

*It is not wisdom but Authority that makes a law.*

**Thomas Hobbes**

We explained last month\* how an idea for a law becomes a Bill and then an Act of Parliament. An Act is a piece of primary legislation. But, as mentioned, this isn't the end of the story.

*\*We do recommend that you first read last month's Insight, although it isn't essential provided you have a basic understanding of primary legislation.*

Provisions in an Act may need further, 'secondary legislation' to bring them into force. That legislation may just confirm an effective date, or it may need to provide specifics. This is an example from the current draft of the Pension Schemes Bill:

The Secretary of State may by regulations—

- (a) specify other information that must be included in an application [to authorise a collective money purchase scheme];
- (b) require a fee to be paid to the Pensions Regulator in respect of an application.

Even if the Bill becomes an Act, as it stands, these provisions will do nothing until the Secretary of State for Work and Pensions legislates further to bring them into effect, and specify the information required for (a).

Secondary legislation (also known as 'delegated legislation' or 'subordinate legislation') cannot be made without power from primary legislation. This means its provisions will have been considered, even if in just skeleton form, as part of the primary legislation-making process described last month.

Sometimes, secondary legislation can look backwards and amend primary legislation. This still requires an enabling provision from an Act of Parliament, called 'Henry VIII powers,' to do so. Other times a parent Act enables secondary legislation to make further, tertiary legislation. The exercise of this power is known as 'sub-delegated legislation.'

### Types of Secondary Legislation

We will consider mainly statutory instruments, the most common secondary legislation and the most likely to impact on pensions, but there are other types.

Church instruments are made by the Archbishops of Canterbury and York to govern the administration and organisation of the Church of England.

'Statutory rules and orders' were the precursor to statutory instruments until the [Statutory Instruments Act 1946](#). Secondary legislation produced by the Northern Ireland Assembly are still called 'statutory rules.' The other devolved parliaments produce 'Scottish statutory instruments' and 'Welsh statutory instruments' respectively.

### Types of Statutory Instrument ("SI")

A common type of SI is 'commencement regulations' (also known as 'commencement orders' or 'appointed day orders'). Where, for whatever reason, a provision in primary legislation is held back, the Minister in the relevant department makes these SIs to bring the provision into force. For example, the [Financial Guidance and Claims Act 2018](#) laid the groundwork for the Single Financial Guidance Body (now known as 'MaPS') in May 2018, but it wasn't until an [SI](#) in September that the body was legally established. Most of the provisions in the current Pension Schemes Bill will require commencement regulations to come into force.

SIs affecting pensions tend to come from either Pensions or Finance Acts. There are other Acts granting legislation-making powers that could potentially amend pensions legislation:

- [The Human Rights Act 1998](#) allows ministers to make 'remedial orders' amending legislation found to be incompatible with the European Convention on Human Rights.
- [The Public Bodies Act 2011](#) allows ministers to make 'public bodies orders' to change the constitutional or funding arrangements of public bodies (e.g. the Regulator).
- [The Regulatory Reform Act 2001](#) allows ministers to make 'regulated reform orders' amending or repealing provisions in primary legislation considered to impose a burden on business, so long as any essential protections aren't lost.

- The [Legislative and Regulatory Reform Act 2006](#) allows ministers to make 'legislative reform orders' for similar reasons, and to promote better regulation.

The Privy Council, a formal body of members and former members of Parliament that advises the Queen, has powers to make 'orders of council.' The Queen herself may make 'orders in council,' though this will be Government initiated.

Such orders are made under a different process from most SIs that may affect pensions. We will focus though on a more typical pensions SI's journey to law.

### How a (Pension) SI Becomes Law

SIs are 'laid' before Parliament and 'made' when they're signed by the Minister, and not necessarily in that order.

The parent Act will confirm the procedure an SI will follow. '**Negative (resolution) procedures**' are used for most SIs. The SI automatically becomes law unless it is voted down by Parliament during a set 'prayer period.' This is typically 40 'sitting days' (broadly, when Parliament is in session), and convention dictates it should be no less than 21 calendar days (the '21-day rule').

During the prayer period, the SI can be annulled by either House. However, the last time this happened was in 2000 (in the House of Lords; it was 1979 in the Commons). Any Member of the relevant House may put down a motion to annul (a 'prayer motion'). Motions don't always lead to a debate, but at least record objections on the official record.

