



HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

23rd Report of Session 2016–17

**Special Report: Submission
to the House of Commons
Procedure Committee inquiry
on the delegated powers in the
“Great Repeal Bill”**

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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.

Membership

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

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Lord Lisvane

Baroness Fookes (*Chairman*)

Lord Moynihan

Lord Flight

Lord Thomas of Gresford

Baroness Gould of Potternewton

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Lord Jones

Lord Tyler

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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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Twenty Third Report

INTRODUCTION

1. The House of Commons Procedure Committee is currently conducting an inquiry into the delegated powers in the “Great Repeal Bill”.¹ We were delighted to receive, with others, an invitation from the Chairman of the Committee, Charles Walker OBE MP, to contribute to the inquiry. We have made a submission, welcoming the Committee’s collaborative approach and expressing the hope that this engagement between the two Houses will continue as more becomes known about the legislative framework of the Great Repeal Bill, and associated primary and delegated legislation.
2. There is, of course, a high level of interest in the House about any matter relating to Parliamentary scrutiny of the legislation resulting from the decision to withdraw from the European Union. Whilst our observations are, at this stage, necessarily tentative, the House may nonetheless find them of interest and, for this reason, we are publishing our submission as a Special Report.

¹ House of Commons Procedure Committee, inquiry into the delegated powers in the “Great Repeal Bill”: <http://www.parliament.uk/business/committees/committees-a-z/commons-select/procedure-committee/inquiries/parliament-2015/delegated-powers-great-repeal-bill-16-17/> [accessed 16 March 2017]

SUBMISSION TO THE HOUSE OF COMMONS PROCEDURE COMMITTEE INQUIRY ON THE DELEGATED POWERS IN THE “GREAT REPEAL BILL”

3. The Government are at an early stage in the process of implementing the decision to withdraw from the EU. The European Union (Notification of Withdrawal) Bill is still before Parliament and we are awaiting more detailed information about the Great Repeal Bill. Any observations about the delegations of power in the Bill are therefore necessarily tentative. The Government have published a White Paper, *The United Kingdom’s exit from and the new partnership with the European Union* (Cm 9417), which sets out some general principles. The White Paper states:

“The Government’s general approach to preserving EU law is to ensure that all EU laws which are directly applicable in the UK ... and all laws which have been made in the UK, in order to implement our obligations as a member of the EU, remain part of domestic law on the day we leave the EU”.²
4. The purpose of the Great Repeal Bill is threefold: to repeal the European Communities Act 1972, to preserve EU law and to delegate powers to enable the Government to make amendments to those laws “that would otherwise not function sensibly once we have left the EU”.³ There will therefore be “a programme of delegated legislation under the Great Repeal Bill to address deficiencies in the preserved law”.⁴
5. Significant policy changes, we are told, “will be underpinned by other primary legislation” and the White Paper states that the Government expect to bring forward separate bills on immigration and customs.⁵ We anticipate that these bills will also contain extensive delegations of power and, although our principal focus in this submission is the Great Repeal Bill, many of our observations in relation to that Bill will also apply to the other primary legislation.
6. The underlying motivation for your inquiry is that “it is vital” that the Government do not use the Bill as an excuse to give themselves “unfettered delegated powers”, and that the House of Commons must therefore be in a position to be able properly to scrutinise the conversion of EU law into domestic law and also future changes to former EU law. **The Delegated Powers and Regulatory Reform Committee (the DPRRC or “the Committee”)** shares your concern unreservedly. **It goes to the very heart of the reason for which the Committee was established and raises the fundamental issue of the balance of power between the Executive and Parliament.**

2 HM Government, *The United Kingdom’s exit from and the new partnership with the European Union*, CM 9417, February 2017, p 10: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf [accessed 16 March 2017]

3 *Ibid.*

4 Para 1.8.

5 *Ibid.*

7. The DPRRC therefore welcomes the opportunity to respond to the inquiry by the House of Commons Procedure Committee into the delegated powers in the Great Repeal Bill. We also welcome the collaborative approach which your Committee has adopted in seeking to address this important matter. **We look forward to continuing our engagement in your inquiry as further information about the legislative framework of the Great Repeal Bill, and associated primary and delegated legislation, is provided by the Government.**

