

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

30th Report of Session 2016–17

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

Ordered to be printed 26 April 2017 and published 27 April 2017

Published by the Authority of the House of Lords

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:

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

Registered Interests

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the Parliamentary Archives.

Publications

The Committee's reports are published by Order of the House in hard copy and on the internet at www.parliament.uk/hldprcpublications.

General Information

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

Contacts for the Delegated Powers and Regulatory Reform Committee

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

Historical Note

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that "in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion" (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, "be well suited to the revising function of the House". As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and certain instruments made under other Acts specified in the Committee's terms of reference.

Thirtieth Report

INTRODUCTION

1. In our 23rd Report of this Session,¹ we published our response to the House of Commons Procedure Committee inquiry into the delegated powers in the “Great Repeal Bill”.² A second call for evidence³ was issued in the light of the White Paper, “Legislating for the United Kingdom’s withdrawal from the European Union” (Cm 9446),⁴ published in March 2017. We set out in this Special Report our response to that second call for evidence.

1 [23rd Report](#), Session 2016–17 (HL Paper 143).

2 See: <http://www.parliament.uk/business/committees/committees-a-z/commons-select/procedure-committee/inquiries/parliament-2015/delegated-powers-great-repeal-bill-16-17/>

3 See: <http://www.parliament.uk/business/committees/committees-a-z/commons-select/procedure-committee/news-parliament-2015/delegated-powers-great-repeal-bill-updated-terms-16-17/>

4 [Legislating for the United Kingdom’s withdrawal from the European Union \(Cm 9446\)](#)

SECOND SUBMISSION TO THE HOUSE OF COMMONS PROCEDURE COMMITTEE

1. This second submission by the Delegated Powers and Regulatory Reform Committee (DPRRC) responds to further questions raised by the House of Commons Procedure Committee in the light of the White Paper, published on 30 March 2017, entitled “Legislating for the United Kingdom’s withdrawal from the European Union” (Cm 9446) (“the White Paper”).
2. Not all questions raised by the Procedure Committee are relevant to the DPRRC. Of those set out in the second call for evidence, we propose to address the following:
 - (a) (1) The justifications for the use of delegated powers to be claimed under the Bill, and (2) what information should be provided to Parliament in support of such justification.
 - (b) The adequacy of the statutory procedures set out in the Statutory Instruments Act 1946 to handle the anticipated scope and volume of delegated legislation.
 - (c) The claims made by the Government about present parliamentary scrutiny of delegated legislation, with particular reference to practice in the House of Commons: “Existing parliamentary procedures allow for Parliament to scrutinise as many or as few statutory instruments as it sees fit. Parliament can, and regularly does, both debate and vote on secondary legislation”.
 - (d) The principles and mechanism for determining whether any proposed secondary legislation should be handled under the affirmative procedure or the negative procedure.
 - (e) The present practice of the Government in determining the procedure applicable to secondary legislation transposing EU Directives under section 2(2) of the European Communities Act 1972.
 - (f) Considerations to be taken into account when determining “the most pragmatic and effective” approach to take in balancing the need for scrutiny and speed.
 - (g) The merits or otherwise of requiring certain categories of instrument to be presented to Parliament in amendable draft form prior to approval (the so-called “super-affirmative” procedure).
 - (h) The means whereby the powers claimed in the Bill are to be time-limited.

A (1). The justifications for the use of delegated powers to be claimed under the Bill.

Background: the purpose of secondary legislation

3. In our report on the Strathclyde Review, published in March 2016, we described the purpose of secondary (or delegated) legislation.⁵ We said:

“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”.

4. We also drew attention to a statement made by the DPRRC (then called the Delegated Powers Scrutiny Committee) shortly after it was established in 1992:

“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”.

The Government’s justifications in the context of the Great Repeal Bill

5. The Government give three reasons for using secondary legislation in the Great Repeal Bill:

- To implement the Article 50 withdrawal agreement.
- To make adjustments to policy that are directly consequential on our leaving the EU, referred to as “correcting” the *acquis* so that it works properly from Day 1.
- To provide a level of detail not thought appropriate for a bill.⁶

The DPRRC’s concerns

6. We are concerned that each of these reasons may well result in secondary legislation being used to implement significant and controversial policy matters.
7. First, the scope of the Article 50 withdrawal agreement is likely to go well beyond simply correcting the *acquis*.

5 Special Report: Response to the Strathclyde Review, DPRRC, [25th Report](#), Session 2015–16 (HL Paper 119), paras 17 and 18.

