

## **UK SECONDARY LEGISLATION AND PARLIAMENTARY COMMITTEES**

**PETER DAVIS, COUNSEL FOR DOMESTIC LEGISLATION, HOUSE OF COMMONS (U.K.)**

### **Introduction**

1. This paper begins with an outline of delegation of legislative powers in the UK. It then covers the stages of scrutiny by Select Committees in Parliament. The first stage involves scrutiny of Bill provisions that delegate powers to legislate and the second stage involves scrutiny of the delegated legislation itself. Examples of how each Committee works are included and, at the end, there is a brief discussion of implications.

### **Outline of delegation of legislative powers in the UK**

2. Legislative precision (as part of the rule of law) and supremacy of Parliament are standard assumptions in the UK constitutional settlement. A court cannot say that an Act of Parliament doesn't count. No person can legislate except Parliament and there is nothing that cannot be included in an Act of Parliament. However it is implicit that Parliament can delegate the power to legislate, and the delegate then is empowered to legislate within the limits of the delegation.

3. Given that, as a matter of concept, there are no constraints at all on what can be delegated, there is no intrinsic reason why the system could not be used either to pass legislation that is deliberately vague or even to impose a dictatorship. The steps would be easy enough – Parliament passes an Act to bestow unlimited concurrent powers to legislate on the Government, and the Government then uses that concurrent power to dissolve Parliament and ban opposition<sup>1</sup>. Even in the absence of any sinister intentions, the complications in preparing and passing primary legislation make the delegation of wide legislative powers tempting to a Government<sup>2</sup>.

4. While an Act, which can contain anything, can theoretically be totally random in the delegation it includes<sup>3</sup>, in general the conventions are observed that –

- some delegations call for no parliamentary procedure – e.g. statutory instruments to bring into force provisions of an Act that do not come into force automatically;
- standard delegations call for negative resolution procedure, which is a form of inertia selling, i.e. in its most common form the statutory instrument comes into force on the day the instrument says it does but it has to be laid before Parliament before it comes into force in the absence of urgency and it can be annulled by a vote of either House within 40 sitting days of laying, the result being that nothing can be validly done under it afterwards;
- more politically controversial delegations call for affirmative resolution procedure, the most common form being that a draft is laid before both Houses for prior approval and the statutory instrument cannot be made unless it is in the terms of a draft so approved by both Houses;
- the widest delegations call for super-affirmative resolution procedure – i.e. affirmative resolution procedure preceded by a proposal with reasons laid for 60 days and scope

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<sup>1</sup> An equivalent device was used in the German Enabling Act of 1933.

<sup>2</sup> The term 'statutory instrument' is the standard generic term in the UK for an item of delegated legislation, as it covers the common nomenclature, e.g. 'regulations, order, rules'.

<sup>3</sup> Not all delegations are delegations to Government Ministers – e.g. there are occasional delegations to statutory regulators.

for either House to recommend amendments which must either be taken on in the draft or rejected with reasons.

None of those delegations expressly reserves to Parliament a *direct* power to amend a statutory instrument (though Acts of Parliament are necessarily capable of doing so), and the reason why the responsible Government Minister is assumed to have the final say in the content of a statutory instrument is that, unlike primary legislation, delegated legislation can be challenged in court either as being outside the scope of the enabling power or as being irrational, and in any such case it is the Government Minister not Parliament that defends the challenge.

### **Select Committee scrutiny**

5. The specialist Select Committee system in Parliament for scrutinising delegation can be used, and indeed has been used, as a protection against the risk that legislation is deliberately vague or that Parliament is undermined. The system is by no means the only protection, but it comprises an important link in the protective chain. There are two aspects to Select Committee scrutiny. One is the scrutiny that is carried out before or while a Bill is proceeding through Parliament (the first stage) and the other is scrutiny of the delegated legislation itself (the second stage).

### **Scrutiny at the first stage**

6. There is one automatic element of scrutiny at the first stage. At a time when any Bill goes to the House of Lords, and so while there is still time to amend the Bill, a memorandum is submitted by the Government to the House's own Delegated Powers and Regulatory Reform Committee and the memorandum identifies each delegation in the Bill and the reason for it.

