

# Public Law Issues with Statutory Instruments

How statutory instruments are laid, made and scrutinised

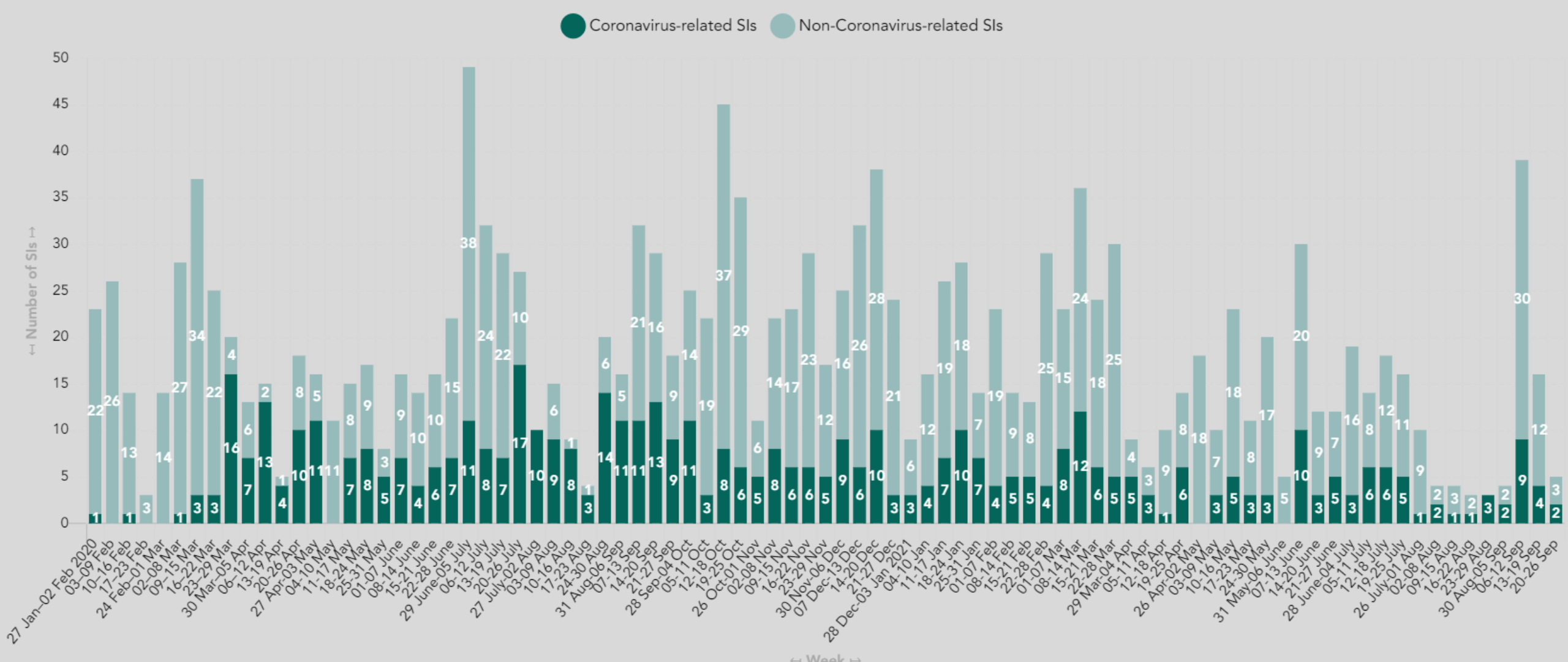
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Tom West  
30 September 2021



