



Northern Ireland  
Assembly

## Research and Information Service Briefing Paper

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# Parliamentary Scrutiny of Delegated Legislation – A Comparative Review

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## 1 Introduction

This paper presents the findings of comparative research on the scrutiny procedures for delegated legislation<sup>25</sup> undertaken by other legislatures within the UK and more widely. The paper was commissioned by the Examiner of Statutory Rules (the ESR) from RaISe, which provides evidenced based research support to both the Assembly and the secretariat. Given that the ESR may wish to share the paper with others, it may be useful to say something about delegated legislation and the role of the ESR.

Delegated legislation refers to law made by ministers or certain public bodies under powers conferred on them in a parent Act, such as a UK Act of Parliament or an Act of the Northern Ireland Assembly. Delegated legislation exists in a variety of forms (such as Regulations, Orders or Rules) all of which are categorised as Statutory Instruments (SIs). A parent Act will set out what form of SI should be produced and which parliamentary process it should follow. Concern over the use of delegated legislation is

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<sup>25</sup> Whilst delegated legislation is often called secondary or subordinate, the Hansard Society advises that use of the former term is preferable, as it does not misleadingly suggest lesser importance in relation to primary legislation.

long-standing.<sup>26</sup> Critics say that it involves ‘a diffusion of law-making authority’ away from parliamentarians to ministers and executive bodies. This shift, some argue, undermines the constitutional values of representative democracy and creates the potential for abuses of power.<sup>27</sup>

In Northern Ireland, pieces of delegated legislation are commonly known as ‘Statutory Rules’ with the body of legislation being known as the ‘Statutory Rules of Northern Ireland.’<sup>28</sup> The position and remit of the ESR are provided for under Standing Order 43. Broadly speaking, the role of the ESR, as provided for under Standing Order 43 is to assist committees of the Assembly undertake technical scrutiny of such certain statutory rules. Technical scrutiny is distinct from policy/merits scrutiny. However, whilst the former function can be easily broken down in a number of component parts, the latter cannot. It has been, noted that policy/merits scrutiny:

...is not about ranging over the whole *raison d’être* for subordinate legislation, but, nevertheless, it is an opportunity to probe into the background in terms of the policy that the secondary legislation is intended to implement, and whether it achieves its objectives. In that sense, it is a valuable addition to the scrutiny process.<sup>13</sup>

Standing Order 43 prevents the ESR, when carrying out scrutiny provided for under that same provision, from considering any ground which impinges on the merits or the policy behind the relevant delegated legislation.

## 2 Review of literature

One of the aims of the research conducted by RaISe was to identify best practice processes for the scrutiny of delegated legislation. A review of academic literature and a wide range of other material, including parliamentary inquiry reports and think tank commentary, was conducted as the initial phase of the research.

The initial review of the literature found a significant amount of commentary on problems relating to the scrutiny process but no one system emerged as an example of

<sup>26</sup> For example, in an article published in 1944 it was observed that - “John Citizen may not know it but he is confronting a problem which has for a long time past engaged the attention of many wise learned men, and bids fair to become an active issue of practical politics - the problem of Ministerial powers by delegated legislation and of judicial or quasi judicial decision”. *Delegated legislation*, The Round Table, 34:135, 204-210. Key texts date back almost a century to C.T. Carr, *Delegated Legislation; Three Lectures* (Cambridge University Press, 1921); G. Hewart, *The New Despotism* (Ernest Benn, 1929); R. Fox and J. Blackwell, *Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society, 2014); E.C. Page, *Governing by Numbers: Delegated Legislation and Everyday Policy Making* (Hart, 2001); A. Tucker, ‘Parliamentary Scrutiny of Delegated Legislation’ in A. Horne and G. Drewry (eds), *Parliament and the Law* (Hart, 2018).

<sup>27</sup> Reid, L. (2010) “Oversight of Regulations by Parliamentarians” *Canadian Parliamentary Review*. Vol.33 Iss. 7.

<sup>28</sup> The Statutory Rules (Northern Ireland) Order 1979 lists the public authorities which can make rules, if given the authority to do so an enabling clause in the primary legislation. While this includes a wide range of administrative and legal authorities, most delegation is conferred on the Department responsible for the relevant policy area.

best practice. It may be that best practice is context specific.<sup>29</sup> The initial examination of literature did, however, reveal a growing interest in the nature and scrutiny of delegated legislation.<sup>30</sup>

The literature review revealed a renewed interest in the need to develop more efficient and effective scrutiny mechanisms. Three factors appear to have contributed to this interest:

- Firstly, the growing volume of delegated legislation due to the increasing inclusion within primary legislation of delegated law-making powers.<sup>31</sup>
- Secondly, the growing concern in relation to the range and scope of delegated powers and delegated legislation.
- Thirdly, delegated legislation has featured in some high profile court cases at both the UK and NI level.

The following sections of the paper provide further information relating to each of these factors.

## 2.1 Volume

As is shown in Chart 1 below, since 1950 there has been a slow decline in the number of Acts passed by the UK parliament. However, whilst the number of SIs considered remained broadly stable between 1950 and 1980, the number increased significantly over the next three decades. The annual average of 2,100 SIs from 1950 to 1980 period rose to a peak annual average of 4,200 in the 2000s and then fell to around an average of 3,000 a year during the last decade.

