HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

12th Report of Session 2021–22

Democracy Denied? The urgent need to rebalance power between Parliament and the Executive

Ordered to be printed 19 November 2021 and published 24 November 2021

Published by the Authority of the House of Lords

HL Paper 106

The Delegated Powers and Regulatory Reform Committee

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

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

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

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

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

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

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

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

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

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

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

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

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

Membership

Baroness Andrews
Lord Blencathra (Chair)
Baroness Browning
Lord Goddard of Stockport
Lord Haselhurst
Lord Hendy
Lord Janvrin
Baroness Meacher
Lord Rowlands
Lord Tope

Registered Interests

Committee Members' registered interests may be examined in the online Register of Lords' Interests at https://www.parliament.uk/hlregister. The Register may also be inspected in the Parliamentary Archives.

Publications

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

General Information

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

Contacts for the Delegated Powers and Regulatory Reform Committee

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

Historical Note

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

CONTENTS

	Page
Summary	3
Chapter 1: An urgent need for change	7
Introduction	7
Purpose of the report	8
Collaboration with the SLSC	8
Acknowledgements	9
Explanation of terms	9
Structure of the report	9
Chapter 2: Reasons for and against delegated legislation	11
What is delegated legislation?	11
Henry VIII powers	11
Skeleton legislation	11
Affirmative and negative procedure – draft and made	11
Enhanced scrutiny procedures	12
Why delegated legislation is necessary	13
Why delegated legislation is contentious	14
Parliamentary oversight of delegated legislation – its limitations	14
Delegated legislation cannot be amended	15
"All or nothing"	15
Regret motions	16
Conclusion	16
Chapter 3: "Considerable disquiet" – the problem of wide and ill-defined delegated powers	17
Introduction	17
The New Despotism	17
Background to the establishment of the DPRRC	18
Strathclyde Review	20
These "exceptional times"	22
Conclusion	23
Chapter 4: Familiar and emerging grounds for continued "considerable disquiet"	24
Introduction	24
Familiar concerns	24
Skeleton legislation	24
Henry VIII powers	28
Disturbing new trends	33
Disguised law	33
Guidance	33
Other disguised legislative instruments	36
Legislative sub-delegation of power	40
Made affirmatives	42
Conclusion	43
Chapter 5: Ways to re-set the balance of power	45
Asserting the fundamental principles of parliamentary democracy	45
Box 1: Statement of principles of parliamentary democracy	46

What departments can do 46
Relationship between policy development and bill drafting 46
Pre-legislative scrutiny 47
What the DPRRC can do 49
Impact of the Committee 49
Pre-emptive impact 49
How often are the Committee's recommendations accepted? 50
Committee guidance to departments 51
Commenting on the quality of delegated powers memoranda 51
Timing of Committee reports 52
Government responses to DPRRC reports 53
Calling in ministers and "scrutiny reserve" 53
End of session reports 55

Chapter 6: Culture change within departments — changing the guidance 56
Committee's revised guidance to departments 56
Box 2: Guidance to departments 56
PART 1: Principles 56
Statement of principles of parliamentary democracy 56
Additional principles 57
PART 2: content of the delegated powers memorandum 59
Skeleton legislation declaration 59
Powers to be covered by a memorandum 59
Content of the explanatory paragraphs 59
Changes to the Cabinet Office Guide to Making Legislation 61
Box 3: Summary of recommended revisions of the Guide to Making Legislation 61

Summary of conclusions and recommendations 63

Appendix 1: List of Members (and length of parliamentary experience) and Members' interests 69

Appendix 2: Glossary of key parliamentary terms 70

Appendix 3: List of bills with inappropriate delegations cited in this report 72

Appendix 4: Part 3 of the guidance to departments 74

Q in footnotes refers to a question in oral evidence.

SUMMARY

This report is about the relationship between Parliament and the executive. Its purpose is to alert members of both Houses, and the wider public, to a potentially serious threat to a cornerstone of our constitution — effective parliamentary scrutiny of legislation. Based upon Committee reports since its inception in 1992 and covering pre- and post-Brexit and the COVID-19 pandemic, we highlight a disturbing trend in the way in which bills are framed with the effect that they often limit or even avoid appropriate legislative scrutiny. **We have concluded that it is now a matter of urgency that Parliament should take stock and consider how the balance of power can be re-set.**

The fundamental principles underpinning this necessary change are twofold: that primary legislation, and powers conferred by it, should be drafted on the basis of the principles of parliamentary democracy, namely parliamentary sovereignty, the rule of law and the accountability of the executive to Parliament; and, second, that the threshold between primary and delegated legislation should be founded on the principle that the principal aspects of policy should be on the face of a bill and only its detailed implementation left to delegation.

So concerned are we about the erosion of parliamentary power that we have once again joined forces with the Secondary Legislation Scrutiny Committee (SLSC) to express — what, in 1992, the Jellicoe Committee called — the "considerable disquiet" about the denial of democracy implicit in what are often seen as obscure practices and procedures by which laws are made. We have collaborated with the SLSC and are producing parallel reports reflecting our overlapping interests.

We acknowledge that the delegation of legislative powers is necessary — and even, on occasion, that Henry VIII powers can be justified. But far too often primary legislation has been stripped out by skeleton provisions and the inappropriate use of wide delegated powers. This means that it is increasingly difficult for Parliament to understand what legislation will mean in practice and to challenge its potential consequences on people affected by it in their daily lives.

We make recommendations covering a wide range of issues, some familiar, others less so. These include:

- **Skeleton legislation**: where little of the policy is included on the face of the bill but, instead, left to delegated legislation which Parliament cannot amend but only accept or reject, with rejection being a rare occurrence and fraught with difficulty. We conclude that, even in an emergency, skeleton bills are rarely justified. We recommend that, should the Government introduce a skeleton bill or a bill containing skeleton clauses, they should be clear that this is what they are doing by making an explicit declaration in the delegated powers memorandum, with a full justification including why it is necessary and how the scope of the skeletal provision is constrained. Where the Committee want to challenge the Government further about the use of skeleton provision, we propose that we should have a "scrutiny reserve", to be exercised in exceptional circumstances, to allow us time to take evidence from a minister before second reading. But this is not enough. With the SLSC, we support the need for the

Government, the two Houses and their Procedure Committees to consider, following consultation, how the democratic deficit inherent in skeleton legislation can be remedied, including introducing more testing scrutiny procedures for the delegated legislation made under skeleton powers.

- **Henry VIII powers**: where ministers can repeal or amend an Act of Parliament by regulations. Henry VIII powers have always been contentious because of the disparity in the quality of parliamentary scrutiny of primary and delegated legislation. We acknowledge that they are, on occasion, appropriate but reject their inclusion "just in case" and reassert our view that there should be a presumption that regulations made under Henry VIII powers should be subject to the affirmative resolution procedure.

- **Legislative sub-delegation of power**: where ministers can confer powers on themselves or other bodies (and which may include a power to amend or even repeal an Act of Parliament). Tertiary legislation has as much legal force as any other form of law and we conclude that conferring legislative sub-delegation of power is potentially a more egregious erosion of democratic accountability than a simple delegation to a minister. We recommend that sub-delegation should be limited and specific, and its exercise subject to parliamentary scrutiny and, in certain circumstances, to a duty to consult. Where the exercise of the sub-delegated power is subject to a different level of parliamentary scrutiny to the exercise of the original power, a compelling justification for the divergence needs to be provided.

- **Disguised legislation**: perhaps the most striking and disturbing recent development, where ministers can exercise legislative powers using various devices — such as guidance, determinations, protocols — often not subject parliamentary scrutiny. We draw attention to a wide range of examples. We conclude that the multiplicity of disguised legislative instruments is confusing to Parliament and the public, and that, in the absence of convincing reasons to the contrary, they should not be used.

The shift of power from Parliament to the executive must stop. To support this, **we need to challenge the culture of Whitehall** itself – which appears to encourage a tendency to see the delegation of legislative powers as a matter of political expediency. We therefore recommend significant amendments to the Cabinet Office Guide to Making Legislation — the bible which officials must follow — including an explicit assertion of the fundamental principles of parliamentary democracy as the basis for the way in which bills are framed. We have also revised our own guidance to departments in the light of our conclusions in this report and we believe that it should be reproduced in full in the Cabinet Office Guide, including a reinstatement of the presumption that most, if not all, of our recommendations should be accepted by ministers.

Legislative scrutiny really matters. We are conscious of the fact that this report is full of parliamentary nomenclature and technical procedural explanations which may read as an esoteric constitutional essay. However, the issues raised are anything but esoteric. The way our laws are made can have a profound effect upon the lives of millions of citizens — granting rights,

imposing obligations, involving enforcement measures possibly including criminal sanctions and imprisonment. As we said at the outset, parliamentary scrutiny is a cornerstone of parliamentary democracy. We have never denied an appropriate role for such legislation but one clearly and specifically defined. We have, however, refuted the argument that parliamentary legislative procedures cannot respond swiftly to address urgent unforeseen situations. And there can be no better proof of the case than in the way Parliament responded to Brexit and the pandemic. As our historic account of delegated legislation shows, there have been times when the government of the day have been impatient of parliamentary legislative constraints. We detect such impatience today. But Parliament rightly demands patience in fulfilling its most important role — the making of our laws.

The abuse of delegated powers is in effect an abuse of Parliament and an abuse of democracy, and this report will, we hope, be a prompt to strengthen Parliament in the coming years.

Democracy Denied? The urgent need to rebalance power between Parliament and the Executive

CHAPTER 1: AN URGENT NEED FOR CHANGE

Introduction

1. This report is about the relationship between Parliament and the executive, and the urgent need for that relationship to be rebalanced and the power of Parliament reasserted.

2. In April 2021, the Hansard Society said:[1]

> "Since March 2020, the public has lived under some of the UK's most restrictive peacetime laws, and to support the economy public money has been spent on a vast scale. Yet parliamentary accountability for, and control over, these decisions has diminished to a degree that would have been unthinkable prior to the COVID-19 pandemic. One year on, with lockdown easing, the restoration of parliamentary control and functioning is now an urgent priority."

While we agree about the urgency, we believe that the twin challenges of Brexit and the pandemic did not mark the beginning of the shift but an acceleration and intensification of an existing trend.