6 See paras 1.24 and 3.9 of the White Paper.

8. Second, with regard to correcting the *acquis*, the White Paper gives some examples of where corrections will be required:
- References across the statute book to the UK’s “EU obligations” will need to be repealed or amended.
 - Requirements to obtain an opinion from the European Commission on, for example, oil and gas projects will no longer be applicable.
 - Requirements to send information to EU institutions will no longer be appropriate.⁷
9. Making these corrections could well involve fundamental policy choices, a possibility which is somewhat underplayed by the use of the word “correcting”. For example, a legal duty to send information to an EU body will raise the following issues:
- Should there be a duty or a power to send the information to an existing UK body or a newly-created body?
 - Should the requirement be scrapped altogether and not replaced?
 - If an information requirement remains, what information should be sent?
10. The White Paper acknowledges that converting EU law into UK law will include a degree of discretion, although it puts its significance into context by emphasising that the purpose of the Great Repeal Bill and associated secondary legislation is limited simply to converting EU law into UK law rather than implementing new policies in areas that previously lay within EU competence.⁸
11. The third reason offered by the Government for using secondary legislation in the Great Repeal Bill is the familiar one that it provides for a level of detail that is not appropriate for a bill. This is uncontroversial as a general principle but, in the context of withdrawal from the EU, is more controversial. The main reason why, since 1973, secondary legislation has been used to give effect to most EU law is not because the law is unsuitable for being dealt with in a bill. It is much more to do with the fact that Parliament would have been overwhelmed with the sheer volume of primary legislation that would have been necessary had it been the principal vehicle of transposition.
12. **The delegated powers in the Great Repeal Bill will require the closest scrutiny to see that the Government keep to their pledge that, so far as preserving the *acquis* is concerned, the Bill will not enable major changes to policy or establish new frameworks beyond what is *necessary* to ensure that the law works properly on Day 1. Our comment in our first submission bears repetition: “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 ...”⁹**

7 Case studies on pp 20-21.

8 Para 3.10.

9 Para 12.

A (2). What information should be provided to Parliament in support of the Government’s justifications for using delegated powers?

13. We regard it as essential that every delegated power contained in the Great Repeal Bill and indeed in any other piece of primary legislation must be fully explained and justified in the accompanying Delegated Powers Memorandum. We expect each Memorandum to be supported where possible by appropriate precedents and examples, and by substantive arguments. Formulaic arguments are unacceptable.

B. The adequacy of the statutory procedures set out in the Statutory Instruments Act 1946 to handle the anticipated scope and volume of delegated legislation (box, page 23)

14. The most common procedures relating to statutory instruments are the negative and the affirmative procedures. There are also a number of strengthened scrutiny procedures, such as that which was applied to Public Bodies Orders under the Public Bodies Act 2011, which allow for two-stage scrutiny by Parliament and include an opportunity for Parliament to make recommendations for amendments. We describe these procedures in some detail in our report entitled “Strengthened statutory procedures for the scrutiny of delegated powers” published in July 2012.¹⁰
15. These existing procedures are tried and tested and appear to us to be, in principle, adequate. However, much will depend on the particular content and scope of the delegated power in question.
16. We note that the recent report of the Constitution Committee on the delegation of power in the Great Repeal Bill makes a recommendation which would enable Parliament to have a role in determining the level of scrutiny to be applied to an instrument, by the establishment of a parliamentary committee in each House or a joint committee to decide the appropriate level of scrutiny for each instrument.¹¹
17. **The challenge for the Government will be to complete the substantial legislative task caused by the decision to withdraw from the EU in the limited time available. Parliament, however, will wish to be certain that appropriate provision is made for full and effective scrutiny of the relevant secondary legislation. Getting the balance right will be crucial. In that context, we hope that serious consideration will be given to the recent report of the Constitution Committee on the delegation of power in the Great Repeal Bill and, in particular, to the recommendation mentioned above.**¹²

10 [3rd Report](#), Session 2012–13 (HL Paper 19).

11 Constitution Committee, The “Great Repeal Bill”, [9th Report](#) (HL Paper 123), para 102.

12 *Ibid.*

C. The claims made by the Government about present parliamentary scrutiny of delegated legislation, with particular reference to practice in the House of Commons: “Existing parliamentary procedures allow for Parliament to scrutinise as many or as few statutory instruments as it sees fit. Parliament can, and regularly does, both debate and vote on secondary legislation.” (box, page 23)

18. The White Paper discloses a marked difference between theory and reality. In practice, any government with a working majority in the House of Commons will have the decisive say in the delegation of powers contained in a bill and also the level of scrutiny applied to their exercise. Although governments are often amenable to recommendations from the various scrutiny committees, the implication of the White Paper that Parliament is in control of the statutory instrument process does not fit the facts. Although Parliament regularly debates secondary legislation, the vast majority is not debated and, of that, very little indeed is voted upon. The quality of scrutiny of secondary legislation by Parliament was the subject of a great deal of comment during the time of the Strathclyde Review and we draw your attention in particular to the report of the Secondary Legislation Scrutiny Committee on these issues¹³ and to the report of the Hansard Society entitled “The Devil is in the Detail: Parliament and Delegated Legislation”, published in 2014.

