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Delegated Powers and Regulatory Reform
Committee

25th Report of Session 2015–16

Special Report: Response to the Strathclyde Review

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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 19 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.

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The members of the Delegated Powers and Regulatory Reform Committee are:

Baroness Drake	Lord Lisvane
Baroness Fookes (<i>Chairman</i>)	Countess of Mar
Lord Flight	Lord Moynihan
Baroness Gould of Potternewton	Lord Thomas of Gresford
Lord Jones	Lord Tyler

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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

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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 certain instruments made under other Acts specified in the Committee's terms of reference.

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SUMMARY

The Strathclyde Review was appointed following votes in the House of Lords on the draft Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015. The purpose of the Review was to consider “how more certainty and clarity could be brought to the passage [of statutory instruments] through Parliament” and three options are proposed. They range from excluding the House of Lords altogether from the scrutiny of delegated legislation, to re-affirming and codifying the current convention, to introducing a new statutory power which would replace the House’s power of veto with a power to invite the House of Commons to “think again”. In recommending the third option, the Strathclyde Review says that it would also be appropriate for the Government “to take steps to ensure that bills contain an appropriate level of detail and that too much is not left for implementation by statutory instrument”. It is this last issue—the boundary between primary and delegated legislation—on which this Report focuses.

We share with Lord Norton of Louth the view that the “mischief” which should have been addressed by the Review was “the extent to which government uses unamendable secondary legislation to achieve policy goals”. In this Report, we set out several examples of the use of skeleton bills, skeleton provision in bills and Henry VIII powers and we conclude that something needs to be done to re-set the boundary between primary and delegated legislation.

To this end, we make a number of recommendations which are intended to strengthen Parliament and to improve the standard of bills introduced by the Government:

- We propose that this Committee should “sharpen its teeth” so that, where a Minister fails to provide an adequate justification for the powers sought in a bill, we may invite him or her to appear before the Committee; and in order to ensure that the bill cannot proceed whilst this is being done, we propose that the Committee should have the benefit of a “scrutiny reserve”.
- We also impress on the Government the importance of providing responses to our reports which address *all* the issues we raise and are made available in good time.
- We make other recommendations directed at the Government. Re-visiting our earlier report, *Special Report: Quality of Delegated Powers Memoranda*, we invite the Government to explain what progress has been made towards ensuring that bill teams think about delegations of power right at the outset of policy and bill development.
- We challenge the Government to make good their commitment to ensuring that the Parliamentary Business and Legislation Committee, a committee of the Cabinet, is “more robust” in assessing what should be on the face of a bill and what should be left to delegated legislation.
- We call on the Government to ensure that draft regulations which are of considerable substance are made available to the House at an early stage during the passage of a bill.

Finally, we make some general observations on the Strathclyde Review. We take the view that the Review is based on a misunderstanding about the difference between primary and delegated legislation, and that the relationship central to the Review is between the Executive and Parliament, and not between the two Houses. We note the widely-held view that, for good reasons, scrutiny of delegated legislation is undertaken more thoroughly in this House than in the House of Commons. We conclude that, given that the House of Commons is controlled by the Government, the effect of the three Strathclyde options would be to tilt power away from Parliament towards Government.

The Strathclyde Review raises very serious issues and, in our view, before any further action is taken, the two Houses, working together as a Joint Committee, should have time to reflect further on the central question of how Parliament can most effectively perform its role in scrutinising delegated legislation.

A list of our observations and recommendations is set out in Appendix A to this Report.

Special Report: Response to the Strathclyde Review

CHAPTER 1: INTRODUCTION

1. We welcome the Strathclyde Review for bringing to the fore the significant concern, long held by the Delegated Powers and Regulatory Reform Committee (DPRRC) and members of the House, that successive governments have often failed to observe the appropriate threshold between primary and delegated (or secondary) legislation in the public bills introduced into Parliament.
2. The role of the DPRRC is to examine the delegations of power in all public bills,¹ and “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”. The Committee was established following the report, in 1992, of the Select Committee on the Committee Work of the House, under the chairmanship of Earl Jellicoe, which noted that there had “been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion”.² That problem remains today.
3. Our concern about this issue has been sharpened by a related matter, namely our view that in recent years the quality of delegated powers memoranda has varied considerably. A delegated powers memorandum *must* be sent to the DPRRC by the originating department when a bill is introduced into the Lords and it provides the department with an opportunity to explain and justify each and every delegation of power in the bill and the scrutiny procedure applied to it. On a number of occasions, we have felt it necessary to comment adversely on memoranda in our reports on bills; and, in 2014, following an inquiry, we made a Special Report entitled *Quality of Delegated Powers Memoranda* (“our Special Report”).³ As we shall explain later, there is, in our view, a connection between the quality of memoranda and decisions about the delegations of power which they purport to explain and justify. Given this connection, we have found it helpful to return to our Special Report and the Government’s response to it during the course of this Report. For convenience, the Government’s response is set out in Appendix B.

Strathclyde Review

4. The Strathclyde Review was appointed by the Government in order to examine “how to protect the ability of elected Governments to secure their business in Parliament” and, in particular, to consider “how to secure the decisive role of the elected House of Commons in relation to its primacy on financial matters and secondary legislation”.⁴

1 Except supply bills and consolidation bills. The Committee has power to examine private bills as well.
2 Session 1991–92 (HL Paper 35), para 133.
3 Session 2014–15 (HL Paper 39).
4 HL Deb, 28 October 2015, cols 1175–76, and HL Deb, 5 November 2015, HLWS285.

5. The Review was set up in response to votes in the House of Lords concerning the draft Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015 (“the Tax Credits Regulations”). The Tax Credits Regulations were laid under section 66 of the Tax Credits Act 2002. As a result, they were subject to the draft affirmative procedure and required the approval of both Houses. They had been approved by the House of Commons on 15 September 2015.⁵

6. On 26 October 2015, the House of Lords considered an approval motion for the Tax Credits Regulations in the name of the Leader of the House of Lords alongside four amending motions:

- The first was a motion, in the name of Baroness Manzoor, to “decline to approve” the regulations.

This motion was disagreed to by 99 to 310 votes.

- The second, in the name of Baroness Meacher, was that the House should decline to consider the regulations until the Government had laid a report before the House, “detailing their response to the analysis of the draft Regulations by the Institute for Fiscal Studies, and considering possible mitigating action”.

This motion was agreed to by 307 to 277 votes.

- The third, in the name of Baroness Hollis of Heigham, was that the House should decline to consider the regulations until the Government “(1) following consultation have reported to Parliament a scheme for full transitional protection for a minimum of three years for all low-income families and individuals currently receiving tax credits before 5 April 2016, such transitional protection to be renewable after three years with parliamentary approval, and (2) have laid a report before the House, detailing their response to the analysis of the draft Regulations by the Institute for Fiscal Studies, and considering possible mitigating action”.

This motion was agreed to by 289 to 272 votes.

- The Lord Bishop of Portsmouth had tabled a “regret motion” which would have had the effect, had it been successful, of approving the instrument but expressing the view that “this House regrets that the draft Regulations fail to take account of concerns about their short-term impact on working families and individuals currently receiving tax credits, and calls on the Government to consult further on the draft Regulations and revisit their impact”.

This motion was pre-empted by the previous resolutions and was, therefore, not called.

⁵ The Regulations were further discussed (and voted on) in the Commons on 20 October 2015 and 29 October 2015.

7. The Report of the Strathclyde Review was published on 17 December 2015.⁶ It proposes three options which are set out in the Executive Summary as follows:
- The first option would be “to remove the House of Lords from statutory instrument procedure altogether”.
 - The second option would be “to retain the present role of the House of Lords in relation to statutory instruments, but for that House, in a resolution or in standing orders, to set out and recognise, in a clear and unambiguous way, the restrictions on how its powers to withhold approval or to annul should be exercised in practice and to revert to a position where the veto is left unused. This option seeks to codify the convention.”
 - A third option would be “to create a new procedure - set out in statute - allowing the House of Lords to invite the House of Commons to think again when a disagreement exists and to insist on its primacy.”⁷
8. The Strathclyde Review recommends option 3. In addition, the Review included the following remarks:

“Finally, in order to mitigate against excessive use of the new process which I have proposed under option 3, I believe it would be appropriate for the Government to take steps to ensure that Bills contain an appropriate level of detail and that too much is not left for implementation by statutory instrument.”

