The Delegated Powers and Regulatory Reform Committee
The Committee is appointed by the House of Lords each session and has the following terms of reference:
(i) 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;
(ii) To report on documents and draft orders laid before Parliament under or by virtue of:
   (a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,
   (b) section 7(2) or section 15 of the Localism Act 2011, or
   (c) section 5E(2) of the Fire and Rescue Services Act 2004;
   and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and
(iii) To report on documents and draft orders laid before Parliament under or by virtue of:
   (a) section 85 of the Northern Ireland Act 1998,
   (b) section 17 of the Local Government Act 1999,
   (c) section 9 of the Local Government Act 2000,
   (d) section 98 of the Local Government Act 2003, or
   (e) section 102 of the Local Transport Act 2008.

Membership
The members of the Delegated Powers and Regulatory Reform Committee are:
Baroness Andrews
Lord Bourne of Aberystwyth
Baroness Drake
Baroness Farrington of Ribbleton
Baroness Fookes
Countess of Mar
Lord Marks of Henley-on-Thames
Baroness O’Loan
Baroness Thomas of Winchester (Chairman)
Viscount Ullswater

Registered Interests
Committee Members’ registered interests may be examined in the online Register of Lords’ Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the Parliamentary Archives. Interests related to this Report are in the Appendix.

Publications
The Committee’s reports are published by the Stationery Office by Order of the House in hard copy and on the internet at www.parliament.uk/hldprrcpublications.

General Information
General information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at http://www.parliament.uk/business/lords/.

Contacts for the Delegated Powers and Regulatory Reform Committee
Any query about the Committee or its work should be directed to the Clerk of Delegated Legislation, Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3103 and the fax number is 020 7219 2571. The Committee’s email address is dprr@parliament.uk.

Historical Note
In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that “in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion” (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, “be well suited to the revising function of the House”. As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and other acts specified in the Committee’s terms of reference.
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The Delegated Powers and Regulatory Reform Committee reports to the House of Lords on the delegations in public bills. To assist it in its work, the Government provide the Committee with a delegated powers memorandum (“a memorandum”) which is intended to explain and justify each delegation in a bill. Recently, the Committee has commented adversely on a number of memoranda and, for this reason, decided to undertake a short inquiry to see how this inconsistency in standards can be remedied.

Delegated powers memoranda are prepared by bill team policy officials and departmental lawyers with some assistance from Parliamentary Counsel. Bill teams are necessarily temporary in character and one of our principal concerns was the absence of central oversight, both in terms of monitoring performance and dissemination of best practice (including drawing on the comments made in Committee reports).

We were pleased to hear from Jonathan Jones, the Treasury Solicitor, that the Government Legal Service, of which he is Head, was currently undergoing a process of change which would enable “more systematic control of the quality of legal work in teams”. The changes would include, he anticipated, the appointment of a “senior person” to monitor the comments on memoranda made by the Committee in its reports. Richard Heaton, First Parliamentary Counsel and Permanent Secretary at the Cabinet Office, told us that a member of the Office of the Parliamentary Counsel would perform a similar task and that the secretariat to the Parliamentary Business and Legislation Committee (a Cabinet Committee) would now be designated as responsible for disseminating guidance and best practice. We welcome all these developments.

In addition, during the course of the inquiry, the Cabinet Office published revised guidance on the preparation of delegated powers memoranda and we welcome the revisions which have been made to that guidance. To supplement the Government’s guidance, the Committee will also issue revised guidance which appears in Appendix 4 to this report. It is intended to provide departments with more information on what should be included in memoranda and also what should be avoided. We state, for example, that the memorandum should explain and justify the scope of a power, not only in terms of how the current Government intend to exercise it but also how future governments could exercise it.

Undertaking this inquiry has, we believe, been a useful reminder to the Government of the importance of achieving and maintaining a consistently high standard of memoranda and we are hopeful that the steps which are being taken within Government, supported by the revised guidance from both the Cabinet Office and this Committee, will ensure that improvements will be made. We shall however continue to comment on the quality of memoranda, where appropriate, and we envisage undertaking a short follow-up inquiry in due course. Should the expected improvements not result, it is, of course, open to the Committee to revisit the issues raised in this inquiry and consider whether tougher measures are needed.
CHAPTER 1: BACKGROUND

Introduction

1. In 1992, the Select Committee on the Committee Work of the House, under the chairmanship of Earl Jellicoe, noted that there had “been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion”. As a result, in the following session, the Select Committee on the Scrutiny of Delegated Powers was appointed. The current incarnation of that committee is the Delegated Powers and Regulatory Reform Committee (DPRRC). The aspect of the remit of the Committee relevant to this report is that it is required, in relation to all public bills (except supply bills and consolidation bills) introduced into the House of Lords, “to report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of delegated power to an inappropriate level of parliamentary scrutiny”. In addition, where the Committee’s resources allow, the Committee will respond to requests from a joint committee to consider the delegations in a draft bill.

2. The Committee is charged with considering the delegations in all public bills and, because of this focus on the implications of Parliament delegating power to a Minister to make legislation, in this report we call that legislation “delegated legislation”. “Delegated legislation” is not, however, the only name given to this type of legislation. It is also called “secondary legislation” and “subordinate legislation”. While we acknowledge that these different names can be useful in different contexts (so, for example, the name “secondary legislation” clarifies the distinction between this form of legislation and primary legislation or Acts of Parliament), nonetheless, we note in passing, they can also be a source of confusion.

3. When the Committee was first established, the (then) Government undertook to provide a delegated powers memorandum (“a memorandum”) for the Committee on each government bill on introduction into the House of Lords. According to Cabinet Office guidance (with which we concur), the memorandum should “give a concise account of the bill, and: identify every provision for delegated legislation within the bill; give a brief description or statement of their purpose; describe briefly why the matter has been left to delegated legislation; [and] explain the choice of parliamentary scrutiny
procedure selected for the exercise of each power (affirmative, negative or none at all) and why”.3

Why are delegated powers memoranda important?

4. The principal purpose of a memorandum is to enable the Government to explain and justify the powers which they intend should be delegated to a Minister so that the Committee can decide whether a delegated power is, in its view, appropriately delegated and, if so, that the level of parliamentary scrutiny it attracts is also appropriate. If the Committee takes the view that a particular delegation is either inappropriate or subject to an inappropriate level of scrutiny, the Committee will make a report to the House to that effect. It is then a matter for the House to press the Government further (either in the form of an amendment to meet the concerns of the Committee or further explanation), taking into account any written response by the Government to the Committee’s comments. Having to provide a memorandum, therefore, in effect, gives the Government a chance to put their case and so, as the Committee noted in one of its very early reports, a good memorandum has the potential to work to the advantage of departments in that it may well “substantially” reduce the number of recommendations made by the Committee.4

5. Not only is the memorandum of direct value to the Committee, its preparation, as an activity within departments, has also led to benefits. The Committee suggested in a report in 2000 that the requirement on departments to prepare a memorandum had had a salutary effect on their selection of powers and choice of scrutiny procedure: “We believe that memoranda are not only useful to the House, but may help the executive also, as those writing them are required to justify each new power sought, and the level of parliamentary control provided for it”.5 Richard Heaton, First Parliamentary Counsel and Permanent Secretary at the Cabinet Office, confirmed this view in evidence to us. He told us that the establishment of the Committee had created a culture in departments where “people think quite carefully ... about delegated powers” which contrasted with the period before the Committee existed when “more likely than not when you were thinking about how to wrap up the last clauses of the bill you would ask counsel to put in something that broadly speaking allowed you to do what you liked because it was convenient”. Mr Heaton suggested also that the fact that the memorandum is circulated to the powerful Parliamentary Business and Legislation (PBL) Committee similarly had “a good internal-discipline effect”.6

6. Given that the memorandum sets out information about how the Government intend a power to be exercised, we invited evidence on whether memoranda were seen as also having a value going forward into the future, after a bill had been enacted; that is, whether memoranda were used as a resource to those preparing delegated legislation. Mr Heaton seemed

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6 Q1. The PBL Committee is a Cabinet Committee which has to approve bills for introduction into Parliament.
doubtful. He described the DPRRC as “the principal customer” for the memorandum. Jonathan Jones, Treasury Solicitor and Head of the Government Legal Service (GLS), similarly suggested that lawyers, when preparing delegated legislation, would not routinely revert back to memoranda.

7. The delegated powers memorandum accompanying a bill can be a valuable resource in explaining the purpose and intended use of a delegated power. We encourage those who commission delegated legislation and also those responsible for the preparation of delegated legislation to have regard to this resource. We also draw the attention of members of both Houses of Parliament involved in the scrutiny of delegated legislation, including relevant committees, to the availability of memoranda (on the Committee’s webpage) as a useful source of information.

The problem of inconsistent standards

8. The memorandum plays a critical part in the DPRRC’s effective scrutiny of government bills. The Committee has, in the past, expressed its gratitude to departments for providing them. For example, in October 1994, it reported: “The Committee is extremely grateful to all departments for providing memoranda. ... The memoranda have always been helpful and are usually very thorough”.

9. On a number of occasions recently, however, the Committee has commented adversely on the quality of memoranda. For example, in reporting on the Transparency of Lobbying, Non-party Campaigning and Trade Union Administration Bill during the last session, the Committee said of the memorandum prepared by the Cabinet Office and the Department for Business, Innovation and Skills (BIS):

“Unfortunately, our consideration of the powers in Parts 1 and 2 has been made much more difficult by the very poor quality of the memorandum as it relates to those Parts. From the very first page onwards, many of the references in it to clause and paragraph numbers in the bill are incorrect; a number of powers have either not been mentioned at all or have been only cursorily explained; and in more than one instance we have found that information provided to us about a power is inaccurate or incomplete”.

10. In the same session, the Immigration Bill memorandum, prepared by the Home Office, drew similar criticism: “In a number of respects the quality of the memorandum fell short of the standard the Committee expects”; and, in its report on the Care Bill, the Committee said: “Although extensive, we have found that, in a number of instances ... the memorandum could have explained more fully or more accurately why a delegation is thought to be necessary, or why a particular level of parliamentary scrutiny is being

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7 Q1
8 Q1
9 Q21
proposed”.

Further examples of specific criticisms made by the Committee in the last two sessions are set out in Appendix 3 to this report.

Purpose and conduct of the inquiry

11. The number of occasions on which the Committee has felt it necessary to comment recently on the poor quality of memoranda, whether generally or in relation to specific delegations, prompted the Committee to undertake this short and tightly-focused inquiry into the quality of delegated powers memoranda.

12. A Call for Evidence was issued in April of this year (and is set out in Appendix 1) and the responses we received are published on the Committee’s webpage. We also sent a questionnaire to all Government departments inviting them to explain how delegated powers memoranda are prepared in their departments. The Cabinet Office co-ordinated their responses and these are set out, with the Government’s evidence, in Appendix 2. We note that not all departments responded. We are grateful, however, to the departments which did respond and also to those who made submissions in response to the Call for Evidence (listed in Appendix 1).

13. We held two oral evidence sessions. The first was with Richard Heaton, First Parliamentary Counsel and Permanent Secretary at the Cabinet Office; and the second was with Jonathan Jones, Treasury Solicitor and Head of the Government Legal Service. We also wish to express our thanks to Mr Heaton and Mr Jones.
CHAPTER 2: HOW MEMORANDA ARE PREPARED AND PROPOSALS FOR CHANGE

How are memoranda prepared and when?

Who is involved?