7. It is routine for that Committee to be vigilant in spotting mismatches – i.e. if a memorandum states that a power is needed for specified purposes and the power in the Bill provides for wider delegation, the Committee is likely to recommend narrowing the power to match the intention.

8. Also, it is routine for the Committee to keep an eye on the procedures under which delegation is offered. Here the Committee may well recommend a level of scrutiny different from that proposed by the Government, depending on the controversy or width of the proposed power.

9. In addition, the Committee may recommend that some provisions are unsuitable for delegation altogether, generally because they are of a nature for which detailed amendment might be required, with even the scope in super-affirmative procedure being insufficient. Thus, in 2005, what eventually became the Companies Act 2006 was under consideration by the Committee; Part 31 of its then current text comprised a power to make “company law reform orders” amending or repealing primary legislation relating to companies, and the Committee recommended that Part 31 should not be included at all<sup>4</sup>.

10. As in normal in the case of a Select Committee, its Report is formally no more than a statement of the opinion of the Committee members. However in practice it expects that its recommendations will be acted on in the absence of compelling contrary reasons and, in

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<sup>4</sup> House of Lords Delegated Powers and Regulatory Reform Committee, Ninth Report, Company Law Reform Bill (2005-06 HL 86), pp.5-7.

particular, the general company law reform power did not appear in the 2006 Act when passed.

11. I have highlighted that Committee first because that is the Committee that automatically considers delegated powers. But there are other Select Committees that, while not required to consider delegation of powers, have terms of reference with sufficient latitude to enable them to make their views known if they choose<sup>5</sup>.

12. The most dramatic example in my experience was the reaction to the first appearance of the Bill provisions that eventually became Part 1 of the Legislative and Regulatory Reform Act 2006. At the time preparation started there was already the Deregulation Act 2001, which itself contained a wide power to amend primary legislation by statutory instrument if it imposed burdens on businesses but required super-affirmative procedure in each case. Those working on the new Bill, frustrated by the small number of measures taken by statutory instrument under the 2001 Act, in effect took the company law reform power just before it was removed from what became the Companies Act 2006 and introduced it as the main power – with the word ‘company’ crossed out.

13. The result was that a delegated power, if enacted in that form, could be used to make law reform orders generally by statutory instrument, covering all primary legislation. The introducing Minister also had a choice of procedures, though Select Committees tasked with considering statutory instruments under it were – unusually – offered a small window of opportunity to require the procedure to be a more onerous one, the requirement being legally effective unless the requirement were overturned by a vote of the House as a whole. Only a very limited range of measures was excluded from the scope of those instruments, and the range seemed to have been included by extrapolation from arguably irrelevant precedents. It appeared likely that the Government, keen to reduce what it saw as the burden of red tape on business, had barely taken the constitutional implications into account<sup>6</sup>.

14. Six separate Select Committees, three in the House of Commons, two in the House of Lords and one being a Joint Committee of both Houses, commented critically on the width of proposed delegation and suggested how it might be narrowed<sup>7</sup>. In addition there was an unusual degree of warning on the topic in the press, the titles of relevant articles in which spoke for themselves<sup>8</sup>.

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<sup>5</sup> The terms of reference of the various Select Committees in Parliament are rarely mutually exclusive.

<sup>6</sup> On February 4, 2006, the “Your Business” section in the Financial Times, after explaining the hopes of business groups that the new powers would “at last help to contain the rising tide of burdensome rules”, finished with the following passage: “A Cabinet Office spokesman said the new deregulation bill was an attempt to give the existing rules a ‘kick up the arse’. He added: ‘the principles of the previous legislation were right but it is not working quickly enough’.”

