

Legislative standards of the Constitution Committee: 2017–2024

Select Committee on the Constitution

The Constitution Committee is appointed by the House of Lords in each session “to examine the constitutional implications of public bills coming before the House and to keep under review the operation of the constitution and the constitutional aspects of devolution”.

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Declaration of interests

Declarations of interests relevant to each of the legislative standards listed can be found in the cited committee reports.

Legislative standards of the Constitution Committee

This document is a compilation of the legislative standards expressed in the Committee’s reports published between the beginning of the 2017–19 parliamentary session and December 2024. It should not be read as a comprehensive account of the Committee’s conclusions, the UK constitution, or legislative best practice. It is not an attempt to codify the legislative standards identified, and the Committee is free to amend its views in future. This document is a snapshot of what the Committee has said about legislation during the specified time period, and each standard should be read in the specific context of the report in which it was identified.

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LEGISLATIVE STANDARDS

Introduction

1. The Constitution Committee was set up in 2001 to “examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution”.¹ In the Committee’s very first report, we set out what we considered to be the five basic tenets of the UK constitution, and these have guided our work since then. These tenets are:
 - Sovereignty of the Crown in Parliament
 - The Rule of Law, encompassing the rights of the individual
 - Union State
 - Representative Government
 - Membership of the Commonwealth and other international organisations.²
2. The Committee undertakes both legislative scrutiny of all Government bills and inquiries into constitutional issues. In doing this work, now for over two decades, we have developed a set of legislative standards that guides our legislative scrutiny. Until now, however, we have not sought to bring these standards together in one document. In this document, we draw together themes highlighted in our most recent reports to the House, published since 2017. Our focus is upon legislative scrutiny reports but, where relevant, we also draw upon relevant inquiry reports.
3. This report presents a summary of legislative standards which the Committee has noted in its scrutiny of legislation over the past eight years. In doing so, we have taken a lead from the UCL Constitution Unit’s earlier work to publish three editions of ‘The Constitutional Standards of the House of Lords Select Committee on the Constitution’,³ though note that those documents were not produced by us.
4. This document draws upon our reports published between the beginning of the 2017–19 parliamentary session and December 2024. This reflects a particularly busy and demanding period for the constitution. This document reflects the specific issues in the passage of legislation that we have encountered in our scrutiny of Government bills (or wider policy on the passage of legislation covered in our inquiries), and the standards that we have articulated in relation to these issues.
5. The document does not, therefore, purport to be a comprehensive account of the laws, rules, principles, or standards of the constitution, or even of the Committee’s conclusions since its inception; its focus is upon legislative standards in recent years. Nor does it suggest that the standards we have identified should be codified in law. Each standard should be read in the specific context of the report in which

1 Constitution Committee, *Reviewing the Constitution: Terms of Reference and Method of Working* (First Report, Session 2001–02, HL Paper 11), para 1

2 The original tenets have been amended slightly simply to reflect the fact that the UK is no longer a member of the EU. *Reviewing the Constitution: Terms of Reference and Method of Working*, para 21

3 UCL Constitution Unit, *The Constitutional Standards of the House of Lords Select Committee on the Constitution* (January 2014, August 2015 and November 2017): https://www.ucl.ac.uk/constitution-unit/sites/constitution_unit/files/159_0.pdf, https://www.ucl.ac.uk/constitution-unit/sites/constitution_unit/files/164.pdf, https://www.ucl.ac.uk/constitution-unit/sites/constitution_unit/files/constitutional-standards-third-edition.pdf

it was identified, and we encourage readers to engage with this broader context. Our intention is to update this document over time to incorporate standards we express in future reports.

6. We hope that Parliament, government ministers, policy-makers, officials and legislative drafters will find this a useful guide to the legislative standards which the Committee expects all of those engaged in law-making to meet. It will hopefully help ensure that standards are maintained and will assist the House in ensuring that this is so.

Methodology

7. In compiling these constitutional standards, we have drawn upon every report published by the Constitution Committee from the beginning of the 2017–19 Parliament until December 2024 (principally legislative scrutiny reports on specific bills). From these we have compiled what we consider to be ‘constitutional standards’ relevant to legislation. The relevant parts of these reports are set out in the annex to this report.
8. We have grouped the standards set out in our reports within a number of chapters, each reflecting a broader constitutional principle or set of constitutional principles relating to legislation:
 - Parliamentary procedure and good law-making
 - Delegated powers, delegated legislation and Henry VIII powers
 - The rule of law
9. This categorisation consolidates commonly expressed standards found across multiple reports. The specific sources of each standard are referenced throughout the report.

PARLIAMENTARY PROCEDURE AND GOOD LAW-MAKING

Pre-legislative scrutiny

10. Effective pre-legislative scrutiny is valuable for enhancing the capacity of parliament to influence and improve legislation at a formative stage, leading ultimately to better legislation.⁴
11. The Government should think critically about the value of pre-legislative scrutiny for all its proposed legislation, irrespective of whether there have been prior policy papers or public consultations.⁵
12. Pre-legislative scrutiny should be the norm rather than the exception.⁶
13. Significant constitutional legislation should be subject to pre-legislative scrutiny. This requirement should be departed from only in exceptional circumstances.⁷
14. It is essential that, prior to the introduction of a bill which provides for significant constitutional change, the Government publishes green and white papers.⁸
15. Laws of constitutional significance should be as non-partisan and uncontroversial as possible, which can be aided by pre-legislative scrutiny.⁹
16. Other than in exceptional circumstances, six weeks is the minimum feasible consultation period.¹⁰

Explanatory notes

17. Explanatory notes are to assist understanding of the legislation, but they have no legal effect and are not to be relied on for legal interpretation.¹¹

Legislative consent and the Sewel convention

18. Where the UK parliament legislates in devolved areas without consent it should demonstrate that the particular circumstances require it to do so. In any event, the UK Government should always demonstrate that it has taken all reasonable steps to secure consent. Other than in exceptional circumstances, the UK Government ought not to seek to legislate in devolved areas without consent.¹²

4 Constitution Committee, *Domestic Abuse Bill* (14th Report, Session 2019–21, HL Paper 128), para 4

5 Constitution Committee, *The Legislative Process: Preparing Legislation for Parliament* (4th Report, Session 2017–19, HL Paper 27), para 82

6 Constitution Committee, *The Legislative Process: The Passage of Bills Through Parliament* (24th Report, Session 2017–19, HL Paper 393), para 111

7 *United Kingdom Internal Market Bill*, para 11

8 *The Legislative Process: Preparing Legislation for Parliament*, para 41

9 Constitution Committee, *Elections Bill* (13th Report, Session 2021–22, HL Paper 164), para 5

10 *United Kingdom Internal Market Bill*, para 7; Constitution Committee, *Schools Bill [HL]* (1st Report, Session 2022–23, HL Paper 10), para 11

11 *The Legislative Process: The Passage of Bills Through Parliament*, para 73

12 Constitution Committee, *Economic Crime (Transparency and Enforcement) Bill* (14th Report, Session 2021–22, HL Paper 174), para 16; Constitution Committee, *Identity and Language (Northern Ireland) Bill [HL]* (2nd Report, Session 2022–23, HL Paper 27), paras 9–12; *Northern Ireland Protocol Bill*, para 46; Constitution Committee, *Respect and Co-operation: Building a Stronger Union for the 21st Century* (10th Report, Session 2021–22, HL Paper 142), para 124; Constitution Committee, *Economic Activity of Public Bodies (Overseas Matters) Bill* (4th Report, Session 2023–24, HL Paper 66), para 22; Constitution Committee, *The Governance of the Union: Consultation, Co-operation and Legislative consent* (1st Report, Session 2024–25, HL Paper 13), para 217

19. It is constitutionally inappropriate for a significant measure to pass without legislative consent.¹³
20. In circumstances where there is disagreement between the UK Government and one or more of the devolved governments as to whether legislative consent is required, close and timely engagement between governments is necessary to address differences of opinion and, where possible, reach consensus.¹⁴