3. In a debate in the House of Lords on 16 September 2021, the Rt Hon.Baroness Taylor of Bolton, Chair of the Constitution Committee, described how she had become increasingly alarmed at the "extremely unhealthy trends"—trends which she believed were accelerating — "in what government ministers think they can get away with without properly consulting Parliament" in an attitude which she described as "cavalier".[2] We share this view, and also agree with Baroness Taylor's later comment that: "The more significant problem is not the issues in each individual bill but the underlying trend we are seeing of moving away from Parliament making our laws and ministers increasingly taking powers to change the rules, regulations and guidance".[3]

4. Concerns have not only been expressed within Parliament. In remarks to the Statute Law Society, Sir Jonathan Jones KCB QC (Hon.), former Government Legal Department Permanent Secretary and Treasury Solicitor, said that the use of delegated legislation over the last few years "gives a number of causes for concern", and he concluded that there was "a strong case for a kind of re-set".[4] On 2 November, the Hansard Society launched a review of

---

1 Hansard Society, H*ouse of Commons marginalisation under Covid* (21 April 2021): https://www.hansardsociety.org.uk/publications/briefings/the-marginalisation-of-the-house-of-commons-under-covid-has-been-shocking-a [accessed 18 November 2021]

2 HL Debs, 16 September 2021, col 1604.

3 *Ibid.*

4 Sir Jonathan Jones KCB QC (Hon), Speech on The Rule of Law and Subordinate Legislation for the Statute Law Society (edited) (29 September 2021): https://www.ucl.ac.uk/laws/sites/laws/files/statute_law_society_re_secondary_legislation_edited_-_j.jones_27102021.pdf [accessed 5 November 2021].

delegated legislation because recent events had led the Society to conclude that "fundamental and far-reaching reform is needed".[5]

5. **A substantial groundswell of concern is developing about the shift in power from Parliament to ministers.[6] We take the view that a critical moment has been reached where action is needed to bring about significant change in the way in which legislation is framed so that it is, first and foremost, founded on the principles of parliamentary democracy, namely parliamentary sovereignty, the rule of law and the accountability of the executive to Parliament.**

Purpose of the report

6. The purpose of this report is to consider what can be done to stop the "unhealthy trends" identified by Baroness Taylor, and to make recommendations intended to assist in re-setting the balance of power between Parliament and the executive. Our aim is an ambitious one. It is not to return to how things were immediately pre-Brexit and pre-pandemic but to establish a new relationship based on principle and informed, amongst other things, by the conclusions set out in this report.

7. The Delegated Powers and Regulatory Reform Committee (DPRRC) has, we believe, a crucial role to play in achieving this important aim. Its function goes to the heart of the relationship between Parliament and executive: namely, "to police the boundary between primary and delegated legislation" and "in doing so 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".[7] Its remit is to report on whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny.

8. The DPRRC was established — as the Scrutiny of Delegated Powers Committee — in 1992. For some years after that, it was the practice of the Committee to publish an end of session report in which it would reflect on its work during the previous session. We have decided to reinstate the practice, beginning with this report in which we consider not only the impact of Brexit and the pandemic but also take a longer view, back to the Committee's inception and beyond. We draw attention to both familiar and emerging legislative practices about which we, and others, have over the years been highly critical, and make recommendations intended to bring about the change which, in our view, is now urgently needed.

Collaboration with the SLSC

9. Whereas the DPRRC scrutinises provisions in primary legislation which confer powers on ministers to make delegated legislation, the Secondary Legislation Scrutiny Committee (SLSC) is responsible for the scrutiny of the delegated legislation itself.[8] The DPRRC and the SLSC therefore perform

5 Hansard Society, *Delegated Legislation Review*: https://www.hansardsociety.org.uk/projects/delegated-legislation-review [accessed 16 November 2021].

6 Acts of Parliament confer delegated powers on ministers and other bodies or individuals. Throughout this report we refer only to ministers to avoid complicating the text.

7 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.

8 The SLSC considers policy aspects of delegated legislation. The Joint Committee on Statutory Instruments considers legal and technical aspects.

complementary functions and it is unsurprising that the two Committees share a common concern about the delegation of legislative powers.

10. A testament to the level of concern about the extent to which power is being delegated to ministers is that the two Committees have taken the unusual step on this occasion of collaborating, not only in holding joint evidence sessions (see paragraph 11 below), but also in the preparation and publication of parallel reports.[9] This has enabled the Committees, in areas of overlapping interest, to make common cause in addressing the imbalance in the relationship between Parliament and the executive.

Acknowledgements

11. In April 2021, the SLSC held an evidence session with three Permanent Secretaries: Dame Elizabeth Gardiner, First Parliamentary Counsel and Permanent Secretary, Government in Parliament Group; Susanna McGibbon, Treasury Solicitor and Permanent Secretary, Government Legal Department; and Tamara Finkelstein, Permanent Secretary of the Department for Environment, Food and Rural Affairs and Head of the Civil Service Policy Profession.[10] The SLSC invited members of the DPRRC to attend the session. On 12 May, we held an evidence session with the Rt Hon. Jacob Rees-Mogg MP, Lord President of the Council and Leader of the House of Commons, and members of the SLSC were also invited.[11] On 26 May, we held a further evidence session with Dame Elizabeth. We are grateful to those who gave evidence. We would also like to thank members of the SLSC for contributing to the evidence session with the Lord President, for inviting members of the DPRRC to join them in their evidence session with the three Permanent Secretaries, and for their collaboration more generally.

12. We are also grateful to the House of Lords Library which provided a comparative analysis of the Committee's reports looking at the period immediately after its establishment and more recent sessions. It was a very substantial and thorough piece of work.

Explanation of terms

13. We believe that the issues raised in this report will be of interest to those outside the immediate parliamentary community, including members of the wider public who are affected daily by the regulations made by ministers using powers conferred by Parliament. For this reason, on occasion, we have provided explanations of terms which, although well-known to members of the House, may be less familiar to members of the public.

Structure of the report

14. The following chapters are arranged as follows:

- Chapter 2 describes what delegated legislation is, why is it necessary but also why it is contentious.

---

9 We refer to the SLSC's report as "the SLSC's parallel report".

10 SLSC, Corrected oral evidence: Departmental support of secondary legislation (21 April 2021): https://committees.parliament.uk/oralevidence/2063/default/

11 DPRRC, Corrected oral evidence: Delegation of legislative power (12 May 2021): https://committees.parliament.uk/oralevidence/2175/pdf/

- Chapter 3 provides an historical overview of concern about the delegation of legislative power, including the background to the establishment of the DPRRC in 1992, events surrounding the appointment of the Strathclyde Review and the report of the Review, and the impact of what has on many occasions been referred to as these "exceptional times" of Brexit and the pandemic.

- Chapter 4 sets out in detail examples, some familiar and others emerging, of forms of delegated powers that have caused particular concern. The familiar concerns are the use of skeleton provision and Henry VIII powers, and we make recommendations about their use. The emerging forms include a range of disguised legislative instruments. We also draw attention to the made affirmative procedure and sub-delegation of legislative power.

- Chapter 5 sets out our recommendations for making more long-lasting changes that we believe will assist in re-setting the balance between Parliament and the executive, including actions by departments and by the Committee.

- Chapter 6 sets out the DPRRC's revised guidance to departments and our proposed changes to the Cabinet Office Guide to Making Legislation.

- The final chapter sets out the summary of conclusions and recommendations.

- Appendix 1 is a list of the Committee's membership (Members' parliamentary experience).

- Appendix 2 is a short glossary of parliamentary terms.

- Appendix 3 sets out a list of the bills with inappropriate delegations cited in this report.

- Appendix 4 sets out Part 3 of the Committee's guidance to departments. (Parts 1 and 2 are set out in the body of the report.)

CHAPTER 2: REASONS FOR AND AGAINST DELEGATED LEGISLATION

What is delegated legislation?

15. Parliament is the sovereign law-making body and primary legislation — called bills during their passage through Parliament and Acts of Parliament once they have received Royal Assent — is law made by Parliament. Sometimes Parliament may decide to delegate legislative powers to ministers (or others).[12] This is done by including in an Act (sometimes referred to as "the parent Act") provision which confers legislative powers on ministers. The law made by ministers is variously called delegated legislation, secondary legislation,[13] and subordinate legislation, and it is usually, but not always, made by statutory instrument. In this report, we largely refer to it as delegated legislation.

Henry VIII powers

16. We shall be referring throughout this report to a type of delegated power called a Henry VIII power. Henry VIII powers have long attracted particularly strong criticism. This is because they are powers conferred by primary legislation which enable a minister, by delegated legislation, to amend, repeal or otherwise alter the effect of an Act of Parliament. The objection to Henry VIII powers rests in principle on the fact that primary legislation, in contrast to delegated legislation, is subject to relatively substantial parliamentary scrutiny, involving first reading (formal), second reading (general debate about the bill), committee stage (line by line scrutiny and consideration of amendments suggested by members of the House, including the government), report stage (further amendable stage) and third reading in the first House, followed by the same stages in the second House and then "ping pong" between the Houses until final agreement on the text of the bill is achieved. As we set out below (see paragraphs 27 to 35), delegated legislation is unamendable and, if debated at all, is debated once in either or both Houses.

Skeleton legislation

17. We shall also be referring frequently to skeleton— or framework— legislation. This is described in detail in Chapter 4 (see paragraphs 59 to 74). It includes, in brief, bills or parts of bills which so substantially consist of delegated powers that the policy change which the bill or clauses are intended to implement is, in effect, left to delegated legislation.

Affirmative and negative procedure – draft and made

18. When Parliament confers a power to make delegated legislation, the parent Act will specify the level of parliamentary scrutiny, if any, to which the delegated legislation will be subject. Sometimes there will be no subsequent scrutiny or the requirement is simply that the instrument should be laid before Parliament. On other occasions, Parliament has decided that the statutory instrument should be subject to a parliamentary procedure. There are two main sorts of procedure: the negative and the affirmative.

12 See footnote 6 above.
13 In paras 107–112 below, we also refer to a form of delegated legislation called tertiary legislation.

- If an instrument is subject to the negative procedure, it is usually first made by the minister (and is therefore law) and then laid before Parliament. It will remain law so long as neither House successfully objects to it (that is, "prays against it" in accordance with the Statutory Instruments Act 1946).

- If it is subject to the affirmative procedure, it is usually laid before Parliament as a draft (and so not law) and cannot be made by the minister (so become law) unless both Houses approve it.[14] This is called the *draft* affirmative procedure. Sometimes affirmative instruments are made by the minister before they are laid — so they are not laid simply in draft form — and need the approval of Parliament either to come into force or to remain in force beyond a period specified in the parent Act (usually 28 or 40 days). This is called the *made* affirmative procedure and has been used in cases of urgency under both Brexit-related and pandemic-related legislation.

Under neither of the negative or the affirmative procedures is Parliament able to amend a statutory instrument.

Enhanced scrutiny procedures

19. Occasionally, some delegated legislation is subject to a more rigorous level of scrutiny by Parliament. Such procedures give Parliament the opportunity to propose amendments to an instrument. They involve a two-stage procedure and take the following forms:

- a *proposal* containing a draft order is laid and then, after a specified scrutiny period, the draft order itself may be laid (for example, instruments laid under section 17 of the Local Government Act 1999); or

- a *draft* order is laid and then, after a specified scrutiny period, a revised draft order may be laid (for example, instruments laid under the Legislative and Regulatory Reform Act 2006).

20. In 2012, the DPRRC published a report entitled *Strengthened Statutory Procedures for the Scrutiny of Delegated Powers* which contains a list of the enhanced scrutiny procedures available at that time.[15]

21. Since then, two new procedures have been introduced under the European Union (Withdrawal) Act 2018 ("the withdrawal Act"). The first concerns the "sifting" procedure of so-called proposed negative instruments. Whereas a parent Act almost always specifies the level of parliamentary scrutiny to be applied to the exercise of a power, the withdrawal Act (like the European Communities Act 1972) contains regulation-making powers where the level of parliamentary scrutiny is not specified, and the choice is left to ministers. During the passage of the withdrawal Bill through Parliament, both the House of Commons Procedure Committee and the DPRRC said that the level of scrutiny should be a matter for Parliament — not for ministers — and both recommended that a scrutiny committee should be established to consider relevant instruments where the minister proposes that it should be subject to the negative procedure only. In the House of Commons, the Bill was amended to introduce a sifting mechanism in the Commons. Subsequent

14 Some instruments are Commons-only, so require the approval of that House alone.
15 3rd Report, Session 2012–13 (HL Paper 19).

amendments made similar provision for the House of Lords. The sifting function is undertaken by the SLSC in the Lords and by the European Statutory Instruments Committee (ESIC) in the Commons.[16] Although a committee recommendation to upgrade an instrument from the negative to the affirmative procedure is advisory only, it has invariably been the case that when either or both Committees have made such a recommendation, the Government have accepted it. The European Union (Future Relationship) Act 2020 also includes provision for a proposed negative instruments procedure.