<sup>7</sup> In chronological order of publication their reports comprised: House of Commons Regulatory Reform Committee, First Special Report, Legislative and Regulatory Reform Bill (2005-06 HC 878); House of Commons Procedure Committee, First Report, Legislative and Regulatory Reform Bill (2005-06 HC 894); House of Lords, House of Commons, Joint Committee on Human Rights, Seventeenth Report, Legislative Scrutiny: Eighth Progress Report (2005-06 HL 164, HC 1062); House of Commons Public Administration Select Committee, Third Report, Legislative and Regulatory Reform Bill (2005-06 HC 1033); House of Lords Delegated Powers and Regulatory Reform Committee, Twentieth Report, Legislative and Regulatory Reform Bill (2005-06 HL 192); and House of Lords Select Committee on the Constitution, Eleventh Report, Legislative and Regulatory Reform Bill (2005-06 HL 194).

<sup>8</sup> D. Finkelstein, “How I woke up to a nightmare plot to steal centuries of law and liberty”, The Times (London); M. Berlins, “Why is the Government seeking the power to pass far-reaching laws without Parliament’s approval?”, The Guardian (London); “Blair ‘wants to make new laws without Parliament’”, J. Chapman, The Daily Mail (London); Q. Letts, “An immodest proposal – free votes for all”, The Daily Telegraph (London); S. Carr, “Now we can all make laws if our faces fit”, The Independent (London); P. Johnson, “A Doomsday Machine for Parliament Home Front”, The Daily Telegraph (London). All appeared in February or March 2006.

15. Faced with that, the Government introduced amendments to Part 1 to ring fence the main power in it. In its final form, in outline, statutory instruments under it it could be used to remove what the introducing Minister saw as a burden on persons and bodies other than central Government itself. Also the exclusions were widened (in particular a statutory instrument under it could not be used for anything the Minister saw as constitutionally significant). In addition the window of opportunity for Select Committees to require more onerous procedures was widened and they were also granted a veto, which – like the power to require the procedure to be more onerous – would be legally effective unless overturned by a vote of the House. The power remains a very wide one but it is within the range of previously accepted precedent in a way that it was not when the Bill first appeared.

16. A more recent example can be found in the Deregulation Bill which is proceeding at present. This Bill, as is the case in some Bills, was published as a draft Bill before being formally introduced as a Bill. It contained a general power for a Minister by statutory instrument to repeal legislation considered by the responsible Minister no longer to be of practical use. A Committee of both Houses was established to report on the draft Bill. It took evidence from various Committees and reported that the draft provision was too wide for delegated legislation<sup>9</sup>. The provision was not in the actual Bill, when it came to be introduced, nor so far has it been sought to be introduced by Government amendment.

### **Scrutiny – second stage**

17. Scrutiny at the second stage can be divided into scrutiny before and after delegated legislation is made. That depends on what Standing Orders of both Houses say in establishing the Select Committees specifically charged with considering the statutory instruments in question. As a slight simplification, there are four specialist Committees –

- the House of Lords Delegated Powers and Regulatory Reform Committee mentioned above, which scrutinises statutory instruments under Part 1 of the Legislative and Regulatory Reform Act 2006 – also mentioned above – and other powers with parallel procedures; it carries out its scrutiny on behalf of the House of Lords;
- the House of Commons Regulatory Reform Committee, which scrutinises the same statutory instruments on behalf of the House of Commons;
- the House of Lords Secondary Legislation Scrutiny Committee, which scrutinises most other statutory instruments on merits grounds for the House of Lords; and
- the Joint Committee on Statutory Instruments, which scrutinises them on technical grounds on behalf of both Houses.

Each is dealt with turn, but the first two are linked as the coverage is materially parallel, and an illustrative example is given in each case.

### **House of Lords Delegated Powers and Regulatory Reform Committee and House of Commons Regulatory Reform Committee**

18. The statutory instruments that these Committees consider all have to be laid before both Houses in the form of a proposal for a draft before they can be made; they have to lie for a specified period along with an explanatory document which must indicate the type of procedure intended: inertia selling, prior approval required or prior approval with the possibility of amendment. The Committees consider the instruments at proposal stage, and they can recommend making the procedure more onerous and they can also recommend approval, rejection without a veto and veto. A veto recommendation is legally effective

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<sup>9</sup> Report of the Joint Committee on the Draft Deregulation Bill (2013-14, HL 101, HC 925)

unless overturned by the House, as is a recommendation to make the procedure more onerous<sup>10</sup>. In making recommendations the Committees are operating partly on a policy basis and partly on a technical basis.

