Secondary Legislation Scrutiny Committee—Written evidence (LEG0050)

The House of Lords’ Secondary Legislation Scrutiny Committee (SLSC) was established in 2003 and since then has scrutinised on average 1000 pieces of secondary legislation, mainly Statutory Instruments (SIs), each year. The purpose of the Committee is to draw to the special attention of the House any instruments that we consider to be either interesting or flawed.

Q1. For what purposes is it appropriate to delegate powers to make law to Government? Is there a clear boundary between subject-matters which are appropriate for primary legislation on the one hand, and for secondary legislation on the other?

Q2. Does the Government have a consistent approach to the delegation of powers and, if so, on what basis has that approach been adopted? Has the outcome of this approach been satisfactory?

There appears to us to be some inconsistency in the Government’s approach to the delegation of powers. Erskine May describes secondary legislation “as essentially subsidiary or procedural in character”. The majority of instruments appear, in our view, to conform to that description and simply make mundane or technical changes. Some, however, make major and controversial changes to policy, such as the Draft Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015 which gave rise to the Strathclyde Review. These Regulations were described by the Government as very significant. Earl Howe, for example, in evidence to the SLSC, referred to them as “a major plank of the Government’s economic and fiscal strategy under which a reshaping of tax credits would contribute swiftly and substantially to a reduction in the public sector deficit”.

Other examples of instruments that have attracted a great deal of media attention, and even led to protests outside the House, include the increase in student fees to £9,000, allowing Mitochondrial IVF in humans, various instruments to permit fracking and a proposed amendment to the number of dogs permitted in hunting. When, in October 2015, the proposal to alter the number of dogs permitted for hunting was laid, many expressed the view that that change would undermine the whole purpose of the Hunting Act 2004. The order has not been debated and so the House’s view on it is, as yet, untested.

Because of this inconsistent approach, it is particularly regrettable that the Government have on a number of occasions failed to respond positively to the advice of the Delegated Powers and Regulatory Reform Committee.

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1 SLSC’s full terms of reference
3 9th Report, Session 2015-16 (HL Paper 38).
4 Oral evidence 8 March 2016 Q75.
8 For example HL Deb, 15 July 2015, col 575.
Q5. How far are matters previously dealt with in secondary legislation moving into guidance, codes of practice and directions; and what are the implications of any such movement for Parliamentary scrutiny?

The SLSC has a strongly held view that if guidance is intended to direct users on how specific terms contained in an instrument should be interpreted or how decisions should be made, such guidance should, as a minimum, be laid with the regulations and be available to Parliament throughout the scrutiny process. For example:

- in relation to the Draft Social Security (Personal Independence Payment) Regulations 2013 we said: “As it is so material to the House’s understanding of how the system will operate for individuals, rather than on a theoretical level, the Committee suggests that proper scrutiny is not possible if the guidance is not published before the debate on these Regulations takes place”.  

- the Immigration (European Economic Area) Regulations 2016 (SI 2016/1052), laid on 3 November 2016, set out the grounds on which a person could be deported in terms such as “protecting public services” or “preventing social harm”. The Committee asked the Minister how such broad provisions could be interpreted consistently and objectively. In his reply, the Minister simply referred us to guidance that would not be published until 1 February 2017, three months after the Regulations had been laid.

We believe that where terms contained in secondary legislation have a significant impact on the way in which that legislation is implemented, then their meaning should be set out in the legislation itself rather than in guidance. We note, in this regard, the Supreme Court’s ruling in the case of Mr Alvi. As a result of the Ruling, the Home Office had to lay overnight an instrument to incorporate into the Immigration Rules 290 pages of material previously published as guidance with immediate effect so that the Points Based System could continue to function as intended.

Whilst we recognise the need for guidance in certain circumstances, a major concern is that guidance is almost invariably not subject to Parliamentary scrutiny. We also query whether, on occasion, guidance simply adds layers of complexity. Our report on the Draft Code of Practice on Industrial Action Ballots and Notice to Employers illustrates this point. The Explanatory Memorandum stated that the Department for Business Energy and Industrial Strategy would publish guidance (a month later) for unions and employers “to clarify which workers we expect to be captured by each of the important public services listed”. If such clarification was necessary, the SLSC questioned whether the legislation to which the guidance related was sufficiently clear to those affected by it.

