HOUSE OF LORDS

Merits of Statutory Instruments Committee

3rd Report of Session 2003-04

Special Report

The Committee's Methods of Working

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The Select Committee on the Merits of Statutory Instruments

The Merits of Statutory Instruments Committee was appointed by the House of Lords on 17 December 2003 with the terms of reference "to consider every instrument which is laid before each House of Parliament and upon which proceedings may be or might have been taken in either House of Parliament, in pursuance of an Act of Parliament, being:

(i) a statutory instrument, or a draft of a statutory instrument;

(ii) a scheme, or an amendment of a scheme, or a draft thereof, requiring approval by statutory instrument; or

(iii) any other instrument (whether or not in draft), where the proceedings in pursuance of an Act of Parliament are proceedings by way of an affirmative or negative resolution;

but excluding any Order in Council or draft Order in Council made or proposed to be made under paragraph 1 of the Schedule to the Northern Ireland Act 2000 and any remedial order or draft remedial order under Schedule 2 to the Human Rights Act 1998 and any draft order proposed to be made under section 1 of the Regulatory Reform Act 2001, or any subordinate provisions order made or proposed to be made under that Act;

with a view to determining whether the special attention of the House should be drawn to it on any of the following grounds:

(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 is inappropriate in view of the changed circumstances since the passage of the parent Act;

(c) that it inappropriately implements European Union legislation;

(d) that it imperfectly achieves its policy objectives."

Current Membership

The Members of the Merits of Statutory Instruments Committee are:

Lord Addington
Lord Armstrong of Ilminster
Lord Boston of Faversham
Viscount Colville of Culross
Lord Desai
Lord Graham of Edmonton
Lord Hunt of Kings Heath (Chairman)
Lord Jopling
Lord Methuen
Earl of Northesk
Viscount Ullswater

Publications

The Committee's reports are published by The Stationery Office by Order of the House. All publications of the Committee are on the internet at
http://www.parliament.uk/parliamentary_committees/merits.cfm

General Information

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Contacts for the Merits of Statutory Instruments Committee

If you have any queries regarding the Committee and its work, please contact the Clerk to the Merits of Statutory Instruments Committee, Delegated Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3233/8821. The fax number is 020 7219 2571.
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CONTENTS

Special Report: the Committee's Methods of Working

CHAPTER 1: INTRODUCTION

1. The volume and importance of delegated (or secondary) legislation has increased in recent years, regulating many aspects of our lives.[1] The Joint Committee on Statutory Instruments (JCSI) puts this down to Parliament enacting more and more legislation and the "substantial and complex regulations implementing EU directives".[2] The House of Lords Delegated Powers and Regulatory Reform Committee (DPRRC) suggests that it is a necessary consequence of the increasing complexity of Government activity: "Parliament recognises that detailed implementation of legislation needs to be undertaken by powers delegated … by primary legislation if the Parliamentary process is to remain workable".[3] As a result of this growth in delegated legislation, Parliament has developed mechanisms for the more effective scrutiny of the ambit and exercise of delegated powers. The Merits of Statutory Instruments Committee ("the Merits Committee") is the most recent addition to those mechanisms. In Chapter 3 of this Report, we describe the other Parliamentary scrutiny committees whose work the Merits Committee will complement.

Purpose of this Report

2. In our First Report, published in February, we announced that, given the large number of statutory instruments laid before Parliament each year and the wide scope of the Committee's terms of reference, we would at the outset conduct a short inquiry into our role and methods of working. We sought advice from a number of sources on how we could assist the House, as efficiently and as effectively as possible, in its scrutiny of delegated legislation.

3. We have taken written evidence from the witnesses listed in Appendix 2 to this Report. These included the party leaders in the House of Lords, chairmen of other scrutiny committees, Lord Wakeham, Lord Skelmersdale, the Law Society, the Hansard Society and the House of Lords Clerk Assistant. We are very grateful for the contributions they have made, all of which are published at the end of this Report, in Appendix 3.

4. The purpose of this Report is to inform the House of our preliminary conclusions about our working methods, which we are bringing into effect immediately. At the beginning of April we began reporting on statutory instruments[4] and will continue to do so on a weekly basis.

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1 The average number of instruments considered by the JCSI each session, by Parliament, is as follows: 1987-92, 1304; 1992-97, 1697; 1997-2001, 1726. (Annex to evidence of Mr David Tredinnick, MP, Chairman of the JCSI, p 46.)

2 Ibid, p 45.

3 Sessions 2001-02 and 2002-03: The Work of the Committee, First (Special) Report, HL Paper 9, Session 2003-04, p 1, para 1.

4 Our first report on statutory instruments was the 2nd Report, HL Paper 72, Session 2003-04.

Historical note

House of Lords

5. In January 2000, the Royal Commission on the Reform of the House of Lords[5] (under the chairmanship of Lord Wakeham) ("the Royal Commission") indicated that there was a good case for enhanced Parliamentary scrutiny of delegated legislation and recommended that a reformed House should establish a "sifting" mechanism, either by way of a joint committee of both Houses or a Lords-only committee, to identify those statutory instruments which were important and merited further debate or consideration (Recommendation 37).[6]

6. The Report of the Leader's Group on the Working of the House, published in April 2002, took up the Royal Commission's recommendation and recommended that a committee should be established to examine the merits of every statutory instrument subject to Parliamentary scrutiny.[7] Last session, the House of Lords Liaison Committee agreed that such a committee should be established,[8] and on 16 June 2003, the House, on a motion to approve the 3rd Report of the Procedure Committee,[9] agreed the Merits Committee's terms of reference.[10] The Committee was subsequently appointed on 17 December 2003.[11]

House of Commons

7. The House of Commons Procedure Committee has, in two reports (in Sessions 1995-96 and 1999-2000),[12] indicated its support for the appointment of a statutory instruments sifting committee. On 10 March 2003, the Procedure Committee published a further report[13] in which it welcomed the Lords proposal to appoint a sifting committee but recommended immediate discussions with a view to setting up a joint committee. The Government came down against this recommendation, preferring to see how the Lords Committee worked before considering whether the Commons should participate in this scrutiny work.[14]

Terms of reference

8. The Committee's terms of reference are set out on the inside front cover of this Report. The Procedure Committee proposed that the terms of reference should be reviewed after the Committee had been in existence for one session (see paragraph 82 below).

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5 Royal Commission on the Reform of the House of Lords, *A House for the Future* (January 2000), Cm 4534.

6 Ibid, pp 74-75, paras 7.23-7.27.

7 HL Paper 111, Session 2001-02, para 17.

8 First Report, HL Paper 57, Session 2002-03. The House agreed a motion to approve the report on 27 February 2003 (HL Hansard, cols 427-35).

9 HL Paper 115, Session 2002-03.

10 HL Hansard, cols 527-29.

11 HL Hansard, 17 December 2003, cols 1156-57.

12 4th Report, HC 152, Session 1995-96; First Report, HC 48, Session 1999-2000.

13 First Report, HC 501, Session 2002-03.

14 2nd Report, HC 684, Session 2002-03.

9. The membership of the Committee is also set out on the inside front cover of this Report. Although the Procedure Committee had originally suggested that the Committee should have nine members, the House approved the proposal of the Committee of Selection that it should have 11 members. The declared interests of Members of the Committee are set out in Appendix 1 to this Report.

The Committee's Secretariat

10. The Committee is supported by a Clerk, two Committee Advisers and a Committee Administrator. It is also assisted, from time to time, by Counsel to the Chairman of Committees.

References

11. We refer to the evidence of witnesses by reference to the page number on which it appears in this Report. We also refer, from time to time, to the following publications: Companion to Standing Orders (2003) ("the Companion") and Statutory Instrument Practice (3rd Edition)(June 2003)("the SIP").

CHAPTER 2: STATUTORY INSTRUMENTS AND PROCEDURE

12. In this chapter we describe the statutory instruments which fall within the remit of the Merits Committee, and the Parliamentary procedures which apply to them. We also describe how the work of the Committee will be formally publicised in the House and the procedures which may be applied in response to a report by the Committee. We have drawn, in particular, on the submission by the Clerk Assistant and on the Companion.

Relevant statutory instruments

13. The Committee's terms of reference (see the inside front cover) describe in some detail the instruments which it is required to consider. They include:

"every instrument which is laid before each House of Parliament …"

14. Of those instruments which are laid before Parliament, most are laid before both the House of Lords and the House of Commons. A small number of instruments are laid before the Commons only. These are primarily financial instruments.[15] **Our terms of reference preclude us from considering Commons-only instruments**.[16]

"… and upon which proceedings may or might have been taken in either House of Parliament, in pursuance of an Act of Parliament …"

15. Whether an instrument is one "upon which proceedings may or might have been taken" depends on the parent Act.[17] Some statutory instruments are not laid and are not, therefore, subject to any Parliamentary procedure (for example, commencement orders). Some statutory instruments are laid before Parliament but are, none the less, not subject to any Parliamentary procedure.[18] Instruments which fall into these two categories will not be considered by the Merits Committee. Other instruments are laid before Parliament and are subject to either an affirmative or a negative resolution procedure (described in paragraphs 20 to 24 below). These instruments will be considered by the Merits Committee.

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15 The Companion, para 8.11.

16 We note, however, that although such instruments do not fall to be considered by the Merits Committee, the Government has undertaken to provide Explanatory Memoranda in respect of these instruments. See evidence of the Leader of the House of Lords, Baroness Amos, p 28.

17 The parent Act will, if passed since 1992, have been scrutinised by the DPRRC which will have taken a view on the appropriateness of the level of Parliamentary scrutiny applied to a delegated power.

18 The SIP describes this procedure as "not very common" (para 4.7.1).

"… being: (i) a statutory instrument, or a draft of a statutory instrument; (ii) a scheme, or an amendment of a scheme, or a draft thereof, requiring approval by statutory instrument; or (iii) any other instrument (whether or not in draft), where the proceedings in pursuance of an Act of Parliament are proceedings by way of an affirmative or negative resolution …"

16. This element of the Merits Committee's terms of reference is the same as that of the JCSI save that, for the JCSI, (iii) is limited to proceedings by way of an affirmative resolution only (rather than affirmative or negative).[19]

"… but excluding any Order in Council or draft Order in Council made or proposed to be made under paragraph 1 of the Schedule to the Northern Ireland Act 2000 …"

17. Orders in Council (or drafts) made under paragraph 1 of the Schedule to the Northern Ireland Act 2000 are excluded. They are, in practice, akin to primary legislation and are subject to scrutiny by the House of Commons Northern Ireland Grand Committee. Although our terms of reference exclude the Northern Ireland Orders specified, they do not exclude Statutory Rules of Northern Ireland.

"… but excluding … any remedial order or draft remedial order under Schedule 2 to the Human Rights Act 1998 …"

18. If primary legislation is found by a higher United Kingdom court or the European Court of Human Rights to be incompatible with the European Convention on Human Rights, then a Minister may, by order, amend the legislation to remove the incompatibility. These orders (or drafts) are called remedial orders and are excluded from scrutiny because they are subject to a separate scrutiny procedure by the Joint Committee on Human Rights.[20]

"… but excluding …any draft order proposed to be made under section 1 of the Regulatory Reform Act 2001, or any subordinate provisions order made or proposed to be made under that Act;…"

19. Similarly, proposals and orders under the Regulatory Reform Act 2001 are excluded from the Committee's remit because they are subject to a separate scrutiny procedure by the Lords Delegated Powers and Regulatory Reform Committee (and the Commons' Regulatory Reform Committee).

Procedure in the House in relation to affirmative and negative instruments

Affirmative instruments

20. Affirmative instruments require the express approval of Parliament (or, sometimes, the Commons only (see paragraph 14 above)). The procedure which applies to an affirmative instrument can take one of three forms depending on the parent Act: (a) an instrument may be made and have immediate effect, but not continue in force beyond a specified period unless approved by Parliament;

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19 The JCSI's terms of reference also include a fourth element: orders "subject to special parliamentary procedure". These are subject to the special parliamentary procedure prescribed in the Statutory Orders (Special Procedure) Act 1945 (as amended by the Statutory Orders (Special Procedure) Act 1965). They are classified as local instruments. (See the SIP, para 1.6.5.) The Merits Committee does not consider local instruments.

20 The Companion, paras 8.20-8.23.

(b) an instrument may be made and laid before Parliament, but will only come into force after approval by Parliament; or, (c) an instrument may be laid in draft before Parliament and will not be made or have effect unless approved by Parliament.

21. In Session 2001-02, the JCSI considered 165 affirmative instruments, and in Session 2002-03, 129. In the House of Lords, all affirmative instruments are debated in the Chamber, on a motion by a Minister to approve the instrument.[21]

Negative instruments

22. The procedure governing negative instruments, unlike that for affirmative instruments, has been standardised by the Statutory Instruments Act 1946. Negative instruments come into force either straightaway or after a period after laying.[22] They are subject to annulment following a resolution of either House. A resolution to reject a negative instrument takes the form of a motion praying Her Majesty that the instrument be annulled. The period during which a prayer may be moved, the "praying time", is 40 days (not including periods of dissolution, prorogation or adjournment of both Houses for more than four days).[23] A negative instrument can be annulled after it has come into force and had substantive effect.

23. Very occasionally,[24] draft negative instruments are laid before Parliament. The procedure is governed by section 6 of the Statutory Instruments Act 1946.

24. There are far more negative instruments than affirmative. In Session 2001-02, the JCSI considered 1268 negative instruments, and in Session 2002-03, 1136.[25] In the Lords, all motions in relation to negative instruments are taken in the Chamber. These are infrequent: in Session 2002-03, only 14 motions were tabled.

Time constraints

Affirmative instruments

25. The significant majority of affirmative instruments are laid in draft[26] and do not, therefore, come into effect until a motion of approval has been passed by both Houses. Under Standing Order 73, a motion may not be moved until the JCSI has reported. No such scrutiny reserve exists in respect of the Merits Committee. We will therefore need to report in reasonable time and to ensure that our reports are available before affirmative motions are debated in the House.

26. We propose to hold weekly meetings (at present we meet on Tuesdays) at which we will consider all instruments laid during the first week of the preceding fortnight. We expect, therefore, routinely to complete consideration of

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21 Annex to the evidence of Mr David Tredinnick, MP, Chairman of the JCSI, p 46.

22 See para 29 below, on the "21-day rule".

23 The Companion, para 8.15.

24 The JCSI considered, in Session 2002-03, 1076 negative instruments, 59 Northern Ireland instruments and one draft negative instrument. (Annex to evidence of Mr David Tredinnick, MP, Chairman of the JCSI, p 46.)

25 Ibid.

26 Ibid.

affirmative instruments within two and a half weeks of laying. (The JCSI usually completes consideration of affirmatives within two weeks of laying.)

