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Secondary Legislation Scrutiny Committee

20th Report of Session 2021–22

Government by Diktat: A call to return power to Parliament

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Secondary Legislation Scrutiny Committee

The Committee's terms of reference, as amended on 13 May 2021, are set out on the website but are, broadly:

To report on draft instruments published under paragraph 14 of Schedule 8 to the European Union (Withdrawal) Act 2018; to report on draft instruments and memoranda laid before Parliament under sections 8 and 23(1) of the European Union (Withdrawal) Act 2018 and section 31 of the European Union (Future Relationship) Act 2020.

And, to scrutinise –

(a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;

(b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in the terms of reference.

The Committee may also consider such other general matters relating to the effective scrutiny of secondary legislation as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

Baroness Bakewell of Hardington Mandeville
Rt Hon. Lord Chartres
Rt Hon. Lord Cunningham of Felling
Lord German
Viscount Hanworth
Lord Hodgson of Astley Abbotts (Chair)
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Registered interests

Information about interests of Committee Members can be found in the last Appendix to this report.

Publications

The Committee's Reports are published on the internet at https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/

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Further Information

Further information about the Committee is available at https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/

The progress of statutory instruments can be followed at https://statutoryinstruments.parliament.uk/

The National Archives publish statutory instruments with a plain English explanatory memorandum on the internet at http://www.legislation.gov.uk/uksi

Contacts

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CONTENTS

	Page
Summary	2
Chapter 1: Introduction	5
Background	5
Range of issues of concern	6
Further collaboration with the DPRRC	7
End of session reports	7
Acknowledgements	8
Structure of the report	8
Chapter 2: Shared concerns of the SLSC and the DPRRC about primary legislation	9
Threshold between primary and secondary legislation	9
Need to re-set the balance between Parliament and the government	9
Overlapping interests of the SLSC and the DPRRC	9
Re-setting the balance and the principles of parliamentary democracy	12
Skeleton legislation	13
Secondary legislation and skeleton bills and clauses	15
Further inquiry on re-setting the balance of power between Parliament and the government	16
Legislative sub-delegation of power	17
Chapter 3: Issues of concern to the SLSC about secondary legislation	18
Secondary legislation and guidance	18
Blurring of the boundary	18
Use of guidance "to amplify legislation"	20
Quality of legislation and supporting information	22
Senior responsible owners (SROs)	23
Impact assessments	23
Coronavirus instruments	23
More generally	24
Sunset provision	24
Restricting parliamentary scrutiny	25
Looking ahead: volume and flow of statutory instruments	26
Summary of conclusions and recommendations	27
Appendix 1: Extracts from executive summaries of two SLSC reports	31
Appendix 2: List of Members (and length of parliamentary experience) and Members' interests	33

Evidence is published online at https://committees.parliament.uk/oralevidence/2063/default/.

Q in footnotes refers to a question in oral evidence.

SUMMARY

This Report is intended to issue a stark warning—that the balance of power between Parliament and government has for some time been shifting away from Parliament, a trend accentuated by the twin challenges of Brexit and the COVID-19 pandemic. **A critical moment has now been reached when that balance must be re-set: not restored to how things were immediately before these exceptional recent events but re-set afresh.**

Over recent years, bills—which become Acts of Parliament and which are subject to robust scrutiny in their passage through Parliament—have often provided only the broadest outlines of the direction of policy travel, with all the detail that will have a direct impact on individual members of the public left to secondary legislation. And the more that is left to secondary legislation, the greater the democratic deficit because, in contrast to primary legislation, there is relatively scant effective parliamentary scrutiny of secondary legislation; it cannot be amended; in some cases, it may become law without any parliamentary debate; and, because the decision to accept or reject is all or nothing, very rarely will the Houses reject it.

To underline our acute concern, in preparing this report we have adopted the novel approach of working in close collaboration with the Delegated Powers and Regulatory Reform Committee (DPRRC). We have held joint evidence sessions and shared our findings, and, through our parallel reports, the two Committees have been able to join forces on:

- asserting the fundamental importance of **the appropriate balance between primary and secondary legislation** as the foundation of the relationship between Parliament and government;
- seeking to bring about culture change by recommending that ministers, when deciding whether a bill should include delegated legislative powers, should take into account to the fullest extent possible **the principles of parliamentary democracy**, namely parliamentary sovereignty, the rule of law and the accountability of government to Parliament;
- restricting **the use of skeleton bills (or skeleton clauses)**—bills (or clauses) so devoid of content that they leave the real operation of the law to ministers and secondary legislation—by recommending that such bills are used only in the most exceptional circumstances and where their use can be fully justified; and further recommending that the exercise of powers conferred by skeleton legislation is balanced by new statutory safeguards to ensure that the absence of adequate parliamentary scrutiny at the primary legislation stage is recompensed by a more challenging scrutiny procedure at the secondary legislation stage; and
- ensuring that, where secondary legislation itself delegates legislative powers (called **legislative sub-delegation of power**), the explanatory memorandum accompanying the instrument makes this clear and provides a full justification.

We also raise issues of specific concern to the SLSC, including: the need to maintain a clear **distinction between legislation and guidance**; the

importance of **high quality legislation and supporting materials**, and in particular the need for **impact assessments** or impact information to be available *at the same time that an instrument is considered by the Houses*—afterwards is too late for effective parliamentary scrutiny; greater use of sunset provisions; and allowing **sufficient opportunity for effective parliamentary scrutiny.**

We believe that the House and the wider public will have a keen interest in these important issues that go to the heart of our constitution and of our parliamentary democracy. Re-setting the balance of power is a matter of urgency—but, whatever is done now, we cannot allow complacency to take hold in the future. We therefore share with the DPRRC the view that **end of session reports by the SLSC and the DPRRC, along with relevant reports of the Joint Committee on Statutory Instruments and the Constitution Committee, should form the basis for regular debates in the House.**

Government by Diktat: A call to return power to Parliament

CHAPTER 1: INTRODUCTION

1. It is generally accepted that the pace of change in our society has quickened dramatically in recent years. There are many reasons for this but the impacts of new technology, social media and the rolling 24/7 news cycle would feature large in any list. As a result, the somewhat stately pace at which primary legislation is made has come under strain. To meet this challenge, governments of the day have increasingly drafted primary legislation which provides only the broadest outlines of the direction of policy travel.[1] All the detail—the parts which will have a direct impact on individual members of the public–is left to secondary legislation which is subject to a much lower level of parliamentary scrutiny.[2] This represents a significant shift in the balance of power between Parliament (the legislature) and government (the executive), and we believe that the public would be astonished if it became widely known how much legislation is passed without effective scrutiny by Parliament. This long-term trend has been given greater impetus by the twin challenges of UK withdrawal from the EU and the COVID-19 pandemic. To meet those challenges, Parliament has had to pass a great deal of primary and secondary legislation, often at speed and in quick succession. Much of that legislation has resulted in a further significant shift in the balance of power between Parliament and government.

2. **But, whatever the reason, if because of modern conditions Parliament is being asked to accept new ways of legislating, then it is surely right that the Government must stand ready to accept new methods of scrutiny and of holding them to account. So, like others, we take the view that there is now an urgent need to take stock and to re-balance that relationship.**

3. We acknowledge that this is not a light undertaking. If the weight of legislation continues to increase to match the complexity of modern life and if, at the same time, the balance of power is re-set so that Parliament regains greater control over legislation—either by requiring bills to contain greater detail on their face or by applying more robust scrutiny procedures to secondary legislation—then we recognise that the capacity of Parliament to handle this greater workload will have to be addressed. This is in part a practical matter, and we would look to the Government and the two Houses to support and facilitate the changes needed within Parliament to expand the resources of the two Houses to meet this challenge.

Background

4. Earlier this year, on 20 April, we took oral evidence from three Permanent Secretaries: Dame Elizabeth Gardiner, First Parliamentary Counsel, and Permanent Secretary, Government in Parliament Group; Susanna

1 This sort of primary legislation is sometimes called skeleton or framework legislation.

2 Acts of Parliament are primary legislation. Secondary legislation, also called delegated or subordinate legislation, usually takes the form of statutory instruments which are made by ministers (or other bodies) using powers conferred by an Act.

McGibbon, Treasury Solicitor and Permanent Secretary, Government Legal Department; and, Tamara Finkelstein, Permanent Secretary, Department for Environment, Food and Rural Affairs, and Head of the Civil Service Policy Profession. This is not the first time we have held such a session. Although individual officeholders have changed—this was the first occasion for Ms McGibbon and Ms Finkelstein—we have taken evidence from the three Permanent Secretaries on previous occasions in 2016, 2017 and 2018.[3]

5. The theme of those earlier evidence sessions was the quality of information provided in support of secondary legislation. Over the years these sessions have, in our view, led to a helpful and productive relationship between the Committee and departments, with welcome developments such as implementation of a 7-point improvement plan to improve secondary legislation scrutiny support. This included: creation of an SI (Statutory Instrument) Hub which, amongst other things, examines all Secondary Legislation Scrutiny Committee (SLSC) and Joint Committee on Statutory Instruments (JCSI) reports and draws out key concerns; improvements in training; the appointment of Senior Responsible Owners (SROs) in each department[4] with responsibility for all secondary legislation in the department (both the process and the quality of legislation); and new guidance on the preparation of Explanatory Memoranda (EMs).