Q6. The extent to which it is appropriate for Parliament to devolve power to the

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10 14th Report, Session 2016-17 (HL Paper 67).
11 9th Report, Session 2012-13 (HL Paper 40), item on Statement of Changes of Immigration Rules CM 8423. Mr Alvi had been refused leave to remain under Tier 2 of the Points Based System because his level of skills and salary did not meet the published criteria. The Supreme Court quashed that decision on the grounds that the list of skilled occupations and salary was not part of the Immigration Rules as laid before Parliament under section 3(2) of the Immigration Act 1971 but was published in guidance not subject to any Parliamentary procedure.

Government inevitably depends on the appropriateness of Parliament’s future scrutiny of the exercise of those powers. To what extent are current procedures for scrutinising secondary legislation effective?

We commented on this matter in our response to the Strathclyde Report. We said at paragraphs 48 to 51:

“48. When asked about the current contribution of the House of Commons to the scrutiny of secondary legislation, Mr Grayling said:

“It is a question that, in a sense, depends very much on the statutory instrument concerned. There are statutory instruments that get very detailed and exhaustive debate, discussion and scrutiny in the Commons. There are those that are uncontroversial and pass through relatively undebated …. But where Commons Members believe that there is an issue with a statutory instrument, it gets vigorous debate.”

This positive view was not shared by other witnesses.

49. Dr Fox of the Hansard Society, for example, said: “Having spent two years looking at scrutiny at the Commons end, we think it is inadequate”. The Hansard Society Report concluded: “MPs are treated as cannon fodder in the process and a huge amount of time 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”. Dr Adam Tucker of York Law School, University of York, told us: “… as is well known, the House of Commons presently plays essentially no role in the scrutiny of delegated legislation. For (obvious) reasons, it acts purely as a rubber stamping chamber, if at all”.

50. Lord Lisvane, former Clerk of the House of Commons, when asked about the “asymmetry of consideration” of secondary legislation in the two Houses said: “Ruth Fox said … that [the Lords] has the mechanisms, the appetite and the time, and I do not think the Commons has any of that, particularly the time”. But, he continued, he was not being “in any sense critical”: “it is about the extraordinary press of competing priorities which Members of the Commons have to deal with”. Lord Cunningham suggested that “… the treatment of secondary legislation in the House of Commons is minimal to the point of being superficial, and Lord Butler said that the Lords “does a very valuable job” and “makes up for the deficiencies” of the Commons. Lord Hunt of Kings Heath said: “ … the Commons involvement in statutory instruments is so scant that it hardly comes into it”, and Lord Wallace of Tankerness, who, like Lord Cunningham, has experience as a member of each House, commented that, although there used to be regular debates on secondary legislation in the House of Commons, they “tend not to happen now”: “I do not think that the same level of attention is given in the House of Commons now, which makes our job in the House of Lords all the more important”. This evidence reflects the view of the Wakeham Commission in 2000 which commented that “very little time [was] made available for debates on statutory instruments in the House of Commons”.

51. The evidence we received suggests that the scrutiny of secondary legislation is judged to be more thoroughly undertaken in the Lords than in the Commons. In making this observation, our intention is not to be critical. The relationship between the two Houses—with their different characteristics and functions, and with the multiple competing pressures on the time of Members of the House of Commons—should, as Lord Lisvane said, “be one of complementarity and not competition”. But acknowledging that this asymmetry exists is important … in the context of the debate about parliamentary scrutiny of secondary legislation.”

Q7. Is there a case for making secondary legislation amendable in certain circumstances (and if so, in which circumstances), or for greater use of an enhanced scrutiny process that allows Parliament to scrutinise draft instruments before a final version is introduced for approval (such as the existing super-affirmative procedure)? What problems arise from the ‘take it or leave it’ process currently used for agreeing secondary legislation?

The Constitution Committee will be aware that there are a number of strengthened scrutiny procedures (for example, the procedure relating to Legislative Reform Orders) which include provision for both Houses to propose amendments to the order laid. Such orders are relatively rare.

Save in the most exceptional cases (where the parent Act specifically provides for amendment, such as section 1(2) of the Census Act 1920), secondary legislation is unamendable. We acknowledge that some members of the House take the view that procedures should be introduced to enable amendment of secondary legislation. This may be the case, in particular, where the substance of an instrument is of such significance that the power to amend secondary legislation would provide a welcome opportunity to challenge the instrument in a targeted and effective way.