22. The second new procedure under the withdrawal Act concerns draft instruments published under Schedule 8 to the Act. Under this provision, instruments that amend or revoke delegated legislation made under section 2(2) of the European Communities Act 1972 and made under a power conferred before the beginning of session 2017–19, must be (1) subject to an enhanced scrutiny procedure and (2), when laid formally, subject to the affirmative procedure. The enhanced scrutiny procedure requires a proposed instrument to be published for at least 28 days before it is laid before Parliament to allow for comment, whether by a committee of either House or any other organisation or individual. When the instrument is laid formally, the minister must make a "scrutiny statement" setting out, amongst other things, the Government's response to any recommendations made by a parliamentary committee. In addition, the minister is required to provide two further statements: one setting out the "good reasons for the amendment or revocation" and the other explaining relevant law and the effect of the amendment or revocation on retained EU law.[17] Scrutiny of published drafts is undertaken by the SLSC in the Lords and ESIC in the Commons.

Why delegated legislation is necessary

23. While the delegation of powers can be controversial, the need for delegated legislation has long been widely accepted. *Erskine May*, the authoritative text on parliamentary procedure, refers to the advantages arising from its "speed, flexibility and adaptability",[18] and the first report of the Delegated Powers Scrutiny Committee, published in March 1993, began:

> "Parliament recognises the need to delegate some legislative powers. The ever-increasing mass of detail in statutory instruments could not be scrutinised by Parliament if it formed part of primary legislation. The need to change detailed provisions from time to time would place impossible burdens on Parliament if the changes always required the introduction of new legislation. The argument is not whether delegation is ever justified but what criteria can be used in determining whether particular proposals for delegation are acceptable."[19]

24. This has been a long-held view. In 1932, the report of the Committee on Ministers' Powers ("the Donoughmore Committee") said: "We do not agree with those critics who think that the practice is wholly bad. We see in it definite advantages, provided that the statutory powers are exercised, and

16 For additional information, see SLSC, 37th Report, Session 2017–19 (HL Paper 174).
17 For additional information, see SLSC, 3rd Report, Session 2021–22 (HL Paper 10).
18 25th ed, para 31.1.
19 Delegated Powers Scrutiny Committee, 1st Report, Session 1992–93 (HL Paper 57), para 1.

the statutory functions performed in the right way".[20] In a debate on 31 January 1990 on the quality of legislation, the Lord Advocate, Lord Fraser of Carmyllie, made a similar point: "… any debate on the propriety or otherwise of a particular power to make subordinate legislation must start from the premise … that there is nothing inherently wrong with delegated legislation. Without it, governments simply could not deliver the degree of provision which is now demanded of them."[21] Sir Jonathan Jones, in his recent remarks to the Statute Law Society, said: "As a matter of principle, the use of … delegated legislation is clearly *possible* and *legitimate* within our constitution. It's a well-established and indeed indispensable feature of our system of legislation".[22]

Why delegated legislation is contentious

25. In the following chapters we consider further the controversy surrounding the delegation of powers. Put simply, the issue is that, in conferring powers on minsters, Parliament is delegating its law-making powers so that legislative power shifts from the democratically appointed legislature to the executive. The resulting democratic deficit can be offset to some extent by the parent legislation including:

- provision which explicitly limits the scope of the legislative powers conferred on ministers clearly on the face of the bill, and
- a requirement that the exercise of a power should be subject to parliamentary oversight.

26. But these supposed safeguards are imperfect. A government which commands a majority in the House of Commons can resist attempts to restrict the scope of a power. Sir Jonathan Jones commented: "Under our constitution, with the doctrine of parliamentary sovereignty at its heart, it is open to Parliament to confer whatever powers it wants on ministers, subject to whatever conditions, limitations and procedures Parliament wishes to impose"; but, he went on, "… of course a government with a big majority can generally get Parliament to confer the powers it wants".[23] As for parliamentary oversight of delegated legislation, whilst scrutiny by parliamentary committees and the Houses is effective in highlighting concerns, the procedures lack teeth — a point which was clearly demonstrated in 2015 when, following objection in the House of Lords to the draft Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015, the Government appointed the Strathclyde Review, the report of which drew trenchant criticism from, amongst others, this Committee, the Constitution Committee and the SLSC. Given its significance, we consider the Strathclyde Review in detail in the next chapter.

Parliamentary oversight of delegated legislation – its limitations

27. Where a statutory instrument is subject to a parliamentary proceeding then, in principle, Parliament has the potential to intervene and even to reject an instrument. In practice, however, that potential is circumscribed by (1) the fact that neither the affirmative nor negative procedure allows Parliament to amend a statutory instrument and (2) the parliamentary practice relating

20 Donoughmore Report, p 4, para 5.
21 HL Debs, 14 Feb 1990, col 1430.
22 See footnote 4 above.
23 *Ibid.*

to objecting to delegated legislation. While issues about whether delegated legislation should be amendable or the parliamentary practice should be recast are beyond the scope of this report, understanding this context is, we believe, crucial to understanding why there is widespread concern about the delegation of legislative powers.

Delegated legislation cannot be amended

28. Delegated legislation is made by the executive and is unamendable by Parliament.[24] Instruments laid before both Houses are laid at the same time in each House and dealt with by each House independently. There is no "dialogue" between the Houses because, in contrast to primary legislation, there is no need to seek agreement on the text because, in turn, neither House can change the text of the instrument. If one House declines to approve an affirmative instrument or successfully objects to a negative instrument, the instrument is lost.

"All or nothing"

29. Without a power to amend, the options available to the two Houses are, in effect, "all or nothing": either the instrument becomes (or remains) law, or it is voted down in its entirety. But the choice is not evenly weighted. The number of occasions on which statutory instruments have been rejected is very small indeed. Since 1968, when the Lords rejected the draft Southern Rhodesia (United Nations Sanctions) Order 1968, the House of Lords has defeated the Government on six motions relating to five statutory instruments — four involving motions to reject and two by motions to defer.[25]

30. A report by the Joint Committee on Conventions of the UK Parliament (under the chairmanship of the Rt Hon. Lord Cunningham of Felling), published in 2006, stated: "By 1994 it was beginning to be asserted as a convention not merely that the Lords did not defeat [statutory instruments], but that they did not even divide against them."[26] The Joint Committee noted that, in response to this development, in October 1994, Lord Simon of Glaisdale had initiated a debate on the proposition: "That this House affirms its unfettered freedom to vote on any subordinate legislation submitted for its consideration." The motion was carried without a vote.[27] The Joint Committee concluded that:

> "… the House of Lords should not regularly reject statutory instruments [SI], but that in exceptional circumstances it may be appropriate for it to do so. … It is not incompatible with the role of a revising chamber to reject an SI, since (a) the Lords (rightly or wrongly) cannot exercise its revising role by amending the SI or in any other way, (b) the Government can bring the SI forward again immediately, with or without substantive amendment …, and (c) the power to reject SIs gives purpose and leverage to scrutiny by the Joint Committee on SIs, and by the new Lords Committee on the Merits of SIs".[28]

24 There are a very small number of exceptions to this: s 1(2) of the Census Act 1920 and s 27(3) of the Civil Contingencies Act 2004.

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

26 Joint Committee on Conventions, *Conventions of the UK Parliament*, Report of Session 2005–06 (HL Paper 265-I), p 55, para 195.

27 HL Deb, 20 0ctober 1994, cols 356–83.

28 Joint Committee on Conventions, *Conventions of the UK Parliament*, Report of Session 2005–06 (HL Paper 265-I), p 62, para 228. The Merits of Statutory Instruments Committee is now called the Secondary Legislation Scrutiny Committee.

31. Parliament's "all or nothing" choice is therefore firmly rooted in favour of "all".

32. Suggestions for an intermediate option have been proposed from time to time. For example, the report of the Royal Commission on the Reform of the House of Lords (chaired by the Rt Hon. Lord Wakeham) ("the Wakeham Commission"), published in 2000, recommended a statutory approach whereby "where the second chamber votes against a draft instrument, the draft should nevertheless be deemed to be approved if the House of Commons subsequently gives (or, as the case may be, reaffirms) its approval within three months"; and "where the second chamber votes to annul an instrument, the annulment would not take effect for three months and could be overridden by a resolution of the House of Commons".[29] The Report of the Leader's Group on Working Practices (chaired by Lord Goodlad), published in 2011, noted that "… both the volume … and importance of delegated legislation continues to grow" and endorsed "the spirit" of the Wakeham Commission proposal. The Group proposed that a new convention should be adopted by resolution to the effect that, in defeating an affirmative instrument, "the House's intention would be to invite the Government to 'think again'". Then, if, after having considered the issues raised by the Lords, the Commons were to approve the instrument, the House would undertake not to vote it down a second time.[30]

33. Sadly, neither of these reports resulted in the adoption of an intermediate option.

Regret motions

34. Objection to an instrument can be expressed by way of a "regret motion". Recent examples include: a motion, debated on 20 July, in the name of Baroness Thornton on the Medical Devices (Coronavirus Test Device Approvals) (Amendment) Regulations 2021 (narrowly defeated by 229 votes to 230) and another in the name of Baroness Wheeler in relation to the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 (passed by 221 votes to 211). But whilst regret motions prompt effective and focused debates, a government defeat does not affect the outcome in that an instrument will come into (or remain in) effect in any event.

Conclusion

35. **Issues relating to whether delegated legislation should be amendable and whether parliamentary procedures could be changed to provide Parliament with a greater range of options than a simple "all or nothing" are beyond the scope of this report. That said, understanding what Parliament is currently able to do is integral to understanding why delegation of legislative powers by Parliament to the executive is constitutionally important. The limits on Parliament's ability to intervene in delegated legislation places an even greater significance on ensuring the appropriateness of the delegation in the first place. Where laws are passed with little or no scrutiny, Parliament must do more to ensure that they do not amount to an abuse of power.**

29 Wakeham Report, p 77, para 7.35.
30 Goodlad Report, pp 39–40, paras 152–3.

CHAPTER 3: "CONSIDERABLE DISQUIET" – THE PROBLEM OF WIDE AND ILL-DEFINED DELEGATED POWERS

Introduction

36. In the recent past, we have reported on many bills — often Brexit-related bills — in strongly critical terms. For example, in session 2017–19, we said that clause 2 of the Healthcare (International Arrangements) Bill had "a breath-taking scope. Indeed, the scope of the regulations could hardly be wider"[31] and the bill contained "unprecedented powers".[32] We said of the European Union (Withdrawal) Bill that, amongst other things, it conferred "wider Henry VIII powers than we have ever seen";[33] and in our report on the first Agriculture Bill (introduced into the House of Commons in September 2018) we said that we were "dismayed at the Government's approach to delegated powers" and that Parliament would not be able to debate the new agriculture regime because the Bill did "not contain even an outline of the substantive law that will replace the [Common Agricultural Policy]".[34]

37. Concern about the extent to which power is delegated to the executive is not, however, a new phenomenon. In this chapter we set out a short historical overview of important events which show how that concern has, from time to time, resurfaced and taken centre stage. These include publication of *The New Despotism* and the appointment of the Donoughmore Committee, events leading up to the appointment of the Scrutiny of Delegated Powers Committee, the Strathclyde Review and the recent exceptional circumstances of Brexit and the pandemic.