19. There were interesting legal implications in the lead up to the London Olympic Games, which called for a statutory instrument of that nature.

20. The need for such a statutory instrument arose from a difficulty related to the location of the temporary police HQ. The authorities saw the best location as the southern end of Epping Forest, a stretch of rural land that juts into north-east London. Although it is called 'Epping Forest', only some is actual forest and the rest is open land. Epping Forest is protected by specific Acts of Parliament which among other things prohibit structures being placed on the land and permit neighbouring landowners to graze sheep and cattle on it. The statutory instrument power the Government proposed to use could indeed vary those Acts on a temporary basis, but it could only be used if there was a requisite level of prior consultation with local residents and relevant authorities. There is no doubt that those required to be consulted were actually consulted. But what was consulted on was arguably incomplete, for the formal consultation document took the location of the HQ for granted and did not ask those consulted whether they thought the HQ should be somewhere else. If that consultation were legally incomplete, then, irrespective of any vote in favour, any purported temporary variation of the Epping Forest Acts would be a nullity.

21. Faced with that, what were the two relevant Select Committees to do?

22. Well the Committees are supposed to act in accordance with their terms of reference. The relevant technical reporting ground here is *vires* doubt not an actual *ultra vires* finding. On that basis both the Lords and the Commons Committees identified in their reports that consultation was arguably incomplete, but then, in looking at the instrument from the perspective of their policy role, they both recommended approval<sup>11</sup>.

23. Anyone new to the subject matter might think of that as a partial abdication, but to the familiar it was not one at all. What the Select Committees were implicitly saying was that they liked the proposal but were highlighting the possible legal inadequacy, a determinative finding on which was a matter for the courts and not for them. After all, had they recommended a veto, the project might well not have gone ahead at all even if legally valid, whereas not recommending the veto did not prevent legal challenge. Following the Committee Reports both Houses voted for the draft secondary legislation to vary the Epping Forest Acts on a temporary basis and then the Government made the secondary legislation in question<sup>12</sup>.

24. The next stage was that a local resident brought a court action to challenge the validity of the secondary legislation, which of course the Government defended<sup>13</sup>. Both sides sought to use the Select Committee reports in evidence. The parliamentary lawyers then intervened to

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<sup>10</sup> See in particular Legislative and Regulatory Reform Act 2006, sections 12 to 18, and House of Commons Standing Orders 18, 141 and 142; terms of reference for the House of Lords Committee can be found on its website

<sup>11</sup> House of Lords Delegated Powers and Regulatory Reform Committee, Fourteenth Report, Draft Legislative Reform (Epping Forest) Order 2011 (2010-12 HL 142), House of Commons Regulatory Reform Committee, Second Report, Draft Legislative Reform (Epping Forest) Order 2011 (2010-12 HC 963).

<sup>12</sup> Legislative Reform (Epping Forest) Order 2011

<sup>13</sup> R (Pelling) v Secretary of State for the Home Department and others

try persuade them not to or, if necessary, to get the court to exclude the evidence. The reason is that the late 17th century Bill of Rights, article 9, protects parliamentary proceedings from being questioned in court. That does not prevent the parties from repeating arguments used in the reports but the fact that those arguments could be found in the reports was neither here nor there. After all, even if the Bill of Rights did not exist, the validity of a legal argument should correctly depend on its merits and not on the identity of the arguer. So reminding the parties of the Bill of Rights should not be seen as inhibiting them.

25. For completeness it should be added that –

- attempts to keep the Committee reports out of the pleadings and judgment were only partly successful – they are referred to in more than one place in the judgment; and
- the Government won the case and therefore nobody could graze cattle or sheep in the temporary police HQ.

A significant factor was that there had been various meetings with residents and authorities about location before the formal consultation and it was accepted by the court that the history could be taken into account in deciding what to consult on.