Range of issues of concern

6. Our approach to the most recent evidence session, on this occasion, was different. First, given our more general concern about the relationship between Parliament and government, we took a broader view of the issues we wished to raise. Second, given the range of questions we had, we also adopted a different approach to evidence gathering. We began by inviting written responses to fifteen questions ("the written evidence"), the answers to which then formed the basis of questions at the oral evidence session. The questions covered the following subject areas:

- The need for greater clarity about the threshold between primary and secondary legislation.
- Concern about the quality of legislation, and the absence of adequate evidence and other supporting information to underpin proposed policy changes.
- Lack of impact assessments for coronavirus instruments.
- Incomplete revocation of instruments and use of sunset provisions.
- Blurring of the distinction between legislation and guidance.
- The increasing use of skeleton bills.
- Restrictions on parliamentary scrutiny.

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3 12 July 2016, 12 September 2017, and 21 November 2018. See, respectively, the following reports of the SLSC: *7th Report* (Session 2016–17, HL Paper 32), p 14; *5th Report* (Session 2017–19, HL Paper 20), p 5, and *43rd Report* (Session 2017–19, HL Paper 248), p 1. The Committee had arranged to hold the fourth session earlier than April 2021, but this was postponed in March 2020 because of the pandemic.

4 The written evidence can be found on the Committee's webpage: https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/8/scrutiny-evidence/.

- The volume and flow of statutory instruments.

7. Finally, we invited members of the Delegated Powers and Regulatory Reform Committee (DPRRC) to join us. Later, on 12 May, the DPRRC held an oral evidence session with the Rt Hon. Jacob Rees-Mogg MP, Lord President of the Council and Leader of the House of Commons, to which members of the SLSC were invited.[5]

Further collaboration with the DPRRC

8. The SLSC and the DPRRC have complementary functions. The DPRRC scrutinises provisions in bills which confer powers on ministers[6] to make secondary legislation. The SLSC is responsible for the scrutiny of the secondary legislation itself. There are therefore some issues about which the two Committees have overlapping interests, the principal one being the boundary between primary and secondary legislation and, within that, the use of skeleton bills and skeleton clauses (see paragraphs 30 to 42).

9. This commonality of interest prompted, in September 2020, a joint letter from the two Committees, along with the Constitution Committee, to the Rt Hon. Michael Gove MP, Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office, and Mr Rees-Mogg, complaining about the use of skeleton bills. Mr Rees-Mogg's response, along with further correspondence, has been very useful and we welcome his willingness to engage with the Committee.[7]

10. Following that joint correspondence and the shared evidence sessions, the SLSC and the DPRRC have continued to collaborate. As a result, we have been able, by sharing our findings, to develop some recommendations that fall within the common ground between us. For this reason, some of our recommendations refer to recommendations made by the DPRRC in its report, published in parallel with this report.[8]

End of session reports

11. It has been the practice of the SLSC to publish an annual report on the work of the Committee, including an analysis of issues of concern and statistical information. Usually, they are published as the final report of a session although, because of recent extended sessions, we have published interim reports as well. The most recent report was published at the end of April 2021.[9] **We welcome the suggestion made by the DPRRC in its parallel report that end of session reports by the SLSC and the DPRRC, along with relevant reports of the JCSI and the Constitution Committee, might form the basis for regular debates in the House on issues relating to the quality of legislation and supporting explanatory materials, and the wider issues raised in the reports.**

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5 The transcript of the evidence session can be found on the Committee's webpage: SLSC, Corrected oral evidence: Departmental support of secondary legislation (21 April 2021): https://committees.parliament.uk/oralevidence/2063/default/.

6 Acts of Parliament confer delegated powers on ministers and other bodies or individuals. For simplicity, in this report we refer only to ministers.

7 The correspondence can be found on the Committee's webpage: https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/3/correspondence/.

8 We refer in this report to the DPRRC's report as "the DPRRC's parallel report".

9 SLSC, *54th Report* (Session 2019–21, HL Paper 276). An interim report was published in December 2020. SLSC, *39th Report* (Session 2019–21, HL Paper 200). Extracts of the executive summaries of the two reports are set out in Appendix 1 to this report.

Acknowledgements

12. We are grateful to the three Permanent Secretaries for their written and oral evidence. We would also like to thank members of the DPRRC for participating in our evidence session with the Permanent Secretaries and for inviting members of the SLSC to contribute to the evidence session with the Lord President. We further thank the DPRRC for joining us in adopting an innovative and collaborative approach in relation to the development of recommendations.

Structure of the report

13. In the remainder of the report, we will consider many of the subject areas listed above. Chapter 2 will focus on issues in which the DPRRC has a shared interest. Chapter 3 will focus on issues specific to the SLSC. The final chapter sets out a list of observations and recommendations made in this report. Appendix 1 sets out extracts from the Committee's interim and end of session reports (Session 2019-21), and Appendix 2 lists the membership of the Committee (and members' parliamentary experience).

CHAPTER 2: SHARED CONCERNS OF THE SLSC AND THE DPRRC ABOUT PRIMARY LEGISLATION

Threshold between primary and secondary legislation

Need to re-set the balance between Parliament and the government

14. The threshold between primary and secondary legislation is central to the balance of power between Parliament and government. Parliament is the sovereign law-making body but, routinely, and for good reason, will delegate legislative powers so that the finer detail of legislation can be set out in secondary legislation. It is, therefore, usual practice for bills (which become Acts of Parliament) to include provision conferring power on ministers to make secondary legislation (usually in the form of statutory instruments).

15. In recent years, the balance of power between Parliament and government has shifted significantly towards the government, a trend that has been accentuated by Brexit and the pandemic. We acknowledge that even before these exceptional times, concerns had been raised, going back as far as the Committee on Ministers' Powers (the Donoughmore Committee) which reported in 1932;[10] later by Lord Rippon of Hexham during debates in the House of Lords in 1990, for example,[11] and then in 1992 when the Select Committee on the Work of the House (chaired by the Earl Jellicoe) published a report which recommended the appointment of a Delegated Powers Scrutiny Committee because of "the considerable disquiet over the problem of wide and sometimes ill-defined order making powers".[12] **But, as we said in our introduction, we believe, like the DPRRC and others, that a critical moment has been reached when it is imperative that efforts are made to re-set the relationship between Parliament and government—and not to how it was immediately before Brexit and the pandemic but afresh, to reflect the modern conditions of government.**

Overlapping interests of the SLSC and the DPRRC

16. Scrutiny of the delegation of legislative power is the principal concern of the DPRRC. Its terms of reference charge it with advising the House on whether a delegation of legislative power is appropriate and, if it is, whether it is subject to an appropriate level of parliamentary scrutiny. The DPRRC has described its role as being "to police the boundary between primary and delegated legislation"—and, in so doing, "playing a critical role in protecting the integrity of Parliament in the face of any attempts by governments of whatever political persuasion to erode it".[13]

17. The SLSC also has a significant interest in this boundary between primary and secondary legislation because it scrutinises the legislation which is the product of the exercise of delegated legislative powers. If legislative power rests to an inappropriate degree in the hands of the executive because of the delegation of far-reaching powers, the secondary legislation made under such powers may make significant policy changes rather than the sort of technical

10 Committee on Ministers' Powers, *Report*, Cmd 4060 (April 1932).
11 HL Deb, 14 February 1990, col 1407.
12 Committee on the Work of the House, *Report* (Session 1991–92, HL Paper 35), para 133. During the debate on the Jellicoe Report, Lord Rippon was acknowledged as the originator of the proposal for a delegated powers scrutiny committee. HL Deb, 3 June 1992, col 901.
13 DPRRC, *Special Report: Submission to the House of Commons Procedure Committee inquiry on the delegated powers in the "Great Repeal Bill"* (23rd Report, Session 2016–17, HL Paper 143), para 10.

refinement of previously agreed policy for which secondary legislation is more appropriately used.

18. It cannot be emphasised strongly enough that the critical problem about relegating significant policy change to secondary legislation is that parliamentary scrutiny of secondary legislation is *far* less robust than that afforded to primary legislation–in three ways:

- first, secondary legislation cannot be amended and so the two Houses have only an "all or nothing" choice—to accept or reject the legislation in its entirety, even if members of either House may wish to object only to parts of an instrument;[14]

- second, and linked to the fact that secondary legislation cannot be amended, it is not subjected to line-by-line scrutiny over a number of days, and to "to and fro" (sometimes called "ping pong") between the Houses in the way that bills are;[15] and if it is debated (and most secondary legislation is not), it is debated only once in each House; and,

- third, rejection of secondary legislation by Parliament is a very rare occurrence. Since 1968, when the Lords rejected the draft Southern Rhodesia (United Nations Sanctions) Order 1968, the Government have been defeated in the House of Lords on only six motions relating to five statutory instruments–four motions to reject and two motions to defer.[16]Added to which, when–on the most recent of those rare occasions–the House *did* oppose a statutory instrument (which under the parent Act was laid before both Houses),[17] there were significant constitutional consequences in the shape of the Strathclyde Review.

