

HOUSE OF LORDS

Select Committee on the Constitution

16th Report of Session 2017–19

The Legislative Process: The Delegation of Powers

Ordered to be printed 14 November 2018 and published 20 November 2018

Published by the Authority of the House of Lords

HL Paper 225

Select Committee on the Constitution

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Q in footnotes refers to a question in oral evidence.

SUMMARY

Delegated powers are a necessary part of the legislative process. When used appropriately, they allow Parliament to focus on the important policy frameworks and decisions in primary legislation, and to leave the detail of implementation to secondary legislation. They provide the Government with the flexibility to deliver its policy, and adjust its operation as circumstances change, through a less onerous scrutiny process. However, decisions as to what powers to delegate, and the level of parliamentary scrutiny to which they should be subject, have proved increasingly contentious.

The Government has a list of functions for which delegated powers may be appropriate, including: providing for the technical implementation of a policy; filling in detail that may need to be updated frequently or is otherwise subject to change; and accommodating cases where the detailed policy has to work differently in different circumstances. Such purposes constitute reasonable uses of delegated powers. However, it has become increasingly apparent that the determining factor as to whether to include a delegated power in a bill is whether Parliament will accept the delegation, rather than any point of principle. We find this disturbing and it emphasises the importance of robust parliamentary scrutiny of delegated powers to ensure that unjustifiably broad powers are not granted to ministers and that constitutional standards are upheld.

The Delegated Powers and Regulatory Reform Committee (DPRRC) provides an expert assessment of the appropriateness of proposed delegations of power. Its scrutiny has a beneficial effect on legislation presented to Parliament, both in securing government agreement to amend proposed powers of delegation in a bill and, less obviously, in concentrating the minds of ministers and their bill teams during the earlier process of drafting the legislation. We recommend that the Government accepts recommendations of the DPRRC more frequently and ensures that the lessons from their reports are applied to future bills.

As part of our scrutiny of bills, and from the work of the DPRRC, we have identified a number of recurring problems with delegated powers. We have observed an increasing and constitutionally objectionable trend for the Government to seek wide delegated powers, that would permit the determination as well as the implementation of policy. In recent years the Government has sought to create criminal offences and establish public bodies through delegated powers. This is constitutionally unacceptable.

Henry VIII powers—which permit changes to primary legislation to be made through secondary legislation—are a departure from constitutional principle. Primary legislation, subject to lengthy and detailed parliamentary scrutiny, should not be amended by the lighter-touch processes of secondary legislation other than in exceptional circumstances.

Similarly, we find it difficult to envisage any circumstances in which skeleton bills—which contain wide delegated powers in the absence of substantive policy—are acceptable, given the deleterious impact they have on the parliamentary scrutiny that can be brought to bear.

We are also troubled by the use of guidance by the Government as a substitute for legislation. Guidance is not legislation and should not include matters that should properly be in legislation.

Delegated powers should be sought only when their use can be clearly anticipated and defined. Broad or vague powers, or those sought for the convenience of flexibility for the Government, are unacceptable. The Government must provide a full and compelling justification for all delegated powers and it is for Parliament to decide whether that justification is acceptable. Where broad powers are sought, the Government should publish draft secondary legislation to allow Parliament to assess their potential usage.

There is a large number of different scrutiny processes to which secondary legislation may be subject, many with only small differences between them. This complexity is unhelpful for the understanding and scrutiny of statutory instruments. As a minimum, we recommend that future primary legislation should not create new enhanced affirmative scrutiny procedures and should instead use one of the existing variants.

If the Government uses delegated powers to propose secondary legislation which makes technical provision within the boundaries of the policy and has previously been agreed in primary legislation, Parliament is unlikely to wish to block statutory instruments. However, we are concerned that these boundaries are not always respected and that ministers may seek to use statutory instruments to give effect to significant policy decisions. Without a genuine risk of defeat, and no amendment possible, Parliament is doing little more than rubber-stamping the Government's secondary legislation. This is constitutionally unacceptable.

For secondary legislation processes to work, the Government must take account of the scrutiny of statutory instruments and respond promptly to remedy any deficiencies. Where it does not do so, in exceptional circumstances Parliament may use its existing powers to block such instruments. The Government should recognise that parliamentary defeat on a statutory instrument need not be considered momentous or fatal. It does not prevent the Government subsequently tabling a revised SI having listened to and acted on parliamentarians' concerns.

If the Government's current approach to delegated legislation persists, or the situation deteriorates further, the established constitutional restraint shown by the House of Lords towards secondary legislation may not be sustained.

The Legislative Process: The Delegation of Powers

CHAPTER 1: INTRODUCTION

1. In 2004, this Committee published a report on *Parliament and the Legislative Process*.¹ In that report we made significant recommendations about the way Parliament and the Government handle legislation. Some of those recommendations were followed by now well-established changes to the legislative process, such as the public evidence stage of Public Bill Committees in the Commons, and an expectation that every Act will have a post-legislative review memorandum produced by its relevant government department within 3–6 years of its commencement. Others, such as a presumption that all bills should be published in draft ahead of their introduction to Parliament, have not been followed.
2. In 2016, we launched a further inquiry into the legislative process in which we have taken a broader view of the law-making process. Whilst the term ‘legislative process’ is most commonly used to refer to the sequence of steps by which laws are formally passed by Parliament, we have considered as a whole the different stages and procedures by which laws are developed, drafted, scrutinised, agreed to and disseminated. Our inquiry is in four parts:
 - Preparing legislation for Parliament;
 - The passage of legislation through Parliament;
 - The delegation of powers; and
 - After Royal Assent.
3. In October 2017 we published our report on *Preparing Legislation for Parliament*. We made a number of recommendations, including that: legislation needed to be made more accessible and easier to understand; the Government should routinely publish the evidence base for policy proposals; draft bills should be published and subject to pre-legislative scrutiny more frequently; and consolidation was urgently needed in several areas of the law.²
4. In this report we consider the delegation of powers. It is commonplace for bills to grant powers to government ministers (and sometimes others) to make secondary legislation. The broad justification is that while primary legislation (a bill) sets out the proposed scheme of changes in the law, the precise details, including some aspects of implementation, can be dealt with later through the less onerous processes of secondary, or delegated, legislation. In this part of our inquiry, we examine what powers are delegated to ministers and why, the issues that arise with delegated powers and the scrutiny of delegated legislation.

1 Constitution Committee, *Parliament and the Legislative Process* (14th Report, Session 2003–04, HL Paper 173)

2 Constitution Committee, *The Legislative Process: Preparing Legislation for Parliament* (4th Report, Session 2017–19, HL Paper 27)

5. During the evidence for this part of the inquiry, the Government announced its intention to introduce a significant bill to deliver Brexit that was likely to include substantial delegated powers. We focused on the pressing questions that raised and used some of the evidence we received in our report on *The ‘Great Repeal Bill’ and delegated powers*, published in March 2017.³ The ‘Great Repeal Bill’ became the European Union (Withdrawal) Bill (now Act), which was the subject of two of our subsequent reports.⁴ In this report we return to the remaining issues with delegated powers that were identified during our inquiry and which are not particular to Brexit.
6. As part of our remit, we scrutinise public bills before the House of Lords. We have reported repeatedly on the Government’s proposals for problematic delegated powers as part of this work, and in this report we develop and expand on these concerns.
7. As part of our inquiry into the legislative process, we have so far heard from 39 witnesses and received 62 pieces of written evidence. We are grateful to everyone who submitted written material or gave evidence to us in person.

3 Constitution Committee, *The ‘Great Repeal Bill’ and delegated powers* (9th Report, Session 2016–17, HL Paper 123)

4 Constitution Committee, *European Union (Withdrawal) Bill: interim report* (3rd Report, Session 2017–19, HL Paper 19) and *European Union (Withdrawal) Bill* (9th Report, Session 2017–19, HL Paper 69)

CHAPTER 2: DELEGATING POWER

The purpose of delegation

8. Bills may grant powers to ministers or other bodies to make delegated legislation. There are various circumstances in which it may be necessary or valuable to do so. *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”.⁵ Delegated legislation allows the executive to “work out the application of the law in greater detail” within the principles laid down by primary legislation.⁶
9. In written evidence, the Rt Hon David Lidington MP, then Leader of the House of Commons, set out the various circumstances in which the Government might think it appropriate to use delegated legislation:
 - “to fill in a level of detail not thought appropriate for primary legislation, possibly as it needs to be updated on a frequent basis;
 - to enable consultation to take place on the detailed implementation of a policy, this may include technical details or levels of fees;
 - to deal with things which it is anticipated may change in future (e.g. uprating for inflation);
 - to provide an acceptable level of flexibility to accommodate small policy changes (e.g. when operating in a novel area, where there may be a desire to retain flexibility to tweak the policy in the light of practical experience);
 - to deal with matters, concerning the technical implementation of a policy, which cannot be known at the point when the primary legislation is being passed;
 - to accommodate the fact that the detailed policy has to work differently for different groups of people, different areas etc.”⁷
10. The Government may also use delegated powers as a tactic when conceding points during the passage of a bill. Rather than accepting an amendment to insert new policy proposals into a bill, the Government may promise to introduce similar provisions through secondary legislation.
11. The Bingham Centre for the Rule of Law noted that delegated powers may generally be exercised more than once, enabling the regulating authority to revise its regulations as circumstances change: “[t]his flexibility avoids the need for Parliament to revisit matters relating to the practical implementation of policies”. It warned, however, that “the power to regulate should not be used to make further policy choices beyond those made by the statute.”⁸
12. Our witnesses largely agreed on the need for delegated powers and the importance of delineating what should be in primary, rather than secondary,

5 *Erskine May*, 24th edition (London: LexisNexis, 2011), p 667

6 *Ibid.*

7 Written evidence from the Cabinet Office ([LEG0040](#))

8 Written evidence from the Bingham Centre for the Rule of Law ([LEG0052](#))

legislation. Baroness Fookes, then Chairman of the Delegated Powers and Regulatory Reform Committee, offered what she described as the “classic definition—that all policy objectives should be on the face of the bill, with details only left to delegated legislation.”⁹ The Rt Hon Baroness Smith of Basildon, Shadow Leader of the House of Lords, said that delegated legislation “makes sense for ... minor, technical and mundane matters”, such as the uprating of fees and other figures, but that “ideally, we would say that no policy matters would be dealt with by [statutory instrument].”¹⁰ However, the Bar Council said that: “A dividing line simply between matters of policy and matters of implementation is a difficult one to draw in a general way, and a similar point will often apply in other areas (e.g., whether laws have a significant effect on fundamental rights and freedoms).”¹¹

Delegating appropriately and consistently

13. We asked the Government about the principles governing when delegations of power were included in bills. Mr Lidington told us that there was not a written set of principles. He said:

“The principle that I and my PBL [Parliamentary Business and Legislation Cabinet Committee] colleagues impress upon ministers is that they should not seek, in a new piece of legislation, to have additional regulation-making powers unless those are essential and can be fully justified to Parliament.”¹²

The current Leader of the House of Commons, Rt Hon Andrea Leadsom MP, told us that the PBL Committee had “a high threshold for accepting delegated powers.”¹³ Elizabeth Gardiner, First Parliamentary Counsel, said that it was “very much a case of testing with the departments ... ‘How are you going to justify taking this power to Parliament? How, as a Minister, are you going to explain that you need to do this in delegated legislation?’”¹⁴

14. Sir Stephen Laws, a former First Parliamentary Counsel, made a similar point:

“The overriding guiding principle is what Parliament wants. It is a matter of policy how much you put in delegated legislation and how much you put in the Act. If you think Parliament is going to be content for the detail to be dealt with in subordinate legislation, you are happy to do it. If you think Parliament is going to insist on its being in the Bill, you try to make sure it is in the Bill.”¹⁵

15. **We accept the broad criteria outlined by David Lidington justifying the use of delegated powers (see para 9). If these criteria were rigorously applied, we would have fewer concerns with their use. We do not accept that there is a “high threshold” for the inclusion of delegated powers in bills and it is unacceptable that the delegation of power is seen by at least some in the Government as a matter of what powers they can get past Parliament. It is a responsibility for all,**

9 [Q 124](#) (Baroness Fookes)

10 [Q 143](#) (Baroness Smith of Basildon)

11 Written evidence from the Bar Council of England and Wales ([LEG0042](#))

12 [Q 97](#) (David Lidington MP)

13 [Q 204](#) (Andrea Leadsom MP)

14 [Q 97](#) (Elizabeth Gardiner)

15 [Q 71](#) (Sir Stephen Laws)

including Parliamentary Counsel, to uphold constitutional standards in relation to delegated powers.

