



HOUSE *of* LORDS

BRIEFING

SCRUTINISING THE EXECUTIVE - DELEGATED LEGISLATION

What is delegated legislation?

For practical purposes, and so as not to overload a busy legislature, powers are often conferred on the executive (Government) which enable a minister to make delegated (or secondary) legislation. In the United Kingdom, most Acts of Parliament (primary legislation) contain such provisions. Delegated legislation, in the form of **statutory instruments**, may be used for example to uprate certain annual grants and benefits where the basic rules have been agreed in primary legislation but the rates or amounts need to be altered from time to time.

Note: *As well as being able to confer delegated powers on the UK executive, Parliament can grant similar powers to the National Assembly for Wales (instruments to be made by the Assembly are subject to the subordinate legislation procedures under the Government of Wales Act 1998).*

Statutory instruments

There are two main types of statutory instrument: **affirmative instruments**, which Parliament must expressly approve; and **negative instruments**, which become law without a debate or vote - but may be opposed, or “prayed against”, by a Member of either House. In both cases, Parliament’s room for manoeuvre is limited. Parliament can accept or (theoretically) reject an instrument but cannot amend it. In practice, time for debating statutory instruments is limited.

Role of the House of Lords

An important function of the House of Lords is to keep a watchful eye on the activities of the executive to ensure that it does not exceed or abuse its powers or take inappropriate powers. Part of this task is undertaken by two of its select committees:

- the Delegated Powers and Regulatory Reform Committee; and
- the Merits of Statutory Instruments Committee.

These two committees have complementary functions in that the first examines delegated powers in primary legislation and the second examines the secondary legislation which results from the exercise of those powers. This paper describes the work of each.

HOUSE *of* LORDS
LONDON
SW1A 0PW

E-MAIL:
hlinfo@parliament.uk

TELEPHONE:
020 7219 3107

INTERNET:
www.parliament.uk



The Delegated Powers and Regulatory Reform Committee

In February 1992, the Select Committee on the Work of the House (“the Jellicoe Committee”) noted growing disquiet “over the problem of wide and sometimes ill-defined order-making powers which give ministers unlimited discretion” and recommended the establishment of a delegated powers scrutiny committee in the House. As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed. Following the passage of the Deregulation and Contracting Out Act 1994, the Committee was given the additional role of scrutinising deregulation proposals under that Act and the name of the Committee was changed to the Select Committee on Delegated Powers and Deregulation. In April 2001, the Regulatory Reform Act 2001 was passed which expanded the application of the deregulation order-making power under the 1994 Act, and the Committee took on the scrutiny of regulatory reform proposals under the 2001 Act. The Committee’s name was amended to its present form, the Select Committee on Delegated Powers and Regulatory Reform.

Role of the Committee in relation to bills

The Committee is required “to report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny”. The Committee’s role is to advise the House of Lords. It is for the House to decide whether or not to act on the Committee’s recommendations. The Committee itself has no power to amend bills, although amendments are frequently tabled in response to its recommendations.

The scrutiny process

The Committee takes evidence in writing on each public bill from the relevant government department. It may also hear oral evidence. The written evidence:

- identifies provisions for delegated legislation;
- describes their purpose;
- explains why the matter has been left to delegated legislation;
- explains the degree of parliamentary control provided for the exercise of each power (affirmative, negative, or none at all) and why it is thought appropriate.

The Committee does not report on supply bills, as the Lords do not amend these, and it does not consider consolidation bills because they do not seek to introduce new law. In examining a bill, the Committee:

- considers whether the power to make secondary legislation is appropriate. This includes expressing a view on whether the subject matter is so important that it should only be regulated by primary legislation;
- always pays special attention to “Henry VIII” powers. These provisions enable primary legislation to be amended or repealed by secondary legislation with or without further parliamentary scrutiny;
- considers what form of parliamentary control is appropriate and, in particular, whether the proposed power calls for affirmative rather than negative resolution procedure.