The New Despotism

38. In 1929, the Lord Chief Justice, Lord Hewart, in a book entitled *The New Despotism*, referred to the Rating and Valuation Act 1925 and, in particular, to section 67 which enabled a minister, in the event of any difficulties in bringing the Act into operation, to remove the difficulty "by order", including a power to "modify the provisions" of the Act "so far as may appear to the minister necessary or expedient for carrying the order into effect". Lord Hewart concluded: "It would be difficult to imagine more comprehensive powers or more remarkable legislation".[35] Following the publication of *The New Despotism*, the Donoughmore Committee was appointed to consider delegation of powers and what safeguards were needed "to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the law".[36] The Donoughmore Committee observed that, at that time, for practical reasons, Parliament had had to pass so many laws, it lacked "the time to shape all the legislative details" but, in adopting the practice of delegation, "Parliament [had] steadily pursued a course without fully realising its attendant risks".[37] The Committee doubted whether Parliament itself had "fully realised how extensive the practice of delegation [had]

31 39th Report, Session 2017–19 (HL Paper 226) para 10.
32 47th Report, Session 2017–19 (HL Paper 289) para 3.
33 3rd Report, Session 2017–19 (HL Paper 22) para 9.
34 34th Report, Session 2017–19 (HL Paper 194) para 4. The Agriculture Bill was introduced a second time during Session 2019–21: 13th Report, Session 2019–21 (HL Paper 69).
35 Lord Hewart, *The New Despotism*, Chapt 1, p 10.
36 April 1932, Cmd 4060.
37 April 1932, Cmd 4060, p 23.

become, or the extent to which it [had] surrendered its own functions in the process, or how easily the practice might be abused".[38]

Background to the establishment of the DPRRC

39. The impact of the Donoughmore Committee appeared to last decades. But then, in a debate in 1990, Lord Simon of Glaisdale commented:

> "It is alarming to find a recrudescence of an age-long pretension; namely, the claim of the executive to legislate. It was settled at the Glorious Revolution. There was a slight attempt to revive it in the 1930s but then the Donoughmore Committee seemed to put the stop on the executive pretensions. The recommendations of that committee were observed for over 50 years; but, then, suddenly during the last session a crop of Bills was produced with Henry VIII clauses."[39]

As a result, late last century, a resurgence in concern about the use of delegated legislation occurred.[40] On 31 January 1990, Lord Simon[41] moved a debate "to ask Her Majesty's Government whether they will reduce the quantity and improve the quality of legislation". Lord Simon commented not only on the increase in the amount of primary legislation passed by Parliament but also in the number of statutory instruments made by ministers: "In 1976 the statutory instruments amounted to seven volumes. By 1986 there were 10 volumes. Therefore, the increase in the statute book of public and general Acts was accompanied by a massive increase on secondary legislation".[42] Lord Rippon of Hexham made a similar point, drawing attention in particular to skeleton bills and the use of Henry VIII powers:

> "The mass of legislation is one thing, the mode is another. The practice whereby the Government seek in statutes to make their general intention clear, although in some complexity, while leaving detail — sometimes essential detail — to subordinate legislation is another growing mischief. Increasingly the Government, in spite of the length and complexity of Bills, seek skeleton or framework legislation allegedly to allow greater flexibility in bringing it into operation. Time and again, as the noble and learned Lord, Lord Simon of Glaisdale, has explained, they use the Henry VIII clause to give them the right to amend or even repeal primary legislation by order."[43]

40. Shortly after, on 14 February 1990, Lord Rippon moved a debate "to call attention to the case for a Select Committee to scrutinise all Bills coming before Parliament, and to report whether such Bills contain insufficiently defined administrative powers or propose any inappropriate delegation of legislative powers".[44] Lord Rippon referred to the earlier debate as having "… successfully identified the mischief, and in particular the growing tendency for an all-powerful executive to diminish effective parliamentary control and replace it by ministerial legislation in the form of innumerable

---

38 April 1932, Cmd 4060, p 24.
39 HL Debs, 14 Feb 1990, col 1419.
40 See "Henry VIII Clauses", The History of Parliament (13 July 2017): https://historyofparliamentblog.wordpress.com/2017/07/13/henry-viii-clauses/ [accessed 22 November 2021].
41 Former MP, Law Officer, Treasury Minister, High Court judge and President of the Probate, Divorce and Admiralty Division (forerunner of the Family Division), and Law Lord.
42 HL Debs, 31 Jan 1990, col 382.
43 HL Debs, 31 Jan 1990, col 386.
44 HL Debs, 14 Feb 1990, col 1407.

rules, regulations and orders having the force of law".[45] He also referred to the prevalence of Henry VIII powers and "an increasing reliance on enabling powers of one kind or another".[46] By way of example, Lord Rippon cited "the Courts and Legal Services Bill, the Children Act, the Companies Act, the Financial Services Act, the Banking Act and the many local government finance Acts".[47]

41. In February 1992, the Select Committee on the Committee Work of the House (under the chairmanship of Earl Jellicoe) published a report ("the Jellicoe Report") in which it made wide-ranging recommendations about the committee work of the House of Lords. They included the appointment of a delegated powers scrutiny committee, for which "authoritative support" had been given by witnesses to the Committee's inquiry.[48] The Committee concluded:[49]

> "Almost all the evidence we received on the proposal for a committee to give closer and more systematic scrutiny of delegated powers sought in bills was enthusiastic … . Such work would be well-suited to the revising function of the House and in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order making powers which give Ministers unlimited discretion."

The Committee therefore recommended the appointment of the Delegated Powers Scrutiny Committee. It could, the Jellicoe Committee believed, "have great potential value".[50]

42. On 3 June 1992, Earl Jellicoe moved a debate to take note of his Committee's report.[51] Lord Rippon was acknowledged as the originator of the proposal for a delegated powers scrutiny committee and several contributors welcomed the recommendation. They included, for example, Lord Renton who commented that "[f]or some years past our Bills have been too lengthy, too detailed and too complex and have at the same time, in spite of their length, contained far-reaching powers to make delegated legislation". He mentioned, as an example, the Child Support Act which included numerous delegations. He went on: "Really this vast use of delegated powers has become something to which informed opinion is totally opposed".[52] Lord Simon referred to the Donoughmore Committee recommendations in relation to Henry VIII clauses which he said had been "persistently flouted in recent times".[53]

43. The Delegated Powers Scrutiny Committee was appointed by the House on 10 November 1992, at first as an experiment, later to become a permanent sessional committee. Following a short inquiry into the principles of its work, the Committee published its first bill report on 1 April 1993.[54] Since then, the Committee has been meeting regularly throughout each session, publishing reports on bills as they proceed through Parliament, the flow of

---

45 *Ibid.*
46 *Ibid.*
47 HL Debs, 14 Feb 1990, col 1408.
48 Session 1991–92 (HL Paper 35).
49 *Ibid.*, para 133.
50 *Ibid.*, para 185.
51 HL Debs, 3 June 1992, col 899.
52 HL Debs, 3 June 1992, col 966.
53 HL Debs, 3 June 1992, col 971.
54 On the Education Bill. 2nd Report, Session 1992–93 (HL Paper 79).

bills containing either inappropriate delegations of power or powers subject to an inappropriate degree of parliamentary scrutiny seemingly unabated.

Strathclyde Review

44. In the previous chapter (see paragraph 26), we referred to the Strathclyde Review as evidence of the weakness of Parliament's powers in relation to delegated legislation. The Review (under the chairmanship of the Rt Hon. Lord Strathclyde) was appointed in 2015 by the Government following votes in the House of Lords on the draft Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015 ("the Tax Credits Regulations"). The circumstances prompting the Review, and Lord Strathclyde's conclusions, gave rise to one of the most significant debates about the balance of power between Parliament and the executive, and threshold between primary and delegated legislation, in recent decades.

45. The Tax Credits Regulations had been approved by the House of Commons on 26 September 2015. On 26 October 2015, they were debated in the House of Lords. A motion to "decline to approve" the Regulations was disagreed to by 99 to 310 votes but two motions to "decline to consider" them until the Government had undertaken certain actions were agreed, by 307 votes to 277 and by 289 votes to 272.[55] The following day, a motion was moved and narrowly defeated which would have annulled the Electoral Registration and Administration Act 2013 (Transitional Provisions) Order 2015.

46. The Government's response was to appoint the Strathclyde Review. Its purpose was to examine "how to protect the ability of elected governments to secure their business in Parliament" and, in particular, to consider "how to secure the decisive role of the elected House of Commons in relation to its primacy on financial matters and secondary legislation".[56]

47. The Review reported on 17 December 2015.[57] In the Foreword to the report, *Strathclyde Review: Secondary legislation and the primacy of the House of Commons*, Lord Strathclyde said:

> "The Lords convention on statutory instruments has been fraying for some years and the combination of less collective memory, a misunderstanding of important constitutional principles, a House more willing to flex its political muscles, and some innovative drafting of motions against statutory instruments has made it imperative that we understand better the expectations of both Houses when it comes to secondary legislation and, in particular, whether the House of Lords should retain its veto."

---

55 The first of these motions, in the name of Baroness Meacher, was "that the House should decline to consider the regulations until the Government had laid a report before the House, "detailing their response to the analysis of the draft Regulations by the Institute for Fiscal Studies, and considering possible mitigating action". The second, in the name of Baroness Hollis of Heigham, was "that the House should decline to consider the regulations until the Government "(1) following consultation have reported to Parliament a scheme for full transitional protection for a minimum of three years for all low-income families and individuals currently receiving tax credits before 5 April 2016, such transitional protection to be renewable after three years with parliamentary approval, and (2) have laid a report before the House, detailing their response to the analysis of the draft Regulations by the Institute for Fiscal Studies, and considering possible mitigating action".

56 HL Deb, 28 October 2015, cols 1175–76, and HL Deb, 5 November 2015, HLWS285.

57 Cabinet Office, *Strathclyde Review: Secondary legislation and the primacy of the House of Commons* (December 2015), Cm 9177.

48. The Report set out three options for reform, with a recommendation in favour of the third:

- "to remove the House of Lords from statutory instrument procedure altogether",
- "to retain the present role of the House of Lords in relation to statutory instruments, but for that House, in a resolution or in standing orders, to set out and recognise, in a clear and unambiguous way, the restrictions on how its powers to withhold approval or to annul should be exercised in practice and to revert to a position where the veto is left unused",
- "to create a new procedure — set out in statute — allowing the Lords to invite the Commons to think again when a disagreement exists and insist on its primacy".

49. In 2016, this Committee, the Constitution Committee and the SLSC each published a special report in response to the Strathclyde Review. Each Committee challenged the assertion by the Review that the relationship at issue was the relationship between the two Houses of Parliament and that the key concern was "the primacy of the House of Commons". Instead, the Committees argued, the relationship at issue was the balance of power between Parliament and the executive.