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<sup>29</sup> A significant research project, which may identify best practice, is currently being undertaken by Dr Lorne Neudorf. Dr Neudorf has identified the following design features as part of his research: • when the scrutiny is applied (delegation provisions in draft legislation, draft regulations, promulgated regulations); • scope of the scrutiny in terms of what can be scrutinised (only regulations subject to a certain procedure, all regulations one time, all regulations on an ongoing basis); • *criteria* of the scrutiny to be applied (technical considerations, broader policy questions); • *resourcing* including budget, staff and the number of members; • *powers* (reporting, calling witnesses, revocation); • *composition* of the committee (joint committee, expertise of members, government representation); and • *procedures* of the committee (public or private hearings, decision-making process by consensus or majority).

<sup>30</sup> An annotated reading list of useful information is provided in Annex 1 of this paper.

<sup>31</sup> Volume encompasses not just the number of SIs but also their length and, regarding the latter, the House of Lords Secondary Legislation Scrutiny Committee has expressed concern about the length of some SIs, including the draft Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019, which runs to 619 pages. House of Lords, Secondary Legislation Scrutiny Committee (Sub-Committee B), Seventeenth Report of Session 2017/19, 21 February 2019, [Source IfG Monitoring Report]

Chart 1. UK Acts and Statutory Instruments, 1950–2016<sup>32</sup>

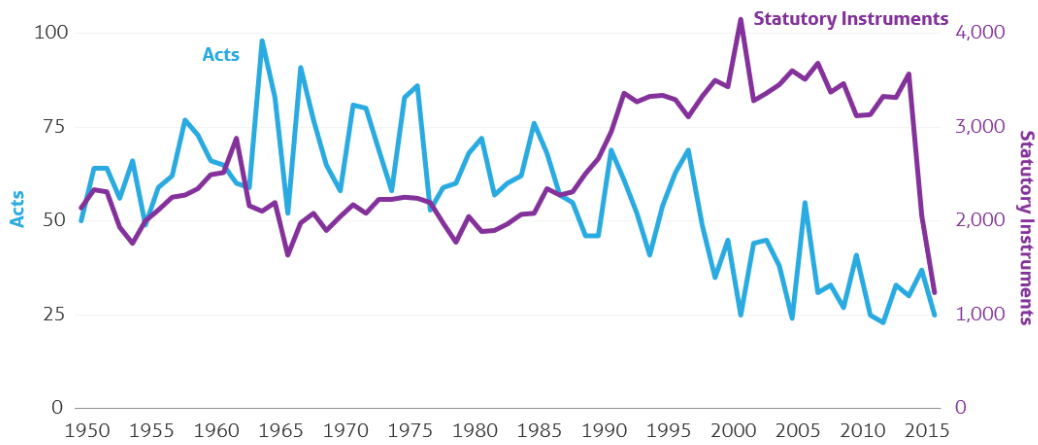
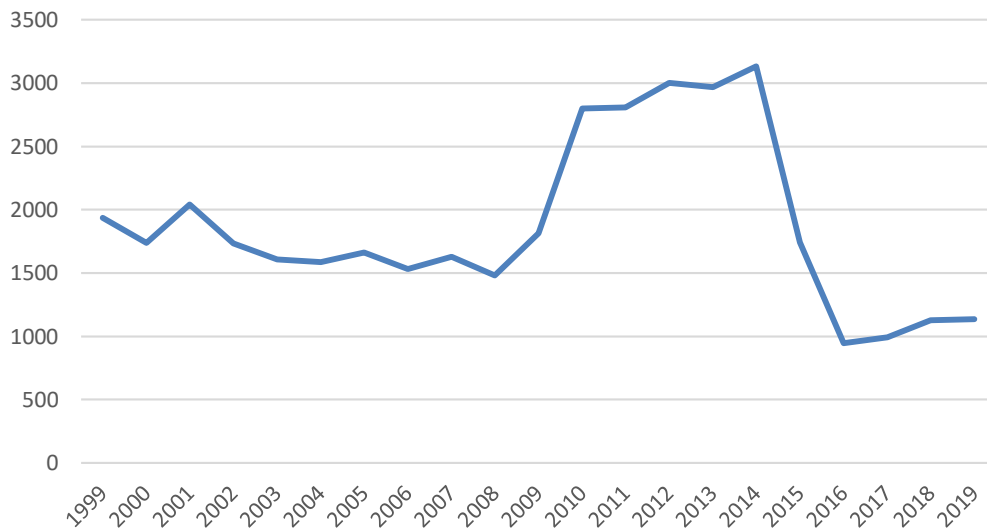
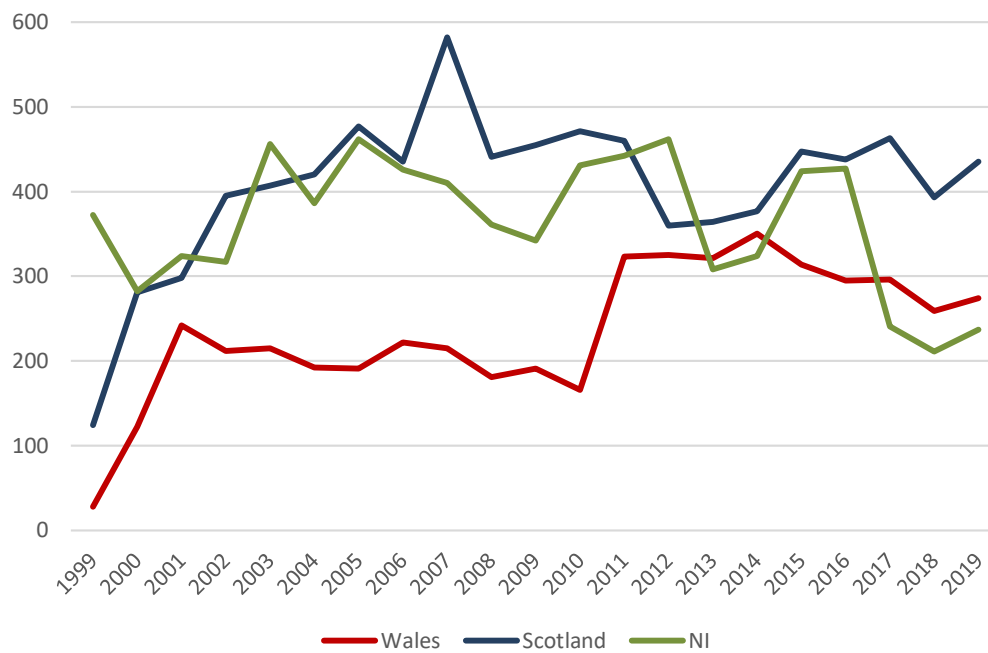