14. All government bills have a dedicated bill manager and bill team within the department who are responsible for the administration of a bill’s passage through Parliament. According to the Government’s submission, in the majority of departments, “the bill manager or the lead bill lawyer will usually be responsible for commissioning the memorandum and will work closely with relevant policy leads and other legal advisers on its preparation”. Mr Jones said that there was “no set template for the role of lawyers as opposed to policy officials in the production of ... memoranda”. They work in partnership.

15. Parliamentary Counsel are usually involved in the preparation of memoranda although the extent varies from bill to bill. For example, the Cabinet Office stated that memoranda in that department are prepared by the bill lawyer, in conjunction with policy colleagues and Parliamentary Counsel; and BIS said that legal advisers usually prepare memoranda in consultation with “relevant policy leads and Parliamentary Counsel”. The Department for Education referred to Parliamentary Counsel being consulted “as appropriate”; and the Department for Work and Pensions (DWP) said that “Counsel will ... often clear the draft memorandum if time allows” and gave an example of a smaller bill where a memorandum was drafted by the “bill/policy team”, reviewed by the bill lawyer and then “cleared” with Parliamentary Counsel and other lawyers “as relevant”.

16. The Cabinet Office guidance to bill teams, recently revised in July 2014, entitled Guide to Making Legislation, says that departmental instructions to Parliamentary Counsel to draft a bill should specify the powers to be delegated by the bill and the level of parliamentary scrutiny to be applied to each delegation. In practice, therefore, the decision whether a power should, for example, be subject to negative or affirmative procedure rests with the departmental officials and lawyers and not with Parliamentary Counsel.

17. Once finalised, the memorandum is signed off by the relevant Minister. It will then go before the PBL Committee. The memorandum is required by the PBL Committee before it will approve a bill for introduction.

At what stage in bill drafting is the memorandum prepared?

18. According to the Government’s submission, memoranda are prepared “during the final stages” of bill drafting. In its response to the...
questionnaire, BIS confirmed that preparation of the memorandum took place “alongside finalising the drafting of the Bill”.\textsuperscript{21} The Department for Transport said that, in the case of the High Speed Rail (London-West Midlands) Bill, a hybrid bill, the memorandum was commissioned two months before the bill’s introduction. DWP said that, with larger bills, “the bill team commissioned input from policy and legal leads on each delegated power, as clauses were finalised”; and the Ministry of Defence stated that, in that department, the bill manager would commission the memorandum “once a slot in the legislative programme is confirmed and the drafting of the bill is at a sufficiently mature stage”.\textsuperscript{22}

**How is quality assured?**

19. We asked Mr Jones what were the “key levers” for ensuring the standard of memoranda. He suggested four: training, written guidance, a system for sharing feedback, and monitoring.\textsuperscript{23}

*Training*

20. Mr Jones explained that government lawyers were subjected to a very full programme of training which included specific bill training, both as induction training and training to meet a specific need.\textsuperscript{24} Mr Heaton also commented on the training available to bill teams, although he conceded that “this is probably an area where we could do some more”.\textsuperscript{25}

*Guidance*

21. The departments have two sources of written guidance: the Cabinet Office’s newly revised *Guide to Making Legislation*,\textsuperscript{26} and this Committee’s guidance, published in November 2009.\textsuperscript{27} A number of departments, in response to the questionnaire, indicated that they also referred to precedents taken from previous bills.

*Sharing feedback*

22. According to Mr Jones, the GLS includes a network of lawyers involved in primary legislation which was a “ready-made community of bill lawyers whose purpose is to share best practice and experience ... on bill work”. Mr Jones conceded that the network “could and probably should include more of a focus on the delegated powers memoranda and the use of delegated powers generally”.\textsuperscript{28}

*Monitoring*

23. The evidence we received suggests that there is, at present, relatively little monitoring. Mr Heaton, for example, agreed that there was “no methodical

\textsuperscript{21} Table, set out in Appendix 2 to this report.
\textsuperscript{22} Ibid.
\textsuperscript{23} Q21
\textsuperscript{24} Q14
\textsuperscript{25} Q2
\textsuperscript{26} https://www.gov.uk/government/publications/guide-to-making-legislation
\textsuperscript{27} http://www.parliament.uk/documents/DPRR/GFD/Guidance-for-Departments.pdf
\textsuperscript{28} Q14
spot check on quality” of memoranda. 29 And when we asked Mr Jones whether anyone in the GLS analysed the Committee’s reports regularly to identify emerging themes, he said that this had not been happening. 30 His response is confirmed by the Committee’s own experience that comments made in one report about one bill do not seem to be taken on board by other bill teams when deciding on delegations and levels of scrutiny in other bills. An example of this that has arisen in recent reports concerns delegated powers to “modify” Acts, particularly where future Acts may be affected. In the Committee’s recent report on the Infrastructure Bill [HL], we were critical not only of the absence of proper explanation but also of the fact that we were once again commenting on the inclusion of such a power:

“We are surprised that none of those important features of such significant delegations of legislative power (which paragraphs 46 and 109 of the memorandum dismiss as “standard provision”) or of the arrangements for their control by Parliament has been expressly explained and supported in the relevant memorandum. On several past occasions, we have indicated that we expect that to be done for powers in Bills enabling the amendment of future Acts. Only last session, we questioned the purpose and effect of powers to “modify” Acts: see our 12th Report in session 2013-14 in relation to the Transparency of Lobbying, Non-party Campaigning and Trade Union Administration Bill, and our 27th Report concerning the Commons’ amendments to the Care Bill. In the first of those instances, the Bill was amended to extend the requirement for the affirmative procedure to instruments which “modify” primary legislation; and in the latter case, amendments were made to make clear that the power to “otherwise modify” an Act was intended to mean “apply with modifications” (and to apply the affirmative procedure to that power).” 31

24. We commented, in the same report, on the same issue with regard to the Serious Crime Bill [HL]. 32 In our 3rd Report of this session we repeated the point in relation to the Consumer Rights Bill, 33 and again in our 5th Report in relation to the Deregulation Bill. 34

25. That the same issue has arisen successively in this way suggests that much more needs to be done to disseminate the Committee’s comments within departments to ensure that bill teams are made aware of the Committee’s views.

Why has the problem of inconsistent standards arisen?

26. Mr Jones agreed that the quality of memoranda has been inconsistent: “I accept that there are lapses, and there is a variation in quality”. 35 Daniel Greenberg, former Parliamentary Counsel, commented that “compared with the very early days it is certainly noticeable that a number of memoranda have become more routine and formalistic” (although he added, rightly, that

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29 Q6
30 Q13
32 Ibid., para 13.
35 Q12
there are still examples of very good memoranda). Mr Heaton suggested that the explanation for such inconsistent standards was a product of the variability of departments, of departmental teams and even of Ministers; that variability was caused by “all sorts of things” such as bill timescales (by which we take Mr Heaton to mean the speed at which teams have to work to meet the bill timetable) and bill team inexperience. Mr Jones similarly suggested that “the speed of the parliamentary process” and also “the volume of material that has to be produced in the course of bill work” explained the lapses in standards.

Proposals for change

27. While we suspect that, although within the control of the government of the day, tight deadlines and over-stretched resources are a largely irresolvable part of departmental bill work, it appears, from our own findings and from comments made by our witnesses, that important changes can be made to the processes and practices surrounding the drafting of memoranda which could markedly improve the consistency and quality of memoranda.

Guidance

28. Although the current guidance is good and remains sound – as Mr Jones said, the guidance is not “particularly flawed” – we think that there are ways in which it can be improved. We believe that the Committee’s own guidance should be updated to include examples of good and bad practice, and also to include guidance on what is not acceptable as well as what should be included in a memorandum. We share Mr Heaton’s view that achieving greater consistency depends on having “a really clear idea of what is acceptable and good and where things fall short”.

29. We therefore set out in Appendix 4 to this report revised guidance which builds on our current guidance and, in particular, highlights some of the unhelpful practices which departments should make efforts to avoid as well as the matters which a memorandum should address.

30. In addition to the Committee’s guidance, the Cabinet Office has issued guidance which, as we have already noted, has recently been revised. We welcome the new additional material included in the guidance, in particular the new paragraphs which emphasise the importance of fully justifying the delegations in a bill.

31. We note, for example, that the introduction to the chapter on delegated powers in the Cabinet Office’s revised guidance now states: “... when preparing instructions to the OPC [Office of the Parliamentary Counsel] care needs to be taken to ensure that it will be possible to justify the proposed powers to make subordinate legislation and the form of Parliamentary scrutiny chosen. The Bill team should also make sure that the minister is content with what is proposed and alerted to any proposed delegated powers

36 Daniel Greenberg, answer to qu 4.
37 Q2
38 Q16
39 Q2
which may prove controversial”. The Cabinet Office’s revised guidance also meets a particular concern of the Committee, raised during our evidence sessions with each of our witnesses, that justifying the negative procedure with the bare assertion that the power is of a technical or procedural or administrative nature, without more explanation, is not adequate. The guidance now states: “The memorandum should not simply refer to past precedent or state that a power is of [a] technical nature, a full explanation needs to be given in each instance”.41

32. In providing a “full explanation”, as required by the new Cabinet Office guidance, we urge departments to consider not only how the current Government intend to use it (which may, indeed, be a use which is purely technical in character) but also how future governments might use the power (which may be drawn so broadly that it would encompass uses which go far beyond the purely technical and far beyond the use intended by those involved in the preparation of the bill).

Principles underlying the choice of level of scrutiny

33. Mr Heaton suggested that the Committee might set out “the principles” for when a negative or an affirmative procedure should apply to a power because, he said, he was not sure “that there are really clear principles yet that everyone is agreed on”. In the Committee’s very first report, published in 1993, the Committee endorsed the view of the (then) Government “that there is ‘no finite rule’ for determining the appropriate form of scrutiny”. At that time, the Committee indicated that it would bear in mind the criteria established by the Joint Committee on Delegated Legislation (the Brooke Committee) in 1973 (to the effect that the affirmative procedure would normally be appropriate for “powers substantially affecting provisions of Acts of Parliament”, powers to impose or increase taxation and other financial matters, and powers involving consideration of special importance not falling in the first two categories (for example, powers to create new criminal offences of a serious nature)). But, the Committee went on, “we propose to consider what level of parliamentary scrutiny of a provision, if any, is appropriate in the particular circumstances of the case”. Mr Heaton confirmed that the Cabinet Office had “no formal guidance” on the matter and that the civil service approach “has been to treat every delegated power on its merits”; and we note that Lord Wallace of Saltaire, in reply to a recent Question for Written Answer, took a similar line: “Every delegated power has to be treated on its own merit and the level of parliamentary scrutiny proposed will depend on the nature of the delegated power, past precedent and the level of interest in a particular policy area”.

34. Whilst the Committee continues to consider each delegation on its merits, the accumulation of over twenty years of experience has

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41 Ibid., p127, para 15.16.
42 Q4
44 Ibid., para 30.
45 Mr Heaton, supplementary evidence.
46 HL Deb, 8 July 2014, WA36.
enabled the Committee to develop a number of principles which provide the starting point for its consideration of delegated powers. These are set out in more detail in the revised Committee guidance (in Appendix 4 to this report) and include, for example, the (now well-established) presumption in favour of the affirmative procedure for any Henry VIII power (that is, a delegated power which enables a Minister, by delegated legislation, to amend, modify or repeal an Act of Parliament).

Central oversight

35. By “central oversight”, we mean both central monitoring of performance, including taking on board comments made by the Committee in its reports, and central dissemination of best practice.