16. **It is a constitutional obligation of Parliament to decide whether a proposed delegation of power is acceptable. Given the trend in the number and nature of delegated powers sought by the Government, the importance of Parliament’s scrutiny of delegations is all the more important.**
17. Lord Lisvane, a former Clerk of the House of Commons, told us that delegated powers were increasingly being used to make policy. He said “the threshold between secondary and primary legislation has moved upwards, and delegated legislation is used for matters of policy and principle, which 20 or 30 years ago would not have been thought appropriate.”¹⁶ He cited as examples the Childcare Act 2016 and the Housing and Planning Act 2016: in both cases policy could be defined by delegated powers.
18. The Government’s approach to delegation was described as “arbitrary”¹⁷ and “inconsistent”¹⁸ by some of our witnesses. The Delegated Powers and Regulatory Reform Committee has said 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.”¹⁹
19. The Bar Council told us:
- “laws which describe procedures and forms are often suitable for delegated legislation ... but beyond that [our] perception is that too often the reason for seeking delegated powers is not concerned with their justification on any of those grounds, but more with trying to give the executive flexibility in situations in which legislation is being brought forward without sufficient clarity (or even internal agreement) about what the final policy aims and methodology will be.”²⁰
20. Baroness Fookes said that “Governments go into Bills in too much of a rush, without adequate preparation. This is for two reasons, Governments like to have as much play as they can through the use of delegated legislation, and very often they have not worked out what they want in the regulations in the first place.”²¹ Dr Ruth Fox, Director of the Hansard Society, made a similar point when considering the role of Parliamentary Counsel in drafting legislation that provides delegated powers:
- “If a Government are at mid-consultation on an aspect of policy, it is very difficult for the draftsmen to draft accordingly. As a consequence, in terms of delegated legislation that is where you sometimes get the inclusion of powers in quite broad scope, because the Government have not quite decided what they want to do. It is not policy-ready; it has not properly completed its consultation processes, and draftsmen have to take account of that in how they approach the work.”²²

16 [Q 168](#) (Lord Lisvane)

17 Written evidence from the Chartered Institute of Taxation ([LEG0044](#))

18 Written evidence from the Secondary Legislation Scrutiny Committee ([LEG0050](#))

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

20 Written evidence from the Bar Council of England and Wales ([LEG0042](#))

21 [Q 125](#) (Baroness Fookes)

22 [Q 4](#) (Dr Ruth Fox)

21. Delegations that provide significant flexibility to the Government raise the risk of policy not just being *implemented* but *amended* by secondary legislation. The Secondary Legislation Scrutiny Committee (SLSC), which scrutinises secondary legislation in the House of Lords, said that while the majority of instruments they scrutinised conformed to the expectation of “making mundane or technical changes”, some “make major and controversial changes to policy.” They referred to the example of the draft Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015, which were described by the Government as “a major plank” of its fiscal and economic strategy in the context of reducing the public sector deficit.²³ The SLSC said:

“Other examples of instruments that have attracted a great deal of media attention, and even led to protests outside the House, include the increase in student fees to £9,000, allowing Mitochondrial IVF in humans, various instruments to permit fracking and a proposed amendment to the number of dogs permitted in hunting. When, in October 2015, the proposal to alter the number of dogs permitted for hunting was laid, many expressed the view that that change would undermine the whole purpose of the Hunting Act 2004.”²⁴

22. A further example is the Education (Student Support) (Amendment) Regulations 2015,²⁵ which replaced maintenance grants for poorer students with loans. The SLSC noted that it “gave rise to issues of public policy likely to be of interest to the House”.²⁶ Lord Howarth of Newport described the measures as “reckless constitutionally ... introducing major change affecting a large number of people, with major expenditure implications, by way of a statutory instrument.”²⁷ In the House of Commons, Wes Streeting MP said it was “not a usual statutory instrument that involves some tinkering with thresholds or levels, or amends an existing policy framework in the way that statutory instruments normally do. This is a major change in Government policy.”²⁸

23. Garden Court Chambers cited four statutory instruments as examples of delegated powers being used to legislate in an area of acute controversy:

“In a number of instances the powers were used in a manner not specifically envisioned at the time the parent legislation came into force. In others, the powers were used in a way which was unlawful. In our view these examples suggest that delegated powers are being used on a relatively frequent basis by the Government to legislate on matters which should properly be reserved to Parliament by means of primary legislation.”²⁹

24. In our earlier report, *Preparing Legislation for Parliament*, we concluded that both Houses should improve the accessibility and clarity of legislation

23 Written evidence from the Secondary Legislation Scrutiny Committee ([LEG0050](#))

24 *Ibid.*

25 Education (Student Support) (Amendment) Regulations 2015 ([SI 2015/1951](#))

26 Secondary Legislation Scrutiny Committee, *Education (Student Support) (Amendment) Regulations 2015; Prosecution of Offences Act 1985 (Criminal Courts Charge) (Amendment) Regulations 2015* (18th Report, Session 2015–16, HL Paper 72)

27 HL Deb 25 January 2016 vol 768 [cols 1109–1110](#)

28 Education (Student Support) (Amendment) Regulations 2015, Third Delegated Legislation Committee, 14 January 2016, [col 12](#)

29 Written evidence from Garden Court Chambers ([LEG0049](#))

passing through Parliament.³⁰ This objective would be assisted if legislation were brought to Parliament only when the policy aims were clear and there had been sufficient preparation.

25. **Delegating power to make provision for minor and technical matters is a necessary part of the legislative process. It is essential that primary legislation is used to legislate for policy and other major objectives. Delegated legislation, which is subject to less parliamentary scrutiny, should only be used to fill in the details. There has been an upward trend in the seeking of delegated powers in recent years and this should cease.**
26. **It is constitutionally objectionable for the Government to seek delegated powers simply because substantive policy decisions have not yet been taken. It is our judgement that there has been a significant and unwelcome increase in this phenomenon.**³¹

Scrutinising delegations of power

27. The Delegated Powers and Regulatory Reform Committee (DPRRC) examines delegations in all public bills. The Government provides a memorandum for each bill, identifying each of the delegations, its purpose and the justification for leaving the matter to delegated legislation, and explaining why the proposed level of parliamentary control is thought appropriate. The DPRRC's recommendations are made in reports to the House of Lords before the start of the committee stage of the bill in the Lords. The DPRRC may issue further reports during the passage of a bill if there are amendments which add or significantly amend a delegated power.³²
28. The Cabinet Office's *Guide to Making Legislation* specifies the need for departments formally to submit a delegated powers memorandum to the DPRRC.³³ It states, "DPRRC's recommendations must be considered seriously to see whether it is possible to accept them ... There is, therefore, benefit in departments anticipating the views of the DPRRC when drafting the bill to avoid the need for amendments. The DPRRC's advisers are willing to be consulted informally before introduction."³⁴

30 Constitution Committee, *The Legislative Process: Preparing Legislation for Parliament* (4th Report, Session 2017–19, HL Paper 27), para 150

31 See, for example, Constitution Committee, *Space Industry Bill [HL]* (2nd Report, Session 2017–19, HL Paper 18); Constitution Committee, *Haulage Permits and Trailer Registration Bill [HL]* (11th Report, Session 2017–19, HL Paper 90); Delegated Powers and Regulatory Reform Committee, *Childcare Bill, Regulation of Political Opinion Polling Bill, Airports Act 1986 (Amendment) Bill, Cities and Government Devolution Bill: Government response, Draft Legislative Reform (Duchy of Lancaster) Order 2015* (2nd Report, Session 2015–16, HL Paper 12)

32 For example, the DPRRC issued two reports on the Sanctions and Anti-Money Laundering Bill [HL] during its passage, one on the Bill (7th Report, Session 2017–19) and the second on Commons amendments to it (26th Report, Session 2017–19). The DPRRC also published three reports that included the Government's responses to their work on that Bill (10th, 11th and 28th Reports, Session 2017–19).

33 Cabinet Office, *Guide to Making Legislation* (July 2017), para 3.15: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/645652/Guide_to_Making_Legislation_Jul_2017.pdf [accessed 19 November 2018]

34 *Ibid.*

29. The Guide concludes, “Careful handling will be required if the Government chooses not to accept the recommendations of the DPRRC”,³⁵ a view echoed by Lord Newby, Leader of the Liberal Democrats in the House of Lords:

“certainly when I was a Minister—if we were up against a DPRRC recommendation that we were going to resist, we tended to feel on pretty shaky grounds in terms of persuading the House. Indeed, one of the commonest government amendments made as a result of pressure in the House [of Lords], on the legislation with which I was involved, was to move from negative to affirmative procedure on SIs, because that is what the DPRRC had recommended.”³⁶

30. The then DPRRC Chairman, Baroness Fookes, told us that the committee estimated that 66% of its recommendations were accepted by the Government.³⁷ She added “but we have no powers over how our recommendations are dealt with. To that extent, we are powerless. We rely of course on the House itself looking at this and taking it up with Ministers.”³⁸
31. Other witnesses commented supportively on the DPRRC’s scrutiny work.³⁹ The Bar Council said: “Without its reports, the Bar Council would fear that the Government would seek considerably larger numbers of, and considerably broader, delegated powers. The most important element of the DPRRC’s scrutiny is in questioning whether power should be delegated at all and seeking a justification for it.”⁴⁰ The SLSC concluded that it was “particularly regrettable that the Government have on a number of occasions failed to respond positively to the advice of the Delegated Powers and Regulatory Reform Committee” on the appropriateness of delegated powers.⁴¹
32. The House of Commons has no equivalent to the DPRRC and witnesses said that MPs were missing out by not having detailed reports on the propriety of delegated powers in bills.⁴² The Bar Council suggested that the DPRRC might produce its reports earlier for bills which are introduced in the House of Commons, to assist the public bill committee’s consideration.⁴³ Lord Newby made the same suggestion, but noted that “it may be very difficult logistically”,⁴⁴ as a large number of bills may be introduced in each House at the same time, especially early in a session. The then Leader of the House of Commons, David Lidington, said that the DPRRC already had “a very powerful impact upon debates and divisions” in the House of Commons.⁴⁵ The former MP Professor Paul Burstow agreed that “Very often in Commons Bill Committees, one is waiting to see the Lords Committee’s review of delegated legislation because it will be relevant to what the Bill would mean for delegated legislation.”⁴⁶

33. **The Delegated Powers and Regulatory Reform Committee provides an expert assessment of the appropriateness of proposed delegations**

35 *Ibid.*

36 [Q 148](#) (Lord Newby)

37 [Q 125](#) (Baroness Fookes)

38 *Ibid.*

39 See, for example, [Q 156](#) (Meg Russell) and [Q 148](#) (Baroness Smith of Basildon)

40 Written evidence from the Bar Council of England and Wales ([LEG0042](#))

41 Written evidence from the Secondary Legislation Scrutiny Committee ([LEG0050](#))

42 [Q 147](#) (Lord Newby)

43 Written evidence from the Bar Council of England and Wales ([LEG0042](#))

44 [Q 147](#) (Lord Newby)

45 [Q 97](#) (David Lidington MP)

46 [Q 87](#) (Paul Burstow)

of power. Its scrutiny has a beneficial effect on legislation presented to Parliament, both in securing government agreement to amend proposed powers of delegation in a bill and, less obviously, in concentrating the minds of ministers and their bill teams during the earlier process of drafting the legislation. Ministers should follow its recommendations unless there are clear and compelling reasons not to do so. These reasons should be fully explained by the Government in writing before committee stage.

