

25 September 2020

The Rt Hon. Michael Gove MP
Chancellor of the Duchy of Lancaster and
Minister for the Cabinet Office
By email

The Rt. Hon. Jacob Rees-Mogg MP
Lord President of the Council and
Leader of the House of Commons
By email

Dear Minister and Leader of the House of Commons

Skeleton bills and skeleton provision

We are writing to you in your respective capacities as Minister for the Cabinet Office and as Chair of the Parliamentary Business and Legislation (PBL) Cabinet Committee, and in our capacity as Chairs of the three House of Lords committees principally concerned with the scrutiny of legislation: the Constitution Committee which examines public bills for constitutional implications and investigates broad constitutional issues; the Delegated Powers and Regulatory Reform Committee (DPRRC) which reports, amongst other things, on whether the provisions of any bill inappropriately delegate legislative power; and the Secondary Legislation Scrutiny Committee (SLSC) which reports on policy aspects of all secondary legislation subject to parliamentary proceedings.

We are concerned about the growing tendency for the Government to introduce skeleton bills, in which broad delegated powers are sought in lieu of policy detail. Exceptional recent events – in particular, the withdrawal of the United Kingdom from the European Union and the Covid-19 pandemic – have given rise to a need for exceptional legislation. But even taking these exceptional events into account, the bills which have been introduced into Parliament in response to them have been extraordinary in terms of the extent to which they have permitted a shift of power from the legislature to the executive. In many cases they have given ministers extraordinarily wide powers, powers which have, in some cases, been conferred by primary legislation which is nothing short of skeletal. This is the issue which we wish to raise now, as a point of principle.

The issues with skeleton bills

It is a constitutionally fundamental issue, not only in terms of the relationship between Parliament and the executive but also more widely in terms of the relationship of trust between government and the public at large. Without substantive provision on the face of the Bill, Parliament is being asked to pass legislation without knowing how the powers conferred may be exercised by ministers and so without knowing what impact the legislation may have on members of the public affected by it. It is not enough for the Government to give assurances to Parliament about how

the powers will be exercised. As the DPRRC has said on many occasions, powers delegated to ministers have to be assessed not by how the Government say they will be exercised but by how they *could* be exercised by future administrations.

We also question whether such assurances can be made since there would be no need for skeleton provision if the Government were confident of the scope of powers needed. The use of skeleton provision enables the Government to truncate policy development, which is detrimental to good government as well as effective parliamentary scrutiny.

And a consequence of skeleton powers is that the secondary legislation made under them contains the substance – the principle and policy – that should have been set out in the Act. Scrutiny of secondary legislation, as you know well, is far less rigorous than that to which primary legislation is subject. It is unamendable, and the only recourse for Parliament, if either House wishes to object to an instrument, is to adopt the ‘nuclear option’ of rejecting it outright. But that option is used only in the rarest of circumstances and is blighted by the threat contained in the response of the then Leader of the House of Commons, the Rt Hon. David Lidington MP, to the Strathclyde Review. He said:

“Whilst recognising the valuable role of the House of Lords in scrutinising SIs, the Government remains concerned that there is no mechanism for the elected chamber to overturn a decision by the unelected chamber on SIs. We do not believe that it is something that can remain unchanged if the House of Lords seeks to vote against SIs approved by the House of Commons when there is no mechanism for the will of the elected House to prevail. We must, therefore, keep the situation under review and remain prepared to act if the primacy of the Commons is further threatened.”

But as principle and policy slide into secondary legislation, the restraint, so amply demonstrated in the Lords over previous decades, will doubtless be tested when faced with controversial instruments which have not been foreshadowed in the parent Act.