36. As we have said, at present there appears to be little or no central monitoring. According to Mr Jones, “... there is no systematic process of looking across the whole service to see whether there are particular patches of very good practice or particular patches of poor practice, or particular themes that are emerging”,47 and the Government response, in answer to the question whether there is any cross-departmental mechanism for monitoring and reviewing memoranda, stated that there was no designated individual or team within departments who held that responsibility.48 Mr Jones was, however, able to be more positive about future arrangements. He explained that the GLS, of which he is Head, is currently going through a process of change which would bring more and more legal teams directly into the Treasury Solicitor’s Department, thereby providing “an opportunity to get more systematic control over the quality of legal work in the teams” for which the Treasury Solicitor is responsible. This would include bill work which would, in turn, include monitoring comments from the Committee about the quality of memoranda. Mr Jones said that he anticipated that a process would be established, supervised by a “senior person” in his department, which would include feedback on reports from the DPRRC.49

37. We welcome the implications of the changes being introduced into the GLS, and the Treasury Solicitor’s comments on how those changes will improve central monitoring of feedback about the quality of memoranda; and we were pleased to hear from Mr Heaton that the comments of the Committee would receive greater attention in the future, in that he had arranged for a member of the OPC “to have special responsibility for scanning the Committee’s reports with a view to extracting points of general importance or points which tend to get repeated”.50

38. We welcome also the Government’s commitment to designating the secretariat of PBL Committee as responsible for liaising with the DPRRC and “disseminating guidance, best practice and feedback so that departments can continually seek to improve upon their performance”.51 We note that the newly revised Cabinet Office guidance

47 Q13
48 Government, answer to qu 7, set out in Appendix 2 to this report.
49 Q13
50 Mr Heaton, supplementary evidence.
51 Government, answer to qu 7, set out in Appendix 2 to this report.
states that “all memoranda should be shared in draft with PBL Secretariat who can provide examples of memoranda which the DPRRC have praised”.52

39. **While we are pleased by the Government’s efforts to improve central oversight, we invite the Government, in their response to this report, to explain how the central monitoring role of the Treasury Solicitor’s Department will be co-ordinated with the new role assigned to the secretariat of PBL Committee and the OPC.**

*Stage of preparation*

40. The evidence we received about the stage during the development of a bill at which the memorandum is prepared (see paragraph 18 above) suggests that it is often undertaken fairly late in the day. This is despite there being clear advantages to the memorandum being drafted earlier in the process, when the policy is being developed and bill drafting begins. It is at this earlier stage that policy makers and departmental lawyers will be considering what delegations are needed in a bill and the level of parliamentary scrutiny that should attach to them. Setting out, formally in a draft delegated powers memorandum, the reasoning applied in making these decisions at the time they are being made, rather than later in the process, would reinforce the “internal-discipline effect” described by Mr Heaton (see paragraph 5 above). Furthermore, it would, importantly, be the point at which the bill team and departmental lawyers could be expected to challenge a proposed power to see whether it is drawn exactly for the purposes envisaged by the government of the day, or whether its ambit extends beyond those exact needs, thereby creating the possibility of unanticipated use by future governments (see paragraph 32 above).

41. **We recommend that the Government encourage departments, as best practice, to prepare a draft memorandum in parallel with the policy development and early drafting stages of the bill rather than leaving it until later in the process.**

*The role of the bill lawyer and Parliamentary Counsel*

42. Mr Jones explained that “precisely who does the drafting, who does the first draft, or who co-ordinates the draft, will vary from bill to bill and department to department”; and that, he said, was “probably as it should be”.53 We agree, not least because, as Mr Jones said, decisions about whether to take delegated powers and the level of scrutiny attaching to them “is not a hard-edged legal question”.54 As a result we also agree with both Mr Jones and Mr Heaton that there is no case for recommending that either the bill lawyer or Parliamentary Counsel should be required formally to sign-off memoranda. We share the view expressed by Mr Heaton that the more important issue is for “the authorship to be right”,55 rather than shoring up patchy authorship with disproportionate mechanisms for signing-off.

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53 Q15
54 Ibid.
55 Q11
Penalties for lapses?

43. The suggestion was made to us that one way to ensure the quality of memoranda would be for the Committee to delay consideration of a bill until any formal pre-report questions requesting clarification, elucidation and expansion of a memorandum had been answered.56 These requests might involve a written response or inviting the Minister to give oral evidence. It has also been suggested to us that the Committee should have the power to reject a memorandum that failed to meet the required standard and that consideration by the House of the parts of the bill covered by the memorandum should be delayed until a satisfactory memorandum has been provided.57

44. There are practical difficulties with each of these suggestions. First, timing: the memorandum is required to be deposited with the Committee on the bill’s introduction into the House of Lords. The Committee endeavours to report after second reading and before committee stage. Given the recommended minimum intervals between stages,58 and factoring in time for the Committee to meet and publish its report, there is little opportunity, if any, for the Committee formally to make pre-report requests. Secondly, the Committee does not have a “scrutiny reserve” requiring bill proceedings to await publication of the Committee’s findings. If the Committee were to delay its report on a bill, there is no requirement on the Government to re-schedule committee stage.

45. Rather than suggest such significant procedural changes, we believe that, at this stage, the better approach is to rely on the steps (suggested in this report) which are intended to ensure a more consistent standard of memoranda across all departments. The Committee will continue, where appropriate, to comment on the quality of delegated powers memoranda and will, in due course, undertake a short follow-up inquiry to assess progress. Should the expected improvements not result despite these efforts, then it is, of course, open to the Committee to re-visit these, and any other, proposals for procedural change.

56 Daniel Greenberg, answer to qu 5.
57 Immigration Law Practitioners’ Association, para 29.
58 Two weekends between first and second readings and 14 days between second reading and committee stage. See The Companion (2013), p125, para 8.04.
APPENDIX 1: CALL FOR EVIDENCE AND LIST OF RESPONDENTS

In 1992, the Lords Select Committee on the Committee Work of the House noted that “in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order making powers which give Ministers unlimited discretion”. As a result it recommended the establishment of a Delegated Powers Scrutiny Committee “to give closer and more systematic scrutiny to delegated powers sought in bills”. The Committee was appointed the following session and has continued to perform its function (albeit under different names) every session since its inception. Its current name is the Delegated Powers and Regulatory Reform Committee (DPRRC).

One of the principal purposes of the DPRRC is 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. When the Committee was first established, to assist it in its work, the Government undertook to provide a delegated powers memorandum on each bill which would identify provisions for delegated legislation in the bill, explain the procedure selected and why it had been chosen. The Committee has provided further guidance on what should be included in a delegated powers memorandum in a document entitled “Guidance for Departments”. On several occasions the Committee has expressed its gratitude to departments for the memoranda. More recently however the Committee has reported on its concern about their quality. For example, the Committee was recently critical of the memoranda for the Transparency of Lobbying etc. Bill and the Immigration Bill.

Given the importance of delegated powers memoranda to the Committee’s scrutiny of bills, the DPRRC has decided to undertake a short inquiry into how delegated powers memoranda are prepared and quality assured and what can be done to ensure that an acceptable standard of memorandum is achieved and maintained. To this end, the Committee has sent a questionnaire to Government departments asking them for information about current arrangements and suggestions for improvements. In addition, the Committee is seeking evidence from anyone with an interest in the subject.

Issues

The Committee seeks evidence on this tightly-focused topic, and particularly on the following questions:

1. Has there been a change in either the volume or the character of delegations in bills over recent years?

2. What, in your view, is the value of delegated powers memoranda to the work of the Delegated Powers and Regulatory Reform Committee and,

60 Ibid.
63 DPRRC, 12th Report, Session 2013-14, para 2.
64 DPRRC, 22nd Report, Session 2013-14, para 2.
more generally, to the capacity of Parliament to scrutinise delegations within bills effectively?

3. How can the quality of delegated powers memoranda be defined and measured?

4. Has the quality of memoranda changed over time and, if so, how? Is there any variation between departments?

5. The Committee has recently drawn attention to a number of examples where the memorandum has fallen below standard. How do you think that the necessary quality of delegated powers memoranda can be achieved and maintained, both within and across departments?

6. The Committee has issued guidance about what should be contained in delegated powers memoranda. (The link can be found at footnote 4 above.) Do you think that this document gives departments adequate guidance about the necessary content of a delegated powers memorandum? If not, how should it be changed?

Whilst the focus of this inquiry is a narrow one, the Committee would also welcome evidence on issues within the scope of the inquiry but which are not raised in the above questions.

30 April 2014

List of respondents who submitted written evidence

Daniel Greenberg, Barrister specialising in legislation

Immigration Law Practitioners' Association

Rt Hon. Andrew Lansley CBE MP, (then) Leader of the House of Commons

Professor Helen Xanthaki, Professor of Law and Legislative Studies, Institute of Advanced Legal Studies, School of Advanced Study, University of London
APPENDIX 2: GOVERNMENT SUBMISSION

Written evidence submitted by the Rt Hon. Andrew Lansley CBE MP, (then) Leader of the House of Commons.

The Government welcomes the opportunity to submit evidence to the Committee’s inquiry into the quality of delegated powers memoranda. In particular, we recognise the important part delegated powers memoranda play in the Committee’s effective scrutiny of Bills, and are committed to ensuring an acceptable standard is achieved and maintained.

In response to the Committee’s questionnaire, the Government has collated information from all Government Departments regarding their current arrangements and any suggestions they have for improvement. For the Committee’s assistance, a summary of these responses is provided below, with individual departmental responses attached at Annex A.

Within Government, delegated powers are carefully scrutinised before they are included in a Bill. Officials are encouraged to engage with the Committee and send copies of the delegated powers memoranda to the Clerk of the Committee each time a Bill is introduced or when it enters its second House. Ministers and officials regularly engage with the Committee and we would welcome further engagement from the Committee and its staff before the Committee publishes reports on Bills.

Summary of Responses

1. What written guidance does your department follow when preparing a delegated powers memorandum?


2. Does your department have a standard procedure for preparing delegated powers memoranda or is a procedure adopted on a case by case basis?

The majority of Government departments do not have separate guidance in place for preparing delegated powers memoranda, but follow the Committee’s guidance and that in the Cabinet Office’s Guide to Making Legislation. Procedures tend to be used on a case by case basis. Different approaches are often required depending on the nature of the Bill, as each Bill and the delegated powers within them are different, covering different areas of law – It is for the departments in each case to justify the procedure they have used. Departments also draw on examples of previous memoranda submitted to the Committee.

3. a. If you have a standard procedure,

- who (in terms of job title) is responsible for commissioning a memorandum and at what stage of a bill’s progress?
• who prepares the memorandum?
• who is consulted about the memorandum during the course of its development?
• who signs off the memorandum?

b. If you do not have a standard procedure, who decides the answers to the questions set out in question 3a above and on what basis?

Whilst there tend not to be separate procedures in place for preparing memoranda, in the majority of Government Departments the Bill Manager or the lead Bill lawyer will usually be responsible for commissioning the memorandum and will work closely with relevant policy leads and other legal advisors on its preparation. In most cases, this takes place during the final stages of Bill drafting, before being finalised by the lead Bill lawyer or Bill Manager. The memorandum will be approved by the Minister.

Variations in terms of the procedure used by different departments are limited, and predominantly centre on whether lawyers or policy leads are responsible for the actual drafting of the memoranda. In all cases, lawyers and policy leads will be consulted regardless of who is responsible for the drafting.

c. In answer to either question 3a or 3b, please provide an example of the handling of a recent bill.

Examples of recent memorandum handling for each Government Department can be found at Annex A in the attached table.

4. What role, if any, does Parliamentary Counsel play in the preparation by your department of delegated powers memoranda?