Fast-track legislation

21. The fast-tracking of legislation is only acceptable in exceptional and urgent circumstances, and with the agreement of the usual channels. There remains a need to ensure effective parliamentary scrutiny.¹⁵
22. When fast-tracking legislation, the Government should set out its justification for doing so in the explanatory notes to the Bill.¹⁶
23. Fast-tracking legislation relating to Northern Ireland is constitutionally unacceptable save for exceptional and urgent circumstances.¹⁷
24. It is inappropriate for changes that are intended to be permanent to be fast-tracked through parliament.¹⁸
25. When a bill is fast-tracked the Government should include sunset clauses and review provisions, and should explain why if not.¹⁹

Content of legislation

26. Omnibus bills hinder legislative scrutiny and should be avoided.²⁰
27. The use of placeholder clauses can, on occasion, be acceptable. However, the delayed introduction of many significant clauses is unacceptable and must not become a normal way of legislating.²¹
28. The use of placeholder clauses for constitutionally significant provisions is unacceptable.²²

13 [*Northern Ireland Troubles \(Legacy and Reconciliation\) Bill*](#), para 16

14 Constitution Committee, [*Product Regulation and Metrology Bill*](#) (2nd Report, Session 2024–25, HL Paper 24), para 39

15 Constitution Committee, [*European Union \(Withdrawal\) \(No. 5\) Bill*](#) (19th Report, Session 2017–19, HL Paper 339), para 7; [*Corporate Insolvency and Governance Bill*](#), paras 5 and 11; Constitution Committee, [*Business and Planning Bill*](#) (9th Report, Session 2019–21, HL Paper 101), para 5; Constitution Committee, [*Coronavirus Bill*](#) (4th Report, Session 2019–21, HL Paper 44), para 6; Constitution Committee, [*European Union \(Future Relationship\) Bill*](#) (21st Report, Session 2019–21, HL Paper 205), para 6; [*Economic Crime \(Transparency and Enforcement\) Bill*](#), para 5

16 Constitution Committee, [*Northern Ireland \(Executive Formation\) Bill*](#) (26th Report, Session 2017–19, HL Paper 404), para 10; Constitution Committee, [*Terrorist Offenders \(Restriction of Early Release\) Bill*](#) (3rd Report, Session 2019–21, HL Paper 23), para 7

17 [*Northern Ireland \(Executive Formation\) Bill*](#), para 9; [*The Legislative Process: The Passage of Bills Through Parliament*](#), para 39

18 [*Business and Planning Bill*](#), para 7; [*Corporate Insolvency and Governance Bill*](#), para 11

19 [*European Union \(Future Relationship\) Bill*](#), para 8; [*Economic Crime \(Transparency and Enforcement\) Bill*](#), para 8

20 Constitution Committee, [*Police, Crime, Sentencing and Courts Bill*](#) (7th Report, Session 2021–22, HL Paper 64), paras 4–5; Constitution Committee, [*Levelling-up and Regeneration Bill*](#) (12th Report, Session 2022–23, HL Paper 140), para 5; Constitution Committee, [*Energy Bill \[HL\]*](#) (4th Report, Session 2022–23, HL Paper 60), para 2

21 [*Nationality and Borders Bill*](#), para 12

22 [*Illegal Migration Bill*](#), para 60

DELEGATED POWERS, DELEGATED LEGISLATION AND HENRY VIII POWERS

Defining the power

29. Bills should not have broad or vaguely worded delegated powers that leave considerable discretion to ministers.²³
30. Ministers should not be given the power to do what they consider ‘appropriate’ without qualification. In particular, the ‘appropriateness’ test should not be applied to broad, undefined terms.²⁴
31. The use of guidance as ‘disguised legislation’²⁵, in place of primary or secondary legislation, should be avoided as it does not offer an adequate degree of parliamentary scrutiny.²⁶
32. A broad and subjective power to legislate by public notice is not constitutionally acceptable.²⁷
33. In drafting delegated powers, the Government must find an appropriate balance between urgency and meaningful parliamentary scrutiny and control of the executive.²⁸
34. The scrutiny of bills which contain a large number of delegated powers in lieu of policy detail, or broad powers, 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 within the bill.²⁹

Appropriate uses of delegated powers

35. The Government’s desire to future-proof legislation, by including broad delegated powers, must be balanced against the need for Parliament to scrutinise and, where necessary, constrain executive power.³⁰
36. Excessive reliance on delegated powers, Henry VIII clauses, or skeleton legislation, upsets the proper balance between Parliament and the executive.³¹

23 *The Legislative Process: The Delegation of Powers*, para 41

24 *European Union (Withdrawal) Bill*, para 167 and 176; *Northern Ireland Protocol Bill*, para 40; *Retained EU Law (Revocation and Reform) Bill*, para 23

25 The Delegated Powers and Regulatory Reform Committee has defined ‘disguised legislation’ as “instruments which are legislative in effect but often not subject to parliamentary oversight”. Delegated Powers and Regulatory Reform Committee, *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive* (12th Report, Session 2021–22, HL Paper 106), para 89

26 Constitution Committee, *Victims and Prisoners Bill* (1st Report, Session 2023–24, HL Paper 46), para 7; Constitution Committee, *European Union (Withdrawal Agreement) Bill* (1st Report, Session 2019–21, HL Paper 5), para 105; Constitution Committee, *Great British Energy Bill* (4th Report, Session 2024–25, HL Paper 50), para 7

27 Constitution Committee, *Taxation (Cross-border Trade) Bill* (10th Report, Session 2017–19, HL Paper 80), para 13

28 Constitution Committee, *European Union (Withdrawal) Bill: interim report* (3rd Report, Session 2017–19, HL Paper 19), para 44

29 Constitution Committee, *Space Industry Bill [HL]* (2nd Report, Session 2017–19, HL Paper 18), para 6; *The Legislative Process: The Delegation of Powers*, para 49

30 Constitution Committee, *Data Protection Bill [HL]* (6th Report, Session 2017–19, HL Paper 31), para 11

31 *Product Regulation and Metrology Bill*, para 14

37. 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 and make necessary amendments, and should not be used to make major policy changes.³²
38. Where potentially significant changes are to be made to law, whether assimilated former EU law or otherwise, this should be done by primary legislation, giving Parliament the opportunity to undertake detailed scrutiny.³³
39. Delegated powers should be sought only when their use can be clearly anticipated and defined, and there must be a compelling justification for them. Broad or vague powers, or those sought for the convenience of flexibility for the Government, are inappropriate.³⁴
40. It is constitutionally objectionable for the Government to seek delegated powers simply because substantive policy decisions have not yet been taken.³⁵
41. The sub-delegation of power potentially erodes democratic accountability and should only be used in very specific and limited circumstances.³⁶
42. It is constitutionally inappropriate for ministers to have the power, by regulations, to create new forms of sanctions.³⁷
43. Introducing taxes by delegated powers is constitutionally inappropriate.³⁸
44. Delegated legislation should not be used to create new criminal offences—this is generally constitutionally unacceptable.³⁹
45. Delegated powers should not be used to change in any significant way the category of a criminal offence or to increase the level of punishment applicable to any criminal offence beyond a maximum penalty, which should always be stated on the face of any bill.⁴⁰

32 [*The Legislative Process: The Delegation of Powers*](#), para 25; Constitution Committee, [*Brexit legislation: constitutional issues*](#) (6th Report, Session 2019–21, HL Paper 71), para 24; [*COVID-19 and the use and scrutiny of emergency powers*](#), para 55; [*European Union \(Withdrawal\) Bill: interim report*](#), para 10; [*Product Regulation and Metrology Bill*](#), para 21; Constitution Committee, [*Trade Bill*](#) (13th Report, Session 2017–19, HL Paper 193), para 9

33 [*Product Regulation and Metrology Bill*](#), para 11

34 [*The Legislative Process: The Delegation of Powers*](#), para 48; [*Brexit legislation: constitutional issues*](#), paras 35 and 49; Constitution Committee, [*Fisheries Bill: Commons amendment 22*](#) (18th Report, Session 2019–21, HL Paper 166), para 7; [*Immigration and Social Security Co-ordination \(EU Withdrawal\) Bill*](#), para 17; [*Strikes \(Minimum Service Levels\) Bill*](#), para 10

35 [*The Legislative Process: The Delegation of Powers*](#), para 26

36 [*Retained EU Law \(Revocation and Reform\) Bill*](#), para 30

37 Constitution Committee, [*Sanctions and Anti-Money Laundering Bill \[HL\]*](#) (8th Report, Session 2017–19, HL Paper 39), para 11; [*Brexit legislation: constitutional issues*](#), para 26

