HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

22nd Report of Session 2017–19

Civil Liability Bill [HL]

Family Relationships (Impact Assessment and Targets) Bill [HL]

Home Education (Duty of Local Authorities) Bill [HL]

Correspondence: European Union (Withdrawal) Bill

Ordered to be printed 18 April 2018 and published 19 April 2018

Published by the Authority of the House of Lords

HL Paper 123

The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session and has the following terms of reference:

(i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;

(ii) To report on documents and draft orders laid before Parliament under or by virtue of:

(a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,

(b) section 7(2) or section 19 of the Localism Act 2011, or

(c) section 5E(2) of the Fire and Rescue Services Act 2004;

and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and

(iii) To report on documents and draft orders laid before Parliament under or by virtue of:

(a) section 85 of the Northern Ireland Act 1998,

(b) section 17 of the Local Government Act 1999,

(c) section 9 of the Local Government Act 2000,

(d) section 98 of the Local Government Act 2003, or

(e) section 102 of the Local Transport Act 2008.

Membership

The members of the Delegated Powers and Regulatory Reform Committee who agreed this report are:

Lord Blencathra (Chairman)
Lord Flight
Lord Jones
Lord Lisvane
Lord Moynihan
Lord Rowlands
Lord Thomas of Gresford
Lord Thurlow
Lord Tyler

Registered Interests

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

Publications

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

General Information

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

Contacts for the Delegated Powers and Regulatory Reform Committee

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

Historical Note

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

Twenty Second Report

CIVIL LIABILITY BILL [HL]

1. This 12-clause Bill, relating to whiplash claims and the personal injury discount rate, was introduced in the House of Lords on 13 March 2018. The Bill has two main purposes:

   - Part 1 (clauses 1–7) seeks to reduce insurance costs for motorists by limiting the amount of damages that can be awarded for whiplash injuries.

   - Part 2 (clause 8) reforms the calculation of lump sums for future financial loss in actions for personal injury. In such cases, the courts apply a discount rate because investment of the money in advance of it being needed may result in over-compensation for the victim. At present, the discount rate is calculated on the basis that the claimant is a "very risk averse" investor. Clause 8 envisages that the rate will be altered on the assumption that the investor will accept more risk than a very low level but still less than would ordinarily be accepted by a prudent and properly-advised investor.

   The Ministry of Justice has provided a Delegated Powers Memorandum.[1]

2. The Bill's main provisions are found in clauses 1–8, all of which contain delegated powers. We are becoming very familiar with skeletal bills.[2] By any standards, the Bill is skeletal. Most of it is concerned with reducing the damages that the courts currently award for certain types of whiplash injury. Two central questions are:

   (a) What is meant by "whiplash injury"?

   (b) By how much are awards of damages to be reduced?

3. The answers are:

   (a) "Whiplash injury" means whatever the Lord Chancellor says it will mean, in regulations to be made by him or her at some future date.[3] Clause 1(1) has a partial definition but a full definition awaits the making of regulations by the Lord Chancellor, which will only happen once the Bill has been enacted. Given the complex physical and psychological components of whiplash injury, it is not satisfactory that these matters should be left to regulations rather than being subject to a rigorous debate in Parliament.

   (b) The reduction in damages will be whatever the Lord Chancellor says it will be, in regulations to be made by him or her at some future date.[4]

---

1 Ministry of Justice, Civil Liability Bill [HL] Delegated Powers Memorandum

2 Since January 2018 they have included: (a) The European Union (Withdrawal) Bill, which involves the largest peace-time transfer of power from Parliament to Ministers in our history. (b) The Taxation (Cross-border) Trade Bill gives to Ministers well over 150 separate powers to make tax law binding on individuals and businesses. (c) The Haulage Permits and Trailer Registration Bill contains 24 clauses, of which 16 contain delegated powers, and the first five all begin: "Regulations may". See further the Committee's 11th, 12th and 15th Reports of Session 2017–19.

3 Clause 1(1).

4 Clause 2(2).

4. We agree with the Motor Accident Solicitors Society which, in a letter to the Committee dated 16 April 2018,[5] said that the extensive use of delegated powers in this short Bill "will severely limit parliamentary scrutiny as the full impact of the proposed measures cannot be determined without consideration of the proposed regulations/secondary legislation. The devil is very much in the detail".

