The proposals have now been endorsed by the Procedure Committee under both a Conservative and a Labour Administration, as well as by the Royal Commission on House of Lords Reform and by the Chairman's Panel in the House of Commons. We believe they represent a significant contribution to the process of modernising Parliament, and we press the Government to accept them as a matter of urgency (paragraph 59).

Appendix 1 (cont) -

Procedure Committee, *Delegated Legislation*, 7 March 2000, HC 48 1999-2000

ANNEX

Summary of Conclusions and Recommendations in the Procedure Committee's Fourth Report of Session 1995-96, *Delegated Legislation* (HC 152)

- (a) We consider that there is too great a readiness on the part of Parliament to delegate legislative powers to Ministers in primary legislation. It has nonetheless to be accepted that this practice has advantages for Government and is bound to continue. So the House will continue to have to consider a vast volume of delegated legislation, which needs to be, and to be seen to be, properly scrutinised (paras.14-15).
- (b) We accept the continuation of the division of instruments into affirmative and negative, but consider that a more radical categorisation will be necessary if the proposals we make prove ineffective (para.8).
- (c) We propose a new category of "super-affirmative" instruments for future legislation, whereby proposals for draft Orders would be laid for pre-legislative scrutiny (para.9).
- (d) We recommend the extension of the 40 day "praying time" to 60 days (para.18).
- (e) We recommend that there should be a Standing Order providing that no decision on a statutory instrument should be made by the House until completion of its consideration by the Joint Committee on Statutory Instruments (para.20).
- (f) We recommend that serious consideration be given by the Joint Committee on Statutory Instruments as to whether its terms of reference should be amended to exclude consideration of instruments not subject to Parliamentary proceedings (para.21).
- (g) We recommend that the detailed Memorandum prepared on each instrument by Departments be made available to all Members on request (para.16).
- (h) We recommend that the Government consider how best to identify for Members instruments laid under the European Communities Act 1972, whether by colour-coding or otherwise (para.17).
- (i) We recommend that debates on negative instruments be arranged before the expiry of praying time (para.36).
- (j) We recommend repeal of the 11.30 cut-off on debates on negative instruments held on the Floor of the House enshrined in Standing Order No.15 (para.42).
- (k) We recommend that reference of a negative instrument to Committee be permitted to be moved by a Member where a Prayer against it has been signed by at least 20 Members; and

that the question be decided on a simple majority rather than open to decisive objection by 20 Members as at present (para.27).

- (l) We recommend the establishment of a Sifting Committee to determine which negative instruments merit debate, with the power to move reference of such instruments to Committee (para.33).
- (m) We recommend that minor affirmative instruments of broadly similar subject matter be grouped together for sequential debate, and that Ministers be given the power to make Motions in such Committees although not members of the Committee (para.40).
- (n) We recommend that the proposed Sifting Committee be empowered to identify those affirmative instruments which it considers do not require debate, and that the question on them be put forthwith after the elapse of an appropriate interval, unless at least 6 Members have given notice of their desire to debate the instrument (para.41).
- (o) We recommend that debate in Standing Committees on Delegated Legislation last up to two and a half hours (para.44).
- (p) We recommend that proceedings in Standing Committees on Delegated Legislation begin with a statement and questions (para.45).
- (q) We recommend that the Chairman of a Standing Committee on Delegated Legislation be empowered to limit backbench speeches to 10 minutes (para.46).
- (r) We recommend that debate on instruments in Standing Committee be on a substantive motion (para.50).
- (s) We recommend that motions on instruments be open to specified classes of amendment, including reasoned amendments and conditional amendments (paras.52-53).
- (t) We recommend that, where a Committee has recommended annulment of an instrument, or approval subject to conditions, or where the motion to recommend approval has been defeated, there be up to one hour's further debate on the Floor (para.54).

Appendix 2 – Royal Commission on the Reform of the House of Lords, *A House for the Future*, Jan 2000, Cm 4534

Summary of Conclusions and Recommendations

Chapter 7 – Scrutinising statutory instruments

Recommendation 35: There is a strong case for enhanced Parliamentary scrutiny of secondary legislation. The reformed second chamber should make a strong contribution in this area. (Paragraph 7.6.)

Recommendation 36: The Delegated Powers and Deregulation Committee should encourage the practice of publishing particularly significant Statutory Instruments in draft so that they can be subjected to detailed comment by interested parties and members of both Houses of Parliament before being formally laid before Parliament. Ministers and Departments should consider doing so wherever that would be beneficial. (Paragraph 7.22.)