19. The Strathclyde Review was prompted principally by the outcome of votes in the House of Lords on the Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015, a draft affirmative instrument, on 26 October 2015. The votes had the effect of deferring further consideration of the draft instrument until specified conditions had been satisfied. The following day, the Government announced a review to "examine how to protect the ability of elected Governments to secure their business in Parliament". The review would "in particular … consider how to secure the decisive role of the elected House of Commons in relation to its primacy on financial matters and secondary legislation".[18]

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14 Except in the very small number of cases where the parent Act specifically provides for such amendment, for example, the Census Act 1920 s. 1(2) and the Civil Contingencies Act 2004 s. 27(3).

15 Bills pass through each of the Houses of Parliament in turn. If the second House amends a bill, then it has to return to the first House. The first House may agree to the amendments and the bill can then receive Royal Assent and become an Act of Parliament. If the first House does not agree to the amendments, then the bill goes between the Houses ("to and fro")—until they agree a single text. In contrast, secondary legislation is laid before both Houses at the same time and considered by each House entirely separately. In the unlikely event that an instrument is rejected by either House, the instruments falls, irrespective of whether the other House has agreed to it.

16 SLSC, *Response to the Strathclyde Review: Effective parliamentary scrutiny of secondary legislation* (32nd Report, Session 2015–16, HL Paper 128), paras 56 and 57.

17 The parent Act was not a money bill.

18 HL Deb, 28 October 2015, cols 1175–76.

20. The review was conducted by the Rt Hon. Lord Strathclyde and reported in December 2015.[19] It set out three options for change: (1) to remove the House of Lords from statutory instrument procedure altogether, (2) to retain the role of the House of Lords in such procedure but underpinned by an understanding (either set out in a resolution or in standing orders) that the power of the House to reject an instrument would be left unused, and (3) to create a new statutory procedure enabling the Commons to override any decision by the Lords to reject an instrument. Lord Strathclyde recommended the third option.

21. The SLSC, the DPRRC and the Constitution Committee each responded to the Strathclyde Review, all in highly critical terms and all reflecting on the significance of the relationship between primary and secondary legislation.[20] The concerns of the three Committees led to a collaborative approach between the SLSC and DPRRC that was not unlike our current approach: "Of interest to both this Committee and, more directly, to the DPRRC is Lord Strathclyde's concluding comment in the Executive Summary about the need "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".[21] As a result, the (then) Chair of the DPRRC, Baroness Fookes, attended our evidence sessions and we were grateful for her contribution to our work at that time.

22. Despite the Strathclyde Report having little support in the House and despite the Government deciding, at the time, not to adopt Lord Strathclyde's recommended option, the legacy of the Review continues to be felt. In their response to the Review and to the Committees' reports, the Government issued a warning to the House of Lords: "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.[22] 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."[23] The weight of that warning remains.

23. **In our report on the Strathclyde Review, we concluded that: "The boundary between primary and secondary legislation is the foundation of any consideration of the scrutiny by Parliament of**

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19 Cabinet Office, *Strathclyde Review: Secondary legislation and the primacy of the House of Commons*, Cm 9177 (December 2015): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/486790/53088_Cm_9177_Web_Accessible.pdf.

20 SLSC, *Response to the Strathclyde Review: Effective parliamentary scrutiny of secondary legislation*, (32nd Report, Session 2015–16, HL Paper 128); DPRRC, *Special Report: Response to the Strathclyde Review*, (25th Report, Session 2015–16, HL Paper 119); Constitution Committee, *Delegated Legislation and Parliament: A response to the Strathclyde Review* (9th Report, Session 2015–16, HL Paper 116).

21 SLSC, *32nd Report* (Session 2015–16, HL Paper 128), para 26.

22 This passage implies that a rejection of an instrument by the Lords is irreversible by the Commons. Although this is strictly the case, it is open to the government to lay an almost identical instrument and seek approval for this second instrument. In the case of the Southern Rhodesia (United Nations Sanctions) Order 1968, following the decision of the Lords not to approve the original instrument, the Lords approved an almost identical instrument some weeks later.

23 House of Commons, *Government Response to the Strathclyde Review: Secondary legislation and the primacy of the House of Commons and the related Select Committee Reports*, Cm 9363 (December 2016), foreword: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/573768/government_response_to_the_strathclyde_review_december_2016_print_version.pdf.

secondary legislation".[24] We remain of that view. The more that is left to secondary legislation, the greater the democratic deficit because of the absence of robust procedures enabling effective parliamentary scrutiny of secondary legislation.

Re-setting the balance and the principles of parliamentary democracy

24. In our request to the three Permanent Secretaries for written evidence for this report, we put to them that a number of recent statutory instruments had contained significant policy changes, and we asked them whether they agreed that it was time to consider re-setting the boundary between primary and secondary legislation.[25] They replied: "The Government recognises the importance of reflecting well developed policy in appropriate legislative detail. Delegated legislation is an essential part of our legislative framework and all legislation, including delegated legislation, should be clear, precise and proportionate and must also be subject to appropriate scrutiny". They acknowledged that these "exceptional times … do not necessarily provide a model example of how Parliament would like to see legislation brought forward" and said that: "The Government is committed to ensuring the appropriateness of any delegated powers included in a bill is fully tested as part of the bill preparation process by policy leads and departmental lawyers acting with advice from Parliamentary Counsel."[26] **We are concerned, however, that the underlying challenge to the balance between Parliament and government is not primarily attributable to the impact of "exceptional times" such as Brexit and the pandemic, as the Permanent Secretaries appeared to assert, but is instead the result of a general strategic shift by government.**

25. The Permanent Secretaries were pressed further in oral evidence. They were asked whether part of their role was to advise ministers whether policy should be implemented by primary rather than secondary legislation. Ms Finkelstein said that, if a power to make secondary legislation existed, it would always be considered because "… there is competition for parliamentary time, so there is no question that, when thinking about making changes, there will always be a question as to whether they are suitable for secondary legislation because of the challenge of space for significant primary legislation".[27]

26. Dame Elizabeth was also asked about the basis for deciding, when drafting a bill, what should be on the face of the bill and what should be left to regulations. She said: "Our starting position is that we want the Bill to tell its story in such a way that Parliament can scrutinise the policy framework and the policy at a sufficient level of detail that they understand what the Bill is about".[28] She went on: "… your hope [is] that the main points of principle of the policy are set out in the Bill to enable Parliament to give it sufficient scrutiny"–but, she said, "… we do not always achieve that, for a variety of reasons".[29] These included, for example, that "… the detailed policy cannot be worked out at the point at which you bring forward the primary legislation, but there may be practical or political drivers to bringing forward the legislation at a particular time", or "… the legislative programme is so

24 SLSC, *32nd Report* (Session 2015–16, HL Paper 128), para 76.
25 Written evidence from HM Government, Q12.
26 Written evidence from HM Government, A12.
27 Q2.
28 Q4.
29 Q4.

tight and there is great demand for legislation each year".[30] We acknowledge that Dame Elizabeth correctly describes a political reality but it is one which has contributed to the crisis in the legislative process that we have identified. If detailed policy has not been resolved at the introduction of primary legislation, then that legislation must always be premature.

27. In their written evidence, the Permanent Secretaries described what was being done to ensure that bills contain only appropriate delegations of power. They referred to training and resources, including the Cabinet Office Guide to Making Legislation ("the Guide") which, they said, "contains extensive guidance for teams in relation to delegated powers".[31] In oral evidence, both Dame Elizabeth[32] and the Lord President[33] also asserted that departments were called to account by the Parliamentary Business and Legislation (PBL) Committee of the Cabinet Office for the inclusion of delegated powers in bills.

28. While we welcome these encouraging words, we share the concern expressed by the DPRRC in its parallel report that the answers given in evidence appear to encourage bill teams to see the inclusion of delegated powers as a political or practical matter, without reference to more fundamental issues relating to the principles of parliamentary democracy.

29. We wonder how strong a protection the provisions of a Guide will prove in the face of ministers wishing to show prompt departmental performance. **We nonetheless endorse the DPRRC's recommendation that the Cabinet Office Guide to Making Legislation be amended to include a statement of principles which should govern any decision by ministers about whether a bill should include delegated legislative powers. The statement should require ministers, when seeking a delegation of legislative power, to take into account to the fullest extent possible the principles of parliamentary democracy, namely parliamentary sovereignty, the rule of law and the accountability of the executive to Parliament**. We note that the current Guide, in paragraph 16.1, refers to some factors that departments are told to consider when seeking delegated powers, but they do not, we believe, go to the fundamental issue raised by the DPRRC.