# 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”



Hansard Society Coronavirus Statutory Instruments Dashboard

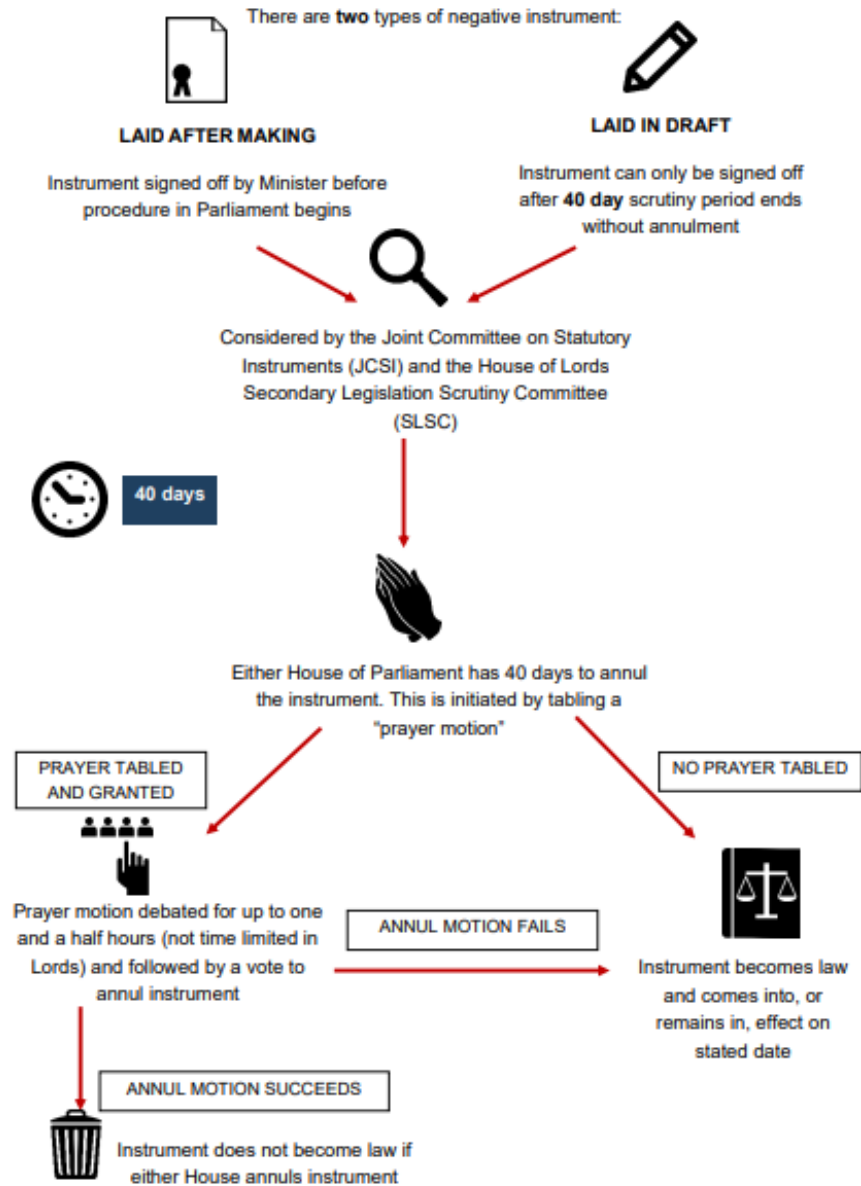
# Parliamentary scrutiny procedures

- 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.
- Strengthened scrutiny procedures (<2%): 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.