34. On three occasions this session the DPRRC has broken with its usual practice and reported on Brexit-related bills while they were in the Commons.⁴⁷ The Committee said of its early scrutiny of the European Union (Withdrawal) Bill that:

“[t]his Bill is of exceptional constitutional significance. Central to the Bill is the balance of power between Parliament and Government, including the propriety of giving Ministers such unprecedented powers to override Acts of Parliament subject, in the great majority of cases, to no scrutiny whatsoever on the floor of either House. Accordingly we have written this report in sufficient time for Members of the House of Commons to consider it at committee stage in their House.”⁴⁸

35. **To the extent that the Delegated Powers and Regulatory Reform Committee is able to report on bills at an earlier stage, this is welcome and could aid scrutiny, especially of significant Brexit-related legislation. However, we recognise that the DPRRC is unlikely to wish to report as a matter of routine on bills while they are in the Commons.**

36. The Bingham Centre for the Rule of Law suggested that Parliament could establish a set of principles “to underpin its assessment of the validity of clauses that delegate legislative authority”, and could adopt a code for this purpose: “A code of constitutional standards written for the legislative process would be particularly helpful to all concerned in the preparation and scrutiny of Bills with regard to the question of the extent to which a proposed delegation of legislative powers in a Bill might create constitutional problems at a later date.”⁴⁹

37. Dr Ruth Fox agreed that there should be a set of principles to identify when power should and should not be delegated. However, she said:

“we tried to move in that direction and struggled with the people we were engaging with, both in government and Parliament, to get any kind of consensus on what those principles would be. Therefore, I do not underestimate the difficulty of it. It is easy to argue, on the one hand, about detail and administrative convenience versus policy principle, but, on the other hand, you can see where Bills, which require a huge amount of technical detail, arguably could and perhaps should be delegated, and where for readability purposes it would be best to put them through the

47 Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill* (3rd Report, Session 2017–19, HL Paper 22); *Taxation (Cross Border Trade) Bill; Laser Misuse (Vehicles) Bill [HL]; Sanctions and Anti-Money Laundering Bill [HL]; Government Response* (11th Report, Session 2017–19, HL Paper 65); *Agriculture Bill* (34th Report, Session 2017–19, HL Paper 194)

48 Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill* (3rd Report, Session 2017–19, HL Paper 22)

49 Written evidence from the Bingham Centre for the Rule of Law ([LEG0052](#))

delegated process. For political reasons, they may well be things that Members want to debate and discuss and, therefore, perhaps ought to be on the face of the Bill. We have struggled with this question.”⁵⁰

38. The DPRRC has concluded that “it was not possible to set out a list of criteria which would give precision to the test of appropriateness.”⁵¹ Baroness Fookes told us that, while the DPRRC had never made “an absolute ruling as to what is or is not admissible [as a delegated power] ... we have developed various criteria along the way.”⁵² This included issues such as Henry VIII powers and skeleton bills, to which we turn in the next chapter.
39. **We agree with the Delegated Powers and Regulatory Reform Committee that it would be hard to design a prescriptive list to cater for the variety of circumstances in which delegation is sought. That said, the Government must adhere to the broad principles which are outlined in the DPRRC’s guidance.**⁵³

50 [Q 9](#) (Dr Ruth Fox)

51 Delegated Powers and Regulatory Reform Committee, *Special Report: Quality of Delegated Powers Memoranda* (7th Report, Session 2014–15, HL Paper 39), Annex 4

52 [Q 123](#) (Baroness Fookes)

53 Delegated Powers and Regulatory Reform Committee, *Guidance for Departments on the role and requirements of the Committee*, July 2004

CHAPTER 3: PROBLEMS WITH DELEGATED POWERS

40. Delegations of power are a necessary part of the legislative process, but their use should be limited and carefully scrutinised. The suitability of any individual delegation is assessed by the Delegated Powers and Regulatory Reform Committee on its merits and the particular circumstances of the bill in question. As part of our scrutiny of public bills, the Constitution Committee will on occasion comment on delegated powers when they engage constitutional issues. In this chapter we draw on our legislative scrutiny reports, as well as those of the DPRRC, to highlight some recurring problems with delegated powers.

Broad or unclear powers

41. There has been a tendency for bills to be introduced with broad or vaguely worded delegated powers that leave considerable discretion to ministers. Such provisions make it harder for Parliament to scrutinise the policy aims of the bill and can raise concerns about legal certainty. In our second report of the 2015–16 session, we said that:

“we see the continuation of a trend that was evident during the last Parliament—a tendency towards the introduction of vaguely worded legislation that leaves much to the discretion of ministers. This is apparent in the broad discretion given to the Secretary of State to implement the Cities and Local Government Devolution Bill [HL], and in the vague language in the Psychoactive Substances Bill [HL] and the Charities (Protection and Social Investment) Bill [HL] which raises concerns about legal certainty and the precise scope of powers being afforded to the Secretary of State to make changes through secondary legislation.”⁵⁴

42. The following two examples are indicative of the concerns that we and the DPRRC have reported on repeatedly. On the Immigration Bill 2015–16, the DPRRC commented on powers that were inappropriate because it was not “clear on the face of the Bill who is to exercise the sub-delegated power and what arrangements are to be made for its Parliamentary control.”⁵⁵ We observed that the Bill would permit the Secretary of State to provide failed asylum-seekers with support only if—in addition to meeting an impending destitution criterion—they faced “a genuine obstacle to leaving the United Kingdom”. The definition of “genuine obstacle” was not given in the Bill, but was to be determined by regulations. We concluded that the House was being asked to legislate without a clear understanding of how the legislation might affect individuals in potentially desperate circumstances.⁵⁶
43. In the current session, the DPRRC reported at length on the Data Protection Bill [HL]. It noted that the delegated powers memorandum justified many of the powers simply on the basis that “flexibility” was needed to deal with future changes of circumstances. The DPRRC concluded:

“We are troubled that the Government should think it appropriate, on the basis of such a thin justification, to seek to take wide-ranging powers

54 Constitution Committee, *Cities and Local Government Devolution, Psychoactive Substances and Charities (Protection and Social Investment) Bills* (2nd Report, Session 2015–16, HL Paper 9), para 2

55 Delegated Powers and Regulatory Report Committee, *Cities and Local Government Devolution Bill [HL]: Commons amendments* (17th Report, Session 2015–16, HL Paper 73)

56 Constitution Committee, *Immigration Bill* (7th Report, Session 2015–16, HL Paper 75)

allowing current or future Ministers to implement important policy changes without the need for further primary legislation.”⁵⁷

44. Also in this session, we reported on the Space Industry Bill [HL]. We observed that the Bill conferred around 100 delegated powers and that some fundamental policy choices would be made using the powers. We said that a

“Bill which contains a large number of delegated powers in lieu of policy detail can be challenging for Parliament to scrutinise meaningfully, as it is more difficult to form an accurate impression of what the legislative package as a whole will look like. In such circumstances, scrutiny can be aided by the publication alongside the Bill of illustrative regulations giving a sense of how the Government envisages using the delegated powers contained in the Bill.”⁵⁸

45. Parliamentary scrutiny is assisted when the Government publishes, alongside the bill, drafts of the statutory instruments that might be made using delegated powers. There is, however, no requirement for the statutory instruments laid after the primary legislation is enacted to follow those illustrative drafts. In the case of the Space Industry Bill, the Government had published ‘policy scoping notes’, an additional explanatory document, rather than draft regulations. We observed that: “The notes are relatively detailed, and, while not a full substitute for detail on the face of the Bill or for illustrative regulations, they go some way towards assisting scrutiny by giving a sense of how delegated powers are likely to be used.”⁵⁹

46. In addition to broad general powers, we have also reported on bills where delegated powers have been proposed for matters of policy significance, such as the creation of new criminal offences or public bodies. For example, clause 34 of the Children and Social Work Bill in 2016–17 provided for criminal offences to be created in relation to other clauses which contained little detail and were themselves expected to be defined and implemented by delegated legislation. We concluded that it was

“difficult to ascertain how Parliament may properly scrutinise or debate the offences that may be created under this Clause during the passage of the Bill. From a constitutional point of view, the creation of criminal offences, whether or not punishable by imprisonment, should be subject to proper and full parliamentary scrutiny.”⁶⁰

47. The Trade Bill in the current session allows for the creation of a new public body, the Trade Remedies Authority (TRA), by secondary legislation. The TRA will be a non-departmental body which will take over the anti-dumping functions and other operations relating to subsidies etc. currently performed at EU level, to protect UK businesses from unfair business practices. The Bill gives the Secretary of State broad discretion as to the creation and constitution of this body, the appointment of its members and its operations, including the power to issue guidance which the TRA must have regard to when carrying out its functions. We concluded that, while we recognised “the pressing timescales and uncertainties concerning Brexit, in

57 Delegated Powers and Regulatory Reform Committee, *Data Protection Bill [HL]* (6th Report, Session 2017–19, HL Paper 29)

58 Constitution Committee, *Space Industry Bill [HL]* (2nd Report, Session 2017–19, HL Paper 18)

59 *Ibid.*

60 Constitution Committee, *Children and Social Work Bill* (2nd Report, Session 2016–17, HL Paper 10), para 8

constitutional terms, creating and empowering an important public body in such a manner [was] inappropriate.”⁶¹

48. **Delegated powers should be sought only when their use can be clearly anticipated and defined. Broad or vague powers, or those sought for the convenience of flexibility for the Government, are inappropriate. There must be a compelling justification for delegated powers and it is for Parliament to decide if that justification is acceptable.**
49. **It is incumbent on the Government to provide Parliament with a full explanation of, and justification for, the delegated powers it seeks. Where broad powers are sought, the Government should publish draft secondary legislation in time to allow Parliament to assess its potential usage when each House is considering the primary legislation. Alternative publications, such as “policy scoping notes”, may assist the process of scrutiny, but greater clarity will be achieved only through drafts of the statutory instruments.**
50. **In recent years the Government has sought to create criminal offences and establish public bodies through delegated powers. This is constitutionally unacceptable.**