5. We draw attention to two clauses: clause 1 (meaning of whiplash injury) and clause 2 (damages for whiplash injuries).

Clause 1—meaning of "whiplash injury"

6. To the question "what is meant by whiplash injury?" clause 1 provides an opaque answer:

> "(1) In this Part "whiplash injury" means an injury, or set of injuries, of soft tissue in the neck, back or shoulder **that is of a description specified in regulations made by the Lord Chancellor**".

7. In other words, regulations will supply the answer in due course. The Government's justification for putting the definition into regulations is found at paragraph 10 of the Delegated Powers Memorandum.

- Whiplash must be defined accurately.
- There must be extensive consultation.
- The definition must remain accurate.

8. We agree with these propositions. But it does not follow from them that the definition of "whiplash injury" should be contained in regulations rather than the Bill. Neither the Lord Chancellor nor the Ministry of Justice is best placed to make this determination, which depends on medical expertise and clinical judgment.

9. **We take the view that it would be an inappropriate delegation of power for "whiplash injury", a concept central to a full understanding of the Bill, to be defined in regulations made by Ministers rather than being defined on the face of the Bill.**

Clause 2—damages for whiplash injury

10. Just as clause 1(1) leaves "whiplash injury" to be defined in regulations made by the Lord Chancellor, clause 2(2) limits the power of the courts to award damages. The limitation will take the form of a tariff to be set in regulations made by the Lord Chancellor.

11. The Government justify this power[6] because setting compensation requires review from time to time, for several reasons:

(a) To make reasonable allowance for inflation.

(b) Damages for pain, suffering and loss of amenity ("PSLA") are not capable of precise quantification.

---

5 Letter from the Motor Accident Solicitors Society dated 16 April 2018.
6 Paragraph 14 of the Delegated Powers Memorandum.

(c) Flexibility is needed to reflect possible changes in society's perception of the value of PSLA over time.

(d) There is a possible "need to change the parameters of the categories of the tariff to adjust or refine the approach to different severities of injury should this become necessary in future and in the light of experience over time".

12. We are not convinced by these reasons:

(a) Merely because a figure or a mechanism needs updating from time to time does not mean that it should not initially appear in primary legislation.

(b) Even if damages for PSLA are not capable of precise quantification, their quantification is not rendered easier merely because the choice of legislative vehicle is a statutory instrument rather than an Act of Parliament.

(c) "Society's perception of the value of PSLA **over time**" is just that: something that changes over time rather than overnight. Slower changes can be accommodated by a new Act of Parliament.[7]

(d) The need to refine the tariff in relation to different severities of injury is a matter that can be dealt with by Parliament. There is a distinct advantage to this being dealt with by Parliament. Bills are amendable during their passage; statutory instruments are not.

(e) We are not convinced that the Lord Chancellor will make a better job of this than the judges, who have had decades of experience dealing with damages for personal injury at the bar and on the bench. Our judgment is shared by the Motor Accident Solicitors Society's letter of 16 April. We also agree with the Society that it is not appropriate for the Lord Chancellor to be granted powers to make provision for damages relating to "minor psychological injuries" occasioned by the whiplash injury. If this is not to be determined by the judges, it would be better determined by independent medical experts rather than by Government.

13. **In our view it would be an inappropriate delegation of power for damages for whiplash injury to be set in a tariff made by Ministerial regulations rather than on the face of the Bill. The tariff should be set out on the face of the Bill, albeit amendable by affirmative statutory instrument.**

7 In the context of the changes made by clause 8 to the Lord Chancellor's power under the Damages Act 1996 to set a revised personal injury discount rate, the Government note (at paragraph 12 of the Explanatory Notes to the Bill) that the Lord Chancellor's power has only been exercised twice: in 2001 and 2017.

FAMILY RELATIONSHIPS (IMPACT ASSESSMENT AND TARGETS) BILL [HL]

14. There is nothing in this Bill which we would wish to draw to the attention of the House.

HOME EDUCATION (DUTY OF LOCAL AUTHORITIES) BILL [HL]

15. There is nothing in this Bill which we would wish to draw to the attention of the House.

CORRESPONDENCE: EUROPEAN UNION (WITHDRAWAL) BILL

16. We published a report on the European Union (Withdrawal) Bill on 1 February 2018.[8] Following the committee stage debates on amendment 71, concerning the "appropriateness test" in clause 7,[9] and amendment 237, concerning the sifting mechanism for regulations made under clauses 7 to 9 and 17,[10] the Chairman wrote to the Minister for Exiting the European Union and to the Lord Privy Seal in response to points made during the debates and to invite further explanation. We have received responses from the Minister and from the Lord Privy Seal which are printed at Appendix 1.

