



Delegated legislation

The volume of legislation has grown considerably over the years. Often Acts of Parliament set out a general principal but allow (by making provision for delegated legislation) the detail to be changed as circumstances change. Delegated legislation (also known as secondary legislation) allows such changes to be made by means of a much simpler procedure. The legislation is delegated, usually either to a minister or to a local authority.

Delegated legislation takes various forms the most usual of which is a Statutory Instrument (SI). Statutory Instruments most commonly take the form of orders (generally giving effect to ministers' decisions) or regulations (which deal with detailed provisions).

General points

It is difficult to speak generally about delegated legislation as it is used for a wide range of purposes and is scrutinised by Parliament in a variety of ways. However, several thousand Statutory Instruments are created every year and they are just as much a part of the law of the land as an Act of Parliament. The Courts can question whether a Minister, when issuing an SI, is using a power they have actually been delegated by an Act of Parliament, or whether the procedure laid down in the Act has been complied with, but cannot question the validity of the SI for any other reason.

The delegation of law making powers was formalised by the *Statutory Instruments Act 1946*. As a result, Statutory Instruments conform to certain standards. On every SI there will be a date on which it was '*made*' (signed by the Minister or other authorised person) and when it '*comes into force*' (when people have to obey it as law). Any SI that has to come before Parliament will also have a date on which it is '*laid*' (copies given to Parliament for scrutiny purposes).

There are different levels of scrutiny applied to SIs that come before Parliament:

- Made – not laid and not subject to debate or voting (no scrutiny)
- Made – laid but not subject to further debate or voting (no scrutiny)
- Made – laid in draft but can be revoked if either House of Parliament votes against it (the **negative procedure**). Occasionally instruments are laid in draft and cannot be made if the draft is voted against within 40 sitting days
- Laid (normally after being made) and cannot come into force unless agreed to by both Houses of Parliament (or in urgent cases cannot remain in force after a specified period unless approved). This is the **affirmative procedure**.

A higher hurdle is set for instruments under the **affirmative procedure**, when a positive decision is required in each House of Parliament (or in the case of SIs dealing with taxation, by the Commons only) before the instrument can become (or remain) law.

Statutory Instruments, when they are considered by Parliament, must generally be accepted as laid or rejected outright. There is normally no mechanism by which Parliament can amend an SI or accept part of it.



Negative procedure

Under the **negative procedure** SIs are usually made (signed by the Minister) before they are laid before Parliament. There will be 40 sitting days, within which MPs or Members of the House of Lords may request a debate by asking the Government that the instrument be annulled (this procedure is called 'praying' against the SI). In the House of Lords, a debate will most likely take place on the Floor of the House. In the House of Commons, if the Government agrees to a debate, it is likely to take place in Delegated Legislation Committees rather than in the main Chamber. Usually, SIs are laid before Parliament at least 21 days before they come into force.

If there are no objections to an SI subject to the negative procedure then there will be no Parliamentary procedure on the SI, and even when instruments have been prayed against the Government may not find time for a debate.

In the Commons, negative SIs which have been prayed against may be referred to a Delegated Legislation Committee or, far more rarely, be debated on the floor of the House.

In the House of Lords these SIs can be debated on the floor of the House or in Grand Committee. The House of Lords are unlikely to defeat a negative procedure SI but may vote on a 'take note' motion which highlights a concern about the SI to the Government but does not stop it becoming law.

Affirmative procedure

A Statutory Instrument (SI) that is subject to the **affirmative procedure** needs to be actively approved by Parliament before it can become law. Approval must be given



separately in each House. An SI that is concerned with financial privilege or taxation only gets laid before the House of Commons so only needs to be approved by the House of Commons.

Most debates on SIs in the House of Commons take place in committee where the motion upon which Members vote is 'The Committee has considered the instrument'. Delegated Legislation Committees are given 90 minutes to debate the SI (or 2½ hours for SIs relating exclusively to Northern Ireland). The Government always votes in favour of the motion, though if it were defeated the Chair of the Committee would still report that consideration had taken place and the SI could still become law.

The House of Lords consider most instruments on the Floor of the House but it is rare that they do not approve an affirmative instrument and so stop it becoming law. This is because the House of Lords see their role



as a revising chamber. The process does not allow for changes to be made to the content of the SI and so the Lords, if they disagree, will agree to the motion but vote for a wording that indicates their concern to the Government.