Chart 2. UK Statutory Instruments, 1999-2019 [source: legislation.gov.uk]



<sup>32</sup> Institute for Government - Parliamentary Monitor 2018

**Chart 3. Wales/Scotland/NI Statutory Instruments, 1999-2019 [source: legislation.gov.uk]**

## 2.2 Range and scope of delegated powers and of delegated legislation

The literature examined indicated a common concern across a number of jurisdictions regarding the growing use of broad delegated powers and skeleton bills. These concerns, however, have been particularly acute in the UK, given the broad nature of the powers (including Henry VIII powers)<sup>33</sup> contained in key pieces of primary legislation providing for the UK's exit from the European Union (Brexit).<sup>34</sup>

In addition to these three broad concerns, there is also a growing evidence base regarding the use of delegated legislation. Research has shown, for example, that in the UK substantial numbers of criminal offences are created in delegated legislation, the majority passed under the negative resolution procedure, which offers very limited opportunity for scrutiny and does not involve a parliamentary vote.<sup>35</sup>

## 2.3 Litigation

Given its creation by administrative process, delegated legislation can be subject to judicial review on procedural and substantive grounds. These include:

<sup>33</sup> 'Henry VIII clauses' are clauses in a bill that enable ministers to amend or repeal provisions in an Act of Parliament using secondary legislation, which is subject to varying degrees of parliamentary scrutiny.

<sup>34</sup> EU(W)A and the European Union (Withdrawal Agreement) Act 2020

<sup>35</sup> Chalmers, J. and Leverick, F. (2018) "Criminal law in the shadows: creating offences in delegated legislation" *Legal Studies*, vol. 38, pp. 221-224

- where it was not made within the scope of the power of the enabling primary legislation;
- if irrelevant considerations were taken into account or relevant considerations were not taken into account when it was made;
- irrationality;
- procedural impropriety,
- human rights grounds.

Brexit related delegated legislation has received high profile examination by the Courts. Furthermore, the use and adequacy of scrutiny of delegated legislation has received further attention in Northern Ireland through the RHI inquiry and judicial review.<sup>36</sup>

### 3. The ESR in a comparative context

Whilst the initial review of the literature did not identify what might be considered best practice, it did show that there was no body of evidence to suggest that the complex division of scrutiny functions that exists in bicameral legislatures is more effective than those found in the unicameral systems found in the devolved legislatures. Indeed the former have been criticised as “woefully inadequate” by the House of Commons Select Committee on Liaison.<sup>37</sup> Similarly, but in relation to operation of the Australian parliament, it has been observed that:

Australia was once a world leader in parliamentary oversight of delegated legislation. Today, parliamentary scrutiny has been undermined by a number of factors, including overly wide delegations, uncritical bi-partisan support for measures, party discipline restraining oversight, abuse of the disallowance procedure and parliamentary recesses to avoid parliamentary scrutiny, and interest-group capture within government. (Appleby)

In addition to the apparent weaknesses of complex bicameral systems, the volume of delegated legislation considered by national parliaments provides a further limit to their utility as comparators, in relation to the work of the ESR is limited. In terms of volume, the scrutiny demands in the Scottish Parliament and the National Assembly for Wales are more likely to reflect those of the Northern Ireland Assembly. In addition, the demands placed by Brexit on the scrutiny systems in these legislatures are more likely

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<sup>36</sup> Judicial remedies are limited. In Neudorf, L. (2019) Parliamentary Scrutiny of Delegated Legislation Inquiry, Submission 8, 31 January it is noted that judicial review is not a comprehensive, robust scrutiny mechanism for delegated legislation. A court challenge to a particular regulation depends upon an aggrieved party initiating and funding litigation.