8 Delegated Powers and Regulatory Reform Committee, (12th Report, Session 2017–19, HL Paper 73)
9 HL Deb, 7 March 2018, cols 1178–1201
10 HL Deb, 19 March 2018, cols 142–157

APPENDIX 1: CORRESPONDENCE: EUROPEAN UNION (WITHDRAWAL) BILL

Letter from the Rt Hon. Lord Blencathra, Chairman of the Delegated Powers and Regulatory Reform Committee, to Lord Callanan, Minister of State at the Department for Exiting the European Union

The DPRRC met this week and, amongst other things, discussed the debate in the House of Lords on Wednesday 7 March on Lord Wilson of Dinton's amendment 71 to the European Union (Withdrawal) Bill. Amendment 71, as you will recall, was one of a number of amendments recommended by the DPRRC in its 12th Report of this session and would, in effect, replace the subjective "appropriateness" test in clause 7 with a test based on objective necessity.

The Committee has considered your arguments in response to amendment 71. We did not find them wholly convincing. We also believe that there is a solution which will satisfy the needs of the Government and the concerns of the House and we will offer up that suggestion again. As a result, we have decided to take the unusual step of writing to respond to the points you made in debate and to invite further explanation. In order to assist the House in time for report stage of the Bill, we propose to publish both this letter and your response.

Scope of the "appropriateness" test

The Committee recommended the "necessity" test because, we said, "clause 7, in allowing Ministers to make regulations where they consider it appropriate, allows for substantial policy changes that ought to be made only in primary legislation". During the debate, you argued against the Committee's view. You said that that the "appropriateness" test did not give Ministers "unrestricted discretion to correct anything that they may wish or like" because corrections had not only to be appropriate in themselves, they had to be appropriate to correct the particular deficiency they were addressing.

We accept that the context is deficiencies in retained EU law. But a deficiency having been identified, the "appropriateness" test allows Ministers to do anything they like to correct the deficiency provided it is not manifestly unreasonable. We therefore remain of the view that the power in clause 7 is unacceptably wide and should be circumscribed by an objective test of necessity.

"Necessity" test and "really needed"

You argued that the "necessity" test was unworkable, that it was "a high bar to meet" and it would be "too constrictive".

You also made the point that the nearest paraphrase for "necessity" was "really needed". In rejecting the "necessity" test, therefore, does this mean that the law can be amended under clauses 7 to 9 (and 17) when its amendment is not really needed? And how can this be reconciled with the Government's White Paper which stated that legal and policy changes would only be made under the Bill when it was necessary to ensure that the law continues to function properly after exit day?

Reviewable by the courts and scrutiny by JCSI

You also suggested that because (a) regulations using the appropriateness test were reviewable in the courts, and (b) the legal powers under which regulations

are made are scrutinised by the Joint Committee on Statutory Instruments, the Government could "not responsibly remove "appropriate" from the Bill".

It is not clear to us how this conclusion follows from those premisses, and we would welcome further explanation.

Scope of the "necessity" test

The Government's principal concern appears to be that desirable changes to our law by regulations under clauses 7 to 9 (and 17) - for example, to avoid illogicality, waste of time and public money - may not be possible using a "necessity" test.

You suggested that altering references from euros to sterling would be appropriate but not necessary, and that other changes that would enhance the coherence of the statute book, or further the national interest, might not be allowed under a "necessity" test. You also took issue with the example that we gave in our report, of a hypothetical requirement to send information to the EU that would, once the UK had left the EU, simply be ignored by the EU authorities. Whereas the DPRRC said that such a legal requirement would, after Brexit, be a waste of time, effort and public money and could be removed by regulations under clause 7 using a "necessity" test, you disagreed on the ground that the statute book could survive with such an information requirement, albeit "illogically and not in the public interest".

If, as your answers in debate suggest, you take the view the "necessity" test is too uncertain, there is a way forward. We mentioned it in paragraph I I of our 12th Report, namely that the term could be defined in the Bill so that it clearly includes the matters about which the Government have doubts. Clause 7 (2) of the Bill contains seven subsections defining what the Government considers may be "deficiencies." We believe that if it is possible to anticipate what may be deficiencies then it should be equally possible to define the types of circumstances where the Government considers it would be necessary to change the law.