‘Skeleton bills’

51. The extreme end of the spectrum of legislative uncertainty comes in the form of ‘skeleton bills’, where broad delegated powers are sought to fill in policy details at a later date. We heard a great deal of scepticism about skeleton bills “that lead to lots of regulation because [the policy] has not been worked out yet.”⁶²
52. Lord Newby said that bills arrived in skeleton form:

“because the Government have committed themselves to doing something and do not know quite what to do. If you look at the Cities and Local Government Devolution Bill, for example, at Second Reading the degree of confusion as to how that Bill was going to work was pretty broad. It appeared to be that the Bill had come forward too soon.”⁶³
53. Another example of a skeleton bill was the Childcare Bill in 2015–16. The DPRRC reported that:

“the Government’s stated approach to delegation is flawed. While the Bill may contain a legislative framework, it contains virtually nothing of substance beyond the vague ‘mission statement’ in clause 1(1). It is quite inaccurate to describe the nature of the provision authorised by clause 1(4) (particularly in view of the possible ingredients envisaged by subsection (5)) as ‘operational, administrative and technical detail’.”⁶⁴

61 Constitution Committee, *Trade Bill* (13th Report, Session 2017–19, HL Paper 193)

62 [Q 145](#) (Baroness Smith of Basildon)

63 [Q 146](#) (Lord Newby)

64 Delegated Powers and Regulatory Reform Committee, *Childcare Bill, Regulation of Political Opinion Polling Bill, Airports Act 1986 (Amendment) Bill, Cities and Government Devolution Bill: Government response, Draft Legislative Reform (Duchy of Lancaster) Order 2015* (2nd Report, Session 2015–16, HL Paper 12), paras 1–13

Baroness Smith of Basildon said that half the Bill was left to regulations: “There was no detail; there was no real policy direction there, which I thought was inappropriate.”⁶⁵

54. A more recent example is the Agriculture Bill from the current session. The DPRRC described the number of delegated powers in the bill as “ominous” and concluded that “it cannot even be said that the devil is in the detail, because the Bill contains so little detail”.⁶⁶
55. The Bar Council said that skeleton bills “should be assessed on their merits, but with a sceptical approach”, and that they should be subject to “appropriate scrutiny and sunset provisions.”⁶⁷ They added that skeleton bills were, “in most cases ... simply shorthand for [the Government saying] ‘we have not thought through what we intend to do’.”⁶⁸ The British Bankers’ Association commented that, under normal circumstances, the use of skeleton bills “should be tightly constrained so as to ensure appropriate parliamentary and stakeholder scrutiny.” It added that, in the financial services context, the use of skeleton bills could be appropriate “provided the body to whom the power is delegated is appropriate and the underlying detail is highly technical, or the timescales sufficiently pressing.”⁶⁹
56. The Bingham Centre for the Rule of Law said that “Bills which are wholly or partly ‘skeleton’ in nature should not be adopted in the absence of an exceptional justification, and the burden of explanation should fall on the government.”⁷⁰
57. We have previously stressed the importance of good policy development as the foundation of good legislation.⁷¹ If the Government is thorough in its policy development prior to drafting legislation, the need for skeleton bills would be reduced. The Law Society of Scotland made a similar point: “If the Parliamentary Counsel Guidance on making good law is adhered to, that law will be necessary, clear, coherent, effective and accessible. Skeleton Bills by their very nature do not fulfil these criteria.”⁷²
58. **Skeleton bills inhibit parliamentary scrutiny and we find it difficult to envisage any circumstances in which their use is acceptable. The Government must provide an exceptional justification for them, as recommended by the DPRRC’s guidance for departments;⁷³ it cannot rely on generalised assertions of the need for flexibility or future-proofing.**

65 [QQ 144–46](#) (Baroness Smith of Basildon)

66 Delegated Powers and Regulatory Reform Committee, *Agriculture Bill* (34th Report, Session 2017–19, HL Paper 194)

67 Written evidence from the Bar Council of England and Wales ([LEG0042](#))

68 *Ibid.*

69 Written evidence from the British Bankers’ Association ([LEG0047](#))

70 Written evidence from the Bingham Centre for the Rule of Law ([LEG0052](#))

71 See Constitution Committee, *The Legislative Process: Preparing Legislation for Parliament* (4th Report, Session 2017–19, HL Paper 27)

72 Written evidence from the Law Society of Scotland ([LEG0046](#))

73 Delegated Powers and Regulatory Reform Committee, *Guidance for Departments on the role and requirements of the Committee*, July 2004

Henry VIII powers

59. ‘Henry VIII clauses’ are clauses in a bill that enable ministers to amend or repeal provisions in an Act of Parliament using secondary legislation.⁷⁴ As secondary legislation is subject to a lesser degree of scrutiny than primary legislation, Henry VIII clauses are a significant form of delegated power.
60. Elizabeth Gardiner, First Parliamentary Counsel, said that there was “a range of situations where it might be entirely sensible to take a Henry VIII power where it is not sensible to come back and expect Parliament to spend time on the sorts of amendments that you might want to make.” She gave as an example a consequential amendment power at the back of a bill where some tidying up might be required, such as amending references across the statute book to a body whose name has been changed: “So these are not substantive new policies but powers that are just needed to tidy up.”⁷⁵
61. The Bar Council agreed that:
- “There will be cases in which it is convenient and appropriate to grant a number of tightly-circumscribed Henry VIII powers, focused on the aspects of a legal regime that may need to be amended in future ... in some situations, the granting of Henry VIII powers might increase the chance of creating ‘good law’ ... particularly where the Henry VIII power is limited to a power to make consequential or incidental provision.”⁷⁶
- They suggested that “Granting a small number of Henry VIII powers will in most cases be preferable to granting a single broad power.”⁷⁷
62. However, the Bingham Centre stated that “Henry VIII clauses should be recognised as constitutionally anomalous”; they were acceptable “only where there is an exceptional justification and no other realistic way of ensuring effective governance.”⁷⁸
63. The DPRRC has said “Henry VIII powers should not be inserted in Bills as a matter of routine, and any that are included should be fully explained and justified.”⁷⁹ Baroness Fookes, then Chairman, said the Committee regarded Henry VIII clauses “with great suspicion”. Although she recognised that there were occasions when such a power could be useful, in all cases “really good reasons should always be put forward.”⁸⁰
64. Too frequently, good reasons have not been proffered. On the Digital Economy Bill in 2016–17, the DPRRC raised concerns about three Henry VIII clauses for which the Government had not provided a “convincing justification”.⁸¹ In respect of one of the clauses, it said “This one appears to be have been taken just in case it may prove useful.” The Committee concluded that other Henry VIII clauses in the Bill would be acceptable only

74 The expression is a reference to King Henry VIII’s preference for legislating directly by proclamation rather than through Parliament.

75 [Q 99](#) (Elizabeth Gardiner)

76 Written evidence from the Bar Council of England and Wales ([LEG0042](#))

77 *Ibid.*

78 Written evidence from the Bingham Centre on the Rule of Law ([LEG0052](#))

79 Delegated Powers and Regulatory Reform Committee, *Higher Education and Research Bill* (10th Report, Session 2016–17, HL Paper 86), para 39

80 [Q 148](#) (Baroness Fookes)

81 Delegated Powers and Regulatory Reform Committee *Digital Economy Bill: Parts 5–7* (13th Report, Session 2016–17, HL Paper 95), para 39

if they were narrowed in scope or defined with greater specificity as to their intended application.⁸²

65. In the Data Protection Bill [HL] in the current session, the DPRRC identified “several widely-drafted and highly significant Henry VIII provisions” that were justified by the Government “simply on the basis that ‘flexibility’ is needed to deal with future changes of circumstances.”⁸³ The DPRRC recommended the removal of five of the delegated powers, and amendments to narrow the scope of others or change the scrutiny procedures to which they would be subject.⁸⁴
66. We have raised concern about the prevalence of Henry VIII clauses in bills. We drew attention to the number and breadth of the delegated powers in the Data Protection Bill and concluded:
- “This is an increasingly common feature of legislation which, as we have repeatedly stated, causes considerable concern. The Government’s desire to future-proof legislation, both in light of Brexit and the rapidly changing nature of digital technologies, must be balanced against the need for Parliament to scrutinise and, where necessary, constrain executive power.”⁸⁵
67. **Henry VIII clauses are “a departure from constitutional principle. Departures from constitutional principle should be contemplated only where a full and clear explanation and justification is provided.”⁸⁶ Such justification should set out the specific purpose that the Henry VIII power is designed to serve and how the power will be used. Widely drawn delegations of legislative authority cannot be justified solely by the need for speed and flexibility.**⁸⁷

Delegation and devolution

68. We have raised concerns about the inclusion in bills of delegated powers that may amend the legislation passed by the devolved legislatures. For example, the Digital Economy Bill in 2016–17 included a Henry VIII power that permitted primary and secondary legislation passed by the devolved legislatures to be amended by secondary legislation passed by the UK Parliament without the consent or involvement of the relevant devolved legislatures or governments.
69. The same issue has arisen on a number of bills in the current session, including the Telecommunications Infrastructure (Relief from Non-Domestic Rates) Bill,⁸⁸ the Space Industry Bill [HL],⁸⁹ and the Sanctions and Anti-Money Laundering Bill [HL].⁹⁰ On the former bill, the Government’s response was

82 *Ibid.*

83 Delegated Powers and Regulatory Reform Committee, *Data Protection Bill* (6th Report, Session 2017–19, HL Paper 29)

84 *Ibid.*

85 Constitution Committee, *Data Protection Bill [HL]* (6th Report, Session 2017–19, HL Paper 31)

86 Constitution Committee, *Public Bodies Bill [HL]* (6th Report, Session 2010–12, HL Paper 51)

87 Written evidence from Professor John McEldowney, University of Warwick ([LEG0053](#))

88 [Letter from the Chairman to Lord Bourne of Aberystwyth on the Telecommunications Infrastructure \(Relief from Non-Domestic Rates\) Bill](#), 12 October 2017 and [Letter from the Chairman to Lord Bourne of Aberystwyth on the Telecommunications Infrastructure \(Relief from Non-Domestic Rates\) Bill](#), 29 November 2017

89 Constitution Committee, *Space Industry Bill [HL]* (2nd Report, Session 2017–19, HL Paper 18)

90 Constitution Committee, *Sanctions and Anti-Money Laundering Bill [HL]* (8th Report, Session 2017–19, HL Paper 39)

that such powers “reflect well-established reciprocal arrangements” and that “in practice” the Government will liaise with the devolved executive “as necessary” when the power will be used to amend devolved legislation.⁹¹

70. **Where UK ministers seek a power to amend devolved legislation, they must be subject to a statutory requirement to consult the relevant devolved administration.**

Delegated legislation and guidance

71. Some witnesses raised concerns about the balance between the use of secondary legislation and ‘policy guidance’ from government departments.