<sup>37</sup> In addition, the 18 variants of processes for making SIs involve scrutiny have been described as 'negligible; entirely theoretical', 'palpably unsatisfactory' and 'woefully inadequate'. (Select Committee on Liaison, Liaison—First Report (TSO, 2000), para.24, <https://publications.parliament.uk/pa/cm/199900/cmselect/cmliaisn/300/30003.htm#a1>)

to reflect those of the Northern Ireland Assembly and consequently the ESR. The Scottish Parliament and the National Assembly for Wales scrutiny systems, therefore, are the focus of the following section of this paper.

## 4. Delegated legislation and scrutiny in the Scottish Parliament and National Assembly for Wales

This section provides information relating to the design of the scrutiny systems in the Scottish Parliament and the National Assembly for Wales.

### 4.1 Scottish Parliament

In the Scottish Parliament, delegated legislation is referred by the Clerk to both the Delegated Powers and Law Reform Committee (DPLRC) and the lead committee. The lead committee is the committee within whose remit the subject matter of the delegated legislation falls.

The DPLRC has five Members of the Scottish Parliament (MSPs) and three substitute MSPs. The DPLRC is responsible for, amongst other things, the technical scrutiny of delegated legislation laid before the Parliament. In considering the delegated legislation, the DPLRC decides whether the attention of the Parliament should be drawn to the instrument on one or more of ten specific grounds listed in standing orders.

#### 4.1.1 Merits/Policy

The committee is not involved in scrutinising the policy merits of subordinate legislation – Standing Orders prevent it from addressing any ground that impinges on the substance of, or on the policy behind it, delegated legislation. This scrutiny is the domain of/reserved to the relevant lead committee.

#### 4.1.2 Recent trends

In 2018-19, the third year of the fifth session of the Scottish Parliament, the DPLRC met 36 times and considered 243 SSIs.<sup>38</sup> This compares with 279 considered in 2017-18. DPLRC staff have reported that numbers of SIs can peak ahead of recess periods. They also report a pre-dissolution ‘bulge’ of Bills and SIs as the Scottish Government tries to get all remaining legislation passed.

#### 4.1.3 EU Exit SIs

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<sup>38</sup> The Scottish Parliament Delegated Powers and Law Reform Committee (2019) *Work of the Delegated Powers and Law Reform Committee in 2018-19* SP Paper 633 60th Report, 2019 (Session 5)

A significant number of instruments have passed through the Scottish Parliament to address deficiencies in legislation that would arise on the UK's exit from the European Union. These have been made under delegated powers in the European Union (Withdrawal) Act 1998 and fall into two categories:

- SSIs laid by the Scottish Government; and
- SIs laid by the UK Government which relate to devolved matters.

Two protocols set out how these are scrutinised by the Scottish Parliament. The SSI protocol adds an extra element to normal procedure by allowing committees to take a view on the categorisation of instruments (as high or low significance) and which procedure they should be subject to (either negative or affirmative). The protocol also establishes a role for the DPLRC to “flag” instruments to lead committees where it holds a contrary view to the Scottish Government on the significance of an instrument. The DPLRC's involvement in the protocol is shown in Annex 2.

#### **4.1.4 SI Reporting**

The DPLRC produces weekly SI reports. It also issues quarterly reports and an annual report that highlights trends. The DPLRC produces the Scottish SI tracker. This shows the SIs currently laid before Parliament. Committee staff update the tracker on an ad-hoc basis but aim to do it at least once per week.

The reports listed above are publicised via the Scottish Parliament website, twitter, news releases, calls for evidence and speaking at information sessions on the work of the parliament.

#### **4.1.5 Delegated powers**

The DPLRC's remit, as provided for in the standing orders of the Scottish Parliament, includes the consideration of delegated powers provisions in bills. The DPLRC engages with a bill at two stages of legislative passage (at Stage 1 and Stage 2). Over 2018-19, the Committee considered and reported 14 bills at Stage 1 and seven bills after Stage 2.

Standing orders also provide the DPLRC with the power to consider and report on:

- general questions relating to powers to make subordinate legislation;
- Scottish Law Commission Bills;
- Legislative Consent Motions; and
- proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

#### **4.1.6 Resourcing**



The DPLRC meets in public session once a week. It is supported by a team comprising of one committee clerk, one clerk assistant, and one support manager. Six lawyers, based within the Legal Services Legislative team, provide the committee with technical scrutiny support. A lawyer prepares a briefing for every SI laid. It receives legal advice privately. Although the DPLRC is not involved in scrutinising the policy merits of subordinate legislation it does, at times, gets help from SPICe researchers, as there can sometimes be a fine line between the technical reason for delegating a power and the policy behind the approach.

Any money spent by the DPLRC comes from a wider office budget. Generally, the Committee's non-staff costs are considerably less than other committees which are more public facing.

## **4.2 National Assembly for Wales**

In the National Assembly for Wales Constitutional and Legislative Affairs Committee (the CLAC) is responsible for the technical scrutiny of delegated legislation – it considers and reports on all SIs or draft SIs laid before the Assembly. The ten technical issues which the CLAC must consider are detailed in standing orders. The committee comprises of four Assembly Members.

### **4.2.1 Merits/Policy**

In 2009, the National Assembly of Wales's Subordinate Legislation Committee's Inquiry into the Scrutiny of Subordinate Legislation and Delegated Legislation recommended it should undertake merits scrutiny of affirmative SIs. It looked to the merits scrutiny undertaken in the House of Lords by the then Merits of Statutory Instruments Committee and agreed that scrutiny of the merits of SIs is an important and beneficial function to ensure the right level of checks and balances of the use of Ministers delegated powers. The Merits Committee usually reported in neutral way, rather than taking a stance on the policy. Although it may identify areas where the House may wish to make further inquiries. The Committee concluded this approach may help improve transparency and highlight to National Assembly of Wales Members and the public when delegated legislation of not has been laid and any potential areas of concern.