38 [*Northern Ireland Protocol Bill*](#), para 36

39 [*Sanctions and Anti-Money Laundering Bill \[HL\]*](#), para 20; [*The Legislative Process: The Delegation of Powers*](#), para 50; Constitution Committee, [*Private International Law \(Implementation of Agreements\) Bill \[HL\]*](#) (5th Report, Session 2019–21, HL Paper 55), para 21; Constitution Committee, [*Agriculture Bill*](#) (8th Report, Session 2019–21, HL Paper 80), para 31; [*Brexit legislation: constitutional issues*](#), para 30; Constitution Committee, [*Medicines and Medical Devices Bill*](#) (10th Report, Session 2019–21, HL Paper 119), para 21; [*Energy Bill \[HL\]*](#), para 10; [*Northern Ireland Protocol Bill*](#), para 36; [*Retained EU Law \(Revocation and Reform\) Bill*](#), para 33; [*Product Regulation and Metrology Bill*](#), para 25; [*Northern Ireland Troubles \(Legacy and Reconciliation\) Bill*](#), para 29

40 [*Brexit legislation: constitutional issues*](#), para 30

46. It is constitutionally unacceptable for ministers to have the power to determine something as fundamental as whether a part of our law should be treated as primary or secondary legislation.⁴¹
47. It would be unacceptable for delegated powers to be used to bypass sunset clauses.⁴²
48. In constitutional terms, creating and empowering an important public body using secondary legislation is inappropriate. Any transfer of its functions or alteration of its constitutional arrangements should be carried out by primary rather than secondary legislation.⁴³
49. As the operation of the devolution arrangements and the respective powers of the devolved institutions are constitutional matters, we would expect to see them amended by primary rather than secondary legislation—or by using a statutory procedure that requires the consent of the devolved legislatures.⁴⁴
50. It would be constitutionally questionable for parliament to circumvent the Sewel Convention by legislating in a way that foresees or intends delegated legislation to change devolved legislation in areas of devolved competence.⁴⁵
51. It is not constitutionally acceptable for ministers to invite parliament to pass secondary legislation, particularly via the negative resolution procedure, in breach of the UK’s international obligations.⁴⁶
52. Definitions with significant implications should be amended only by primary legislation unless any delegated power to do so is limited in some way.⁴⁷
53. It is unacceptable to include a power in legislation to amend future acts to make consequential provision unless a satisfactory explanation is provided by the Government.⁴⁸

Parliamentary scrutiny and other safeguards in the delegation of legislative powers

54. Delegated powers should not be used to make changes in significant policy areas. Where powers have a broad scope, there should be restrictions on the face of the Bill to limit their use to technical changes.⁴⁹
55. Broad delegated powers, including those which could be used to make policy, should be constrained as far as is possible and subject to the affirmative resolution

41 [European Union \(Withdrawal\) Bill](#), para 69

42 [European Union \(Withdrawal\) Bill](#), para 199

43 [The Legislative Process: The Delegation of Powers](#), paras 47–50; Constitution Committee, [Rivers Authorities and Land Drainage Bill](#) (22nd Report, Session 2017–19, HL Paper 375), para 6; [European Union \(Withdrawal Agreement\) Bill](#), para 62; [Brexit legislation: constitutional issues](#), para 30

44 [United Kingdom Internal Market Bill](#), para 25

45 [Nationality and Borders Bill](#), para 103; [Energy Bill \[HL\]](#), para 19; [Illegal Migration Bill](#), para 46; [Economic Crime \(Transparency and Enforcement\) Bill](#), para 16; [The Governance of the Union: Consultation, Co-operation and Legislative consent](#), para 289

46 [Northern Ireland Protocol Bill](#), para 24

47 [Illegal Migration Bill](#), para 52

48 Constitution Committee, [Data Protection and Digital Information Bill](#) (2nd Report, Session 2023–24, HL Paper 53), para 21; [Strikes \(Minimum Service Levels\) Bill](#), para 17

49 [European Union \(Withdrawal\) Bill: interim report](#), para 184

procedure. In most cases such powers should be limited by sunset clauses or other means.⁵⁰

56. It is incumbent on the Government to provide Parliament with a full explanation of, and justification for, the delegated powers it seeks.⁵¹
57. Powers given to ministers to define elements that are pivotal to the operation of the bill should not be unduly broad in scope and flexibility and should be subject to some form of parliamentary scrutiny procedure.⁵²
58. If there are exceptional circumstances which require the creation or amendment of criminal offences by regulations, these should normally be subject to the affirmative procedure.⁵³
59. The made affirmative procedure should be used only in urgent cases where it is not possible for parliament to scrutinise the instruments and approve them before they take effect.⁵⁴
60. The Government should publish, alongside the bill, drafts of the statutory instruments that might be made using delegated powers.⁵⁵
61. Where UK ministers seek a power to amend devolved legislation or make delegated legislation in devolved areas, they must be subject to a statutory requirement to consult the relevant devolved administration or seek their consent, depending on the significance of the power in question.⁵⁶
62. When strengthened scrutiny is required, the Government should use an existing model of the enhanced scrutiny procedure, rather than creating a new variation, as this adds unnecessary complexity.⁵⁷
63. Illustrative language, such as ‘for example’ and ‘among other things’, that does not meaningfully constrain broad powers is inappropriate and should not be used.⁵⁸
64. The use of emergency powers should be time bound and subject to periodic review.⁵⁹

50 [Brexit legislation: constitutional issues](#), para 40; [European Union \(Withdrawal\) Bill: interim report](#), para 54; Constitution Committee, [Healthcare \(International Arrangements\) Bill](#) (18th Report, Session 2017–19, HL Paper 291), para 14; [European Union \(Withdrawal\) Bill](#), para 219

51 [The Legislative Process: The Delegation of Powers](#), para 49; Constitution Committee, [Genetic Technology \(Precision Breeding\) Bill](#) (8th Report, Session 2022–23, HL Paper 110), para 16

52 [European Union \(Withdrawal\) Bill: interim report](#), para 21

53 Constitution Committee, [Haulage Permits and Trailer Registration Bill \[HL\]](#) (11th Report, Session 2017–19, HL Paper 90), para 7; [Brexit legislation: constitutional issues](#), para 30

54 [Taxation \(Cross-border Trade\) Bill](#), paras 8–9; [Corporate Insolvency and Governance Bill](#), para 37; [Business and Planning Bill](#), para 20; [Brexit legislation: constitutional issues](#), para 49; [United Kingdom Internal Market Bill](#), para 107; [Medicines and Medical Devices Bill](#), para 17

55 [The Legislative Process: The Delegation of Powers](#), para 45

56 [The Legislative Process: The Delegation of Powers](#), para 70; [Agriculture Bill](#), para 20; [Brexit legislation: constitutional issues](#), paras 64–65; [Retained EU Law \(Revocation and Reform\) Bill](#), paras 36–39; [Levelling-up and Regeneration Bill](#), para 21; [Respect and Co-operation: Building a Stronger Union for the 21st Century](#), para 124; [Product Regulation and Metrology Bill](#), para 33; [The Governance of the Union: Consultation, Co-operation and Legislative consent](#), paras 288, 290 and 291; Constitution Committee, [Trade \(Australia and New Zealand\) Bill](#) (11th Report, Session 2022–23, HL Paper 135), para 20

57 [The Legislative Process: The Delegation of Powers](#), para 89

58 [Brexit legislation: constitutional issues](#), para 35; [Immigration and Social Security Co-ordination \(EU Withdrawal\) Bill](#), para 17

59 [Medicines and Medical Devices Bill](#), para 16

65. There should be a presumption in favour of using sunset provisions in all regulations introduced during a national emergency.⁶⁰
66. The Government should adopt, at a minimum, the following safeguards in respect of all affirmative instruments introduced during a national emergency:
 - (a) the Government should commit to holding a debate and vote on regulations before coming into force wherever possible;
 - (b) where this is not possible:
 - (i) the Government should set out in the explanatory memorandum accompanying an instrument why it considers it necessary for the regulations to come into force before a parliamentary debate; and
 - (ii) the Government should commit to holding a debate and vote on regulations within 21 days of regulations coming into force.⁶¹