- The DPRRC concluded: "The House of Lords' votes on the Tax Credits Regulations challenged the Government, not the House of Commons, and the effect of the options set out in the Strathclyde Review would be to tilt the balance of power away from Parliament generally and towards Government."[58]
- The SLSC said: "We do not share the view which underlies the Strathclyde Review that the central issue is the "primacy of the House of Commons". The nature of secondary legislation is such that the debate should be framed in terms of the relationship between Parliament and the executive, and not between the two Houses."[59]
- The Constitution Committee said: "There are indeed serious problems with the current system of delegated legislation that must be addressed. But by tasking Lord Strathclyde to consider the balance of power between the two Houses of Parliament, it seems to us that the Government focused his Review on the wrong questions. It consequently addressed the wrong issues. We believe that the more serious concerns arising from the delegated legislation process are rooted in the relationship between Parliament and the executive."[60]

50. The focus of the DPRRC's response to the Strathclyde Review was the question: is too much being "left for implementation by statutory instrument?" The Committee noted that setting the appropriate boundary between primary and delegated legislation was not a simple, objective exercise and that, for that reason, since its inception, the Committee had taken the view that "it would not offer a list of criteria but would consider each delegation in a bill on its merits".[61] As a result, it said, "any assessment of

58 DPRRC, 25th Report, Session 2015–16 (HL Paper 119), para 77.
59 SLSC, 32nd Report, Session 2015–16 (HL Paper 128), para 87.
60 Constitution Committee, 9th Report, Session 2015–16 (HL Paper 116), summary.
61 25th Report, Session 2015–16 (HL Paper 119), para 21.

the extent to which primary legislation may or may not be leaving too much for implementation by delegated legislation is not directly quantifiable". That said, the Committee went on to say that its reports had indicated "that time and again successive governments have attempted to relegate too many important policies to delegated legislation, leaving too little on the face of the bill",[62] and of particular concern were the use of skeleton legislation and Henry VIII powers.

51. In December 2016, the Government responded to the Strathclyde Review. It was decided that legislation would not be introduced to bring option three into effect although the then Leader of the House of Commons, the Rt Hon. David Lidington MP, gave a warning in the Foreword to the response: "Whilst recognising the valuable role of the House of Lords in scrutinising SIs [statutory instruments], the Government remains concerned that there is no mechanism for the elected chamber to overturn a decision by the unelected chamber on SIs. We do not believe that it is something that can remain unchanged if the House of Lords seeks to vote against SIs approved by the House of Commons when there is no mechanism for the will of the elected House to prevail. We must, therefore, keep the situation under review and remain prepared to act if the primacy of the Commons is further threatened."[63]

52. In a letter dated 19 December 2016, the Chairs of the three Committees — Baroness Fookes of the DPRRC, the Rt Hon. Lord Lang of Monkton of the Constitution Committee and the Rt Hon. Lord Trefgarne of the SLSC — replied to the Government's response, amongst other things, regretting the "minatory tone" of the final remarks in the response which concluded: " … if the House of Lords puts itself in a position where it seeks to vote against SIs approved by the House of Commons, then Lord Strathclyde's recommendation provides a clear mechanism for the House of Commons to be able to assert its primacy over SIs" and drawing attention again to what the three Committees believed to be the "fundamental error" underpinning the remit of the review which the Government had commissioned.[64]

These "exceptional times"

53. Following the referendum in June 2016 and the decision of the UK to leave the EU, the legislative landscape was dominated by Brexit-related primary and delegated legislation. Then, in 2020, the legislative response to the pandemic added to the weight of urgent legislation. In response to a letter from this Committee, the Constitution Committee and the SLSC to the Lord President (see paragraph 61 below) about the frequent use of skeleton provision in recent years — on many occasions related to Brexit — the Lord President acknowledged that "we have been living in exceptional times".

54. The Lord President also acknowledged — quite rightly — that "exceptional times … do not necessarily provide a model example of how Parliament would like to see legislation brought forward".[65] The Donoughmore Committee, in 1932, made a similar point: "The recent emergency statutes … afford

62 *Ibid.*, para 22.

63 Cabinet Office, *Government Response to the Strathclyde Review: Secondary legislation and the primacy of the House of Commons and the related Select Committee Reports* (December 2016), Cm 9363.

64 Mr Lidington's response to the letter of 19 December 2016, dated 12 January 2017, is published in DPRRC, 14th Report, Session 2016–17 (HL Paper 97), Appx 3.

65 Letter dated 19 October 2020: https://committees.parliament.uk/publications/3230/documents/30049/default/.

other illustrations of the necessity of this method of legislation where there is thought to be need of giving to the Government power to take very rapid decisions which to be effective must possess the force of law. There is in truth no alternative means by which strong measures to meet great emergencies can be possible; and for that reason the means is constitutional". But the Committee went on: "It is the essence of constitutional Government that the normal control of Parliament should not be suspended either to a greater degree, or for a longer time, than the exigency demands. … Emergencies are exceptional …".[66]

Conclusion

55. **The "considerable disquiet" identified in the Jellicoe Report, and wider issues relating to the balance of power between Parliament and the executive, remain as live an issue in the current political environment as it was at the time of the Donoughmore Committee, brought to the fore in recent years by the circumstances surrounding the Strathclyde Review and then the impact of Brexit and the pandemic. It is for this reason that we say that a critical moment has been reached and it is now a matter of urgency that Parliament should revisit these important issues, take stock, and consider how the balance of power can be re-set.**

66 April 1932, Cmd 4060, p 52.

CHAPTER 4: FAMILIAR AND EMERGING GROUNDS FOR CONTINUED "CONSIDERABLE DISQUIET"

Introduction

56. As part of our background work for this report, we — with the invaluable assistance of the House of Lords Library staff — have attempted to detect whether, and if so how, the framing of delegated powers has changed since the Committee began reporting on bills in 1993. We looked at reports published in sessions immediately after the Committee began work (1992 to 1997) and compared them with those published in later sessions (2015 to 2019), extending to the most recent sessions covering Brexit and the pandemic.

57. We have made two principal findings:

- First, the issues of **skeleton legislation** and **Henry VIII powers** that dominated discussion about the delegation of legislative power at the time of *The New Despotism* and the Donoughmore Committee remain live — indeed, under Brexit and the pandemic, have taken on a new urgency.

- Second, new issues have emerged, the most striking of which is delegations of power that enable ministers to make what are, in effect, **disguised legislative instruments** often without any subsequent oversight by Parliament, but also include the use of **legislative sub-delegation of power** (that is, delegated powers to make tertiary legislation).

58. We also draw attention to the recent increase in use of the **"made" affirmative procedure**.

Familiar concerns

Skeleton legislation

59. Skeleton — or framework — legislation may involve the entire bill or clauses within a bill. The first report of the Scrutiny of Delegated Powers Committee described a skeleton bill as one which contained so many significant delegated powers that the "real operation [of the Act] would be entirely by the regulations made under it".[67] A few years later, the Committee gave a more colourful description: they were bills which were "little more than a licence to legislate and so give flesh to the 'skeleton' embodied in the bill".[68]

60. The use of skeleton legislation has long been a source of significant concern. The Donoughmore Committee described how critics of skeleton legislation had argued that the practice had "so far passed all reasonable limits, as to have assumed the character of a serious invasion of the sphere of Parliament by the Executive".[69] Skeleton bills were mentioned in debates at the time of the inception of the Committee and were highlighted in the Committee's first report in 1993: "Several witnesses drew attention to the even more extreme use of delegated powers that were contained in so-called "skeleton

67 1st Report, Session 1992–93 (HL Paper 57), para 15.
68 29th Report, Session 1998–99, para 23.
69 Donoughmore Report, p 53, para 12 (1).

bills" — drawing particular attention to the Child Support Act which had included over 100 regulation-making powers …".[70]

61. As a result of what was perceived to be the increasing use of skeleton legislation, in a letter dated 25 September 2020, this Committee, the Constitution Committee and the SLSC wrote to the Government about "the growing tendency for the Government to introduce skeleton bills, in which broad delegated powers are sought in lieu of policy detail".[71] The Committees complained 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."

62. In session 1998–99, the Committee had been able to report that, since its inception (so covering a period of about five years), it had "found it necessary to denounce a bill as skeletal on only four occasions".[72] Following that time, the numbers have mounted. In 2015, as a result of concerns about the Cities and Local Government Devolution Bill and the Childcare Bill, the Chair of the DPRRC, Baroness Fookes, and the Chair of the Constitution Committee, the Rt Hon. Lord Lang of Monkton, wrote to the Lord President, the Rt Hon. Chris Grayling MP, urging him "to remind ministers and civil servants across Government that … 'skeleton bills' be introduced only when absolutely necessary and with a full justification for the decision to adopt that structure". The Constitution Committee, in its report on the delegation of powers published in 2018, also warned against the use of skeleton bills — "[s]keleton bills inhibit parliamentary scrutiny" — and concluded "we find it difficult to envisage any circumstances in which their use is acceptable".[73]

63. Despite these strictures, the number of skeleton bills in recent years has grown markedly. These include, for example, several Brexit-related bills: 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. We said about the last of these that the Bill conferred "very wide powers to almost completely rewrite the existing regulatory regimes for human and veterinary medicines and medical devices".[74] The Constitution Committee also remarked on the skeletal nature of the Bill and on the extensive delegated powers, covering a range of significant policy matters with few constraints on how they could be exercised.[75] The Civil Liability Bill provides an example of a non-Brexit skeleton bill, about which we said:

70 Scrutiny of Delegated Powers Committee, 1st Report, Session 1992–93, HL Paper 57, para 15.
71 The letter and the Lord President's reply are published on the Committee's webpage: https://committees.parliament.uk/committee/173/delegated-powers-and-regulatory-reform-committee/publications/3/correspondence/.
72 29th Report, Session 1998–99, para 23.
73 Constitution Committee, *The Legislative Process: the Delegation of Powers*, 16th Report, Session 2017–19 (HL Paper 225), p.2.
74 DPRRC, 19th Report, Session 2019–21 (HL Paper 109).
75 Constitution Committee, 10th Report, Session 2019–21 (HL Paper 119).

"We are becoming very familiar with skeletal bills. By any standards, the Bill is skeletal".[76]

64. In oral evidence to the Committee, on 12 May 2021, the Lord President agreed that the Childcare Bill in 2015 had been too skeletal but said that it was "a response to a general election and a promise to deliver on something".[77] In contrast, he defended the Cities and Local Government Devolution Bill on the ground that it would not have been possible to achieve its objective without significant powers. That Bill, he said, "is one of the examples where powers are appropriate".[78] He concluded: "Detailed legislation is very important and is the right way to go in most cases, but in some cases, powers are the only way to achieve the objective and are a reasonable way of doing it, particularly if there are proper safeguards as to how those powers are used".[79] Dame Elizabeth Gardiner, First Parliamentary Counsel, in oral evidence, took a similar view with regard to the Childcare Bill: "… if we thought that that was a quick way to get something easily through Parliament, we were soon disabused of that. The whole thing ground to a halt for months while the policy caught up with the legislation and was put into the Bill".[80] But the Cities and Local Government Devolution Bill, she said, was "quite a good illustration of when a framework bill is probably the only possible solution".[81]

65. The Lord President suggested that skeleton bills were more likely "immediately after a general election, for the respectable reason that a Government has just got elected promising to do something and therefore they have an urgency to do it, to implement it".[82] This is, in our view, an example of a conflict between political expediency and principle. **The appropriate threshold between primary and secondary legislation should not be dependent on the exigencies of timing but should be founded on the overarching principle that the principal aspects of policy should be on the face of a bill and only its detailed implementation left to delegated legislation. There is a long-standing maxim that ignorance of the law excuses no-one but if Parliament is ignorant of the law passed in its name, then how can the public be expected to know and obey it.**

A "skeleton legislation declaration"

66. **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 legislation to be decided by ministers. As such, it will rarely be justifiable.**

---

76 22nd Report, Session 2017–19 (HL Paper 123), para 2. A footnote to para 2 to support the assertion that the Committee had become familiar with skeleton bills stated: "Since January 2018 they have included: (a) The European Union (Withdrawal) Bill, which involves the largest peace-time transfer of power from Parliament to Ministers in our history. (b) The Taxation (Cross-border) Trade Bill gives to Ministers well over 150 separate powers to make tax law binding on individuals and businesses. (c) The Haulage Permits and Trailer Registration Bill contains 24 clauses, of which 16 contain delegated powers, and the first five all begin: "Regulations may"."

