GOVERNANCE PROJECT

8

Secondary Legislation

R.8.1. There are deep and long-standing concerns about the excessive use of secondary legislation and the inability of Parliament to scrutinise it effectively.

R.8.2. Secondary (or delegated, or subordinate) legislation is law made under powers conferred by Act of Parliament – i.e. by primary legislation or statute, which, of course, has to be considered and formally enacted by Parliament. Secondary legislation typically consists of regulations made by Ministers in the form of a statutory instrument (SI), and, as explained below, such legislation, although it normally has to be "laid before" Parliament, hardly ever has any Parliamentary scrutiny or any Parliamentary input.

R.8.3. Secondary legislation generally comes in two forms. The great majority are Negative SIs, which are only (and therefore very, very rarely) considered by Parliament if an MP or Peer objects to them. Affirmative SIs require a Parliamentary vote to become law, but such a vote is almost always a formality.

R.8.4. Secondary legislation is an appropriate, indeed indispensable, form of law-making – for example to make detailed or technical provision where the use of primary legislation would not be a proportionate use of Parliamentary time; or to enable the law to be updated periodically (and uncontroversially) without needing a new Act each time.

R.8.5. However, secondary legislation has progressively come to be used much more extensively and inappropriately. For instance, it is now frequently used to make substantive policy provision, to create and extend criminal offences, to create or extend the powers of public bodies, and to affect the rights of individual citizens.

R.8.6. The most egregious forms of inappropriate use of secondary legislation are the increasing use of:

a. "skeleton" Bills, which do little more than set out a number of policy topics, leaving almost all of the substance to be implemented by Ministers in secondary legislation; and

b. "Henry VIII powers", which are powers for Ministers to amend primary legislation by secondary legislation.

R.8.7. Secondary legislation (typically between 1,500 and 3,000 SIs a year) receives little or no scrutiny by parliament. The great majority of SIs (including almost all those subject to the "negative" procedure) are not debated in parliament at all. SIs are almost never rejected by Parliament. (Only 17 out of 160,000 have been rejected in the last 65 years and 5 in the last 25 years, and the last time an affirmative SI was rejected was in 1978) Parliamentary committees (the Joint Committee on Statutory Instruments, and the House of Lords Secondary Legislation Scrutiny Committee) examine some of the technical aspects of SIs (e.g. drafting and use of powers), but there is almost no consideration of their policy content.

R.8.8. This is by no means simply a technical legal problem. It means that large numbers of important laws are made without any meaningful consideration whatever by MPs or Peers, which has major implications both for the quality of the law and the democratic legitimacy of the law. And the problem is getting worse as the SI process is being increasingly used as a means of inappropriately enacting substantive legislation, rather than for administrative purposes, which is what it should be used for.

R.8.9. The Commission therefore proposes processes:

a. to clarify and re-affirm the appropriate use of secondary legislation;

b. to enhance the scrutiny of secondary legislation by MPs and Peers and; thus

c. to enable proper Parliamentary consideration of the policy and technical merits of the law.

We recommend that:

There should be a Memorandum of Understanding to codify the proper use of secondary legislation

R.8.10. A Memorandum of Understanding (MoU), setting out agreed principles and limits on the use of secondary legislation, should be agreed between Government and Parliament, on the basis that:

a. those principles would govern the scope and nature of powers contained in Bills, and the use of those powers when any Bill is enacted;

b. the MoU would be the "Bible" as to the use of secondary legislation for Ministers and Civil Servants, governing the preparation of every Bill and SI; and

c. on the introduction of every Bill, the Government would be required to make a statement setting out how it meets the requirements of the MoU or give a full explanation for why (exceptionally) it did not.

R.8.11. It would be for the Government and Parliament to decide on the mechanism for drawing up and agreeing the MoU, and how any subsequent amendments are to be made to it. In those discussions, we suggest that the Government should be led by the Cabinet Office, and Parliament by the Committee of Selection.