27. We are aware that there will be occasions when motions will be taken in the House soon after laying and the Committee will then need to act more swiftly. In order to assist us in achieving this, **we express the hope that the Government Whips Office will inform Merits Committee staff, at the earliest opportunity, of dates for motions to approve affirmative instruments. Furthermore, where it is intended that a motion is to be taken soon after laying, we hope that Government Departments will be able to provide Committee staff with advance sight of the text of the instrument or a draft of the instrument, prior to laying.**

Negative instruments

28. The principal time constraint in relation to negative instruments is the 40 day "praying time", and the consequent need for us to report in good time so as to enable Members of the House to table motions in cases where instruments are drawn to the special attention of the House.

29. A further consideration in regard to timing arises from the convention that negative instruments should not come into force before 21 (calendar) days after laying ("the 21-day rule").[27] We shall use our best endeavours to complete consideration of negative instruments within 21 days of laying and, given our intention to consider at our weekly meetings the instruments laid during the first week of the preceding fortnight, we expect to achieve this. (The JCSI normally completes consideration of negative instruments within three weeks of the receipt of copies by Committee staff.) There will however be circumstances where the Committee will request further information from a Government Department and this will necessarily delay our final report on an instrument.

Procedure following a report by the Committee

Publicising the reports of the Committee in the Minutes of Proceedings

30. The Clerk Assistant's submission[28] sets out in detail how the reports of the Committee will be identified in the Minutes of Proceedings. First, when the Committee makes a report to the House, an entry will appear in the first half of the Minute listing the statutory instruments to which the Committee draws the special attention of the House.[29] Second, a section in the second half of the Minute (the Notices and Orders of the Day) will list those instruments on which the Committee has reported; when the praying time on the negative instruments so reported expires; and the dates when instruments (whether negative or affirmative) are to be debated in the House.

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[27] Though the 21 days is intended to be a minimum period, many instruments in fact come into force 21 days after laying.

[28] Evidence of the Clerk Assistant, pp 52-56.

[29] There will be occasions when the Committee will take the view that none of the instruments laid during a given week warrant drawing the special attention of the House.

Motions in the Chamber

31. The Committee reports to the House. It will be for Members of the House to decide whether to act on our reports and seek to debate instruments to which we have drawn attention. In the case of affirmative instruments, which are debated in the House in any event, our reports may simply contribute to the range of points raised in debate and provide a focus for such debate. Negative instruments, even those drawn to the special attention of the House in our reports, will not be debated in the House unless a motion is tabled by a Member of the House.

32. The Clerk Assistant's submission sets out, with reference to the Companion, the ways in which a Member can challenge or debate secondary legislation by means of motions or amendments. These include motions to reject an instrument, motions (or amendments) regretting some aspect of the statutory instrument and motions (or amendments) calling on the Government to take some specific action.

33. An alternative procedure, which has not hitherto been followed, would be for a Member to table a motion drawing attention to a report of our Committee in respect of a particular negative instrument. This approach would provide the opportunity for debate without any possibility of a vote and, in his submission, the Clerk Assistant suggests that it "would appear to be well-suited to the Committee's general approach".

34. There are a number of alternative motions (or amendments) which can be tabled which provide Members of the House with an opportunity to raise points in respect of a statutory instrument. It will be a matter for a Member to decide which motion (or amendment) would be appropriate in the circumstances.

CHAPTER 3: WORKING WITH OTHER PARLIAMENTARY SCRUTINY COMMITTEES

35. Part of the rationale for conducting an inquiry into working methods was to investigate the functions of other Parliamentary scrutiny committees and the relationship between them and the new Merits Committee.

36. The Merits Committee will complement the work of certain other committees. We share the view of the DPRRC that "in providing policy scrutiny of delegated legislative instruments, the work of the Merits Committee will complement (a) the technical, legal scrutiny of such instruments by the Joint Committee on Statutory Instruments and (b) scrutiny of the parent (domestic and European Union (EU)) legislation by [the DPRRC] and by the EU Scrutiny Committees in the Lords and the Commons".[30] We also note the comment by Lord Grenfell, Chairman of the Lords European Union Committee, that the Merits Committee has "a great opportunity to enhance Parliamentary scrutiny of legislation at a stage that was not previously scrutinised in a systematic way" and that we will "neatly complement" the work of the European Union Committee.[31]

37. In this chapter, we briefly describe the work of other Parliamentary scrutiny committees and our relationship with them.

Delegated Powers and Regulatory Reform Committee

38. The DPRRC, which was first appointed in Session 1992-93, has no equivalent in the House of Commons. Its authority is widely acknowledged. Its terms of reference include a requirement "to report 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".[32]

39. The DPRRC therefore considers and reports on the delegated powers contained in primary legislation. In contrast, the Merits Committee considers and reports on the delegated (secondary) legislation which results from the exercise of those powers. We invited the DPRRC to comment on the scope for cooperation between the two committees. The DPRRC, in its submission, made two suggestions, both of which we welcome.

40. The first is a practical point. The DPRRC has indicated that, "where appropriate", it would refer in its reports to those delegated powers to which the Merits Committee "may wish to pay particular regard". We are grateful for this offer of assistance.

41. The second suggestion raises a more far-reaching, procedural point. The DPRRC, in its submission, notes the difference in the procedures which apply to negative and affirmative instruments and suggests that, if the Merits Committee were to become "a permanent element of the legislative process", then "there may be occasions where [the DPRRC] would endorse the application of the

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30 Memorandum from the DPRRC, p 40.

31 Evidence of Lord Grenfell, Chairman of the Lords' EU Committee, p 38.

32 Following the passage of the Deregulation and Contracting Out Act 1994, and then the Regulatory Reform Act 2001, the remit of the Committee was extended to include reporting on regulatory reform orders (formerly, under the 1994 Act, called deregulation orders). Regulatory reform orders are explicitly excluded from the Merits Committee's terms of reference.

negative procedure in a particular instance where it would not have done prior to the appointment of the Merits Committee". This is because the DPRRC "has been concerned … that instruments subject to negative procedure only could easily escape the attention of the House. The appointment of the Merits Committee addresses [that] concern…".[33]

European Union Committees

42. Both the Lords and Commons have European Union scrutiny committees which consider the parent EU legislation which, on implementation, gives rise to a proportion of the instruments that will come before the Merits Committee.[34] We invited the Lords European Union Committee to contribute to this inquiry and we are grateful for the comments by Lord Grenfell, Chairman of the Committee.

43. In a recent report, the Lords European Union Committee suggested that "scrutiny of secondary legislation implementing EU legislation … is weak and needs to be strengthened".[35] The Merits Committee has been appointed, in part, to meet this need and we invited Lord Grenfell to suggest how we could perform this task most effectively. Lord Grenfell offered a number of practical suggestions including drawing on the work of the Lords and Commons European Union scrutiny committees and, from time to time, seeking the views of "key MEPs who were involved in agreeing the EU legislation". We welcome, and share, the Lords' European Union Committee's enthusiasm for co-operation at staff level and agree that "the key" will be for us "to have a system in place to ensure that information in [European Union Committee] reports, and particularly [committee] correspondence with ministers is, where relevant, marked and carried forward for consideration" by the Merits Committee.

Joint Committee on Statutory Instruments

44. The Joint Committee on Statutory Instruments (JCSI) considers all instruments to be considered by the Merits Committee. In addition, it considers all general statutory instruments which are laid before Parliament but for which there is no subsequent Parliamentary proceeding. It also considers all general statutory instruments which are not required to be laid before Parliament unless they are instruments made by a member of the Scottish Executive or by the National Assembly for Wales. The JCSI provides technical scrutiny of instruments; in particular it considers the *vires* of instruments and drafting defects. It may consider, in respect of any statutory instrument, any ground for drawing the

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33 Memorandum from the DPRRC, p 41.

34 Mr John Redwood, MP, asked a series of Parliamentary Questions for Written Answer in December 2003 about the proportion of primary and secondary legislation that each Government Department had introduced in Session 2002-03 to implement EU requirements. Responses varied widely: the highest percentages of secondary legislation introduced to implement EU requirements were reported by DEFRA (57%) (HC Hansard, 18 Dec 2003, col 1027W) and DTI (26%)(HC Hansard, 5 Jan 2004, col 118W); several Departments (MOD, ODPM and the Cabinet Office) reported that none of their secondary legislation had been brought forward for this purpose (HC Hansard, 5 Jan 2004, col 31W; 15 Dec 2003, col 751W; and 4 Dec 2003, col 114W, respectively). Of the remaining Departments, there was a group in the range around 10%: DfT 13%; DCMS 12%; DWP (including HSE) 9.27% (HC Hansard, 5 Jan 2004, col 49W;4 Dec 2003 col 165W; 15 Dec 2003, col 695W). The DoH reported 3% (HC Hansard, 15 Dec 2003, col 767W) and DfES 1.2% (HC Hansard, 17 Dec 2003, col 959W).

35 First Report, Review of Scrutiny of European Legislation, HL Paper 15, Session 2002-03, p 24, para 96.

special attention of Parliament so long as it "does not impinge on its merits or on the policy behind it".

45. Given that the JCSI and the Merits Committee will be dealing with very similar workloads, and working to the same timescale, we share the view of the JCSI that, in normal circumstances, the Committees will "have to work in parallel". We also share the view that given our "separate but complementary remits, it is not clear what benefits might be gained from the two Committees working sequentially". We are grateful, however, for the suggestion by the JCSI that there is scope for supporting each other informally and, like the JCSI, would be happy for papers and appropriate information to be shared at staff level.[36]

[36] Evidence of Mr David Tredinnick, MP, Chairman of the JCSI, p 43.

CHAPTER 4: WORKING METHODS

Principal purposes of the Merits Committee

Provision of information

46. Members of the Committee have had an opportunity to examine quite a number of statutory instruments laid before Parliament since its appointment in December 2003. We have been struck by how difficult it is to understand the policy implications of statutory instruments without the assistance of explanatory material. We note that the DPRRC, in its submission, refers to "the impenetrability of many statutory instruments". In paragraphs 53 to 55 below, we set out the explanatory material which already accompanies statutory instruments (in particular, Explanatory Notes in all cases and an Explanatory Memorandum in the case of affirmative instruments) and describe the further material which the Government has now agreed to provide.

47. Lord Wakeham, in response to a question on how the success of the Committee might be judged, said: "The Royal Commission's view was that the Second Chamber's principal role was to provide wise counsel on a wide range of issues, and in particular to review and offer advice on possible revision of legislation for Parliament to consider. If the Merits Committee is able by all means available to it, to get the relevant information on the table in respect of secondary legislation then it will have done a good job".[37]

Improving debate on negative instruments

48. More specifically, a number of witnesses suggested that the principal purpose of the Merits Committee is to improve debate in the House on negative instruments, both in terms of which negative instruments are debated in the House and the focus of debate on specific instruments.

49. The Leader of the House, Baroness Amos, in her submission, alluded to the first point: "Her Majesty's Government think that this Committee would be of most use to the House and the legislative process if it helps to focus debate on SIs… Members of the House will have a more strategic view on which negative SIs are worth tabling a motion against".[38] A number of witnesses echoed this view. The DPRRC said that "given the difference in procedure which applies to negative and affirmative instruments … the Committee will particularly assist the House in its identification of negative instruments of special interest".[39] Lord Skelmersdale suggested that the "major work" of the Committee "should be in the field of negative instruments" because "affirmatives on the whole look after themselves" and "are not worth much effort on your behalf".[40]

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37 Evidence of Lord Wakeham, p 37.

38 Evidence of the Leader of the House, Baroness Amos, p 29.

39 Memorandum from the DPRRC, p 40.

40 Evidence of Lord Skelmersdale, p 35.

Sifting affirmative instruments

50. The Leader of the House further suggested that the Committee should not only indicate negative instruments to which the special attention of the House should be drawn but should also assist the House in forming a view on which affirmative instruments "warrant very little debate on policy grounds". Lord Skelmersdale told us: "To my mind the whole point of the Merits Committee is to improve the legislative process, by recommending for debate those instruments which might otherwise pass by unnoticed, and to speed things up by having a formal (non-speaking) debate on some affirmative instruments".[41]

Distinguishing between affirmative and negative instruments

51. Our current terms of reference enable the Committee to draw the special attention of the House to certain instruments. When our terms of reference are reviewed at the end of the current session, the House will wish to consider whether we should also be charged with identifying affirmative instruments which do not raise issues of special interest (as indicated in the Leader's evidence). Meanwhile, we have considered whether we should approach affirmative instruments differently from negative instruments, given that all affirmatives come before the House for debate. **We have concluded that it is likely that, under our current terms of reference, our principal contribution to the effective scrutiny of delegated legislation by the House will be in identifying negative instruments. None the less, where an affirmative instrument is clearly one which will be of considerable interest to the House, our role will be to draw it to the attention of the House.**

Timing of meetings

52. As a result of the time constraints implicit in the affirmative and negative procedures, we anticipate that we shall meet every week whilst the House is sitting.

Evidence

Explanatory Notes

53. At present, an Explanatory Note (EN) accompanies all statutory instruments. The EN is printed with the instrument but is stated explicitly not to be part of the instrument. According to the Statutory Instruments Practice manual (the SIP),[42] "the explanatory note should give a concise and clear statement of the substance and purport of the instrument. …. It should assist the reader in deciding whether or not he needs to refer to the instrument itself, and be intelligible to one who is not familiar with the relevant area of law or administration. … [It] should help the reader to understand the instrument's effect without looking up other provisions". The SIP specifically requires that an

41 Evidence of Lord Skelmersdale, p 35.

42 Paras 2.13.2-3.

EN "must not seek to explain or justify policy".[43] Further detailed guidance about the EN is given in the SIP.

54. The JCSI, in its submission, agreed with our experience (so far) that the quality of ENs varies in the extent to which they elucidate. The JCSI, which has in the past criticised the inadequacy of information in ENs, concludes however that "they do not often fall outside the parameters set by [SIP]".[44]

Explanatory Memoranda

55. Since 1 March 2001, Government Departments have been required to provide Parliament with general explanatory memoranda (EMs) on all affirmative instruments. The SIP sets out guidance on what should be included in a memorandum (Appendix H), and describes it, in comparison with ENs, as "a fuller document, not printed with the instrument, but provided to Parliament". It will usually include a description of the policy background of the instrument. In addition, Government Departments sometimes supply memoranda to the JCSI on a voluntary basis (for example, in the circumstances set out in paragraphs 5.4.16-19 of the SIP), and it is open to the JCSI to request a memorandum (or further memorandum).

56. EMs are supplied to the EU scrutiny committees in respect of EU legislation. In its review of scrutiny (see paragraph 43 above), the Lords Committee commented on the importance of explanatory memoranda in facilitating its work.[45] Lord Grenfell suggested that the Government should include details of "scrutiny history" (that is, "an account of what consideration both Houses gave to that legislation during the EU scrutiny process") in any EM provided for the Merits Committee.