Skeleton bills

67. Skeleton bills inhibit parliamentary scrutiny and it is difficult to envisage any circumstances in which their use is acceptable. The Government must provide an exceptional justification for them. It cannot rely on generalised assertions of the need for flexibility or future-proofing.⁶²

Henry VIII powers

68. Henry VIII clauses are a departure from constitutional principle and their use 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. They cannot be justified solely by the need for speed and flexibility.⁶³
69. Henry VIII powers must come with commensurate safeguards and levels of scrutiny.⁶⁴
70. Significant Henry VIII powers, including both those that amend or repeal primary legislation, should be subject to the affirmative procedure.⁶⁵

60 *COVID-19 and the use and scrutiny of emergency powers*, para 82

61 *COVID-19 and the use and scrutiny of emergency powers*, para 83

62 *The Legislative Process: The Delegation of Powers*, para 58; Constitution Committee, *Civil Partnerships, Marriages and Deaths (Registration Etc.) Bill* (17th Report, Session 2017–19, HL Paper 279), para 6; Constitution Committee, *Pension Schemes Bill [HL]* (2nd Report, Session 2019–21, HL Paper 22); *Medicines and Medical Devices Bill*, para 5; *Schools Bill [HL]*, para 5; *Retained EU Law (Revocation and Reform) Bill*, para 6; *Strikes (Minimum Service Levels) Bill*, para 10; *Product Regulation and Metrology Bill*, para 6

63 *The Legislative Process: The Delegation of Powers*, para 67; *Civil Partnerships, Marriages and Deaths (Registration Etc.) Bill*, para 6; *Product Regulation and Metrology Bill*, para 25

64 *European Union (Withdrawal) Bill: interim report*, para 48; *Immigration and Social Security Co-ordination (EU Withdrawal) Bill*, para 22

65 *European Union (Withdrawal) Bill: interim report*, para 56; *Space Industry Bill [HL]*, para 7

THE RULE OF LAW

The independence of the judiciary

71. It is imperative that the independence of the judiciary is protected.⁶⁶
72. The rule of law requires that independent courts can adjudicate on the lawfulness of ministerial action.⁶⁷
73. It is constitutionally inappropriate for legislation to be enacted that significantly impacts the separation of powers between Parliament and the courts.⁶⁸
74. The relationship between Parliament and the judiciary is based on both parties demonstrating self-restraint and institutional deference.⁶⁹
75. Parliament is legislatively supreme, but that supremacy cannot be asserted, with constitutional propriety, to undermine other constitutional values, in particular the rule of law.⁷⁰
76. Legislative intervention by Parliament in the matter of justiciability, such as through ouster clauses, should only be resorted to in defined and exceptional circumstances.⁷¹

Retrospective legislation

77. Retrospective legislation is unacceptable other than in very exceptional circumstances.⁷²
78. When used, measures with retrospective effect must have the strongest possible justification, be drawn as narrowly as possible and not deprive individuals of the benefit of a judgment already obtained.⁷³

Legal certainty

79. The law should be free from ambiguity and uncertainty. People should have a fair opportunity to know the laws which apply to them and to be able to predict with reasonable confidence when and how legal powers can be used against them.⁷⁴

66 Constitution Committee, *Judicial Appointments: follow-up* (7th Report, Session 2017–19, HL Paper 32), para 56; Constitution Committee, *The roles of the Lord Chancellor and the Law Officers* (9th Report, Session 2022–23, HL Paper 118), para 104

67 Constitution Committee, *United Kingdom Internal Market Bill* (17th Report, Session 2019–21, HL Paper 151), para 196

68 Constitution Committee, *Safety of Rwanda (Asylum and Immigration) Bill* (3rd Report, Session 2023–24, HL Paper 63), para 13

69 Constitution Committee, *Judicial Review and Courts Bill* (12th Report, Session 2021–22, HL Paper 160), para 3

70 Constitution Committee, *Post Office (Horizon System) Offences Bill* (6th Report, Session 2023–24, HL Paper 126), para 13

71 Constitution Committee, *Dissolution and Calling of Parliament Bill* (8th Report, Session 2021–22, HL Paper 100), para 25

72 Constitution Committee, *Nationality and Borders Bill* (2nd Report, Session 2021–22, HL Paper 149), para 22; Constitution Committee, *Corporate Insolvency and Governance Bill* (7th Report, Session 2019–21, HL Paper 76), para 30; Constitution Committee, Constitution Committee, *Counter-Terrorism and Sentencing Bill* (16th Report, Session 2019–21, HL Paper 134), para 6

73 *Corporate Insolvency and Governance Bill*, para 17; Constitution Committee, *Illegal Migration Bill* (16th Report, Session 2022–23, HL Paper 200), para 29

74 Constitution Committee, *Counter-Terrorism and Border Security Bill* (14th Report, Session 2017–19, HL Paper 207), para 13; Constitution Committee, *COVID-19 and the use and scrutiny of emergency powers* (3rd Report, Session 2021–22, HL Paper 15), para 125

80. Legislation must be sufficiently clear for the courts to effectively interpret and apply the law, and thus for the separation of powers to operate effectively.⁷⁵
81. The statute book requires clarity, so provisions worded in vague or subjective terms should be avoided. For example, phrases such as ‘among other things’ that have no operative legal effect are vague and generate unnecessary uncertainty about the provision and should be removed. Signposts should be found in the Explanatory Notes and not in the bill itself.⁷⁶
82. Bills and statutory instruments should be sufficiently clear to ensure that guidance need not be relied on to interpret legislation.⁷⁷

International law

83. The responsibility of the Government to honour the state’s international obligations requires it to refrain from inviting Parliament to legislate knowingly contrary to the UK’s international obligations.⁷⁸
84. Parliamentary sovereignty means that parliament can legislate contrary to the UK’s obligations under international law. The requirement that Treaty obligations do not have effect in domestic law until ‘incorporated’ by statute ensures that rights and obligations in domestic law are not created or altered through government action in agreeing a treaty without parliamentary approval.⁷⁹
85. The rule of law requires a state to comply with its obligations in international law as in domestic law. The introduction and enactment of legislation that results in the UK violating its obligations under international law is cause for serious constitutional concern.⁸⁰

Access to justice

86. Access to, and the swift administration of, justice underpins the fundamental constitutional principle that is the rule of law.⁸¹
87. Restricting access to legal aid in all cases for individuals convicted of terrorist offences is constitutionally unsound because it risks denying those individuals access to justice altogether.⁸²

75 Constitution Committee, *European Union (Withdrawal) Bill* (9th Report, Session 2017–19, HL Paper 69), para 124

76 *European Union (Withdrawal) Bill*, para 146; Constitution Committee, *Immigration and Social Security Co-ordination (EU Withdrawal) Bill* (11th Report, Session 2019–21, HL Paper 120), para 8

77 Constitution Committee, *The Legislative Process: The Delegation of Powers* (16th Report, Session 2017–19, HL Paper 225), para 81

78 *The roles of the Lord Chancellor and the Law Officers*, para 59

79 *The roles of the Lord Chancellor and the Law Officers*, para 58

80 Constitution Committee, *Northern Ireland Protocol Bill* (6th Report, Session 2022–23, HL Paper 78), para 14; Constitution Committee, *Public Order Bill* (7th Report, Session 2022–23, HL Paper 95), para 6; Constitution Committee, *Retained EU Law (Revocation and Reform) Bill* (13th Report, Session 2022–23, HL Paper 151), para 51; *Safety of Rwanda (Asylum and Immigration) Bill*, paras 55–56; Constitution Committee, *Strikes (Minimum Service Levels) Bill* (14th Report, Session 2022–23, HL Paper 162), para 25

81 Constitution Committee, *COVID-19 and the Courts* (22nd Report, Session 2019–21, HL Paper 257), paras 6 and 127

82 Constitution Committee, *National Security Bill* (10th Report, Session 2022–23, HL Paper 119), para 24

Specific individual rights

88. It is unsatisfactory for legislation to be drafted in a way that fails to acknowledge the fundamental right to a fair hearing, both at common law and under the European Convention on Human Rights.⁸³
89. It is not constitutionally acceptable for a Secretary of State to give guidance about the potential criminal liability of a person without parliamentary oversight.⁸⁴

83 Constitution Committee, *Courts and Tribunals (Online Procedure) Bill* (21st Report, Session 2017–19, HL Paper 375), para 11

84 Constitution Committee, *Northern Ireland Troubles (Legacy and Reconciliation) Bill* (5th Report, Session 2022–23, HL Paper 70), para 24

APPENDIX 1: CONSTITUTION COMMITTEE REPORTS

Session 2017–19

Sessional report 2016–17

- None.