The current role of the DPRRC

8. The DPRRC is a Lords-only committee. It was set up 25 years ago as a result of growing disquiet about the “wide” and “ill-defined” powers being conferred on Ministers.⁶ The Committee’s function is to examine the delegations of power, and associated scrutiny procedures, in all bills before the House and to report to the House those which give cause for concern. Our terms of reference state that our role is:

“(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”

9. In deciding whether a delegated power is “inappropriate”, we ask ourselves whether the power would allow a Minister to make legislation of such significance to the objective of the bill that it should appear on the face of the bill itself. Where a power *is* appropriately delegated, we ask ourselves whether the nature of the delegation is such that the House would expect to debate the delegated legislation—in which case the affirmative or, on rare occasions, the super-affirmative procedure should apply—or whether the negative or no procedure would suffice.
10. Put simply, the purpose of the Committee is to police the boundary between primary and delegated legislation, in doing so playing a critical role in protecting the integrity of Parliament in the face of any attempts by governments of whatever political persuasion to erode it. A brief history and the Committee’s full terms of reference are set out in Appendix 1 to this submission.
11. Although the Committee’s reports are advisory only, they have proved influential. We draw your attention, for example, to the Committee’s most recent reports on the Neighbourhood Planning Bill,⁷ the Digital Economy Bill⁸ and the Health Service Medical Supplies (Costs) Bill,⁹ in respect of which the Government accepted a significant number of the Committee’s recommendations. Further examples of the Committee’s impact are set out in Appendix 2 to this submission.

6 Jellicoe Report, (Session 1991–92, HL Paper 35–I), para 133. See Appendix 1 to this submission.

7 Delegated Powers and Regulatory Reform Committee, (15th and 18th Reports, Session 2016–17, HL Papers [104](#) and [118](#))

8 Delegated Powers and Regulatory Reform Committee, (11th, 13th, 16th and 18th Reports, Session 2016–17, HL Papers [89](#), [95](#), [107](#) and [118](#))

9 Delegated Powers and Regulatory Reform Committee, (12th and 17th Reports, Session 2016–17, HL Papers [94](#) and [112](#))

The role of the DPRRC in relation to the Great Repeal Bill

12. Given the scale of the task in converting the EU *acquis* into domestic law and the uncertainty arising from the fact that the exit negotiations will proceed in parallel with the passage of the Bill, we anticipate that the Great Repeal Bill will contain extensive delegations of power. The focus of the DPRRC's attention is likely to be on what the Government describe as the third element of the Bill, namely the delegation of powers to enable the Government to make amendments to those laws "that would otherwise not function sensibly once we have left the EU".¹⁰ The exact wording of the Bill will be crucial. For example, the difference between allowing the Minister to make *necessary* changes to the law to enable it to function sensibly and allowing changes that are regarded as *expedient* is considerable, and also much will depend on the interpretation of the words "function sensibly".
13. **In examining the Great Repeal Bill, the DPRRC will apply the same rigorous standards of scrutiny as we apply to all bills that come before us. Our priority will be to ensure that, while recognising that the Great Repeal Bill will be a wholly exceptional piece of primary legislation, the integrity of Parliament is not compromised and the appropriate balance of power between the Executive and Parliament is maintained.**
14. The Committee is a committee of the House of Lords and reports to the House of Lords on those bills which are before it. **However, given the exceptional nature of the Great Repeal Bill, it may be the case that the Committee will wish to make its first assessment earlier and, if practicable, when the Bill is still in the House of Commons. Further assessments would be made as the Bill progressed.**

Principles

15. 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.¹¹ Whilst we continue to consider each delegation on its merits, the accumulation of over 25 years of experience has enabled the Committee to develop a number of principles which provide the starting point for its consideration of delegated powers. Given not only the volume of legislation resulting from withdrawal from the EU but also the speed at which all this work will have to be undertaken, we anticipate that these principles may have particular relevance to the scrutiny of the Great Repeal Bill.

Henry VIII powers

16. A Henry VIII power is one which enables a Minister, by delegated legislation, to amend, repeal or otherwise alter the effect of an Act of Parliament. The Committee is particularly vigilant about such powers. Whilst we recognise that they are justified in certain circumstances, our Guidance to Departments states:

¹⁰ *Ibid.*

¹¹ Delegated Powers and Regulatory Reform Committee (1st Report, Session 1992–93, HL Paper 106), para 23.