Parliamentary Counsel has a role to play in the preparation of delegated powers memoranda, with Departments consulting with them as appropriate during the drafting of the memoranda.

The extent of Parliamentary Counsel’s involvement varies. In some cases their involvement will be limited to initial advice on the appropriate level of scrutiny for the delegated powers during the development of the legislation, whereas in other cases Counsel can play a more in-depth role in terms of both reviewing and commenting on the draft memorandum.

5. How are delegated powers memoranda in your department quality assured against the standard set in the Committee’s “Guidance for Departments”?

6. Who in the department is responsible for their standard generally and are there procedures for monitoring and reviewing the quality of memoranda?

There is no designated individual or team within Government Departments who have responsibility for monitoring and reviewing the quality of memoranda. In most cases, this responsibility will rest with the lead lawyers for the Bill, in
conjunction with the Bill Team or Bill Manager. Between them, they check the memoranda’s quality and ensure it meets the requisite standard.

7. **Are you aware of any cross-departmental mechanism for monitoring and reviewing the quality of memoranda?**

There is no designated individual or team within Government Departments who have responsibility for monitoring and reviewing the quality of memoranda per se. In most cases, this responsibility will rest with the lead lawyers for the Bill, in conjunction with the Bill Team or Bill Manager. Between them, they check the memoranda’s quality and ensure it meets the requisite standard.

The Parliamentary Business and Legislation Committee and Ministers responsible for each Bill consider the delegated powers before they are introduced, in particular whether delegated powers are appropriate, proportionate and necessary. I would like to reassure the Committee that the Government gives serious consideration to delegated powers and the scrutiny arrangements for their exercise.

Consultation between departmental lawyers and policy leads will take place when a Bill contains cross-departmental provisions. There have also been calls from some Departments for an individual to be nominated either within each Department or located centrally – i.e. within Cabinet Office – to be responsible for liaising with the Committee and disseminating guidance, best practice and feedback so that Departments can continually seek to improve upon their performance. The Parliamentary Business and Legislation Secretariat in the Cabinet Office will play this role in future.

8. **What happens within the department if the Lords Delegated Powers and Regulatory Reform Committee makes an adverse comment about a delegated powers memorandum?**

Any comments or recommendations made from the Committee regarding delegated powers memoranda are considered carefully by each Government Department.

In the majority of cases, relevant policy leads, lawyers and the Bill team will consider the views of the Committee and review proposed legislative approaches as applicable. Advice will then be provided to the relevant Ministers setting out the Committee’s recommendations and a proposed response.

9. **Are there any changes to either the procedures or available guidance which would better ensure that the necessary quality of memoranda is achieved and maintained?**

The Government is keen to ensure that the necessary quality of memoranda is achieved and maintained. To achieve this aim, we believe a refreshed edition of the Committee’s guidance with specific best practice examples of good quality memoranda, and an agreed format which could be used as a basis for drafting purposes, would be hugely welcomed by Departments, particularly as the current guidance is now five years old. We will also include a link to the Committee’s guidance within the Cabinet Office’s Guide to Making Legislation, to further aid Government departments.
The Government would welcome any views the Committee may have on these proposals.
Fourteen responses were received from Government Departments to the Committee’s questionnaire. The Government Departments were:

- Cabinet Office (CO)
- Department for Business Innovation Business and Skills (BIS)
- Department for Communities and Local Government (DCLG)
- Department for Environment, Food and Rural Affairs (DEFRA)
- Department for Education (DfE)
- Department for Transport (DfT)
- Department of Health (DoH)
- Department for Work and Pensions (DWP)
- Foreign and Commonwealth Office (FCO)
- HM Treasury (HMT)
- Home Office (HO)
- Ministry of Defence (MoD)
- Ministry of Justice (MoJ)
- The Territorial Offices

Questions and responses

1. What written guidance does your department follow when preparing a delegated powers memorandum?

<table>
<thead>
<tr>
<th>Department</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>CO</td>
<td>DPRRC’s guidance, the Cabinet Office’s Legislation Guidance, and Previous Memoranda by way of precedent.</td>
</tr>
<tr>
<td>DCLG</td>
<td>Cabinet Office Guide to Legislative Practice, and precedents from previous Bills.</td>
</tr>
</tbody>
</table>
2. Does your department have a standard procedure for preparing delegated powers memoranda or is a procedure adopted on a case by case basis?

<table>
<thead>
<tr>
<th>Department</th>
<th>Response</th>
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</thead>
<tbody>
<tr>
<td>HMT</td>
<td>DPRRC Guidance for Departments, and Legal Advisers use past precedents as templates for memoranda.</td>
</tr>
<tr>
<td>HO</td>
<td>Cabinet Office Guide to Legislative Practice and precedents from previous Bills.</td>
</tr>
<tr>
<td>MoD</td>
<td>Cabinet Office Guide to Making Legislation and DPRRC guidance for Departments</td>
</tr>
<tr>
<td>The Territorial Offices</td>
<td>Cabinet Office Guide to making legislation, and DPRRC Guidance.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Department</th>
<th>Response</th>
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</thead>
<tbody>
<tr>
<td>CO</td>
<td>Memoranda are generally prepared on a case by case basis to reflect the nature of a particular Bill.</td>
</tr>
<tr>
<td>BIS</td>
<td>Case by case scenario is adopted.</td>
</tr>
<tr>
<td>DCLLG</td>
<td>Procedure is adopted on a case by case basis.</td>
</tr>
<tr>
<td>DEFRA</td>
<td>Bill Teams work closely with Legal Advisors and policy Officials on the preparation of a delegated powers memoranda.</td>
</tr>
<tr>
<td>DfE</td>
<td>The Departmental Legal Advisors usually take the lead.</td>
</tr>
<tr>
<td>DfT</td>
<td>A procedure is adopted on a case by case basis. Regard is also had to memoranda submitted by the Department for other Bills.</td>
</tr>
<tr>
<td>DoH</td>
<td>The procedure varies on a case by case basis, i.e. different approaches are needed depending on whether the Bill deals with</td>
</tr>
<tr>
<td></td>
<td>a) one topic, in which case the memo is likely to be drafted by a single team, or b) several topics, in which case there are likely to be several contributors.</td>
</tr>
<tr>
<td>DWP</td>
<td>Procedure is adopted on a case by case basis.</td>
</tr>
<tr>
<td>FCO</td>
<td>FCO has only been responsible for 26 Acts of Parliament since 1993, of which 9 contain delegated powers</td>
</tr>
<tr>
<td>HMT</td>
<td>Our procedure is adopted on a case by case basis.</td>
</tr>
<tr>
<td>HO</td>
<td>Procedure is adopted on a case by case basis.</td>
</tr>
<tr>
<td>MoD</td>
<td>Case by case (but see answers below).</td>
</tr>
<tr>
<td>MoJ</td>
<td>The Bill Manager will be responsibility for ensuring the</td>
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</tbody>
</table>
### Department Response

<table>
<thead>
<tr>
<th>Department</th>
<th>Response</th>
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<tbody>
<tr>
<td></td>
<td>Department complies with this requirement.</td>
</tr>
<tr>
<td>The Territorial Offices</td>
<td>Case by case basis.</td>
</tr>
</tbody>
</table>

#### 3a If you have a standard procedure,
- who (in terms of job title) is responsible for commissioning a memorandum and at what stage of a bill’s progress?
- who prepares the memorandum?
- who is consulted about the memorandum during the course of its development?
- who signs off the memorandum

<table>
<thead>
<tr>
<th>Department</th>
<th>Response</th>
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<tbody>
<tr>
<td>CO</td>
<td>See above</td>
</tr>
<tr>
<td>BIS</td>
<td>See above</td>
</tr>
<tr>
<td>DCLG</td>
<td>See above</td>
</tr>
<tr>
<td>DEFRA</td>
<td>The Bill manager is responsible initially for commissioning the memorandum. Preparation of the memorandum usually happens alongside the drafting of the Bill. It is prepared by the Bill Lawyer in conjunction with Policy Colleagues and Parliamentary Counsel. The Bill Minister will sign off the memo before it is submitted to the Committee.</td>
</tr>
<tr>
<td>DfE</td>
<td>See above</td>
</tr>
<tr>
<td>DfT</td>
<td>See 3b below.</td>
</tr>
<tr>
<td>DoH</td>
<td>See above</td>
</tr>
<tr>
<td>DWP</td>
<td>See above</td>
</tr>
<tr>
<td>FCO</td>
<td>See above</td>
</tr>
<tr>
<td>HMT</td>
<td>See above</td>
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<tr>
<td>HO</td>
<td>See above</td>
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<tr>
<td>MoD</td>
<td>See above</td>
</tr>
<tr>
<td>MoJ</td>
<td>See above</td>
</tr>
<tr>
<td>The Territorial Offices</td>
<td>See above</td>
</tr>
</tbody>
</table>
3b If you do not have a standard procedure, who decides the answers to the questions set out in question 3a above and on what basis?

- In answer to either question 3a or 3b, please provide an example of the handling of a recent bill.

<table>
<thead>
<tr>
<th>Department</th>
<th>Response</th>
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</thead>
<tbody>
<tr>
<td>CO</td>
<td>CO Legal (based within Tsol) usually co-ordinate the preparation of the Memoranda, working with departmental lawyers, and policy leads, and often in consultation with Parliamentary Counsel.</td>
</tr>
<tr>
<td></td>
<td><strong>Example - DP Memorandum for the Deregulation Bill</strong>, was prepared by CO Legal, working with Departmental lawyers to determine which provisions needed an entry. The memo was checked with colleagues in CO Legal, before being signed off by the Lead CO lawyer on the Bill. Lawyers at the AGO were also consulted regarding some provisions. Parliamentary Counsel was also consulted regarding some entries.</td>
</tr>
<tr>
<td>BIS</td>
<td>Bill Team leaders usually work with Legal Advisors to commission the Memoranda. Departmental Legal Advisors usually prepare the Memoranda in consultation with relevant policy leads and Parliamentary Counsel, which usually takes place alongside finalising the drafting of the Bill. The Memoranda will then be signed off by the relevant Minister.</td>
</tr>
<tr>
<td></td>
<td>Departmental legal advisors usually take the lead in ensuring the Memorandum sets out clearly the purpose of the power, the justification for the power and procedure and any relevant precedents.</td>
</tr>
<tr>
<td>DCLLG</td>
<td>The Bill lawyer leads on preparation of the delegated powers memorandum with policy input as appropriate. The memorandum will be signed off by the relevant policy lead and Bill team.</td>
</tr>
<tr>
<td>DEFRA</td>
<td>See above.</td>
</tr>
<tr>
<td>DfE</td>
<td>The Bill Team leader will work with Legal Advisors in commissioning a Memorandum, which is usually prepared by Legal Advisors in conjunction with the final drafting of the Bill. Relevant policy leads, legal advisors and Parliamentary Counsel, are consulted as appropriate, and the responsible Minister will sign off the memorandum. A recent example would be The Adoption and Children Act Register (Clause 6 of the Children and Families Act).</td>
</tr>
<tr>
<td>DfT</td>
<td><strong>Civil Aviation Act 2012 (CAA) and HS2 Hybrid Bill</strong></td>
</tr>
<tr>
<td></td>
<td>The Legal Bill Manager commissioned the memorandum, prior to the Bill being introduced. Text for each provision was drafted</td>
</tr>
<tr>
<td>Department</td>
<td>Response</td>
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<tr>
<td>------------</td>
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<tr>
<td>DoH</td>
<td>Care Bill – the Bill Team identified it as a required product and included it within overall programme plan, and commissioned lawyers to prepare it. The Deputy Bill Manager was responsible for ensuring requirements were met. Lawyers and Bill team discussed and agreed when to prepare supplementary memoranda. This was submitted after passage through the Lords and Commons, due to amendments affecting delegated powers. Policy teams were consulted by lawyers in the preparation, and Bill team reviewed. Each Memo was signed off by the Minister.</td>
</tr>
</tbody>
</table>
| DWP        | The Bill manager determines the process in conjunction with the Bill’s lead lawyer taking into account the nature of the Bill (e.g. size, breadth of policy areas covered, likely sensitivity of legislation and powers). Two examples  

**Smaller Bill covering a single policy area:** The Memorandum was initially drafted by the Bill/policy team, reviewed by the Bill lawyer who amended it and cleared it with Parliamentary Counsel and internal/external lawyers as relevant. The memorandum was shared with Minister and ultimately signed off by the Bill lawyer at SCS level.  