72. The Bar Council said that policy guidance, “without any clear or express statutory basis, has in some areas of law created a complex body of provisions that governed the way individuals and businesses can behave” but which was not subject to parliamentary scrutiny:

“A clear example is the Guidance issued by the Home Office in connection with the sponsorship of foreign students or employees in the points based immigration system ... this Guidance is a very clear example of regulation outside any framework of parliamentary control.”⁹²

73. Judge Michael Clements, President of the First-tier Tribunal, Immigration and Asylum Chamber, told us:

“Home Office guidance does not form part of statute or statutory instruments. However, the Home Office produces masses of guidance that [judges] need to be aware of, or certainly the person making an application needs to be aware of. Not all of it is widely distributed. Sometimes you have to root around to find out what the policy guidance from the Home Office is ... certain parts of the guidance have started to form policy, such as the Immigration Rules for families.”⁹³

74. A contrasting view was given by the British Bankers’ Association, which said that areas traditionally dealt with in secondary legislation had not been “downgraded” to guidance or codes: “In the financial services industry, the reverse is indeed sometimes the case with guidance and recommendations subsequently turned into legislation.”⁹⁴

75. The Secondary Legislation Scrutiny Committee said that “where terms contained in secondary legislation have a significant impact on the way in which that legislation is implemented, then their meaning should be set out in the legislation itself rather than in guidance.” It referred to the Supreme Court’s ruling in the case of Mr Alvi which had led the Home Office to lay an instrument the following day to incorporate into the Immigration Rules with immediate effect 290 pages of material previously published as guidance. This was done so that the points-based immigration system could continue to function as the Government intended.⁹⁵

91 [Letter from Lord Bourne of Aberystwyth to the Chairman on the Telecommunications Infrastructure \(Relief from Non-Domestic Rates\) Bill](#), 6 November 2017

92 Written evidence from the Bar Council of England and Wales ([LEG0042](#))

93 [Q 43](#) (Judge Michael Clements)

94 Written evidence from the British Bankers’ Association ([LEG0047](#))

95 Written evidence from the Secondary Legislation and Scrutiny Committee ([LEG0050](#))

76. In our scrutiny of the Counter-Terrorism and Border Security Bill, we expressed concern that guidance (in the form of a code of practice) would significantly determine new powers to stop, search, question and detain people on the grounds of “hostile activity”.⁹⁶ We were not convinced that such an important matter should be left to supplementary materials, especially as the Bill imposed an obligation on officers to abide by the code of practice. The Government assured the Joint Committee on Human Rights that this code of practice would be published in draft in advance of committee stage in the House of Lords.⁹⁷ However, this meant that a crucial supporting document was not available to the House of Commons for the entirety of its consideration of the Bill; a situation which we concluded was unacceptable.⁹⁸
77. The Chartered Institute of Taxation told us that it was “sometimes necessary to rely on guidance rather than further complicate legislation.” However, they had seen “numerous examples of changed HMRC policy not being reflected in their published guidance even many years after the shift.”⁹⁹ They concluded that “It would be a practical impossibility for guidance to be removed entirely and replaced with primary or secondary legislation”; what mattered most was ensuring guidance was up to date and available.¹⁰⁰
78. David Lidington MP, then Leader of the House, said that it was:
- “Government policy that guidance should not be used to circumvent the usual way of regulating a matter. If the policy is to create rules that must be followed, the Government accepts that this should be achieved using regulations subject to parliamentary scrutiny and not guidance.”
- He added that there was nothing to prevent Parliament from scrutinising guidance and that, in exceptional circumstances, it could be appropriate for guidance to be laid before Parliament or subject to the negative procedure.¹⁰¹
79. The DPRRC observed that on the Ivory Bill and the Mental Health Units (Use of Force) Bill in the current session the Secretary of State was given power to issue guidance which specified legislative requirements or was otherwise determinative of matters which affected a person’s legal rights or obligations. The DPRRC concluded:
- “The guidance is therefore not properly guidance at all but to all intents and purposes a form of legislation. Since it is not guidance it should not in our view be given that label. This is not simply a matter of form; but it ensures that the relevant provisions are treated consistently with other legislation. We would be grateful for the Government’s views on this practice of camouflaging legislation as guidance and seek an assurance that it will not be continued in the future.”¹⁰²

96 Constitution Committee, *Counter-Terrorism and Border Security Bill* (14th Report, Session 2017–19, HL Paper 207)

97 The draft code of practice was not published until 1 November 2018, after two days of committee stage debate had already taken place in the House of Lords.

98 Constitution Committee, *Counter-Terrorism and Border Security Bill* (14th Report, Session 2017–19, HL Paper 207)

99 Written evidence from the Chartered Institute of Taxation ([LEG0044](#))

100 *Ibid.*

101 Written evidence from the Cabinet Office ([LEG0040](#))

102 Delegated Powers and Regulatory Reform Committee, *Thirty First Report* (31st Report, Session 2017–19, HL Paper 177)

80. In response, the Government agreed to amend the Ivory Bill to include in secondary legislation matters that had been intended for guidance and committed to laying before Parliament its proposed guidance under the Mental Health Units (Use of Force) Bill. The Government also confirmed that:

“guidance should not be used to circumvent the usual way of regulating a matter. If the policy is to create rules that must be followed, the Government accepts that this should be achieved using regulations subject to parliamentary scrutiny and not guidance. The purpose of guidance is to aid policy implementation by supplementing legal rules.”¹⁰³

81. **Bills and statutory instruments should be sufficiently clear to ensure that guidance need not be relied on to interpret legislation. Guidance is not legislation and should not be treated as such. If there are policy lacunae in the legislation itself, it is unacceptable that guidance, which for the most part avoids parliamentary scrutiny, should serve to fill them.**

103 Delegated Powers and Regulatory Reform Committee, *Thirty Fifth Report* (35th Report, Session 2017–19, HL Paper 202)

CHAPTER 4: SCRUTINY OF DELEGATED LEGISLATION

Introduction

82. Once power has been delegated to ministers, Parliament may scrutinise the secondary legislation made under the power. This chapter explores the issues with scrutinising this legislation.
83. The main challenges for scrutinising delegated legislation relate to the volume and complexity of statutory instruments. As Figure 1 shows, a sustained increase in the number of SIs began in the early 1990s, averaging between 3,000 and 3,500 each calendar year to 2015. Of these, around 1,200 are subject to parliamentary scrutiny.¹⁰⁴ The length of statutory instruments has also increased: from 6,550 pages of SIs in 1990 to 11,888 pages in 2009 (see Figure 2).¹⁰⁵
84. Since 2015 the total number of SIs has declined: there were a little over 1,200 in 2016 and 2017, and (as of October 2018) just over 1,000 in 2018.¹⁰⁶ This recent decline may in part be in anticipation of an increase in Brexit-related SIs, of which the Government estimated that 800–1,000 may be needed.¹⁰⁷ Andrea Leadsom MP, Leader of the House of Commons, said that the number of SIs tended to vary over the years between “feast and famine”. She explained that the Government had “tried to get through as much of the urgent secondary legislation as possible to clear the decks for the Brexit secondary legislation. We are now managing the Brexit secondary legislation and we are confident that there will be a decent manageable flow of secondary legislation.”¹⁰⁸ The Leader of the House of Lords, Baroness Evans of Bowes Park, added that Brexit would “undoubtedly see the number of business-as-usual SIs that are not essential being delayed.”¹⁰⁹

104 Written evidence from Professor John McEldowney, University of Warwick ([LEG0053](#))

105 2009 is the last year for which figures in this data series are available due to changes in the way statutory instruments were published.

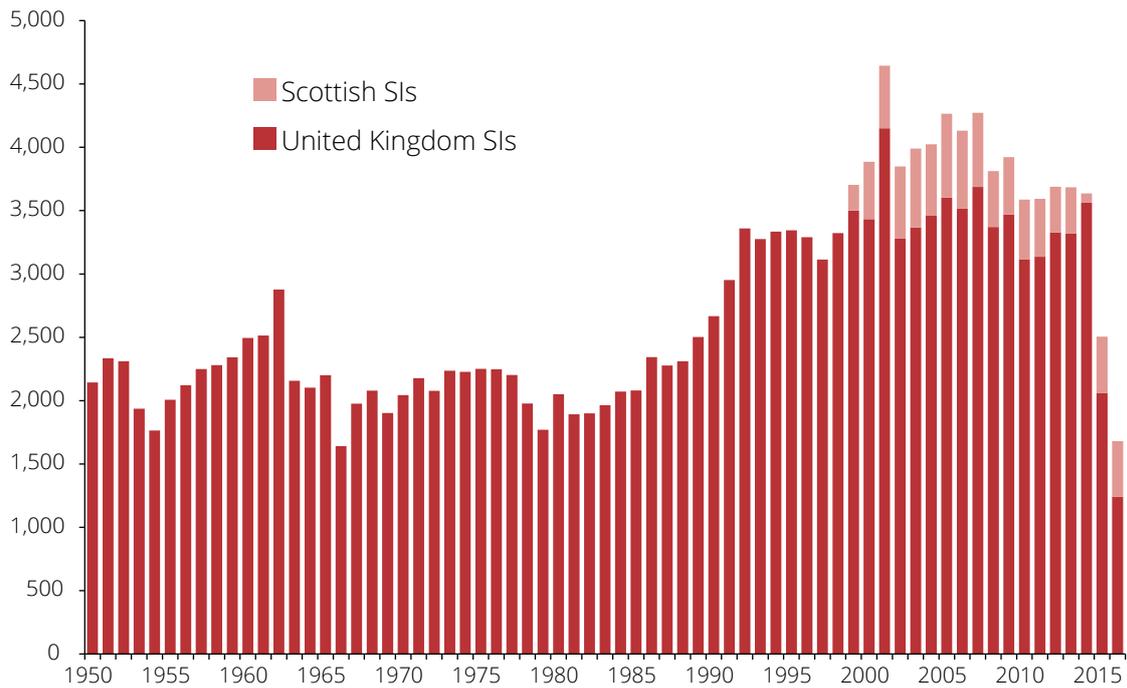
106 UK Statutory Instruments, Legislation.gov.uk: <https://www.legislation.gov.uk/uksi>

107 Constitution Committee, *European Union (Withdrawal) Bill* (9th Report, Session 2017–19, HL Paper 69), paras 229–230

108 [Q 217](#) (Andrea Leadsom MP)

