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Untangling the law

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Pywell, S. (2003) 'Untangling the law', *New Law Journal*, 163 (7553), pp. 321–322.

Untangling the



Stephanie Pywell challenges a widely held view on the classification of delegated legislation

IN BRIEF

- The widespread view that there are three types of delegated legislation—statutory instruments, byelaws and Orders in Council—is incorrect.
- There are two types of delegated legislation—statutory instruments and byelaws—and five forms of statutory instrument—Orders in Council, Orders of Council, orders, rules and regulations.

The nature and classification of delegated legislation features in most introductory-level law courses. For many years, most students have been taught that there are three types of delegated legislation: statutory instruments (SIs), byelaws and Orders in Council. Research using parliamentary papers indicates, however, that this method of classification is misleading, and that it is appropriate to identify two distinct types of delegated legislation: SIs, of which there can be considered to be five forms, and byelaws.

Forms of statutory instrument

SIs were created by the Statutory Instruments Act 1946. Section 1(1) is entitled “Definition of ‘Statutory Instrument’” and provides that there are two ways in which delegated legislation (“orders, rules, regulations or other subordinate legislation”) may be made. If the law-making power is conferred on the Crown, it is exercisable by Order in Council; if it is conferred on a minister, it is exercisable by SI. In either case, the resulting document “shall be known as a ‘statutory instrument’”. By definition, therefore, Orders in Council are a form of SI, rather than a separate type of delegated legislation.

The standard reference document used in the drafting of SIs is *Statutory Instrument Practice: A manual for those concerned with the preparation of statutory instruments and the parliamentary procedures relating to them 4th edition* (Office of Public Sector Information,

November 2006; “SIP”). SIP identifies (at para 1.5.3) one further UK-wide form of SI, an Order of Council, so five distinct forms of SI can be identified: Orders in Council, Orders of Council, orders, rules and regulations.

Orders in Council

Orders in Council, which are made by the Queen and Privy Council, can take the form of primary legislation, but most are made as SIs, and should be used when “an ordinary statutory instrument made by a minister would be inappropriate, as in...an Order which transfers ministerial functions... or where the Order is in effect a constitutional document...” (SIP, para 1.5.2). By means of the Civil Service (Amendment) Order in Council 1997, Tony Blair gave himself the power to appoint up to three people to the Prime Minister’s Office outside the normal Civil Service recruitment procedure (*Civil Service Commissioners’ Annual Report 1997-98*). He used this power to appoint his two most trusted political advisers, Alastair Campbell and Jonathan Powell. The significance of the monarch’s constitutional role in Orders in Council is shown in the introductory wording used when they are SIs: “Her Majesty, in exercise of the powers conferred on Her by [specified Act(s)] and *all of the other powers enabling Her to do so...*” (emphasis added). The involvement of the head of state is necessary because of the potentially far-reaching consequences of Orders in Council.

Orders of Council

Orders of Council, by contrast, are made by “the Lords of Her Majesty’s Most Honourable Privy Council”, and usually involve the regulation of professions or professional bodies. Such SIs amount to little more than a rubber-stamping of detailed rules drafted by the governing bodies of professions; it would clearly be inappropriate to trouble the monarch with such minutiae.

Orders

Orders are usually made by government ministers, and serve a specific, closely defined purpose. They should be used for executive powers and judicial and quasi-judicial decisions. Four specific types of order—Commencement Orders, Legislative Reform Orders, Remedial Orders and Public Bodies Orders—are worthy of particular mention because of the important purposes that they serve.

Commencement Orders (COs) bring into effect one or more sections of an Act of Parliament. COs are widely used because it is often the case that not all of an Act comes into force on the date on which it receives the Royal Assent. It is common for an Act to include wording such as: “The provisions of this Act come into force on such day as the Secretary of State may by order appoint”.

Legislative Reform Orders (LROs), created under the Legislative and Regulatory Reform Act 2006 (LRA 2006), enable ministers to effect changes to primary legislation. Similarly extensive “Henry VIII” powers exist under seven other Acts, and the House of Lords’ Delegated Powers and Regulatory Reform Committee has recently expressed concern about the lack of parliamentary scrutiny that such orders potentially involve (3rd Report of Session 2012-13: *Strengthened Statutory Procedures for the Scrutiny of Delegated Powers*). The circumstances in which such orders may be made are specified in the enabling Acts.