77 Q6.

78 *Ibid.*

79 *Ibid.*

80 Q7.

81 Q8.

82 Q6.

67. **We recommend that:**

- **Should the Government introduce skeleton legislation, the delegated powers memorandum should make an explicit declaration that the bill is a skeleton bill or clauses within a bill are skeleton clauses.**
- **Such a declaration should be accompanied by a full justification for adopting that approach, including why no other approach was reasonable to adopt and how the scope of the skeleton provision is constrained.**

68. The Lord President and First Parliamentary Counsel gave one example — the Cities and Local Government Devolution Bill — where, in their view, a skeleton bill was necessary. **We invite the Government to provide further examples of bills which were, in their view, *necessarily* skeletal — on grounds other than political expediency — and the justification for adopting the approach taken on each occasion.**

69. There may, of course, be occasion where the DPRRC may disagree with a department's conclusion that a declaration is not required. In these circumstances, the Committee may wish to invite a minister to attend an oral evidence session to justify his or her department's view. The Committee would then make a report to the House. In this event, it would, we believe, be helpful to the House — if time permitted — if the Committee were to make a report before second reading (rather than the usual practice of reporting before committee stage) so that the House can test the government's justification during the debate on second reading. We envisage that such a report would focus on the skeletal nature of the legislation only, with the Committee's more detailed analysis of delegated powers following in the usual way as a report before committee stage.

70. **In paragraphs 157 to 160 below, we propose that consideration should be given to the DPRRC having a "scrutiny reserve", exercisable in exceptional circumstances only. A difference of opinion about whether a bill contains skeleton provision and requires a skeleton legislation declaration would amount to such an exceptional circumstance. This would allow the Committee time to take evidence from the minister and prepare a report before second reading.**

71. We are aware that the SLSC, in its parallel report, suggests that there may be a role for the Speakers in the two Houses in deciding whether a bill, or parts of a bill, should be declared skeletal.[83] We look forward to the debate which will no doubt be promoted by this suggestion.

Consequence of a skeleton legislation declaration

72. We share the view of the SLSC that "skeleton bills or skeleton clauses, by their very nature, cannot be adequately scrutinised during their passage through Parliament" and that, therefore, there should be safeguards on the face of the bill "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".[84]

83 SLSC's parallel report, para 36.
84 *Ibid.*, para 39.

73. We have no final view on how this can be achieved. It raises complex issues (including agreement about what is meant by "skeleton"). One option may be that there should be a presumption, set out in the Cabinet Office Guide to Making Legislation, that where a bill contains skeleton provision, the bill should also make provision for an enhanced scrutiny procedure to apply to an instrument made under a skeleton power. A statutory option might to amend the Statutory Instruments Act 1946 to require an enhanced procedure if certain conditions about the skeletal nature of the bill are met, or the solution might rest with Parliament so that, for example, minimum intervals between stages of bills are lengthened for skeleton bills, or bills with skeleton clauses, so that the House, or a scrutiny committee, could subject the skeleton provision to examination in greater depth.

74. **We support the SLSC's recommendation that the Government, together with the two Houses of Parliament and their Procedure Committees, should consider, following consultation, how the democratic deficit inherent in skeleton legislation can be remedied.**

Henry VIII powers

75. Henry VIII powers enable a minister, by delegated legislation, to amend, repeal or otherwise alter the effect of an Act of Parliament. They are contentious because they enable primary legislation to be amended by delegated legislation, the scrutiny procedures associated with which are far less robust than those applied to bills. For this reason, the DPRRC has stated that there should be a presumption that the affirmative resolution procedure should apply to statutory instruments made under a Henry VIII power and, where the government propose the negative procedure, a full explanation giving the reasons for choosing that procedure should be provided in the delegated powers memorandum.

76. Henry VIII powers, like skeleton legislation, have long been a source of concern. First Parliamentary Counsel, in oral evidence, said that the idea of Henry VIII powers "has been very controversial for a very long time".[85] The Donoughmore Committee said that a minister had to justify a Henry VIII power "up to the hilt" and it should not be used "unless demonstrably essential".[86] In the first report of the Scrutiny of Delegated Powers Committee, the Committee noted that Henry VIII clauses had become "increasingly common" — albeit acknowledging that they varied widely, with one extreme being section 2(2) of the European Communities Act 1972 — and concluded: "… the case for using Henry VIII clauses for updating lists, uprating for inflation and for making consequential and transitional provisions was recognised" but that the government should "justify the use of such clauses as being necessary: they should not be used simply for convenience".[87] Lord Simon of Glaisdale, in the debate on 31 Jan 1990 (see paragraph 39 above), referred to Henry VIII powers as "legislative anomalies … whereby the Minister can arrogate to himself the normal parliamentary functions of repealing and amending legislation."[88] The Lord President, in

85 Q7.
86 Donoughmore Report, p 61, para 14 (c).
87 Scrutiny of Delegated Powers Committee, 1st Report, Session 1992–93 (HL Paper 57), paras 8 and 14.
88 HL Debs, 31 Jan 1990, col 383.

oral evidence, echoed the need for Henry VIII clauses to be "completely justified" and based on "a strong argument".[89]

77. We have often repeated our view that there should be a presumption that the affirmative procedure should apply to instruments made under Henry VIII powers. For example:

- In a report on amendments to the Housing and Planning Bill, in session 2015–16, we said: "As a general rule, the deployment of Henry VIII powers should be exceptional, and reserved for specific, closely controlled and carefully justified purposes; they should not become a routine feature of Bills simply to facilitate presentational re-engineering."[90]

- In session 2016–17, in a report on Parts 5 to 7 of the Digital Economy Bill, we were critical of a part of the Bill which included standard provision allowing regulations made under Chapter 1 of the Bill to contain "consequential, supplementary, transitional or transitory provision or savings" but which, contentiously, allowed regulations to contain provision to amend Chapter 1 itself and any other enactment passed before or in the same session as the Bill. We said: "We have emphasised in recent reports that Henry VIII powers should not be inserted in Bills as a matter of routine, and any that are included should be fully explained and justified. This one appears to have been taken just in case it may prove useful." We recommended that the Henry VIII provision should be removed from the Bill unless the Government could provide a convincing justification.[91] We made similar and other comments about Henry VIII powers in the same report. In response, the Government said: "The Committee views the Henry VIII power … to have been taken "just in case" and recommended that they should be removed. During the passage of the Bill the Government has considered the Bill further in the light of the Committee's recommendation and concluded that these powers are no longer required."[92]

78. In session 2017–19, the Committee made numerous comments about the use of Henry VIII powers, including powers in several Brexit-related bills, such as the European Union (Withdrawal) Bill which, we said, included "wider Henry VIII powers than we have ever seen".[93] Other examples are:

- A power to authorise additional sanctions under clause 39 of the Sanctions and Anti-Money Laundering Bill.[94] The Government did not accept the Committee's view that the powers conferred by clause 39 were inappropriate, but the Minister said that he took "the concerns expressed by the Committee and others very seriously" and, as a result, a Government amendment was tabled restricting the use of the power. The amendment stipulated that the clause 39 power to create new types of sanctions could only be used where the UK was subject to a UN obligation or other international obligation, and not where the UK was acting autonomously. It also made clear that the clause 39 power

89 Q15.
90 27th Report, Session 2015–16 (HL Paper 132), para 12.
91 13th Report, Session 2016–17 (HL Paper 95), paras 40 to 44.
92 Government response published in 18th Report, Session 2016–17 (HL Paper 118), Appx 1, p 7.
93 12th Report, Session 2017–19 (HL Paper 73), paras 4 and 53.
94 7th Report, Session 2017–19 (HL Paper 38), paras 31 to 34.

could not be used to alter the purposes of sanctions specified in clause 1 or clause 2.[95]

- A power to make provision in consequence of, or in connection with, Part 1 of the Immigration and Social Security Co-ordination (EU Withdrawal) Bill which would allow, amongst other things, amendment of primary legislation and retained direct EU legislation.[96] In our report on the first version of the Bill, we said that we were "frankly disturbed" by the width of the power and made several recommendations for amendments.[97] The recommendations were not accepted by the Government.[98]

- A Henry VIII power in clause 2 of the Healthcare (International Arrangements) Bill which enabled ministers, for specified purposes, to amend or repeal any Act ever passed. We said that the power was too broad and that the use of the affirmative resolution procedure did not remedy this.[99] In response, the Minister conceded that "[i]t is recognised that more usually with consequential powers to make amendments to primary legislation, such as this, they are either limited to amendments to primary legislation that is not more recent/older than the primary legislation itself … or there is an accompanying schedule with consequential amendments that have already been identified". But the Minister said that: "For this Bill, however, the Department has concerns that placing express limitations on the consequential power could prevent it from being used to effectively implement and give effect to detailed healthcare agreements in the future."[100] Later, however, in response to our report and to the views expressed in the House, the Government tabled a number of amendments including an amendment to sunset (that is, time limit) certain regulation-making powers contained in clause 2.[101]

79. In oral evidence, First Parliamentary Counsel said that the "starting point" in government was that Henry VIII powers should be subject to the affirmative procedure.[102] Dame Elizabeth also said that she would "ensure that departments are aware of the principled concern about Henry VIII powers and about recent decisions, say, of the DPRRC on particular powers that have caused it concern".[103]

80. Despite our concern in principle about Henry VIII powers, we recognise that there are times when it is appropriate to use them. Indeed, on occasion, we have recommended the creation of a new Henry VIII power. For example, in session 2019–21, we reported on the Domestic Abuse Bill. Clause 63 of the Bill introduced a prohibition on the cross-examination in person by a

95 11th Report, Session 2017–19 (HL Paper 65), Appx 1, p 13.
96 46th Report, Session 2017–19 (HL Paper 275).
97 This first Bill fell upon the dissolution of Parliament before the December 2019 General Election. A new version, little different from the first, was introduced in session 2019–21.
98 25th Report, Session 2019–21 (HL Paper 141), Appx 1.
99 47th Report, Session 2017–19 (HL Paper 289), paras 12 and 13.
100 *Ibid.*, Appx 1, p 10.
101 At this point, the Bill was called the Healthcare (European Economic Area and Switzerland arrangements) Bill. Further Government response published in 50th Report, Session 2017–19 (HL Paper 336), Appx 1.
102 Q5.
103 Q7.

party to family proceedings where the person had been convicted[104] of a "specified offence", where the witness to be cross-examined was the victim[105] of that offence. The definition of "specified offence" was to be left entirely to regulations. We recommended that a list should be set out on the face of the Bill which could be kept up to date by a power to amend the list by regulations. We further recommended that "since this would be a Henry VIII power", the regulations should be made by the affirmative procedure.[106] On that occasion, the Government did not accept the Committee's recommendation.[107]

81. Dame Elizabeth also offered some examples where a Henry VIII power would be appropriate:

- "Let us say that you are setting up a very large new regime that is perhaps being refined constantly before it goes into Parliament and expected to be further refined when it is in Parliament. A decision might be taken that this thing is going to be implemented in 18 months' time and that the work required to make the consequential amendments across the statute book would be better left until later, because we want to concentrate on getting the detail about the main policy propositions into the Bill. In those circumstances, parliamentary counsel might be advising that it would be better to take a power to make those consequential amendments."

