



HOUSE OF LORDS

Briefing

Delegated Legislation

Looking at the small print

STATUTORY INSTRUMENT

2008 No. 131

MENTAL CAPACITY,

Capacity (Deprivation of
Person's Representati

... * * *

ing into force * *

... for Health makes these Regulations
paragraphs 138(1), 142 to 145, 14
2005(a).

ment and application

... may be cited as it

✉ House of Lords
London SW1A 0PW

☎ 020 7219 3107

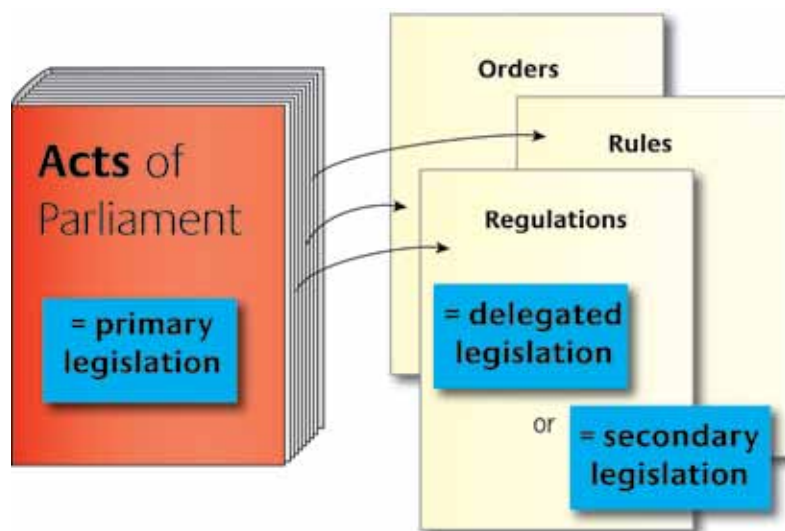
@ hinfo@parliament.uk

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What is delegated legislation?

Acts of Parliament often confer powers on ministers to make law themselves. These are called 'delegated powers' (because Parliament is giving some of its authority to make law to someone else). **Acts are known as 'primary legislation'.** **Orders, rules and regulations made by ministers are known as 'delegated legislation', or 'secondary legislation'.**



Orders, rules and regulations are usually made as statutory instruments (SIs). There are about 3,500 each year, varying in size from a single sheet to several hundreds of pages.

Why is it used?

Delegated legislation is a practical way to avoid overloading Parliament. Acts set out the broad framework of a policy and rely on delegated legislation to fill in the detail. SIs can also be used to make sure that the Act itself does not get out of date too quickly: e.g. an Act may state that an activity is to be licensed but leave the minister to set out the provisions in a set of regulations. The Act would set out the criteria for the licensing scheme, leaving to the regulations details such as what forms need to be filled in, what fees should be charged and who will inspect the regime etc. Further SIs may be needed each year to increase the fees so that they keep pace with the value of money, or to change the detail of the scheme to make it work better.

Levels of delegation

Parliament sets out its level of control over the exercise of a delegated power, the main levels are:

None at all

Sometimes Parliament may decide that it doesn't need any control over the exercise of a power, e.g. over the closing of a main road for roadworks.

About 2,200 a year

Negative instruments

Can become law without a debate or vote in Parliament. They can be opposed and, in theory, rejected but not amended.

About 1,100 a year

Affirmative instruments

The most important delegations of power are subject to affirmative resolution. They cannot come into effect until **both** Houses have approved a draft SI in a vote.