### **House of Lords Secondary Legislation Scrutiny Committee**

26. This Committee was set up about a decade ago because it was considered that the terms of reference of the existing Committee that scrutinised routine statutory instruments – being purely technical – left a hiatus in scrutiny of secondary legislation on merits; i.e the politicians could usefully do with a reasonably non-partisan steer on which instruments were sufficiently important to be suitable for debate<sup>14</sup>.

27. The type of thing that one may expect to see in this Committee’s reports is the highlighting of inconsistencies in a Department’s overall approach in making a statutory instrument.

28. In a recent example, the Committee considered an Explanatory Memorandum – a document routinely published with every statutory instrument that has a parliamentary procedure. Here the memorandum identified one purpose of a particular statutory instrument as being “to allow consumers to have the information they need to make informed and healthy food choices, and to ensure they are not being misled”. That stuck the Committee as inconsistent with a permission, included in the instrument, to omit declarations of the fat content of minced meat destined purely for the home market<sup>15</sup>.

### **Joint Committee on Statutory Instruments**

29. For technical scrutiny of routine statutory instruments, responsibility falls to the Joint Committee on Statutory Instruments. It is joint because it has Commons and Lords members. Where there is a draft affirmative instrument the Committee considers the draft before it is

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<sup>14</sup> Its relevant terms of reference as follows:

“The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—

- (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
- (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;
- (c) that it may inappropriately implement European Union legislation;
- (d) that it may imperfectly achieve its policy objectives;
- (e) that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument’s policy objective and intended implementation;
- (f) that there appear to be inadequacies in the consultation process which relates to the instrument.”

<sup>15</sup> House of Lords Delegated Secondary Legislation Scrutiny Committee Eighth Report, Food Information Regulations 2014 (2014-15 HL 42).

voted on<sup>16</sup>. Where procedure is negative or there is no procedure, scrutiny takes place after the instrument is made. While in such cases all the Committee can do is publicise flaws, as it sees them, its advice tends on the whole (though not always) to be followed, for example by the making of a later amending statutory instrument to get rid of the flaws.

30. The main reporting grounds are defective drafting, requiring elucidation, unexpected use of powers and doubtful *vires*, but the relevant standing orders allow the Committee to highlight anything that does not impinge on policy and merits<sup>17</sup>. In other words, it is purely technical.

31. Given that its role involves holding the Government to account, it is always chaired by an opposition MP, and it not only examines the specific delegated legislation but also is able to issue themed reports, a recent one covering a worrying tendency of makers of statutory instruments to blur material that is essentially legislative with material that is not<sup>18</sup>. Thus a classic example is the statement that some person or body ‘will’ perform a given function, so leaving it unclear whether what is intended is an obligation or the exercise of discretion. The Committee's view of such usage has been that -

- if either discretion or obligation is intended, wording such as ‘must’ or ‘may’ should be used to make the position clear, and
- if the intention has not been settled but the instrument maker simply wants to give some sort of assurance of likely behaviour, the statement including ‘will’ should be confined to guidance notes and press statements, for example, and should not be in an operative provision of legislation.

32. A more specific example of how the Joint Committee on Statutory Instruments stresses the need for precision can be found in a pair of pieces of delegated legislation giving enforcement officers the right to enter the homes of defaulting debtors to seize property to sell it to pay the debts, qualified by a prohibition on doing so if the only person in the home was ‘vulnerable’, a term that could have been defined but was not. The Department responsible defended the imprecision as deliberate, as they wanted to give enforcement officers flexibility. The Committee was particularly critical, stressing that –

- the Department was confusing flexibility with uncertainty,
- the enabling power did not provide scope for bestowing discretion on enforcement officers, and
- imprecision as a deliberate policy in secondary legislation, to compensate for lack of power in primary legislation, was inimical to equality before the law and would be alarming if adopted widely<sup>19</sup>.