“Every Henry VIII power ..., 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, 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”.¹²

17. In our report on the Strathclyde Review, we commented on the prevalence of Henry VIII powers and a list of examples cited in that report is set out in Appendix 3.

Skeleton bills and skeleton part bills

18. A skeleton bill is one where there is so little on the face of the bill that the operation of the resulting Act of Parliament would be essentially a matter for the delegated legislation made under it. Our Guidance to Departments states:

“If a bill is, in effect, a skeleton bill ..., 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”.¹³

19. In our report on the Strathclyde Review, we deprecated the use of skeleton bills and skeleton provision and emphasised our view that “skeleton bills or part bills should not be put before us ..., save in the most exceptional circumstances”.¹⁴ A list of examples of skeleton provision cited in that report is also set out in Appendix 3.
20. **We have acknowledged that the Great Repeal Bill will be a wholly exceptional piece of primary legislation. Nonetheless, should the Bill contain skeleton provision and significant Henry VIII powers, we would expect them to be fully explained and justified in accordance with our usual expectation.**

Working methods

21. We now turn to some practical aspects of how we perform our role which will bear on our ability to scrutinise the Great Repeal Bill.

Delegated Powers Memoranda

22. Every government bill is accompanied by a Delegated Powers Memorandum, and all significant government amendments by a Supplementary Memorandum. The Memorandum is required to identify all delegations of power in a bill and provide a full explanation of, and justification for, the delegation and also for the level of Parliamentary scrutiny applied to it. It is part of the documentation provided with a bill when it is considered by the Parliamentary Business and Legislation (Cabinet) Committee and is made available to Parliament when a bill is first introduced irrespective of the House in which the bill starts.

12 Delegated Powers and Regulatory Reform Committee, *Guidance for Departments*, para 35.

13 Delegated Powers and Regulatory Reform Committee, *Guidance for Departments*, para 36.

14 Delegated Powers and Regulatory Reform Committee, *Special Report: Response to the Strathclyde Review* (25th Report, Session 2015–16, HL Paper 119), para 38.

23. The Memorandum is vitally important to the work of the DPRRC. It is the government's opportunity to set out their arguments for why a power is needed and why the proposed level of scrutiny is appropriate. We have, however, found Memoranda to be variable in quality. Some have omitted to explain all delegations, some have relied on formulaic justifications and occasionally some have cited precedents inaccurately. As a result, in 2014 we undertook an inquiry into the quality of Delegated Powers Memoranda and published a report in which we made a range of recommendations about how their quality could be improved.¹⁵
24. In explaining and justifying delegations, the Memorandum will cite precedents, and examples of how a delegation might be exercised. Whilst helpful, we treat such examples with caution. **We are keenly alert to the fact that future governments may well not share the intentions of the current government. The test we apply in scrutinising a power must be not how the current government intend to exercise it but how any government could exercise it.**
25. It has not hitherto been the practice of the Committee to supplement the Memorandum with oral evidence from a government department—the Great Repeal Bill might well prove to be the exception. The Committee also only very rarely receives correspondence from outside individuals or organisations—although, again, the Great Repeal Bill might well prove to be the exception.
26. **Whatever legislative framework is proposed in the Great Repeal Bill, it will be essential to the Committee's and Parliament's effective scrutiny of the Bill that a comprehensive delegated powers memorandum is made available to Parliament from the outset. It may also be the case that the DPRRC will wish to invite Ministers to supplement the Memorandum, either in writing or at an oral evidence session, where further explanation and justification are required.**

Legislative timetabling

27. DPRRC reports are usually published after Second Reading and before Committee Stage. In the House of Lords, the minimum interval between introduction and Second Reading is two weekends and between Second Reading and Committee Stage 14 days.¹⁶
28. **Whilst we recognise that this is a matter for the House of Lords, we note for completeness that if the Committee is to have time to scrutinise the Great Repeal Bill thoroughly, it is likely that it will be necessary for the interval between Second Reading and Committee Stage to be longer than the minimum in order to give the Committee time to hear oral evidence and receive any further written evidence.**

15 Delegated Powers and Regulatory Reform Committee, *Special Report: Quality of Delegated Powers Memoranda* (7th Report, Session 2014–15, HL Paper 39)

16 House of Lords, *Companion to the Standing Orders and Guide to Proceedings of the House of Lords* (2015), para 8.04.

Government Response

29. Although the Committee reports to the House of Lords, Government departments are expected to provide a written Response to the Committee's reports. The Committee does not, however, engage in further exchanges with the departments, taking the view that, if the government disagrees with a Committee recommendation, it is for the House to decide the matter.
30. **Often a government Response is not available until Report Stage.** In the case of the Great Repeal Bill in particular, however, the House may wish to have the benefit of the Response before Committee Stage.