**Larger Bill covering many policy areas within/across Departments:** The Bill team commissioned input from policy and legal leads on each delegated power, as clauses were finalised (e.g. ahead of pre-legislative scrutiny and Introduction to Parliament). The Bill team drafted in consultation with policy/legal leads, who cleared individual clauses. The memorandum was shared with Minister, and cleared/signed-off by Bill lawyer. |
<p>| FCO        | The most recent FCO Act containing delegated powers was the Antarctic Act 2013 (A PMB supported by Government): |</p>
<table>
<thead>
<tr>
<th>Department</th>
<th>Response</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>The policy team, FCO legal advisers and Parliamentary Relations Department agreed the process for drafting and agreeing the memorandum. The policy team led the drafting, which was then cleared by FCO legal advisers and Parliamentary Counsel. The memorandum was drafted prior to obtaining approval for Government support for the Bill from PBL Committee, and subsequently circulated to PBL Committee as part of the approval process.</td>
</tr>
<tr>
<td>HMT</td>
<td>Example – <strong>Financial Services (Banking Reform) Act 2013</strong>: The lead lawyer for the Bill commissioned the memorandum, as soon as it was clear that the Bill was going to contain delegated powers. Each lawyer responsible for clauses in the Bill which contained delegated powers prepared the sections of the memorandum relating to those provisions. The policy clients responsible for the policy area to which the delegated powers related were consulted, to ensure that the description of the way in which the powers were intended to be used was accurate. The lead lawyer reviewed the completed memorandum, and it was checked by a team leader. The lead lawyer signed off on the memorandum.</td>
</tr>
<tr>
<td>HO</td>
<td>The Bill lawyer leads on preparation of the delegated powers memorandum with policy input as appropriate. The memorandum will be signed off by the relevant policy lead and Bill team.</td>
</tr>
<tr>
<td>MoD</td>
<td>The Bill Manager commissions the memorandum once a slot in the legislative programme is confirmed and the drafting of the Bill is at a sufficiently mature stage. Policy leads prepare the memorandum in consultation with Departmental lawyers and OPC as required. The Bill Minister signs-off the memorandum. This procedure was adopted for the Defence Reform Bill 2013.</td>
</tr>
<tr>
<td>MoJ</td>
<td>The usual practice is along the lines of the Criminal Justice and Courts (CJC) Bill, but it will depend on the Bill’s size and relative experience of Bill team/ lawyers. CJC Bill: The policy lead / lawyer for each policy prepared a first draft, which one of the lawyers on the Bill Team then amended/iterated/challenged etc to produce the final version. The idea was that the team would benefit from the expertise of those leading on the policy but also have some challenge and a consistent approach. The DPRRC have yet to report on this Bill.</td>
</tr>
<tr>
<td>The Territorial Offices</td>
<td>The Bill Manager commissions the memorandum jointly from policy leads and lawyers. It is signed off by SCS before Secretary of State clears it.</td>
</tr>
</tbody>
</table>
4. What role, if any, does Parliamentary Counsel play in the preparation by your department of delegated powers memoranda?

<table>
<thead>
<tr>
<th>Department</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>CO</td>
<td>Parliamentary Counsel play an informal role – they can and do provide views on the memoranda entries which would be required.</td>
</tr>
<tr>
<td>BIS</td>
<td>Parliamentary Counsel may be contacted for advice during the preparation of the Memoranda. The Instructions/correspondence with Counsel when drafting the Bill will discuss delegated powers and the appropriate level of scrutiny.</td>
</tr>
<tr>
<td>DCLG</td>
<td>Parliamentary Counsel advises on appropriateness of delegated powers and appropriate level of scrutiny as part of development of Bill. They have no formal role, but are happy to advise on any particular issues.</td>
</tr>
<tr>
<td>DEFRA</td>
<td>Parliamentary Counsel will be consulted as necessary during the preparation of the memoranda.</td>
</tr>
<tr>
<td>DfE</td>
<td>Parliamentary Counsel may be contacted for advice during the preparation of the Memoranda. The Instructions/correspondence with Counsel when drafting the Bill will discuss delegated powers and the appropriate level of scrutiny.</td>
</tr>
<tr>
<td>DfT</td>
<td>With regard to the CCA 2012 and the HS2 Bill Parliamentary Counsel played a valuable role, as they reviewed and commented on the draft memoranda.</td>
</tr>
<tr>
<td>DoH</td>
<td>Parliamentary Counsel often provide advice on the appropriate level of Parliamentary scrutiny for the delegated powers in the Bill.</td>
</tr>
<tr>
<td>DWP</td>
<td>Parliamentary Counsel’s views on powers and justification feed into the development of the legislation and the drafting of the memorandum. Counsel will also often clear the draft Memorandum if time allows.</td>
</tr>
<tr>
<td>FCO</td>
<td>Parliamentary Counsel was consulted on the drafting of the Memorandum, and saw and approved the entire pack of documents that went to PBL Committee, including the Memorandum.</td>
</tr>
<tr>
<td>HMT</td>
<td>The memorandum will be informed by correspondence with Counsel on the form of particular delegated powers.</td>
</tr>
<tr>
<td>HO</td>
<td>The memorandum will be informed by correspondence with Counsel on the form of particular delegated powers.</td>
</tr>
<tr>
<td>MoD</td>
<td>Parliamentary Counsel are consulted on the draft memoranda as required.</td>
</tr>
<tr>
<td>MoJ</td>
<td>Parliamentary Counsel generally has no role, but they do provide commentary on how delegated powers should be framed during the process of instructing on and drafting clauses.</td>
</tr>
<tr>
<td>Department</td>
<td>Response</td>
</tr>
<tr>
<td>--------------------</td>
<td>-------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>The Territorial</td>
<td>Parliamentary Counsel checks Memorandum once drafted for errors and offers suggestions.</td>
</tr>
<tr>
<td>Offices</td>
<td></td>
</tr>
</tbody>
</table>

5. How are delegated powers memoranda in your department quality assured against the standard set in the Committee’s “Guidance for Departments”?

6. Who in the department is responsible for their standard generally and are there procedures for monitoring and reviewing the quality of memoranda?

<table>
<thead>
<tr>
<th>Department</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>CO</td>
<td>The lead lawyer is usually responsible for reviewing the quality of the memorandum</td>
</tr>
<tr>
<td>BIS</td>
<td>A senior lawyer will usually quality assure the Memoranda.</td>
</tr>
<tr>
<td>DCLG</td>
<td>The Bill team quality assures the memorandum.</td>
</tr>
<tr>
<td>DEFRA</td>
<td>The memorandum will be quality checked by Legal advisors and the Bill Team Manager.</td>
</tr>
<tr>
<td>DfE</td>
<td>A senior lawyer will usually quality assure the Memoranda</td>
</tr>
<tr>
<td>DfT</td>
<td>With the Civil Aviation Act 2012 and HS2 Bill, the Legal Bill Manager was responsible for the standard of the Memorandum. Those involved in the preparation will also seek assistance if needed from those who have prepared them before, or from the team in the General Counsel’s Office that co-ordinates legislative proposals.</td>
</tr>
<tr>
<td>DoH</td>
<td>Those contributing to/co-ordinating the memorandum are responsible for ensuring the standard is met.</td>
</tr>
<tr>
<td>DWP</td>
<td>The assurance is undertaken by lawyers as part of the clearance process, during drafting and final sign-off stages. The quality of the memorandum is monitored and reviewed as part of the end of Bill report/lessons learned exercise which is undertaken by the Bill team (although occasionally this does not happen due to competing pressures). The Bill team will consider the DPRRCC Report as part of this, and the Bill’s progress through Parliament, identifying any improvements for future Bill teams.</td>
</tr>
<tr>
<td>FCO</td>
<td>The Memorandum was cleared by FCO legal advisers and the senior manager overseeing the policy; and Parliamentary Counsel involved (as above).</td>
</tr>
<tr>
<td>HMT</td>
<td>The lead lawyer on a particular Bill, together with the team leader, will assume responsibility for the standard of memoranda for that Bill. As well as ensuring that memoranda comply with the Guidance for Departments, they will use past memoranda as precedents to assist in maintaining a consistent standard.</td>
</tr>
<tr>
<td>Department</td>
<td>Response</td>
</tr>
<tr>
<td>----------------------</td>
<td>--------------------------------------------------------------------------</td>
</tr>
<tr>
<td>HO</td>
<td>Memorandum is signed off by the lead SCS lawyer(s) for the Bill, who is responsible for quality assuring.</td>
</tr>
<tr>
<td>MoD</td>
<td>The Bill Minister and Bill Manager (with input from Departmental lawyers) are responsible for quality assuring the memorandum.</td>
</tr>
<tr>
<td>MoJ</td>
<td>The Bill teams and lawyers look at previous examples.</td>
</tr>
<tr>
<td>The Territorial Offices</td>
<td>Bill Manager/Team will check memoranda against guidance before clearing.</td>
</tr>
</tbody>
</table>

7. Are you aware of any cross-departmental mechanism for monitoring and reviewing the quality of memoranda?

<table>
<thead>
<tr>
<th>Department</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>CO</td>
<td>No. Such a mechanism would require resources, and time would need to be built into the Bill process.</td>
</tr>
<tr>
<td>BIS</td>
<td>No.</td>
</tr>
<tr>
<td>DCLG</td>
<td>No.</td>
</tr>
<tr>
<td>DEFRA</td>
<td>No.</td>
</tr>
<tr>
<td>DfE</td>
<td>No.</td>
</tr>
<tr>
<td>DfT</td>
<td>When the department is involved in a cross-departmental Bill care is taken ensure that a consistent approach is adopted with regard to Memorandum.</td>
</tr>
<tr>
<td>DoH</td>
<td>No.</td>
</tr>
<tr>
<td>DWP</td>
<td>No formal mechanism, but lawyers will consult with lawyers from other Departments in the drafting of the memorandum as appropriate.</td>
</tr>
<tr>
<td>FCO</td>
<td>No.</td>
</tr>
<tr>
<td>HMT</td>
<td>No.</td>
</tr>
<tr>
<td>HO</td>
<td>Relevant cross-cutting recommendations from DPRRC reported to PBL secretariat.</td>
</tr>
<tr>
<td>MoD</td>
<td>If a Bill contains cross departmental provisions, the Bill Manager will be responsible for ensuring all departments approve the relevant parts of the memorandum before submission.</td>
</tr>
<tr>
<td>MoJ</td>
<td>No.</td>
</tr>
<tr>
<td>The Territorial Offices</td>
<td>No.</td>
</tr>
</tbody>
</table>
8. What happens within the department if the Lords Delegated Powers and Regulatory Reform Committee makes an adverse comment about a delegated powers memorandum?