## Implications

33. As is apparent from the above, scrutiny is split between scrutiny where there is still time to change the legislation and scrutiny where the legislation is already made. So a question naturally arises – why bother with the second type of scrutiny? The answer is that there is a strict constitutional basis - i.e. Ministers have powers to legislate only because Parliament has

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<sup>16</sup> This is invariable in relation to the House of Lords and usual in relation to the House of Commons.

<sup>17</sup> House of Lords Standing Order 73, House of Commons Standing Order 151.

<sup>18</sup> Joint Committee on Statutory Instruments First Special Report, Excluding the Inert from Secondary Legislation (2013-14 HL 6, HC 167)

<sup>19</sup> Joint Committee on Statutory Instruments Eleventh Report, Taking Control of Goods Regulations 2013 (2013-14 HL 71, HC 166-xi) and Twenty-first Report, Taking Control of Goods (Fees) Regulations 2014 (2013-14 HL 135, HC 166-xxi).

delegated the powers and has not cancelled the delegation, and the Committees accordingly comprise mechanisms for making the recipients of those powers answerable to the donor.

34. In addition there is, in my view, an informal justification. It involves comparing Westminster procedures for primary and secondary legislation. In making primary legislation, both Houses go through Public Bill Committee<sup>20</sup> and Report stages, at which point any amendment moved, whether by Ministers, back benchers or opposition, has to be debated. At times those stages can be pretty bland, but the mere fact that nobody can be sure in advance that those stages will be bland has a major relevance, in my view, to precision. It means that, when Bills are prepared by the Government to survive those stages, that can only be done securely if those preparing Bills think out what they want to achieve in detail, and express it in full as exactly as they can, rather than hoping to skate over difficult issues without them being noticed, and internal Government machinery operates with that in mind. In contrast, with almost no exceptions, there is no formal procedure for amending secondary legislation and therefore there is not the equivalent internal Government machinery<sup>21</sup>, so the temptation to skate over matters is inevitably stronger. Thus, although the publication of Select Committee reports does no more than make public what otherwise might be concealed, that very publicity is probably the most cogent means of replicating, for secondary legislation, the disciplines that the very existence of Public Bill Committee and Report stages imposes on the making of primary legislation.

35. A further point I should deal with is a question that might arise – are so many Committees actually needed? No doubt systems could be differently devised but there is a logic in the fact that all the Committees are in one House or other except the purely technical one which is a Joint Committee; the logic is that there is no expectation of potential disagreement between the two Houses where the issue is a technical one<sup>22</sup>, while the two Houses can well disagree on a policy issue.

36. Finally I should touch on whether the Committees that purely consider secondary legislation can have an influence on later primary legislation, and although that is rare there is one recent example where that appears to have happened and another where it appears likely to happen:

- the first example relates to a policy of the present Government that each statutory instrument that imposes demands of particular types should be reviewed every five years by the responsible Department to see whether it has become excessive, with a duty to report the review to Parliament. This obligation started to be put in each such

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<sup>20</sup> A Public Bill Committee is different from the Select Committees described above. In the House of Commons it is generally appointed *ad hoc* to represent the parties in proportion; it is responsible for scrutinising a Bill in detail after the House as a whole has approved it in principle at Second Reading (First Reading provides no more than the opportunity to read the Bill). Once the Public Bill Committee has completed amending the Bill, the Bill returns to the House as a whole for Report Stage, at which point amendments can be tabled by any MP, and then at Third Reading the House votes on the Bill in the form then reached. In the House of Lords the equivalent of Public Bill Committee stage is conducted by the House as a whole. Normally Bills are considered first by Commons then by Lords then they return to Commons for consideration of Lords' amendments but converse procedure is possible.

<sup>21</sup> For example, a Bill, although based on instructions from lawyers in the sponsoring Department, is drafted in the Office of Parliamentary Counsel, which is independent of the Department in question. In contrast statutory instruments are drafted by Departmental lawyers.