SOs state that the CLAC *may* consider and report on whether an instrument:

- imposes a charge on the Welsh Consolidated Fund or contains provisions requiring payments to be made to that Fund;
- is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly;
- is inappropriate in view of the changed circumstances since the enactment;
- inappropriately implements European Union legislation; or

- imperfectly achieves its policy objectives.

Examples of where the CLAC has raised issues of political or legal importance to the Assembly (merit points) include:

- ***The Electricity (Offshore Generating Stations) (Miscellaneous Amendments) (Wales) Regulations 2019***

the CLAC queried whether “national” newspaper meant a Welsh newspaper or a UK-wide newspaper. The Welsh government (WG) responded by amending the regulations, changing “national newspaper” to “a newspaper circulating in Wales, England and Northern Ireland”.

- ***The NHS (Welsh Language in Primary Care Services) (Miscellaneous Amendments) (Wales)***

the CLAC noted that the regulations impose a light-touch Welsh language regime in this new area. WG responded by saying these were the first Welsh language duties in this area.

- ***The Plant Health (Fees) (Forestry) (Wales) Regulations 2019***

the CLAC noted the increase in fees contained in these regulations (because it is a reporting point under SO21.3(i)).

- ***The Sea Fishing (Penalty Notices) (Wales) Order 2019***

- the CLAC noted that the Order did not allow penalties to be paid in cash, despite some people still preferring to use cash. WG responded to say that cash payments are more onerous to check for fraud, and that not all WG officials are able to accept cash payments.

#### **4.2.2 Recent trends**

The the CLAC is busiest in the build-up to and following recess, particularly the summer recess because of reporting on SIs.

#### **4.2.3 EU Exit SIs**

The European Union (Withdrawal) Act 2018 provides UK Ministers and the Welsh Ministers with regulation-making powers to amend existing primary and secondary legislation. It also provides for a committee in the National Assembly of Wales to sift certain regulations that the Welsh Ministers propose to make under the negative

procedure known as 'proposed negative regulations'.<sup>39</sup> The sift committee will then consider the appropriate procedure to be followed, either negative or affirmative.

The National Assembly of Wales's Standing Orders require that, for regulations in devolved areas made or to be made by UK Ministers acting alone under sections 8 and 9 of the European Union (Withdrawal) Act 2018, the Welsh Government must lay a statement (30C Written Statement) notifying the it of the regulations in question. Where the regulations amend primary legislation, the Welsh Government must also lay a Statutory Instrument Consent Memorandum (SCIM) under Standing Order 30A. Any member may then table a motion to require the National Assembly of Wales to formally give consent to the regulations, provided they lay their own memorandum. The flow chart in Annex 3 illustrates this process.

#### **4.2.3 Delegated powers**

The the CLAC is also empowered to report on:

- the appropriateness of powers granted by Bills to permit the Welsh Ministers to make delegated legislation,
- Legislative Consent Memoranda referred by the Business Committee;
- Statutory Consent Memoranda; and,
- European legislation.

It also undertakes policy inquiries such as the ongoing inquiry into Wales' changing constitution.

#### **4.2.4 Resourcing**

The the CLAC meets on a weekly basis, either in public or private session,<sup>40</sup> and has a team of staff comprising of one clerk, one second clerk, one deputy clerk and one team support (undertaking administrative work). An integrated team, which incorporates representatives of legal services, research, translation and communications and engagement, supports the work of the committee staff. Legal advisers are responsible

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<sup>39</sup> Paragraph 4 of schedule 7

<sup>40</sup> Under Standing Order 17.42, the public may be excluded where matters to be discussed include: international relations, national security, the investigation of alleged illegality, the effectiveness of law enforcement or the proper administration of justice requires it; \*a particular item of business cannot be discussed without disclosing personal information relating to identified or identifiable individuals; discussion in public would be likely to cause harm to commercial or economic interests; discussion in public would be likely to cause harm to the health or safety of an individual, the public, or the environment; reference to material would be likely to be considered defamatory of any person; the committee is deliberating on the content, conclusions or recommendations of a report it proposes to publish; legal advice or information, given in confidence, could be disclosed; a particular item of business cannot be discussed without reference to a document or documents which would be excluded or exempted from disclosure under legislation, or, any matter relating to the internal business of the committee, or of the Assembly.

for checking all SIs that come before the Committee, with a specific focus on constitutional and legislative aspects as set out in Standing Order 21. Researchers assist with briefings ahead of scrutiny sessions and throughout inquiries.

The budget is held at a service level. However, the CLAC staff undertake forecasting with other clerking teams to help identify and manage spend within a financial year. The committee incurs costs through visits to other parliaments and large-scale evidence sessions and/or stakeholder events.

The Welsh Government's legislative programme and the number of Bills brought forward at any one-time influence reporting trends.

## 5 Commentary

This concluding section draws on the information presented above, together with the body of literature considered, to consider the role of the ESR in a comparative context. The comparisons are made under the following headings.