We note however that secondary legislation is intended to enable more efficient use of parliamentary time so that, as commented in Erskine May (2011) at page 667, “more time will be available for the discussion of major matters of public concern”. A general power to amend secondary legislation could, we believe, defeat that purpose. Arguably a preferable approach would be for Government to ensure that secondary legislation is used only for provision of “essentially subsidiary or procedural character” and to avoid lengthy, composite instruments. If this were the case, then the likelihood of any demand to amend an instrument would, we believe, be significantly lessened.

We made this point in our response to the Strathclyde Review: “Lord Strathclyde ends his review with the comment that, “to mitigate against excessive use” of the proposed procedure under option 3, it would be appropriate for the Government “to take steps to ensure that bills contain an appropriate level of detail and that too much is not left for implementation by statutory instrument”. We welcome this sentiment and suggest that if the Government were, in the future, to exercise greater caution in using secondary legislation for significant policy change, then a likely concomitant would be a reduction in challenges to secondary legislation.”

Q8. Is there a case for allowing either or both Houses of Parliament additional powers to

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14 See the Companion (2015), page 198, footnote 1.
15 Summary, p 4.
delay or reject secondary legislation?

We concluded in our response to the Strathclyde Review:

“The Strathclyde Review asserts that the Lords convention on secondary legislation has been “stretched to breaking point”, hence the need for change. Whilst we acknowledge that opinions vary about the appropriateness of the Tax Credits Regulations votes, we do not share this view of the convention, and we recommend that the House of Lords should retain its power to reject secondary legislation—albeit to be exercised in exceptional circumstances only.

We make this recommendation on two principal grounds:

- first, that the House has demonstrated, not least by the fact that there have been only six defeats on secondary legislation since 1968, an understanding that the power should be exercised only rarely, and we take the view that, as a self-regulating House, the House can be relied upon to continue to do so; and

- secondly, that the nature of secondary legislation is such that the key issue is not, as the Strathclyde Review suggests, the “primacy of the Commons” but the role of Parliament in scrutinising and, where appropriate, challenging the Executive. Given the Government majority in the Commons and also, as a result of the many pressures on the time of MPs, the greater scope of the Lords to devote time and effort to the scrutiny of secondary legislation, the Lords has a critical part to play in the effective scrutiny of secondary legislation by Parliament.”

Q11. How far is the intended content of secondary legislation made clear when the Bill is going through Parliament? Should draft secondary legislation be routinely made available when Bills are scrutinised by Parliament? Are there any examples of secondary legislation that brought forward provisions which were unexpected in the light of information provided by Government when the primary legislation was being enacted?

This is principally a matter for the Delegated Powers and Regulatory Reform Committee (DPRRC). We believe, however, that it is self-evident that the purpose of any delegation of power to make secondary legislation should be fully explained and justified in delegated power memoranda, and should be made available in draft wherever possible. We regard that as best practice.

As regards instruments which have included unexpected provisions, we note in passing that the terms of reference of the Joint Committee on Statutory Instruments includes whether an instrument “appears to make some unusual or unexpected use of the powers conferred” (Standing Order 73(2)(f)).

Q12. To what extent, in Brexit-related primary legislation, might the use of secondary legislation be necessary or justified to convert the ‘acquis’ (the body of existing EU law) into British law?

We anticipate that the Brexit process will involve a very substantial amount of secondary legislation.
legislation, including instruments made under Henry VIII powers. We also anticipate that it will be appropriate for some changes to be made by statutory instruments subject to the standard affirmative and negative procedures whereas other, more significant changes may require some form of strengthened scrutiny procedures.

Q13. Do you envisage that any changes will be required to procedures related to the delegation of powers or secondary legislation, to cope with the legislation likely to be required as a result of Brexit?

The answer to this question will depend on the volume of secondary legislation, the types chosen and the amount of time available before the chosen end date. The Lords has a well-established scrutiny process but more resources may need to be committed to it if the current, high standard of scrutiny is to be maintained.

If a new strengthened scrutiny procedure is introduced for certain orders, then thought will need to be given to which committee should be charged with scrutinising those orders, whether the DPRRC, the SLSC or another committee.

An increase in affirmative SIs would require a corresponding increase in the time allocated for debates. Furthermore, members of the House will wish to be properly informed about the welter of instruments expected, so that they can deal appropriately with these additional responsibilities as well as the normal flow of SIs. The public may also wish to know what secondary legislation is before the House at any given date so that they can interact with Parliamentarians where they have concerns. Effective, accessible and transparent information resources will therefore be essential.

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