Lord Strathclyde referred again to this issue in his speech during the debate on the Strathclyde Review on 13 January 2016: “We should question very strongly when framework Bills are put before us whether the requirements for ministerial powers are necessary”.⁸

Purpose of our Report

9. Given that the core purpose of the DPRRC is to consider bills in terms of the appropriateness of their various delegations of legislative power and associated levels of scrutiny, we are focusing in this Report on that issue. The Report therefore does not provide a detailed analysis of the three options proposed by the Strathclyde Review but looks at the current boundary between primary and delegated legislation before considering what “steps” can be taken, to quote the Strathclyde Review, “to ensure that bills contain an appropriate level of detail and that too much is not left for implementation by statutory instrument”. We also offer some further, wider comments about the Strathclyde Review. A list of our observations and recommendations is set out in Appendix A to this Report.

6 Strathclyde Review: Secondary legislation and the primacy of the House of Commons (December 2015), Cm 9177.

7 Strathclyde Review, p 5.

8 HL Deb, 13 January 2016, col 276.

Evidence-gathering

10. On 27 January 2016, the Secondary Legislation Scrutiny Committee (SLSC) published a Call for Evidence with a view to gathering evidence about the implications of the Strathclyde options for the effective scrutiny of delegated legislation. The Committee held 11 oral evidence sessions with 12 witnesses and received ten pieces of written evidence. Rather than seeking to duplicate that Committee's efforts, we have relied extensively on the evidence received by the SLSC.⁹
11. Lord Trefgarne, Chairman of the SLSC, wrote to the Chairman of this Committee, Baroness Fookes, inviting her to attend the evidence sessions and to ask questions of particular relevance to the DPRRC. We are extremely grateful to the SLSC for this suggestion and see it as a fine example of useful collaborative working. We have also taken into account a substantial report by Dr Ruth Fox and Joel Blackwell of the Hansard Society entitled *The Devil is in the Detail: Parliament and Delegated Legislation* (2014) which contains a wealth of information ("the Hansard Society Report"). Finally, as we have said, we have re-visited our earlier Special Report and looked again at the evidence we received during that inquiry.

A note on terminology

12. One potential area for confusion is that varying expressions are used to describe the vehicle by which delegated legislative powers are exercised; namely, "delegated legislation", "secondary legislation" and "subordinate legislation". In this Report we use the term "delegated legislation". On occasion, quoted sources use the alternative terms; and the three generally tend to be used interchangeably.

⁹ <http://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/inquiries/parliament-2015/response-to-strathclyde-review/publications/>

CHAPTER 2: BOUNDARY BETWEEN PRIMARY AND DELEGATED LEGISLATION

Distinction between primary and delegated legislation

13. Delegated legislation is legislation, usually in the form of statutory instruments,¹⁰ which is made by Ministers, and certain public bodies such as regulators, using powers conferred by an Act of Parliament—sometimes called the “parent Act”. It is well known that bills go through a number of stages in both Houses before becoming Acts of Parliament. In contrast, delegated legislation is subject to much simpler procedures:
- some statutory instruments do not have to be laid before Parliament at all;¹¹
 - some are required only to be laid before Parliament without any subsequent scrutiny procedure; and
 - some are laid before Parliament and are then subject to a scrutiny procedure.

In most cases, that scrutiny procedure will be either the affirmative or negative procedure:

- an affirmative instrument requires the approval of both Houses before it may be made or come into force, or remain in force;¹² and
 - a negative instrument will have effect, or remain in effect, unless rejected by either House.
14. A small number of instruments are subject to a strengthened statutory procedure of which there are several varieties. These include Legislative Reform Orders, laid under the Legislative and Regulatory Reform Act 2006, which may be subject to the super-affirmative procedure which allows for an additional scrutiny stage before the approval motion is taken in the House. We describe these in some detail in our report on strengthened statutory procedures published in 2012.¹³
15. We set out in Appendix C to this Report a table illustrating the different scrutiny procedures along with the approximate numbers of instruments laid each session.

10 The exercise of delegated legislative power usually takes the form of statutory instruments. There are other forms, however, and these include, for example, codes and “guidance”.

11 For example, commencement orders.

12 Save for those instruments which are specified in the parent Act as requiring Commons approval only.

13 3rd Report, Special Report: Strengthened Statutory Procedures for the Scrutiny of Delegated Powers, Session 2012–13 (HL Paper 19).

16. Crucially, as we have said, delegated legislation is made by the Executive and not by either House of Parliament, and it is unamendable.¹⁴ Where required to be laid, it is laid by the Government before the two Houses at the same time (unless Commons-only) and dealt with by each House independently. There is no requirement for instruments to be considered first by the House of Commons. Unlike primary legislation, therefore, there is no “dialogue” between the Houses, no “to-ing and fro-ing”—often described as “ping-pong”—in order to seek agreement. If one House declines to approve an affirmative instrument or successfully prays against a negative instrument, the instrument is lost.

Value of delegated legislation

17. Delegated legislation serves an important purpose. *Erskine May* describes the advantages of delegated legislation as follows: “... it has been recognised that the greater the number of details of an essentially subsidiary or procedural character which can be withdrawn from the floors of both Houses, the more time will be available for the discussion of major matters of public concern”. Delegated legislation allows the Executive to “work out the application of the law in greater detail” within the principles laid down by primary legislation.¹⁵
18. When first established, this Committee made a similar point. The DPRRC, originally called the Delegated Powers Scrutiny Committee, was appointed in November 1992. Following a short inquiry, it published its first report which began:

“Parliament recognises the need to delegate some legislative powers. The ever increasing mass of detail in statutory instruments could not be scrutinised by Parliament if it formed part of primary legislation. The need to change detailed provisions from time to time would place impossible burdens on Parliament if the changes always required the introduction of new legislation. The argument is not whether delegation is ever justified but what criteria can be used in determining whether particular proposals for delegation are acceptable.”¹⁶

19. **This remains our view: the issue is not the delegation of powers in principle but the scope and nature of the delegations sought by governments. The fundamental point as far as consideration of the Strathclyde Review is concerned is that the use and misuse of provision for the delegation of powers underpins any examination of the role of the House of Lords, and of Parliament more generally, in relation to delegated legislation.**

14 Except in very rare instances: for example, section 1(2) of the Census Act 1920 and section 27(3) of the Civil Contingencies Act 2004.

15 *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (24th edition), p 667.

16 1st Report, Session 1992–93 (HL Paper 57), para 1.

20. If delegated powers were highly prescribed and dealt only with the mundane and technical aspects of legislation, then one could speculate that the Strathclyde Review would never have taken place. It was because the Tax Credits Regulations contained such significant policy changes that they attracted the attention they did. Lord Norton of Louth made this point in written evidence to the SLSC. He argued that the Strathclyde Review was based on the “false premise” that “the mischief to be addressed is the behaviour of the House of Lords rather than the scope of the statutory instrument in question”:

“The mischief is the extent to which government uses unamendable secondary legislation to achieve policy goals that should more appropriately be embodied in primary legislation. The focus should therefore be on ensuring that secondary legislation is not employed to avoid the rigours of scrutiny through primary legislation.”¹⁷

Dr Fox of the Hansard Society made a similar point:

“We go back to our original point about what the problem is: it is the balance between primary and secondary legislation. We should be asking why it is and whether it is appropriate that the power [which] at the beginning allowed for uprating, which I think most people would accept was an appropriate use of delegated legislation ... that same power also enabled the Government to reduce or abolish that credit.”¹⁸

Lord Hunt of Kings Heath described the reference in the Strathclyde Review to taking steps to ensure sufficient detail is contained in bills as “the most important part of that report”.¹⁹

Is too much being “left for implementation by statutory instrument”?