- Technical scrutiny
- Merits/Policy
- Scrutiny of EU Exit related SIs
- Scrutiny of delegation of powers
- Outward engagement of the ESR

### 5.1 Technical scrutiny

The grounds which the ESR considers when undertaking technical scrutiny are broadly similar to those contained in SOs of National Assembly of Wales and Scottish Parliament. Unlike these legislatures, however, the practice in the Assembly has been for committees to delegate technical scrutiny to the ESR rather than exercise this function themselves. Indeed the Assembly appears unique in having an individual rather than a committee carry out this function. Those committees which conduct technical scrutiny, however, do so as part of a wider remit relating to delegated legislation and, in some cases, other functions.

The only formal review of the ESR/committee arrangement was undertaken by the Procedures Committee as part of its 'Review of the Legislative Process in

the Northern Ireland Assembly'.<sup>41</sup> As part of this review, the Procedures Committee considered, amongst other things, establishing a separate committee to consider delegated legislation. In its January 2002 report, however, the committee concluded that the existing standing orders, subject to minor amendments, facilitated the efficient passage of legislation through the Assembly. It is now almost two decades since this review was undertaken.

## 5.2 Merits/Policy scrutiny

The role of the ESR, as currently set out in Standing Orders, provides only for technical scrutiny of delegated legislation and it is out with her delegation to consider any ground which impinges on the merits or the policy behind an instrument. In the Assembly, the relevant statutory committee should, therefore, conduct policy/merits scrutiny. Standing Orders do not address any input which the ESR may have into this consideration.

Mirroring these boundaries, the standing orders in the Scottish Parliament similarly prevent the committee charged with technical scrutiny from addressing merits/policy scrutiny grounds. The arrangement is that lead committee considers any policy issues raised by an instrument and then makes a recommendation to Parliament about whether the instrument should become law, informed by both policy considerations and the report of the technical scrutiny committee.

The National Assembly of Wales is notable as the CLAC is required to undertake technical scrutiny but is also free to address issues relating to policy, although lead committees also carries out this function.

In the UK Parliament, the SLSC considers the policy merits and implications of all SIs subject to parliamentary scrutiny. Further information may be found in Annex 1 of this paper.

In the literature considered, there were differing views as to whether merits-policy scrutiny should be carried out by a committee. While the evidence from Wales would suggest there may be benefits to locating technical and policy scrutiny within the same committee, a leading academic cautions against the politicisation of scrutiny that this might produce.<sup>42</sup>

## 5.3 Scrutiny of Brexit related SIs

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<sup>41</sup> Northern Ireland Assembly Procedures Committee (2002) *Review of the Legislative Process in the Northern Ireland Assembly* Belfast: Northern Ireland Assembly.

<sup>42</sup> Neudorf, L. (2019) Parliamentary Scrutiny of Delegated Legislation Inquiry, Submission 8, 31 January

The Brexit process has created new scrutiny demands in Westminster and the devolved legislatures. In each legislature these demands, including new sifting of proposed negative instruments, have been incorporated into the functions of existing committees. In line with the general point observed earlier in this paper, the arrangements in the National Assembly for Wales and the Scottish Parliament may be of more comparable value to the Northern Ireland Assembly, than the complex arrangements at Westminster, which span committees in both houses. Clearly, the ability to absorb new demands, such as those arising from Brexit related legislation, is a strength of the relevant scrutiny committee systems in the other devolved legislature and it would seem unlikely that the ESR is sufficiently resourced to enable her to absorb these demands. Furthermore, scrutiny of the use of the regulation making powers in connection with the Ireland/Northern Ireland Protocol, which forms part of the UK/EU Withdrawal Agreement, is likely to create greater demands in the Assembly than in other devolved legislatures. So too is the requirement to ensure that relevant delegated legislation does not ‘...diminish any form of North-South cooperation provided for by the Belfast Agreement’ or ‘create or facilitate border arrangements between Northern Ireland and the Republic of Ireland after exit day which feature physical infrastructure, including border posts, or checks and controls, that did not exist before exit day and are not in accordance with an agreement between the United Kingdom and the EU’.

#### **5.4 Scrutiny of delegation of powers**

Effective scrutiny of delegated legislation is underpinned by effective scrutiny of delegating powers contained in primary legislation, as a Bill makes its way through the legislative process. In the Scottish Parliament, the DLPRC scrutinises delegations of power to make subordinate legislation in particular Bills or other proposed legislation and considers whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation.

In the National Assembly of Wales, the CLAC considers the appropriateness of provisions in Assembly Bills and Acts of the United Kingdom Parliament that grant powers to make subordinate legislation to the Welsh Ministers, the First Minister or the Counsel General. Whilst the Standing Orders of the National Assembly of Wales refer only to the ‘appropriateness of the provisions’ in Bills, a review of relevant CLAC reports indicates that it considers:

- matters relating to the competence of the National Assembly, including compatibility with the European Convention on Human Rights (ECHR);
- the balance between the information that is included on the face of the Bill and that which is left to subordinate legislation;

- whether an appropriate legislative procedure has been chosen, in relation to the granting of powers to the Welsh Ministers, to make subordinate legislation;
- any other matter it considers relevant to the quality of legislation.