<sup>22</sup> On one occasion it was possible that reorganisation of Select Committee responsibilities might give the Joint Committee on Statutory Instruments a minor policy responsibility and the idea was opposed by the then Chairman, who described it as a relief to have a weekly meeting with political opponents and no scope for political argument at all. However it should be noted that in the Scottish Parliament, which is unicameral, a single Committee covers a combined remit of the House of Lords Secondary Legislation Scrutiny Committee and the Joint Committee on Statutory Instruments.



instrument, but it was not clear that all Acts provided for it be included in the legislation itself (rather than just being a statement of policy intention), and on the odd occasion a misdirected inclusion of a review obligation had been highlighted in Joint Committee on Statutory Instruments Reports<sup>23</sup>. So a new primary legislation provision was enacted to ensure that it could be so included securely<sup>24</sup>;

- the second example relates to a further policy of the present Government, to the effect that particular types of business should where possible have a longer lead in time to comply with new legislation. Attempts to achieve that in secondary legislation have more than once been highlighted by the Joint Committee on Statutory Instruments as lacking precision in defining what those types of business comprise<sup>25</sup>. Now there is a proposed provision in a Bill that if enacted will give a meaning to ‘small business’ and ‘micro-business’ when those terms are used in statutory instruments. Incidentally it may turn out if enacted to fall short of the full precision that the Joint Committee had expected to see<sup>26</sup>, but it seems reasonable to assume that, if Parliament, after scope for full debate, accepts a degree of imprecision in primary legislation in a particular case as apt for reference in secondary legislation, that will be a factor for the Joint Committee to take into account in considering any statutory instrument that contains such a reference.

35. In conclusion, no procedure guarantees precision but the Committees that consider statutory instruments, while they cannot enforce precision, can clearly make it more likely. The understood assumption is that, if it is going to be parted from, the place to do it is in primary legislation, where amendments can be tabled and debated, and not secondary legislation, where they cannot. So there is an easy answer to Departments arguing that the Committees are making matters impossible for them. The solution, if they wish to avoid precision, is the same as when they want to go beyond what the enabling powers permit – i.e. to use primary legislation and seek to persuade Members of Parliament and Lords of the need to do so, in a forum that automatically provides scope for prior debate.

**Peter Davis**  
**9 September 2014**

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<sup>23</sup> For example Joint Committee on Statutory Instruments Twenty-seventh Report, Food Additives (England) (Amendment) (No. 2) Regulations 2011 (2010-12 HL 183, HC 346-xvii).

<sup>24</sup> Enterprise and Regulatory Reform Act 2013, section 59, inserting a new provision (section 14A) into the Interpretation Act 1978. Salient extracts from the inserted text read as follows: “(1) This section applies where an Act confers a power or a duty on a person to make subordinate legislation ....

(2) The subordinate legislation may include—

(a) provision requiring the person to review the effectiveness of the legislation within a specified period or at the end of a specified period;

(b) provision for the legislation to cease to have effect at the end of a specified day or a specified period...

(3) The provision that may be made by virtue of subsection (2)(a) includes provision requiring the person to consider whether the objectives which it was the purpose of the legislation to achieve remain appropriate and, if so, whether they could be achieved in another way.”.

<sup>25</sup> Joint Committee on Statutory Instruments Twenty-first Report, Consumer Rights (Payment Surcharges) Regulations 2012 (2012-13 HL 141, HC 135-xxi), Seventh Report, Draft Equality Act 2010 (Equal Pay Audits) Regulations 2014 (2014-15 HL 33, HC 332-vii).

<sup>26</sup> Deregulation Bill, clause 30, which states that it applies “where any subordinate legislation made by a Minister of the Crown ... uses the term “small business” or “micro business”, and ... defines that term” by reference to the clause in question. The terms are then defined by adapted cross-reference to the Annex to European Union Commission Recommendation 2003/361/EC of 6 May 2003, which is arguably problematic in certain particulars. Generally the Joint Committee on Statutory Instruments has avoided criticising replication of imprecise EU terminology in cases where there is a legal obligation, arising from the EU Treaties as given effect internally by section 2 of the European Communities Act 1972, to implement a binding EU rule using the same terminology, but an EU Recommendation (as opposed to a Regulation, Directive or Decision) does not have legal force.