21. Setting the appropriate boundary between primary and delegated legislation is not a simple, objective exercise and it is for this reason that the Committee, at its inception, said that it would not offer a list of criteria but would consider each delegation in a bill on its merits.²⁰ In our Special Report on delegated powers memoranda, we suggested a small number of principles, such as the presumption of the affirmative procedure for Henry VIII powers—that is, those powers which enable a Minister, by delegated legislation, to amend, repeal or otherwise alter the effect of an Act of Parliament. Identifying these principles was based on over 20 years’ experience but, on the whole, we continue to adopt a case-by-case approach.
22. Consequently, any assessment of the extent to which primary legislation may or may not be leaving too much for implementation by delegated legislation is not directly quantifiable. Our reports on bills, however, indicate that time and again successive governments have attempted to relegate too many important policies to delegated legislation, leaving too little on the face of the bill. Of particular concern to the Committee is the use of skeleton bills or skeleton provisions in bills, and Henry VIII powers. The picture that emerges is that, as Lord Strathclyde appears to imply, there is a problem which needs correction.

17 Written evidence to the SLSC.

18 Evidence to the SLSC, Q 12.

19 HL Deb, 13 January 2016, cols 370–71.

20 Scrutiny of Delegated Powers Committee, 1st Report, Session 1992–93 (HL Paper 57), para 23.

Interventions by the Delegated Powers Committee

23. The DPRRC reports on bills normally after second reading and always before committee stage and, where necessary, on the Government amendments produced during the various stages of a bill as it makes its passage through the House. We meet almost every week and very occasionally more often. In 2013–14, we published 27 reports on 20 Government bills, and in 2014–15, we published 19 reports on 16 Government bills. During the current session to date (up to 15 March), we have considered 40 public bills. These include 18 Government programme bills and 22 private members' bills, of which four were what are called "handout" bills and so, in effect, Government bills. Some bills have no delegations or no delegations to which we would wish to draw the attention of the House. These tend to be private members' bills.
24. In evidence to the SLSC, the Rt Hon. Earl Howe, Deputy Leader of the House of Lords, said: "Governments, as we know, have traditionally implemented the recommendations contained in DPRRC's reports."²¹ The Strathclyde Review makes a similar comment: "The Committee's recommendations are usually accepted by the Government".²² If this were the case, this Committee could be seen as a bulwark against the inclusion of inappropriate delegations in bills as enacted.
25. With this in mind, we decided to undertake an analysis of the outcome of our recommendations during the current session. So far this session (up to 15 March), we have made 102 recommendations about 18 bills.²³ 13 recommendations have yet to be considered.²⁴ Of the remaining 89 recommendations: whilst 25 have been explicitly rejected and five have received no comment at all,²⁵ the remainder have either been explicitly accepted by the Government or given rise to debate in the House.
26. Our findings, which we realise are based on a very limited sample, indicate, therefore, that the picture is more complex than that described by Earl Howe and Lord Strathclyde. The acceptance rate does not appear to be as high as they, and others, suggest. It is however certainly the case that the Committee's reports are mentioned frequently during debates in the House and we see this as one indicator of success, since our role is to offer advice to the House about the bills before it.

21 Evidence to the SLSC, Q 81.

22 Strathclyde Review, p 9.

23 The 18 bills include Government programme bills and "handout" private members' bills, but exclude any that contain no delegated powers, or any that do but are not drawn to the attention of the House.

24 In the sense either that the Government have yet to respond to them, or that the House has yet to consider in committee the bill to which the recommendation relates.

25 Also the Government have yet to respond to 21 recommendations on the Housing and Planning Bill, made in the 20th and 21st Reports of this Committee (HL Papers 90 and 98).

27. Furthermore, the impact of the Committee's recommendations will of course vary from bill to bill. Some instances are particularly notable, such as the Childcare Bill [HL] where, at the beginning of committee stage in July 2015, the Minister, Lord Nash, announced that report stage would not be taken until October 2015. He said:

“It may be helpful if I report to the House that there have been productive discussions in the usual channels about the next stage of this Bill and that as a result of these discussions we will be looking to arrange the report stage for October when the House returns from the conference recess. Noble Lords will be aware that last Friday the Delegated Powers and Regulatory Reform Committee published its report on this Bill and other Bills before the House. We are of course mindful of that report and its recommendations in respect of this Bill and intend to prepare and publish our response in good time before Report, including tabling government amendments where appropriate.”²⁶

28. The figure emerging from our analysis which has caused us greatest concern is the one relating to those recommendations which have received no reaction at all. In this context, we draw the attention of departments to the Cabinet Office's Manual entitled *Guide to Making Legislation* (“the Cabinet Office Manual”) which makes clear that departments have to respond to DPRRC reports and, from this we take it to mean, that they must respond to each and every recommendation we make in our reports.²⁷
29. The latest edition of the Manual, published in July 2015, states that “it is usual for the Government to accept most, if not all, of the DPRRC's recommendations” but that “the Minister should write to the chair of the DPRRC *before committee stage* to inform them of the Government's response to the recommendations”. Given this tight timetable, the Manual suggests that “departments therefore need to make sure that they consider their response to the DPRRC *promptly*, to allow time to seek clearance if necessary” (emphasis added).²⁸
30. **In order for the House to benefit fully from the advice of this Committee, it is essential that the House is informed in good time of the Government's response to each and every recommendation it makes in its reports on bills. The Government are urged to take steps to ensure that the requirements of their own guidance are followed and, where, exceptionally, a Minister is unable to provide a timely and substantive response, then the Minister should write to this Committee to explain why.**

26 HL Deb, 1 July 2015, col 2074.

27 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450239/Guide_to_Making_Legislation.pdf

28 Cabinet Office, Guide to Making Legislation (July 2015), para 16.16.

Skeleton bills and skeleton provision

31. A skeleton, or framework, bill is one which is principally made up of delegations of powers, leaving most of the legislative content to be set out in delegated legislation made under the bill once it has become an Act of Parliament. Sometimes whole bills are “skeleton”; sometimes the description applies to only a part of a bill. The problem of skeleton bills and skeleton provision is not new. In its first report in 1992–93 the Committee referred to “the more extreme use of delegated powers that [are] contained in so-called ‘skeleton bills’”.²⁹
32. During the debate on the Strathclyde Review, several members referred to the problem of governments’ over-reliance on delegated legislation and skeleton bills in particular:
- Baroness Hollis of Heigham, for example, said: “More and more, we have framework legislation—for social security, childcare, the Cities and Devolution Bill—where key decisions are to be carried by [statutory instruments] beyond reach of amendment, sometimes drawn down months, even years, later.”³⁰
 - Baroness Williams of Crosby referred to the “deep and profound undesirability of statutory instruments replacing primary legislation”.³¹
 - Lord Cormack said that he hoped that the Strathclyde Review would lead to “a realisation on the part of government that skeleton bills should become a thing of the past”.³²
 - Lord Gordon of Strathblane suggested that the distinction between the primary and delegated legislation “has long since been abused by successive governments and we need to start doing something about it”.³³
 - Lord Goodlad gave his support to the suggestion that more detail should be included on the face of bills.³⁴
 - Lord Lisvane referred to the threshold between primary and delegated legislation as “the real reason we are in this fix”.³⁵

Examples of the use of skeleton bills and skeleton provision

33. The following is a list of examples, along with a short extract from the Committee’s report on the bill, covering a number of governments since the Committee was established:
- **Jobseekers Bill** (1994–95): “It could be ... argued that the bill leaves so much power in the hands of Ministers, and that the powers are so fundamental, that the bill is no more than a ‘skeleton bill’.”³⁶

29 1st Report, Session 1992–93 (HL Paper 57), para 15.

30 HL Deb, 13 January 2016, col 286.

31 *Ibid.*, cols 305–06.

32 *Ibid.*, col 307.

33 *Ibid.*, cols 349–50.

34 *Ibid.*, col 362.

35 *Ibid.*, col 364.

36 5th Report, Session 1994–95 (HL Paper 50), para 9.