57. In view of "the impenetrability of many statutory instruments" – even with the assistance of an EN – we invited the Government to agree that the current provision of EMs for affirmative instruments should be extended to negative instruments, to help meet the information requirements of the Merits Committee. We appreciate the resource implications of this request and therefore particularly welcome the Government's agreement not only to provide EMs as requested, but also to publish them. The Government invited the JCSI and the Merits Committee to agree a template for a single, composite memorandum which would cover the information required by the JCSI and that provided in those EMs which already accompany affirmative instruments, along with the information required by the Merits Committee. This work has been undertaken, and the template is set out in Appendix 4 to this Report.

58. We agree with the Leader of the House that there will be some instruments that will require "only very limited explanation" and Merits Committee staff will be keen to work with Departmental officials to develop, in the light of experience, a list of categories of instruments to which this limited requirement might apply.

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43 Para 2.13.2.

44 Evidence of Mr David Tredinnick, Chairman of the JCSI, p 45.

45 "We stress … that the provision of proper Explanatory Memoranda is absolutely essential to the effective functioning of the sift system…": First Report, Review of Scrutiny of European Legislation, HL Paper 15, Session 2002-03, p 18, para 58.

59. We welcome the Government's decision to provide, and publish, explanatory memoranda in respect of all negative, as well as affirmative, instruments. This is an important step in enabling the Committee to provide appropriate information about statutory instruments to Members. We invite the Government to clarify the manner in which they intend to publish EMs. We also hope that administrative systems can be put in place in Departments to ensure that copies of an EM are always provided with the copies of the instruments supplied directly to the staff of the Merits Committee.

Transposition Notes

60. In addition to ENs and EMs, we are able to draw on information in Transposition Notes (TNs). These are prepared in order to inform the European Commission about how a piece of EU legislation has been implemented. According to the SIP,[46] TNs should be "more specific about how the main elements of the Directive(s) will be transposed into UK law and should display this information in a more structured way". The EN is required to state whether a TN is available, and it should be laid at the same time as the instrument and the EM. **We hope that administrative systems can be put in place in Departments to ensure that copies of a TN are always provided with the copies of the instruments supplied directly to the staff of the Merits Committee.**

61. We also note that, where an instrument implements EU legislation, Departments are required to supply the JCSI with copies of the European documents cited in the instrument. We hope that Departments will provide a similar service to the Merits Committee.

Regulatory Impact Assessments

62. It is a Cabinet Office requirement that Regulatory Impact Assessments (RIAs) must accompany all legislation, including statutory instruments, where a new regulatory proposal has an impact on businesses, charities and the voluntary bodies. RIAs set out the risks, costs and benefits of the proposal.[47] They are not required to be laid with an instrument and the SIP suggests that Departments may wish to send copies to Parliamentary scrutiny committees directly. We have, in our limited experience, found RIAs very helpful in elucidating instruments. **We would therefore be grateful if administrative systems could be put in place in Departments to ensure that copies of an RIA are always provided with the copies of the instruments which are supplied directly to the staff of the Merits Committee**

Oral evidence from Government Departments and others

63. The Committee has power to take oral evidence. We do not anticipate exercising this power often and we recognise that the time constraints inherent in the affirmative and negative procedures will mean that oral evidence sessions will have to be arranged at very short notice.

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46 The SIP, paras 4.1.2-6.

47 Ibid, paras 2.13.8-9.

Statutory Instrument Practice Manual

64. The SIP is published by the Cabinet Office and "is intended primarily for the use of civil servants and others concerned with the preparation and making of statutory instruments and the parliamentary procedures relating to them".[48] It is a comprehensive document and supplementary guidance in the form of circular memoranda has already been issued to Departments to take account of the additional administrative requirements arising from the establishment of the Merits Committee.[49]

Publication of reports

65. We will publish a report after every meeting, in which we will list the statutory instruments on which the Committee has completed consideration. We will set out (with reasons) those instruments which we wish to draw to the special attention of the House and, in an appendix to the report, those instruments which we have considered but do not draw to the special attention of the House.

66. **We recognise that there are great pressures on business in the Chamber, and we do not wish to increase those pressures by recommending too many instruments for debate.**

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48 Para 1.1.1.

49 The SIP Circulars 2(04) and 3(04).

CHAPTER 5: GROUNDS FOR DRAWING SPECIAL ATTENTION

67. In this chapter we consider briefly the grounds on which the Committee may draw the special attention of the House to a statutory instrument. Our views on how these grounds should be construed are, necessarily, at an early stage of development. The DPRRC commented in its submission that "experience and periodic review will provide the best information about how the Merits Committee can most effectively perform its function".[50]

68. There are four grounds set out in the terms of reference.[51] The first is distinguishable from the remaining three in that it can be described as "neutral" whereas the other grounds require the Committee to find some element, or apparent element, of deficiency. The grounds are:

(a) that an instrument is politically or legally important or gives rise to issues of public policy likely to be of interest to the House

69. This ground comprises three separate elements: that the instrument is "politically important", that it is "legally important" or that it "gives rise to issues of public policy likely to be of interest to the House". The Committee has already reported a number of statutory instruments on this ground.[52] So far we have not distinguished between the three elements but have referred to the ground as a whole.

70. A recent example of a negative instrument which caused a significant degree of interest in the House is SI 2004/402 Education (Pupil Exclusions) (Miscellaneous Amendments) (England) Regulations 2004 which (amongst other things) explicitly provided that the standard of proof for the exclusion of a pupil should be the "balance of probabilities" (a lower standard of proof than "beyond reasonable doubt"). A motion to annul the instrument was debated in the House, reflecting concern that the lower standard of proof could adversely affect the right of a pupil to be treated fairly when a decision to exclude him or her was being considered.

71. Baroness Williams of Crosby suggested that the Committee should highlight statutory instruments which affect the rights and obligations of citizens, which disadvantage any particular segment of the population, and which involve disproportionate burdens.[53] The Law Society suggested that one issue which the Committee should focus on is the "workability" of an instrument.[54]

(b) that an instrument is inappropriate in view of the changed circumstances since the passage of the parent Act

72. We envisage that this ground may apply when, for example, an Act was passed a significant number of years ago – perhaps in response to particular conditions

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50 Memorandum from the DPRRC, p 40.

51 See inside front cover.

52 The Committee has reported, for example, on a package of instruments relating to EU enlargement (2nd Report, HL Paper 72, and 6th Report, HL Paper 85, Session 2003-04), and on the draft guidance issued under the Licensing Act 2003 (2nd Report).

53 Evidence of Baroness Williams of Crosby, p 32.

54 Evidence of The Law Society, p 51.

prevailing at the time – and, as a result, secondary legislation made under the Act may no longer be appropriate to current conditions.

(c) that an instrument inappropriately implements EU legislation

73. The JCSI submission suggests that this ground might provide the most likely point of overlap between the Merits Committee and the JCSI (since the JCSI, in considering instruments that implement EU legislation, may have to compare "the result required by the EU legislation with the result achieved by the regulations"). The JCSI concluded, and we agree, that our functions in this respect are clearly distinguishable because the "issues considered by the Joint Committee remain essentially technical ones".

74. A number of witnesses expressed concern about "gold-plating" by Government when implementing EU legislation and suggested that this was an issue to which the Committee could pay particular regard.[55] Lord Strathclyde, the Leader of the Opposition in the Lords, said: "I … hope that [the Committee] will direct particular attention to the danger of "gold-plating" of EU directives by Departments". Lord Craig of Radley, Convenor of the Crossbench Peers, said: "One issue of general concern is a perception that EU directives are "gold-plated" when brought forward in secondary legislation" and that it would be "most helpful" if the Merits Committee could comment on this where appropriate. Lord Skelmersdale suggested that once we "get in full swing", we might like to consider "naming and shaming Departments for "gold-plating"".

75. The recent report of the Lords' European Union Committee, which reviewed scrutiny of European legislation,[56] commented: "We recommend that … the scrutiny of delegated legislation implementing EU law be a key task of the House's proposed new committee on Statutory Instruments. … The new committee could also … invite the views of MEPs on whether any gold-plating had taken place".[57] Lord Grenfell, in his submission to us on behalf of the EU Committee, suggested that an analysis by the Merits Committee "of what might constitute gold-plating would be very timely …".

76. **We recognise the importance of this aspect of the Committee's work and will consider how best to identify relevant instruments**.

(d) that an instrument imperfectly achieves its policy objectives

77. In order to decide whether this ground applies, we will take into account the Government's statement (in an EM) about the purpose of an instrument, and take a view on whether the proposed purpose appears to be met by the instrument. We envisage that there will be occasions where this may include consideration of the "workability" of an instrument as a mechanism for

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55 "Gold-plating is when implementation goes beyond the minimum necessary to comply with a directive, by: extending the scope, adding in some way to the substantive requirement, or substituting wider UK legal terms for those used in the directive …; or, not taking full advantage of any derogations which keep requirements to a minimum …; or, providing sanctions, enforcement mechanisms and matters such as burden of proof which go beyond the minimum needed …; or, implementing early, before the date given in the directive." Transposition Guide: How to Implement European Directives Effectively, Cabinet Office (March 2003).

56 First Report, Review of Scrutiny of European Legislation, HL Paper 15, Session 2002-03.

57 Ibid, p 24, para 97.

implementing a policy objective, as well as the substantive effect of the instrument.

CHAPTER 6: LOOKING FORWARD

Indicators of success

78. We asked a number of witnesses what would be an indicator of the success of the Committee. Lord Strathclyde said that we would "have achieved success if there were far fewer instances than there are now of companies, charities and other bodies complaining of the impact of vexatious regulation which has been passed with limited discussion by Parliament".[58] Lord Skelmersdale suggested that our success will be judged on whether our reports gain the same respect as that accorded reports of the DPRRC, "in this connection their job is to stop the horse from bolting, yours is to stop it after it has bolted!"[59] Lord Wakeham suggested that the success of the Committee should be seen in terms of better provision of information about statutory instruments to the House.[60]

79. We are aware that there is some concern that reports of the Merits Committee may lead to an increase in the number of motions relating to negative instruments. This will inevitably increase pressure on the Parliamentary timetable. The Committee may also, however, act as a mechanism for relieving pressure on the Parliamentary timetable. We have already referred to the evidence of the DPRRC which suggested that, if the Merits Committee were to become an established and authoritative component of the delegated legislative process, then this may, potentially, lead to fewer affirmative and more negative instruments in future legislation.

80. Furthermore, in encouraging Government Departments to provide further or clearer information about statutory instruments, in particular negative instruments, some concern and hence some debate may be pre-empted. Debate may also be pre-empted if the Committee encourages greater vigilance on the part of Departments to prevent instruments from falling within the scope of the second, third and fourth of our grounds for drawing special attention.

81. Finally, the House may wish, in due course, to charge the Merits Committee with the task of indicating which affirmative instruments do not warrant debate. This will be a matter for the review of our terms of reference which is to take place at the end of this session.

Reviewing the terms of reference

82. In reviewing our terms of reference at the end of the session, it is our intention to reflect on our performance and methods of working in order to consider what improvements might be made. We will consider what criteria can be applied to assess our achievements and shortcomings, and how our performance measures up against those criteria. We will report our conclusions to the House.

Invitation to comment

83. With this in mind, we would welcome throughout the year any comments from Members of the House, Departmental officials and others on the work of the

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58 Evidence of Lord Strathclyde, p 31.

59 Evidence of Lord Skelmersdale, p 35.

60 Evidence of Lord Wakeham, p 37.

Committee. Information on how to contact the Committee is set out on the inside front cover of this Report.

APPENDIX 1: DECLARATION OF INTERESTS

Lord Addington

Adviser, Maybeck Communications Ltd (33 St. James's Square, London SW1) (no personal clients and no remuneration received to date)
Chairman, Purcell & Company
Vice President, British Dyslexia Association
Vice President, Lakenham Hewitt Rugby Club
Vice President, Lonsdale Club
Vice President, UK Sports Association
Patron, Adult Dyslexia Association
Patron, Carousel

Lord Armstrong of Ilminster

Director, Forensic Investigative Associates plc
Chairman, Board of Governors, Royal Northern College of Music
Chancellor, University of Hull
Chairman, Leeds Castle Foundation
Chairman, Hestercombe Gardens Trust
Trustee, RVW Trust
Trustee, Derek Hill Foundation

Lord Boston of Faversham

Two properties let as holiday cottages
Trustee, Leeds Castle Foundation, Leeds Castle, Maidstone, Kent (a charity)
President, The Faversham Society (a local amenity society; a charity)
Chairman, The Sheppey Group (formed to safeguard areas of Kent and Essex from proposals for a third London airport; has not been active for some twenty-or-so years
Fellow, Royal Society of Arts

Viscount Colville of Culross

Assistant Surveillance Commissioner under Regulation of Investigating Powers Act 2000

Lord Desai

Chairman, AHA Communications Ltd (a company producing brochures and designing websites)
Director, Centre for the Study of Global Governance, London School of Economics
Professor of Economics, London School of Economics
Secretarial assistance provided at place of full-time employment (London School of Economics)
Hon. President, City Roads (drug rehabilitation charity)
Hon. President, Islington South and Finsbury Labour Party
Trustee, Tribune Newspaper

Lord Graham of Edmonton

Consultancy with the Co-operative Group (£16,000 per annum)

Lord Hunt of Kings Heath

Senior Policy Advisor, Sainsbury Centre for Mental Health
Senior Policy Advisor, Kings Fund
Member, Advisory Board, Commission for Health Audit and Inspection
Advisor, University Hospital Birmingham NHS Trust
Advisor, Beechcroft Wansbroughs Lawyers
Advisor, Harrogate Management Centre
Advisor, Turning Point (Substance Abuse Charity)
Advisor, KPMG (Accountants)
Advisor, Long Term Conditions Alliance
Columnist, Health Services Journal
Regular speaking engagements on variety of subjects in relation to the NHS and

healthcare issues
Associate, Cumberlege Connections
Chair, Birmingham and Black Country Health Authority Modernisation Board
Chair, National Patient Safety Agency
Parliamentary Supporter of the Patients Association
Patron, Birmingham Centre for Arts Therapies
Patron, Comprehensive Future
Patron, Rethink
Patron, Family Planning Association
Co-operative Party
Cyclist Touring Club
Labour Party
Socialist Education Association
Socialist Health Association
St. Mary's Hospice, Birmingham
UK Public Health Association
Unison (trade union)
Warwickshire County Cricket Club

Lord Jopling

Owner of rented houses in North Yorkshire
Part owner of agricultural land in North Yorkshire
Partner in farming business in North Yorkshire
Member of the Court, York University
President Emeritus, Auto Cycle Union
President, Despatch Association

Lord Methuen

Chairman of Trustees of the Lady Margaret Hungerford Charity (which has alms houses and schoolroom in Corsham, Wiltshire)

Earl of Northesk

A number of tenanted properties in West Sussex and the Isle of Man

Viscount Ullswater

Regular part-time consultancy to Newmarket Countryside Race Day
Director, Lowther Park Farms Ltd, Cumbria
Cottage in Norfolk rented out as holiday home
Elected Councillor of Docking Ward of King's Lynn & West Norfolk Borough Council
Trustee of small landowning trusts in Cumbria and Devon
Life Member, Supporters of Nuclear Energy (SONE)

APPENDIX 2: LIST OF WITNESSES

Written Evidence was received from:

Baroness Amos, Leader of the House of Lords and Lord President of the Council

Lord Strathclyde, Leader of the Opposition, House of Lords

Baroness Williams of Crosby, Leader of the Liberal Democrat Party, House of Lords

Lord Craig of Radley, Convenor of the Crossbench Peers, House of Lords

Lord Skelmersdale

Lord Wakeham

Lord Grenfell, Chairman of the European Union Committee, House of Lords

Lord Dahrendorf, Chairman of the Delegated Powers and Regulatory Reform Committee, House of Lords

Mr David Tredinnick MP, Chairman of the Joint Committee on Statutory Instruments

Mr Alex Brazier, Senior Researcher, The Hansard Society

Ms Vicki Chapman, Head of Law Reform, The Law Society

Mr Michael Pownall, Clerk Assistant and Clerk of Legislation, House of Lords

APPENDIX 3: WRITTEN EVIDENCE

Baroness Amos, Leader of House of Lords and Lord President of the Council

Letter from the Chairman to the Leader of the House

The Merits Committee held its first meeting on 13 January. Bearing in mind the task ahead of us, we have decided to begin by considering our terms of reference and working methods.