Space Industry Bill [HL]

- For a bill which contains a large number of delegated powers in lieu of policy detail, parliamentary 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 within the Bill. ‘Policy scoping notes’ are not a full substitute for detail on the face of the Bill or for illustrative regulations (para 6).
- Henry VIII powers to amend or repeal primary legislation should be subject to the affirmative procedure (para 7).

European Union (Withdrawal) Bill: interim report

- Delegated powers should only be used to make necessary amendments rather than substantive, more discretionary changes to implement new policies (para 10).
- There should be, on the face of the Bill, restrictions on the powers to limit the use of delegated powers to purely technical changes. Where powers have a broad scope, ministerial assurances are not sufficient (para 39).
- Powers given to ministers to define elements that are pivotal to the operation of a bill should not be unduly broad in scope and flexibility, and should be subject to some form of parliamentary scrutiny procedure (para 21).
- In drafting delegated powers, the Government must find an appropriate balance between urgency and meaningful parliamentary scrutiny and control of the executive (para 44).
- Henry VIII powers must come with commensurate safeguards and levels of scrutiny (para 48).
- For delegated powers that are broad and could be used to make substantive policy changes there should be consideration of making them subject to enhanced parliamentary procedures (para 54).
- Significant Henry VIII powers should be subject to the affirmative procedure (para 56).

The Legislative Process: Preparing Legislation for Parliament

- It is essential that, prior to the introduction of a bill which provides for significant constitutional change, the Government publishes green and white papers (para 41).

- The Government should think critically about the value of pre-legislative scrutiny for all its proposed legislation, irrespective of whether there have been prior policy papers or public consultations (para 82).

The Salisbury-Addison Convention

- None.

Data Protection Bill [HL]

- The Government's desire to future-proof legislation, by including broad delegated powers, must be balanced against the need for Parliament to scrutinise and, where necessary, constrain executive power (para 11).

Judicial Appointments: follow-up

- It is imperative that the independence of the judiciary is protected (para 56).

Sanctions and Anti-Money Laundering Bill [HL]

- It is constitutionally inappropriate for ministers to have the power, by regulations, to create new forms of sanctions. To make them constitutionally acceptable, it is important to ensure that there are sufficient safeguards and that there is adequate parliamentary scrutiny (para 11).
- A requirement for an assessment of proportionality is an important limitation on ministers' powers when making a designation affecting an individual's human rights (para 14).
- It is constitutionally unacceptable for delegated legislation to be used to create new criminal offences (para 20).

European Union (Withdrawal) Bill

- It is constitutionally unacceptable for ministers to have the power, by regulations, to determine whether law should be treated as primary or secondary legislation (para 69).
- For the separation of powers between parliament and the courts to operate effectively, legislation must be sufficiently clear (para 124).
- Phrases such as 'among other things' generate unnecessary uncertainty about a provision and should not be included in bills (para 146).
- The power of ministers to do what they consider 'appropriate' is subjective and inappropriately wide. Instead, the power should be qualified by ministers demonstrating that there are 'good reasons' for its use and can show that the use of the power is a 'reasonable course of action' (para 167).
- A subjective test of 'appropriateness' should not be applied to a broad term as that makes the regulation-making power potentially open-ended (para 176).
- For powers with a wide scope, ministerial assurances that the powers will not be used to make 'major' or 'substantive' policy changes are insufficient. The powers must be more tightly circumscribed on the face of the bill so that they do not allow for major policy changes to be effected by them (para 184).

- It would be unacceptable for powers to be used to bypass sunset clauses (para 199).
- If parliament has approved, subject to detailed and appropriate circumscription, other broad delegated powers for ministers, it would be constitutionally unacceptable to undo these restrictions and protections by conferring a general power on ministers to make ‘consequential provisions’ to alter other enactments (para 206).
- The affirmative procedure should be required for the making of any regulation which involves the making of policy (para 219).

Taxation (Cross-border Trade) Bill

- The made affirmative procedure may be acceptable only in very limited circumstances when there is sufficient justification for its use (paras 8 and 9).
- A broad and subjective power to legislate by public notice is not constitutionally acceptable, as they are not subject to any parliamentary process. A system for making determinations which are capable of affecting an individual’s legal position should ordinarily be dealt with by legislation, subject to scrutiny by Parliament (para 13).

Haulage Permits and Trailer Registration Bill [HL]

- If there are exceptional circumstances which require the creation of criminal offences by regulations, they should normally be subject to the affirmative procedure (para 7).

Ivory Bill

- None.

Trade Bill

- Delegated powers should not be used to make major policy changes (para 9).

Counter-Terrorism and Border Security Bill

- People should have a fair opportunity to know the laws which apply to them, and the law should be clear in how it will apply (para 13).

Northern Ireland (Executive Formation and Exercise of Functions) Bill

- None.

The Legislative Process: The Delegation of Powers

- It is a constitutional obligation of parliament to decide whether a proposed delegation of power is acceptable (para 16).
- Delegating legislation 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 (para 25).

- It is constitutionally objectionable for the Government to seek delegated powers simply because substantive policy decisions have not yet been taken (para 26).
- Bills should not have broad or vaguely worded delegated powers that leave considerable discretion to ministers (para 41).
- Parliamentary scrutiny is assisted when the Government publishes, alongside a bill, drafts of the statutory instruments that might be made using its delegated powers (para 45).
- Creating and empowering an important public body using secondary legislation is constitutionally inappropriate (para 47).
- 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 (para 48).
- 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. 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 (para 49).
- It is constitutionally unacceptable to create criminal offences and establish public bodies through delegated powers (para 50).
- The Government must provide an exceptional justification for the use of skeleton bills, as they inhibit parliamentary scrutiny and it is difficult to envisage any circumstances in which their use is acceptable (para 58).
- 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 (para 67).
- Where UK ministers seek a power to amend devolved legislation, they must be subject to a statutory requirement to consult the relevant devolved administration (para 70).
- Bills and statutory instruments should be sufficiently clear to ensure that guidance need not be relied on to interpret legislation (para 81).
- When strengthened scrutiny is required, the Government should use an existing model of the enhanced affirmative procedure, rather than creating a new variation, as this adds unnecessary complexity (para 89).

Civil Partnerships, Marriages and Deaths (Registration Etc.) Bill

- Skeleton bills inhibit parliamentary scrutiny. Henry VIII clauses are a departure from constitutional principle that should be contemplated only where a full and clear explanation and justification is provided (para 6).

Healthcare (International Arrangements) Bill

- Broad delegated powers must be subject to detailed scrutiny and appropriate safeguards on their usage (para 14).

European Union (Withdrawal) (No. 5) Bill

- In exceptional circumstances the fast-tracking of legislation could be acceptable, though there is a need to ensure effective parliamentary scrutiny (para 7).

Parliamentary Scrutiny of Treaties

- None.

Courts and Tribunals (Online Procedure) Bill

- It is unsatisfactory for legislation to be drafted in a way that fails to acknowledge the fundamental right to a fair hearing, both at common law and under the European Convention on Human Rights (para 11).

Rivers Authorities and Land Drainage Bill

- The creation of public bodies using delegated powers is constitutionally unacceptable, particularly if the purpose of doing so is to avoid the bill having to go through the hybrid bill procedure (para 6).

Sentencing (Pre-consolidation Amendments) Bill [HL]

- None.

The Legislative Process: The Passage of Bills Through Parliament

- Routinely fast-tracking legislation relating to Northern Ireland is unacceptable, unsustainable and should only be used for urgent matters (para 39).
- Explanatory notes are to assist understanding of the legislation, but they have no legal effect and are not to be relied on for legal interpretation (para 73).
- Pre-legislative scrutiny should be the norm rather than the exception (para 111).