Skeleton legislation

30. The balance between what provision is on the face of a bill and what is left for secondary legislation varies from bill to bill. At one extreme, a bill will contain no delegations and every aspect of the policy will be set out on its face. At the other extreme, a bill is simply a skeleton or framework bill–a bill which contains so many significant delegated powers that the "real operation [of the Act] would be entirely by the regulations made under it"[34] Without delegation of power to enable ministers to make regulations about the detailed implementation of an Act, parliamentary time would become congested, and the legislative process would move too slowly. But too little on the face of a bill means that Parliament would, in effect, be signing a legislative blank cheque. There is a balance to be struck whereby the principles of the

30 Q4.
31 Written evidence from HM Government, A12.
32 Q4.
33 Q3.
34 Delegated Powers Committee, *1st Report* (Session 1992–93, HL Paper 57), para 15.

legislation are set out on the face of the primary legislation with matters of detailed implementation left to regulations.

31. In September 2020, such was their concern about the use of skeleton legislation, that the SLSC, the DPRRC and the Constitution Committee wrote to the Government (see paragraph 9 above) about "the growing tendency for the Government to introduce skeleton bills, in which broad delegated powers are sought in lieu of policy detail". The Committees said that "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". The letter set out in detail examples of skeleton legislation, both recent Brexit-related bills and bills in earlier sessions. The former included: the Haulage Permits and Trailer Registration Bill, the Healthcare (International Arrangements) Bill, the first and second Immigration and Social Security Co-ordination (EU Withdrawal) Bills and the Medicines and Medical Devices Bill. The Civil Liability Bill, in session 2017–19, provided an example of a non-Brexit skeleton bill.

32. In their written evidence, the Permanent Secretaries acknowledged that Brexit and the pandemic had led to some legislation having to be "delivered swiftly" and as a result some bills had had "to provide for significant secondary powers".[35] In oral evidence, Dame Elizabeth sought to offer the following reassurance:

> "The Parliamentary Business and Legislation Committee takes the powers very seriously, and Ministers understand that. When they come before the committee, they know they will have to discuss the powers they are taking and how they might land in Parliament, and that is a significant part of the role which the Parliamentary Business and Legislation Committee plays in relation to the clearance of Bills."

33. We do not quarrel with Dame Elizabeth's assertion, but we nonetheless believe that the outcomes have been less than desirable.

34. The PBL Committee is a Cabinet Committee, with terms of reference "to consider matters relating to the Government's parliamentary business and delivery of its legislative programme". It is chaired by the Lord President. In evidence to the DPRRC, on 12 May 2021, a session also attended by members of the SLSC, the Lord President emphasised that the PBL Committee invariably asks for delegated powers to be justified and he added that, in his view, it is "in the interests of the Government to be as specific as possible".[36] In response to the letter sent by the three Committees in September 2020, the Lord President took a similar line and agreed to consider issuing a communication to Secretaries of State "encouraging them to minimise the use of delegated powers where possible".[37]

35. **As the DPRRC states in its parallel report, skeleton legislation signifies an exceptional shift in power from Parliament to the executive and entails the government, in effect, asking Parliament to pass primary legislation which is so insubstantial that it leaves the "real operation" of the law to be decided by ministers "on the hoof".**

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35 Written evidence from HM Government, A12.

36 Q3.

37 Letter dated 19 October 2020 which is part of the skeleton bill correspondence. See footnote 7 above.

We endorse the DPRRC's view that skeleton legislation should only be used in the most exceptional circumstances and that, where it is used, a department should always provide a full justification, including an explanation of the nature of those exceptional circumstances, why no other approach was reasonable to adopt and how the scope of the skeleton provision is to be constrained. We note that the Guide to Making Legislation, in paragraph 16.11, tells departments that skeleton (called in the Guide "enabling") bills or skeleton clauses in a bill need to be fully justified, if possible, with relevant precedents. This does not, however, cover sufficiently the range of issues which should be addressed in a full justification.

36. The DPRRC proposes a new procedure for identifying skeleton bills or skeleton clauses in a bill. The principal burden, under the proposal, would initially rest with the department in that the procedure expects the department to disclose skeleton provision by way of a declaration in the delegated powers memorandum accompanying the bill (a "skeleton legislation declaration"). If no such declaration were made but the DPRRC considered that one should have been, then the Committee may invite the minister to justify his or her department's view (possibly in oral evidence), following which the Committee would make a short report to the House, ideally before second reading. The DPRRC proposes that it should be given a "scrutiny reserve" in these circumstances so that the bill could not proceed to second reading before it has made that short report.

37. For bills starting in the House of Commons, unless a similar mechanism were to be established in that House, the challenge of the DPRRC, in the event of a department failing to make a skeleton legislation declaration, would ordinarily only bite once a bill had reached the House of Lords. An alternative mechanism might be to draw on the authority of the Speakers of the two Houses by giving them a role in adjudicating whether a bill is, or clauses in a bill are, skeleton legislation. We believe that the intervention of the Speakers would strengthen the role of Parliament, and there is the precedent that the Speaker of the House of Commons has power to certify whether a bill is a money bill under the Parliament Act 1911. We acknowledge, however, that a precise definition of "skeleton bill" or "skeleton clauses" would be more difficult to prescribe compared to the clarity of the meaning of money bill set out in section 1(2) of the 1911 Act. More generally, this proposal raises complex issues which would require a great deal of further exploration by both Houses and the Government.

Secondary legislation and skeleton bills and clauses

38. Despite the burden of being called to account to justify their use, we accept that there may be circumstances where a government, perhaps for the reasons described by Dame Elizabeth (see paragraph 26 above), will nevertheless decide to press ahead with a skeleton bill or skeleton clauses in a bill.

39. In such circumstances, whether the department makes a declaration that the bill is (or contains clauses which are) skeletal, or a finding to that effect is made by the DPRRC or under a procedure involving the Speakers, the consequences might be that:

- the minister would be challenged about the use of skeleton legislation during the second reading debate and required to provide a fuller

justification for its use. It would then be a matter for the House to decide whether the bill should receive a second reading;

- the minister would be persuaded to delay progress of the bill to enable further provision to be put on its face (as happened during the passage of the Childcare Bill in 2015, following adverse reports from the DPRRC and the Constitution Committee about its skeletal nature);[38]

- the department would be pressed into providing illustrative draft statutory instruments, before second reading, to show how the powers were intended to be used.

40. **The consequences of a declaration—or a finding—that a bill is a skeleton bill (or contains skeleton clauses) need, however, to go well beyond second reading. Skeleton bills or skeleton clauses, by their very nature, cannot be adequately scrutinised during their passage through Parliament. Accordingly, if skeleton legislation is to be enacted, there should, at the very least, be statutory safeguards in place to ensure that the lack of parliamentary scrutiny at the primary legislation stage is recompensed by a more challenging scrutiny procedure at the secondary legislation stage.**

41. Options for safeguards might include:

- A requirement on the face of the bill that the exercise of any powers under it that are conferred by skeleton provision should be subject to an enhanced scrutiny procedure (a super-affirmative procedure) that enables Parliament, or committees of the two Houses, to comment on a draft of any instrument before it is laid in its final form and to propose amendments to the draft.[39]

- Alternatively, as the DPRRC suggests in its parallel report, a generic requirement to apply an enhanced scrutiny procedure to the exercise of powers conferred under skeleton provision might be included in a revised Statutory Instruments Act 1946 (including provision for Parliament to propose amendments to draft statutory instruments made under such powers).

- A requirement, in addition, that the exercise of any powers made under skeleton provision should be subject to consultation, with a further requirement for ministers to report to Parliament on the outcome of such consultation, including how the findings of the consultation were taken into account in preparing the secondary legislation.

Further inquiry on re-setting the balance of power between Parliament and the government

42. We are aware that we are making suggestions that some may consider to be radical, both in terms of there being a determination as to whether a bill is a skeleton bill (or contains skeleton clauses) and the consequences that should follow any such determination. It is not within the scope of this report to offer

38 HL Deb, 1 July 2015, col 2074.

39 We note that Sir Jonathan Jones KCB QC (Hon), former Treasury Solicitor, in his remarks to the Statute Law Society on 9 September 2021 made a similar proposal in relation to the exercise of Henry VIII powers or powers which create or extend criminal offences: https://www.ucl.ac.uk/laws/sites/laws/files/statute_law_society_re_secondary_legislation_edited_-_j.jones_27102021.pdf [accessed 12 November 2021].

a fully developed scheme for the implementation of these suggestions–not least because these are matters of equal concern to the House of Commons, and the Government, and require thorough discussion within Parliament and Whitehall, and the involvement of interested organisations and the wider public.