- "There is also a form-over-substance argument for Henry VIII powers. An example would be that you have a list of bodies in a provision, and you need to be able to change that list going forward. It is not a good use of parliamentary time to come back with a new Bill every time you want to change the name of the body, because it has been changed in the real world, or you want to add a new body. If you have made the case to Parliament that you should be able to change that legislation, the best way, in my view, of making the change to the list is to go in and amend the list, because then the reader who is looking at it on the Government's website for the legislation sees the updated legislation all in one place."

- "Similarly, if you have a level of fine or another financial limit that you want to uprate over time, it seems much more helpful for the reader to be able to read the actual amount that is now the law in the primary legislation. Rather than having to go off and look at regulations, it would be better for that amount to be in the Bill."[108]

82. Dame Elizabeth concluded: "The danger … is that departments just see Henry VIII powers as bad and try to avoid them when, in fact, sometimes, those Henry VIII powers would produce the best-quality product for the end reader, which is what we are trying to achieve. It is a balance." She helpfully offered to consider whether further guidance could be given to departments about examples where the use of Henry VIII powers is likely to be regarded as appropriate.

---

104 Or given a caution for or charged with.
105 Or alleged victim.
106 21st Report, Session 2019–21 (HL Paper 117), para 6.
107 Government response published in 28th Report, Session 2019–21 (HL Paper 162), Appx 1.
108 Q7.

83. **Henry VIII powers are controversial, and for good reason. Every such power, and its scope, must always be fully justified. We will always deprecate the use of Henry VIII powers where they appear to have been included in a bill "just in case".**

84. **That said, we acknowledge that, on occasion, it is appropriate to use them, albeit subject to the presumption that the affirmative procedure should apply to their exercise and that their scope should be constrained on the face of the bill.**

85. **We welcome the offer made by First Parliamentary Counsel: (1) to ensure that departments are aware of the Committee's concern about Henry VIII powers and; (2) to consider developing guidance about examples of Henry VIII powers which are likely to regarded as appropriate. We will, of course, continue to consider each use of a Henry VIII power on its merits.**

Regulatory reform legislation

86. For completeness, mention should be made of a series of bills about which the Committee has, over the years, been particularly critical, beginning with the Deregulation and Contracting Out Bill. In a report published in May 1994, the Committee stated that the power conferred by Chapter 1 of Part 1 of the Bill was "unprecedented in time of peace", involving a very wide Henry VIII power and leaving ministers "to take the essential policy decisions".[109] In session 1999–2000, the Committee commented on a successor bill, the draft Regulatory Reform Bill, which would, it said, "if enacted, be one of the most far-reaching delegations of legislative power ever" — it would "allow ministers to do almost anything by a new form of delegated legislation, rather than by primary legislation".[110] And in session 2005–06, the Committee reported on a further successor bill, the Legislative and Regulatory Reform Bill. While not finding the regulatory reform provisions inappropriate, the Committee described the Bill as proposing "the greatest delegation of power to ministers that this Committee has seen".[111] In session 2010–12, the Committee reported on another highly contentious bill, the Public Bodies Bill, which it described as granting to ministers "unacceptable discretion to rewrite the statute book, with inadequate parliamentary scrutiny of, and control over, the process."[112]

87. In 2012, the Committee published a special report about the strengthened statutory procedures which are applied to, for example, Legislative Reform Orders (LROs) and Public Bodies Orders (PBOs). The Committee explained:

> "… this Report is concerned with those [Henry VIII powers] that confer on Ministers particularly significant powers to amend primary legislation. Frequently, Henry VIII powers are simply incidental, consequential, updating or otherwise limited in character. But many of these powers go well beyond this. In such cases Parliament has decided it is necessary for each power to be subject to additional statutory scrutiny

109 Delegated Powers Scrutiny Committee, 8th Report, Session 1993–94 (HL Paper 60), para 1.
110 Delegated Powers and Deregulation Committee, 37th Report, Session 1999–2000, (HL Paper 130), para 102.
111 DPRRC, 20th Report, Session 2005–06 (HL Paper 192).
112 DPRRC, 5th Report, Session 2010–12 (HL Paper 57), para 1.

safeguards, so giving both Houses the opportunity for a greater level of control of the exercise of such powers."[113]

In the case of both LROs and PBOs, the relevant committee in each House has power to upgrade the level of parliamentary scrutiny, and — for LROs — the relevant committee may veto the Order.

88. In recent years, the strengthened statutory procedures — of which 11 are set out in the Committee's special report — have been seldom used and we make no recommendations about them in this report. Indeed, a recent example demonstrates the high degree of parliamentary control over LROs, the most common form of order subject to a strengthened scrutiny procedure. In 2018, the Committee considered the draft Legislative Reform (Horserace Betting Levy) Order 2018 and concluded: "… the draft Order does not meet the "appropriateness" test [in the Legislative and Regulatory Reform Act 2006] and that the proposed policy changes are of a character that Parliament would expect them to be contained in a bill and afforded the greater level of parliamentary scrutiny and debate to which primary legislation is subject".[114] The Committee went on: "Should the Minister decide to proceed with the draft Order, we anticipate that we would exercise our power under section 18 of the 2006 Act to find that no further proceedings be taken in relation to the draft Order." The Government did not proceed with the LRO.

Disturbing new trends

Disguised law

89. Issues relating to skeleton legislation and Henry VIII powers are not new. An issue that has developed more recently, however, has been an increase in the number of occasions on which ministers have been given power to supplement primary legislation by what is, in effect, disguised legislation — instruments which are legislative in effect but often not subject to parliamentary oversight.

90. Our principal concerns relate to the following:

- Mandatory guidance.
- Requirements "to have regard to" guidance (including guidance in relation to the determination of the amount of a financial penalty).
- Other forms of disguised legislation. These include powers to make a "determination", to make "directions", to determine "arrangements", and to issue a "code of practice", a "protocol" or a "public notice".

Guidance

91. It is not unusual for a bill to contain a power to issue guidance. Guidance takes three principal forms: 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).

113 3rd Report, Special Report: Strengthened Statutory Procedures for the Scrutiny of Delegated Powers, Session 2012–13 (HL Paper 19).
114 DPRRC, 41st Report, Session 2017–19 (HL Paper 249).

Mandatory guidance

92. In session 2017–19, the Committee reported on two Bills – the Ivory Bill and the Mental Health Units (Use of Force) Bill – which dealt with entirely different subjects but included the same "striking procedural similarity", namely a delegated power enabling the Secretary of State to issue guidance which was, in effect, mandatory.[115] Unlike guidance which those to whom it is addressed are required "to have regard to", there was no element of choice. The Secretary of State's power was to issue guidance which specified legislative requirements or was otherwise determinative of matters which affected a person's legal rights and obligations. The guidance was, the Committee said, not guidance at all "but to all intents and purposes a form of legislation" and referred to the practice of "camouflaging legislation as guidance".[116] The Leader of the House of Lords, the Rt. Hon Baroness Evans of Bowes Park, replied:[117]

> "As you will be aware, it is Government policy that guidance should not be used to circumvent the usual way of regulating a matter. If the policy is to create rules that must be followed, the Government accepts that this should be achieved using regulations subject to parliamentary scrutiny and not guidance. The purpose of guidance is to aid policy implementation by supplementing legal rules. This remains the Government's policy and there is no intention to alter this approach."

93. With regard to the Ivory Bill, the Government accepted that in almost all instances it was more appropriate for the legal requirements to be set out in delegated legislation rather than in guidance. With regard to the Mental Health Units (Use of Force) Bill, while the Government remained of the view that guidance was appropriate, they made a commitment to lay the guidance before Parliament.

94. **We share the view of the Leader of the House "that guidance should not be used to circumvent the usual way of regulating a matter". Mandatory guidance is such a circumvention. The very concept is a contradiction in terms and a power to make mandatory guidance will never be appropriate. Requirements which have legislative effect should always be expressed in legislative language, either in primary or secondary legislation, and subject to parliamentary oversight.**

Requirements "to have regard to" guidance

95. Powers to issue guidance which is mandatory are relatively unusual. They are more commonly expressed as including a requirement on the person to whom the guidance is addressed "to have regard to" such guidance. Where the power includes a requirement "to have regard to" the guidance, it has been the Committee's practice to recommend that the guidance should be subject to some form of parliamentary scrutiny. This is because, although there is an element of choice, a requirement "to have regard to" guidance carries with it an expectation that the guidance will be followed unless there are cogent reasons for not doing so.[118] A typical example is the Committee's report on the Financial Guidance and Claims Bill, in session 2017–19, where it concluded:

115 31st Report, Session 2017–19 (HL Paper 177), paras 1 to 5.
116 *Ibid.*, para 5.
117 Published in 35th Report, Session 2017–19 (HL Paper 202), Appx 1.
118 31st Report, Session 2017–19 (HL Paper 177), paras 2 and 5.

> "Clause 5 allows the Secretary of State to issue guidance to the single financial guidance body. The body "must have regard to" the guidance. The guidance is not subject to any parliamentary scrutiny. There is a clear distinction between guidance that the recipient is free to disregard and guidance to which the recipient must have regard or must follow. People required by statute to have regard to guidance will normally be expected to follow the guidance unless they have cogent reasons for not doing so. Accordingly, we take the view that guidance issued under clause 5 should be subject to Parliamentary scrutiny, with the negative procedure providing an appropriate level of scrutiny."[119]

A recent example is provided by the Armed Forces Bill, in the current session, where the Committee recommended, amongst other things, that a power to decide a key definition (of "relevant family members") should be exercised through a regulation-making power (rather than just set out in published guidance) which should be subject to the affirmative procedure.[120] The Committee noted that, on this occasion, the department had sought to justify the absence of a parliamentary procedure on the ground that the bill contained a statutory duty to consult — but concluded: "We do not find this explanation convincing. Consultation and parliamentary scrutiny are aimed at different things, and we do not consider that consultation can be viewed as a substitute for parliamentary scrutiny."[121] Also in the current session, the Committee reported on the Police, Crime, Sentencing and Courts Bill, drawing attention to a number of clauses which made provision for "must have regard to" guidance which would not be subject to any parliamentary scrutiny (and in some cases without even a requirement to be published). The Committee again said that it was unconvinced by the argument about consultation — "the fact that guidance would be produced after consultation with interested parties cannot be a reason for denying Parliament any scrutiny role" — and recommended that the guidance should be subject to parliamentary oversight.[122]

Guidance in relation to the determination of a financial penalty

96. The Committee raised the issue of guidance (called "guidelines" on this occasion) in relation to the determination of the amount of a financial penalty in its report on Parts 1 to 4 of the Digital Economy Bill in session 2016–17.[123] The Committee cited an earlier report on the Energy Bill where it had recommended that the guidance should be subject to parliamentary scrutiny because it "would be highly influential in determining the amount of a substantial financial penalty". The Committee went on to recommend, with regard to the Digital Economy Bill, that the guidelines should be laid before Parliament, with the affirmative procedure applying to an order bringing the initial guidelines into force and the negative to an order for the commencement of revised guidelines.[124] The Committee raised a similar point in relation to the Tenant Fees Bill, in session 2017–19, with regard to a power to issue guidance to enforcement authorities. Following pre-legislative scrutiny, during which the Committee had raised the same issue in its submission to the House of Commons Housing, Communities