The role of the ESR in relation to scrutiny, during the legislative passage, of the delegation of powers contained in bills is not specified in the Assembly's Standing Orders. It has, however, been stated that:

...the Assembly began to consider delegated powers in legislation (against criteria similar to those used by the [House of Lords] Delegated Powers and Regulatory Reform Committee) in 2007. This function is also generally delegated to the ESR, who reports to the appropriate committee.<sup>43</sup>

If this scrutiny is carried out in practice, there may be merit in providing for it more formally, perhaps in Standing Orders. It is also worth observing that, whilst the Delegated Powers Memorandum accompanying a bill is published, the relevant report from the Examiner is not. A member of the public trying to follow the consideration by a committee of delegating provisions will, therefore, find it difficult to do so.

## 5.5 Outward engagement of the ESR

Reporting is one of the most important tools available to the ESR. Frequently published reports can encourage departmental responsiveness and identify systemic issues. In the context of the Assembly, where there is a high reliance on one individual, legacy reports build collective memory.

Information resources can also be used promote the awareness and understanding of the scrutiny of delegated legislation among MLAs, their staff, and the Assembly Secretariat may be very beneficial. The UK Parliament has a number of different resources for accessing information about the status of SIs. The House of Lords Business and Minutes of Proceedings includes a section on motions relating to delegated legislation. Each entry includes a link to relevant scrutiny reports by the SLSC. The UK Parliament is also testing a webpage that lists the current procedural activity for SIs. Instruments can be searched by name or portfolio. The page outlines the procedural timeframes for SIs that follow both affirmative and negative procedure, as well as scrutiny committees' findings regarding the instruments. The webpage follows the format of the Hansard Society's SI Tracker which allows users to track SIs in Parliament. Similarly, the Scottish Parliament's DPLRC produces the Scottish Statutory Instrument Tracker. This shows the SIs currently laid before the Scottish

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<sup>43</sup> House of Commons Political and Constitutional Reform Committee (2013) Ensuring standards in the quality of legislation: Government Response to the Committee's First Report of Session 2013-14 HC 611 London: The Stationery Office

Parliament. It is updated on an ad-hoc basis, but staff aim to do it at least once per week.

As an individual, the ESR is not in a position to drive education and awareness which have been addressed by technical scrutiny committees in other legislatures. Building a 'fit for purpose' team with the necessary specialist skills, procedural knowledge and experience to deliver robust scrutiny will facilitate knowledge exchanges/transfers with Assembly Secretariat colleagues (such as clerks in statutory committees and the Bills Office); other legislatures; departments and other government bodies.

The Scottish Parliament's DPLR Committee has sought to develop public understanding and awareness of secondary legislation with videos, infographics and improved guidance for the website. The Committee has also held engagement events on secondary legislation, targeted at groups who have an interest in and regularly engage. Similarly, the National Assembly of Wales CLA has held stakeholder events. The Assembly lacks a mechanism to flag to Assembly Members and the public, when delegated legislation of note has been laid and any potential areas of concern.

In relation to engagement, it is worth noting that the scrutiny performed by the ESR is not limited to statutory rules. It has been noted, for example, that she supports scrutiny of delegation of powers during legislative passage of a bill. To articulate the ESR's scrutiny role to a wider audience and facilitate better understanding of the use of delegation of power, it may be desirable to change the title of the ESR to more accurately reflect this role. In 2009, the National Assembly of Wales Subordinate Legislation Committee's Inquiry into the Scrutiny of Subordinate Legislation and Delegated Legislation recommended it changed its name to the Delegated Powers and Subordinate Legislation Committee. The scrutiny committees in the Scottish Parliament and UK Parliament are named in accordance with their scrutiny functions.

## 6 Concluding comments

When comparing the role of the ESR with the committee scrutiny systems that exist in the NAW and the Scottish Parliament, a number of observations can be made.

Firstly, the reliance on one person to conduct technical scrutiny carries with it potential risks arising from that person's absence. Secondly, whilst the functions of the ESR extended beyond technical scrutiny and include consideration of delegation of powers, it is unclear what consideration, if any, was given to resourcing this function. Thirdly, the committee structures in the other devolved legislatures, together with their associated resources, are better placed than the ESR to respond to new scrutiny demands, such as those arising from Brexit.



Finally, it is worth highlighting that the additional resources, in terms of both Member time and committee support, enable the relevant scrutiny committees in the other devolved legislatures to play a proactive role in citizen engagement and in driving forward improvements in the law making process.



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## Research and Library Service

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### APPENDICES

#### Scrutiny of delegated powers and secondary legislation

##### Suggested Reading

##### PARLIAMENTARY REVIEW

- 1. National Assembly for Wales Subordinate Legislation Committee (2009) Inquiry into the Scrutiny of Subordinate Legislation of Delegated Powers**  
This report provides useful information about structure.
- 2. Neudorf, L. (2019) Submission to the Senate Standing Committee on Regulations and Ordinances Inquiry into the Parliamentary scrutiny of delegated legislation, 31 January**  
This submission provides good background to the issue. Its conclusion (page 8) provides a good benchmark and deals with additional issues.
- 3. Neudorf, L. (2016) "Rule by Regulation: Revitalizing Parliament's Supervisory Role in the Making of Subordinate Legislation" *Canadian Parliamentary Review* Vol. 39(1), pp.29-33**  
This article proposes that Canada adapt the UK model, by dividing the existing Joint Committee for the Scrutiny of Regulations into two separate committees to facilitate new merits-based review.
- 4. Office of the Leader of the House of Commons (2019) *Government response to the Lords Constitution Committee Report: The Legislative Process: The Delegation of Powers*, 25 January**

**5. Parliament of Australia Senate Standing Committee on Regulations and Ordinances (2019) *Parliamentary Scrutiny of Delegated Legislation* Canberra: Parliament of Australia**

The Senate Standing Committee on Regulations and Ordinances conducted an inquiry into its role and future direction and, more broadly, into the adequacy of the existing framework for parliamentary scrutiny and control of delegated legislation.