In order to perform our function effectively, it will be important for the Committee to have an accurate understanding of the policy behind the statutory instruments before us. I recognise that there are already some sources of information available (Explanatory Notes, Regulatory Impact Assessments and Transposition Notes). Some of these sources are more useful to the Committee than others, and some are available only in respect of certain categories of instrument.

It is clear that the demanding workload of the Merits Committee can only be met successfully with the co-operation of Departments. I am writing, therefore, on behalf of the Committee, to ask Government Departments to provide an explanatory memorandum in respect of all statutory instruments falling within the Committee's remit. The purpose of the memorandum will be to assist the Committee in coming to a view about whether an instrument should be drawn to the special attention of the House on any of the grounds specified in the terms of reference. We are at an early stage in our work, and it is therefore likely that our views about the content of Explanatory Memoranda will develop further. However, at present, we believe that it would be helpful if a Memorandum were to set out a brief statement of the purpose of an instrument and provide information about its policy objective and policy implications.

It is likely that we would publish all or part of Explanatory Memoranda.

We aim to begin our substantive work shortly before the Easter recess. We would therefore be grateful if the Explanatory Memoranda could be provided on a regular basis in time to meet that intention.

Your help and support would be very much appreciated.

27 January 2004

Questions to the Leader of the House from the Chairman

1. What in your view would be an indication of the success of the Committee?

2. How should the Committee complement the work of existing scrutiny Parliamentary committees? In particular, how should the Committee interact with the Joint Committee on Statutory Instruments?

3. Should there be a practice in the House that no statutory instrument is debated before the Committee has reported on that instrument?

4. Aside from the issue of an explanatory memorandum (see letter of 27 January), what assistance can Government departments give to enable the Committee to perform its role effectively?

5. When the Committee reports substantively on an instrument, how should that report be taken forward?

6. What are the implications of the Committee's work for the timetabling of business on the floor of the House? What capacity is there in the timetabling of business for additional debates on statutory instruments in the Chamber?

7. What contribution do you envisage the Committee will make generally to improving the secondary legislative process?

10 February 2004

Response to the Chairman from the Leader of the House

Thank you for your letters of 27 January and 10 February 2004, and for sending me a copy of your first special report on your methods of working.

I have set out answers to each of your questions below. The answers supplied are being given on behalf of Her Majesty's Government as a whole.

Will Government Departments provide an explanatory memo in respect of all SIs falling within the Committee's remit (setting out a brief statement of the purpose of an instrument and providing information about its policy objective and policy implications)?

All Departments already lay affirmative instruments with an explanatory memorandum. However, although practice varies I understand that most Departments do not lay explanatory memoranda with negative instruments.

Some Departments are very concerned about the resource implications of agreeing to the Committee's request of providing an explanatory memorandum for all negative instruments. Some Departments lay over 100 negative instruments a year, and if each of these has to be accompanied by a document not previously prepared then there will be significant staff and time resource implications. Negative instruments are of course already laid with Explanatory Notes which go some way to providing the information you need.

Nevertheless I understand your view that in order for the Committee to scrutinise instruments effectively you need this co-operation from Departments. I am also aware that your secretariat has been working very constructively with officials from across Government on how best to work together without overburdening Departments.

Although we think that there may be a case for asking you to call for evidence on individual instruments that you are interested in, rather than asking for evidence to be provided when all instruments are laid, calling for evidence takes time. It would be most helpful for the House if you can report on all negatives as soon as possible after laying, in order that there is time within the 40 day praying period for any motions arising from your report to be debated. Therefore we will undertake to provide (and publish) a short policy Explanatory Memorandum for each negative instrument laid before Parliament. (I understand, and welcome, the fact that you will not be considering instruments laid before the House of Commons only. However for presentational reasons I do not think Her Majesty's Government should limit their provision of Explanatory Memoranda to instruments laid before this House).

In return we request that your Committee and the Joint Committee on Statutory Instruments work together to provide clear instructions on the contents of a single explanatory memorandum for each instrument that would meet the information requirements of both Committees. This would mean that when an instrument was laid, it would be laid with just one memorandum, covering the information already provided in respect of affirmative instruments, the additional information which will be required by the Merits Committee, and any information that would previously have gone in a voluntary memorandum to the Joint Committee on Statutory Instruments.

I also hope that your secretariat will work with Departmental officials to identify certain types of statutory instruments which need only very limited explanation. For example I would hope you would not require full explanatory memoranda for statutory instruments that simply uprate costs in line with inflation. In such cases I hope Departments could provide a memo which would simply say: "This instrument uprates costs in line with inflation and has no policy implications".

I understand the terms of reference of your Committee will be reviewed after one year and I think it would be useful if at that point the provision of a single explanatory memorandum were reviewed.

1. What would Her Majesty's Government see as an indication of the success of the Committee?

Her Majesty's Government thinks that this Committee would be of most use to the House and the legislative process if it helps to focus debate on SIs. At the moment all affirmatives get some substantive time on the Floor of the House. Which negative SIs get debated depends on which happen to come to the attention of members of the House. If this Committee works well then there will be some affirmative SIs which the House can agree warrant very little debate on policy grounds, and members of the House will have a more strategic view on which negative SIs are worth tabling a motion against.

2. How should the Committee complement the work of existing scrutiny Parliamentary committees? In particular, how should the Committee interact with the Joint Committee on Statutory Instruments?

Her Majesty's Government sees very distinct roles for the JCSI and the new SI Merits Committee.

To assist the House we would hope your new Committee will work to a similar timetable for reporting on instruments as the JCSI.

As mentioned above, we would like the Committees to work together to devise advice to Departments on what to put in a single memo to accompany all instruments which will satisfy both Committees.

3. Should there be a practice in the House that no statutory instrument is debated before the Committee has reported on that instrument?

This is ultimately a matter for the House. However at this stage Her Majesty's Government does not support any proposal for a Standing Order, or even a convention, that would stop the House debating an SI before the Committee has reported on it. Although there is such guidance for JCSI reports, there is a good reason for that. The JCSI look at the drafting and legal basis for an instrument and it is vital that Parliament know of problems in those areas before looking at the policy behind an instrument.

If the Committee is able to work to the same timetable as the JCSI, then there should be very few cases when an instrument is put to the House before both Committees have reported on it.

4. Aside from the issue of an explanatory memorandum (see letter of 27 January), what assistance can Government departments give to enable the Committee to perform its role effectively?

Her Majesty's Government understands that the Committee has the power to send for papers and persons, and of course officials and Ministers will give evidence to the Committee when required. We do hope the Committee will use the power discerningly, bearing in mind the resource implications involved for Ministers and officials if they are regularly asked to give evidence.

For SIs that are to be debated I have no doubt that officials will use your reports to inform ministerial briefings. I also understand that Departments have undertaken to supply your Committee with 13 copies of each SI.

5. When the Committee reports substantively on an instrument, how should that report be taken forward?

Like the Delegated Powers and Regulatory Reform Committee, this committee draws issues to the attention of the House, rather than making recommendations directly to Her Majesty's Government. We would therefore not expect to issue responses to each Committee report. We would expect that if a member of the House thought that the Committee's report highlighted a point of substance then that member would pursue the point with a Minister. There will inevitably be occasions when a point of substance does not necessarily need to lead to a debate, particularly if it is minor and/or time critical. In such cases it may be appropriate for a member to write to the Minister concerned or table a written or starred question in the House. At other times members may want to raise the point in the debate on an affirmative instrument, or they may occasionally wish to table a motion to inspire a debate on a negative instrument.

We note that current practice has it that motions against negative instruments are mostly drafted on "Prayers", which are fatal if agreed by the House. We hope members of the House simply wishing to debate a point made in your report will use the option of non-fatal motions to allow debate.

6. What are the implications of the Committee's work for the timetabling of business on the floor of the House? What capacity is there in the timetabling of business for additional debates on statutory instruments in the Chamber?

Debates on affirmative instruments usually take place in the dinner break, at the end of business, or on Fridays. These same time slots are used for Unstarred Questions, Private Members Bills and occasionally Select Committee Reports. Should there be an increase in the time needed to debate statutory instruments then this would mean a reduction in the time available for Unstarred Questions, Private Members Bills and Committee reports. We expect that this would be unpopular with back benchers.

If your Committee does result in an increase in the amount of time taken to debate SIs, then it might be worth considering whether the debates on SIs should take place in some form of Grand Committee.

7. What contribution do you envisage the Committee will make generally to improving the secondary legislative process?

As described above, Her Majesty's Government think the Committee will be working well if it results in more focused debate on SIs.

19 March 2004

Lord Strathclyde, Leader of the Opposition, House of Lords

Questions to Lord Strathclyde from the Chairman

1. What should be the primary aim of the Committee? What would be an indication of the success of the Committee?

2. How should the Committee complement the work of existing scrutiny Parliamentary committees? In particular, how should the Committee interact with the Joint Committee on Statutory Instruments?

3. Should there be a practice in the House that no statutory instrument is debated before the Committee has reported on that instrument?

4. What assistance should Government departments give to enable the Committee to perform its role effectively?

5. When the Committee reports substantively on an instrument, how should that report be taken forward?

6. Do you think that the implications of the Committee's work for the timetabling of business on the floor of the House should have a bearing on the Committee's decisions?

7. What contribution do you envisage the Committee will make generally to improving the secondary legislative process?

10 February 2004

Response to the Chairman from Lord Strathclyde

Thank you for your letter of 10 February about the work of the Committee. I am sorry for the late reply. This is no reflection on the importance of your Committee which I strongly support. It is simply that there has been a great deal going on.

Can I answer your questions as follows:

1. The primary aim of the Committee is specified in its Terms of Reference – to draw the attention of the House to Statutory Instruments that especially merit its attention by reason of their policy or legal significance. I also hope that it will direct particular attention to the danger of "gold-plating" of EU directives by Departments. The Committee would have achieved success if there were far fewer instances than there are now of companies, charities and other bodies complaining of the impact of vexatious regulation which has been passed with limited discussion in Parliament.

2. It is a matter for the two Committees how they should interact.

3. No – the House's right to debate an SI must be unfettered. It would be helpful for the Committee to have deliberated, but there may be circumstances where the Committee did not take into account sufficiently issues judged of importance by members of the House with particular expertise or knowledge of a subject and thus where the House would wish to discuss an SI not highlighted by the Committee.

4. Government Departments should answer all questions from the Committee as if they were questions addressed to the government by any member of the House. No information should be withheld unless it is prejudicial to the national interest or legitimately withheld from Parliament under laws covering Freedom of Information. If circumstances warrant it and the Committee is conducting a study of particular depth, then Ministers and officials should be ready to give oral or written evidence.

5. It should be reported to the House and laid in the PPO as is done with reports of the Delegated Powers and Regulatory Reform Committee.

6. No.

7. I hope it will significantly improve the House's ability to focus on and scrutinize major regulatory change, pending any wider reform of the way in which secondary legislation is considered by Parliament, which is something that the Committee in due time may wish to

reflect on. However, I would underline the importance of the House's right to reject secondary legislation, which should be retained in any reform.

I hope this is helpful.

5 March 2004

Baroness Williams of Crosby, Leader of the Liberal Democrat Party, House of Lords

Questions to Baroness Williams of Crosby from the Chairman

1. What should be the primary aim of the Committee? What would be an indication of the success of the Committee?

2. How should the Committee complement the work of existing scrutiny Parliamentary committees? In particular, how should the Committee interact with the Joint Committee on Statutory Instruments?

3. Should there be a practice in the House that no statutory instrument is debated before the Committee has reported on that instrument?

4. What assistance should Government departments give to enable the Committee to perform its role effectively?

5. When the Committee reports substantively on an instrument, how should that report be taken forward?

6. Do you think that the implications of the Committee's work for the timetabling of business on the floor of the House should have a bearing on the Committee's decisions?

7. What contribution do you envisage the Committee will make generally to improving the secondary legislative process?

12 February 2004

Response to the Chairman from Baroness Williams of Crosby

Thank you for your letter of 12 February. I am grateful for the Special Report, and must congratulate you on your approach.

Let me comment on each of your questions:

1. Given the large number of statutory instruments the Committee will have to consider, a key indication of the success of the Committee would be its ability to highlight statutory instruments 1) which affect the rights and obligations of citizens, 2) which disadvantage any particularly segment of our citizens, or 3) which involve disproportionate burdens. I hope the Committee will also look closely at SIs identified by the Select Committee on Delegated Powers and Regulatory Reform as more appropriately dealt with by primary legislation.

2. Close co-operation. The Joint Committee on Statutory Instruments should be ready to refer SIs on to the new Committee on the merits of the relevant SI.

3. Yes, there should be, but the Committee should work closely with Departments to ensure this occurs. The Committee should feel free to report to the House if any Department is unhelpful in this respect.

4. Departments should forewarn the Committee of important SIs or groups of SIs. Departments should also be encouraged to avoid skeleton legislation as far as possible i.e. legislation of a framework nature, with important details left to SIs.

5. I would like to see the Committee able to recommend which SIs should be subject to affirmative resolution, reserving also the right to recommend primary legislation.