19 March 2018

Letter from Lord Callanan to the Rt Hon. Lord Blencathra

Thank you for your continued participation, and that of the other members of the Delegated Powers and Regulatory Reform Committee, in the debate on the EU (Withdrawal) Bill, and for writing to me in response to my points on amendment 71. As you know, this is a vitally important piece of legislation and can only benefit from detailed scrutiny including contributions like those of you and your Committee if the UK is to leave the EU with certainty, continuity and control.

Scope of the appropriateness test

You wrote in your letter that "*We accept the context is deficiencies in retained EU law. But a deficiency having been identified, the "appropriateness" test allows Ministers to do anything they like to correct the deficiency provided it is not manifestly unreasonable. We therefore remain of the view that the power in clause 7 is unacceptably wide and should be circumscribed by an objective test of necessity*".

I would like to clarify that there are three distinct tests which circumscribe the use of the power in clause 7. First, for the power to be engaged at all, it is necessary to identify a deficiency in retained EU law, as outlined in Clause 7(2). Secondly, it must be appropriate to correct that deficiency, and thirdly, the action taken by Ministers must be appropriate to correct it. I understand your Committee's

preference for a 'necessity' test, but it would be helpful to fully understand at which point you believe the test should 'bite', as it may be that there is actually little practical difference in what we are proposing. In your Committee's 12th report of this session on the EU (Withdrawal) Bill, it stated:

> *"9. Our view is that regulations under clause 7 should depend on:*
>
> *(a) there being a failure/deficiency in retained EU law arising from the United Kingdom leaving the EU, and*
>
> *(b) it being necessary to prevent, remedy or mitigate it.*
>
> *10. Once this necessity threshold is met, Ministers may choose whichever solution most commends itself even if it is one of several possible solutions.*[11]"

The above text in paragraph 10 suggests that, after your test that a deficiency is necessary to correct has been met, you approved of a level of flexibility to act in an appropriate manner from a range of possible solutions. We consider that this is not far from the way that the Bill is currently drawn because, as you recognise in your letter, correcting deficiencies in retained EU law is the context of the power. For the power to be engaged at all, therefore, it is *necessary* that a deficiency is identified. We would argue that this is the correct way to circumscribe the power.

I believe that your Committee's assessment also relies on the assumption that 'appropriate' and 'not manifestly unreasonable' are synonymous terms in this context. Our assessment is that 'appropriate' is more focused and more limited a test than one that allows any provision to be made provided it is not manifestly unreasonable.

It is certainly true that 'appropriate' is a broader term than 'necessary', but when the courts turn to interpret broad discretions, they construe them in the context in which the powers have been conferred by Parliament. As *Craies on Legislation* notes, the more apparently wide a power is, the more the courts will feel obliged to impose some kind of limitation based on the context and probable legislative intent[12].

Your letter also asserts that 'necessity' is an objective test whilst 'appropriateness' is a subjective test, and I can understand the reasoning here. However, I would highlight that there is an element of subjectivity in 'necessity' too. For example, it might be considered 'necessary' to correct a deficiency if it is causing the statute book to be inconsistent, cause legal uncertainty, prevent the waste of public authorities' time and money, or prevent the statue book from including 'inert' or otherwise confusing material. Simply inserting the word 'necessary' does not point incontrovertibly to any of these options in particular. As I think our ongoing discussion on this point proves, there is no single objective answer.

As we noted in the debate, there is a degree of subjectivity in almost all tests, but it is important to recognise that the current drafting does set limits on the exercise of the power. Without labouring the point, these include:

- The limitations in the wording of subsection (1) i.e. that it is necessary to identify a deficiency in retained EU for the power to be engaged, that the deficiency must arise from the withdrawal of the UK from

11 https://publications.parliament.uk/pa/ld201719/ldselect/lddelreg/73/73.pdf
12 Section 12.2.7.2, Craies on Legislation (11th ed., 2017)

the EU, that a provision must be 'appropriate' *and* serve 'to prevent, remedy or mitigate' that deficiency;

- The limitations in subsection (2) i.e. the exhaustive list of what can be defined as a deficiency (subject to the 'of a kind' sweeper in subsection (3)(a)) which, in my view, already acts as a 'quasi-list' of what it may be *necessary* to fix;
- The limitations in subsection (7) preventing certain types of provision;
- The sunset in subsection (8); preventing Ministers making any sort of provision from two years after exit day;
- The scrutiny and sifting provisions which ensure that there will be transparency before Parliament and scrutiny of all SIs.