- **Activity Centres (Young Persons' Safety) Bill** (1994–95): “If the Long Title ... stood alone it would provide virtually as much information ... as would the rest of the Bill inescapable conclusion we draw is that this is no more than a skeleton bill.”³⁷
 - **Pollution Prevention and Control Bill** (1998–99): “... our fundamental concern is as to whether it can ever be right to legislate on a topic of such importance ... leaving everything of substance to be determined either by or under ... regulations. We are bound to report ... that ... this is a ‘skeleton’ bill and so is an inappropriate delegation ...”³⁸
 - **Age-related Payments Bill** (2003–04): “ ... a skeleton provision only, setting out neither a sufficient statement of principle nor appropriate limitations on the face of the bill ... an inappropriate delegation of legislative power.”³⁹
 - **Compensation Bill** (2005–06): “In our view it is inappropriate that so many key features are here proposed to be left to delegated legislation.”⁴⁰
 - **Planning Bill** (2007–08): “Part 11 of the bill is skeleton in its current form and ... a considerable amount of legislation which is currently proposed to be delegated should instead appear on the face of the bill.”⁴¹
 - **Energy Bill** (2013–14): “... the true nature of very significant new arrangements concerned with aspects of the reform of the electricity market is virtually indiscernible from the provision on the face of the Bill.”⁴² And, “... not enough has been done to redress the imbalance between the scarcity of provision on the face of the Bill and the preponderance of delegated powers.”⁴³
 - **Water Bill** (2013–14): “... clauses 51 to 69 ... are almost entirely enabling in character ... the wide and significant nature of the delegations can be judged from the following summary ...”;⁴⁴
34. Related to the issue of skeleton provisions is the bad practice of not defining in the bill certain expressions used in it which are critical to the understanding of some of its key provisions. The following are recent examples of that practice:
- **Water Bill** (2013–14): “It is, in our view, wholly inappropriate that key expressions of the kind specified in that clause should not be defined on the face of the Bill ...”⁴⁵

37 7th Report, Session 1994–95 (HL Paper 63), para 11.

38 3rd Report, Session 1998–99 (HL Paper 12), paras 5–6.

39 21st Report, Session 2003–04 (HL Paper 121), para 11.

40 7th Report, Session 2005–06 (HL Paper 73), para 3.

41 12th Report, Session 2007–08 (HL Paper 148), para 22.

42 5th Report, Session 2007–08 (HL Paper 58), para 3.

43 6th Report, Session 2007–08 (HL Paper 76), para 10.

44 20th Report, Session 2013–14 (HL Paper 126), paras 13, 14 and 16.

45 *Ibid.*

- **Education and Adoption Bill (2015–16):** “The effect ... is to leave the definition of “coasting” to be wholly set out in regulations, without anything on the face of the primary legislation to limit or condition the way in which the power may be exercised. We consider such a wide and open-ended delegation to be inappropriate given the fundamental importance of the definition ... and the significant powers which become exercisable in relation to a school once it becomes eligible for intervention.”⁴⁶
35. There have been some particularly poor examples of skeleton bills during the current session. They include:
- **Cities and Local Government Devolution Bill [HL]**, which we described as “in essence an enabling Bill in that it primarily confers delegated powers rather than containing operative provisions”;⁴⁷ and
 - **Childcare Bill [HL]**, which we described as containing “virtually nothing of substance beyond the vague ‘mission statement’ in clause 1(1)”. We went on: “It is quite inaccurate to describe the nature of the provision authorised by clause 1(4) ... as ‘operational, administrative and technical detail’”.⁴⁸
36. As a result of concern caused by these most recent examples, Baroness Fookes, Chairman of this Committee, and the Rt Hon. Lord Lang of Monkton, Chairman of the Constitution Committee, wrote to the Leader of the House of Commons, Rt Hon. Chris Grayling MP, on 22 July 2015. Referring to the Cities and Local Government Devolution Bill [HL] and the Childcare Bill [HL], the letter concluded:
- “We urge you ... to remind Ministers and civil servants across Government that delegations of legislative power must be appropriate, the degree of flexibility afforded to Ministers proportionate to the objectives set out in primary legislation, and that ‘skeleton’ bills be introduced only when absolutely necessary and with a full justification for the decision to adopt that structure of powers.”⁴⁹
37. In the Committee’s Guidance to Departments, we state the following principle:
- “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”.⁵⁰

46 10th Report, Session 2015–16 (HL Paper 45), para 4.

47 1st Report, Session 2015–16 (HL Paper 8), para 2.

48 2nd Report, Session 2015–16 (HL Paper 12), para 8.

49 <http://www.parliament.uk/documents/lords-committees/constitution/Correswithministers/ChairmanDPRCtoGraylingLegislation220715.pdf>

50 7th Report, Special Report: Quality of Delegated Powers Memoranda, Session 2014–15 (HL Paper 39), p 47, para 36.

38. **The Committee’s Guidance is a practical document aimed at bill teams preparing to take a bill through Parliament. Whilst we adhere to the view expressed in the Guidance in the event that a skeleton bill is placed before us, it does not address our wider concern that skeleton bills or part bills should not be put before us in the first place, save in the most exceptional circumstances.**

Prevalence of Henry VIII powers

39. Given the difference between parliamentary scrutiny procedures for primary and for delegated legislation, Henry VIII powers are bound to be potentially controversial. During the debate on the Strathclyde Review, a number of members of the House deprecated their use. Lord Judge, in particular, spoke powerfully about his “nightmare”: “we have too many Henry VIII clauses, and we call them Henry VIII clauses because they are draconian and potentially tyrannical”.⁵¹ Examples of Henry VIII powers on which we have commented across the years are:

- **Local Government (Wales) Bill** (1993–94): “The Bill contains a number of provisions which confer a power to amend or modify primary legislation. Some are clearly Henry VIII powers and others could be so labelled. ... [we] invite the House to consider with care any proposal that a Henry VIII clause should be subject to the negative procedure.”⁵²
- **Company Law Reform Bill** (later the Companies Bill) (2005–06): “... if the Bill is passed, the power would enable the Secretary of State to repeal and replace most of one of the longest Acts ever passed ... The power is, in effect, one to rewrite company law, including policy changes ... Despite the limitations ... and the super-affirmative procedure, we consider that the proposed delegation of power ... is inappropriate and we recommend ... its removal from the Bill.”⁵³
- **Banking No.2 Bill** (2008–09): “... an extremely wide power ... by order to disapply or modify the effect of any enactment (other than Part 1 of the Bill) or of any rule of law not in legislation, for the purpose of enabling the powers in Part 1 of the Bill ... to be used effectively ... we draw it to the attention of the House, so that it might satisfy itself that the rather unusual context for which Part 1 of this Bill makes provision justifies the extremely wide power.”⁵⁴
- **Pensions Bill** (2013–14): “... enables the amendment or other modification of legislation (“whenever passed or made”) ... the memorandum does not explain why the power extends to the amendment of future Acts. We recommend that such extension is inappropriate, unless the House can be satisfied by the Minister that there are compelling reasons why it should be retained.”⁵⁵

51 HL Deb, 13 January 2016, col 321.

52 2nd Report, Session 1993–94 (HL Paper 17), para 8.

53 9th Report, Session 2005–06 (HL Paper 86), paras 34–44.

54 1st Report, Session 2008–09 (HL Paper 12), para 6.

55 13th Report, Session 2013–14 (HL Paper 56), para 21.

- **Draft Deregulation Bill** (2013–14): “... enables a Minister to provide by order for legislation (including provisions of Acts) to cease to apply “if the Minister considers that it is no longer of practical use” ... We are therefore strongly of the view that the power ... is inappropriate. We found the explanations advanced in the memorandum ... to be wholly unconvincing; and we do not regard the procedural arrangements ... as in any sense mitigating the unacceptability of the power.”⁵⁶
- **Recall of MPs Bill** (2014–15): “On their face, those words could permit the infiltration of quite substantial and significant additional provision into the Bill ... In the absence of any explanation why so significant a power is necessary ... we recommend that the power ... to amend the Act resulting from this Bill, is an inappropriate delegation.”⁵⁷

What steps can be taken to re-set the boundary between primary and delegated legislation?