6. I think there should be regular allocation of Parliamentary time to debate the Committee's decisions.

7. I regard the Committee's work as vital if executive responsibility to Parliament is to be maintained. It should also curb the excessive reliance on secondary legislation, and may even encourage Governments to reduce the volume of legislation, primary and secondary, to some extent.

I hope these comments are useful.

24 February 2004

Lord Craig of Radley, Convenor of the Crossbench Peers, House of Lords

Questions to Lord Craig of Radley from the Chairman

1. What should be the primary aim of the Committee? What would be an indication of the success of the Committee?

2. How should the Committee complement the work of existing scrutiny Parliamentary committees? In particular, how should the Committee interact with the Joint Committee on Statutory Instruments?

3. Should there be a practice in the House that no statutory instrument is debated before the Committee has reported on that instrument?

4. What assistance should Government departments give to enable the Committee to perform its role effectively?

5. When the Committee reports substantively on an instrument, how should that report be taken forward?

6. Do you think that the implications of the Committee's work for the timetabling of business on the floor of the House should have a bearing on the Committee's decisions?

7. What contribution do you envisage the Committee will make generally to improving the secondary legislative process?

10 February 2004

Response to the Chairman from Lord Craig of Radley

Thank you for your letter and questionnaire about your Select Committee.

My comments on your questions are:-

1. The primary aim should be to ensure that the House is alerted in good time to SIs of major impact. A review of the response of the House to the SIs that you have drawn to its attention might indicate the extent to which your scrutiny and comment has been helpful – and thus give an indication of success.

2. Liaison between your Committee and the Joint Committee on Statutory Instruments will be essential, but their interest (vires) and yours on 'merits' should ensure that you are not duplicating work unnecessarily.

3. Yes – but presumably you will not be reporting on every single SI, so those that you do not consider should not be delayed.

4. Rapid and informed responses from departments will be of key importance if your work is not to be delayed. In time you might be able to develop a 'template' for responses, which should aim to be clear and not relying on lists of 'references'.

5. Your reports should be laid before the House and the Usual Channels should aim to give sufficient time for them to be seen and studied before the SI is debated.

6. It will be more convenient if your committee's work can be meshed with forthcoming business planning, so that both you and Whips can programme work.

7. Can only be determined by results! But if your work is programmed to be available to assist consideration of the SI on the floor of the House, and concentrates on identifying the more important SIs that will be helpful.

One issue of general concern is a perception that EU directives are "gold-plated" when brought forward in secondary legislation. It could be most helpful if you could make a particular comment about this when considering SIs that have an EU directive origin.

25 February 2004

Lord Skelmersdale

Questions to Lord Skelmersdale from the Chairman

1. Within the scope of the Merits Committee's terms of reference, what do you think would be an indication of the success of the Committee?

2. The Committee is required to report on both affirmative and negative instruments. Do you think that they should approach these two types of instruments differently, given that, irrespective of the views of the Committee, affirmative instruments will be debated on the floor of the House?

3. The Committee's workload is significantly large. Does your experience of statutory instruments suggest to you that there might be categories of instrument which are less likely than others to give rise to issues of interest?

4. In your written submission to the Delegated Powers Committee in 1993 (1st Report, Session 1992-93, HL Paper 57), you express some concern about the length of the "praying time" in respect of negative instruments and the difficulty experienced by the JCSI in reporting before its expiry. How do you think this problem will impact on the work of the Merits Committee?

5. What contribution do you envisage the Merits Committee will make generally to improving the secondary legislative process?

10 February 2004

Response to the Chairman from Lord Skelmersdale

As you will appreciate I have been involved in subjects to be covered by your Committee for over ten years. At that time I was a Lord in Waiting and I found my frustration growing on two counts.

1. That backbenchers were often ill-informed on Statutory Instruments as to where the government of the day were coming from. Sometimes this even stretched to the front bench members covering the subject for the Opposition – not, as I am sure you will be the first to appreciate, a happy way to pass legislation: legislation incidentally which regularly affects people's lives far more than the original Act from which it stems.

2. That Affirmative Instruments, which have of course to be debated under our standing orders, are laid as Affirmatives, simply because the parent Act says so. Pneumoconiosis orders, such as we debated on Thursday last week, are a case in point. What a waste of everyone's time!

That brings me to your Committee. You will know that before it was finally decided upon, it went under the working title of "a Statutory Instruments Policy Committee". I still see this as your major work: to ascertain, as far as possible, whether the SI in question follows the policy of the parent Act or EU legislation. Over the years the Joint Committee has stretched its orders of reference to partially cover this point, but "exceptional use of powers" is no replacement for the job which needs to be done and the JCSI is not equipped to deal with anything but the most obvious abuses. Although the meetings are short, the work preparation takes an inordinate amount of time, and some weeks I have to take a full day on it. That's just me: what about the legal advisers, who read orders much more thoroughly than I, as a layman, can possibly hope to achieve?

I will answer your questions in order against this background.

1. The success of your Committee will be judged on whether your reports are useful to the House generally, and gain the same respect – and almost unwavering agreement of the Government and the House – as the Delegated Powers and Regulatory Reform Committee. In this connection their job is to stop the horse from bolting, yours is to stop it after it has bolted!

2. Clearly with over 3,000 SIs in a normal year it's impossible to cover both Affirmatives and Negatives properly. In my judgment, Affirmatives on the whole look after themselves, as, since they have to be debated, the Opposition spokesman and sometimes backbenchers have to research them pretty thoroughly, so as to debate them properly. It follows then that I feel that your major work should be in the field of negative instruments.

I should add, though, my point about debating Affirmatives. In an exchange with Lord Williams of Mostyn on this subject, I put it to him that something your Committee could usefully do is recommend to the House that such and such an instrument be not debated, and would be taken formally – unless of course a peer objected … if memory serves me right he replied that that was something the Committee could usefully do ... or words to that effect.

3. As far as categories of instrument are concerned, I am sure that the key word is "topicality". Anything that has featured in the media in the last, say, 6 months would fall into this category. Clearly, the same would apply to anything which had been the subject of recent Debate. This, I would suppose, is the political element to your Committee's work, and the Clerk and members would be best placed to judge the importance of such an order. I have of course already made the point that on the whole Affirmative Instruments are not worth much effort on your behalf.

4. The length of "praying time" has long been a problem. 40 sitting days is not very long for peers to assimilate the report of either the JCSI, or yourselves, put down a prayer, and have the

Government whips find a suitable date for its debate, given that praying time starts from the date an instrument is laid, and inevitably the two reports will take 10 or so days to be printed. Fairly recently, there has been talk of extending this to 60 days, which would be much more practical. However, I think I am right in saying that such a change would need an amendment to Statutory Instruments Act 1946.

This brings me to a subject that you might not have considered. For the last few years the JCSI has produced an annual report, mostly statistical of how Departments are reacting to that committee's suggestions and requirements. When you get in full swing, you might like to consider doing the same, and naming and shaming departments for "goldplating" E.U. legislation, or not taking up permitted derogations, or indeed anything else that experience dictates should be commented upon.

5. To my mind the whole point of the Merits Committee is to improve the legislative process, by recommending for debate those instruments which might otherwise pass by unnoticed, and to speed things up by having a formal (non-speaking) debate on some Affirmative Instruments. There has as you know been much debate in recent years about "the power of the executive" and I see the Merits Committee as a useful tool in investigating this, possibly leading to stemming or even checking it.

I have often made the point in outside speeches that a member of parliament is only as effective as the information he/she receives. Your Committee will be in a position to aid and abet their education. More power to your elbow.

1 March 2004

Lord Wakeham

Questions to Lord Wakeham from the Chairman

1. The Royal Commission on the Reform of the House of Lords recommended the creation of a "sifting committee" for statutory instruments. To what extent does the Merits Committee, with the Terms of Reference that it has been given by the House, meet the need identified by the Royal Commission?

2. What would be an indication of the success of the Committee?

3. How should the Committee complement the work of existing scrutiny Parliamentary committees?

4. The Royal Commission recommended that a reformed second chamber "should adopt an open-minded, flexible and innovative approach to the consideration of statutory instruments within the present procedural arrangements" (Recommendation 40). How do you think that this approach should work in relation to the Merits Committee and how its reports to the House should be taken forward?

5. Should there be a practice in the House that no statutory instrument is debated before the Committee has reported on that instrument?

6. What contribution do you envisage the Merits Committee will make generally to improving the secondary legislative process?

10 February 2004

Response to the Chairman from Lord Wakeham

Thank you for letter of 10 February 2004. I am happy to give you my personal views on the Questions you put to me.

Taking your questions in order.

1. I think a Merits Committee could well provide the sort of additional scrutiny of Secondary Legislation that we had in mind.

2. The Royal Commission's view was that the Second Chamber's principal role was to provide wise counsel on a wide range of issues, and in particular to review and offer advice on possible revision of legislation for Parliament to consider. If the Merits Committee is able by all the means available to it, to get the relevant information on the table in respect of Secondary Legislation then it will have done a good job.

3. I think its key role will be to get all the information that will be necessary for Parliament to make an informal judgment on any particular item of Secondary Legislation. We set out in Chapter 7 of our Report in some detail what we had in mind, but in my view it would include strong pressure on the Government to publish Instruments in Draft, to take evidence from Ministers, Officials and outsiders. All this will greatly help Parliament to make better judgments. It will also make a recommendation to the House as to how it thinks the House could best reach a decision on the matter.

4. In Paragraph 7.30 of our Report we indicate that any new committee could with advantage work closely with Departments and I suggest outsiders to anticipate what is coming along and get the necessary work done in good time.

5. My experience is never say never, but I would think that the occasions that the House considers a Statutory Instrument before the Committee has reported should be rare exceptions.

6. To exercise wise counsel requires experience and judgment but it also requires information and the Committee should be able to obtain that for the House.

23 February 2004

Lord Grenfell, Chairman of the European Union Committee, House of Lords

Questions to Lord Grenfell from the Chairman

1. In your report, Review of Scrutiny of European Legislation (HL Paper 15, Session 2002-03), you suggest that "scrutiny of secondary legislation implementing EU legislation … is weak and needs to be strengthened" (paragraph 96). What specific measures would help the Merits Committee to perform its task of scrutinising secondary legislation which implements EU legislation more effectively?

2. Are there any administrative mechanisms which can be put in place to promote collaborative working between the EU Committee and the Merits Committee?

3. The Merits Committee is required to draw to the special attention of the House those instruments which inappropriately implement European Union legislation. How would you construe "inappropriate implementation"? Are you aware of any examples?

4. In your report (HL 15, Session 2002-03), you suggest that the Merits Committee might invite evidence from MEPs on whether gold-plating has taken place. Are you aware of

whether gold-plating is a prevalent or increasing problem? By what other means can gold-plating be detected?

10 February 2004

Response to the Chairman from Lord Grenfell

Thank you for your letter of 10 February asking for some thoughts as you set up your new committee.

May I start by saying, on behalf of the European Union Committee and its Sub-Committees, how much I welcome the establishment of your Committee. You have a busy time ahead of you; but you also have a great opportunity to enhance parliamentary scrutiny of legislation at a stage that was not previously scrutinised in systematic way. I can assure you that I, and all those on the EU team, will do everything we can to assist you and your team as you move forward with your important work.

My general message is that our Committee seeks to look at EU legislation at the earliest possible stage in the legislative cycle. This means that we examine the Commission's Annual Work programme, and Green and White Papers. We do also examine draft legislation when this comes forward at a later stage. But your Committee's work will neatly complement ours by examining the later stage still, that of implementation.

Your letter asked four questions and I respond to each in turn.

1. Question 1 asked for suggestions on how your Committee might more effectively scrutinise secondary legislation implementing EU law, and you very kindly referred to my own Committee's Review of Scrutiny.

I can offer a number of practical suggestions:

> You might cross-check any instrument implementing EU law against the work of our Committee in scrutinising earlier drafts (see also question 2 below): here, as recommended in our Scrutiny Review, the chairs of our Sub-Committees, which conduct the detailed policy analysis, would be willing to assist your Committee as required.
>
> Your Committee will also wish to draw on the work of the Commons EU Scrutiny Committee where that is relevant.
>
> You might also seek to ascertain the views of key MEPs who were involved in agreeing the EU legislation – the Rapporteurs and shadow Rapporteurs of the relevant EP Committees might be able to assist. I know from conversations I have had that some at least are keen to do so.
>
> Finally, and perhaps most radically, your Committee and mine might jointly press the Government to include, in the explanatory material they produce on affirmative instruments (and indeed bills, and perhaps in the future on other kinds of instrument too) details, where the legislation implements EU law, of the "scrutiny history" – i.e. an account of what consideration both Houses gave to that legislation during the EU scrutiny process: this is information which departments already compile when presenting explanatory memoranda to our Committee on draft legislation, and it does not seem to be unreasonable to ask them to carry this over into explanatory notes on the implementing legislation too.

2. Your Question 2 asked about administrative mechanisms to ensure collaborative working between our two committees. As I am sure you are aware, your team has given a presentation to mine and mine to yours. Our staff are already co-operating at all levels to ensure exchange

of information. From our point of view, the key will be for your team to have a system in place to ensure that information in our reports, and particularly in our correspondence with ministers is, where relevant, marked and carried forward for consideration by your Committee in due course.

Our EU team are working on a number of enhancements to the presentation and dissemination of information, including via our website and through the PIMS project and its particular application to the European Scrutiny database. My team will ensure that every effort is made to ensure that enhancements in these areas are made with the interests of your Committee's staff, as key users, in mind.

3. On your Question 3, I do not think I can give you much of answer on "inappropriate implementation", as this is not a matter which the Committee has considered. Our Committee does not as a matter of course monitor the implementation of EU law, aiming as indicated above, to get in "upstream" at the earliest stage in the legislative cycle. All our Sub-Committees are, however, committed to follow up previous work and in doing so may touch on questions of implementation. Your Committee's work will, I am sure, assist us greatly in this regard.

One report that did examine implementation, albeit some time ago, was: 2nd Report, Community Environmental Law: Making it work, Session 1996-97, HL Paper 12. Relevant pages are on our website at:

http://pubs1.tso.parliament.uk/pa/ld199798/ldselect/ldeucom/012ii/ec0204.htm#a17

4. In Question 4 you rightly say that our Committee hoped that yours would investigate complaints of "gold-plating". Again I do not think I can offer you much assistance here, except to say that an analysis by your Committee of what might constitute gold-plating would be very timely, as this is again not a matter which we have ourselves studied in depth.

You have our best wishes for your work. Please do not hesitate to contact me or colleagues again at any time on any matter as your work moves forward. We will do our best to assist.