Such SIs will usually be laid having already been signed by the Minister: a 'made negative SI.' This means its provisions could be in force even during its progress through Parliament, which could then revoke them. Otherwise it is called a 'draft negative SI.'

The alternative is the '**affirmative (resolution) procedure**.' SIs undertaking this procedure need Parliament's approval to become law ('draft affirmative SIs'), or (less commonly) if they are to remain in force ('made affirmative SIs'). The Minister that laid the SI will have to move a motion for approval within the instrument's allotted time.

Similarly, the Commons hasn't rejected an SI under affirmative procedure since 1978, but the Lords controversially declined to consider an instrument in 2015, leading to the [Strathclyde Review](#).

Unlike Bills, SIs may pass through both Houses simultaneously, rather than in turn (though some, typically those dealing with financial matters, only go through the Commons). Where the Lords annuls or rejects an SI, the Commons doesn't have the same overriding powers as with Bills.

Neither House can propose amendments to an SI. They must either (tacitly) approve or reject. In theory, Parliament has already approved the merits of the provisions in passing the Bill for Royal Assent.

### The Role of Parliamentary Committees

An SI's time in Parliament is largely spent in various committees; more so than a Bill's. Negative procedure SIs may not even be debated on the floor of either House. But these committees won't

be amending the SI in the same way as they might a Bill.

### The Joint Committee on Statutory Instruments ("JCSI")

Most SIs are examined first by the JCSI: a committee made up of members from both Houses. Or, if an SI goes through just the Commons, the Select Committee on Statutory Instruments (a sub-committee of just those members from the Commons) will examine it instead.

In either case, they do not consider the merits of the provisions. They will only judge whether the SI:

- is clear,
- has the necessary power from the parent Act to achieve what it is trying to achieve i.e. it is *intra vires* and not *ultra vires*, and
- is not otherwise defective.

If there are issues, the JCSI will draw their concerns to the attention of Parliament.

### The Secondary Legislation Scrutiny Committee ("SLSC")

This House of Lords committee considers the policy merits of SIs. Again, this is limited in scope. They could recommend that an SI under the negative procedure is upgraded to affirmative. They will also examine and report to the House on whether its provisions:

- are politically or legally important, or give rise to issues of public policy likely to be of interest to the House;

- may be inappropriate in view of changed circumstances since the enactment of the parent Act;
- may inappropriately implement European Union legislation;
- may imperfectly achieve its policy objectives.

In the Lords, this scrutiny will take place before any wider debate.

### Delegated Legislation Committee (“DLC”)

This House of Commons Committee isn't an exact equivalent to the Lords' SLSC, as the debate isn't limited in scope. Rather, it is an alternative to debate on the floor of the House of Commons to save time. Affirmative procedure SIs automatically go to DLCs. Negative procedure SIs only go to DLCs if the Minister requests it (and moves the motion).

Affirmative procedure SIs then return to the House for a final vote and approval before being made.

### Defective Instruments

Not being able to amend SIs once they're laid naturally makes it important to get them right first time. There may be prior consultation, including a draft version of the instrument, which may identify drafting issues in advance.

If an instrument contains minor errors that don't change the meaning of the legislation, but may nonetheless mislead people, a correction slip may be produced and published alongside the legislation (or more commonly at a later date when the defect has become apparent).

As a last resort, the Department may simply have to replace the defective instrument with a correct one. Just this year, the [Pension Protection Fund \(Moratorium and Arrangements and Reconstructions for Companies in Financial Difficulty\) \(Amendment\) Regulations 2020](#) were found to have been made *ultra vires* (i.e. without appropriate powers), and had to be [revoked and replaced](#).

Crucially, unlike with primary legislation, secondary legislation is subject to judicial review. This means that the Courts can strike down SIs if they find them (for example) to be:

- *ultra vires*,
- in breach of human rights,
- made in defiance of correct procedure,
- made without considering relevant factors, or
- made in consideration of irrelevant factors.

### Citation of Statutory Instruments

Normally, rather than quoting a full title, SIs will be referred to by a short reference. This will be “SI”, followed by two numbers separated by an oblique e.g. [SI 2020/693](#). ‘2020’ is the year this example was made and ‘693’ indicates that this was the 693<sup>rd</sup> such instrument made this year.

Informally, they may be known by a shorter name, e.g. “[The Occupational Pension Schemes \(Scheme Administration\) Regulations 1996](#)” are known as “the Administration Regs.”

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