Provision of draft regulations

31. On occasion, scrutiny by the Committee, and by the House, of a bill is assisted by the provision of draft regulations. This allows us to see how the government intend to exercise a delegation of power. In our report on the Strathclyde Review, we made the following recommendation in relation to the availability of draft regulations during the passage of a bill:

“We recognise that it is not necessary for Parliament to see all draft delegated legislation associated with a bill while the 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”.¹⁷

32. **In addition to the provision of a comprehensive Delegated Powers Memorandum, we have no doubt that, where possible, Parliament would welcome the availability of draft regulations where they are of considerable policy substance.**

Pre-legislative scrutiny

33. Where a bill is subject to pre-legislative scrutiny by a joint committee of both Houses, it is the practice of such committees to invite the DPRRC to provide a submission about delegations of power in the draft bill.
34. **If the Great Repeal Bill were to be subject to pre-legislative scrutiny by a joint committee, the DPRRC would welcome the opportunity to comment on the proposed delegations contained in it.**

Resourcing

35. The Committee is supported by a clerk, a committee assistant and three legal advisers, who advise, amongst others, the DPRRC and the Joint Committee on Statutory Instruments (JCSI). The likely complexity of the Great Repeal Bill, along with the other pieces of primary legislation to come after it, will place considerable demands on the Committee and on those supporting it. The resulting delegated legislation is likely, in turn, to place considerable demands on the members and staff of the Secondary Legislation Scrutiny Committee (SLSC) and the JCSI. Furthermore, if a strengthened scrutiny procedure order were introduced, this might also add to the workload of the DPRRC.

¹⁷ Delegated Powers and Regulatory Reform Committee, *Special Report: Response to the Strathclyde Review* (25th Report, Session 2015–16, HL Paper 119), para 68.

36. **Whilst it is too early to be prescriptive about the extra resources which will be needed to support the work of the legislative scrutiny committees, the DPRRC—and, we have no doubt, the other scrutiny committees—are keenly aware of the importance of planning ahead to ensure that the committees are well-placed to undertake effectively the scrutiny of all the legislation related to the withdrawal from the EU.**

Other issues

37. The following issues emerged in our deliberation on your call for evidence. **They are preliminary points only and not definitive.**

A bespoke scrutiny procedure?

38. The conversion of the EU *acquis* into domestic law is an exceptional legislative undertaking, constitutionally and in terms of the sheer scale of the task. It *might* be, and we put it no higher at this early stage, that a bespoke scrutiny procedure is needed to deal with the scope of the delegations in the Great Repeal Bill and the ensuing tidal wave of delegated legislation. Such a procedure might involve novel scrutiny mechanisms or might build on existing structures. In any event, in considering whether a bespoke procedure is needed and if so in what form, one aspect of that consideration must be whether one of the current range of strengthened scrutiny procedures offers a way forward.
39. The DPRRC has experience of strengthened scrutiny procedures as it is charged with scrutinising various instruments subject to such a procedure. These procedures are laid down in statute and there are variations between them which we analysed in a report we published in 2012 (see Appendix 4 to this submission).¹⁸ The Legislative Reform Order (LRO)¹⁹ is used more often than any other type of strengthened scrutiny procedure order and offers the strongest scrutiny procedure in that:
- the government is required to consult,
 - the government is required to lay supporting documents,
 - the relevant Parliamentary committee can determine the level of Parliamentary scrutiny to be applied to the draft order,
 - the relevant committee has a power of veto, and
 - the Minister has a statutory obligation to consider the recommendations by the relevant committee.
40. The DPRRC has stated on several occasions that applying a strengthened scrutiny procedure cannot remedy an *inappropriately wide* delegation of power. However, the Great Repeal Bill may of necessity have to include wide powers if the Bill is to achieve its purpose. Bearing in mind that delegated legislation is unamendable during its passage,²⁰ a strengthened scrutiny procedure may provide a means of ensuring that Parliament retains some control over the content of more significant instruments.