The prevalence of skeleton bills

We are aware that skeleton bills are not novel. In a report published in session 1998-99, the DPRRC described skeleton bills as bills which are “little more than a licence to legislate and so give flesh to the ‘skeleton’ embodied in the bill” (29th Report). At that time, six years after the appointment of the Committee, few skeleton bills had passed through Parliament and the Committee was able to report that it had “found it necessary to denounce a bill as skeletal on only four occasions”. Since then, some skeleton bills or bills containing skeleton provision have featured. The DPRRC, in a report published in session 2015-16 in response to the Strathclyde Review, mentions the Age-related Payments Bill (2003-04), Compensation Bill (2005-06), Part II of the Planning Bill (2007-08), Energy Bill (2013-14), the Water Bill (2013-14), the Cities and Local Government Devolution Bill [HL] (2015-16) and the Childcare Bill [HL] (2015-26).

In 2015, as a result of concerns about the Cities and Local Government Devolution Bill [HL] and the Childcare Bill [HL], the Chair of the DPRRC, then Baroness Fookes, and the Chair of the Constitution Committee, then the Rt Hon. Lord Lang of Monkton, wrote to the Rt Hon. Chris Grayling MP, urging him “to remind ministers and civil servants across Government that ...

'skeleton' bills be introduced only when absolutely necessary and with a full justification for the decision to adopt that structure". This stricture reflects the current DPRRC guidance for departments. Referring to the guidance in its Strathclyde Review report, the DPRRC went on to explain that the guidance was a practical document, to be applied in the event of a skeleton bill being introduced, and did not address the Committee's "wider concern" that skeleton bills or part bills should not be put before it in the first place, "save in the most exceptional circumstances". The Constitution Committee expressed a similar view, in a report on the delegation of powers published in 2018, when it stated: "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."

A growing trend

Despite raising these concerns, during sessions 2017-19 and 2019-21, the number of skeleton bills has grown markedly, each including significant delegations of power to ministers. These include, for example, the Haulage Permits and Trailer Registration Bill, the Civil Liability Bill and the Healthcare (International Arrangements) Bill. Referring to clause 5 (power to modify direct EU legislation relating to social security co-ordination) of the first Immigration and Social Co-ordination (EU Withdrawal) Bill, introduced in session 2017-19, the DPRRC said that the Government had provided "an inadequate justification for a wholesale transfer from Parliament to the Government of power to legislate in a field that could ... have a major impact on large numbers of UK citizens resident in EEA members states, and EEA nationals resident in the UK". The Committee continued: "[the] requirement to provide 'an exceptional justification' applies even more strongly where, as in this case, Parliament is being asked to scrutinise a clause so lacking in any substance whatsoever that it cannot even be described as a skeleton". More recent examples include the second Immigration and Social Security Co-ordination (EU Withdrawal) Bill and the Medicines and Medical Devices Bill, both introduced in the current session.

During the Lords second reading debate on the Medicines and Medical Devices Bill, on 2 September, frequent reference was made to the Bill being a skeleton bill, one member saying: "We are not surprised, of course; this is what we have come to expect. Skeleton Bills have become not the exceptional position, as urged by the Constitution Committee, but the default position of this Government ..." (col. 386). The DPRRC described the Medicines and Medical Devices Bill as conferring "very wide powers to almost completely rewrite the existing regulatory regimes for human and veterinary medicines and medical devices", and the Constitution Committee said it was "a skeleton bill containing extensive delegated powers, covering a range of significant policy matters, with few constraints on the extent of the regulatory changes that could be made using the powers". At the end of the second reading debate, the Minister, Lord Bethell, defended the extent of the delegations in the Bill, referring to the "central challenge" of legislating "for a fast-moving industry in which there is so much opportunity and so much danger, but also so much uncertainty" (col. 433).