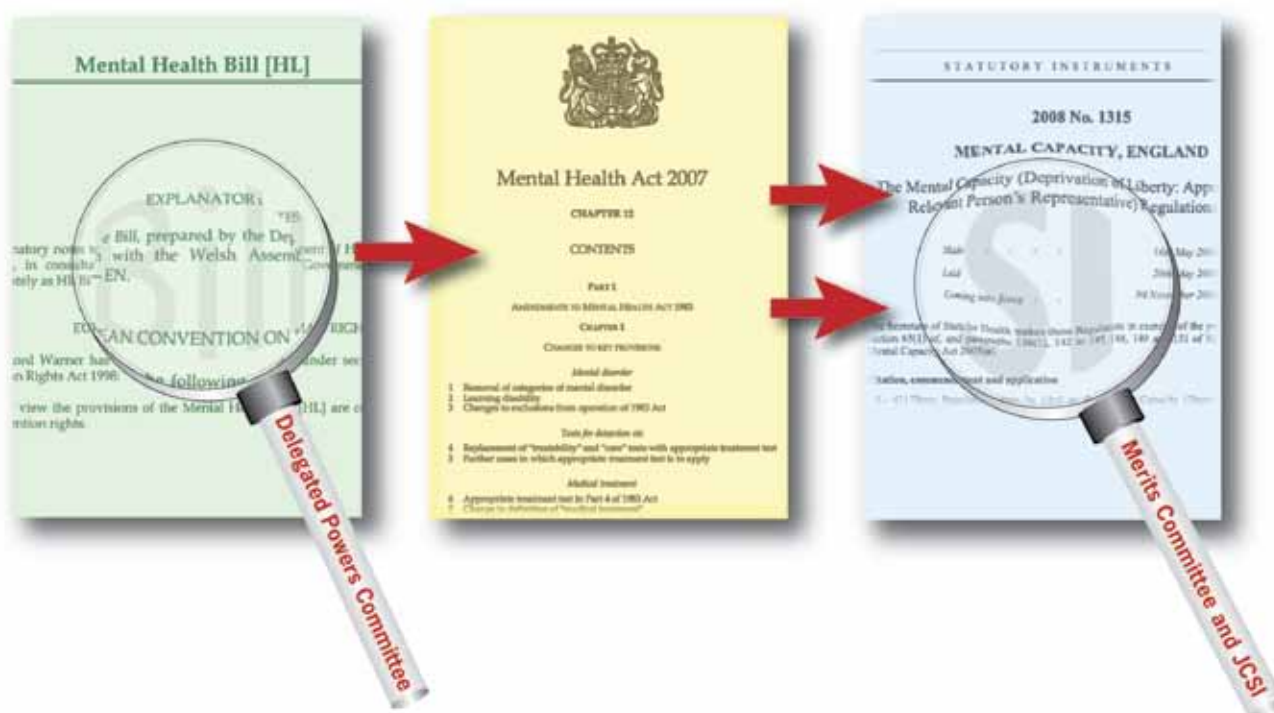
About 200 a year

Role of the House of Lords and its committees

The House of Lords has two committees which complement each other and keep a watchful eye on delegated legislation.

- **Delegated Powers and Regulatory Reform Committee (DPRRC):**
examines delegated powers in primary legislation to see what powers ministers are asking for.
- **Merits of Statutory Instruments Committee (Merits Committee):**
examines the secondary legislation which results from the exercise of those powers.

The Joint Committee on Statutory Instruments (JCSI) has Members from both Houses. It considers whether each SI complies with the legal requirements set out by the parent Act. It does not look at the policy but at legal compliance.



These committees ensure that the small print in legislation, which affects our daily lives in many different ways, is thoroughly checked. There is no similar process for scrutinising ministerial powers in the Commons. The committees give advice to the House, they have no power themselves: it is for individual Members of the House to pursue any SI through tabling questions or motions for debate. The House spends a lot of time debating SIs and asking ministers to explain and justify their policy.

Powers of the House in relation to delegated legislation

Sometimes the House agrees to the SI but passes a critical resolution calling on the government to change their policy. If it does, the government is meant to come back to Parliament to say what it will do but there is no requirement for the government to agree with the House.

The ultimate power is for the House to reject the SI entirely (called a 'fatal motion'). The House does so rarely because it would make government very difficult if the House regularly rejected SIs.

Delegated Powers and Regulatory Reform Committee

The DPRRC's role is to advise the House of Lords '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'.

How does the committee carry out its work?

It takes evidence in writing on each public bill from the relevant government department. The evidence:

- identifies all of the provisions for delegated legislation
- describes their purpose
- explains why the matter is proposed to be delegated and
- 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.

What does the committee look for when it examines bills?

It:

- 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 whether the proposed power calls for affirmative rather than negative resolution procedure.

The committee makes its recommendations to the House and it is for the House to decide whether or not to act on those recommendations. That said, the committee has built up considerable authority and the government usually tries to accept the committee's view.

Merits of Statutory Instruments Committee

When a minister uses one of the powers he/she has been granted, the Merits Committee looks at the policy in the SI and draws the attention of the House to any it considers:

- politically or legally important or that give rise to issues of public policy likely to be of interest
- may inappropriately implement EU legislation or
- may imperfectly achieve its policy objectives.

The committee usually reports in a neutral way, rather than taking a stance on the policy, although it may highlight areas where it feels the House may wish to make further inquiries. It has no power to block the passage of an SI. In considering the policy implications of SIs, the Merits Committee complements the legal technical scrutiny undertaken by the JCSI.

The Merits Committee's various levels of action are:

- clearing an instrument without comment
- mentioning the instrument so that Members are aware of it and
- drawing the instrument to the special attention of the House.

Reports are published every Thursday on the committee's web page: <http://www.parliament.uk/hlmerits>

Examples of the committees' work

Delegated Powers and Regulatory Reform Committee

Disability Discrimination Bill (2004-05)

The bill proposed to remove the requirement of the Disability Discrimination Act 1995 that orders exempting certain rail vehicles from regulations about accessibility for disabled people be laid before Parliament. The committee recommended that they should continue to be subject to parliamentary control. The government accepted this.

UK Borders Bill (2006-07)

The bill made provision about biometric registration for immigration purposes. It contained some detail about how the scheme would work but left much to regulations, including:

- who would have a biometric immigration document
- the purposes for which it would be used
- what biometric information was required
- the content of the document and
- the consequences of failure to comply.

The committee reported that, although it was acceptable for the Secretary of State to have some powers in these areas, the bill itself should define the framework more tightly so that it was Parliament, not ministers, who set the key aspects of the policy. The government accepted this and proposed changes to restrict several of the powers.



Merits of Statutory Instruments Committee

Draft Gambling Order (2007)

This instrument specified the licensing authorities which could issue the one regional, eight large and eight small casino premises licences permitted under the Gambling Act 2005. The committee had concerns about whether the SI would achieve its policy objective, as set out in the Act, of minimising harm from gambling and was unconvinced that the site chosen for the 'super-casino' met the objective of providing the 'best test of social impact'. Its report was extensively quoted during the debates in both Houses and the Lords rejected the instrument by three votes.

Draft Exeter and Devon (Structural Changes) and Draft Norwich and Norfolk (Structural Changes) Orders 2010

The committee's report was critical about the lack of evidence provided by the Department for Communities and Local Government to support the proposed local government reorganisation. By collating correspondence for and against the proposals the committee provided Members with a review of the relevant issues and perceived problems which was used extensively in debates in both Houses.

Further information

All SIs that are subject to a parliamentary procedure are accompanied by an explanatory memorandum (EM). This document, written by the government, explains in plain English what the SI does and why and gives basic information on the policy, costs and consultation.

The EM is available to the public, alongside the text of the SI, on the legislation website:
www.legislation.gov.uk

The Merits Committee welcomes comments on individual SIs from interested groups.

Contact the committees



The Delegated Powers / Merits Committee

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