Public Law Issues with Statutory Instruments

How statutory instruments are laid, made and scrutinised

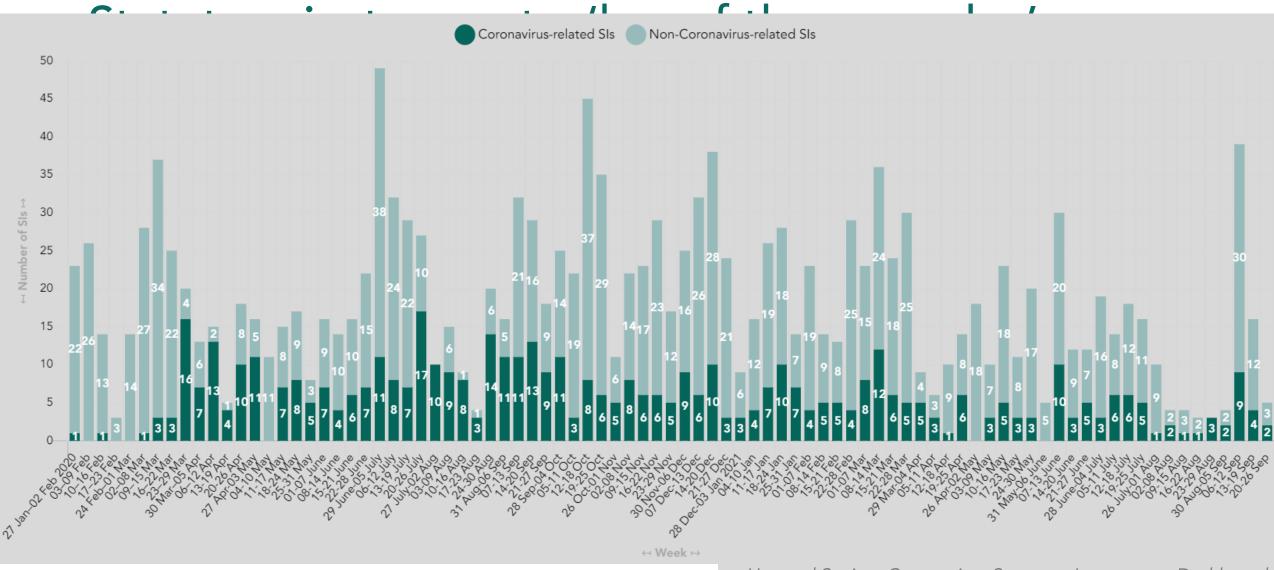
Tom West 30 September 2021



Statutory instruments: 'law of the everyday'

- Most law is made via statutory instrument an appropriate and necessary way to legislate
- Over 1,600 SIs laid before Parliament since 2019 General Election
- But parliamentary scrutiny is weak
- Already busy schedule into Brexit and Covid overdrive
- Review of retained EU law: "a tailored mechanism for accelerating the repeal or amendment of this retained EU law"









Parliamentary scrutiny procedures

- The negative procedure (~75-80%): no debate or vote is required for a statutory instrument to become or remain law.
- The affirmative procedure (~20-25%): there is debate and vote on the statutory instrument. Debate (in HoC) is capped at 90 minutes and is normally in a non-specialist Committee. No amendment is possible.
- <u>Strengthened scrutiny procedures (<2%)</u>: one of (at least) 17 bespoke procedures that have additional requirements such as public consultation, lengthened timeframes, additional supporting documents or (extremely rarely) powers for a parliamentary committee to recommend changes or veto.