11 March 2004

Lord Dahrendorf, Chairman of the Delegated Powers and Regulatory Reform Committee

Questions to Lord Dahrendorf from the Chairman

1. In your Special Report for 1999-2000 (37th Report, Session 1999-2000), you refer to "the deficit in parliamentary scrutiny of secondary legislation" (paragraph 4), and in your Special Report for 1998-99 (29th Report, Session 1998-99) you say that "there is a widespread belief that the provision for parliamentary scrutiny of delegated legislation can be substantially improved" (paragraph 1). How do you think that the Merits Committee can most effectively achieve the improvement which you have identified as needed?

2. Do you anticipate that the establishment of the Merits Committee will have any impact on the decisions of the DPRRC?

3. The DPRRC and the Merits Committee perform complementary roles. Is there scope for the two committees to support each other in any of their work? Are there any administrative mechanisms which can be put in place to promote collaborative working between the DPRRC and the Merits Committee?

4. The DPRRC decides whether a power is appropriately delegated and, if it is, whether the level of parliamentary scrutiny is appropriate. Can you give an indication of the principles you apply when making those decisions? With respect to which subject areas of legislation does your Committee take the view that a higher degree of parliamentary scrutiny is usually warranted?

10 February 2004

Memorandum from the Delegated Powers and Regulatory Reform Committee

The Delegated Powers and Regulatory Reform Committee welcomes the appointment of the Merits of Statutory Instruments Committee as a further development of the scrutiny function of the House of Lords. We are pleased to contribute to your inquiry into working methods.

You have invited us to respond to four questions in particular:

1. In your Special Report for 1999-2000 (37th Report, Session 1999-2000), you refer to "the deficit in parliamentary scrutiny of secondary legislation" (paragraph 4), and in your Special Report for 1998-99 (29th Report, Session 1998-99) you say that "there is a widespread belief that the provision for parliamentary scrutiny of delegated legislation can be substantially improved" (paragraph 1). How do you think that the Merits Committee can most effectively achieve the improvement which you have identified as needed?

In providing policy scrutiny of delegated legislative instruments, the work of the Merits Committee will complement (a) the technical, legal scrutiny of such instruments by the Joint Committee on Statutory Instruments (JCSI) and (b) scrutiny of the parent (domestic and European Union (EU)) legislation by this Committee and by the EU Select Committees in the Lords and the Commons. We note that, just as this Committee has drawn attention to "the deficit in parliamentary scrutiny of secondary legislation", the House of Lords EU Committee has made a similar point in respect of EU implementing legislation. In a recent report, the Committee said: "scrutiny of secondary legislation implementing EU legislation … is weak and needs to be strengthened", and that scrutiny of delegated legislation implementing EU law should be "a key task" of the Merits Committee.[1]

Experience and periodic review will provide the best information about how the Merits Committee can most effectively perform its function. It appears to us, however, at this early stage, that there are at least two significant contributions which the Committee can make. First, given the impenetrability of many statutory instruments, it can generally assist the House by informing Members about the policy implications of statutory instruments. Second, given the difference in procedure which applies to negative and affirmative instruments (see the answer to the question 2 below), the Committee will particularly assist the House in its identification of negative instruments of special interest.

2. Do you anticipate that the establishment of the Merits Committee will have any impact on the decisions of the DPRRC?

The terms of reference of this Committee include a requirement "to report whether the provisions of any bill … subject the exercise of legislative power to an inappropriate level of parliamentary scrutiny". Where a delegated power is subject to the negative resolution procedure, therefore, the Committee will consider whether this is the appropriate procedure or whether the power is of such significance that the affirmative procedure should apply (either on the first use of the power or on every occasion). In considering this issue, the Committee will take account of the distinction between the two procedures and, in particular, the fact that

[1] Review of Scrutiny of European Legislation, First Report, Session 2002-03, paras 96-7.

in the Lords all affirmative instruments are debated in the Chamber whereas only those negatives in respect of which a motion has been tabled will be debated. We have been concerned therefore that instruments subject to negative procedure only could easily escape the attention of the House. The appointment of the Merits Committee addresses this concern; and the logical implication would appear to be, therefore, that there may be occasions where this Committee would endorse the application of the negative procedure in a particular instance where it would not have done prior to the appointment of the Merits Committee. This conclusion, of course, rests on the assumption that the Merits Committee is a permanent element of the legislative process and is made a sessional committee in due course.

3. The DPRRC and the Merits Committee perform complementary roles. Is there scope for the two committees to support each other in any of their work? Are there any administrative mechanisms which can be put in place to promote collaborative working between the DPRRC and the Merits Committee?

We agree that our Committees are complementary. We anticipate that if the Merits Committee were to become a fixture of the legislative process, then, following the answer to question 2 above, we would, where appropriate, refer in our reports to delegated powers to the exercise of which the Merits Committee may wish to pay particular regard.

In terms of the administrative mechanisms for collaboration, we have no doubt that this can be arranged at staff level to good effect. Those advising the Merits Committee may find reference to our reports of assistance.

4. The DPRRC decides whether a power is appropriately delegated and, if it is, whether the level of parliamentary scrutiny is appropriate. Can you give an indication of the principles you apply when making those decisions? With respect to which subject areas of legislation does your Committee take the view that a higher degree of parliamentary scrutiny is usually warranted?

We have recently issued guidance to Departments on the content of delegated powers memoranda.[2] An extract from that guidance is attached (Annex 2)(*not printed*) which we believe offers an answer to your question 4.

10 March 2004

Mr David Tredinnick, MP, Chairman of the Joint Committee on Statutory Instruments

Questions to Mr David Tredinnick, MP, from the Chairman

1. Is there any potential for overlap between the work of the JCSI and the Merits Committee?

2. Is there scope for the two committees to support each other in any of their work? Are there any administrative mechanisms which can be put in place to promote collaborative working between the JCSI and the Merits Committee?

3. How do you envisage the two committees working in terms of the time limits associated with statutory instruments? Is there any scope for the committees to work sequentially or will they have to work in parallel?

4. Will the reports of one committee have an impact on the work of the other, or is their decision-making wholly independent?

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[2] See Annex 2, 9th (Special) Report, Government response to the Committee's First (Special) Report, Session 2003-04, HL Paper 43.

5. What explanatory material is the JCSI provided with by Government departments to assist the committee with its work?

6. One piece of explanatory material is the Explanatory Note (EN) appended to each instrument. Does the JCSI share the view of the Merits Committee that the quality of the EN varies significantly?

7. More generally, has the JCSI developed an impression of whether the number or the complexity or the length of statutory instruments has increased over recent years?

10 February 2004

Response to the Chairman from Mr David Tredinnick, MP

1. Is there any potential for overlap between the work of the JCSI and the Merits Committee?

The Joint Committee's order of reference (contained in House of Commons Standing Order No. 151 and House of Lords Standing Order No. 74) sets out eight specific grounds on which it may draw an instrument to the special attention of both Houses. None of these grounds is directly concerned with the merits of an instrument. In addition, the Joint Committee may draw the attention of both Houses to an instrument on "any other ground which does not impinge on its merits or on the policy behind it."

The order of reference of the Merits Committee sets out four specific grounds on which it may draw an instrument to the attention of the House of Lords. All of these are concerned with the merits of the instrument in question.

It follows that the Joint Committee may not consider instruments on any ground which impinges on their merits, while the Merits Committee may consider instruments only on the four specific grounds stated, each of which relate to merits.

The Merits Committee is charged with considering whether any instrument "inappropriately implements EU legislation." A great deal of EU legislation is implemented in domestic law under the powers conferred by section 2(2) of the European Communities Act 1972. In such cases it is the role of the Joint Committee to consider whether a Minister, in making regulations under section 2(2), is acting *intra vires*. This may involve comparing the result required by the EU legislation with the result achieved by the regulations. In a few cases the Committee has drawn attention to instruments which do not fully implement the EU obligations they claim to be implementing. These two types of case might be said to involve consideration of whether the legislation inappropriately implements the EU legislation: but the issues considered by the Joint Committee remain essentially technical ones. It would therefore appear that such cases do not give rise to any overlap between the roles of the respective committees.

The orders of reference of the two Committees therefore appear to be complementary. In practical terms there is little potential for overlap, since the Joint Committee will not report an instrument on any grounds which impinge upon its merits or its underlying policy.

2. Is there scope for the two committees to support each other in any of their work? Are there any administrative mechanisms which can be put in place to promote collaborative working between the JCSI and the Merits Committee?

The mutually exclusive nature of both Committees' remits makes formal collaboration difficult. For instance, the Joint Committee would be unable formally to refer an instrument to the Merits Committee for consideration, since by doing so it would indicate that it had taken a view on the merits of an instrument. Similarly, the more circumscribed terms of reference of

the Merits Committee would appear to prohibit the formal reference of an instrument to the Joint Committee.

There are of course opportunities for Committees working in similar fields to support each other informally. The Merits Committee may know, for instance, that the Regulatory Reform Committee in the Commons and the Delegated Powers and Regulatory Reform Committee in the Lords exchange papers on a routine and informal basis. The Joint Committee would be happy for its staff to exchange papers and share appropriate information with the Merits Committee secretariat on this basis.

The Merits Committee's advisers will be required to examine all instruments which fall within the Committee's terms of reference laid before the House of Lords. They will therefore be examining a similar corpus of legislation to that examined by the Joint Committee's advisers. It should however be remembered that the task of scrutinising statutory instruments on their merits is a substantively different task from the scrutiny of statutory instruments to identify whether the special attention of both Houses should be drawn to them for any of the reasons set out in the Joint Committee's order of reference. The advisers to each committee will therefore find little benefit in substantive collaborative working, though an exchange of papers will keep each secretariat up to date with the work being undertaken by the other.

3. How do you envisage the two committees working in terms of the time limits associated with statutory instruments? Is there any scope for the committees to work sequentially or will they have to work in parallel?

The Joint Committee seeks to complete its scrutiny of the substantial workload of instruments before it as swiftly and as efficiently as possible.

It is open to any department wishing to lay an instrument subject to *affirmative resolution* ("an affirmative instrument") before Parliament to give the Committee's legal adviser an opportunity to see and comment on the draft before it is laid. This informal procedure enables any technical difficulties with an instrument to be addressed at an early stage. It also enables the Joint Committee to complete its scrutiny of affirmative instruments swiftly. In the majority of cases the Joint Committee will complete its consideration of an affirmative instrument within two weeks of the instrument being laid.

Where statutory instruments subject to *negative resolution* ("negative instruments") are to be drawn to the special attention of both Houses, the Committee considers that this should wherever possible be done within the statutory 40-day period set out in the Statutory Instruments Act 1946. In weeks where relatively few negative instruments are sent for scrutiny, it is normally possible for the Committee to complete consideration of an instrument within three weeks of copies being received by Committee staff, if the Committee has not identified points on which it may report. This period lengthens in weeks when the volume of instruments made and laid increases.

Where the Joint Committee has identified a point which may be taken on a negative instrument, completion of consideration is customarily delayed by a fortnight. This delay is occasioned by the instruction in the Committee's Standing Order "that before reporting that the special attention of the House be drawn to any instrument the committee do afford to any government department concerned therewith an opportunity of furnishing orally or in writing to it or to any subcommittee appointed by it such explanations as the department think fit." If the Committee agrees to seek a memorandum on a particular point from a department at a Tuesday afternoon meeting, the Department is normally requested to respond by the following Monday. The Committee will then consider the department's response and its ensuing action at the meeting a fortnight after the memorandum was requested.

As the House of Lords has not given any such instruction to the Merits Committee, that committee is free to complete consideration of an instrument and to report it to the House without having sought the Department's explanation for the points on which it intends to report.

In normal circumstances it is anticipated that the Committees will have to work in parallel, given the limited time presently available for the scrutiny of statutory instruments subject to negative resolution. Given their separate but complementary remits, it is not clear what benefits might be gained from the two Committees working sequentially, since neither committee would formally be able to take the report of the other into account.

4. Will the reports of one committee have an impact on the work of the other, or is their decision-making wholly independent?

Given the separate though complementary terms of reference of the Committees, the Joint Committee would not normally expect the Merits Committee to take particular account of its report on an instrument, nor vice versa.

5. What explanatory material is the JCSI provided with by Government departments to assist the committee with its work?

Statutory Instrument Practice (3rd edn, 2003, paras 5.4.16–5.4.19) sets out the circumstances in which the government is expected to provide a memorandum to the Joint Committee, in addition to the explanatory note printed with the instrument.

Whether or not a memorandum is provided initially, should the Joint Committee require further explanation of an instrument, it may request a memorandum (or a further memorandum) from the department concerned. In certain circumstances it may also require the department to send representatives to explain the instrument to the Committee in oral evidence.

When the Joint Committee reports an instrument in respect of which it has sought a memorandum, it will normally print that memorandum as an appendix to its report. The Committee may in addition choose to print with its reports other explanatory memoranda which it considers may be of general interest to both Houses.

The Merits Committee will note that since March 2001 government departments have been required to provide Parliament with general explanatory memoranda on all instruments subject to affirmative resolution (see HL Deb, 4 February 2001, col WA 76). These explanatory memoranda are laid before each House, together with the instruments to which they refer.

6. One piece of explanatory material is the Explanatory Note (EN) appended to each instrument. Does the JCSI share the view of the Merits Committee that the quality of the EN varies significantly?

Explanatory Notes are drafted in accordance with the guidance set out in Statutory Instrument Practice (3rd edn, 2003, paras 2.13.1–2.13.13). Previous reports of the Joint Committee have commented adversely on the inadequacy of information in certain explanatory notes, and on the inadequacy of explanatory notes in general (see Statutory Instrument Practice, para 2.13.3).

In the Joint Committee's view, the majority of explanatory notes fulfil the purpose for which they are designed, which is to give "a concise and clear statement of the substance and purport of the instrument" and to "assist the reader in deciding whether or not he needs to refer to the instrument itself". As such, they perform the same function in relation to a statutory instrument that, for example, an abstract of a scientific paper might perform in relation to the

whole paper. They explain what an instrument does, but they cannot explain the policy behind the instrument and cannot seek to construe the law.

While the quality of drafting of explanatory notes may vary, it is the Committee's view that they do not often fall outside the parameters set by Statutory Instrument Practice. Where individual explanatory notes have fallen below a standard which the Committee considers acceptable, the Committee has drawn the House's attention to them, and will continue to do so.

7. More generally, has the JCSI developed an impression of whether the number or the complexity or the length of statutory instruments has increased over recent years?

Statutory instruments have increased in number and in complexity over recent years. A recent note produced by the House of Commons Library[1] indicates the growth in the numbers of statutory instruments registered annually since 1950, although a better indication of their length may be the number of pages of secondary legislation produced each calendar year.

The complexity of statutory instruments must increase as Parliament enacts more and more legislation and accordingly delegates more powers to make secondary legislation, and as legislation made under existing powers is correspondingly amended and augmented. In addition, substantial and complex regulations implementing EU directives are frequently made under the power conferred by section 2(2) of the European Communities Act 1972. The advent of devolution has, in the Committee's view, increased the complexity of statutory instruments laid before Parliament, but has not led to a reduction in their number.