<table>
<thead>
<tr>
<th>Department</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>CO</td>
<td>Where a particular power receives adverse comment, the relevant lawyer will either reconsider the power or the level of scrutiny or, alternatively, strengthen or clarify the arguments in favour of the original position. A revised memorandum taking account of the adverse comments would be submitted to the DPRRC.</td>
</tr>
<tr>
<td>BIS</td>
<td>We consider it carefully before making suggestions to the Minister as to how to address it.</td>
</tr>
<tr>
<td>DCLG</td>
<td>The report is considered by relevant lawyers and officials, and recommendations made to ministers. Ministers take reports from the DPRRC very seriously and try and meet their concerns wherever practicable taking into account wider policy issues.</td>
</tr>
<tr>
<td>DEFRA</td>
<td>The concerns would be discussed by the relevant Departmental officials to decide how to address the issues raised</td>
</tr>
<tr>
<td>DfE</td>
<td>The team will carefully assess the comments and then provide suggestions for the Minister on how to address it.</td>
</tr>
<tr>
<td>DfT</td>
<td>The Bill Manager and Legal Bill Manager would carefully consider the Committee’s recommendation and would give effect to the Committee’s recommendation in the most flexible and proportionate way.</td>
</tr>
<tr>
<td>DoH</td>
<td>No recent experience of this – the Committee were complimentary about the memoranda for the Health and Social Care Act 2012 and the Care Act 2014.</td>
</tr>
<tr>
<td>DWP</td>
<td>The Bill team, policy leads and lawyers consider the DPRRC’s comments, seeking views of Counsel and often views from other lawyers with relevant experience, who are not directly involved in the legislation. The DPRRC’s report will prompt all involved to reconsider the proposed legislative approach and advice will be sent to the Minister setting out the DPRRC’s recommendation, with proposed response – advice reflects the importance of the DPRRC’s Report and recommendation.</td>
</tr>
<tr>
<td>FCO</td>
<td>No adverse comments have been received.</td>
</tr>
<tr>
<td>HMT</td>
<td>If the DPRRC request further information, a supplementary memorandum will be prepared. In the case of the Financial Services (Banking Reform) Bill, a draft Memorandum was prepared before introduction to assist the Committee responsible for pre-legislative scrutiny. The evidence given by the Delegated Powers Committee to the scrutiny committee (which was not copied to the department) was considered on publication, and the Memorandum revised to reflect the views of the Committee.</td>
</tr>
<tr>
<td>HO</td>
<td>Bill manager will put appropriate advice to Ministers with recommendation how to respond to each recommendation from the Committee.</td>
</tr>
</tbody>
</table>
### Department Response

<table>
<thead>
<tr>
<th>Department</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>MoD</td>
<td>It would be discussed with the relevant policy leads and lawyers. Advice would then be provided to the Bill Minister.</td>
</tr>
<tr>
<td>MoJ</td>
<td>The Government will carefully consider the Committee’s comments. The Bill team and legal advisers will analyse recommendations carefully, liaising with the Committee clerk, if necessary, to clarify points of detail, and then prepare detailed advice for Ministers on how to respond. It is normal practice to discuss the report with the lead junior Minister for the Bill, and the Secretary of State, if the report raises substantive recommendations for changing particular powers. The PBL Secretariat and Guide to Making Legislation advise that if the Committee recommends changes, it should only be in the most exceptional circumstances that Government disagrees.</td>
</tr>
<tr>
<td>The Territorial Offices</td>
<td>We would review and respond formally – hoping to accept recommendations as far as possible.</td>
</tr>
</tbody>
</table>

9. Are there any changes to either the procedures or available guidance which would better ensure that the necessary quality of memoranda is achieved and maintained?

<table>
<thead>
<tr>
<th>Department</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>CO</td>
<td>To achieve and maintain quality, it could be useful to set up a mechanism through which DPRRC could communicate key problems/common errors to Departments, and for Departments to create a ‘DP Champion’ with responsibility for disseminating Memorandum-related guidance and information. It could also be beneficial for precedents to be collated centrally within departments, as part of knowledge management.</td>
</tr>
<tr>
<td>BIS</td>
<td>An example of a good format is always helpful</td>
</tr>
<tr>
<td>DCLG</td>
<td>None highlighted by the department.</td>
</tr>
<tr>
<td>DEFRA</td>
<td>None highlighted by the department.</td>
</tr>
<tr>
<td>DfE</td>
<td>It may be helpful for a template to be produced which could be shared with all Departments.</td>
</tr>
<tr>
<td>DfT</td>
<td>None highlighted by the department.</td>
</tr>
<tr>
<td>DoH</td>
<td>None highlighted by the department.</td>
</tr>
<tr>
<td>DWP</td>
<td>None highlighted by the department.</td>
</tr>
<tr>
<td>FCO</td>
<td>None highlighted by the department.</td>
</tr>
<tr>
<td>HMT</td>
<td>It would be helpful if Government departments could be provided with feedback from the Committee on the quality of their memoranda. At present, the only feedback received is in the form of an adverse report by the DPRRC, or through evidence given to another Parliamentary Committee. To facilitate the provision of feedback it may be helpful to require</td>
</tr>
<tr>
<td>Department</td>
<td>Response</td>
</tr>
<tr>
<td>---------------------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td></td>
<td>each Government department to nominate someone to be responsible for liaising with the Committee.</td>
</tr>
<tr>
<td></td>
<td>The provision by the Committee of a memoranda template would also be helpful.</td>
</tr>
<tr>
<td>HO</td>
<td>None highlighted by the department.</td>
</tr>
<tr>
<td>MoD</td>
<td>None highlighted by the department.</td>
</tr>
<tr>
<td>MoJ</td>
<td>A section of the Committee website that gathers together examples of memoranda that are considered excellent would be helpful. It would be helpful for the DPRRC to create a consistent approach across Government by agreeing what a ‘good’ example would look like and introduce a template on the back of this. It would also be helpful to integrate the PBL Guide to Making Legislation with the Committee guide.</td>
</tr>
<tr>
<td>The Territorial Offices</td>
<td>None highlighted by the department.</td>
</tr>
</tbody>
</table>
APPENDIX 3: EXAMPLES OF POOR PRACTICE IN MEMORANDA

Session 2013-14

Care Bill, 1st Report

“1. ... The Department of Health has prepared a memorandum for the Committee explaining the delegated powers in the Bill. Although extensive, we have found that, in a number of instances (of which a few are mentioned below) the memorandum could have explained more fully or more accurately why a delegation is thought to be necessary, or why a particular level of parliamentary scrutiny is being proposed.”

Offender Rehabilitation Bill [HL], 1st Report

“16. The need for a delegated power is explained in paragraph 22 of the memorandum, where it is said that “it is essential that this list can be updated to benefit offenders, without having to wait for a suitable legislative vehicle”. Had the power in subsection (4) been limited to removing requirements from the list, that statement would undoubtedly have been correct and complete. But the power also enables new requirements to be added to the list, and other provision to be made, which may not necessarily be regarded as being for the ‘benefit’ of offenders. While we do not suggest that the delegation in new section 256AB(4) is inappropriate, we are concerned that the memorandum may give a somewhat misleading impression as to the possible effect of exercising the power, and we draw this to the attention of the House.”

Mesothelioma Bill [HL], 1st Report

“26. Paragraph 55 of the memorandum is entirely silent on the nature or extent of any envisaged amplification of the [Technical Committee’s] jurisdiction, beyond the explanation that it might deal with insurance disputes about “other work-related conditions or injuries”. We find that, unless subsection (10) can be amended to include more about the nature of the provision that it is intended should be made by the regulations, it is an inappropriate delegation and, in these circumstances, we would recommend that subsection (10) should be removed from the Bill.”

Children and Families Bill, 7th Report

Clause 6 - The Adoption and Children Act Register

“6. We are surprised that the memorandum does not give any specific indication as to why the Government consider that the negative procedure offers an appropriate level of scrutiny in this case. It states, in the context of the amendments made to sections 125 to 131 as a whole, that the negative procedure “is the appropriate level of scrutiny for regulations providing for this level of operational, administrative and procedural detail”. We do not regard it as appropriate to characterise the provisions made under section 128A as being

operational, administrative or procedural. We believe it constitutes an important change to the operation of the Register in that it will allow access to personal and sensitive information which otherwise only adoption agencies have access to. **In our view the negative procedure does not provide a sufficient level of scrutiny, and regulations under section 128A should be subject to the affirmative procedure.**”

…

**Clause 51 - Appeals**

“15. Clause 51 provides a right of appeal to the First-tier Tribunal in respect of certain matters concerning EHC needs assessments and EHC plans. The matters to which the right of appeal applies are set out in subsection (2). Subsection (4) provides for regulations to make provision about appeals and includes provision about the powers of the Tribunal on determining an appeal. **Under the Education Act 1996 the powers of the Tribunal on determining appeals are set out on the face of the Act. No explanation is given in the memorandum as to why a different approach has been adopted here or as to how it is envisaged the powers will be exercised. We are not convinced that there is a need for this delegation, but if there is we consider the affirmative procedure should apply.** It strikes us that here, as in a number of other provisions referred to in this report, the approach has been to delegate power to make provision which under the 1996 Act appears on the face of the Bill, without in our view sufficient explanation for the decision to move the provision from primary to subordinate legislation.”

…

**Clauses 54 and 55 - Appeals and Claims by Children**

“18. We are concerned that in such an important area none of the matters relating to appeals and claims by children is placed on the face of the Bill. In this context, we cannot accept that it is appropriate to describe matters such as the age at which a child can bring an appeal, or the provisions for determining whether a child is capable of bringing an appeal, as procedural details. In our view the negative procedure does not provide a sufficient level of parliamentary scrutiny. These are novel proposals which will have an important impact on the rights of children. **If the substantive provisions governing appeals and claims by children are all to be contained in subordinate legislation, then we consider the order containing them should be subject to the affirmative procedure, irrespective of whether the powers are exercised under clause 54 or 55.**”

**Transparency of Lobbying, Non-party Campaigning and Trade Union Administration Bill, 12th Report**

“2. … Unfortunately, our consideration of the powers in Parts 1 and 2 has been made much more difficult by the very poor quality of the memorandum as it relates to those Parts. From the very first page onwards, many of the references in it to clause and paragraph numbers in the Bill are incorrect; a number of powers have either not been mentioned at all or have been only cursorily explained; and in more than one instance we have found that information provided to us about a
power is inaccurate or incomplete. **We hope that, for future Bills, the Government will devote much greater care to the preparation of these important explanatory documents.**”

**Anti-social Behaviour, Crime and Policing Bill, 12th Report**

*Clause 55 - Public spaces protection orders*

“18. We were surprised that the memorandum failed to contain any reference to public spaces protection orders since conferring powers on local authorities to make such orders clearly constitutes the delegation of a legislative power. ... One significant difference between the procedures governing public spaces protection orders and those governing the existing orders or byelaws is the absence of any requirement on a local authority to make public its intention to make a public spaces protection order before it is made. In the case of each of the existing orders the legislation imposes a requirement on the local authority to publish notice of its intention to make the order, which allows those affected to object before an order is made. This contrasts with the position under clause 55 where the obligation of the local authority is limited to consulting the chief officer of police, the local policing body, and whatever community representatives it thinks appropriate. In the case of byelaws under section 235 of the Local Government Act 1972, there is the additional control on the local authority’s powers provided by the requirement to obtain the confirmation of the Secretary of State. **It seems to us that clause 55 confers very wide ranging and significant powers on local authorities to control the way in which public spaces may be used. In the absence of a requirement to publicise the notice before it is made, we do not believe this to be an appropriate delegation of powers.**”

**Immigration Bill, 22nd Report**

“1. ... A fuller description of the provisions of the Bill is given in the memorandum prepared by the Home Office for the Committee which also explains the delegations of legislative power in the Bill and the associated arrangements for Parliamentary scrutiny. **In a number of respects the quality of the memorandum fell short of the standard the Committee expects. We repeat, therefore, the hope that we expressed in our 12th Report (HL Paper 72) that, in future, the Government will devote greater care to the preparation of these important explanatory documents.**”

**Session 2012-13**

**Enterprise and Regulatory Reform Bill, 9th Report**

“6. New section 26B leaves to regulations, subject to negative procedure, matters such as consultation, publicity, termination by the Secretary of State and the terms which must be included in an agreement. So matters which are at least partly covered by the Listed Buildings Act itself (as well as by regulations) for listed building consent to be granted on an application are to be in subordinate legislation for consent to be contained in an agreement. Indeed the regulations may even re-apply the very provisions of the Act which the new section 26A(5) disapplies - see section 26B(2)(f) and this may, but need not, include section
16(2) (desirability of preserving building, setting and features). But the approach of leaving matters of this sort to subordinate legislation follows that for planning permission under the Town and Country Planning Act 1990 ("TPCA") and the provisions are likely to be largely, although not exclusively, procedural in character. So, subject to one exception, we do not consider the powers or the level of scrutiny inappropriate.