18 Delegated Powers and Regulatory Reform Committee, *Special Report: Strengthened Statutory Procedures for the Scrutiny of Delegated Legislation* (3rd Report, Session 2012–13, HL Paper 19)

19 The full list of instruments is set out in our terms of reference (see Appendix 1).

20 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.

Sunset provision

41. Some form of sunset provision, specifying that a delegation of power should cease to have effect by a specified time, may also offer a welcome additional safeguard against significant delegations of power being available permanently. Much however will depend on the exact wording of the Bill.

Devolution

42. The White Paper acknowledges that withdrawal from the EU has significant implications for the devolution settlements. Formulating the arrangements to deal with the repatriation of EU law in areas of devolved competence will be complex and contentious. To what extent this will raise issues relevant to the DPRRC remains to be seen.

Conclusion

43. Given that we do not yet have a full understanding of what the Government intend, we make it clear that these are our preliminary observations only. We shall keep a close eye on matters as they develop and we shall no doubt wish to revisit the issues raised in this submission over the coming months. We earnestly hope that we shall be able to have further exchanges with your Committee to our mutual benefit.

APPENDIX 1: COMMITTEE HISTORY AND TERMS OF REFERENCE

Brief history

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”.²¹ The Committee recommended the establishment of a committee to scrutinise the delegation of powers in bills. As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed. Following the passage of the Deregulation and Contracting Out Act 1994, the Committee was given the additional role of scrutinising deregulation proposals under that Act. That additional role has since evolved and now takes the form of scrutiny of Legislative Reform Orders (LROs) laid under the Legislative and Regulatory Reform Act 2006 and of a number of other types of order subject to a strengthened scrutiny procedure.

Terms of reference of the DPRRC

The Committee has two functions:

“(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”

And:

“(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.”

²¹ Jellicoe Report, (Session 1991–92, HL Paper 35–I), para 133.

APPENDIX 2: THE COMMITTEE'S IMPACT

Strathclyde Review

In evidence to the SLSC during that Committee's inquiry into the Strathclyde Review, 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". The Strathclyde Review itself made a similar comment: "The Committee's recommendations are usually accepted by the Government".²²

As a result of these comments, we undertook an analysis of the outcome of our recommendations during Session 2014–15, from the beginning of the session until 15 March 2015. The Committee made 102 recommendations about 18 bills, 13 had yet to be considered by the Government but of the remaining 89, 59 had either been explicitly accepted by the Government or given rise to debate in the House.²³ We commented that although this "hit rate" was lower than that suggested in evidence by the Government, it was "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".²⁴

Examples taken from recent reports

The **Education and Adoption Bill** (2015–16) created a new category of maintained school, known as "a coasting school", eligible for intervention under the Education and Inspections Act 2006. The Bill left the definition of "coasting" to be wholly set out in regulations, subject to the negative procedure. In our view such a wide and open-ended delegation was inappropriate given the fundamental importance of the definition and that more detail should be set out in primary legislation. We also recommended that the affirmative procedure should apply. Whilst the Government did not accept the first part of the recommendation, they tabled an amendment to make the regulations subject to first time affirmative.

The **Childcare Bill** (2015–16) made provision for free childcare for working parents and was a skeleton bill. We concluded that the power conferred by clause 1(4) was inappropriately wide, and that without greater detail in the Bill itself, together with a much fuller explanation about the nature of the provision likely to be contained in the regulations under clause 1, the House would have insufficient information about the design of the new childcare provision for a properly informed debate. We therefore recommended that the Bill should be amended to remedy the deficiency. At Committee Stage, the Minister said: "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".²⁵ At Report Stage, the Minister said: "Subject to the debate today, the first set of regulations made under the Bill will be subject to affirmative procedure. The amendment in question was informed by the first report of the Delegated Powers Committee."²⁶

22 Delegated Powers and Regulatory Reform Committee, *Special Report: Response to the Strathclyde Review* 25th Report, Session 2015–16, HL Paper 119), para 24.

23 *Ibid.*, para 25.

24 *Ibid.*, para 26.