D. The principles and mechanism for determining whether any proposed secondary legislation should be handled under the affirmative procedure or the negative procedure (para 3.22)

19. The Government have given almost no indication of the balance that they will be proposing in the Great Repeal Bill between affirmative and negative instruments. The White Paper says that the “mechanistic” nature of the *acquis* conversion process suggests that many statutory instruments will follow the negative procedure. The affirmative procedure “may be appropriate for the more substantive changes”.¹⁴ The Great Repeal Bill will no doubt reveal the Government’s intentions more clearly although, in the limited time available to lay and, where necessary, debate the 800 to 1000 extra statutory instruments that are currently contemplated, it is inevitable that the process will require a substantial proportion of negative instruments.
20. It seems likely that the Great Repeal Bill will contain significant Henry VIII powers. The Committee’s view is that such powers should be subject to the affirmative procedure unless there is a compelling reason to the contrary. We would apply this same principle to any Henry VIII powers contained in the Great Repeal Bill, and we would also require them to be fully explained and justified in the Delegated Powers Memorandum in accordance with our normal practice.¹⁵
21. With regard to the possible procedural mechanisms for deciding the procedure to be applied to the exercise of delegated powers, we would refer again to the proposals made in the report of the Constitution Committee to which mention is made in paragraph 13 above.

13 SLSC, Response to the Strathclyde Review: Effective parliamentary scrutiny of secondary legislation, [32nd Report](#), Session 2015–16 (HL Paper 128).

14 Para 3.22.

15 Para 20.

22. **The Committee rigorously monitor the split between affirmative and negative instruments. As we indicated in our first submission, given the exceptional circumstances of the Great Repeal Bill and in the spirit of bicameral collaboration, we would welcome the opportunity to report our first assessment of the Bill whilst it was still before the House of Commons, subject, of course, to the House of Commons taking the view that our contribution would be helpful to its scrutiny of the Great Repeal Bill.**¹⁶

E. The present practice of the Government in determining the procedure applicable to secondary legislation transposing EU Directives under section 2(2) of the European Communities Act 1972

23. The European Communities Act 1972 (“the 1972 Act”) gives the Government freedom of choice to make any EU instrument under the affirmative procedure or the negative procedure. Whilst this unrestricted freedom may have been considered appropriate in 1972, it is certainly not acceptable now. Even at the time, this was an unusual approach. Legislation should, as a matter of good law, identify clearly what scrutiny procedure should apply to the exercise of which powers.
24. **It would be *wholly unacceptable* if the Great Repeal Bill were to replicate the 1972 Act by giving to the Government complete discretion to adopt the procedure of their choosing in respect of the exercise of delegated powers under what will become the Great Repeal Act.**

F. Considerations to be taken into account when determining “the most pragmatic and effective” approach to take in balancing the need for scrutiny and speed (para 3.23)

25. We have yet to see the Great Repeal Bill. We are still at an early stage in considering how we can best ensure that we maintain full and effective scrutiny whilst meeting the demanding timetable required. Our initial thoughts, however, include the following practical measures:
- **Good planning.** As the UK approaches exit from the EU, it will be important for the Government to plan to lay a *steady stream* of statutory instruments coming before Parliament for scrutiny. If everything is left to the last minute, scrutiny will suffer as will the quality of the end product.
 - **Availability of drafts of statutory instruments.** Drafts of statutory instruments should be made available to Parliament during the passage of the Great Repeal Bill through Parliament so that the Houses have a better understanding of how any proposed powers are intended to be exercised.
 - **Criteria for choice of scrutiny procedure.** The Great Repeal Bill should include a workable test for identifying which procedure is to apply to which type of instrument. The Government have indicated that significant substantive changes might be suitable for the affirmative procedure. It remains to be seen how this can be translated into statutory terms.

16 Para 14.

G. The merits or otherwise of requiring certain categories of instrument to be presented to Parliament in amendable draft form prior to approval (the so-called “super-affirmative” procedure).

26. It is a particular advantage of the existing strengthened scrutiny procedures that scrutiny is more thorough and the instrument is amendable in draft form. Their disadvantage is that the procedure can be much slower than that of an ordinary statutory instrument and it is notable how infrequently these procedures are used in practice. In the context of leaving the EU, it remains to be seen whether the super-affirmative procedure or some other form of strengthened scrutiny procedure would be an effective tool.

H. The means whereby the powers claimed in the Bill are to be time-limited (para 3.25)

27. The White Paper notes that a “very significant proportion”¹⁷ of the *acquis* will not operate properly after Day 1 unless action is taken to correct it beforehand. Most corrections made by secondary legislation will, therefore, need to be made before Day 1 so that they are ready to come into force on Day 1. The powers for correcting the *acquis* will be needed, therefore, for a limited period only.
28. The Government acknowledge this point in the White Paper:

“Given that most of these corrections can and will need to be made before the UK leaves the EU, the powers proposed under the Bill do not need to exist in perpetuity”.¹⁸

As a result, they have undertaken in the White Paper to ensure that the powers are “appropriately time-limited”.¹⁹

29. Sunset provision in a bill is not uncommon. Including a time limit on the face of the Bill could be along the lines of a simple formulation such as: “The regulation-making power in section X may not be exercised after 29 March 2020”.
30. **We welcome the Government’s decision to take up the DPRRC’s suggestion that the delegation of powers under the Great Repeal Bill should be time-limited.²⁰ It will, however, be extremely important to see how any time limit will operate in practice and, in particular, whether different powers might need different time limits.**

17 Para 3.5.

18 Para 3.25.

19 *Ibid.*

20 See footnote 13 on p 25.

APPENDIX 1: 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.