7. The exception is paragraph (g) in new section 26B(2). This enables the regulations to modify any provision of the Listed Buildings Act as it applies to heritage partnership agreements. The memorandum gives no indication either of why it should be necessary to modify anything outside Chapter 2 of Part 1 of the Listed Buildings Act (which deals with the authorisation of works affecting listed buildings) or why, if it is, the necessary modifications are not in the Bill itself. We consider new section 26B(2)(g) to be inappropriate. The same would not necessarily apply to a more targeted provision which specified particular sections or chapters of the Listed Buildings Act, the need for modification of which was convincingly demonstrated."

…

"13. New section 47(2B) enables regulations subject to affirmative procedure to “make provision about the extent to which breach of a duty imposed by other health and safety legislation is actionable.” “Other health and safety legislation” is defined in new section 47(2C) as including “any provision of an enactment which relates to any matter relevant to any of the general purposes of” Part 1 of the 1974 Act (other than provisions of Part 1 itself, health and safety regulations or the enactments listed in Schedule 1 to the 1974 Act). The general purposes of Part 1 go far further than simply securing the health, safety and welfare of persons at work. They include:

- protecting those not at work against risks to health and safety arising in connection with activities of those at work;
- controlling and keeping dangerous substances, and generally preventing the unlawful acquisition, possession and use of such substances.

14. There is no discernable policy in new section 47(2B) other than a wish to change the existing position under a very widely-drawn description of statutes, including (it seems to us) those relating to defective premises and occupier’s liability, whatever that existing position may be. The memorandum states only that “this flexibility is desirable so that the government can extend this policy [that is, of excluding civil liability] in due course should it wish to do so”. We consider this delegation is potentially so far-reaching in its effect as to be inappropriate despite the affirmative procedure, and we recommend removal of new section 47(2B) from the Bill.”

Enterprise and Regulatory Reform Bill (Part 6), 10th Report

“16. The regulations may require an employment tribunal to order a respondent (who will usually be an employer) to carry out an audit where it finds there has been an equal pay breach (subsection (1)), but the Bill sets out circumstances in which the regulations must require the tribunal not to order an audit (subsection (5)). The means by which an order for an audit is to be enforced is left entirely to
the regulations (subsection (6)), although they may not make non-compliance an
offence. It is unclear from the memorandum whether the Government envisages
that whatever means of enforcement is provided for should be operated by the
tribunal, or whether some other mechanism is contemplated.

... 20. **We draw to the attention of the House ... the lack of clarity in either
subsection (6) or the memorandum about the intended means of
enforcement (paragraph 16).”**

**Growth and Infrastructure Bill, 11th Report**

“1. This Bill deals with a large number of individual topics. There is a
memorandum from the Department for Communities and Local Government on
the delegated legislative powers in the Bill. There are four items that we wish to
draw to the House’s attention.

*Clause 1 - Planning applications direct to Secretary of State*

2. The first item is not mentioned in the memorandum, quite possibly because
the power is not seen as legislative in the light of how the Government intend to
use it. But because of how the Bill is framed, it could be exercised in a way which
amounts in practice to legislating.

3. Paragraphs 13 to 16 of the memorandum address the delegated legislative
power at new section 62A(1)(b) of the Town and Country Planning Act 1990.
That is a power to prescribe by order subject to negative procedure the
descriptions of development for which, under the new section, applications may be
made to the Secretary of State rather than the local planning authority. That
power seems unexceptional. Paragraph 13 of the memorandum says that “Persons
wishing to seek planning permission for such developments will, if their local
planning authority is designated as poorly performing, be entitled to apply direct
to the Secretary of State.” But that is not what the Bill says - there is no limitation
to poorly performing authorities.”
APPENDIX 4: REVISED GUIDANCE

Introduction

1. Since the establishment of the Committee, the government of the day have provided a memorandum to the Delegated Powers and Regulatory Reform Committee (DPRRC) on the delegated powers in all government bills. This note sets out the Committee’s method of working and attempts to answer some common questions from departments on subjects such as timing and the content of memoranda. Unless otherwise stated, references to reports in this note are references to reports of the DPRRC. All Committee reports and delegated powers memoranda can be found on the Committee’s webpage:


2. This guidance supplements guidance issued by the Cabinet Office (Guide to Making Legislation (July 2014) which can be found at the following webpage: https://www.gov.uk/government/publications/guide-to-making-legislation). It is divided into two parts. Part One covers the following matters:

   A. Terms of reference
   B. Working methods
   C. The practicalities of submitting memoranda
   D. What happens after the Committee has considered a bill
   E. Committee contact details.

   Part Two deals with the content of delegated powers memoranda.

PART ONE

A. Terms of reference

3. The Committee’s terms of reference, with regard to its delegated powers function, are:

   “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 …”.

B. Working methods

4. The Committee has ten members. The membership of the Committee is set out on the inside front cover of all DPRRC reports and on the Committee’s webpage. It is supported by a Clerk, a Committee Administrator and two Legal Advisers. The contact details for the Committee can be found at the end of this Part of this guidance. More detailed information about how the Committee works can be found in Special Reports which are published by the Committee from time to time.2

5. The Committee considers and reports on all public bills (except supply bills and consolidation bills), including private Members’ bills (whether or not government handout bills). The Committee aims to report no later than the beginning of the committee stage in the House of Lords. If time allows, the Committee also considers government amendments (and certain non-government amendments (see paragraph 10 below)) with significant delegated powers aspects tabled in the Lords. The Committee similarly considers Commons amendments when a bill returns to the Lords.

6. The Committee is assisted in its examination by written evidence from departments (a delegated powers memorandum ("memorandum")), which may be supplemented by subsequent memoranda ("supplementary memoranda") covering relevant amendments.

7. The Committee usually meets on Wednesdays at 10.30 am. The frequency of meetings will depend on the business going through the Lords. It is likely to be either weekly or fortnightly. Its reports are ordinarily available to the House, and more widely, either on the Thursday or Friday following the Wednesday meeting. Occasionally the Committee meets twice in one week. Reports are likely to include recommendations for amendment of a bill (but not the precise wording of an amendment) or draw matters to the attention of the House where it is suggested that the House may wish to press the Minister for further information. Reports will also include a link to the delegated powers memorandum which will be published on the Committee’s webpage.

C. The practicalities of submitting memoranda

When should the delegated powers memorandum be received by the Committee?

8. According to the Cabinet Office guidance (page 123), the Parliamentary Business and Legislation (PBL) Committee (a Cabinet Committee) require a delegated powers memorandum before it will approve a bill for introduction, and this memorandum must be made available to both the Commons and the Lords on introduction of the bill to either House.

9. As far as the DPRRC is concerned, however, the following applies:

- in the case of a bill beginning in the Lords, the memorandum must be received by the Committee on (or before) its introduction into the Lords; and

- in the case of a bill beginning in the Commons, the Committee will not consider the bill until it has been brought to the Lords (unless it is emergency legislation). A version of the memorandum, reflecting any changes during the bill’s passage through the Commons, must be received by the Committee when the bill arrives in the Lords.

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3 See, for example, the Northern Ireland Assembly (Elections and Periods of Suspension) Bill in 20th Report, Session 2002-03, HL Paper 104.
In what circumstances should supplementary memoranda be provided to the Committee?

10. A supplementary memorandum must be provided when

- any government amendment is tabled which introduces a significant new delegated power or significantly amends an existing one. It is not required if an amendment is simply giving full effect to a recommendation by the Committee or addressing a point raised by it;
- for any non-government amendment with significant delegated powers which the Government are able to indicate that they will support;⁴
- when a bill which starts in the Lords is returned by the Commons with amendments which introduce significant new delegated powers or significantly amend existing ones.⁵

Early warning of amendments

11. Because of tight legislative timescales, the DPRRC reports on amendments on a “best endeavours” basis. Where possible, early warning of relevant government amendments should be given (along with advance sight of the text of amendments). This is particularly important with regard to Commons amendments as the timing of ping-pong is not subject to a minimum interval and can be scheduled quickly.

12. Where the Committee has been unable to consider a significant relevant amendment, it would assist the House if the Minister in charge of the bill were to bring this to the attention of the House when the amendment is being considered.

If a supplementary memorandum is required, when should it be received by the Committee?

13. Supplementary memoranda must be received on (or before) the day an amendment is tabled.

How should memoranda be delivered?

14. Memoranda, whether the original or a supplementary, should be delivered electronically (by email) to the address below as a Word document, with manually numbered paragraphs and numbered pages. When a supplementary memorandum is being provided, the text of the relevant amendments should be attached to the memorandum.

15. Once the memorandum has been received by the Committee, the Government may publish the memorandum themselves, for example on a website or by placing copies in the Library of the House.

Format of memoranda

16. Memoranda, whether the original or a supplementary, should adopt the following format: each power should be introduced by an italic heading which should set out

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⁵ See, for example, 26th Report, Session 2005-06, HL Paper 264, para 3 on the Companies Bill [HL] and paras 19 and 20 on the Safeguarding Vulnerable Groups Bill [HL].
• the clause and subsection number
• who is to exercise the power
• by what means, and
• subject to what level (if any) of Parliamentary scrutiny.

The power should then be explained in the paragraph(s) below the italic heading (see Part Two of this guidance).

17. **Do not** give the powers additional identifiers (such as “Power 1”, “Power 2” etc.).

18. **Take particular care**

   • to ensure that the explanatory paragraph(s) apply to the provision identified in the italicised heading, and

   • when a bill is brought up from the Commons (especially if it has been extensively amended on report), to ensure that the references to clause and subsection numbers are up to date.\(^6\)

19. **When a bill which starts in the Lords is returned by the Commons with amendments** which introduce significant new delegated powers or significantly amend existing ones, the supplementary memorandum should be structured by reference to the relevant numbered Commons amendments and should not be an updated version of the entire original memorandum.

D. What happens after the Committee has considered a bill

*When will the Committee report?*

20. The Committee aims to report before the start of committee stage and reports are usually available within one to two days after the Committee has met (see paragraph 7 above).

21. Committee staff will e-mail report extracts to relevant departmental teams as soon as the text is finalised (in advance of formal publication).