The annexed table sets out the numbers of statutory instruments considered by the Joint Committee in recent Parliamentary sessions, broken down by the category of procedure applicable. Since the numbers of instruments considered in a session fluctuate according to the length of the session, the average number of instruments considered each session over the last three complete Parliaments is also given.

10 March 2004

[1] "Acts and Statutory Instruments: numbers passed 1950 to 2003", Standard Note SG/2911, House of Commons Library, February 2004.

ANNEX

Instruments considered by the Joint Committee on Statutory Instruments by session, 1987–88 to 2002–03

Procedure applicable	1987-88	1988-89	1989-90	1990-91	1991-92	1992-93	1993-94	1994-95	1995-96	1996-97	1997-98	1998-99	1999-2000	2000-01	2001-02	2002-03
Instruments subject to affirmative procedure:																
Made	58	14	27	30	6	23	7	16	12	6	12	6	6	8	12	13
Draft	127	116	104	113	71	159	107	106	107	77	120	115	118	92	153	116
Instruments subject to negative procedure:																
Made	1073	805	870	808	388	1697	970	1156	1106	659	1659	1112	1094	498	1236	1076
Draft	8	5	5	1	1	5	4	7	21	4	21	6	11	0	2	1
Northern Ireland	61	58	49	39	26	83	45	47	62	33	83	29	29	5	30	59
Instruments not subject to Parliamentary proceedings laid before Parliament	81	50	59	37	27	90	48	40	29	24	67	36	42	27	34	37
Instruments not laid before Parliament	373	253	261	257	232	605	393	294	258	172	503	392	322	488	584	248
Orders subject to special Parliamentary procedure	7	5	8	6	2	10	0	0	1	2	1	1	1	2	1	1
TOTAL	**1788**	**1306**	**1383**	**1291**	**753**	**2672**	**1574**	**1666**	**1596**	**977**	**2466**	**1697**	**1623**	**1120**	**2052**	**1551**

Source: House of Commons Sessional Returns, Sessions 1987–88 — 2002–03

Average number of instruments considered each session, by Parliament:
1987–1992: 1304 1992–1997: 1697 1997–2001: 1726

Mr Alex Brazier, Senior Researcher, the Hansard Society

Letter to Mr Alex Brazier from the Chairman

As you may know, in December 2003, the House of Lords appointed a Select Committee on the Merits of Statutory Instruments of which I have the privilege to be Chairman. Given the challenges that face the Committee, in terms of its workload and objectives, we have decided to begin with a short inquiry into our working methods. I enclose a copy of our First Special Report (HL 18) announcing the inquiry. (The Report also sets out our terms of reference.) As you will see, we intend to conduct our investigations on the basis of written evidence with a view to beginning work proper by Easter.

We are aware that you are currently revisiting your earlier Commission report of 1993, Making the Law, and I read with interest your publication Hansard Society Briefing Papers, Issues in Law Making, 3. Delegated Legislation (December 2003). We would welcome any comments from you about how the Committee can most effectively contribute to the scrutiny of secondary legislation by the Lords.

In view of the timescale which we have set ourselves, it would be most helpful if you could respond to this request as soon as possible and, in any event, by Monday 1 March. If your office has any queries, please do not hesitate to contact the Clerk to the Committee, Christine Salmon, on 020 7219 3233 (salmonc@parliament.uk)

10 February 2004

Memorandum from the Hansard Society

1. **Introduction:** The Hansard Society is undertaking a review of its 1993 Commission report Making The Law to highlight critical issues in the legislative process, stimulate debate and identify options for change.[1] The third paper in this series, published in December 2003, looked at delegated legislation. The paper noted that the majority of delegated legislation is subject to little, if any, parliamentary scrutiny and that the parliamentary procedures that exist for scrutinising delegated legislation are widely seen as inadequate.[2]

2. **Procedure Committee Reports:** The Briefing Paper drew particular attention to reform proposals made in reports by the House of Commons Procedure Committee in 1996 and 2000, notably those for a sifting committee in both Houses to consider the political and legal significance of individual Statutory Instruments (SIs).

The Joint Committee on Statutory Instruments, which is charged with considering some aspects of SIs, has provided some level of scrutiny but it is expressly barred from considering the merits of any SI. Although no sifting committee has been established in the Commons [3], the decision by the House of Lords to establish a sifting committee is a positive and welcome development.

3. **Role and functions of Sifting Committees**: The Procedure Committee reports outlined the role and functions of a sifting committee:

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1 The Report of the Hansard Society Commission on the Legislative Process (1993), *Making the Law*, chaired by Lord Rippon of Hexham.

2 See Procedure Committee (1995-1996) Delegated Legislation, HC 152; Procedure Committee, (1999-2000) Delegated Legislation HC 48; Strengthening Parliament, Report of the Commission to Strengthen Parliament (Conservative Party) (2000).

3 First Report of the Procedure Committee (2002-03) Delegated Legislation: Proposals for a Sifting Committee, HC 50.

Sifting Committees should have the power to call for further information from government departments where necessary;

They would recommend which negative procedure instruments ought to be debated (regardless of whether any member of either House had "prayed" against them) and which affirmative instruments could be agreed to without debate (despite the requirement in the parent Act that one should take place), unless six Members demanded one;

At present all affirmative resolution SIs must be debated either in standing committee or on the floor of the House, though many are entirely uncontroversial and of no political interest and meetings may only last for a few minutes;

In contrast, many substantial negative resolution SIs are not subject to any parliamentary scrutiny when, on the face of it, they raise significant issues of which few members of either House are made aware.

The establishment of a House of Lords Merits Committee will help to ensure that these issues are addressed and that a more consistent and coherent approach to delegated legislation can be developed

4. **Delegated legislation in the House of Lords:** The Hansard Society paper drew attention to some distinctive features concerning delegated legislation in the House of Lords:

No SIs can be amended by either House. This means that the Lords would have to reject the SI entirely if they identified a problem, a path that they are usually unwilling to take. This is despite the fact that the power to reject delegated legislation is one of the few unilateral powers possessed by the Lords (on which they cannot be overruled by the Commons);

Since the passage of the House of Lords Act 1999, it has become clear that the conventions restraining the Lords from vetoing delegated legislation have been put under increasing strain. For example, in February 2000 the Lords agreed to two motions disapproving the GLA Elections Rules 2000 and the GLA (Election Expenses) Order 2000. In January 2001, the Human Fertilisation and Embryology Regulations 2000 were only agreed to on condition that the House set up a select committee to consider the issues raised by the regulation;

The House of Lords has set up a select committee on Delegated Powers and Regulatory Reform, which reports on the extent to which powers proposed to be delegated to Ministers in Bills appear to be appropriate in particular cases.

5. **Current concerns and criticisms** about the scrutiny of delegated legislation:

- the length, volume and technical complexity of many SIs can obscure important issues with the result that major changes to law and policy can come into force with little or no parliamentary scrutiny;
- the implications of an SI for other domestic or EU legislation may not be immediately apparent;
- the increasing instance of SIs being used to implement core policy decisions rather than fill out the detail of statutes.

6. **Proposals for reform** to improve the functioning and scrutiny of delegated legislation:

Conditional amendments: The Procedure Committee has raised the possibility of conditional amendments to SIs whereby an SI could be rejected but the terms under which it would be acceptable would be indicated. The Commission to Strengthen

Parliament described this as an "eminently sensible" solution and argued that this represented the best way to proceed.

Post-legislative scrutiny of SIs: As with primary legislation, it would be open to departmental select committees to commission research on the effect of particular SIs or to undertake a short inquiry. Lords committees could also scrutinise delegated legislation within its remit to assess its effects.

Extending the deregulation procedure: Blackburn and Kennon discussed whether deregulation procedures could provide a model for better scrutiny of SIs, arguing:

> "The only substantial improvement in parliamentary scrutiny of such legislation in recent years has been the introduction of deregulation orders. The deregulation procedure could be used for other SIs amending primary legislation, provided an Act was passed defining the categories other than the deregulation to which it would apply." [4]

Lessons from Scotland: The Scottish Parliament's procedures for dealing with secondary legislation involve a designated role for its committees and a guaranteed level of scrutiny. Westminster could evaluate whether there are lessons from Scotland that could strengthen its own procedures on dealing with delegated legislation. (See Appendix)

External consultation: Most draft social security delegated legislation is referred by the Government to the Social Security Advisory Committee (SSAC) before being presented to Parliament. The SSAC consults with public and interested bodies. The Secretary of State is obliged to take account of the SSAC's recommendations (although is not bound by them) and when the regulations in question are laid before Parliament, the SSAC's report and a statement explaining the Government responses to the recommendations must also be laid. This model of consultation may be appropriate in other specific areas of legislation.

7. **Conclusion:** The current parliamentary procedures for scrutinising delegated legislation are not working effectively. A wide range of bodies has reported on this subject in the last ten years and all have proposed substantial reforms. *Making The Law* acknowledged that the increasing use of delegated legislation over recent decades was inevitable, and indeed necessary, given the complexity of modern Government and the constraints on parliamentary time. However, it warned that the mechanisms for achieving effective parliamentary scrutiny were absent and needed to be implemented.

The House of Lords Merits Committee represents an important move in improving scrutiny of delegated legislation. In time, it may provide a model for an equivalent committee in the House of Commons.

Appendix: Subordinate Legislation in the Scottish Parliament.

The Scotland Act 1998 gave Ministers and the Scottish Executive the power to make subordinate legislation (delegated legislation) in any area in which the Scottish Parliament had devolved legislative powers. After a Scottish Statutory Instrument (SSI) is laid before the Clerk of Parliament, it is passed to and scrutinised by two committees.

SSIs are considered by the Subordinate Legislation Committee (SLC). Using specific criteria the SLC determines whether or not the SSI should be drawn to the attention of Parliament; for example, whether the SSI is *ultra vires* or has retrospective effects beyond the authority of the Parent Act. The SLC must report to Parliament within 20 days.

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[4] Blackburn, R and Kennon, A (2003) Griffith & Ryle on Parliament: functions, practice and procedures, London, Sweet and Maxwell.

The SSI is also scrutinised by at least one subject committee, under whose remit the instrument falls. If it falls under the jurisdiction of multiple committees, one committee is designated the "lead committee" and the other committees pass their recommendations to it.

SSIs are subject to either negative or affirmative procedure, depending on the stipulation in the Parent Act. The Parent Act may sometimes indicate that an SSI can be made without parliamentary approval. As in Westminster, instruments can only be approved, annulled or withdrawn; they cannot be amended:

Negative Procedure (Motion for Annulment): An MSP must move for annulment within 40 days of the SSI being laid down, otherwise the SSI is made. The MSP must propose the motion for annulment to the lead committee, where the issue can be debated for no more than 90 minutes. The lead committee must report to Parliament within the 40-day deadline with its recommendations. The SSI may be debated and then voted on by the full House, and if necessary the SSI is annulled.

Affirmative Procedure (Motion for Approval): The lead committee must decide whether the SSI should be recommended for parliamentary approval, and report to Parliament within 40 days of the SSI being laid. A member of the executive can propose to the lead committee that the SSI be approved. The issue can be debated for up to 90 minutes in the committee. Once the committee reports back to Parliament, a debate may take place in the House after which the issue is voted on.

25 February 2004

Ms Vicki Chapman, Head of Law Reform, The Law Society

Letter to Ms Vicki Chapman from the Chairman

In December 2003, the House of Lords appointed a Select Committee on the Merits of Statutory Instruments of which I have the privilege to be Chairman. Given the challenges that face the Committee, in terms of its workload and objectives, we have decided to begin with a short inquiry into our working methods. I enclose a copy of our First Special Report (HL 18) announcing the inquiry. (The Report also sets out our terms of reference.) As you will see, we intend to conduct our investigations on the basis of written evidence with a view to beginning work proper by Easter.

I understand that you have a particular interest in legislative scrutiny procedures. Should you have any comments about how the Merits Committee can most effectively contribute to the scrutiny of secondary legislation by the Lords, I would very much welcome them.

In view of the timescale which we have set ourselves, it would be most helpful if you could respond to this request as soon as possible and, in any event, by Monday 1 March. If your office has any queries, please do not hesitate to contact the Clerk to the Committee, Christine Salmon, on 020 7219 3233 (salmonc@parliament.uk).

12 February 2004

Response to the Chairman from The Law Society

Thank you very much for your letter of 12 February and for agreeing to a short extension to allow us to respond.

We welcome the creation of the Committee and are very pleased to contribute to the inquiry you have instigated. I hope our comments will be of assistance.

My colleague Alison Plouviez has spoken to Christine Salmon, and we understand that you are looking at this stage for practical suggestions about how to filter the large number of Statutory Instruments which might potentially come within the purview of the Committee.

Aspects of the filtering mechanism and the work of the Select Committee

Clearly arrangements are needed for identifying which SIs should be considered by the Committee. It will therefore be necessary to decide which features of an SI will mark it out for attention. This could be for instance the SI's complexity and length, or its importance for or impact on large numbers of people; it could be because it arises from an EU measure; or it could be because of vires issues, such as an unusually wide delegation of powers given by the primary statute. SIs in an area of high political interest are already likely to have had at least some of the issues arising discussed, but matters of detail may still require consideration.

Other features which the Committee could consider might be more related to the practicability of the instrument as far as the "end-users" – members of the public subject to it, and solicitors advising clients, for instance – are concerned: clarity of drafting, workability on the ground and comprehensiveness are all important issues to those who have to put a measure into effect. This may become apparent through external submissions (discussed below) or alternatively the Committee could seek views from interested parties.

A further important area for businesses, for example, is how a measure dovetails (or does not) with any existing or currently-in-passage provision. An SI might be one of a series of measures which together overlap, or leave gaps. The whole series of measures could therefore usefully be considered.

Further, it would be extremely useful to have a body to which concerns about overlap or omissions could be addressed, and a future role for the Committee might be to bring such anomalies speedily to the attention of government with a view possibly to establishing a special procedure for their resolution.

Identifying issues

SIs accepted for consideration by the Committee should be accompanied by a comprehensive brief from the relevant Department, setting out the Parliamentary history of the primary and any subsequent measures, some of the issues of concern which were raised in any consultation, and otherwise. Such a brief should also include copies of any explanatory letters Ministers undertake to write in the course of debate, and any comments or commitments about the scope of the powers to be delegated given similarly.

Ideally all SIs would have such a brief attached to assist the filtering process, but the objection to this is of course that Departments might be required to prepare substantial briefs on SIs which were not in the event given detailed consideration by the Committee, thus wasting time. A compromise might be to ask Departments to undertake to use their best endeavours to bring to the attention of the Committee SIs which would merit consideration. If the Committee decided to give the SI detailed consideration, it could request a full briefing where this was appropriate and necessary.