## **TRENDS IN DELEGATED LEGISLATION**

**6. Angus, C. (2019) “Delegated legislation: Flexibility at the cost of scrutiny?” NSW Parliamentary Research Service**

An up-to-date RaSe style briefing which deals with the volume of delegated legislation (page10), scrutiny measures and safeguards.

**7. Argument, S. (2011) *Leaving it to the Regs – The pros and cons of dealing with issues in subordinate legislation*, paper presented at the Australia – New Zealand Scrutiny of Legislation Conference, Brisbane, July 2011**

Concluding remarks on page 22 are helpful.

**8. Fox, J. and Korris, M. (2010) *Making Better Law: Reform of the legislative process from policy to Act* London: Hansard Society**

Notes the upwards trend in statutory instruments and endorses the Scottish and Welsh approach of a dedicated committee to consider delegated legislation.

**9. House of Lords (2009) *Looking at the small print: delegated legislation* (Briefing) London: House of Lords**

This paper deals with levels of delegation and committee functions.

**10. Loft, P. (2019) *Acts and Statutory Instruments: the volume of UK legislation 1850 to 2019* (Briefing Paper) London: House of Commons Library**

This up-to-date briefing paper provides comparative figures for the volume of UK legislation using legislation.gov.uk as a source. While this source is not comprehensive, it does provide an overview of trends. The figures pertaining are incomplete but are provided in the accompanying RaSe paper.

## BREXIT

**11. House of Lords Secondary Legislation Scrutiny Committee (2019) *Accessing the scrutiny work of the Committee and information resources relating to secondary legislation* (HL 2017-2019 (312)). London: The Stationery Office**

This report states in paragraph 1: "Preparations for leaving the European Union have required Parliament to consider, in a short period of time, an extraordinary volume of secondary legislation, much of it complex, lengthy and making provision for the significant consequences of a 'no deal' exit from the EU." Furthermore, it links the Committee's role and functions to Brexit and provides a summary of information sources in Appendix 2.

**12. Pywell, S. (2019) "Something old, something new: busting some myths about Statutory Instruments and Brexit" *Public Law* pp.102-120**

This interesting and up-to-date article considers the use of statutory instruments in the context of Brexit.

**13. Witness Statement of Joe Tomlinson of the Public Law Project in *R (on the application of Gina Miller) v The Prime Minister* [2019] EWHC 2381 (QB)**

Provides some useful background on Brexit impetus and the development of procedures.

## ACCESSIBILITY AND DISSEMINATION OF INFORMATION

**14. Doteveryone (2018) *Helping Parliament respond to Brexit: Knowledge, engagement and collaboration in the digital age* London: Doteveryone**

This interesting paper focusses on engagement and communication of work. The appendices are helpful particularly with regards the interview notes and information sharing tools.

**15. Linklaters (2019) *Brexit SI Tracker***

This Tracker helps users to identify SIs relevant to their needs. Users can:

- link to the full text of SIs and the government's explanatory notes
- see at a glance which UK legislation or retained EU legislation an SI amends. You can also filter the Tracker to see all SIs that amend a particular piece of UK or retained EU legislation.
- check the current status of an SI and when it will come into force
- view commentary on key changes or issues.

It is understood that the Assembly's IS Office can develop a similar product.

**16. Scottish Parliament Delegated Powers and Law Reform Committee (2019) *Referendums (Scotland) Bill: Stage 1 (SP Paper 577)***

This example of scrutiny of powers in a Bill shows how to develop understanding through the dissemination of information.

**17. Speer, A. (2017) “Legislative scrutiny of regulations in the Anglosphere” *R Street Policy Study No.87***

Provides a good example of setting out the scrutiny powers and remit in table form. For example, please see table 2, which describes Canada’s criteria to evaluate a statutory instrument.

## **FURTHER READING**

**18. Chalmers, J. and Leverick, F. (2018) “Criminal law in the shadows: creating offences in delegated legislation” *Legal Studies*, vol. 38, pp. 221-224**

This article is particularly interesting as it questions preconceived notions/ideas about statutory instruments.

**19. Law Society of Scotland (2017) Written Evidence House of Lords Constitution Committee Inquiry: The Legislative Process**

This evidence deals with broader issues regarding delegated legislation. It touches on both Brexit and information provision.

**20. Rakar, I. (2017) “Public participation and democratic legitimacy of rulemaking – a comparative analysis” *Law, Economics and Social Issues Review*, Vol.8 Iss. 2, pp. 57-77**

Although academic in style, this article addresses public participation in the scrutiny process.

**21. Tudor, P. (2000) “Secondary Legislation: Second Class or Crucial” *Statute Law Review*, Vol. 21 (3), pp. 149-162**

This is an example of the previous impetus to consider review of the secondary legislation. This seems to happen periodically.