Occasionally the Committee will issue a report on a general matter. At the end of 2002, it published a special report on Henry VIII powers (Session 2002–03, HL Paper 21).

Regulatory reform proposals

The Committee also scrutinises regulatory reform orders introduced under the Regulatory Reform Act 2001. The House of Commons' Regulatory Reform Committee performs a similar function. The two Committees operate independently but co-operate closely. Under the 2001 Act, regulatory reform orders may be made by a minister to amend or repeal primary legislation with a view to removing or reducing burdens. Both Houses must be satisfied that the technical requirements of the 2001 Act have been met. There is a two-stage parliamentary procedure:

1. First, the proposal, together with explanatory material, is laid before Parliament in the form of a draft order. The Committee scrutinises the proposal and, within 60 days, reports to the House on it.
2. Secondly, the Government lays a draft order before Parliament, either in its original form or amended (to take account of the views of the Lords' and Commons' Committees). The Committee scrutinises the draft order and makes a second report to the House. The order may then be put before the House for approval.

The scrutiny process

In considering a proposed regulatory reform order, the Committee asks whether:

- its subject matter is appropriate for the regulatory reform order procedure;
- it is *intra vires* (i.e. is the Government entitled to do what is proposed?);
- it removes a burden;
- “necessary protections” are maintained;
- it would prevent anyone from exercising an existing right or freedom which they might reasonably expect to continue to exercise;
- consultation has been adequate.

If an order either re-enacts or creates a burden, further statutory tests apply.

Members and working methods

The Committee has nine members. It takes evidence and meets regularly when Parliament is sitting, according to the legislative workload. As most of its meetings are deliberative, it usually meets in private. Oral evidence is heard in public, as in other parliamentary select committees. The Committee issues separate reports on bills and regulatory reform orders.

From time to time the Committee publishes a review of its work and working methods. The most recent of such reports was published in April 2005 (Session 2004–05, HL Paper 110).



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The Merits of Statutory Instruments Committee

In January 2000, the Royal Commission on the Reform of the House of Lords (“the Wakeham Commission”) recommended that a “sifting” mechanism should be established, either by way of a joint committee or a Lords-only committee, to identify those statutory instruments which were important and merited further debate or consideration. The Report of the Leader’s Group on the Working of the House, published in April 2002, endorsed the Royal Commission’s recommendation. In December 2003, the Lords’ Merits of Statutory Instruments Committee was appointed. It was re-appointed on 29 November 2004.

Terms of reference

The Committee is required to consider every negative and affirmative statutory instrument (or draft statutory instrument) laid before Parliament with a view to determining whether the special attention of the House should be drawn to it 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 is inappropriate in view of the changed circumstances since the passage of the parent Act;
- that it inappropriately implements EU legislation;
- that it imperfectly achieves its policy objectives.

The Committee is assisted in its work by an Explanatory Memorandum which the Government provides with every affirmative and negative instrument.

Role of the Committee

Like the Delegated Powers and Regulatory Reform Committee, the Merits Committee’s role is to advise the House of Lords, and it is for the House to decide whether or not to act on the Committee’s conclusions. The Committee usually reports instruments in a neutral way, rather than taking a stance on the policy. The Committee itself has no power to block the passage of a statutory instrument. The Committee, in considering the policy implications of instruments, complements the technical scrutiny undertaken by the Joint Committee on Statutory Instruments.

Members and working methods

The Committee has 11 members and meets every week when Parliament is sitting. Its meetings are almost invariably deliberative and are therefore almost always held in private. Oral evidence sessions are, in accordance with normal parliamentary practice, held in public. A report is issued after every meeting.

Further information

The Committee Office, House of Lords, Westminster, SW1A 0PW

Telephone: 020 7219 3103 (Delegated Powers)/8821 (Merits)

Fax: 020 7219 2571

E-mail: dpr@parliament.uk (Delegated Powers)

merits@parliament.uk (Merits)

Internet www.parliament.uk