Birmingham Commonwealth Games Bill [HL]

- None.

Northern Ireland (Executive Formation) Bill

- Fast-tracking legislation relating to Northern Ireland is constitutionally unacceptable save for exceptional and urgent circumstances (para 9).
- The Government should set out its justification for fast-tracking in the explanatory notes to the Bill (para 10).

Session 2019

Sessional report 2017–19

- None.

European Union (Withdrawal Agreement) Bill: interim report

- None.

Session 2019–21

European Union (Withdrawal Agreement) Bill

- For an independent body to be, and be seen to be, independent, any transfer of its functions or alteration of its constitutional arrangements should be carried out by primary rather than secondary legislation (para 62).
- Changes to the meaning of UK law should be effected by parliament rather than ministerial guidelines (para 105).
- Signposts, such as ‘see (among other things)’, that have no operative legal effect should be found in Explanatory Notes and not in the bill itself (para 109).

Pension Schemes Bill [HL]

- The Government must provide an exceptional justification for the use of skeleton bills, as they inhibit parliamentary scrutiny (para 16).

Terrorist Offenders (Restriction of Early Release) Bill

- For legislation subject to fast-tracking, the Government should set out its justification for fast-tracking in the explanatory notes to the bill (para 7).

Coronavirus Bill

- Fast-tracking is only acceptable in exceptional circumstances and with the agreement of the usual channels (para 6).

Private International Law (Implementation of Agreements) Bill [HL]

- The creation of criminal offences through delegated powers is constitutionally unacceptable (para 21).
- It is inappropriate for a whole category of international agreements to be made purely by delegated legislation. Such an approach risks undermining legal certainty (para 25).

Brexit legislation: constitutional issues

- Delegating power to make provision for minor and technical matters is a necessary part of the legislative process, but it is essential that primary legislation is used to legislate for policy and other major objectives (para 24).
- It is constitutionally inappropriate for ministers to have the power, by regulations, to create new forms of sanctions (para 26).

- The creation of criminal offences and the establishment and empowerment of public bodies by delegated powers is in general constitutionally unacceptable. Delegated powers should not be used to change in any significant way the category of a criminal offence or to increase the level of punishment applicable to any criminal offence beyond a maximum penalty, which should always be stated on the face of any bill. If, in exceptional cases, minor criminal cases are to be created or changed by statutory instruments, these should be subject to the affirmative resolution procedure (para 30).
- Delegated powers should be sought only when their use can be clearly anticipated and defined. Illustrative language that does not meaningfully constrain broad powers is inappropriate and should not be used (para 35).
- In exceptional circumstances when broad delegated powers are necessary, they should be constrained as far as is possible and subject to the affirmative resolution procedure. In most cases such powers should be limited by sunset clauses or other means (para 40).
- Delegated powers should not be created for executive convenience. These powers should be strictly limited in scope to address specific policy challenges. There should be no proliferation of the made affirmative procedure, which should be used only for urgent matters (para 49).
- While the Sewel convention does not apply to delegated legislation, formal engagement with the devolved institutions on the use of such powers should be a requirement (para 64).
- Powers for UK ministers to make delegated legislation in devolved areas, including the power to supersede law made by devolved legislatures, should include a requirement either to consult devolved ministers or to seek their consent, depending on the significance of the power in question (para 65).

Corporate Insolvency and Governance Bill

- Fast-tracking legislation should only occur where strictly necessary, as it constrains parliamentary scrutiny, limits the opportunities for parliamentarians to table and debate amendments, restricts input from stakeholders and the public, and potentially leads to poor legislation (para 5).
- Prior consultation with the public and stakeholders is not a substitute for the normal processes of legislative scrutiny and does not itself justify fast-tracking measures (para 10).
- Long-planned and permanent changes to the law do not meet the threshold of urgency and exceptional circumstances to warrant fast-tracking. It is inappropriate for such permanent changes to be fast-tracked through parliament and so subject to less debate and scrutiny (para 11).
- Where retrospective legislation is used it should be based on necessity rather than desirability. There must be a compelling reason, the legislation should be drawn as narrowly as possible and not deprive individuals of the benefit of a judgment already obtained (para 17).

- Measures with retrospective effect are exceptional and undesirable in principle, requiring the strongest possible justification (para 30).
- The made affirmative procedure should be used only for urgent measures where it is not possible for parliament to scrutinise and approve them before they take effect (para 37).

Agriculture Bill

- Powers for UK ministers to make delegated legislation in devolved areas should include a requirement either to consult devolved ministers or to seek their consent, depending on the significance of the power in question (para 20).
- The creation of criminal offences by delegated powers is in general constitutionally unacceptable (para 31).

Business and Planning Bill

- Fast-tracking should only occur where strictly necessary (para 5).
- It is inappropriate for permanent changes to be fast-tracked through parliament (para 7).
- The affirmative procedure, rather than the made affirmative, should be used whenever possible (para 20).

Medicines and Medical Devices Bill

- Skeleton bills inhibit parliamentary scrutiny, and the Government must provide an exceptional justification for them (para 5).
- The use of emergency powers should be time bound and subject to periodic review (para 16).
- The Government should seek the made affirmative resolution procedure sparingly and only for urgent measures, such as emergency powers (para 17).
- The creation of criminal offences through delegated powers is constitutionally unacceptable save for exceptional circumstances (para 21).

Immigration and Social Security Co-ordination (EU Withdrawal) Bill

- The statute book requires clarity, so provisions worded in vague or subjective terms should be avoided, especially in an area of the law which is already complex and difficult to navigate and understand (para 8).
- Delegated powers should be sought only when their use can be clearly anticipated and defined. Illustrative language, such as “for example” and “among other things”, that does not meaningfully constrain broad powers is inappropriate and should not be used (para 17).

A Question of Confidence? The Fixed-term Parliaments Act 2011

- None.

Parliamentary Constituencies Bill

- None.

Domestic Abuse Bill

- Effective pre-legislative scrutiny is valuable for enhancing the capacity of parliament to influence and improve legislation at a formative stage, leading ultimately to better legislation (para 4).

Trade Bill

- None.

Counter-Terrorism and Sentencing Bill

- There needs to be a compelling reason in the public interest for a departure from the general principle that retrospective legislation is undesirable (para 6).

United Kingdom Internal Market Bill

- Six weeks should be considered a minimum feasible consultation period, save in circumstances which would generally be recognised as exceptional (para 7).
- Significant constitutional legislation should be subject to pre-legislative scrutiny. This requirement should be departed from only in exceptional circumstances (para 11).
- As the operation of the devolution arrangements and the respective power of the devolved institutions are constitutional matters, they should be amended by primary rather than secondary legislation—or by using a statutory procedure that requires the consent of the devolved legislatures (para 25).
- The made affirmative procedure should be used sparingly by the Government and only for urgent measures. For important policy areas, changing the law with no prior parliamentary scrutiny is unacceptable (para 107).
- Restriction of judicial review by ministerial regulation-making powers would be an unacceptable breach of the rule of law. The rule of law requires that independent courts can adjudicate on the lawfulness of ministerial action (para 195 and 196).

Fisheries Bill: Commons amendment 22

- The Government should seek delegated powers in bills only when they are necessary and their use is anticipated (para 7).

Covert Human Intelligence Sources (Criminal Conduct) Bill

- None.

Overseas Operations (Service Personnel and Veterans) Bill

- None.

European Union (Future Relationship) Bill

- Fast-tracking of bills is only acceptable in exceptional circumstances and with the agreement of the usual channels (para 6).
- When a bill is fast-tracked the Government should include sunset clauses and review provisions (para 8).

COVID-19 and the Courts

- Access to justice underpins the fundamental constitutional principle that is the rule of law (para 6).
- The swift administration of justice is a vital public service which underpins the rule of law (para 127).
- The jury system should not be altered without full parliamentary debate preceded by evidence on the potential impact of changes on case outcomes, access to justice and public perceptions of the criminal justice system (para 233).

Abortion (Northern Ireland) Regulations 2021

- None.

Session 2021–22COVID-19 and Parliament

- None.

Sessional report 2019–21

- None.