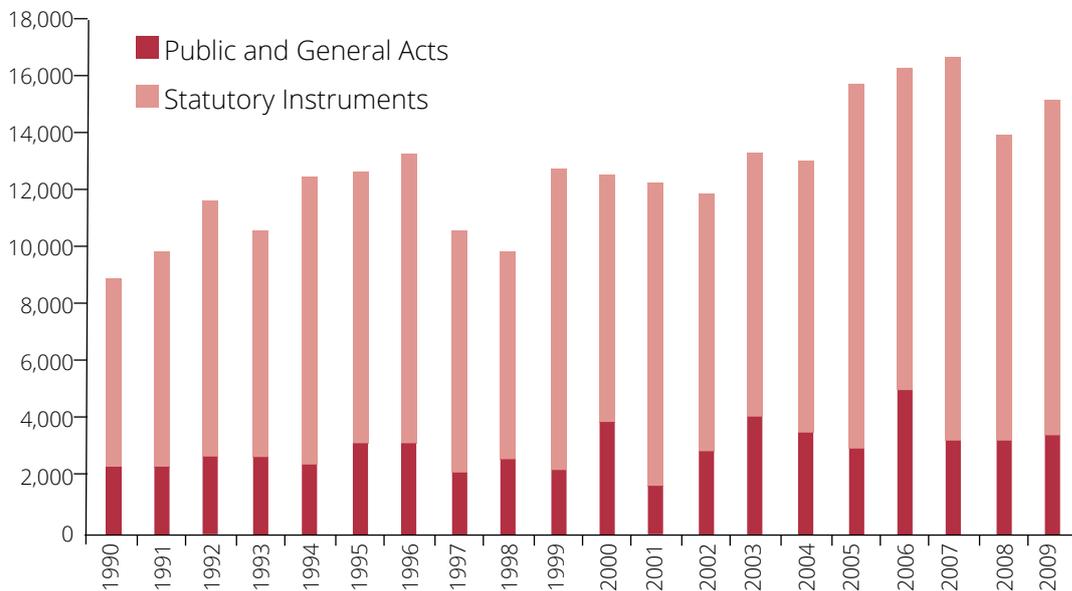
109 [Q 218](#) (Baroness Evans of Bowes Park)

Figure 1: Number of statutory instruments 1950 to 2016



Source: House of Commons Library, *Acts and Statutory Instruments: the volume of UK legislation 1950 to 2016*, CBP 7438, 21 April 2017

Figure 2: Pages of Acts and statutory instruments 1990 to 2009



Source: House of Commons Library, *Acts and Statutory Instruments: the volume of UK legislation 1950 to 2016*, CBP 7438, 21 April 2017

Scrutiny procedures

85. When Acts of Parliament delegate powers to ministers, they designate one of a number of parliamentary scrutiny procedures—or no procedure at all—for the SIs that will follow. The most common procedures are the negative procedure and the affirmative procedure.

86. For the negative procedure, an instrument is laid before both Houses, usually after being made. Either House may within 40 days pass a motion that the instrument be annulled. The instrument may come into force at any time after it is made and remains in force until it expires or is revoked or annulled. Negative instruments are debated only if a member specifically requests a debate and, in the House of Commons, if the Government provides time for it. Under the affirmative procedure, an instrument is usually laid before Parliament in draft and must be approved by both Houses before it may be made. Affirmative instruments are always able to be debated in each House.
87. There are variations on these two procedures. For example, some Acts make provision for draft negatives (instruments subject to a negative procedure that must be laid before Parliament in draft for a period before they may be made) or made affirmatives (instruments which are made, and may come into force, before being laid before Parliament, but which do not continue unless given affirmative approval within a certain time). Another variation is the affirmative procedure on first use model. Such powers, as we observed on the Space Industry Bill [HL] in the current session,¹¹⁰ attract the affirmative procedure on their first use only, with subsequent uses of those powers subject merely to annulment. There is no reason why a subsequent use of such a power might not involve the making of significant or wide-ranging amendments but result in negligible parliamentary scrutiny.
88. A variety of strengthened scrutiny procedures, known as enhanced affirmatives or super-affirmatives, are specified in individual Acts. The Hansard Society report, *The Devil is in The Detail: Parliament and Delegated Legislation*, which was referred to by a number of witnesses, identified 16 variations in scrutiny procedures.¹¹¹ This included the 11 forms of strengthened procedure outlined by the DPRRC. As the DPRRC has reported, “[a]lthough these strengthened scrutiny procedures share a number of common features, there are marked differences between the Parliamentary procedures applicable to different powers or categories of powers.”¹¹² The Law Society of Scotland noted that instruments subject to these enhanced procedures “can attract significant scrutiny which undermines the concept of speed and flexibility which delegated legislation is supposed to represent.”¹¹³ Baroness Fookes suggested that Parliament should “standardise these enhanced procedures”.¹¹⁴
89. **The proliferation of scrutiny procedures for statutory instruments, many with only minor differences, adds unnecessary complexity. We recommend that the Government use an existing model of the enhanced affirmative procedure in any future bill, when strengthened scrutiny is required, rather than creating a new variation.**

Scrutiny of secondary legislation

90. Several committees scrutinise secondary legislation when it is laid before Parliament. The Joint Committee on Statutory Instruments (JCSI), whose membership is drawn from both Houses, looks at the legal and technical correctness of SIs, including whether they are properly made on the basis of

110 Constitution Committee, *Space Industry Bill [HL]* (2nd Report, Session 2017–19, HL Paper 18)

111 Ruth Fox and Joel Blackwell, *The Devil is in The Detail: Parliament and Delegated Legislation* (London: Hansard Society, 2014)

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

113 Written evidence from the Law Society of Scotland ([LEG0046](#))

114 [Q 133](#) (Baroness Fookes)

the delegated powers in the relevant primary legislation.¹¹⁵ The Secondary Legislation Scrutiny Committee (SLSC) of the House of Lords examines the policy impact of SIs. There is no equivalent committee in the Commons.

91. An additional committee process for sifting drafts of statutory instruments has recently been created by the European Union (Withdrawal) Act 2018. Statutory instruments which are proposed to be subject to the negative procedure under the Act are examined by the European Statutory Instruments Committee (ESIC) in the Commons and the SLSC in the Lords, either of which may recommend that the instrument be upgraded from the negative to the affirmative procedure.¹¹⁶ Such recommendations are not binding; however the Government is required to explain why the recommendation for an enhanced form of scrutiny is not being accepted.
92. Affirmative statutory instruments are debated in each House. In the Commons this normally takes place in Delegated Legislation Committees, which are assembled *ad hoc* for each SI. In the House of Lords, affirmative SIs are debated in Grand Committee or on the floor of the House.
93. For negative instruments, a member may ‘pray’ against the SI to trigger a debate. Only motions in the form ‘That an humble Address be presented to Her Majesty’, praying that the regulations in question ‘be annulled’ have an effect, but such motions are rare. In the House of Commons, when negative instruments are debated it is usually on a motion ‘to consider’ the SI, which, even if the Government is defeated, has no consequence on the SI coming into force and does not necessitate any further consideration or vote on the matter. ‘Prayers’ take the form of an Early Day Motion and normally rely on the Government to find allocate time to debate them. There is no guarantee that time will be granted or, if it is, that the debate will take place before the statutory instrument takes effect.¹¹⁷ In the House of Lords, a motion ‘to regret’ an SI may be tabled which, as with a motion ‘to consider’, has no effect on the SI becoming law. Time for a debate on the floor of the House of Lords will be found for such motions.
94. The overwhelming weight of evidence we received about the scrutiny of secondary legislation was critical. Liberty contrasted the extensive engagement of parliamentarians in the passage of primary legislation with an “almost summary” passage of SIs “in its want of deliberation and excess of speed.”¹¹⁸

115 The Commons Select Committee on Statutory Instruments (SCSI) fulfils the same role for statutory instruments that deal with financial matters, which are only laid before and subject to proceedings in the House of Commons.

116 By mid-November, SLSC had considered 61 proposed negative instruments and recommended that six of these be upgraded to the affirmative procedure. The Government had accepted four of these recommendations, confirming that the instrument concerned would be laid as subject to the affirmative procedure, and had yet to respond to the other two. No recommendations had been rejected. ESIC had considered 68 proposed negative instruments and recommended that 11 of these be upgraded to the affirmative procedure. The Government had accepted six of these recommendations, and had yet to respond to the other five. No recommendations had been rejected. The upgrading recommendations from SLSC related mostly, though not exclusively, to the same instruments as were recommended for upgrading by ESIC.

117 See, for example, HC Deb 29 March 2017, vol 624 [col 308](#)

118 Written evidence from Liberty ([LEG0037](#))

95. Dr Ruth Fox argued that:

“the House of Commons procedures are utterly inadequate. In part, it is also about Members’ resources in terms of time to devote to it and the very technical nature of it. This House [of Lords] has responded over the years in reforming some aspects of its scrutiny procedures for delegated legislation; the Commons has not. Its procedures have remained largely as was. Delegated legislation committees are wholly inadequate.”¹¹⁹

96. The SLSC said the evidence it had taken on the subject suggested that:

“the scrutiny of secondary legislation is judged to be more thoroughly undertaken in the Lords than in the Commons. In making this observation, our intention is not to be critical. The relationship between the two Houses—with their different characteristics and functions, and with the multiple competing pressures on the time of Members of the House of Commons—should, as Lord Lisvane said, ‘be one of complementarity and not competition’. But acknowledging that this asymmetry exists is important ... in the context of the debate about parliamentary scrutiny of secondary legislation.”¹²⁰

97. The Bar Council suggested that parliamentary scrutiny of delegated legislation by the JCSI was effective “in ensuring that the Government acts within its powers, follows statutory instruments (SI) practice and procedures and is of adequate quality.”¹²¹ However, Garden Court Chambers said that the process of scrutinising SIs “does not always ensure that errors are picked up in time”, giving as an example a drafting error in the Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2016 (SI 2016/965), which was identified by the JCSI only a fortnight after the regulations had come into force.¹²²

98. The work of the Secondary Legislation Committee since 2003 in scrutinising the policy effect of statutory instruments has meant there is a systematic and rigorous process for scrutinising secondary legislation in the House of Lords. This Committee performs a vital role in scrutinising whether delegated powers are being used for matters of detail not policy. The House of Lords undertaking important scrutiny functions without duplicating the work of the Commons is a good example of the complementary roles of the two Houses.

99. **The sifting procedure for instruments made under the European Union (Withdrawal) Act 2018 is still in its infancy and it is too early to assess its efficacy as part of this inquiry. We will return to this subject again at the appropriate time.**

Amending delegated legislation

100. With a few exceptions,¹²³ secondary legislation is unamendable. The only choice either House has is to accept or reject it. Some witnesses argued that, if secondary legislation was amendable, both Houses would be more engaged

119 [Q 9](#) (Dr Ruth Fox)

120 Written evidence from the Secondary Legislation and Scrutiny Committee ([LEG0050](#))

121 Written evidence from the Bar Council of England and Wales ([LEG0042](#))

122 Written evidence from the Garden Court Chambers ([LEG0049](#))

123 An example of an exception is the Order in Council procedure in the Census Act 1920. The House of Commons considered an amendment to one such Order in 1975. HC Deb 25 March 1975 vol 889 [cols 407–43](#)

with scrutinising it. Lord Newby said that “unless you get to a point where secondary legislation can be amended in some form, the whole thing is a pretty fair charade.”¹²⁴ Lord Hope of Craighead, Convenor of the Crossbench peers, agreed:

“I think without a power to amend delegated legislation much of these debates are really just empty shadowboxing. It is disappointing to spend time in the Grand Committee making points about a measure when you realise the Government are not going to do anything about what you are saying. That seems very unsatisfactory.”¹²⁵

101. Professor Colin Reid, Professor of Law at the University of Dundee, said there were good reasons for not allowing delegated legislation to be amended by Parliament, although this could result in flawed legislation which would require amending measures almost immediately:

“It might be possible to allow for some adjustment to be made after parliamentary scrutiny but before the legislation is formally made (or comes into effect), perhaps limited to adjustments certified by the appropriate parliamentary authority as being exclusively to serve the purpose of correcting flaws identified during the scrutiny stage.”¹²⁶