"Necessity" test and "really needed"

Your letter asks whether the law can be amended under clause 7 "when its amendment is not really needed". The phrase 'really needed' is drawn from a judgment of the former Judicial Committee of the House of Lords[13], not the Government. We have set out that we believe the law is deficient where it contains redundant provisions, but repealing these is something which, as we have said, it can be argued is not 'really needed'. The Government however believes that there are good reasons to do this and that it is a reasonable course of action, and I hope you would agree.

You also raised questions about the wording of the Government's White Paper. This was designed to set out Government *proposals* for future legislation in terms accessible to a broad readership. In line with other White Papers it was not meant to reflect the drafting which would appear in the Bill, where the degree of discretion, which is represented by 'appropriate', was always the policy intention, a theme which I believe is apparent in the White Paper. I do, however, apologise if a false impression was created.

Scope of the "necessity" test

Thank you for your suggestion on defining the term 'necessary' within the Bill, I appreciate why the Committee is attracted to this idea. You draw a comparison between what could be defined as 'necessary' and what is defined as a deficiency in Clause 7(2). I would firstly point out that the list at 7(2) has certain caveats; namely in Clause 7(3)(a), where a deficiency is permitted if it follows a principle similar to *ejusdem generis* , that it is of 'of a similar kind' to those in the list at 7(2), and in Clause 7(3)(b), where a deficiency can be added to the list by regulations. This is to account for any lingering uncertainty with regards to the corrections that will need to be made under Clause 7, and I would argue that a similar uncertainty would be present when trying to define specifically what can be regarded as a 'necessity'.

More broadly, however, I would argue that such definitions are not necessary. Let us take the list that I gave earlier in this letter, with regards to to what necessary might refer to, as an example:

- Necessary to prevent the statute book from being inconsistent

13 *Re an Inquiry under the Company Securities (Insider Dealing) Act* [1988] A.C. 660, at 704, per Lord Griffiths

- Necessary to prevent the statute book from causing legal uncertainty
- Necessary to prevent the waste of public authorities' time and money
- Necessary to prevent the statue book from including 'inert' or otherwise confusing material

This is just illustrative and in practice 'necessary' could be linked to a huge variety of undefinable outcomes and could never be defined in a single list. Let us say for the purposes of the argument that we added these to Clause 7 as a definition of what necessary means within the Bill. I would argue that in this list *we would simply be defining what is appropriate*. We would be putting into statute a definition of 'necessary' which is reliant on what we already deem to be 'appropriate', and is contrary to the meaning of the word more broadly. I would be wary of defining necessary in such a way - not least because of the potential precedent for future legislation - when our current term 'appropriate' is already broadly in line with your suggestion.

Reviewable by the courts and scrutiny by JCSI

I apologise for the lack of clarity on this point; this is a simple misunderstanding. I stated that "the Government cannot responsibly remove "appropriate" from the Bill" as way of summing up my entire introductory section, before moving on to address particular amendments. It was not meant to follow on specifically from the point on the courts and the JCSI. However, if I may reiterate a point I made in my speech, all of the statutory instruments under Clause 7 can ultimately be subject to judicial review, and Ministers are bound by the usual public law principles to act reasonably, in good faith and for proper purposes.

During the debate I agreed to write to Lord Campbell with examples of where a test of 'necessary' would not allow the Government to follow its preferred policy option. This is clearly an important question that underpins the concerns that you have expressed. Given that I know the Committee wanted a response this week, I hope you will accept this response now, with the commitment that the Committee will shortly receive a copy of the letter that I send to Lord Campbell. My aim is to send this before Recess next week, once we have a fuller assessment from all Government departments.

23 March 2018

Letter from the Rt Hon. Lord Blencathra, Chairman of the Delegated Powers and Regulatory Reform Committee, to the Rt Hon. Baroness Evans of Bowes Park, Leader of the House of Lords and Lord Privy Seal

The DPRRC met this week and, amongst other things, discussed the debate in the House of Lords on Monday 19 March on Amendment 237 concerning the sifting mechanism for regulations made under clauses 7 to 9 and 17. Amendment 237 is based on a recommendation of the DPRRC made in its 12th Report of Session 2017–2019, at paragraph 56.

The DPRRC has asked me to write to you to address some of the points that you made during the debate.