Working methods

Evidently the task of the Committee is likely to be a large and growing one. It may be desirable to start the Committee's life by concentrating on the work of one or two Departments: in future it may be necessary to have sub-committees working on the measures produced by particular Departments. Framework legislation is likely to cause particular difficulty in terms of workloads. Again, a special sub-committee devoted to a single topic may be a solution.

Consultation with users

Much of the work we have been able to do so far within our Better Law Making Programme has emphasised the importance of consultation with users, such as those who will be subject to the legislation and their advisers. The Society has specialist committees on a wide range of legal topics including criminal, family, tax, company, planning, mental health and employment. All those committees consider government and other proposals for changes to the law, and are willing to meet to discuss the impact of proposals with officials and others. We think it will be important for your Committee to be open to comments from the public and bodies such as ourselves about secondary legislation, as we feel this is likely to be a very useful way of identifying SIs meriting your Committee's attention – continuing concern about proposals amongst those who had been consulted being an important indicator for this purpose.

Indeed we would strongly recommend that the Committee allow SIs to be proposed for its consideration by members of the public, representative and expert bodies such as the Society and others. A proper case would have to be made, and accordingly the criteria by which the Committee will make its judgment should be made known in advance. We would suggest a discretionary category for the occasional measure which urgently requires attention but does not fit the normal categories.

Transposition of European legislation

We are also concerned about the question of the transposition of European legislation, which is of course frequently carried into law by secondary measures. In this respect we read with great interest the report on the implementation of EU legislation for the Foreign and Commonwealth Office by Robin Bellis (available at http://www.fco.gov.uk/Files/kfile/EUBellis.pdf). Amongst other things he found problems in the existing drafting processes for the primary European measure. We think that attention at that level would help resolve some of the domestic difficulties which must result in every member state, and thus ease the task of bodies such as your Committee.

Review and evaluation

Finally we would also suggest that the Committee consider ways of reviewing and evaluating the filtering mechanism it selects. A system to monitor whether any filtering process does consistently identify the "right" SIs is essential – otherwise improvement cannot be made.

I hope these comments are helpful. We should be glad to contribute further or amplify any of these points should you wish.

4 March 2004

Mr Michael Pownall, Clerk Assistant, House of Lords

Memorandum from Mr Michael Pownall, Clerk Assistant, House of Lords, to the Clerk

You asked me to submit a note for the Committee on any procedural aspects of the Committee's work, in particular on the following two points:

a. *What actions by the House – fatal and non-fatal – could flow from a decision by the Committee to draw an instrument to the special attention of the House (I think that the Committee would feel differently about the way it expressed itself if it knew that not all comments on a negative need necessarily be considered by the House by way of a prayer against); and*

b. *How should the activity of the Committee be publicised in the Minute (bearing in mind, in particular, that the main purpose of the Committee is to persuade Members to put down a motion in respect of negatives)*.

I take the points in turn:

Actions by the House following a decision to draw an instrument to the attention of the House.

The Companion to the Standing Orders describes a number of ways in which Members can challenge or debate secondary legislation by means of motions or amendments. Examples of such motions and amendments are set out in the annex.

1. The House can, of course, reject instruments, whether affirmative or negative. It has done so very rarely (the recent instances are listed in the Companion on page 169).

   However, motions to reject statutory instruments are quite often debated and subsequently withdrawn.

2. Motions or amendments may be moved "regretting some aspect of a statutory instrument but in no way requiring the government to take action. This provides an opportunity for critical views to appear on the Order Paper and be voted upon which would otherwise simply be voiced in the debate. Such motions are invitations to the House to put on record a particular point of view. Even if carried, the motion or amendment has no practical effect: the House passes the instrument in any event." (Companion, paragraph 8.04).

3. Alternatively motions or amendments may be moved "calling on the government to take some specific action. Such motions have been used to invite the government to amend subordinate legislation thereby avoiding the need to vote on the legislation itself." (Companion, paragraph 8.05).

It would also be possible for a Member to table a motion to draw attention to a report of the Merits of Statutory Instruments Committee in respect of a particular negative instrument, for example:

The Lord X – To move, That this House takes note of the third report of the Merits of Statutory Instruments Committee in respect of the National Health Service (Performers List) Regulations. (HL Paper XX)

This would provide the opportunity for a debate on a negative instrument without any possibility of a vote. The procedure would appear to be well suited to the Committee's general approach, and the Committee may wish to recommend the use of this procedure in its initial report.

Publicising the Committee's work in the Minute

1. When the Committee makes a report to the House, an entry will appear in the first half of the Minute listing the statutory instruments to which the Committee draws attention.

2. Whenever a motion or amendment is tabled relating to a statutory instrument to which the Committee has drawn the attention of the House (whether for a day or in the 'No Day Named' section of the Minute of Proceedings), a reference to the relevant report of the Committee will be included against the motion or amendment.

3. We will ensure that the second half of the Minute (Notices and Orders of the Day) indicates clearly those instruments on which the Committee has reported; when

praying time for any negative instruments so reported expires; and the date when such instruments are to be debated in the House.

This will be achieved in two ways. First, the Affirmative Instruments in Progress section in the Minute will be annotated to include references to the Committee's reports and dates against each instrument when affirmative resolutions are to be moved in the House. Second, there will be a new section in the second half of the Minute listing:

i. all negative instruments to which the Committee has drawn the attention of the House, together with an indication of the date of any debate to be held; and

ii. any other negative instruments (i.e. those not reported on by the Committee) which are to be debated. The date when praying time expires will be entered against each instrument and instruments will be removed from the section either when debated or when praying time has expired.

Finally, on the question of publicising the Committee's work, it may be for consideration whether the Weekly Bulletin of House of Lords' Committees should include some mention of the role and work of the Merits of Statutory Instruments Committee, and perhaps of the Delegated Powers Committee. This need not go as far as listing all forthcoming meetings of the Committee or the instruments they are likely to consider, but it could at least draw attention to the Committee and its membership, and outline its terms of reference and methods of work.

29 March 2004

ANNEX

Examples of Motions and Amendments on Statutory Instruments (SIs)

1. Motions or amendments to reject SIs

(a) Affirmative Instruments: Amendment (fatal) to motion for approval agreed to

Greater London Authority (Election Expenses) Order 2000—It was moved by the Lord Whitty that the draft Order laid before the House on 3rd February be approved: then it was moved by the Lord Mackay of Ardbrecknish, as an amendment thereto, to leave out all the words after "That" and insert "this House declines to approve the draft Order laid before it on 3rd February and calls on Her Majesty's Government to lay an Order which provides that candidates are allowed one freepost delivery per household"; after debate, the amendment was agreed to (see division list 1); then the original motion, as amended, was agreed to.

(b) Affirmative Instrument: Amendment (fatal) to motion for approval withdrawn

Asylum (Designated States) Order 2003—It was moved by the Lord Filkin that the draft Order laid before the House on 11th February be approved; then it was moved by the Lord Dholakia, as an amendment thereto, at the end to insert "but this House regrets that the Order has been introduced before the establishment of an Advisory Panel on Country Information under section 142 of the Nationality, Immigration and Asylum Act 2002"; after debate, the amendment was (by leave of the House) withdrawn; then the original motion was agreed to.

(c) Negative Instrument: Prayer against (fatal) agreed to

Greater London Authority Elections Rules 2000—It was moved by the Lord Mackay of Ardbrecknish that an Humble Address be presented to Her Majesty praying that the Rules, laid before the House on 8th February, be annulled (S.I. 2000/208); the motion was agreed to (see division list 2); it was ordered that the Address be presented to Her Majesty by the Captain of the Gentleman at Arms.

(d) Negative Instrument: Prayer against (fatal) withdrawn

NHS Bodies and Local Authorities Partnership Arrangements (Amendment) (England) Regulations 2003—It was moved by the Baroness Greengross that an Humble Address be presented to Her Majesty praying that the Regulations, laid before the House on 11th March, be annulled (S.I. 2003/629); after debate, the amendment was (by leave of the House) withdrawn.

2. Hostile but non-fatal motions and amendments

(a) Affirmative Instrument:

Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2002—It was moved by the Lord McIntosh of Haringey that the Order laid before the House on 14th March be approved; then it was moved by the Lord Lipsey, as an amendment thereto, at the end insert "but this House regrets that Her Majesty's Government have postponed fulfilling their pledge to the House to introduce a similar Order for the regulation of long-term care assurance."; after debate, the amendment was (by leave of the House) withdrawn; then the original Motion was agreed to.

Asylum (Designated States) Order 2003—It was moved by the Lord Filkin that the draft Order laid before the House on 11th February be approved; then it was moved by the Lord Dholakia, as an amendment thereto, at end to insert "but this House regrets that the Order has been introduced before the establishment of an Advisory Panel on Country Information under section 142 of the Nationality, Immigration and Asylum Act 2002"; after debate, the amendment was (by leave of the House) withdrawn; then the original Motion was agreed to.

Extradition Act 2003 (Designation of Part 2 Territories) Order 2003—It was moved by the Lord Goodhart that this House calls on Her Majesty's Government to withdraw the draft Extradition Act 2003 (Designation of Part 2 Territories) Order 2003 and lay a new draft Order deleting the reference to the United Sates of America in paragraph 3 of the Order; the motion was disagreed to.

(b) Negative Instrument:

The Lord Lucas – To move to resolve, That this House calls on Her Majesty's Government to amend paragraphs 4 to 6 of the **Education (Pupil Exclusions) (Miscellaneous Amendments) (England) Regulations 2004 (S.I. 2004/402)**, laid before the House on 23rd February, to offer a greater degree of justice to the pupils concerned.

3. Motions or amendments calling on HMG to take some specific action

(a) Affirmative Instruments:

Employment Equality (Sexual Orientation) Regulations 2003—It was moved by the Lord Lester of Herne Hill that this House invites Her Majesty's Government to withdraw the draft Employment Equality (Sexual Orientation) Regulations 2003 and to lay new regulations amending regulation 7(3) so as to conform with the EC Framework Directive 2000/78/EC; after debate, the motion was disagreed to (see division list 3).

(b) Negative Instruments:

Social Security (Persons From Abroad) Miscellaneous Amendments Regulations 1996—It was moved by the Earl Russell to resolve that this House calls on Her Majesty's Government, following the implementation of the Social Security (Persons From Abroad) Miscellaneous Amendments Regulations 1996 (S.I. 1996 No. 30), to ensure that asylum seekers pursuing appeals have visible legal means of support pending the conclusion of their appeals; the motion was disagreed to (see division list 1).

APPENDIX 4: TEMPLATE FOR EXPLANATORY MEMORANDA

Extract from Statutory Instrument Practice Circular 3(04)

The purpose of the Explanatory Memorandum is to explain to Members of both Houses and, in particular to the relevant scrutiny Committees, the intent and purpose of the instrument it describes. **This should be in plain English and assume no prior knowledge of the subject**.

The format below suggests some headings that will help the Scrutiny Committees judge the proposed instrument against the criteria set out in their respective terms of reference. Entries should be kept concise but should provide clear information in accordance with the headings set out below. An Explanatory Memorandum of less than a page is perfectly adequate as long as it provides the necessary information. Departments should seek to ensure, unless the instrument is extremely complex, that it does not exceed 4 pages.

1. i) **Title of the Instrument** (and SI registration number, where appropriate)

ii) **Laying Authority and Purpose**: every memorandum should contain the appropriate declaration(s) at its head:

"This explanatory memorandum is laid before Parliament by Command of Her Majesty" (where this is a Commons-only instrument "before the House of Commons" should be used instead of "before Parliament")

and, where relevant,

"**This memorandum contains information for the Joint Committee on Statutory Instruments"** (where this is a Commons-only instrument "for the Select Committee on Statutory Instruments" should be substituted "for the Joint Committee")

iii) **Department responsible**

2. **Description:** State clearly in no more than 3 sentences what the instrument does. Please use plain English.

3. **Matters of special interest to the Joint Committee on Statutory Instruments/Select Committee on Statutory Instruments:** Insert here any information which the department wishes to bring to the attention of the JCSI/SCSI. This should include information which would formerly have been included in a voluntary memorandum to JCSI/SCSI, in particular:

i) **fee increases**: if the instrument imposes fee increases above the rate of inflation, please explain the reason for the increase, whether any further such increases are planned, and, if so, when they are projected to cease;

ii) **21-day rule:** if the instrument breaches the 21-day rule (see Statutory Instrument Practice, paras 5.4.13-14) please explain why;

iii) **if the instrument came into force before it was laid**, please explain the circumstances, and indicate the date on which the notification and explanation required by the proviso to section 4(1) of the Statutory Instruments Act 1946 were sent to the Speaker and Lord Chancellor;

iv) **if the instrument uses novel or especially complex powers**, please explain the basis for these powers and indicate the reason for their use.

If the instrument corrects errors previously reported by the JCSI, please provide the reference of the instrument corrected and the relevant JCSI report.

4. Legislative Background:

i) **General:** Explain **why** the instrument is being made: for example, is it to effect an annual uprating in line with inflation; to introduce an amendment following a significant court case; or to implement an EU Directive? Give a little relevant background information to set the instrument in context, mention in particular:

- if this is the first use of a power under an existing Act.
- if in the course of debate, Parliamentary question or Committee appearance any specific undertakings were given to Parliament that relate to this instrument (including Hansard or report reference where relevant).
- if this instrument relates to any other instruments (i.e. it is one of a group), please cross reference.

ii) **EU legislation:** If the instrument implements EU legislation, attach a Transposition Note; explain in broad terms the approach to transposition highlighting any difficult areas; and include a brief scrutiny history of when it was considered by the EU Scrutiny Committees.

5. Extent:

- Specify whether the instrument applies to all UK, all Great Britain or only to one or more of its component parts e.g. England, England and Wales, Northern Ireland.
- If the instrument applies to Gibraltar, the Channel Isles or the Isle of Man, have their legislatures been consulted and consented to the proposal?

6. European Convention on Human Rights: Please state the Minister's view of compatibility with Convention rights. Cabinet Office guidance requires this to be supplied in respect of all instruments subject to affirmative resolution, and all instruments subject to negative resolution which amend primary legislation.

7. Policy background: Please state in particular

- the policy objectives of the parent Act/Directive and how this instrument fulfils them
- the size and nature of the problem it is addressing
- the level of public interest in the policy (for example from the response to consultation if undertaken, or from media attention).
- whether the change is politically or legally important.

8. Impact:

<table>
<tr><td>On business, charities or voluntary bodies</td><td rowspan="2">Where a Regulatory Impact Assessment has been prepared then this should be attached. There is no need to duplicate the information. If no RIA has been prepared please confirm that this is because no impact on the private or voluntary sector is foreseen and simply mention any public sector impacts.</td></tr>
<tr><td>On the Exchequer</td></tr>
</table>

8. Contact: Please give the name and contact details of an official who can answer any queries on the proposed legislation.