102. The SLSC noted that secondary legislation was intended to enable more efficient use of parliamentary time so that “more time will be available for the discussion of major matters of public concern”. It said:

“A general power to amend secondary legislation could, we believe, defeat that purpose. Arguably a preferable approach would be for Government to ensure that secondary legislation is used only for provision of ‘essentially subsidiary or procedural character’ and to avoid lengthy, composite instruments. If this were the case, then the likelihood of any demand to amend an instrument would, we believe, be significantly lessened.”¹²⁷

103. David Lidington MP told us that he was not persuaded by the case for amending statutory instruments: “It would be a very big change in the way Parliament works. To make secondary legislation amendable starts to blur the distinction between the primary and secondary legislative processes as well.”¹²⁸

104. Baroness Smith of Basildon, Shadow Leader of the Lords, concurred: “The danger with having amendments is that it would be very easy to rerun the arguments that we had on the primary legislation on the secondary legislation. The problem at the moment is that it is all or nothing. There is a veto or there is nothing at all.”¹²⁹

105. The Law Society of Scotland suggested that Parliament delaying SIs

“would undermine the initial reason for delegated legislation. To counter this there should be a general presumption that draft delegated legislation

124 [Q 192](#) (Lord Newby)

125 [Q 192](#) (Lord Hope of Craighead)

126 Written evidence from Professor Colin Reid, University of Dundee ([LEG0033](#))

127 Written evidence from the Secondary Legislation Scrutiny Committee ([LEG0050](#))

128 [Q 98](#) (David Lidington MP)

129 [Q 198](#) (Baroness Smith of Basildon)

should be consulted upon broadly so that problems in connection with the order can be identified at an early enough stage for Government Ministers to take account of the criticisms and if so advised change the direction and wording of the order.”¹³⁰

106. **There is no provision for amending statutory instruments and we are not proposing one. However, this means that Parliament’s only options when presented with an inappropriate or defective statutory instrument are to accept it or reject it. This places a greater onus on the Government to respond to the concerns raised by parliamentarians, and to withdraw and re-lay statutory instruments where appropriate.**

Rejecting statutory instruments

107. Parliament has been reluctant to reject SIs. According to the Hansard Society, just 16 SIs out of over 169,000 (0.01%) have been rejected since 1950—11 by the House of Commons and five by the House of Lords.¹³¹
108. The issue of whether Parliament—and particularly the House of Lords—should reject a statutory instrument was brought into sharp relief by the draft Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015. These regulations were intended by the Government to assist in delivering a manifesto commitment to reduce the welfare budget. There were debates about whether the statutory instrument constituted a financial measure, over which the House of Commons should have sole cognisance, and whether, given it intended to implement a manifesto commitment, the House of Lords should accede to it on the basis of the Salisbury–Addison convention that the Lords does not block primary legislation promised in election manifestos. Ultimately the House of Lords voted for an unusual motion to delay consideration of the SI until an independent analysis of the proposals could be conducted and a scheme drawn up for full transitional relief for those affected. The vote led to the Government delaying and then ultimately abandoning the measure.
109. The vote prompted the Government to commission a review into secondary legislation and the primacy of the House of Commons, led by former Leader of the House of Lords, Lord Strathclyde. This review was published on 17 December 2015, with a recommendation to develop a new statutory procedure that would allow the Commons a second vote on a statutory instrument, insisting on its primacy, subsequent to the Lords asking the Government to reconsider.¹³² In our report on the review we concluded that, while there were “serious problems with the current system of delegated legislation that must be addressed”, the Government had directed the review to examine the wrong questions by framing it as a consideration of the balance of power between the two Houses of Parliament.¹³³ We said that while the review might be treated as a starting point for further consideration of the use and scrutiny of delegated legislation, it did not “provide sufficient basis for changing how

130 Written evidence from the Law Society of Scotland (LEG0046)

131 Ruth Fox and Joel Blackwell, *The Devil is in The Detail: Parliament and Delegated Legislation* (London: Hansard Society, 2014). In addition, see para 108.

132 Cabinet Office, *Strathclyde Review: Secondary legislation and the primacy of the House of Commons*, Cm 9177, December 2015: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/486790/53088_Cm_9177_Web_Accessible.pdf [accessed 19 November 2018]

133 Constitution Committee, *Delegated Legislation and Parliament: A response to the Strathclyde Review* (9th Report, Session 2015–16, HL Paper 116), summary

Parliament holds the Executive to account.”¹³⁴ The Secondary Legislation Scrutiny Committee concluded that there were “strong arguments in favour of re-affirming ... the current convention ... that the Lords should retain its power to reject an instrument but that it should be used only in exceptional circumstances.”¹³⁵

110. **If the Government uses delegated powers to propose secondary legislation which makes technical provision within the boundaries of the policy and has previously been agreed in primary legislation, Parliament is unlikely to wish to block statutory instruments. However, we are concerned, and this report has shown, that these boundaries are not always respected and that ministers may seek to use statutory instruments to give effect to significant policy decisions. Without a genuine risk of defeat, and no amendment possible, Parliament is doing little more than rubber-stamping the Government’s secondary legislation. This is constitutionally unacceptable.**
111. **The Government already has a mechanism to remedy faults in statutory instruments which are identified by parliamentary scrutiny. SIs subject to the affirmative procedure are made only when signed by a minister after parliamentary debates have taken place; until they are signed, they can be withdrawn, revised and re-laid. SIs subject to the negative procedure come into force on the date specified on the instrument, but the Government already has the power to lay a second SI to revoke and replace the first.**
112. **However, for these processes to work, the Government must take account of the scrutiny of statutory instruments and respond promptly to remedy any deficiencies. Where it does not do so, in exceptional circumstances Parliament may use its existing powers to block such instruments. The Government should recognise that parliamentary defeat on a statutory instrument need not be considered momentous nor fatal. It does not prevent the Government subsequently tabling a revised SI having listened to and acted on parliamentarians’ concerns.**
113. **If the Government’s current approach to delegated legislation persists, or the situation deteriorates further, the established constitutional restraint shown by the House of Lords towards secondary legislation may not be sustained.**

134 *Ibid.*, para 86

135 Secondary Legislation Scrutiny Committee, *Response to the Strathclyde Review: Effective parliamentary scrutiny of secondary legislation* (32nd Report, Session 2015–16, HL Paper 128)

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

1. We accept the broad criteria outlined by David Lidington justifying the use of delegated powers (see para 9). If these criteria were rigorously applied, we would have fewer concerns with their use. We do not accept that there is a “high threshold” for the inclusion of delegated powers in bills and it is unacceptable that the delegation of power is seen by at least some in the Government as a matter of what powers they can get past Parliament. It is a responsibility for all, including Parliamentary Counsel, to uphold constitutional standards in relation to delegated powers. (Paragraph 15)
2. It is a constitutional obligation of Parliament to decide whether a proposed delegation of power is acceptable. Given the trend in the number and nature of delegated powers sought by the Government, the importance of Parliament’s scrutiny of delegations is all the more important. (Paragraph 16)
3. Delegating power to make provision for minor and technical matters is a necessary part of the legislative process. It is essential that primary legislation is used to legislate for policy and other major objectives. Delegated legislation, which is subject to less parliamentary scrutiny, should only be used to fill in the details. There has been an upward trend in the seeking of delegated powers in recent years and this should cease. (Paragraph 25)
4. It is constitutionally objectionable for the Government to seek delegated powers simply because substantive policy decisions have not yet been taken. It is our judgement that there has been a significant and unwelcome increase in this phenomenon. (Paragraph 26)
5. The Delegated Powers and Regulatory Reform Committee provides an expert assessment of the appropriateness of proposed delegations of power. Its scrutiny has a beneficial effect on legislation presented to Parliament, both in securing government agreement to amend proposed powers of delegation in a bill and, less obviously, in concentrating the minds of ministers and their bill teams during the earlier process of drafting the legislation. Ministers should follow its recommendations unless there are clear and compelling reasons not to do so. These reasons should be fully explained by the Government in writing before committee stage. (Paragraph 33)
6. To the extent that the Delegated Powers and Regulatory Reform Committee is able to report on bills at an earlier stage, this is welcome and could aid scrutiny, especially of significant Brexit-related legislation. However, we recognise that the DPRRC is unlikely to wish to report as a matter of routine on bills while they are in the Commons. (Paragraph 35)
7. We agree with the Delegated Powers and Regulatory Reform Committee that it would be hard to design a prescriptive list to cater for the variety of circumstances in which delegation is sought. That said, the Government must adhere to the broad principles which are outlined in the DPRRC’s guidance. (Paragraph 39)
8. Delegated powers should be sought only when their use can be clearly anticipated and defined. Broad or vague powers, or those sought for the convenience of flexibility for the Government, are inappropriate. There must be a compelling justification for delegated powers and it is for Parliament to decide if that justification is acceptable. (Paragraph 48)

9. It is incumbent on the Government to provide Parliament with a full explanation of, and justification for, the delegated powers it seeks. Where broad powers are sought, the Government should publish draft secondary legislation in time to allow Parliament to assess its potential usage when each House is considering the primary legislation. Alternative publications, such as “policy scoping notes”, may assist the process of scrutiny, but greater clarity will be achieved only through drafts of the statutory instruments. (Paragraph 49)
10. In recent years the Government has sought to create criminal offences and establish public bodies through delegated powers. This is constitutionally unacceptable. (Paragraph 50)
11. Skeleton bills inhibit parliamentary scrutiny and we find it difficult to envisage any circumstances in which their use is acceptable. The Government must provide an exceptional justification for them, as recommended by the DPRRC’s guidance for departments; it cannot rely on generalised assertions of the need for flexibility or future-proofing. (Paragraph 58)
12. Henry VIII clauses are “a departure from constitutional principle. Departures from constitutional principle should be contemplated only where a full and clear explanation and justification is provided.” Such justification should set out the specific purpose that the Henry VIII power is designed to serve and how the power will be used. Widely drawn delegations of legislative authority cannot be justified solely by the need for speed and flexibility. (Paragraph 67)
13. Where UK ministers seek a power to amend devolved legislation, they must be subject to a statutory requirement to consult the relevant devolved administration. (Paragraph 70)
14. Bills and statutory instruments should be sufficiently clear to ensure that guidance need not be relied on to interpret legislation. Guidance is not legislation and should not be treated as such. If there are policy lacunae in the legislation itself, it is unacceptable that guidance, which for the most part avoids parliamentary scrutiny, should serve to fill them. (Paragraph 81)
15. The proliferation of scrutiny procedures for statutory instruments, many with only minor differences, adds unnecessary complexity. We recommend that the Government use an existing model of the enhanced affirmative procedure in any future bill, when strengthened scrutiny is required, rather than creating a new variation. (Paragraph 89)
16. The sifting procedure for instruments made under the European Union (Withdrawal) Act 2018 is still in its infancy and it is too early to assess its efficacy as part of this inquiry. We will return to this subject again at the appropriate time. (Paragraph 99)
17. There is no provision for amending statutory instruments and we are not proposing one. However, this means that Parliament’s only options when presented with an inappropriate or defective statutory instrument are to accept it or reject it. This places a greater onus on the Government to respond to the concerns raised by parliamentarians, and to withdraw and re-lay statutory instruments where appropriate. (Paragraph 106)
18. If the Government uses delegated powers to propose secondary legislation which makes technical provision within the boundaries of the policy and has previously been agreed in primary legislation, Parliament is unlikely to wish

to block statutory instruments. However, we are concerned, and this report has shown, that these boundaries are not always respected and that ministers may seek to use statutory instruments to give effect to significant policy decisions. Without a genuine risk of defeat, and no amendment possible, Parliament is doing little more than rubber-stamping the Government's secondary legislation. This is constitutionally unacceptable. (Paragraph 110)