The benefits of parliamentary scrutiny

The contrast between the first and second Agriculture Bills, however, provides an example where the Government *have* responded positively to concerns about skeleton legislation. The first Agriculture Bill was introduced in session 2017-19. The DPRRC said that it represented “a major transfer of powers from the EU to Ministers of the Crown, bypassing Parliament and the devolved legislatures in Wales and Northern Ireland. ... Parliament will not be able to debate the merits of the new agriculture regime because the Bill does not contain even an outline of the substantive law that will replace the CAP after the United Kingdom leaves the EU. Most debate will centre on delegated powers because most of the Bill is about delegated powers. At this stage it cannot even be said that the devil is in the detail, because the Bill contains so little detail.” The Constitution Committee described it as “a textbook example of a skeleton bill”.

A revised Bill was introduced in the current session. The DPRRC welcomed the changes to the Bill, saying that the Government had engaged “very constructively” with the Committee’s concerns and that, although the Bill still contained “a significant transfer of power from the EU to Ministers of the Crown” and still consisted “of a framework for future regulatory changes rather than containing detailed changes that can be debated here and now”, the amended version would “enable Parliament to scrutinise more effectively the Government’s actions and progress during the transition period”. The Constitution Committee shared that view, concluding that the changes demonstrated “the valuable effect that parliamentary scrutiny has on legislation and how constructive engagement by the Government can result in better law”. We wish to emphasise this point: constructive engagement with parliamentary scrutiny results in laws that achieve their aims more effectively and reduce the risk of legal challenges to the Government. It is not in anyone’s interest to have legislation that is not fit for purpose.

Conclusion

We began this letter by acknowledging the current challenges and, as a result, the need for exceptional legislation. We also acknowledge that this legislation will often include the delegation of power to ministers. That said, we are deeply concerned about the number and significance of skeleton bills (or bills containing skeleton provision) brought before Parliament in recent months for which there has been inadequate justification. The constitutional implications are, as we have said above, fundamental.

We are aware that, following a review in 2013, the Good Law initiative was launched with the aim of making legislation “more accessible and understandable for UK citizens”, and that this aim is now reflected in the priorities of the Office of Parliamentary Counsel (OPC); and also that the OPC is committed to promoting law that is, amongst other things, clear and accessible. Skeleton bills, by their very nature, militate against these laudable intentions.

We therefore seek the following assurances:

- that skeleton bills or skeleton provision will be used only exceptionally and only when there is a full justification which demonstrates that no other approach is available and that the scope of the skeleton provision is constrained as far as possible;

- that where it is necessary to use a skeleton bill or skeleton provision, statutory safeguards will be provided for to ensure full parliamentary scrutiny of the exercise of powers under the bill; and
- that the delegated powers memorandum will acknowledge, where appropriate, that a bill is a skeleton bill or includes skeleton provision, will provide a full justification for that approach and explain why no other approach was available, and set out the statutory safeguards mentioned above.

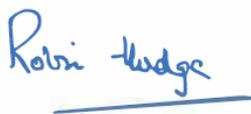
We would also ask that these assurances be set out in the Government’s Guide to Making Legislation, and that the attention of ministers, civil servants and the OPC should be drawn to the explicit instruction about the use of skeleton legislation.

In December 2015, the report of the Strathclyde Review was published. It concluded, in the context of its recommendations, that “it would be appropriate for the Government to take steps to ensure that Bills contain an appropriate level of detail and that too much is not left for implementation by statutory instrument”. That sentiment is equally applicable to our current circumstances.

The growing trend in skeleton bills containing broad delegated powers is inappropriate and we urge the Government to bring forward bills that contain clear policy intention instead of broad delegated powers, so that Parliament can scrutinise them effectively and make better law as a result.

We look forward to your response to the issues raised in this letter. A copy is being sent to the Leader of the House of Lords and Lord Privy Seal, the Rt Hon. Baroness Evans of Bowes Park, and First Parliamentary Counsel, Elizabeth Gardiner CB QC.

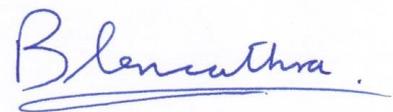
Yours sincerely



**The Lord Hodgson of
Astley Abbotts CBE**
*Chair of the Secondary
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**The Rt Hon. the
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