Recommendation 37: A ‘sifting’ mechanism should be established to look at the significance of every Statutory Instrument subject to Parliamentary scrutiny; call for further information from Departments where necessary; and draw attention to those Statutory Instruments which are important and those which merit further debate or consideration. (Paragraph 7.23.)

Recommendation 38: A joint Committee should be established to sift Statutory Instruments. Alternatively, the second chamber should consider setting up machinery to sift Statutory Instruments, perhaps inviting the Delegated Powers and Deregulation Committee to take on the task. (Paragraph 7.26.)

Recommendation 39: Neither chamber should consider a Statutory Instrument until the JCSI has reported on it. The Statutory Instruments Act 1946 should be amended to extend the statutory ‘praying time’ in respect of negative resolution instruments from 40 days to 60 days. (Paragraph 7.28.)

Conclusion: There is no case for making it possible to amend Statutory Instruments once they have been formally laid before Parliament. (Paragraph 7.29.)

Recommendation 40: The reformed second chamber should adopt an open-minded, flexible and innovative approach to the consideration of Statutory Instruments within the present procedural arrangements. (Paragraph 7.30.)

Recommendation 41: Where the second chamber votes against a draft instrument, the draft should nevertheless be deemed to be approved if the House of Commons subsequently gives (or, as the case may be, reaffirms) its approval within three months. (Paragraph 7.37.)

Recommendation 42: Where the second chamber votes to annul an instrument, the annulment should not take effect for three months and could be overridden by a resolution of the House of Commons. (Paragraph 7.37.)

Recommendation 43: In both cases the relevant Minister should publish an Explanatory Memorandum, giving the second chamber an opportunity to reconsider its position and ensuring that the House of Commons is fully aware of all the issues if it has to take the final decision. (Paragraph 7.37.)

Conclusion: Changing the nature of the second chamber’s powers in relation to Statutory Instruments would actually strengthen its influence and its ability to cause the Government and the House of Commons to take its concerns seriously. (Paragraph 7.38.)

Appendix 3 - Procedure Committee report, *Delegated Legislation*, 7 March 2000, HC 48 1999-2000

Memorandum from the Clerk of the House

UPDATED VERSION OF STATISTICS CONTAINED IN THE MEMORANDUM FROM THE CLERK OF THE HOUSE PRINTED WITH THE COMMITTEE'S FOURTH REPORT OF 1995-96, *DELEGATED LEGISLATION* (HC 152)

Table 1
Numbers of Statutory Instruments

Year	General	Local	Total
1950	1,211	933	2,144
1955	657	1,350	2,007
1960	733	1,762	2,495
1965	899	1,302	2,201
1970	1,040	1,004	2,044
1975	1,362	889	2,251
1980	1,197	854	2,051
1985	1,204	878	2,082
1990	1,408	1,256	2,664
1991	1,535	1,416	2,951
1992	1,693	1,667	3,360
1993	1,572	1,707	3,279
1994	1,688	1,646	3,334
1995	1,666	1,679	3,345
1996	1,832	1,459	3,291
1997	1,663	1,451	3,114
1998	1,576	1,747	3,323
1999 (to end October)	1,486	1,475	2,961

Table 2
Instruments subject to Parliamentary procedure

Session	Affirmatives[1]	Negatives[2]	All
1980-81	130	793	923
1981-82	121	721	842
1984-85	158	682	840
1985-86	158	861	1,019
1988-89	160	912	1,072
1989-90	164	965	1,129
1990-91	179	1,071	1,250
1993-94	155	1,225	1,380
1994-95	175	1,315	1,490
1995-96	188	1,308	1,596
1996-97[3]	139	899	1,308
1997-98[4]	208	1,591	1,799
1998-99	174	1,245	1,419

Table 3*Instruments considered in the House and in standing committee*

Sessions	Floor	Committee	Floor	Committee
1980-81	94	55	15	7
1981-82	71	59	28	21
1984-85	91	72	15	27
1985-86	69	88	14	9
1988-89	53	99	15	18
1989-90	32	98	24	16
1990-91	35	121	13	18
1993-94	87	68	1	1
1994-95	73	99	8	27
1995-96	60	113	7	29
1996-97 ^[5]	45	94	3	14
1997-98 ^[6]	30	170	4	11
1998-99	23	149	1	28

1 Including instruments and draft instruments requiring approval, excluding those withdrawn.

2 Including instruments and draft instruments subject to attachment (including Northern Ireland instruments), excluding those withdrawn.

3 Unusually short Session.

4 Unusually long Session.

5 Unusually short Session

6 Unusually long Session.