25 HL Deb, 1 July 2015, col 2074.

26 HL Deb, 14 Oct 2015, col 238.

Health Service Medical Supplies (Costs) Bill (2016–17): the Government Response stated: “The Committee’s Report made four recommendations in relation to the Bill. Of these recommendations three relate to the powers of the Welsh Government. I am pleased to confirm that following successful discussions with the Welsh Government, we intend to accept all of the recommendations, and will amend the Bill accordingly (subject to the will of Parliament).”

Neighbourhood Planning Bill (2016–17): the Government accepted recommendations that the affirmative procedure should apply to the exercise of powers conferred by a new section to be added to the Town and Country Planning Act 1990 and that there should be a duty to consult before making regulations under that new section. The Government also tabled amendments in response to the Committee’s concerns about the width of a power.

Digital Economy Bill (2016–17): the Government responded positively to a number of recommendations. For example, although they did not accept a recommendation that the age-verification regulator should be identified on the face of the Bill, they agreed that the regulations designating the regulator should be subject to the first time affirmative procedure. The Government did not support a recommendation that the regulator’s arrangements should include a statutory right of appeal but accepted that the appeal should be considered by someone independent from the original decision-maker. The Government accepted a Committee recommendation that the list of persons who may disclose and receive information under Chapters 1, 3 and 4 of Part 5 of the Bill should be specified on the face of the Bill. The Government accepted a recommendation that a power to amend or repeal Chapters 3 and 4 of Part 5 should be narrowed so that it could only be used to improve or make more effective the operation of those Chapters and could not be used to broaden information-sharing powers conferred by Chapter 3 or to remove any necessary safeguards.

APPENDIX 3: EXAMPLES OF HENRY VIII POWERS

The following list is taken from paragraph 39 of the Committee's report on the Strathclyde Review (footnotes omitted). The list includes short extracts from Committee reports:

- **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.”
- **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.”
- **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.”
- **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.”
- **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.”
- **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.”

Examples of skeleton bills and skeleton provision:

The following list is taken from paragraphs 33 to 35 of the Committee's report on the Strathclyde Review (footnotes omitted). This list also includes short extracts from Committee reports:

- **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’.”
- **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.”
- **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 ...”
- **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 powers.”
- **Compensation Bill** (2005–06): “In our view it is inappropriate that so many key features are here proposed to be left to delegated legislation.”
- **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.”
- **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.”
- **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 ...”.

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. We gave the following as 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 ... ”
- **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.”

We noted in our report that there had been some particularly poor examples of skeleton bills during the Session 2015–16. They included:

- **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”; 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’”.

APPENDIX 4: VARIATIONS IN STRENGTHENED SCRUTINY PROCEDURES

Table 1 - Variations in strengthened scrutiny procedures²⁷

	Requirement to consult	Requirement to lay supporting documents	Power for relevant committee to determine the level of Parliamentary scrutiny	Power for relevant committee to veto order	Statutory obligation for Minister to consider recommendations made by relevant committees	Additional (non-statutory) Ministerial undertakings given in respect of the procedure	Laid in first instance as a proposal (P) or draft order (DO)
Northern Ireland Act 1998 (section 85)	x	✓	x	x	✓	x	P
Human Rights Act 1998 (Schedule 2)	x	✓	x	x	✓	x	P
Local Government Act 1999 (section 17)	✓	✓	x	x	x	x	P
Local Government Act 2000 (section 9)	✓	✓	x	x	x	x	P
Local Government Act 2003 (section 98)	✓	✓	x	x	x	x	P

²⁷ Delegated Powers and Regulatory Reform Committee, *Special Report: Strengthened Statutory Procedures for the Scrutiny of Delegated Legislation* (3rd Report, Session 2012–13, HL Paper 19), page 8.

Fire and Rescue Services Act 2004 (section 5E)	✓	✓	✓	✓	✓	✗	DO
Legislative and Regulatory Reform Act 2006 (sections 12 to 19)	✓	✓	✓	✓	✓	✓	DO
Local Transport Act 2008 (section 102)	✓	✓	✗	✗	✗	✗	P
Public Bodies Act 2011 (section 11)	✓	✓	✓	✗	✓	✗	DO
Localism Act 2011 (section 7)	✓	✓	✓	✓	✓	✗	DO
Localism Act 2011 (section 19)	✓	✗	✗	✓	✓	✗	DO

APPENDIX 5: MEMBERS 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.