40. During the debate on the Strathclyde Review, Lord Beith said:

“This is much more than a minor procedural issue. Governments of all kinds use delegated legislation to enact new policies and principles to change the impact of the criminal law, and amend the very legislation on which the instrument is based, as a number of noble Lords have mentioned. Committees of your Lordships’ House have produced egregious examples of this, such as the Childcare Bill 2015–16, which was described by the delegated legislation committee as little more than a mission statement. Yet even the mildest of the alternative proposals in the report of the noble Lord, Lord Strathclyde, rests on the utterly implausible hope that Governments will “take steps to ensure that Bills contain an appropriate level of detail and that too much is not left for implementation by statutory instrument”. That will never happen. It would be like relying on an alcoholic promising to drink only moderately in future. It is just not realistic.”⁵⁸

41. We acknowledge that there are grounds for pessimism given the Committee’s recent experience of Government bills, and also the incentive for governments of all persuasions to seek as much flexibility and future-proofing of legislation as possible. However, we do not accept Lord Beith’s view that change will never happen and that steps cannot be taken to correct the current misalignment.

56 DPRRC memorandum to the Pre-legislative Scrutiny Committee, 22 October 2013, paras 21–27. <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/draft-deregulation-bill-committee/draft-deregulation-bill/written/3274.pdf>

57 11th Report, Session 2014–15 (HL Paper 50), paras 20–22.

58 HL Deb, 13 January 2016, cols 356–57.

42. The issue can be tackled from two sides: first, by Parliament, by which we mean not only the work of this Committee but also of the two Houses more generally; and, second, by Government departments. In this regard, we note with interest the evidence to the SLSC of the Rt Hon. Lord Wallace of Tankerness QC, Leader of the Liberal Democrat Party in the House of Lords. He made a similar point when he suggested that change could be brought about, first, by the Cabinet Secretary exercising leadership to resolve the matter across the Civil Service; and, second, by exertion of “political pressure” by which, he explained, he meant the effect of Ministers being exposed to criticism at the dispatch box.⁵⁹

Delegated Powers and Regulatory Reform Committee

43. In our Special Report on the quality of delegated powers memoranda, we described the value of memoranda as two-fold: first, they assist the Committee and the House in understanding a delegation; and, second, they have a salutary effect on how departments select powers and scrutiny procedures. Richard Heaton CB, then Permanent Secretary to the Cabinet Office and First Parliamentary Counsel, had told us that the establishment of the Committee had created a culture in departments where “people think quite carefully ... about delegated powers” which contrasted, he said, 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 something in that broadly speaking allowed you to do what you liked because it was convenient”.⁶⁰
44. Our inquiry into delegated powers memoranda was prompted by the number of memoranda on which the Committee had made adverse comments. In response to that report, Jonathan Jones, Treasury Solicitor, and Richard Heaton, Permanent Secretary and First Parliamentary Counsel at the Cabinet Office, sent a letter to the Committee which they stated was the Government’s response. In the letter they set out a number of steps that they intended to take to ensure a more consistently high standard of memoranda (see Appendix B).

⁵⁹ Evidence to the SLSC, Q 73.

⁶⁰ Evidence to the Committee’s inquiry into the quality of delegated powers memoranda. 7th Report, Special Report: Quality of Delegated Powers Memoranda, Session 2014–15 (HL Paper 39), para 5.

45. During our inquiry, it was put to us that, where a memorandum fell short of the standard required, the Minister could be requested to provide further explanation either in writing or at an oral evidence session.⁶¹ Lord Lisvane repeated this suggestion in evidence to the SLSC in the context of calling in Ministers to justify significant Henry VIII powers.⁶² In 2014, we noted that the proposal to call in Ministers had practical difficulties to do with timing: namely that the Committee endeavours to report between second reading and committee stage and that, given the recommended minimum interval of 14 days between those two stages, there would be no time to hold an evidence session. We noted that the Committee has no “scrutiny reserve”, by which we mean that there is no requirement under Standing Orders of the House for the Government to delay scheduling committee stage until the Committee has reported. Therefore, the Government would not have to wait for the Committee to report before proceeding with the bill.⁶³ We concluded against proposing a “scrutiny reserve” on the grounds that we would wait to see if our recommendations in the Report had taken effect. We also said however that “should the expected improvements not result ... , then it is, of course, open to the Committee to re-visit these, or any other, proposals for procedural change.”⁶⁴ During this session (up to 15 March), we have so far commented adversely on 17 delegated powers memoranda.
46. We now take the view, for reasons to do with both the extent of delegations in bills as well as the quality of delegated powers memoranda, that there are grounds for re-visiting these proposals for procedural change. In suggesting the introduction of the “scrutiny reserve”, we would not expect the progress of bills to be routinely delayed while the Committee completed its work. We would continue to observe our practice of respecting the agreed scheduling of business and ensure that we reported in accordance with it. The very existence of the “scrutiny reserve” would, however, act as a salutary reminder to Government departments of the importance of proper preparation of bills and memoranda.
47. **The core task of the DPRRC is to examine, and report on, the delegations in bills, a task described by the Wakeham Commission as one of “policing” the boundary between primary and delegated legislation. The DPRRC has always discharged this function rigorously both in terms of the quality of its advice to the House on individual bills and also in monitoring, and commenting on, the standards of bills and their associated delegated powers memoranda more generally. The Strathclyde Review has provided a stark reminder of the importance of our work.**

61 *Ibid.*, p 47, paras 43–45.

62 Evidence to the SLSC, Q 19.

63 The Joint Committee on Statutory Instruments has a “scrutiny reserve” in that no approval motion for an affirmative instrument can be moved in the House of Lords until that committee has reported on the instrument (House of Lords Public Business Standing Orders 72(1) (a)). The European Union Committee has a “scrutiny reserve” in that “... no Minister of the Crown shall give agreement in the Council or the European Council in relation to any document subject to the scrutiny of the European Union Committee in accordance with its terms of reference, while the document remain subject to scrutiny.” (See the Companion to the Standing Orders and Guide to Proceedings of the House of Lords (2015), p 270).

64 7th Report, Special Report: Quality of Delegated Powers Memoranda, Session 2014–15 (HL Paper 39), p 47, para 45.

48. **In order more effectively to “police” the boundary between primary and secondary legislation, procedural change will be needed. In cases where a bill includes exceptionally wide delegations for which there has been no satisfactory justification, we may decide to invite a Minister to appear before us to provide a justification in person. This needs to be coupled with the introduction of a “scrutiny reserve” so that the committee stage could not proceed until the Committee had taken evidence from the Minister and had reported to the House.**
49. We note, in passing, that Earl Howe, in evidence to the SLSC, appeared to suggest that the Joint Committee on Statutory Instruments performed a similar “policing” function in respect of delegated legislation. When asked about the suitability of the policy contained in the Tax Credits Regulations for inclusion in a statutory instrument, he argued that the JCSI “could have flagged up” the Regulations as making “inappropriate use of a delegated power”.⁶⁵ Whilst the JCSI has power to draw the attention of the House to an instrument which “appears to make some unusual or unexpected use of the powers conferred” by a parent Act,⁶⁶ that is, as far as we are aware, a form of scrutiny which is of a technical character and should not be construed more broadly as amounting to an assessment of “appropriateness” in the sense used in this Committee’s terms of reference.

Government departments

Bill preparation

50. Government departments are responsible for carrying out the policies of Ministers, including those that require the preparation of a bill. In discharging this responsibility, they have to decide which policies should be included on the face of the bill and which can be left to delegated legislation.
51. The starting point is the policy development leading up to a bill. Ideally, at that early stage, departments will begin to consider the appropriate split between primary and delegated legislation. We set out in our Special Report a number of suggestions about how to ensure a consistently high standard of memoranda. One key proposal was that the Government should “encourage departments, as best practice, to prepare a draft memorandum in parallel with the policy development and early drafting stages of a bill rather than leaving it until later in the process”⁶⁷ so as to enforce the “internal-discipline effect” of justifying a delegation of power. Not surprisingly, according to the Hansard Society Report, the act of preparing the memorandum can influence the final selection of scrutiny procedures and presumably also the selection of the delegations themselves. That Report relates: “One departmental lawyer admitted that on occasion they had changed their minds about the allocation of procedures to powers in the course of drafting the document”.⁶⁸
52. **The “internal-discipline effect” of preparing a delegated powers memorandum is likely to have an important impact on policy-makers and departmental lawyers, including the selection of delegations and associated procedures.**

65 Evidence to the SLSC, Q 79.

66 The Standing Orders of the House of Lords relating to Public Business SO74(2)(f).

67 7th Report, Special Report: Quality of Delegated Powers Memoranda, Session 2014–15 (HL Paper 39), p 47, para 41.