R.8.12. Such an MoU should cover the following.

a. Ministers should use delegated powers in ways that were originally intended by Parliament, and so there should be a strong presumption that secondary legislation would be used only to make provision about operational details and administrative procedures, not for matters of general principle and policy.

b. Bills should tightly define the scope of any powers to make secondary legislation, and set out clearly the purposes for which they may be used.

c. "Skeleton" Bills or clauses (which leave essential elements of policy or principle to be defined in secondary legislation), Henry VIII powers (i.e. the Power to modify an Act of Parliament by secondary legislation) and Bills conferring powers to create a further tier of 'sub-delegated' legislation should not be used except in wholly exceptional circumstances, in which case:

i. the scope of any such power should be clearly defined (including, for Henry VIII clauses the Acts or categories of Act to which it is to apply);

ii. it should always be subject to future (non-time-limited) annulment motions in the Houses of Parliament; and

iii. there should be a full explanation provided to Parliament as to why it is needed.

d. Secondary legislation should not be used for measures that have significant negative implications for civil liberties.

e. An Act of Parliament should not contain a delegated power for a Minister or other person to amend or suspend that Act.

f. Bills proposing conferring powers to make secondary legislation should provide for Parliament to have an appropriate level of supervision over the exercise of those powers. Negative SIs (which are not normally debated – subject to the procedural changes recommended below) should generally be confined to areas that are purely technical or minor in nature.

g. When it becomes law, delegated legislation should immediately be published in a clearly identifiable and accessible place, and should never come into force before it has been published.

The House of Commons should have greater oversight of secondary legislation

R.8.13. The House of Commons' procedures should allow for greater scrutiny of secondary legislation, in particular of negative SIs, which form the vast majority. It is not suggested that all such SIs would be debated (as that would not be a proportionate use of Parliamentary time), but rather that there should be greater opportunities for MPs to raise concerns about particular SIs. This would draw on the expertise and constituency or other interests of MPs, and improve the quality, transparency, accountability and democratic legitimacy of the law-making process. Accordingly:

a. a consultation procedure should be introduced to allow MPs to raise concerns, and to suggest any changes required to make an SI acceptable before the instrument is considered by the House;

b. there should be a dedicated slot for the consideration of annulment motions tabled by MPs in each parliamentary session;

c. a procedure (independent from Government) should be established to allow backbenchers and/or the Opposition to bring an annulment motion to the Floor of the House, at the discretion of the Speaker;

d. departmental Select Committees should be tasked with scrutinising the underlying policy of secondary legislation. This should be seen as additional to the role of the Joint Committee on Statutory Instruments;

e. Select Committees should be given the ability to request a debate, at the discretion of the Speaker, if they believe an instrument warrants consideration by the House; and

f. the House of Commons should consider creating a new committee (perhaps jointly with the House of Lords) to oversee the processes of secondary legislation generally, including the operation of the MoU recommended above.

The House of Lords should have an enhanced role in the scrutiny of secondary legislation

R.8.14. The House of Lords' role in the scrutiny and approval of affirmative secondary legislation (those SIs requiring a debate in each House) should also be enhanced.

a. The House of Lords should have power to delay, in exceptional circumstances, the approval of such an SI.

b. This suspensory power could be implemented via a change in the House of Lords standing orders with a view to delaying the vote (but not the debate) on an SI for a specified period of time (e.g., until after the production of a report or impact assessment, or for a fixed amount of time).

Such a change would reflect the proper legislative relationship between the Commons and Lords, whilst providing for meaningful input from Peers, for example in their areas of particular expertise, or on the constitutional implications of an SI.

Transparency should be improved

R.8.15. The Government should take measures generally to improve public understanding about the use of secondary legislation, how it is made, and its legal effects for citizens and businesses. This should include steps to ensure that SIs and related explanatory material are readily accessible (including on official websites); and that the language used in such material is as comprehensible as possible.

R.8.16. The Government should also clarify the status and use of 'quasi-legislation' (for example, codes and guidance, which do not take the form of either primary or secondary legislation), and in particular:

a. the Government should establish and maintain a database of quasi-legislation that can be readily inspected by the public;

b. the database should contain an explanation of the scope and legal effect (if any) of such quasi-legislation; and

c. there should be a clear demarcation between quasi-legislation addressed to the general population (such as the ***Highway Code***), and that addressed to particular categories of officials (such as the ***Judges' Rules***).

Certain additional, background material for this Recommendation is available on the website for the Commission (https://www.ukgovernanceproject.co.uk).