43. **We recommend that the Government, together with the two Houses of Parliament and their Procedure Committees, should consider (a) adopting procedures for determining whether legislation is skeleton legislation, and (b) what the consequences of any such determination should be, in terms of scrutiny of such legislation and any statutory instruments made under powers contained in it.**

44. The proposals set out in this chapter are intended to provide safeguards in circumstances where a government introduces skeleton legislation. We have endorsed the view of the DPRRC that the Guide should state that skeleton legislation should be used only in the most exceptional circumstances, and evidence from the Government indicates that they agree—the Lord President told the DPRRC in oral evidence that "detailed legislation is very important and is the right way to go in most cases" and Dame Elizabeth told us that her starting point is that a bill should "tell its story in such a way that Parliament can scrutinise the policy framework and the policy at a sufficient level of detail that they understand what the Bill is about". Given this, it seems reasonable to anticipate—and it is our hope—that skeleton legislation will be relatively rare and, as a result, the proposed enhanced scrutiny procedure would only rarely be required. The inevitable conclusion therefore is that when it is used, it will be as a direct result of the government of the day having decided, in all the circumstances, to press ahead with a skeleton bill or a bill containing skeleton clauses.

Legislative sub-delegation of power

45. In its parallel report, the DPRRC draws attention to legislative sub-delegation of power. This is where an Act of Parliament confers a legislative power on ministers which, in turn, includes provision for a further delegation of legislative power. This means that the minister may make a statutory instrument which includes a delegated power conferring on themselves or another person or body power to make further regulations—or "tertiary legislation".

46. The DPRRC makes several recommendations about legislative sub-delegation of power, focusing on the inclusion in bills of powers to sub-delegate. However, sub-delegation is also relevant to the scrutiny of secondary legislation because it is in secondary legislation that delegated powers to make tertiary legislation are to be found. **We therefore endorse the recommendation of the DPRRC that where a statutory instrument contains a delegation of power, the accompanying explanatory memorandum should state clearly, under a separate heading, that this is the case, with a full explanation of why the power is needed and its scope.**

CHAPTER 3: ISSUES OF CONCERN TO THE SLSC ABOUT SECONDARY LEGISLATION

Secondary legislation and guidance

Blurring of the boundary

47. In its parallel report, the DPRRC identifies three principal forms of guidance: pure guidance (guidance which simply assists but does not direct), guidance which the law requires those to whom it is directed "to have regard to" and mandatory guidance (guidance which must be complied with).[40] The second and third of these may be said to have legislative effect. The Committee also lists a number of other devices used in primary legislation which can similarly be said to be legislative in effect (and gives examples of what it describes as "disguised legislative instruments").[41] The DPRRC suggests that the multiplicity of legislative devices is confusing to Parliament and the public, and makes a number of recommendations intended to improve the clarity of primary legislation and to increase the role of Parliament in scrutinising the exercise of these legislative powers.

48. In our interim report on the work of the Committee, published in December 2020, and again in our end of session report in April 2021,[42] we highlighted another issue relating to guidance, namely the blurring of the boundary between secondary legislation and guidance and, in particular, the way in which, on occasion, guidance which is advisory only has been presented as if it were stating the law as set out in secondary legislation:[43]

> "Quite early on in the pandemic, we drew to the attention of the House the need for a clear distinction between legislation and guidance. For example, guidance for the first lockdown said that "only one form of exercise a day" was allowed, whereas the legislation did not limit it in this way. In our 13th Report, we published an exchange of correspondence with the Secretary of State for Health and Social Care, the Rt Hon. Matt Hancock MP, who confirmed that it was the instrument and not the guidance which was legally enforceable."

49. We remain concerned that the distinction between legislation and guidance continues to be unclear. In our 35th Report, on an exemption to the travel restrictions to allow foreign poultry workers into the country, we noted that guidance said that the employer should provide a translation of the local lockdown restrictions and the worker should sign to say that he or she had understood them, but this provision was not included in the regulations.[44]

50. In a report published in July 2021, entitled *Rule of Law Themes from COVID-19 Regulations*, the JCSI also expressed concern that "guidance has been used in the context of the pandemic response in a way that appears to attempt to

40 See *Craies on Legislation*, 11th edition (Sweet & Maxwell, 2017), pp 165–9, for further analysis of different types of guidance.

41 These include, for example, a power to make to a determination under provision in the Housing and Planning Bill (Session 2015–16), a power to give directions under provision in the Education and Adoption Bill (Session 2015–16) and a power to issue a code of practice under provision in the Digital Economy Bill (Session 2016–17). See the DPRRC's parallel report, para 101.

42 See footnote 9 above and Appendix 1 to this report.

43 SLSC, *Interim report on the Work of the Committee in Session 2019–21* (39th Report, Session 2019–21, HL Paper 200), paras 20–21.

44 SLSC, *35th Report* (Session 2019–21, HL Paper 177).

impose more severe restrictions than are imposed by law, by presenting the guidance to the public as if it were law that compelled compliance",[45] and that "there appears to have been an unwillingness to distinguish between the wishes of Government expressed informally or in guidance and the requirements of the law, which has been a feature of the Government's response to the coronavirus pandemic despite this issue having been raised by parliamentary Committees at various stages in 2020 and 2021".[46] The issue was also raised by the Constitution Committee in its report, published in June 2021, entitled *COVID-19 and the use and scrutiny of emergency powers*,[47] and by the House of Commons Justice Committee in its report, published in September 2021, entitled *Covid-19 and the criminal law*.[48]

51. We note in passing that in our 2nd Report of the current session, we drew special attention to the Wildlife and Countryside Act 1981 (Variation of Schedule 9) (England) (No. 2) Order 2021 (SI 2021/548) as an example of an instrument the statutory guidance on which described the legal requirements in terms which appeared to be less strict than the order itself:[49]

> "We note that there appears to be an inconsistency between the provisions in the Order which make it an offence to allow common pheasants and red-legged partridges to escape into protected areas in England without a licence, and the statutory guidance which states that any activity "must not encourage the released birds to inhabit or occupy an adjacent European site". We take the view that the statutory guidance appears to offer a more realistic approach to the not inconsiderable challenges of trying to prevent the movement of gamebirds in the wild. The mismatch between the provisions in the Order and the statutory guidance again raises concerns about the relationship between guidance and legislation which we have expressed repeatedly before."

52. In a letter to the Lord President, dated 18 January 2021,[50] we said: "… this confusion between legislation and guidance is directly contrary to the idea of accessible and clear law, and falls short of the legislative standards which Parliament and the public are entitled to expect". The JCSI, in its report, made a similar point:[51]

> "The rule of law requires a clear distinction to be made between non-statutory guidance and requirements imposed by law. Whereas non-statutory guidance may influence, the law requires compliance. Law-enforcement officials and other public authorities have neither the duty nor the right to apply or enforce guidance as if it were the law.
>
> In the context of the pandemic, where regulations came into force with little or no time to prepare for the new restrictions and where new

45 JCSI, *Rule of Law Themes from COVID-19 Regulations*, (1st Special Report, Session 2021–22, HC 600, HL Paper 57), para 40.
46 JCSI, *Rule of Law Themes from COVID-19 Regulations*, (1st Special Report, Session 2021–22, HC 600, HL Paper 57), para 42.
47 Constitution Committee, *COVID-19 and the use and scrutiny of emergency powers* (3rd Report, Session 2021–22, HL Paper 15), Chapter 4.
48 House of Commons Justice Committee, *Covid-19 and the criminal law* (4th Report, Session 2021–22, HC 71).
49 SLSC, *2nd Report*, (Session 2021–22, HL Paper 7), para 6.
50 The letter of 18 January 2021 and the Lord President's reply of 17 February 2021 are published on our webpage.
51 JCSI, *Rule of Law Themes from COVID-19 Regulations*, (1st Special Report, Session 2021–22, HC 600, HL Paper 57), paras 45 and 46.

> regulations were made relatively frequently, it was even more important for the guidance to clearly delineate between what was mere advice and what was a legal requirement."

53. The Office of Parliamentary Counsel (OPC) states that it is committed to promoting "good law" which it defines as law that is "necessary, clear, coherent, effective and accessible". We emphatically endorse this definition and the OPC's aim of "making legislation more accessible and understandable for UK citizens".[52]

54. In a report entitled *The Government's response to COVID-19: Human Rights Implications*, published on 21 September 2020, the Joint Committee on Human Rights, said: "More care must be taken by the Government to distinguish between advice, guidance and the law, in media announcements as well as in official online sources".[53] In response, the Government said: "The Government continues to review guidance online and ensure that it is up to date, and accessible so the public are able to interpret it correctly. This includes ensuring that guidance clearly distinguishes between Government advice and what measures people are legally required to follow".[54] In response to our letter, the Lord President said that he would ask officials to remind departments of "the importance of clarity when legislation is being supplemented by guidance".