68 Hansard Society Report, p 61.

53. **We therefore invite the Government to explain what progress has been made in implementing the recommendation in our Special Report that memoranda should be drafted in parallel with policy development and early drafting stages of legislation.**
54. Government bills are drafted by Parliamentary Counsel on instruction by Government departments. Government departments are assisted by the Cabinet Office Manual. It includes the following advice about when it is appropriate for a bill to delegate legislative powers:

“These are some of the factors to consider when deciding whether the Bill should confer a power to make provision by secondary legislation:

- the matter in question may need adjusting more often than Parliament can be expected to legislate for by primary legislation;
- there may be rules which will be better made after some experience of administering the new Act and which it is not essential to have as soon as it begins to operate;
- the use of delegated powers in a particular area may have strong precedent and be uncontroversial;
- there may be transitional and technical matters which it would be appropriate to deal with by delegated powers.

On the other hand:

- the matters, though detailed, may be so much of the essence of the bill that Parliament ought to consider them along with the rest of the bill;
- the matters may raise controversial issues running through the bill which it would be better for Parliament to decide once in principle rather [than] arguing several times over (and taking up scarce parliamentary time in so doing).⁶⁹

55. We regard this as good advice which usefully supplements both the general guidance provided by this Committee to departments and the developing “case law” of guidance embodied in the Committee’s reports on bills.
56. So the issue is not, in our view, the availability of guidance, and we do not subscribe to the view suggested by, for example, Dr Fox⁷⁰ and Professor Russell,⁷¹ that the criteria need to be more explicitly defined. **In our view, the key issue is the capacity and willingness of Ministers and officials to take the advice available, including their own. The recommendations we make later in this Report seek to address this point.**

Developing a collective understanding amongst officials

57. In our Special Report, we highlighted the importance of disseminating the Committee’s comments to ensure that bill teams are aware of the Committee’s views. The Government’s response that action would be taken to improve dissemination included, for example, the following commitments:

69 Cabinet Office, Guide to Making Legislation (July 2015), p 121, para 16.1.

70 Evidence to the SLSC, Q 15.

71 Evidence to the SLSC, Q 38.

- “The Committee’s report, its revised guidance and the revised Cabinet Office guidance have been drawn to the attention of all departmental legal teams and all members of Parliamentary Counsel.”
 - “We have nominated a senior lawyer to monitor all reports of the Committee and draw the attention of counsel and departmental legal teams to any common issues arising from those reports, including instances of good or bad drafting of memoranda. ...”⁷²
58. It is with some disappointment therefore that we heard evidence of a continuing lack of understanding within departments about the approach of the DPRRC. Dr Fox, in describing the absence of “collective knowledge”, said:
- “ ... in many instances civil servants serving on a bill team may do it only once. They come in cold to a bill team, having never been involved before. They have to learn on the job. They get guidance, but not always the same guidance. They always get the Cabinet Office guidance, but they do not, for example, necessarily get the reports from the Committees that would improve their knowledge about what expectations were about precedent and so on.”⁷³

Professor Russell made a similar point.⁷⁴

59. **In response to our inquiry into the quality of delegated powers memoranda, assurances were given to us by the Government about renewed efforts to increase the dissemination of the Committee’s reports within departmental legal teams. Our purpose had been to secure improvement in the quality of memoranda although an important consequential effect would have been a better understanding of the substantive issue of appropriate selection and definition of delegations and their associated procedures.**
60. **We invite the Government to indicate what actions they have taken to improve the dissemination of the Committee’s reports, whether they are satisfied with the outcome and what further efforts they intend to make.**

Role of the Parliamentary Business and Legislation Committee

61. Before a bill prepared by a Government department can see the light of day, it has to get over the hurdle of examination by the Parliamentary Business and Legislation Committee (PBL Committee). The PBL Committee is a Cabinet Committee which “manages the Government’s current legislative programme on behalf of Cabinet and advises Cabinet on strategic management of the forthcoming programme”.⁷⁵ It is currently chaired by the Leader of the House of Commons. The PBL Committee has to approve, amongst other things, the final text of a bill and will have been provided with a delegated powers memorandum justifying any delegations of powers. Cabinet guidance instructs bill teams to pay “particular attention” to Henry VIII powers.⁷⁶

72 Appendix B.

73 Evidence to the SLSC, Q 15.

74 Evidence to the SLSC, Q 37.

75 Cabinet Office, Guide to Making Legislation (July 2015), para 2.1.

76 Cabinet Office, Guide to Making Legislation (July 2015), para 3.18.

62. Although the PBL Committee has an important policy role, Earl Howe, in evidence to the SLSC, described it also as being one of the “checks and balances against inappropriately framed bills” which “formally assesses the appropriateness of a bill’s order-making powers and its substantive provisions prior to introduction”.⁷⁷ He felt that it did “an effective job” although he appreciated that the SLSC “might come to the conclusion that it could do better”.⁷⁸

63. Mr Grayling, when asked about the effectiveness of the PBL Committee, indicated that he realised that improvements needed to be made in terms of ensuring that bills contained an appropriate amount of detail:

“It is for us on the PBL Committee to be more rigorous about this. ... We are trying to tighten up the legislative process in a number of ways to make sure that what comes before Parliament is as ready as possible, that we have thought through issues that may arise in the Houses and that we have looked at legislation much earlier than has previously been the case.”⁷⁹

64. Lord Wallace of Tankerness, who sat on the PBL Committee during the coalition Government, provided a description of PBL Committee meetings which confirmed Mr Grayling’s view that change is needed:

“There were times ... when you were not exactly comfortable that everything had been thought through, but there was an imperative to get the bill published by a certain date, and you would think, “it’s ok. We’ll fill in some of the details a bit later”. Probably more often than not, it worked, but it leads to situations where it does not work, and both Houses of Parliament are left looking at pieces of legislation that are in some sense incomplete; either they should be in a primary bill or ... the draft regulations should be made available.”⁸⁰

65. **We welcome the indication by the Leader of the House of Commons of his commitment, as Chairman of the PBL Committee, to “tighten up the legislative process”. We invite the Government to explain:**

- **what the PBL Committee intends to do to be “more rigorous” about ensuring that bills contain “an appropriate level of detail and that too much is not left for implementation by delegated legislation”;**
- **what steps will be taken to monitor adherence to, and the effectiveness of, the new “more rigorous” approach; and**
- **what was meant by the assurance that legislation introduced into Parliament will be “as ready as possible” and how that will be achieved.**

77 Evidence to the SLSC, Q 82.

78 Evidence to the SLSC, Q 84.

79 Evidence to the SLSC, Q 7.

80 Evidence to the SLSC, Q 73.

Provision of draft instruments during the passage of bills

66. Complaints are often raised in the House about the unavailability of draft regulations during the passage of a bill through Parliament. For example:
- During proceedings on the **Childcare Bill [HL]**, Baroness Jones of Whitchurch said: “as the Bill is constructed, it subsumes all the detail of the proposals into secondary legislation, which we have not yet seen, and it is not clear whether we are intended to see the draft regulations before we start to scrutinise the Bill in detail. ... We do not have the previous evaluation, we do not have the funding formula and we do not have the draft regulations. This all begs the inevitable question of why the Bill is being rushed through, when a little bit more time and preparation might have delivered a popular and workable scheme. Unless the noble Lord is able to provide some reassurances on the availability of that documentation today, we believe there is a strong case for delaying the future stages of the Bill until the information is available and we are able to carry out our responsibilities effectively.”⁸¹
 - During the recent committee stage of the **Housing and Planning Bill**, Baroness Hollis of Heigham referred to the House as “floundering” because, in the absence of draft regulations, “we do not know enough”. She proposed that report stage should be delayed “because otherwise most of this debate will continue on Report with questions such as “What does this mean?” or “What does that mean?” and the Minister will say “We have to await the regulations.”⁸²
67. The Strathclyde Review acknowledged this issue with the comment that: “publishing draft regulations during the parliamentary stages of Bills might also speed the passage of primary legislation”.⁸³
68. **We recognise that it is not necessary for Parliament to see all draft delegated legislation associated with a bill while that bill is going through the two Houses. However, where draft delegated legislation is of considerable substance without which Parliament cannot give proper consideration to the bill itself, we urge the PBL Committee to require departments to provide such drafts to the Houses early in a bill’s passage through Parliament.**
69. **We believe that the availability of such drafts should be regarded as part of the test of readiness to which Mr Grayling referred when he said that the PBL Committee should ensure that legislation is “as ready as possible” to go before Parliament.**

81 HL Deb, 16 June 2015, col 1085.

82 HL Deb, 3 March 2016, col 958.

83 Strathclyde Review, p 22.

CHAPTER 3: FURTHER OBSERVATIONS ON THE STRATHCLYDE REPORT

70. The primary focus of this Report has been the issue of the proper boundary between primary and delegated legislation. However, the Strathclyde Review raises other issues on which we make the following general observations.