Scrutiny Committees

Standing Orders require the Joint Committee on Statutory Instruments – known as the JCSI and comprised of Members of both the Commons and the Lords – to assess every SI laid before the Committee against a checklist relating to the Act of Parliament that delegated the power for the drafting of the SI. The House of Lords cannot approve an SI subject to the affirmative procedure before the JCSI has reported on it. For instruments requiring only Commons approval, the Commons Members of the JCSI sit as the Select Committee on Statutory Instruments.

A more recent addition (2003) to the scrutiny of delegated legislation is the Lords

Committee on the Merits of Statutory Instruments. This committee, unlike the JCSI, considers the policy implications of Statutory Instruments.

Each of the committees undertakes to report on Statutory Instruments subject to the negative resolution procedure within the 40 day praying time to allow Parliamentarians to decide whether they should pray against an instrument.

Other kinds of Statutory Instrument

There are other Statutory Instruments that do not follow the general rules outlined above. These are explained briefly below.

Legislative Reform Orders

A **Legislative Reform Order** is an SI made under the powers of the *Legislative and Regulatory Reform Act 2006* and can amend primary legislation.

The 2006 Act extended the Government's ability to remove or reduce any burdens resulting directly or indirectly from legislation (often referred to as cutting red tape).

A minister proposing to make a Legislative Reform Order has to show, among other things:

- a need for the legislation,
- proportionality
- a fair balance of interests.

The minister must also demonstrate there is no removal of necessary protections, no unreasonable interference with rights and freedoms and that the reform has no constitutional significance.

Legislative Reform Orders may proceed under three procedures. Affirmative and Negative procedures are broadly equivalent to those of normal delegated legislation and there is an additional procedure known as **Super-Affirmative**. Because these Orders have a greater ability to change the law than normal delegated legislation, Parliament requires more stringent scrutiny of them. Ministers have to take more representations, they must recommend scrutiny levels (that Parliament may change) and committees in both the Lords and the Commons may impose a veto on the progress of the Orders that can only be overturned by a vote on the floor of the House (*Legislative and Regulatory Reform Act 2006*).

Remedial Orders

If a court declares a law incompatible with the European Convention on Human Rights, the Government can propose draft Orders, or make Orders, to amend the law so that it

becomes compatible. The procedure followed is similar to that for Legislative Reform Orders.

These SIs were a consequence of the *Human Rights Act 1998*. There are two triggers to instigate the use of a Remedial Order. One trigger is when a UK court says that a specific statutory provision is incompatible with the *Human Rights Act*. The second is in response to a decision from the European Court of Human Rights in Strasbourg.

Orders in Council

Orders in Council are issued by the Queen "by and with the advice of Her Majesty's Privy Council" 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 Statutory Instrument would be inappropriate, such as transferring responsibilities between government departments or where it affects the constitution by extending legislation to the Channel Islands. Orders in Council were also used to transfer powers from ministers of the UK Government to those of the devolved assemblies.

Orders of Council

Orders of Council are made by the Privy Council alone in exercise of powers conferred upon them alone and usually relate to the regulation of professions or professional bodies.

Local SIs

Some SIs affect only a very specific group of people or companies or a very specific area of land. These are called local SIs and very few are subject to Parliamentary procedure. Many Public and General Acts have provisions which result in local SIs.

→ Some basic statistics about Delegated Legislation

The recording of delegated legislation happens by calendar year and the recording of its consideration by Parliament is by Parliamentary Session. These are not directly comparable and so there are some discrepancies in the numbers below. However they provide a reasonable summary of activity in this area.

<i>Number of statutory instruments that became law in 2010</i>	3,866
Number of statutory instruments in Session 2009–10:	
- laid before Parliament	826
- debated in committee	160
- debated on the Floor of the House	12
- motions to approve affirmative instruments in the House of Lords	145
- motions to annul negative instruments in the House of Lords	2
- other proceedings on delegated legislation in the House of Lords	9
- attention drawn by select committees	49
- withdrawn	30
Number of Legislative Reform Orders in Session 2009–10:	
- formally reported on by committee	3
- approved by Parliament	2
Number of Remedial Orders in Session 2009–10:	
- considered by Parliament	None

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