You mentioned the Bill's existing sifting mechanism (in paragraphs 3 and 13 of Schedule 7) and commended the 10-day timeframe common to both that mechanism and Amendment 237. However, there are very significant differences between them, the most fundamental being that the Bill's current sifting mechanism gives all the legal power to the Government to decide the level of scrutiny to be applied to an instrument and none to Parliament. The DPRRC, at paragraph 58 of its 12th Report, said the following:

> "Schedule 7 currently contains a sifting mechanism for regulations made under clauses 7 to 9. However, the sifting mechanism only applies in the House of Commons and, in any event, it lacks teeth. The Minister can ignore with impunity any recommendation from the relevant committee. Even if the committee makes the strongest possible recommendation that the instrument be affirmative, the Minister can go ahead and use the negative procedure. It is striking that the strongest possible recommendation of a sifting committee in favour of the affirmative procedure becomes the legal trigger allowing the Minister to use the negative procedure. This strange result is avoided by our proposal. **A recommendation from a sifting committee of either House to upgrade the negative procedure to the affirmative procedure should be determinative save where the recommendation is rejected by a resolution of that House.** Not only does this mechanism have teeth but it accords with (the Legislative and Regulatory Reform Act 2006, the Public Bodies Act 2011 and the Localism Act 2011)."

You mentioned that, unlike the sifting mechanism currently found in the Bill, Amendment 237 extends to consequential and transitional provision made under clause 17. We think that this is right and proper given that regulations under clause 17 can amend any Act of Parliament ever made, including future Acts made until the end of the current session. Currently, regulations under clause 17(1) can only be made under the negative procedure (see Schedule 7, paragraph 11). Paragraph 53 of the DPRRC's 12th Report said that this was a significant departure from current practice, according to which Henry VIII clauses should be exercised in affirmative instruments save in exceptional cases for which a full justification must be provided.

You expressed a hope, based on the example of one SI to be made under clause 17 that has been published in draft, that the House would be reassured that the negative procedure is being used appropriately. We commend the Government for publishing instruments in draft and would encourage the Government to continue this practice. We believe, however, that this one example provides insufficient evidence on which the House can, at this stage, be assured.

You said that the Government did not believe that it would be right for the sifting committees to make binding decisions about the use of delegated powers independent of the whole House. A central feature of Amendment 237 is that the recommendations of the sifting committees would be subject to an override by the whole House. Furthermore, the DPRRC agrees with the remarks of Lord Beith and Lord Lisvane that the existence of an override would in no way undermine confidence in the committee system. It is of the essence of committees like the DPRRC and the SLSC that they make recommendations that then become a matter for adoption or otherwise by the whole House.

The DPRRC raised a central question at paragraph 54 of its 12th Report: why should Ministers rather than Parliament have the final say on the appropriate level of Parliamentary scrutiny? You mentioned that the sifting mechanism was "a significant departure from the standard SI procedure." In fact, such scrutiny is by no means unprecedented. We provide at paragraph 55 of our 12th Report, three important examples of Acts where the scrutiny provisions have teeth: the Legislative and Regulatory Reform Act 2006, the Public Bodies Act 2011 and the Localism Act 2011. You said during the debate that these scrutiny provisions used the super-affirmative procedure, which would be inappropriate given the time-constraints under which the Government are operating. We are sensitive to those time-constraints and, for this reason, the DPRRC did not recommend the super-affirmative procedure, and neither does Amendment 237.

You mentioned that Amendment 237 would unnecessarily increase the sifting period from 10 to 15 days. The period is not increased where the committee agrees with the Government's recommendation that the instrument be negative. In those cases, the Government can go ahead after 10 days and make the instrument. The extra five days is only in issue where the committee disagrees with the Government.

Finally, you assured the House that, where *both* committees differed from the Government's initial assessment that the instrument be negative, the Government's expectation is that such recommendations are likely to be accepted. You also said:

> "… I am clear that both Houses must be treated equally regarding the proposed sifting arrangements under the Bill."

We agree with this latter statement. Save in the case of financial instruments that are the sole prerogative of the House of Commons, it has long been a feature of the law pertaining to statutory instruments (see now the Statutory Instruments Act 1946) that each House has rights independent of the other. A negative instrument can be annulled following a resolution of *either* House, even if the other House is content with the instrument. Likewise, a draft affirmative instrument that fails to be approved by either House cannot be made even if the other House is content with the draft instrument. It is an important component of the sifting mechanism that the rights of each House should be equal and independent. Accordingly, we reiterate our recommendation mentioned in our 12th Report that a recommendation from a sifting committee of *either* House to upgrade the negative procedure to the affirmative procedure should be determinative save where the recommendation is rejected by a resolution of that House.