Relationship between the Executive and Parliament

71. The Strathclyde Review is described, in its title, as being concerned about “the primacy of the House of Commons” and its recommendation in favour of option 3, which would allow the House of Lords “to invite the Commons to think again when a disagreement exists and insist on its primacy”, is described in terms of providing a “better fit with the established role of the House of Lords as regards primary legislation”.⁸⁴
72. We believe that this approach betrays a fundamental misunderstanding of the difference between primary and delegated legislation. Others have also voiced this criticism. For example, Daniel Greenberg, former Parliamentary Counsel, now in private practice, in evidence to the SLSC said:

“When the House of Lords moves to annul a statutory instrument or fails to approve one in draft under the affirmative resolution procedure, it is not the House of Commons that it is defying, but the Government. When a bill passes from the Commons to the House of Lords, that is an expression of the will of the elected House that the unelected House should respect; but when a statutory instrument is laid before both Houses, that is the will of the Executive and it is the equal responsibility of both Houses of Parliament to scrutinise it and challenge it.”⁸⁵

Lord Norton made a similar point:

“The review is mistitled. It is not so much concerned with ‘secondary legislation and the primacy of the House of Commons’, but rather ‘secondary legislation and empowering the Executive’.”⁸⁶

73. In this context it is telling that Mr Grayling, in evidence to the SLSC, describes Strathclyde option 3 in terms of the House of Lords asking the House of Commons *and* the Government to “think again”. It is also telling that Mr Grayling refers to the House of Lords, when asking the Commons to think again about an instrument, as “pinging it back”. Whilst this language suits primary legislation, it does *not* apply to delegated legislation. A statutory instrument comes from the Executive, not from the Commons. This is demonstrated by the fact that an instrument may be considered in the House of Lords *before* being considered in the House of Commons—in which case “thinking again” cannot arise.
74. Lord Strathclyde, in his speech about his report, said that the debate went “to the heart of the relationship between this House and the House of Commons ...”.⁸⁷ **We do not agree. The relationship at issue is not between the two Houses but between the Government and Parliament.**

84 Strathclyde Review, p 5.

85 Written evidence to the SLSC.

86 Written evidence to the SLSC.

87 HL Deb, 13 January 2016, col 273.

Capacity of the Houses to scrutinise delegated legislation

75. Several witnesses who gave evidence to the SLSC commented that scrutiny in the House of Lords is more thorough than that in the House of Commons, and the Hansard Society Report came to the same conclusion. This is a widely-held view and it is one with which we are bound to agree. In saying this, we are in no way critical of the House of Commons. We understand the many pressures on the time of MPs in the House of Commons, in particular their constituency work which members of the House of Lords do not have. As Lord Lisvane, former Clerk of the House of Commons, told the SLSC: “The starting point ... has to be one of complementarity and not competition”. The House of Commons had neither the appetite nor the time for scrutiny of secondary legislation but that was because of “the extraordinary press of competing priorities which members of the Commons have to deal with.”⁸⁸

Effect of the Strathclyde Review options

76. The three Strathclyde options are intended to reduce the powers of the House of Lords in relation to delegated legislation. The House of Lords, however, makes a significant contribution to the scrutiny of delegated legislation; and we note that, as Lord Strathclyde said in evidence to the SLSC, “the House of Commons is controlled by the Government”.⁸⁹ It follows that the effect of the options will be to reduce the power of Parliament to challenge delegated legislation and to hold the Government to account. Several witnesses who gave evidence to the SLSC inquiry argued this point. For example:
- Lord Norton said: “Limit the role and powers of the House of Lords in respect of secondary legislation and you strengthen not the House of Commons, but the Executive.”⁹⁰
 - Dr Adam Tucker of the University of York said: “... each of the Review’s three recommendations would involve a shift of responsibility for the scrutiny of delegated legislation from the House of Lords to the House of Commons. It is important to recognise that their main effect would therefore be an increase in the Executive’s power to make law.”⁹¹
 - Dr Fox of the Hansard Society, when asked about option 1, said that it “would drive a coach and horses through the concept of having a system of parliamentary government, and in effect it would not ensure the primacy of the House of Commons ...” but “would ensure the primacy of the Government to drive through whatever it wanted.”⁹²

88 Evidence to the SLSC, Q 17.

89 Evidence to the SLSC, Q 89.

90 Written evidence to the SLSC.

91 Written evidence to the SLSC.

92 Evidence to the SLSC, Q11.

77. **We strongly endorse these views. The House of Lords' votes on the Tax Credits Regulations challenged the Government, not the House of Commons, and the effect of the options set out in the Strathclyde Review would be to tilt the balance of power away from Parliament generally and towards Government. These are very important issues which, as we say in our conclusion, warrant further investigation. Underlying this important constitutional debate is the fact, however, that if governments were to follow the guidance about the appropriate threshold between primary and delegated legislation, then the issue which the Strathclyde Review seeks to address might well never have arisen.**

Conclusion

78. **The comments of the Strathclyde Review in relation to the quality of primary legislation and the use or over-use of delegated legislation are timely for the reasons we have set out, and we believe that there are steps that the Government can take without further delay to correct current concerns about the width of delegations, the use of Henry VIII powers and the number of skeleton bills and provisions.**
79. We have not offered a detailed analysis of the Strathclyde options. Our further observations, however, about what we believe to be a fundamental misunderstanding underlying the Review and the potential impact of any of the proposed options, particularly in the context of the asymmetry of treatment of delegated legislation in the two Houses, led us to conclude that there needs to be more time for reflection by Parliament as a whole.
80. **We recommend, therefore, that further work should be carried out by the two Houses working together, most appropriately as a Joint Committee, to consider the scrutiny of delegated legislation by Parliament as a whole.**

APPENDIX A: LIST OF OBSERVATIONS AND RECOMMENDATIONS

Chapter 1: Introduction

1. We welcome the Strathclyde Review for bringing to the fore the significant concern, long held by the Delegated Powers and Regulatory Reform Committee (DPRRC) and members of the House, that successive governments have often failed to observe the appropriate threshold between primary and delegated (or secondary) legislation in the public bills introduced into Parliament. (Paragraph 1)

Chapter 2: Boundary between primary and delegated legislation

2. The issue is not the delegation of powers in principle but the scope and nature of the delegations sought by governments. The fundamental point as far as consideration of the Strathclyde Review is concerned is that the use and misuse of provision for the delegation of powers underpins any examination of the role of the House of Lords, and of Parliament more generally, in relation to delegated legislation. (Paragraph 19)
3. In order for the House to benefit fully from the advice of this Committee, it is essential that the House is informed in good time of the Government's response to each and every recommendation it makes in its reports on bills. The Government is urged to take steps to ensure that the requirements of their own guidance are followed and, where, exceptionally, a Minister is unable to provide a timely and substantive response, then the Minister should write to this Committee to explain why. (Paragraph 30)
4. The Committee's Guidance is a practical document aimed at bill teams preparing to take a bill through Parliament. Whilst we adhere to the view expressed in the guidance in the event that a skeleton bill is placed before us, it does not address our wider concern that skeleton bills or part bills should not be put before us in the first place, save in the most exceptional circumstances. (Paragraph 38)
5. The core task of the DPRRC is to examine, and report on, the delegations in bills, a task described by the Wakeham Commission as one of "policing" the boundary between primary and delegated legislation. The DPRRC has always discharged this function rigorously both in terms of the quality of its advice to the House on individual bills and also in monitoring, and commenting on, the standards of bills and their associated delegated powers memoranda more generally. The Strathclyde Review has provided a stark reminder of the importance of our work. (Paragraph 47)
6. In order more effectively to "police" the boundary between primary and secondary legislation, procedural change will be needed. In cases where a bill includes exceptionally wide delegations for which there has been no satisfactory justification, we may decide to invite a Minister to appear before us to provide a justification in person. This needs to be coupled with the introduction of a "scrutiny reserve" so that the committee stage could not proceed until the Committee had taken evidence from the Minister and had reported to the House. (Paragraph 48)