55. This confusion between legislation and guidance is important. In oral evidence to the DPRRC, the Lord President acknowledged this: "… I very strongly agree with your point that guidance is guidance, and the law is the law. The Government should not give the impression that they can make law by guidance, because they cannot, and no British subject has any obligation to follow non-law".[55] The matter goes to the heart of the principle of the rule of law and the integrity of the statute book, and we agree with the JCSI that "where control is thought necessary, it must be achieved through legislation and not be brought through the back door by way of quasi-legislation presented as if it were actual legislation".[56]

Use of guidance "to amplify legislation"

56. We have also raised concerns about important elements of a policy change being left to guidance rather than being included in the relevant statutory instrument.[57] One example is provided by the Heather and Grass etc. Burning (England) Regulations 2021 (which also demonstrated the uncertainties that arise when key aspects of a decision-making process are to be set out in guidance that is not available, even in draft form, when regulations are being scrutinised). Another example is the Health Protection (Coronavirus, Restrictions) (No. 3) and (All Tiers) (England) (Amendment) Regulations 2021 which left a key definition—the meaning of "critical worker"—to

52 Office of the Parliamentary Counsel, 'About Us': https://www.gov.uk/government/organisations/office-of-the-parliamentary-counsel/about [accessed 10 November 2021].

53 JCHR, *The Government's response to COVID-19: human rights implications* (7th Report, Session 2019–21, HC 265, HL Paper 125), recommendation 2.

54 JCHR, *The Government's Response to the Joint Committee on Human Rights Report: The Government's Response to COVID-19: Human Rights Implications*, CP 335 (December 2020): https://committees.parliament.uk/publications/4154/documents/41106/default/ [accessed 16 November 2021].

55 Q10.

56 JCSI, *Rule of Law Themes from COVID-19 Regulations*, (1st Special Report, Session 2021–22, HC 600, HL Paper 57), para 47.

57 SLSC, *48th Report* (Session 2019–21, HL Paper 242).

guidance. We advised that "[t]he House may wish to ask for the definition to be reviewed urgently and included in regulations so that it can be subject to scrutiny by Parliament".[58]

57. In a report published in November 2018 on the delegation of powers, the Constitution Committee concluded: "Bills and statutory instruments should be sufficiently clear to ensure that guidance need not be relied on to interpret legislation. Guidance is not legislation and should not be treated as such. If there are policy lacunae in the legislation itself, it is unacceptable that guidance, which for the most part avoids parliamentary scrutiny, should serve to fill them".[59] We alluded to this in our letter to the Lord President of 18 January. In reply, the Lord President said that he understood the point that "legislative provisions should generally be found within the body of the legislation, rather than in guidance", and that failure to do this is detrimental to the accessibility of the law and raises difficulties for parliamentary scrutiny. The Government response to the Constitution Committee report, published in January 2019, made a similar point: "The Government agrees that guidance should not generally be used for the purposes of interpreting legislation and, in particular, that it should not stand in the place of anything that should be contained in legislative provision subject to appropriate scrutiny (in particular, provision that has the effect of imposing legal requirements)".[60]

58. The JCSI, in its *Rule of Law Themes from COVID-19 Regulations* report, also refers to what it describes as the "purported use of guidance to amplify legislation":[61]

> "A key element of the rule of law is for legislation to be clear. Where legislation has been drafted so as to leave gaps in the law or areas of uncertainty, guidance (and particularly non-statutory guidance) cannot be used to fill those gaps as if it were the law itself.
>
> Where the enabling power permits, guidance can be expressly referred to in legislation to provide elucidation on meaning. Care should be taken in such situations to ensure that there is tight correspondence between the legislation and guidance. However, where the enabling power does not permit it, Departments cannot add to the law by referring informally to guidance. Such guidance has not undergone parliamentary scrutiny and has no place in amplifying the law."

59. **Concern about the proper use of secondary legislation and guidance–in particular, inconsistencies between legislation and guidance, and the use of guidance to fill gaps in legislation–is widespread, particularly in relation to pandemic regulations. We expect to see fewer examples of poor practice in this regard and recommend that departments make every effort to ensure that a clear and appropriate distinction between legislation and guidance is maintained.**

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58 SLSC, *41st Report* (Session 2019–21, HL Paper 210), para 11.

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

60 Constitution Committee, *The Government Response to the Lords Constitution Committee Report: The Legislative Process: The Delegation of Powers* (25 January 2019): https://www.parliament.uk/globalassets/documents/lords-committees/constitution/Correswithministers/250119-Government-response-to-Leg-Process-Report.pdf [accessed 16 November 2021].

61 JCSI, *Rule of Law Themes from COVID-19 Regulations* (1st Special Report, Session 2021–22, HC 600, HL Paper 57), paras 55–56.

Quality of legislation and supporting information

60. Issues under this heading have been the long-standing concern of the Committee and prompted our regular meetings with the Permanent Secretaries. Inevitably, given both the volume of secondary legislation required in relation to the COVID-19 pandemic and the rapidity with which it had to be brought into effect, the focus of our questions this year was on the impact of the pandemic on the quality of legislation and supporting information.

61. In their written evidence, the Permanent Secretaries acknowledged that "the time for drafting and checking the legislation and explanatory material was often squeezed" and that it was "unfortunately inevitable that from time to time necessary refinements to the policy are identified after the event, requiring correction at a later date, or supporting materials may not be of the quality the Government would normally be able to deliver when there is more time for quality assurance processes".[62] They also acknowledged that the exceptional circumstances of the pandemic did not provide a complete justification for recent lapses and that there were still "lessons to be learnt and progress to be made, especially in relation to explanatory memoranda".

62. Ms McGibbon, the Treasury Solicitor, said in her oral evidence in April 2021 that, although there had been no formal review of the emergency legislation produced in response to the pandemic, they had kept practices under review as they went along. She drew attention to two areas of particular concern: "the limited opportunities for parliamentary scrutiny of the legislation" (see paragraphs 74 to 76 below) and "the increased risk of errors as a result of the speed at which we are developing policy and legislation".[63] With regard to the latter, Ms McGibbon said that the pandemic had placed significant pressure on a small group of drafting lawyers. Her department had responded to this by redeploying other departmental lawyers to support the drafting lawyers. As a result, she said, the quality of legislation had "held up pretty well".[64] Ms Finkelstein, Head of the Civil Service Policy Profession, provided a longer-term view about how improvements would be made, referring to training, a monthly newsletter to civil servants which included issues raised by the SLSC, and a revamping of the explanatory memorandum template.

63. **In our end of session 2019–21 report, we acknowledged the twin challenges of Brexit and the pandemic and recognised the achievements of the many civil servants who have had to respond to the exceptional demands of the current period.[65] We welcome the steps that the Government have taken, despite those challenges, to improve the quality of legislation and supporting information.**

64. **Now that the UK has withdrawn from the EU and the pandemic restrictions have eased, we look forward to seeing an acceleration in these improvements, including any that may result from a review of the delivery of the emergency legislation produced in response to the pandemic.**

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62 Written evidence from HM Government, A3.
63 Q10.
64 Q10.
65 SLSC, *Work of the Committee in Session 2019–21* (54th Report, Session 2019–21, HL Paper 276), para 27.

Senior responsible owners (SROs)

65. Both the written evidence of the Permanent Secretaries[66] and the oral evidence of Ms Finkelstein and Ms McGibbon emphasised the role of the departmental SRO for secondary legislation–established in 2017–as being central in the drive to improve standards. The function of an SRO is to have oversight of their department's secondary legislation and to "champion and raise the profile of secondary legislation, including ensuring all relevant staff have the skills to engage with secondary legislation and Parliament".[67] We were told that the PBL Committee coordinates regular meetings so that SROs can share best practice across Whitehall, and that they "play a vital role in ensuring the quality of EMs".[68] (We explored the role of SROs further in an evidence session with the Department for Transport on 19 October.)[69]

66. **Following the oral evidence session with the Permanent Secretaries, we were provided, at our request, with a list of departmental SROs, for the purpose of developing contacts between the Committee and SROs. We regard this as a welcome development, to the advantage of the SLSC and departments alike in pursuing the aim of improving the quality of secondary legislation.**

Impact assessments

Coronavirus instruments

67. We asked the Permanent Secretaries about the number of occasions on which coronavirus instruments were not accompanied by adequate information about their potential impact. In written evidence, they said that "a pragmatic and proportionate approach" had to be taken in the face of a national emergency, and that sometimes the impact information could be found in associated documents (such as in published Scientific Advisory Group for Emergencies (SAGE) documents). In oral evidence, Ms Finkelstein conceded that, if the information is to be easily accessible, it should be included in the explanatory memorandum but repeated that the exigencies of the pandemic had made this difficult.[70]

68. The issue came to the fore in the Committee's consideration of the draft Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 which made it mandatory for anyone working inside a care home, including tradespeople and service providers, to be fully vaccinated against coronavirus unless subject to medical exemption. We were critical of the quality of the explanatory material including, amongst other things, the lack of any analysis of the impact on care homes. As a result, we took the exceptional step of inviting the Minister, Nadhim Zahawi MP, to give oral evidence during which he acknowledged that impact material should have been available alongside the instrument when it was laid.[71] The instrument was subsequently the subject of a regret motion, debated on 20 July 2021, in the name of Baroness Wheeler. The motion included reference to the absence of an impact assessment and was agreed by 221 votes to 211.