23 March 2018

Letter from the Rt Hon. Baroness Evans of Bowes Park to the Rt Hon. Lord Blencathra

Thank you for your letter of 23 March setting out the Delegated Powers and Regulatory Reform Committee's recent discussion about the points raised during the committee stage on the amendments concerning the proposed sifting mechanism.

I am, of course, aware that your Committee has consistently recommended that the sifting committees should have the power to determine, rather than recommend, the appropriate level of scrutiny for each instrument. For the Government's part, we believe that the sifting mechanism proposed by the Commons Procedure Committee strikes the correct balance between meeting the need for a flexible, agile process and effective Parliamentary scrutiny - in line with how this House's committees conduct their scrutiny work in others areas. I hope that our clear commitment to replicating this sifting mechanism in our House, by building on the existing structures and providing for additional staff and members, demonstrates that we continue to take the established and valuable scrutiny role of the House seriously and will continue to do so when the sifting process is underway.

I am afraid that do not agree with your assessment that the stipulation in the bill that regulations under clause 17(1) can only be made under the negative procedure is a "significant departure from current practice". As I outlined in the debate, this approach has previously been adopted in other constitutionally significant legislation, including the Constitutional Reform and Governance Act 2010; the Scotland Acts; Northern Ireland Acts, and the Government of Wales Acts.

I appreciate your welcome of the Government's intention to publish draft consequential provisions under clause 17. As I mentioned during the debate, we have already published one of these draft instruments - The European Communities (Designation Orders) (Revocation) (EU Exit) Regulations 2018 - and intend to publish further examples by Report stage. I hope this will clarify the uses to which we intend to put the power and provide the Committee with sufficient reassurance that the negative procedure is being used judiciously.

In relation to the question as to whether the sifting committee's decision should be subject to an override by the whole House, as I said in that debate, it is important the House respects the views of its committees but, ultimately, it is up to each House to decide whether a government is making appropriate use of powers delegated to it by Parliament. If members in either House were to feel especially strongly that a particular instrument should use the affirmative procedure despite a sifting recommendation otherwise, they could table a motion to that effect and, with the House's agreement, make a recommendation to the Minister accordingly. Indeed, if there are strong feelings in the House I would be surprised if this did not prove to be the case. As with the sifting committees' recommendations, I am sure that the Government would respond to such a resolution with the weight that was merited in the circumstances.

I also recognise the importance of the distinction between affirmative and negative procedure which lies at the heart of this debate. Both procedures allow the House to object to an instrument, and although many negative Sis are ultimately not debated, all are subject to thorough committee scrutiny already and where the committees want to, drawn to the attention of the House. Of course, in the House of Lords we have the advantage of a procedure, for which we are indebted to Baroness Thomas of Winchester, of holding take note debates on negative

instruments. This remains open as an avenue to provide for further debates on important instruments. For example in cases where the Government and a SLSC sub-committee disagree on whether a negative instrument ought to be upgraded to the affirmative but members are not agreed that tabling a motion against an instrument is proportionate; this would allow for further detailed discussion, akin to an affirmative debate if members viewed it as warranted.

Finally, we do not believe that extending the sifting period from 10 to 15 days is necessary. Indeed, part of the purpose behind the proposed changes to the SLSC's powers, as agreed to by the Procedure Committee on 5 March, is to maximise the sub-committees' ability to conduct their work within the 10 day period, including the power to report directly to the House.

Thank you once again for your letter. For the convenience of other members who took part in the debate, I will place a copy of this letter in the Library of the House.

I am copying my response to the Secretary of State for Exiting the European Union and the Chairman of the Secondary Legislation Scrutiny Committee.

12 April 2018

APPENDIX 2: MEMBERS AND DECLARATIONS OF INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 18 April 2018, Members declared no interests in relation to the Civil Liability Bill [HL].

Attendance

The meeting on the 18 April 2018 was attended by Lord Blencathra, Lord Flight, Lord Jones, Lord Lisvane, Lord Rowlands, Lord Thomas of Gresford, Lord Thurlow and Lord Tyler.