*Is a government response required?*

22. There is no formal obligation on departments to provide a response but most departments do. The Committee welcomes this on the ground that it helps the House in its consideration of Committee recommendations.\(^7\)

23. A response will be printed, for the record, as an Appendix to a Committee report. The response, in addition to being sent to the Committee, should at the same time be made available to members of the House (by being placed in the Library and being sent directly to relevant opposition spokesmen and other interested members).

*What form should a response take and how should it be delivered?*

24. This is a matter for the department rather than the Committee. The usual practice, however, is for the Minister to write to the Chairman of the

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\(^6\) See, for example, 12th Report, Session 2013-14, HL paper 72, para 2 on the Transparency of Lobbying, Non-party Campaigning and Trade Union Administration Bill, quoted in Appendix 3 to this report.

\(^7\) Special Report, Session 2003-04, HL Paper 9, para 27.
Committee. A Word version of the response should also be sent electronically (by email) to the address below.

Will the Committee comment on the response?

25. The Committee takes the view that it is not appropriate for it to enter into negotiations with departments about its recommendations. The response will, therefore, be printed without remark unless, exceptionally, in the view of the Committee, the House would be assisted by some clarificatory comment.  

If the department disagrees with the Committee, what action should it take?

26. It is for the department to justify its view to the House as a whole rather than to the Committee. The function of the Committee is to advise the House and it is for the House to decide whether to adopt the Committee’s recommendations. In forming a view, the House will take into account the Committee’s report and any response by a Minister to its recommendations. It is unusual for the Committee to engage in correspondence or discussions with a department where the Government disagree with the Committee’s conclusions.

E. Committee contact details

Address  Delegated Powers and Regulatory Reform Committee
          Delegated Legislation Office
          House of Lords
          London SW1A 0PW

Telephone  020-7219 3103 (Committee Assistant)
            020-7219 3233 (Clerk)

Facsimile  020-7219 2571

Email  dprr@parliament.uk


PART TWO

A. Powers to be covered by a memorandum

27. The memorandum should identify every provision for delegated legislation in the bill. Given that powers to give directions, issue codes of practice, etc. can be delegated legislative powers, to the extent that they are in a particular bill, the memorandum should cover them as well. Where a power is considered not to be legislative in character, the memorandum should explain fully why this is thought to be the case.

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8 For example, 12th Report, Session 2006-07, HL Paper 150, para 3 on the Local Government and Public Investment in Health Bill.

9 Special Report, Session 2003-04, HL Paper 9, para 32.
B. Content of the explanatory paragraph(s)

28. After the italicised heading (described in paragraph 16 above), an explanatory paragraph (or paragraphs) should

- fully explain the **purpose of the power**
- describe **why the matter that is the subject of the power has been left to delegated legislation rather than included in the bill**
- fully explain **the choice of parliamentary scrutiny procedure** provided for each power; and, if there is no scrutiny, the justification for its absence.

*Explaining the power*

29. With regard to explaining the power, **take particular care** to ensure that

- the memorandum fully explains **why the delegation is necessary and why the matter cannot be included in the bill**. For example, if the reason is “we need flexibility”, explain why it is needed; if it is asserted “it is a reserve power”, explain why a reserve power is needed and what events are likely to trigger its use in the future; or, if the reason is “we need to respond urgently”, explain the reason for, and degree of, urgency;\(^{10}\)
- the memorandum justifies **the full extent of the power**. If the government has in mind a particular proposed exercise, it is helpful for the Committee to be told of this. But the Committee will judge the power by reference to what *could* be done under it by the current or any future government and not only what the current government say they intend to use the power for;\(^{11}\)
- where a **power is delegated to a person or body other than a Minister**,\(^{12}\) the memorandum explains why the power has been conferred on that person or body;\(^ {13}\) and
- the memorandum fully justifies **any unusual or novel delegations of power**,\(^ {14}\) **powers to define, or amend definitions of, key expressions** used in the bill, **powers to interfere with vested rights or legal (for example, ordinary contractual) relationships**, and **powers to make provision by directions, or in codes or “guidance”**.

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\(^{10}\) See, for example, 9th Report, Session 2012-13, HL Paper 64, para 13 on the Enterprise and Regulatory Reform Bill, quoted in Appendix 3 to this report.

\(^{11}\) See, for example, 1st Report, Session 2013-14, HL Paper 12, para 16 on the Offenders Rehabilitation Bill [HL], quoted in Appendix 3 to this report, and 5th Report, Session 2005-06, HL Paper 23, para 13 on the Identity Cards Bill.

\(^{12}\) “Minister” in this context includes the Scottish and Welsh Ministers.

\(^{13}\) See, for example, 3rd Report, Session 2014-15, HL Paper 23, paras 24 to 26 on the Criminal Justice and Courts Bill.

\(^{14}\) See, for an example of a “wide and novel” delegated power, 9th Report, Session 2005-06, HL Paper 8, paras 34 to 36 on the Company Law Reform Bill [HL].
Explaining the procedure

30. With regard to explaining the procedure, take particular care to ensure that

- the memorandum fully explains any de-hybridising provision (that is, provision which enables an order which would otherwise be hybrid because it would affect private interests to proceed as if it were not). Unless addressed in the memorandum, the Committee will invite the House to satisfy itself that private interests otherwise protected by the hybrid instruments procedure will be adequately protected under provision in the bill;\(^{15}\)

- unless a power is self-evidently concerned only with Money or Supply provision, the choice of a Commons-only procedure is fully explained. The Committee will wish to be satisfied that the subject matter of the power is such that the Lords would not expect to scrutinise the exercise of the power;\(^{16}\)

- in circumstances where it is proposed that there should be a removal, or relaxation, of Parliamentary control, from the exercise of a power that presently requires it, the memorandum fully justifies the change;\(^{17}\)

- where the negative procedure is chosen on the ground that there is insufficient time for an affirmative, the memorandum explains why the “made affirmative” procedure is not applied;\(^{18}\) and

- where the chosen procedure is “first-time affirmative”, the memorandum fully explains why the negative procedure is thought to afford adequate scrutiny on subsequent exercises of the power, and on what that prediction is based, bearing in mind that the power will remain exercisable by future governments.\(^ {19}\)

31. The procedure chosen for each power should be explained in the memorandum in its own context and on its own merits. Avoid simple formulaic explanations such as “the provision is procedural”, “the regulations will be technical”, “the order will make administrative provision” or “the provision will be detailed” without analysing the effect of the power to explain why this is thought to be the case.\(^ {20}\)

Use of precedent

32. Where there is a precedent for a delegation or the choice of Parliamentary procedure, the memorandum should indicate this, identify the precedent and explain its relevance to the bill. The Committee will take any precedent into

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\(^{15}\) See, for example, 22nd Report, Session 2013-14, HL Paper 136, para 10 on the Immigration Bill.

\(^{16}\) See, for an example of the DPRRC recommending that a delegated power should be subject to control in both Houses rather than Commons-only, 12th Report, Session 2007-08, HL Paper 148, para 26 on the Planning Bill.

\(^{17}\) See, for example, 9th Report, Session 2010-12, HL Paper 94, paras 4 and 5 on the Pensions Bill [HL] and 5th Report, Session 2014-15, HL Paper 29, paras 14 to 16 on the Deregulation Bill.

\(^{18}\) See, for example, 13th Report, Session 2010-12, HL Paper 141, paras 14 and 15 on the Police Reform and Social Responsibility Bill. In this case, the Government substituted the “made affirmative" procedure.

\(^{19}\) See, for example, 9th Report, Session 2013-14, HL Paper 55, para 5 on the Children and Families Bill.

\(^{20}\) See, for example, 7th Report, Session 2013-14, HL Paper 49, para 6 on the Children and Families Bill, quoted in Appendix 3 to this report.
account in its examination of a bill although will not necessarily find a provision appropriate on the basis of precedent alone. In particular, if the power is a re-enactment with modifications of an existing power, the memorandum should say so and explain the differences.21

33. A precedent will hold less weight if
   - if it predates the Committee (that is, pre-1993)
   - it is an Act arising out of a private Member’s bill22
   - the power cited was inserted by an amendment at a late stage in a bill’s passage.

C. Some principles applied by the Committee

34. When the Committee was first set up, it concluded that it was not possible to set out a list of criteria which would give precision to the test of appropriateness. Instead it was decided that the merits of the proposed use of a delegated power had to be considered on a case by case basis.23 Whilst the Committee continues to consider each delegation on its merits, the accumulation of over twenty years of experience has enabled the Committee to develop a number of principles which provide the starting point for its consideration of delegated powers. These principles are set out in the following paragraphs.

Principles

35. Every Henry VIII power (that is, a delegated power which enables a Minister, by delegated legislation, to amend, repeal or otherwise alter the effect of an Act of Parliament), including where the power is expressed in terms of “modification”, should be clearly identified. Although the Committee recognises that the appropriate level of parliamentary scrutiny for such powers will not be the affirmative procedure in all cases,24 where a Henry VIII power is subject to a scrutiny procedure other than affirmative, a full explanation giving the reasons for choosing that procedure should be provided in the memorandum.

36. If a bill is, in effect, a skeleton bill (so that the real operation of the Act would be entirely by the regulations, or orders made under it), or if part of a bill is, in effect, a skeleton part of a bill, the Committee will expect a full justification for the decision to adopt that structure of powers.25

37. With regard to any power to make incidental, consequential or similar provision,
   - where it is a Henry VIII power, the memorandum should explain why the particular form of wording setting out the power has been adopted.

21 See, for example. 6th Report, Session 2014-15, HL Paper 36, paras 5 and 6 on the Insurance Bill. See also, as an example of a poor precedent, 8th Report, Session 2009-10, HL Paper 106, para 5 on the Crime and Security Bill.
22 See, for example, 8th Report, Session 2009-10, HL Paper 106, paras 10 to 13.
24 It is well understood, for example, that a power limited to uprating for inflation can appropriately be subject to negative procedure.
The presumption in respect of Henry VIII powers, that they should be subject to the affirmative procedure, applies. Therefore, where they are not, the memorandum should explain why not. Where the power extends to the amendment of future Acts, the memorandum should explain clearly why it is thought such a power is necessary;\(^ {26}\)

- where it is a non-Henry VIII power which is included in a commencement order (and which will not therefore be subject to any Parliamentary procedure), the Committee will expect such a power to be covered by the delegated powers memorandum and explained in the usual way.\(^ {27}\)

38. Where a bill creates a criminal offence with provision for the penalty to be set by delegated legislation, the Committee would expect, save in exceptional circumstances, the maximum penalty on conviction to be included on the face of the bill. Therefore, where this is not the case, the memorandum should explain why not;\(^ {28}\) and at the very least the Committee would expect the instrument to be subject to affirmative procedure. Similarly, where the ingredients of a criminal offence are to be set by delegated legislation, the Committee would expect a compelling justification.

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28 See 37th Report, Session 1999-2000, HL Paper 130, para 36; and, for example, 16th Report, Session 2012-13, HL Paper 142, para 5 on the Groceries Code Adjudicator Bill [HL].
APPENDIX 5: MEMBERS AND DECLARATIONS OF INTERESTS

Committee Members’ registered interests may be examined in the online Register of Lords’ Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the House of Lords Record Office and is available for purchase from The Stationery Office.

Attendance:

The meeting on the 23 July 2014 was attended by Lord Bourne of Aberystwyth, Baroness Drake, Baroness Farrington of Ribbleton, Baroness Fookes, Countess of Mar, Baroness Thomas of Winchester and Viscount Ullswater.