19. The Government already has a mechanism to remedy faults in statutory instruments which are identified by parliamentary scrutiny. SIs subject to the affirmative procedure are made only when signed by a minister after parliamentary debates have taken place; until they are signed, they can be withdrawn, revised and re-laid. SIs subject to the negative procedure come into force on the date specified on the instrument, but the Government already has the power to lay a second SI to revoke and replace the first. (Paragraph 111)
20. However, for these processes to work, the Government must take account of the scrutiny of statutory instruments and respond promptly to remedy any deficiencies. Where it does not do so, in exceptional circumstances Parliament may use its existing powers to block such instruments. The Government should recognise that parliamentary defeat on a statutory instrument need not be considered momentous nor fatal. It does not prevent the Government subsequently tabling a revised SI having listened to and acted on parliamentarians' concerns. (Paragraph 112)
21. If the Government's current approach to delegated legislation persists, or the situation deteriorates further, the established constitutional restraint shown by the House of Lords towards secondary legislation may not be sustained. (Paragraph 113)

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members

Lord Beith
 Lord Brennan*
 Baroness Corston**
 Baroness Dean of Thornton-Le-Fylde*
 Baroness Drake**
 Lord Dunlop
 Lord Hunt of Wirral
 Lord Judge
 Lord Lang of Monkton (Chairman until 2 May 2017)*
 Lord MacLennan of Rogart†
 Lord MacGregor of Pulham Market
 Lord Morgan
 Lord Norton of Louth
 Lord Pannick
 Baroness Taylor of Bolton (Chairman since 22 June 2017)
 Lord Wallace of Tankerness‡

* Member of the Committee until 2 May 2017

** Member of the Committee since 27 June 2017

† Member of the Committee until 12 June 2018

‡ Member of the Committee since 12 June 2018

Declarations of interest

Lord Beith
Honorary Bencher of the Middle Temple
 Lord Brennan
No relevant interests
 Baroness Corston
No relevant interests
 Baroness Dean of Thornton-Le-Fylde
No relevant interests
 Baroness Drake
No relevant interests
 Lord Dunlop
No relevant interests
 Lord Hunt of Wirral
Partner DAC Beachcroft LLP
Co-Chair, All Party Parliamentary Group on Legal and Constitutional Affairs
 Lord Judge
Former Lord Chief Justice of England and Wales (2008–2013)
 Lord Lang of Monkton
No relevant interests
 Lord MacGregor of Pulham Market
No relevant interests
 Lord MacLennan of Rogart
No relevant interests

Lord Morgan

No relevant interests

Lord Norton of Louth

No relevant interests

Lord Pannick

No relevant interests

Baroness Taylor of Bolton (Chairman)

No relevant interests

Lord Wallace of Tankerness

No relevant interests

A full list of members' interests can be found in the Register of Lords' Interests:

<http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>

Professor Mark Elliott, Professor of Public Law at the University of Cambridge, and Professor Stephen Tierney, Professor of Constitutional Theory at the University of Edinburgh, acted as specialist advisers for the inquiry. They both declared no relevant interests.

APPENDIX 2: LIST OF WITNESSES

Evidence is published online at <http://www.parliament.uk/legislative-process-inquiry> and available for inspection at the Parliamentary Archives (020 7219 3074).

Evidence received by the Committee is listed below in chronological order of oral evidence session and in alphabetical order. Those witnesses marked with * gave both oral evidence and written evidence. Those witnesses marked ** gave oral evidence and did not submit any written evidence. All other witnesses submitted written evidence only.

The following list includes only the evidence taken for this part of the legislative process inquiry.

Oral evidence in chronological order

**	Baroness Fookes, Chair of the Delegated Powers and Regulatory Reform Committee, House of Lords	QQ 122–133
**	Professor Alison Young, University of Oxford	QQ 134–142
*	Professor John Bell, University of Cambridge	QQ 134–142
**	Professor Paul Craig, University of Oxford	QQ 134–142
**	Rt Hon. Baroness Smith of Basildon, Shadow Leader of the House of Lords	QQ 143–150 QQ 193–201
**	Rt Hon. Lord Hope of Craighead, Convenor of the Crossbench Peers	QQ 183–192
**	Rt Hon. Lord Newby, Leader of the Liberal Democrats, House of Lords	QQ 143–150 QQ 183–192
**	Rt Hon Baroness Evans of Bowes Park, Leader of the House of Lords	QQ 202–219
**	Rt Hon Andrea Leadsom MP, Leader of the House of Commons	QQ 202–219

Alphabetical list of all witnesses

	Association of British Insurers	LEG0041
	Bar Council of England and Wales	LEG0042
*	Professor John Bell, University of Cambridge (QQ 134–142)	LEG0051
	Bingham Centre on the Rule of Law	LEG0052
	British Bankers' Association	LEG0047
**	Professor Paul Craig, University of Oxford (QQ 134–142)	
	The Chartered Institute of Taxation	LEG0044
	Dr Paul Daly, University of Cambridge	LEG0035
**	Rt Hon Baroness Evans of Bowes Park, Leader of the House of Lords (QQ 202–219)	

- ** Baroness Fookes, Chair of the Delegated Powers and Regulatory Reform Committee, House of Lords ([QQ 122–133](#))
Garden Court Chambers [LEG0049](#)
- ** Rt Hon. Lord Hope of Craighead, Convenor of the Crossbench Peers ([QQ 143–150](#))
Dr Richard Lang, University of Brighton [LEG0048](#)
Law Commission of England and Wales [LEG0032](#)
Law Society of Scotland [LEG0046](#)
- ** Rt Hon Andrea Leadsom MP, Leader of the House of Commons ([QQ 202–219](#))
Professor Andrew Le Sueur, University of Essex [LEG0036](#)
Liberty [LEG0037](#)
Rt Hon David Lidington MP, Leader of the House of Commons [LEG0040](#)
The Low Incomes Tax Reform Group [LEG0039](#)
Professor John McEldowney [LEG0053](#)
- ** Rt Hon Lord Newby, Leader of the Liberal Democrats, House of Lords ([QQ 143–150](#)) and ([QQ 183–192](#))
Professor Colin Reid [LEG0033](#)
Mark Ryan, Senior Lecturer in law, University of Coventry [LEG0034](#)
The Scottish Parliament [LEG0043](#)
Secondary Legislation Scrutiny Committee [LEG0050](#)
- ** Rt Hon Baroness Smith of Basildon ([QQ 143–150](#)) and ([QQ 193–201](#))
Professor Richard Susskind [LEG0031](#)
Which? [LEG0038](#)
WWF-UK [LEG0045](#)
- ** Professor Alison Young, University of Oxford ([QQ 134–142](#))

APPENDIX 3: CALL FOR EVIDENCE

The Constitution Committee is conducting a large-scale inquiry into the legislative process. This follows its major 2004 report on Parliament and the Legislative Process. The Committee is interested in how bills are prepared by Government and scrutinised in Parliament; whether and how outside organisations and the public are involved in the process; and how the legislative process is, or could be, affected by new technology and by the UK's withdrawal from the EU.

The inquiry began in October 2016 and will continue over the next year. It will be taken in four parts, each addressing a stage or significant factor in the legislative process. These are:

1. Preparing legislation for introduction in Parliament;
2. The passage of legislation through Parliament;
3. The delegation of powers; and,
4. The period after Royal Assent.

The Committee took evidence on stage 1, 'Preparing legislation for introduction to Parliament', between October and December 2016. The Committee has not yet issued a Call for Evidence in relation to stage 2: 'The passage of legislation through Parliament'—it will return to this topic in the 2017–18 Session of Parliament.

Stage 3: The delegation of powers

The Committee is now seeking evidence in relation to stage 3 of its inquiry: 'The delegation of powers', before the expected introduction of the Government's 'Great Repeal Bill' in the next session of Parliament. Delegated powers are frequently included in the Bills presented to Parliament by the Government. These powers allow Ministers (and occasionally other public bodies) to use 'secondary legislation' (usually in the form of statutory instruments) to do things which would otherwise need another Bill. The Committee is focusing on the inclusion of delegated powers in primary legislation, although it will consider secondary legislation and the manner in which it is scrutinised as necessary to inform its consideration of the delegation of powers in primary legislation.

The Committee would welcome written submissions on any aspect of this topic, and particularly on the issues and questions set out below. We welcome contributions from all interested individuals and organisations.

Questions

Consistency of approach

1. For what purposes is it appropriate to delegate powers to make law to Government? Is there a clear boundary between subject-matters which are appropriate for primary legislation on the one hand, and for secondary legislation on the other?
2. Does the Government have a consistent approach to the delegation of powers and, if so, on what basis has that approach been adopted? Has the outcome of this approach been satisfactory?
3. How effective is parliamentary scrutiny of provisions in primary legislation that delegate power to the Government?

4. Are there circumstances in which ‘skeleton’ Bills and clauses are appropriate? Are ‘skeleton’ Bills and clauses becoming more frequent, and if so, why?
5. How far are matters previously dealt with in secondary legislation moving into guidance, codes of practice and directions; and what are the implications of any such movement for Parliamentary scrutiny?

Scrutiny of secondary legislation

6. The extent to which it is appropriate for Parliament to devolve power to the Government inevitably depends on the appropriateness of Parliament’s future scrutiny of the exercise of those powers. To what extent are current procedures for scrutinising secondary legislation effective?
7. Is there a case for making secondary legislation amendable in certain circumstances (and if so, in which circumstances), or for greater use of an enhanced scrutiny process that allows Parliament to scrutinise draft instruments before a final version is introduced for approval (such as the existing super-affirmative procedure)? What problems arise from the ‘take it or leave it’ process currently used for agreeing secondary legislation?
8. Is there a case for allowing either or both Houses of Parliament additional powers to delay or reject secondary legislation?

Henry VIII powers

9. Bills often include ‘Henry VIII powers’, which allow the Government to amend or repeal primary legislation by secondary legislation. For what reasons might such powers be appropriate, and with what level of scrutiny? Are there any subject-matters or purposes for which Henry VIII powers should never be used? Should Henry VIII powers ever be exercisable by a person who is not a Minister?

Information provision

10. Do the Explanatory Notes that accompany a Bill contain sufficient information about what the proposed secondary legislation will do?
11. How far is the intended content of secondary legislation made clear when the Bill is going through Parliament? Should draft secondary legislation be routinely made available when Bills are scrutinised by Parliament? Are there any examples of secondary legislation that brought forward provisions which were unexpected in the light of information provided by Government when the primary legislation was being enacted?

Brexit

12. To what extent, in Brexit-related primary legislation, might the use of secondary legislation be necessary or justified to convert the ‘*acquis*’ (the body of existing EU law) into British law?
13. Do you envisage that any changes will be required to procedures related to the delegation of powers or secondary legislation, to cope with the legislation likely to be required as a result of Brexit?