Section 1 of the LRA 2006, for example, permits an LRO to be made to reduce a “legislative burden”, which is defined as including the rather nebulous concept of “an administrative inconvenience”. A minister proposing an LRO must demonstrate (*Brief Guide: Delegated Legislation*, House of Commons, 2011) that the proposed legislation is needed, is proportionate, represents a fair balance of interests, does not remove any necessary protection, does not unreasonably interfere with rights and freedoms, and has no constitutional significance. Because of concerns that LROs potentially provide a means via which the government can amend primary legislation without the formal approval of Parliament, LROs may be subject to greater-than-usual parliamentary scrutiny via the “super-affirmative procedure”.

Remedial Orders (ROs), unsurprisingly, are used to correct shortcomings in existing legislation. If a legislative provision is declared by a court to be incompatible with the European Convention on Human Rights, or if the European Court of Human Rights (ECtHR) holds that an individual’s Convention rights have been infringed, s 10 of the Human Rights Act 1998 (HRA 1998) provides that a minister may make an RO. ROs can have retrospective effect, and must normally be laid before Parliament. Before they become law, the Joint Select Committee on Human Rights must report on them. The Terrorism Act 2000 (Remedial) Order 2011 repealed the extensive stop-and-search powers conferred under Pt V of the eponymous Act, and replaced them with powers that are exercisable in much more limited circumstances. The introductory text explains why the RO has been drafted: “It appears to the Secretary of State, following a finding of the [ECtHR] after the coming into force of [s 10] of the [HRA 1998] in proceedings against the United Kingdom, that certain provisions of the Terrorism Act 2000 are incompatible with an obligation of the United Kingdom arising from the Convention.”

Public Bodies Orders (PBOs) are made using powers delegated by the Public Bodies Act 2011, which permit ministers to abolish, merge or modify 285 public bodies as part of an exercise sometimes referred to as “the bonfire of the quangos”. Nineteen draft PBOs were laid before the House of Lords during 2012 (19th Report of Session 2012-13: *Public Bodies Act 2011: one year*

Type	Form	Made by	Typical purpose
Statutory instruments	Orders in Council	The monarch and Privy Council	Constitutional change
	Orders of Council	The Privy Council	Approval of professional bodies’ rules
	Orders	Government Minister	Single purpose; specific forms include: Commencement Orders Legislative Reform Orders Remedial Orders Public Bodies Orders
	Rules	Government Minister	Procedural law
	Regulations	Government Minister	Substantive law, often technical
Byelaws	N/A	Local authorities Statutory bodies	Regulating behaviour within the body’s area of responsibility

on), and 11 UK-wide and two Welsh PBOs became law. The four-article The Public Bodies (Abolition of the Commission for Rural Communities) Order 2012 (SI 2012/2654) does nothing more than its title indicates, other than specifying consequential legislative changes.

Rules

Rules should, according to the *Report of the Committee on Ministers’ Powers* (Cmd 4060, HMSO, 1932), be used to make procedural laws: they set out how things should be done, rather than what should be done. The best-known set of rules is probably The Civil Procedure Rules 1998 (SI 1998/3132), which govern the running of the civil court system.

Regulations

Regulations are used to make substantive law—often amendments to existing primary or secondary legislation—and are frequently technical in nature. The Greenhouse Gas Emissions Trading Scheme Regulations 2012 give effect to the EU Directive on emissions trading schemes and are, inevitably, very detailed. Regulations enable the law to be maintained and kept up-to-date, and students should think of them when they learn that the advantages of delegated legislation include the use of expert advice to create detailed provisions and the resultant saving of parliamentary time.

Byelaws

Byelaws are made under the limited law-making powers conferred on local authorities and statutory bodies, and must be authorised by a Secretary of

State. They deal with matters within the jurisdiction of the maker, and may reflect local concerns. The *Byelaws made by the Lord Mayor, Alderman [sic] and Citizens of the City of Sheffield, acting by the Council, with respect to Pleasure Grounds* on 2 February 1966 prohibit the playing of “Knurr and Spell”, which involves hitting a wooden ball with a wooden stick while the former is travelling vertically upwards. Wikipedia indicates that this game originated in the Yorkshire moors in the 14th century and, despite a local revival in the 1970s, “was virtually unknown by the 21st century”. One wonders whether the prestige afforded by its mention in the Byelaws provided the catalyst for the game’s short-lived resurgence in the late 20th century.

Conclusion

The table above summarises the classifications of delegated legislation discussed in this article. It is hoped that these classifications, derived from SIP, will be adopted in future editions of English legal system textbooks, thereby enabling future law students to gain a more accurate understanding of delegated legislation than many of their lecturers. NLJ

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