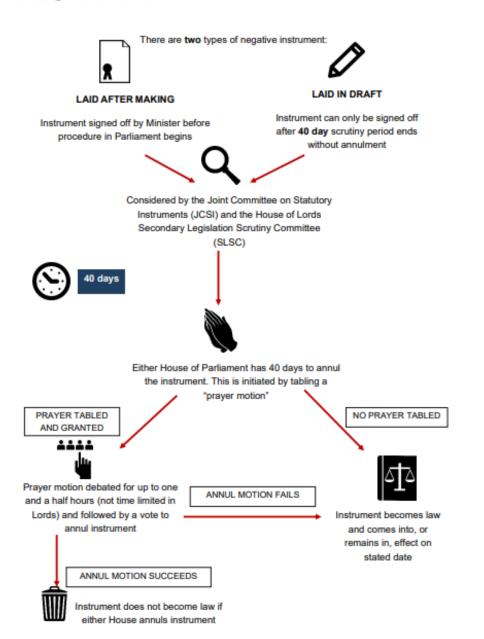


Supporting documents

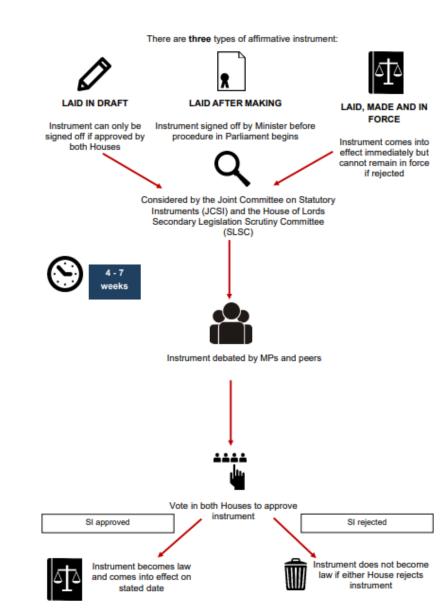
- Explanatory Note
- Explanatory Memorandum
 - Scope and purpose of SI
 - Policy background
 - Links to other SIs
 - Results of public consultation
 - Contact details
- Impact Assessment(?)
- Committee Reports and correspondence



NEGATIVE PROCEDURE FLOWCHART



AFFIRMATIVE PROCEDURE FLOWCHART



NEGATIVE PROCEDURE FLOWCHART FLOWCHART Made Negative Draft Affirmative Made Affirmative There are two types of n Laid only iffirmative instrument: LAID AFTER MAKING AKING LAID, MADE AND IN Instrument signed off by Minister before FORCE procedure in Parliament begins Minister before nent begins (2) Instrument comes into 0.4 effect immediately but cannot remain in force if rejected 21.3% (107) Considered by the Joint Cor mmittee on Statutory Instruments (JCSI) and th he House of Lords Secondary Legislation Sc crutiny Committee (SLSC) 6.4% (32) Either House of Parliamen y MPs and peers the instrument. This is it "prayer m PRAYER TABLED AND GRANTED 72% (362) Prayer motion debated for up to one ANNUL M and a half hours (not time limited in Lords) and followed by a vote to to approve annul instrument SI rejected ANNUL MOTION SUCCEEDS Instrument does not become Hansard Society Coronavirus Statutory Instruments Dashboard law if either House rejects Instrument does not become law if

either House annuls instrument

AFFIRMATIVE PROCEDURE

Parliamentary Committees

- Joint Committee on Statutory Instruments (JCSI)
 - Checks for legal issues and technical quality (not merits)
 - Vires, defective drafting, retrospective effect, not subject to JR, subdelegation
- HoL Secondary Legislation Scrutiny Committee (SLSC)
 - Reviews policy content
 - Draws SIs to the attention of the House of Lords
- HoC Delegated Legislation Committees (DLC)
 - Set up ad hoc to debate SIs
 - 90 mins max frequently less
- European Statutory Instrument Committee (ESIC)
 - Sifting role for EUWA 2018 SIs



Problems with existing scrutiny procedures

- Delegated legislation being used to develop policy
- Scrutiny procedure is pre-determined by parent Act
- More and wider powers same old procedures
- Lack of time/resource/mechanisms for parliamentarians (especially MPs)
- Parliamentary timetable controlled by Government
- Poor quality accompanying documentation
- No power to amend
- No political jeopardy
- Convoluted and confusing processes and terminology



Hansard Society and Statutory Instruments

- SI Tracker
 - Monitoring service that tracks progress of SIs and consultations
 - Provides data for our Coronavirus SI Dashboard
- Review of Delegated Legislation
 - Develop and promote concrete proposals for reform
 - Discussion papers and public events
 - A new Statutory Instruments Act
 - Advocating for scrutiny that is:
 - ✓ More responsive to parliamentarians' needs
 - ✓ More influential in improving legislation
 - ✓ Less bewildering to promote transparency and democracy



Review of Delegated Legislation Launch Event – 2 November 2021

Get in touch to request a demo of our Statutory Instrument Tracker®

Tom West tom.west@hansardsociety.org.uk