7. The “internal-discipline effect” of preparing a delegated powers memorandum is likely to have an important impact on policy-makers and departmental lawyers, including the selection of delegations and associated procedures. We therefore invite the Government to explain what progress has been made in implementing the recommendation in our Special Report that memoranda should be drafted in parallel with policy development and early drafting stages of legislation. (Paragraphs 52 and 53)
8. [The] issue is not, in our view, the availability of guidance. In our view, the key issue is the capacity and willingness of Ministers and officials to take the advice available, including their own. The recommendations we make later in this Report seek to address this point. (Paragraph 56)
9. In response to our inquiry into the quality of delegated powers memoranda, assurances were given to us by the Government about renewed efforts to increase the dissemination of the Committee’s reports within departmental legal teams. Our purpose had been to secure improvement in the quality of memoranda although an important consequent effect would have been a better understanding of the substantive issue of appropriate selection and definition of delegations and their associated procedures. We invite the Government to indicate what actions they have taken to improve the dissemination of the Committee’s reports, whether they are satisfied with the outcome and what further efforts they intend to make. (Paragraphs 59 and 60)
10. We welcome the indication by the Leader of the House of Commons of his commitment, as Chairman of the PBL Committee, to “tighten up the legislative process”. We invite the Government to explain:
 - what the PBL Committee intends to do to be “more rigorous” about ensuring that bills contain “an appropriate level of detail and that too much is not left for implementation by delegated legislation”;
 - what steps will be taken to monitor adherence to, and the effectiveness of, the new “more rigorous” approach; and
 - what was meant by the assurance that legislation introduced into Parliament will be “as ready as possible” and how that will be achieved. (Paragraph 65)
11. We recognise that it is not necessary for Parliament to see *all* draft delegated legislation associated with a bill while that bill is going through the two Houses. However, where draft delegated legislation is of considerable substance without which Parliament cannot give proper consideration to the bill itself, we urge the PBL Committee to require departments to provide such drafts to the Houses early in a bill’s passage through Parliament. We believe that the availability of such drafts should be regarded as part of the test of readiness to which Mr Grayling referred when he said that the PBL Committee should ensure that legislation is “as ready as possible” to go before Parliament. (Paragraphs 68 and 69)

Chapter 3: Further observations on the Strathclyde Report

12. Lord Strathclyde, in his speech about his report, said that the debate went “to the heart of the relationship between this House and the House of Commons ...”. We do not agree. The relationship at issue is not between the two Houses but between the Government and Parliament. (Paragraph 74)
13. The House of Lords’ votes on the Tax Credits Regulations challenged the Government, not the House of Commons, and the effect of the options set out in the Strathclyde Review would be to tilt the balance of power away from Parliament generally and towards Government. These are very important issues which, as we say in our conclusion, warrant further investigation. Underlying this important constitutional debate is the fact, however, that if governments were to follow the guidance about the appropriate threshold between primary and delegated legislation, then the issue which the Strathclyde Review seeks to address might well never have arisen. (Paragraph 77)
14. The comments of the Strathclyde Review in relation to the quality of primary legislation and the use or over-use of delegated legislation are timely for the reasons we have set out, and we believe that there are steps that the Government can take without further delay to correct current concerns about the width of delegations, the use of Henry VIII powers and the number of skeleton bills. (Paragraph 78)
15. We recommend that further work should be carried out by the two Houses working together, most appropriately as a Joint Committee, to consider the scrutiny of delegated legislation by Parliament as a whole. (Paragraph 80)

APPENDIX B: SPECIAL REPORT: QUALITY OF DELEGATED POWERS MEMORANDA: GOVERNMENT RESPONSE

Letter from Jonathan Jones, Treasury Solicitor and HM Procurator General, and Richard Heaton CB, Permanent Secretary and First Parliamentary Counsel at the Cabinet Office, to Baroness Thomas of Winchester, Chairman to the Delegated Powers and Regulatory Reform Committee

We welcome the above report from the Delegated Powers and Regulatory Reform Committee (HL Paper 39) and we were both grateful for the opportunity to give evidence to the Committee.

This letter sets out the Government's response to the report.

We acknowledge the Committee's concerns about the quality of delegated powers memoranda. We agree that quality has been variable. We welcome the examples of poor practice set out in Appendix 3 of the report, together with the revised guidance set out in Appendix 4. In addition, as you are aware, the Cabinet Office has recently revised its guidance on this topic. This material provides a good basis for improving standards in the preparation of memoranda across departments and their legal teams. Accordingly we are taking the following steps:

- The Committee's report, its revised guidance and the revised Cabinet Office guidance have been drawn to the attention of all departmental legal teams and all members of Parliamentary Counsel.
- We have taken the opportunity to stress to all lawyers involved in Bill work the importance we and the Committee attach to high standards in the drafting of delegated powers memoranda.
- We have nominated a senior lawyer to monitor all reports of the Committee and draw the attention of counsel and departmental legal teams to any common issues arising from those reports, including instances of good or bad drafting of memoranda. We will use the existing GLS Primary Legislation Group as a vehicle for disseminating this material around departments.
- In their weekly reports to the Treasury Solicitor, heads of departmental legal teams have been asked specifically to report on any comments (whether critical or complimentary) made by the Committee on their delegated powers memoranda. Where appropriate, such reports will be followed up with the legal team concerned, or shared with other legal teams in order to embed best practice.
- The issue of the quality of delegated powers memoranda will be specifically covered in the Bill training given to lawyers in the Government Legal Service. This will include reference to the guidance from the Committee and the Cabinet Office referred to above.
- Parliamentary Counsel will continue to support departmental legal teams in the preparation of memoranda as appropriate. In particular, in the case of Bills starting in the Commons, they will support departments in making any changes which are needed to memoranda when Bills move to the Lords, in the light of any amendments made in the Commons: the objective is to ensure that the Committee sees the best possible product.

- If the Committee is able to share examples of what it considers to be good memoranda, the Cabinet Office will look at all memoranda produced by Whitehall departments to help ensure that the Committee's concerns are addressed.

We hope that these measures will help address the Committee's concerns and improve standards in the preparation of memoranda.

We also reiterate our willingness to engage informally with the Committee's staff and our invitation to them to raise with us at an early stage any concerns they may have with a particular Bill or memorandum.

13 October 2014

APPENDIX C: LEVELS OF DELEGATION

Table 1: Levels of delegation

Complete	Negative Instruments	Affirmative Instruments	SIs⁹³ with added scrutiny
Minister can make law on his own authority. e.g. closing a road, commencement orders.	Must lay before Parliament for 40 days—can be rejected by a prayer motion.	Laid as draft. Cannot come into effect until both Houses have debated and approved it.	Laid as SIs but with specific scrutiny procedure set out in Act. e.g. LROs, ⁹⁴ PBOs. ⁹⁵
Approx. 2,200 a year	Approx. 800 a year	Approx. 200–250 a year	Less than 10 a year
<i>Can only be amended by another instrument</i>			<i>Limited change possible</i>

93 Statutory instrument.

94 Legislative Reform Order.

95 Public Bodies Order.

APPENDIX D: 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.

For the business taken at the meeting on 16 March 2016 Members declared the following interests:

Lord Tyler
Vice Chair, Hansard Society

Attendance:

The meeting on the 16 March 2016 was attended by Baroness Drake, Baroness Fookes, Lord Jones, Countess of Mar, Lord Moynihan, Lord Thomas of Gresford and Lord Tyler.