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66 Written evidence from HM Government, A2.
67 Written evidence from HM Government, A2.
68 Written evidence from HM Government, A3. See also A4.
69 The transcript can be found on the Committee's webpage: https://committees.parliament.uk/oralevidence/2844/html/. See also SLSC, *17th Report* (Session 2021–22, HL Paper 88), paras 25–34.
70 Q16.
71 SLSC, *10th Report* (Session 2021–22, HL Paper 50).

More generally

69. We have a long-standing concern about the provision of impact information. It is fundamental to the ability of the Committee and of Parliament to scrutinise secondary legislation effectively and to understand the range of alternative policy options available to departments and their consequences. Impact assessments also have the potential to offer reassurance in that they may, depending on their quality, demonstrate a department's evidence base for decisions taken. It is disappointing therefore that issues relating to the provision of timely impact assessments continue to arise, the most recent example being the failure to provide important impact information in relation to the draft Motor Vehicles (Driving Licences) (Amendment) (No.2) Regulations 2021. Those regulations were intended to help to ease the current shortage of HGV drivers. We drew attention to the fact that the department would not be providing Parliament with information on potential safety risks until sometime after the regulations had been approved by Parliament and come into effect.[72]

70. The credibility of a proposed policy change–which translates into the ease or otherwise with which an instrument passes through Parliament–is dependent on the provision of convincing evidence to support the change and evidence to demonstrate departmental due diligence in reaching its choice of policy. This is provided in part by an impact assessment or other impact information. It is also supported by the adequacy of any consultation exercise. Evidence, however, is all the more convincing if it is *independent*. We are aware, for example, that the Social Security Advisory Committee, an independent statutory advisory body, scrutinises secondary legislation relating to the social security system. Other departments may, or should, rely on other sources of expertise.[73]

71. **As we have indicated in relation to the quality of secondary legislation and supporting information, the exceptional demands of the twin challenges of Brexit and the pandemic provide some explanation for a fall in standards but, as those challenges abate, departments and their SROs must ensure that: (a) where an instrument requires a full impact assessment, that assessment is always laid at the same time as the instrument; and (b) where an instrument does not require a formal impact assessment, the explanatory memorandum contains sufficient information to enable the effect of the instrument to be understood. In addition, we encourage departments to consider how independent validation of their policy choices can be demonstrated. This should also be described in full in the explanatory memorandum and should include a thorough description of any consultation exercise.**

Sunset provision

72. Sunset provision is included in a statutory instrument to time limit the period during which the instrument remains in effect by setting an automatic expiry date. In written evidence, we were told that the Government had moved away from using such provision. Ms McGibbon explained that sunset provision was one of a "range of tools" used to make secondary legislation proportionate. An alternative tool was the inclusion of a statutory review. The choice is, she

72 SLSC, *15th Report* (Session 2021–22, HL Paper 79), para 5.
73 Social Security Administration Act 1992, section 172.

said, a matter for departments and ministers.[74] Ms Finkelstein was asked about the variety of different sunset provisions and the confusion they might cause. She too stated that responsibility rested with departments which, she added, were required to monitor the things that they had committed to.[75]

73. **Sunset provision in secondary legislation has the advantage of clarity and transparency and encouraging departments to remain vigilant about ensuring that regulations do not continue to apply when they are no longer needed.[76] We were not convinced by the answers we received in evidence about why sunset provision is not used more often as a matter of good practice and what alternative arrangements are in place to ensure legislative good housekeeping. We would welcome further explanation.**

Restricting parliamentary scrutiny

74. We have raised the issue of the significant proportion of pandemic instruments which came into effect within 48 hours of being laid, some instruments coming into effect even before they were laid. The JCSI, in its *Rule of Law Themes from COVID-19 Regulations* report, also mentioned this point:[77]

> "It is only to be expected that the pandemic has required legislation to be made and brought into force at speed, as the Government has been forced to respond to the fast-changing facts on the ground and to take proactive steps to prevent damage from escalating further. This is reflected in the fact that as of 5 July 2021, of the 461 coronavirus instruments laid before Parliament: 87 were made using the urgent made affirmative procedure under section 45R of the Public Health (Control of Disease) Act 1984; 188 (of 327 coronavirus instruments made using the negative procedure) breached the convention that an instrument should not come into force until at least 21 days after being laid; and 54 came into force before being laid, triggering the requirement under section 4 of the Statutory Instruments Act 1946 to notify the Speaker and the Lord Speaker of the early commencement and why it was necessary. Moreover, several of the made affirmative instruments were revoked before they had even been debated."

75. In written evidence, the Permanent Secretaries referred to the fast-moving and urgent nature of the pandemic which had necessitated the use of the "made affirmative" procedure (whereby an affirmative instrument is made before laying and will remain in force only if approved by both Houses within a statutory period[78]) and bringing negative instruments into force before the expiry of the 21-day period set by convention. They also drew attention to how, in the light of concerns expressed in Parliament, the Government had made a commitment to hold debates on affirmative instruments in advance of them coming into force whenever possible on matters of national significance. And they said that the Government were committed to complying with the

74 Q14.
75 Q15.
76 See HM Government, *Sunsetting Regulations: Guidance* (March 2011): http://data.parliament.uk/DepositedPapers/Files/DEP2011–0504/DEP2011–0504.pdf.
77 JCSI, *Rule of Law Themes from COVID-19 Regulations*, (1st Special Report, Session 2021–22, HC 600, HL Paper 57), para 59.
78 28 days for COVID-19 instruments.

21-day convention "as far as possible".[79] In oral evidence, Ms McGibbon gave a similar response.[80]

76. **As we said in our end of session 2019–21 report, while the pandemic may have provided a justification for some instruments to be subject to an accelerated timetable, this was not the case for all instruments that were dealt with in this way—including some pandemic-related instruments.[81] We repeat our view that parliamentary scrutiny should not be curtailed save in exceptional circumstances and with a full justification clearly set out in the explanatory memorandum.[82] We are aware of the DPRRC's concerns about the use of the made affirmative procedure—that it enables significant policy change without prior parliamentary approval—and we support the DPRRC's recommendation that consideration should be given as to whether it would be feasible to hold a debate at an early stage and for the approval motion to be taken later, either formally or as a second debate if either the SLSC or the JCSI raises matters of concern.**

Looking ahead: volume and flow of statutory instruments

77. The withdrawal of the UK from the EU gave rise to an exceptional number of statutory instruments, one practical consequence of which was that the Committee, for a period, split into two sub-committees and co-opted 11 additional members in order to deal with the number of instruments. The pandemic has also led to a large volume of secondary legislation.

78. We therefore welcome the written evidence of the Permanent Secretaries that, now that the UK has withdrawn from the EU, they "… anticipate returning to business as usual with the exception of COVID-19 SIs which, naturally, the Government will need to respond to as the situation evolves and on which we continue to provide regular updates. There is no indication that there is a backlog of "business as usual" SIs as more than half of the SIs made in the last three years have been business as usual".[83]

79. **We valued the information provided by the Government to us about anticipated numbers of instruments during the height of the Brexit-related secondary legislation. We look forward to that practice continuing so that Parliament and departments can together support the public interest in properly scrutinised legislation.**

79 Written evidence from HM Government, A13.
80 Q10.
81 See, for example, SLSC, *9th Report* (Session 2021–22, HL Paper 45), paras 9–11, on the Marriages and Civil Partnerships (Approved Premises) (Amendment) Regulations 2021 (SI 2021/775), and SLSC, *17th Report* (Session 2021–22, HL Paper 88), pp 7–24, on the Health Protection (Coronavirus, International Travel and Operator Liability) (England) (Amendment) (No. 16) Regulations 2021 (SI 2021/1179).
82 SLSC, *Work of the Committee in Session 2019–21* (54th Report, Session 2019–21, HL Paper 276), para 13.
83 Written evidence from HM Government, A14.

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Chapter 1: Introduction

1. Whatever the reason, if because of modern conditions Parliament is being asked to accept new ways of legislating, then it is surely right that the government must stand ready to accept new methods of scrutiny and of holding them to account. So, like others, we take the view that there is now an urgent need to take stock and to re-balance that relationship. (Paragraph 2)

End of session reports

2. We welcome the suggestion made by the DPRRC in its parallel report that end of session reports by the SLSC and the DPRRC, along with relevant reports by the JCSI and the Constitution Committee, might form the basis for regular debates in the House on issues relating to the quality of legislation and supporting explanatory materials, and the wider issues raised in the reports. (Paragraph 11)

Chapter 2: Shared concerns of the SLSC and DPRRC about primary legislation

Threshold between primary and secondary legislation

3. As we said in our introduction, we believe, like the DPRRC and others, that a critical moment has been reached when it is imperative that efforts are made to re-set the relationship between Parliament and the executive—and not to how it was immediately before Brexit and the pandemic but afresh, to reflect the modern conditions of government. (Paragraph 15)

4. In our report on the Strathclyde Review, we concluded that: "The boundary between primary and secondary legislation is the foundation of any consideration of the scrutiny by Parliament of secondary legislation". We remain of that view. The more that is left to secondary legislation, the greater the democratic deficit because of the absence of robust procedures enabling effective parliamentary scrutiny of secondary legislation. (Paragraph 23)