COVID-19 and the use and scrutiny of emergency powers

- Emergency powers are lent, not granted, by the legislature to the executive, and such powers should be returned as swiftly and completely as possible, avoiding any spill over into permanence. When a government decides to fast-track legislation, it should do so for legitimate and urgent reasons only, limiting parliamentary scrutiny to the extent strictly necessary (para 21).
- Significant policy decisions should be enacted in primary legislation, subject to full scrutiny by parliament (para 55).
- There should be a presumption in favour of using sunset provisions in all regulations introduced during a national emergency. They should expire after three months unless renewed by a resolution of both houses (para 82).
- The Government should adopt, at a minimum, the following safeguards in respect of all affirmative instruments introduced during a national emergency:
 - the Government should commit to holding a debate and vote on regulations before coming into force wherever possible.
- where this is not possible:

- the Government should set out in the explanatory memorandum accompanying an instrument why it considers it necessary for the regulations to come into force before a parliamentary debate; and
- the Government should commit to holding a debate and vote on regulations within 21 days of regulations coming into force (para 83).
- Legal certainty is an essential component of the rule of law. In order for people to understand what the law requires them to do, or refrain from doing, the law should be free from ambiguity and uncertainty. Ordinary people must be able to predict with reasonable confidence when and how legal powers can be used against them, on the basis of clear and accessible information (para 125).

Environment Bill

- None.

Telecommunications (Security) Bill

- None.

Revision of the Cabinet Manual

- None.

Police, Crime, Sentencing and Courts Bill

- Legislative scrutiny is hindered by omnibus bills (para 4).
- Bills of significant size and complexity impede proper legislative scrutiny in parliament (para 5).

Dissolution and Calling of Parliament Bill

- The use of ouster clauses should only be resorted to in defined and exceptional circumstances (para 25).

Health and Care Bill

- None.

Respect and Co-operation: Building a Stronger Union for the 21st Century

- Where the UK Parliament legislates in devolved areas without consent it should demonstrate that the particular circumstances require it to do so. In any event, the UK Government should always demonstrate that it has taken all reasonable steps to secure consent. Other than in exceptional circumstances, the UK Government ought not to seek to legislate in devolved areas without consent. While the convention does not technically apply to secondary legislation, the UK Government should still seek consent before acting in this area (para 124).

Nationality and Borders Bill

- While on occasion the use of placeholder clauses is understandable, the delayed introduction of so many significant clauses, the legal implications of

which are in some cases far from clear, is unacceptable. This must not become a normal way of legislating (para 12).

- Retrospective legislation is unacceptable other than in very exceptional circumstances (para 22).
- It would be constitutionally questionable for parliament to circumvent the Sewel convention by legislating in a way that foresees or intends delegated legislation to change devolved legislation in areas of devolved competence (para 103).

Judicial Review and Courts Bill

- The relationship between Parliament and the judiciary is based on both parties demonstrating self-restraint and institutional deference (para 3).

Elections Bill

- Laws of constitutional significance should be as non-partisan and uncontroversial as possible (para 5).

Economic Crime (Transparency and Enforcement) Bill

- Legislation should be fast-tracked only when it is a proportionate, justified and appropriate response to the matter in hand and fundamental constitutional rights and principles would not be jeopardised. Fast-tracking is acceptable only in exceptional circumstances and with the agreement of the usual channels (para 5).
- If a fast-tracked bill does not contain a sunset clause the Government should explain why (para 8).
- Where the UK Parliament legislates in devolved areas without consent it should demonstrate that the particular circumstances require it to do so. In any event, the UK Government should always demonstrate that it has taken all reasonable steps to secure consent. Other than in exceptional circumstances, the UK Government ought not to seek to legislate in devolved areas without consent. While the convention does not technically apply to secondary legislation, the UK Government should still seek consent before acting in this area. It would be constitutionally questionable for Parliament to circumvent the convention by legislating in a way that foresees or intends delegated legislation to change devolved legislation in areas of devolved competence (para 16).

Session 2022–23

Schools Bill [HL]

- The Government must provide exceptional justification for the use of framework legislation that does not rely on generalised assertions about flexibility or future-proofing (para 5).
- Six weeks is the minimum feasible consultation period, save in exceptional circumstances (para 11).

Identity and Language (Northern Ireland) Bill [HL]

- Where the UK Parliament legislates in devolved areas without consent it should demonstrate that the particular circumstances require it do so. In any event, the UK Government should always demonstrate that it has taken all reasonable steps to secure consent. Other than in exceptional circumstances, the UK Government ought not to seek to legislate in devolved areas without consent (para 9).
- It is undesirable for parliament to be invited to legislate on a matter within devolved competence without the consent of the relevant devolved legislature unless all reasonable steps have been taken to secure consent (para 12).

Higher Education (Freedom of Speech) Bill

- None.

Energy Bill [HL]

- The constitutionally important process of legislative scrutiny is hindered by omnibus bills which include too wide a range of proposals, all inherently significant in their own right (para 2).
- It is constitutionally unacceptable to create criminal offences through delegated powers (para 10).
- It would be constitutionally questionable for parliament to circumvent the Sewel convention by legislating in a way that foresees or intends delegated legislation to change devolved legislation in areas of devolved competence (para 19).

Northern Ireland Troubles (Legacy and Reconciliation) Bill

- It is constitutionally inappropriate for a significant measure to pass without legislative consent (para 16).
- It is not constitutionally acceptable for the Secretary of State to give guidance about the potential criminal liability of a person without parliamentary oversight (para 24).
- The creation of criminal offences through delegated legislation is constitutionally unacceptable (para 29).

Northern Ireland Protocol Bill

- Bills should be lawful in international law (para 14).
- The rule of law requires a state to comply with its obligations in international law as in domestic law. The introduction and enactment of legislation that results in the UK violating its obligations under international law is therefore cause for serious constitutional concern (para 16).
- Legislation that puts the UK in breach of international law undermines the rule of law and trust in the UK in fulfilling future treaty commitments (para 18).
- It undermines the rule of law for the UK Government to invite Parliament to pass legislation in breach of the UK's international obligations. Enabling

ministers to do this through secondary legislation, particularly via the negative resolution procedure, is even less constitutionally acceptable (para 24).

- Creating new offences or introducing taxes by delegated powers is constitutionally inappropriate (para 36).
- The power of ministers to do what they consider ‘appropriate’ is subjective and inappropriately wide (para 40).
- Where the UK Parliament legislates in devolved areas without consent it should demonstrate that the particular circumstances require it to do so (para 46).

Public Order Bill

- It is important to ensure that legislation is compliant with the UK’s international law obligations, including the European Convention on Human Rights (para 6).

Genetic Technology (Precision Breeding) Bill

- The inclusion of delegated powers should be sufficiently justified (para 16).

The roles of the Lord Chancellor and the Law Officers

- Parliamentary sovereignty means that parliament can legislate contrary to the UK’s obligations under international law. It ensures that rights and obligations in domestic law are not created or altered through Government action in agreeing a treaty without parliamentary approval (para 58).
- The responsibility of the Government to honour the state’s international obligations requires it to refrain from inviting parliament to legislate knowingly contrary to the UK’s international obligations (para 59).
- Judicial independence is a vital element of the UK’s uncodified constitution (para 104).
- All those in government have a duty to defend the rule of law and should be mindful of the fundamental tenets on which it rests (para 134).

National Security Bill

- Restricting access to legal aid in all cases for individuals convicted of terrorist offences is constitutionally unsound because it risks denying those individuals access to justice altogether (para 24).

Trade (Australia and New Zealand) Bill

- It is important for the UK Government to make every effort to achieve consent in the exercise of delegated powers in devolved areas (para 20).

Levelling-up and Regeneration Bill

- The size and complexity of omnibus bills impede proper legislative scrutiny in Parliament (para 5).

- Where UK ministers seek a power to amend devolved legislation, they must be subject to a statutory requirement to consult the relevant devolved administration (para 21).

Retained EU Law (Revocation and Reform) Bill

- The Government must provide an exceptional justification for the use of skeleton bills, particularly where it can be described as ‘hyper-skeletal’ (para 6).
- ‘Appropriateness’ should not be used as a test for the use of powers, particularly when it involves a policy choice (para 23).
- The sub-delegation of power potentially erodes democratic accountability and should only be used in very specific and limited circumstances (para 30).
- The use of delegated legislation to create criminal offences is in general constitutionally unacceptable (para 33).
- Where UK ministers seek a power to amend devolved legislation, they must be subject to a statutory requirement to consult the relevant devolved administration (para 36).
- UK ministers should make regulations in areas of devolved competence only after consulting the relevant devolved administration (para 39).
- The rule of law requires a state to comply with its obligations in international law as in domestic law (para 51).