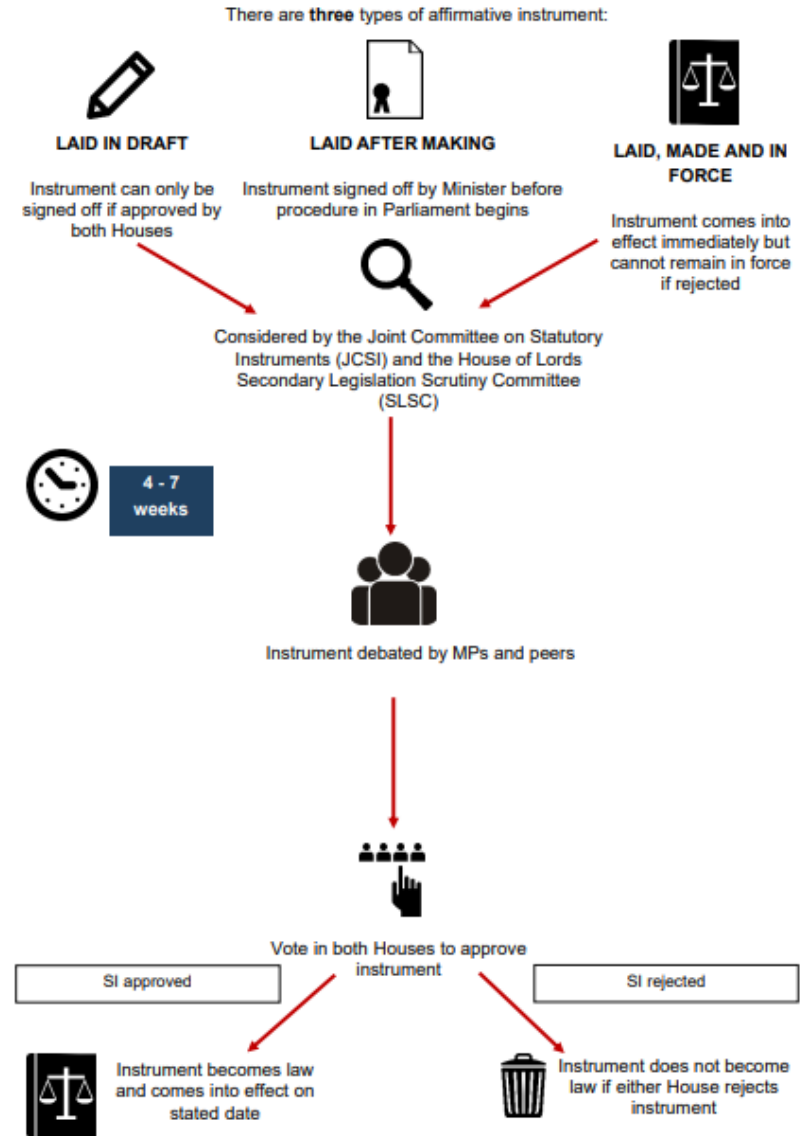
# Supporting documents

- 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

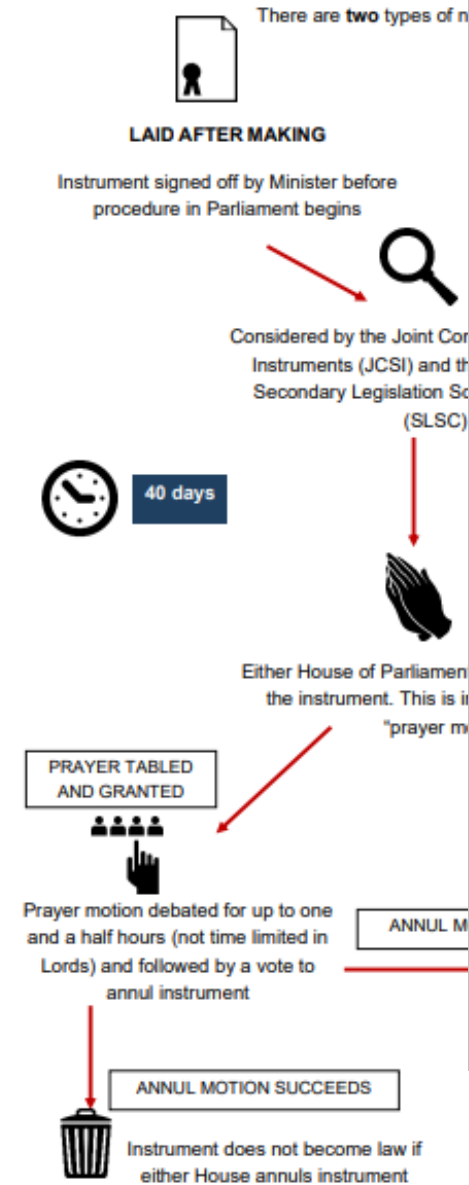
# NEGATIVE PROCEDURE FLOWCHART



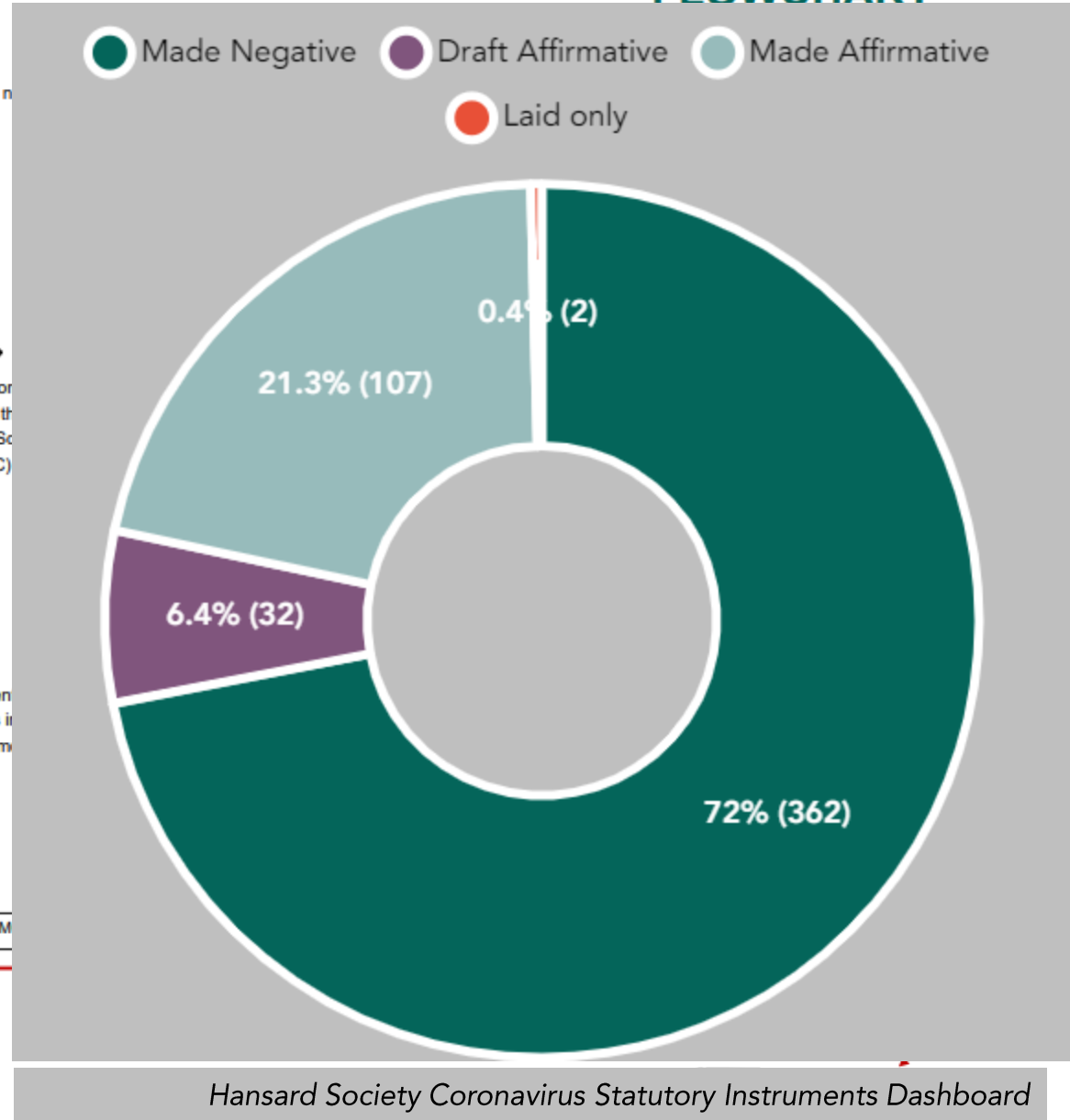
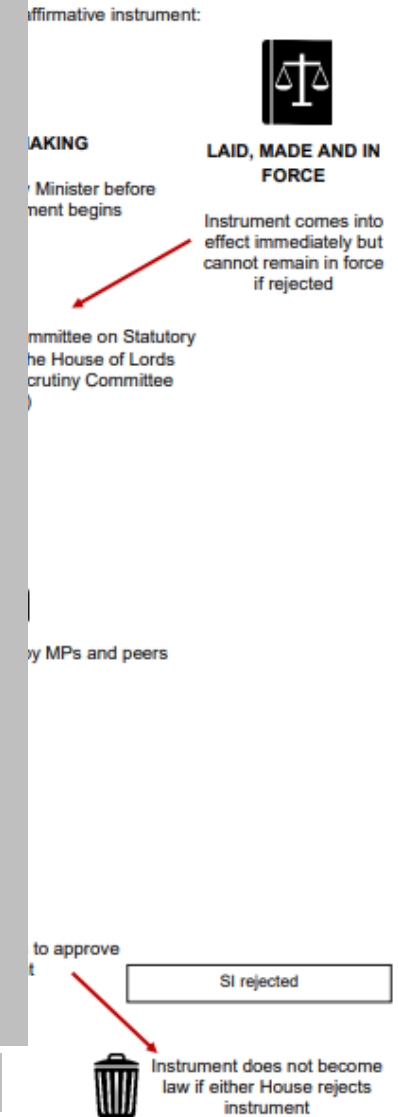
# AFFIRMATIVE PROCEDURE FLOWCHART



# NEGATIVE PROCEDURE FLOWCHART



# AFFIRMATIVE PROCEDURE FLOWCHART



# 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, sub-delegation
- 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
- **Convolut**ed 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®*

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