5. We are concerned that the underlying challenge to the balance between Parliament and government is not primarily attributable to the impact of "exceptional times" such as Brexit and the pandemic, as the Permanent Secretaries appeared to assert, but is instead the result of a general strategic shift by government. (Paragraph 24)

6. We endorse the DPRRC's recommendation that the Cabinet Office Guide to Making Legislation be amended to include a statement of principles which should govern any decision by ministers about whether a bill should include delegated legislative powers. The statement should require ministers, when seeking a delegation of legislative power, to take into account to the fullest extent possible the principles of parliamentary democracy, namely parliamentary sovereignty, the rule of law and the accountability of the executive to Parliament. (Paragraph 29)

Skeleton legislation

7. As the DPRRC states in its parallel report, skeleton legislation signifies an exceptional shift in power from Parliament to the executive and entails the Government, in effect, asking Parliament to pass primary legislation which

is so insubstantial that it leaves the "real operation" of the law to be decided by ministers "on the hoof". We endorse the DPRRC's view that skeleton legislation should only be used in the most exceptional circumstances and that, where used, a department should always provide a full justification, including an explanation of the "most exceptional circumstances", why no other approach was reasonable to adopt and how the scope of the skeleton provision is to be constrained. (Paragraph 35)

8. The consequences of a declaration—or a finding—that a bill is a skeleton bill (or contains skeleton clauses) need, however, to go well beyond second reading. Skeleton bills or skeleton clauses, by their very nature, cannot be adequately scrutinised during their passage through Parliament. Accordingly, if skeleton legislation is to be enacted, there should, at the very least, be statutory safeguards in place to ensure that the lack of parliamentary scrutiny at the primary legislation stage is recompensed by a more challenging scrutiny procedure at the secondary legislation stage. (Paragraph 40)

9. **We recommend that the Government, together with the two Houses of Parliament and their Procedure Committees, should consider (a) adopting procedures for determining whether legislation is skeleton legislation and, (b) what the consequences of any such determination should be, in terms of scrutiny of such legislation and any statutory instruments made under powers contained in it.** (Paragraph 43)

Legislative sub-delegation of power

10. We endorse the recommendation of the DPRRC that where a statutory instrument contains a delegation of power, the accompanying explanatory memorandum should state clearly, under a separate heading, that this is the case, with a full explanation of why the power is needed and its scope. (Paragraph 46)

Chapter 3: Issues of concern to the SLSC about secondary legislation

Secondary legislation and guidance

11. Concern about the proper use of secondary legislation and guidance–in particular, inconsistencies between legislation and guidance, and the use of guidance to fill gaps in legislation–is widespread, particularly in relation to pandemic regulations. We expect to see fewer examples of poor practice in this regard and recommend that departments make every effort to ensure that a clear and appropriate distinction between legislation and guidance is maintained. (Paragraph 59)

Quality of legislation and supporting information

12. In our end of session 2019–21 report, we acknowledged the twin challenges of Brexit and the pandemic and recognised the achievements of the many civil servants who have had to respond to the exceptional demands of the current period. We welcome the steps that the Government have taken, despite those challenges, to improve the quality of legislation and supporting information. (Paragraph 63)

13. Now that the UK has withdrawn from the EU and the pandemic restrictions have eased, we look forward to seeing an acceleration in these improvements, including any that may result from a review of the delivery of the emergency legislation produced in response to the pandemic. (Paragraph 64)

Senior Responsible Owners

14. Following the oral evidence session with the Permanent Secretaries, we were provided, at our request, with a list of departmental SROs, for the purpose of developing contacts between the Committee and SROs. We regard this as a welcome development, to the advantage of the SLSC and departments alike in pursuing the aim of improving the quality of secondary legislation. (Paragraph 66)

Impact assessments for coronavirus instruments

15. **As we have indicated in relation to the quality of secondary legislation and supporting information, the exceptional demands of the twin challenges of Brexit and the pandemic provide some explanation for a fall in standards but, as those challenges abate, departments and their SROs must ensure that: (a) where an instrument requires a full impact assessment, that assessment is always laid at the same time as the instrument; and (b) where an instrument does not require a formal impact assessment, the explanatory memorandum contains sufficient information to enable the effect of the instrument to be understood. In addition, we encourage departments to consider how independent validation of their policy choices can be demonstrated. This should also be described in full in the explanatory memorandum and should include a thorough description of any consultation exercise.** (Paragraph 71)

Sunset provision

16. **Sunset provision in secondary legislation has the advantage of clarity and transparency and encouraging departments to remain vigilant about ensuring that regulations do not continue to apply when they are no longer needed. We were not convinced by the answers we received in evidence about why sunset provision is not used more often as a matter of good practice and what alternative arrangements are in place to ensure legislative good housekeeping. We would welcome further explanation.** (Paragraph 73)

Restricting parliamentary scrutiny

17. **As we said in our end of session 2019–21 report, while the pandemic may have provided a justification for some instruments to be subject to an accelerated timetable, this was not the case for all instruments that were dealt with in this way—including some pandemic-related instruments. We repeat our view that parliamentary scrutiny should not be curtailed save in exceptional circumstances and with a full justification clearly set out in the explanatory memorandum. We are aware of the DPRRC's concerns about the use of the made affirmative procedure–that it enables significant policy change without prior parliamentary approval–and we support the DPRRC's recommendation that consideration should be given as to whether it would be feasible to hold a debate at an early stage and for the approval motion to be taken later, either formally or as a second debate if either the SLSC or the JCSI raises matters of concern.** (Paragraph 76)

Looking ahead: volume and flow of statutory instruments

18. **We valued the information provided by the Government to us about anticipated numbers of instruments during the height of the Brexit-related secondary legislation. We look forward to that practice continuing so that Parliament and departments can together support the public interest in properly scrutinised legislation.** (Paragraph 79)

APPENDIX 1: EXTRACTS FROM EXECUTIVE SUMMARIES OF TWO SLSC REPORTS

Interim report on the Work of the Committee in Session 2019–21 (39th Report, Session 2019–21, HL Paper 200)

In the period under review [the first 12 months of session 2019–21 up to 18 December 2020], we considered 901 statutory instruments and 33 other instruments. This is above the average for each of the calendar years 2016 to 2019, but below the level reached in the period of most intensive Brexit preparation. The details of the instruments laid, the Departments which laid them, and the Committee's observations on general trends are set out in the section on Committee Activity of this report (paragraphs 33–43).

In addition, in this report, we draw attention to a number of factors which we consider to be of significance both as to what has happened in the period under review but, no less importantly, as to their potential impact on the future effectiveness of parliamentary scrutiny. These are:

- Emergency legislation and the quality of Explanatory Memoranda (paragraphs 8–15)
- Incomplete revocations (paragraph 16)
- Inconsistent sunset provisions (paragraph 17)
- The pandemic as a pretext for significant policy changes (paragraphs 18–19)
- Blurring of legislation and guidance (paragraphs 20–21)
- Inadequate Impact Assessment (paragraphs 22–23)
- Restricting parliamentary scrutiny (paragraphs 24–28)
- Increased use of "skeleton bills" (paragraphs 29–32)
- Overlarge complex SIs (paragraph 39).

Work of the Committee in Session 2019–21 (54th Report, Session 2019–21, HL Paper 276)

Given the uncertainty about the length of session 2019–21, we published an Interim Report about our activity during the first 12 months of the session (up to 18 December 2020) (We called this period "Year 1").

- This report is in two parts. The first part examines activity in the remainder of the session (from 19 December 2020 to 27 April 2021). We found that although some of the matters we raised in the Year 1 report have improved, others continue to be an issue:
- Corrections and flawed instruments (paragraphs 5–6)
- Poor quality explanation (paragraphs 7–8)
- Blurring of boundaries between legislation and guidance (paragraphs 9–11)
- Restricting Parliamentary scrutiny (paragraphs 12–13)

During recent times, departments have had to meet the twin challenge of producing large numbers of EU Exit and pandemic-related instruments to very tight timetables and under difficult working conditions. In this report, and the reports we have published throughout the session, we have made a number of criticisms–some of them points of detail but others matters of principle that go to

the very heart of the relationship between Parliament and the executive and the rule of law. That said, we wish to take this opportunity to acknowledge the work and the achievements of the many civil servants who have had to respond to the exceptional demands of the current period.

APPENDIX 2: LIST OF MEMBERS (AND LENGTH OF PARLIAMENTARY EXPERIENCE) AND MEMBERS' INTERESTS

Committee membership (and length of parliamentary experience)

Baroness Bakewell of Hardington Mandeville (8 years)
Lord Chartres (25 years)
Lord Cunningham of Felling (51 years)
Lord German (11 years)
Viscount Hanworth (13 years)
Lord Hodgson of Astley Abbotts (Chair) (24 years)
Lord Hutton of Furness (29 years)
Earl Lindsay (32 years)
Lord Lisvane (49 years)
Lord Sherbourne of Didsbury (8 years)
Baroness Watkins of Tavistock (6 years)

Interests

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