Strikes (Minimum Service Levels) Bill

- 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 (para 10).
- Skeleton bills inhibit parliament 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. It cannot rely on generalised assertions of the need for flexibility or future-proofing (para 10).
- It is now common practice to include in bills a power to amend future Acts to make consequential provision. However, as a matter of principle, it is unacceptable to include such a power in legislation unless a satisfactory explanation is provided by the Government (para 17).
- It is important to ensure that legislation is compliant with the UK’s international obligations (para 25).

Online Safety Bill

- None.

Illegal Migration Bill

- Retrospective legislation should be properly justified and based on a compelling reason (para 29).
- The Sewel convention does not apply to delegated legislation but it would be constitutionally questionable for parliament to circumvent that convention by legislating in a way that foresees or intends to change devolved legislation in areas of devolved competence (para 46).
- The use of placeholder clauses for constitutionally significant provisions is unacceptable and reduces the opportunity for the finalised policy to be considered (para 60).

Permanent secretaries: their appointment and removal

- None.

Session 2023–24Victims and Prisoners Bill

- The use of guidance as ‘disguised legislation’ does not offer an adequate degree of parliamentary scrutiny (para 7).

Data Protection and Digital Information Bill

- As a matter of principle, it is unacceptable to include such a power in legislation to amend future acts to make consequential provision unless a satisfactory explanation is provided by the Government (para 21).

Safety of Rwanda (Asylum and Immigration) Bill

- There are constitutional consequences when legislation is enacted that significantly impacts the separation of powers. This is constitutionally inappropriate because it provides a potential precedent in which legislation could be used to effectively reverse factual conclusions, jeopardising the rule of law as well as the separation of powers (para 13).
- Respect for the rule of law requires respect for international law (para 55).
- Legislation which puts the UK in breach of international law undermines the rule of law (para 56).

Economic Activity of Public Bodies (Overseas Matters) Bill

- Where the UK parliament legislates in devolved areas without consent it should demonstrate that the particular circumstances require it to do so. Other than in exceptional circumstances, the UK Government ought not to seek to legislate in devolved areas without consent (para 22).

Litigation Funding Agreements (Enforceability) Bill

- None.

Post Office (Horizon System) Offences Bill

- The independence of the judiciary, and the separation of the judicial function from the executive and legislative functions of the state, is a fundamental facet of the rule of law (para 9).
- Parliament is legislatively supreme, but that does not mean that it can, with constitutional propriety, assert that supremacy to undermine other constitutional values, in particular the rule of law (para 13).
- It is a fundamental principle of our constitution that the determination of guilt and innocence is a matter for the courts and that parliament should not legislate to overturn criminal convictions (para 24).

Session 2024–25

The Governance of the Union: Consultation, Co-operation and Legislative consent

- Where the UK Parliament legislates in devolved areas without consent it should demonstrate that the particular circumstances require it to do so. In any event, the UK Government should always demonstrate that it has taken all reasonable steps to secure consent. Other than in exceptional circumstances, the UK Government ought not to seek to legislate in devolved areas (para 217).
- Where UK legislation empowers UK ministers to make secondary legislation in areas of devolved competence, we have supported the inclusion of a requirement to consult relevant devolved ministers (para 288).
- Where UK legislation introduces Henry VIII powers which empower UK ministers to alter acts or secondary legislation of the devolved legislatures, we have said it would be “constitutionally questionable” for Parliament to circumvent the Sewel convention “by legislating in a way that foresees or intends delegated legislation to change devolved legislation in areas of devolved competence” (para 289).
- Powers for UK ministers to make delegated legislation in devolved areas, including the power to supersede law made by devolved legislatures, should include a requirement either to consult devolved ministers or to seek their consent, depending on the significance of the power in question (para 290).
- While the Sewel convention does not technically apply to secondary legislation, the UK Government should still seek consent before acting in this area (para 291).

Product Regulation and Metrology Bill

- 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 ... it cannot rely on generalised assertions of the need for flexibility or future-proofing (para 6).
- Where potentially significant changes are to be made to law, whether assimilated former EU law or otherwise, this should be done by primary

legislation, giving Parliament the opportunity to undertake detailed scrutiny (para 11).

- Excessive reliance on delegated powers, Henry VIII clauses, or skeleton legislation, upsets the proper balance between Parliament and the executive (para 14).
- Significant policy decisions should properly be scrutinised by Parliament and implemented by way of primary legislation (para 21).
- New criminal offences should be made by primary legislation (para 25).
- Henry VIII clauses are a departure from constitutional principle and the Government should provide a full and clear explanation and justification for their inclusion (para 29).
- Formal engagement with the devolved administrations on the use of delegated powers in areas of devolved competence should be a requirement. UK Ministers should either consult devolved ministers or seek their consent, depending on the significance of the delegated power in question (para 33).
- In circumstances where there is disagreement between the UK Government and one or more of the devolved governments as to whether legislative consent is required, close and timely engagement between governments is necessary to address differences of opinion and, where possible, reach consensus (para 39).

Data (Use and Access) Bill [HL]

- None.

Great British Energy Bill

- ‘Disguised legislation’ is of constitutional concern when there is no parliamentary oversight over the making of the provisions (para 7).

House of Lords (Hereditary Peers) Bill

- None.

APPENDIX 2: GLOSSARY

Consequential provisions: Powers in an Act to amend existing, and potentially future, Acts of Parliament as a consequence of the provisions of that Act. These powers are usually delegated to a Minister and exercised by the making of regulations.

Disguised legislation: Instruments (such as guidance or codes of practice) which are legislative in effect but which may not be subject to adequate, or possibly any, parliamentary oversight.⁸⁵

Fast-track bills: Bills which complete all their parliamentary stages in a shortened timescale.⁸⁶

Henry VIII powers: Powers in a bill which enable a minister, by secondary legislation, to amend, repeal or otherwise alter the effect of an Act of Parliament.⁸⁷

Omnibus bills: An informal term for bills before Parliament which combine a number of potentially disparate matters (also known as portmanteau bills).

Ouster clause: A provision which seeks to have the effect of preventing the courts from adjudicating on a decision in certain circumstances in which they would otherwise have done so.⁸⁸

Placeholder clauses: Clauses in bills, provisional and often skeletal in nature, which the Government intend to replace later in the legislative process with more substantive provisions.

Retrospective legislation: Legislation that operates on matters taking place before its enactment, e.g. by penalizing conduct that was lawful when it occurred.⁸⁹

Sewel convention: A constitutional convention that the UK Parliament will not normally legislate with regard to devolved matters in Scotland, Wales or Northern Ireland without the consent of the relevant devolved legislature (expressed through the passage of a legislative consent motion).

Skeleton bills: Bills that set out the principles for a policy but which lack substantial detail on how that policy will be given practical effect. The formulation of the detail of the policy is left to secondary legislation. They are also known as ‘framework bills’.⁹⁰

Sunset clause: A provision in a bill which provides that the Act, or provisions of it, will cease to have effect after a certain date.

85 Delegated Powers and Regulatory Reform Committee, *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive* (12th Report of Session 2021–22, HL Paper 106), para 89

86 House of Lords Library, *Fast-tracking legislation* (12 September 2023): <https://lordslibrary.parliament.uk/fast-tracking-legislation/> [accessed 24 March 2025]

87 Delegated Powers and Regulatory Reform Committee, *Democracy Denied?* (12th Report of Session 2021–22, HL Paper 106), para 16

88 Daniel Greenberg, *Craies on Legislation*, 13th Edition (London: Sweet & Maxwell, 2025), pp 847–856

89 Elizabeth A. Martin (ed.), *Oxford Dictionary of Law*, Fourth edition, (Oxford: Oxford University Press, 1997), p 406

90 House of Lords Library, *Skeleton bills and delegated powers* (21 December 2021): <https://lordslibrary.parliament.uk/skeleton-bills-and-delegated-powers/> [accessed 24 March 2025]