119 1st Report, Session 2017–19 (HL Paper 10), para 18.
120 7th Report, Session 2021–22 (HL Paper 71).
121 *Ibid.*, para 7.
122 6th Report, Session 2021–22 (HL Paper 65), paras 15 to 24.
123 11th Report, Session 2016–17 (HL Paper 89).
124 *Ibid.*, para 41.

and Local Government Committee, the Government responded by making a commitment to share the draft guidance with Parliament. The Committee remained dissatisfied and concluded that the commitment was "not sufficient to remove the need for the guidance to be made subject to parliamentary scrutiny."[125]

97. **When drafting a delegated powers memorandum for a bill which includes a power to issue guidance, departments must clearly explain and justify the character of the guidance. Where guidance is, in effect, legislative in character, it should be laid before Parliament and subject to parliamentary scrutiny.**

Blurring of the distinction between delegated legislation and guidance

98. There is a further issue in relation to the use of guidance which has been raised by the SLSC in its parallel report and also by the Joint Committee on Statutory Instruments (JCSI) in its report, published in July 2021, entitled *Rule of Law Themes from COVID-19 Regulations*. It concerns the distinction between delegated legislation and guidance and, in particular, that:

- on occasion, the Government have appeared to impose stricter requirements through guidance accompanying regulations than imposed by the regulations themselves — the JCSI, for example, observed: "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";[126] and
- guidance has been used "to amplify legislation" — by which is meant that important elements of a policy change, such as key definitions, have been left to guidance rather than contained in regulations.

99. This issue has also been raised by the House of Lords Constitution Committee in its report, published in June 2021, entitled *COVID-19 and the use and scrutiny of emergency powers*,[127] and by the House of Commons Justice Committee in its report, published in September 2021, entitled *Covid-19 and the criminal law*, in which the Committee warned of the "potentially damaging long-term consequences, including for the rule of law".[128] Sir Jonathan Jones concurred with the Justice Committee in his remarks to the Statute Law Society.[129]

100. **We share the concern of the SLSC, the JCSI and others about inconsistencies between legislation and guidance, and the use of guidance to fill gaps in legislation. We support the SLSC in its recommendation that it is crucial that departments ensure a clear and appropriate distinction between legislation and guidance.**

Other disguised legislative instruments

101. Examples of other disguised legislative instruments include the following:

125 35th Report, Session 2017–19 (HL Paper 202), para 53.
126 Joint Committee on Statutory Instruments, *Rule of Law Themes from COVID-19 Regulations*, First Special Report of Session 2021–22 (HL Paper 57 and HC 600), para 42.
127 Constitution Committee, *COVID-19 and the use and scrutiny of emergency powers*, 3rd Report, Session 2021–22 (HL Paper 15), Chapter 4.
128 House of Commons Justice Committee, *Covid-19 and the criminal law*, 4th Report, Session 2021–22 (HC 71), para 44.
129 See footnote 4.

- In a report on Parts 1 to 5 of the Housing and Planning Bill, in session 2015–16, the Committee drew attention to clause 67 which enabled the Secretary of State, by "**determination**", to impose a levy on local housing authorities which own social housing stock in respect of the estimated market value of their interest in any "high value" housing which is likely to be become vacant in a given financial year. The exercise of the power would not be subject to parliamentary scrutiny. The Committee concluded: "… it is inappropriate to delegate to the Secretary of State a power to determine the amount of the payment to be made by local housing authorities without any form of Parliamentary scrutiny, particularly in view of the paucity of detail on the face of the Bill to guide how the power is to be exercised". The Committee recommended: "… a determination under clause 67(1) should be made by statutory instrument laid before Parliament, and that: it should attract the negative procedure where it applies to a particular local authority, and the affirmative procedure where it applies to all local housing authorities or to all such authorities of a particular description."[130]

- In a report on the Education and Adoption Bill, in session 2015–16, the Committee drew attention to a new section to be introduced into the Adoption and Children Act 2002 which would confer power on the Secretary of State to give "**directions**" to one or more local authorities in England requiring them to make arrangements for certain adoption related functions to be carried out on their behalf by one or more of those authorities, or by one or more other adoption agencies.[131] The exercise of the power would not be subject to parliamentary scrutiny. The Committee did not accept the view of the Government that the power was purely administrative in character and recommended that it should be subject to parliamentary scrutiny under the negative procedure.

- In a report on the Children and Social Work Bill, in session 2016–17, the Committee drew attention to the power of the Secretary of State to determine "**arrangements**" in accordance with which a new statutory Child Safeguarding Practice Review Panel would be required to carry out its functions. The Committee considered that that power was a delegation of legislative power because the arrangements would "play a significant role in shaping what the Panel is required to do and how it is required to do it".[132] The Committee therefore recommended that the "arrangements" should be contained in a statutory instrument and subject to the affirmative procedure. (The Secretary of State was further able to influence how the Panel carried out its functions by requiring the Panel "to have regard to" guidance. We recommended that the guidance should also be subject to parliamentary scrutiny, with the negative procedure applying.)[133]

- In a report on Parts 5–7 of the Digital Economy Bill, in session 2016–17, the Committee drew attention to the power of "the relevant Minister" (the Secretary of State or the Minister for the Cabinet Office) to issue a "**code of practice**" about the disclosure of information and the use of

130 20th Report, Session 2015–16 (HL Paper 90), paras 15 to 23.
131 10th Report, Session 2015–16 (HL Paper 45), para 8.
132 1st Report, Session 2016–17 (HL Paper 13), para 37.
133 *Ibid.*, para 39.

information disclosed under certain provisions in the Bill. The delegated powers memorandum said that the code may "possibly" be legislative in nature. The Committee took the view that there was "no doubt" that it was legislative "because persons to whom the code applies must have regard to it".[134] The Committee recommended that the first code should be laid in draft before Parliament and subject to the affirmative procedure, with the draft negative procedure applying to any revisions of the code. The Committee made similar recommendations in relation to other codes of practice issued under the Bill, and also made a general statement: "we consider that Parliament should always be afforded the opportunity to scrutinise "quasi-legislation" in the form of statutory codes or guidance of this nature unless very good reasons exist why it is unnecessary or inappropriate to do so, which must be fully set out in the delegated powers memorandum".[135]

- Brexit-related bills have provided perhaps the starkest examples of the delegation of legislative powers under the guise of another device. Because of its significance and the fact that — as a supply bill — it would not be amended in the House of Lords, the Committee reported, in session 2017–19, on the Taxation (Cross-Border Trade) Bill while it was still in the House of Commons.[136] The Committee described it as involving "a massive transfer of power from the House of Commons to Ministers of the Crown".[137] The Committee also drew attention to what it called "the radical concept of making law by "**public notice**"". It said:

  "The Bill relies heavily on the concept of making law by "public notice". Paragraph 39 of the Treasury's Delegated Powers Memorandum says that such notices will only make provision that is purely technical or administrative in nature. Nonetheless, clause 32(9) of the Bill allows anything that can be done under public notice to be done by regulations, implicitly acknowledging the importance of things done by public notice. For Ministers and others to make law by "public notice", without any recourse to Parliament, is highly unusual and such provisions should attract strict surveillance by Parliament. The Statute of Proclamations 1539 gave proclamations the force of statute law. Although it was repealed in 1547 after the death of Henry VIII, it now enjoys a limited revival under the veil of Ministers and HMRC making law by "public notice."[138]

The Committee concluded that "the creation of a generally applicable system for making determinations which are capable of affecting an individual's legal position should ordinarily be dealt with by legislation, subject to scrutiny by Parliament, rather than by public notice without any such scrutiny".[139] The Government's reply to the Committee's observations did not assuage our concerns.[140]

134 13th Report, Session 2016–17 (HL Paper 95), para 35.
135 *Ibid.* para 39.
136 11th Report, Session 2017–19 (HL Paper 65).
137 *Ibid.*, para 4.
138 *Ibid.*, para 25.
139 *Ibid.*, para 27.
140 32nd Report, Session 2017–19 (HL Paper 181).

- The Committee also reported on the European Union (Withdrawal) Bill while it was in the House of Commons. The Committee described it as giving Ministers "a range of powers, unique in peace-time, to override Acts of Parliament by statutory instrument, without in most cases the need for any prior debate in either House of Parliament".[141] One of the less prominent powers, contained in Schedule 5 to the Bill, concerned the statutory duty of the Queen's Printer, the scope of which a minister was empowered to amend not by statutory instrument but simply by "**direction**". The Committee said: "… to allow Ministers to amend the law by a mere direction, with no associated parliamentary procedure, sets an ominous precedent" and went on to refer to the Statute of Proclamations 1539 in words similar to those used in respect of the power to make law by public notice (see the Taxation (Cross-Border Trade) Bill above).

- In the following session, session 2019–21, the Committee reported on the Medicines and Medical Devices Bill, drawing attention to clauses in the Bill which provided that any disapplication of regulatory provisions may be subject to conditions set out in regulations, or to conditions not set out in legislation but in a "**protocol**" published by ministers. Citing examples including the Taxation (Cross-Border Trade) Bill and the European Union (Withdrawal) Bill, the Committee said: "On a number of occasions, we have drawn the attention of the House to provision in Bills which enables Minsters to make what are, in effect, legally enforceable rules under the radar of the parliamentary scrutiny that is afforded to primary and secondary legislation."[142] The Committee concluded that: "Allowing regulations to make the disapplication of legislation subject to conditions set out in a "protocol" is yet another example of "camouflaging legislation"".[143]

- In the current session, session 2021–22, the Committee reported on the Police, Crime, Sentencing and Courts Bill, drawing attention to a provision which appeared to enable specified authorities in a local government area to prepare a "**strategy**" which could have legislative effect but which the Secretary of State could decide, under powers conferred by the Bill, need not be published. The Committee concluded that this was insufficiently transparent and that powers under the Bill should require the Secretary of State to publish any actions contained in the strategy which had legislative effect.[144]

102. **The number of occasions on which the Government have sought to acquire legislative powers under the guise of various devices not subject to parliamentary scrutiny is perhaps the most striking and disturbing of recent developments that have had the effect of shifting the balance of legislative power from Parliament to the executive. This finding is especially significant given that it has emerged so prominently at a time when Brexit and the pandemic have given so many other examples of a shift in power.**

103. **We have already referred to the statement by the Leader of the House that guidance should not be used to circumvent the usual way of**

141 3rd Report, Session 2017–19 (HL Paper 22), para 1.
142 19th Report, Session 2019–21 (HL Paper 109), para 39.
143 *Ibid.*, para 42.
144 6th Report, Session 2021–22 (HL Paper 65), para 14.

regulating a matter. The same is also true of these other devices. Provision in bills giving ministers powers to make determinations, directions, arrangements or to issue codes of practice, public notices etc. — where they are in effect camouflaged legislation — is an unacceptable ploy and, as matter of principle, should not be sought by the Government in the bills they put before Parliament.

104. **Furthermore, the multiplicity of disguised legislative instruments is confusing to Parliament and to the public, and does not, in our view, promote the good law principles of law that is clear and accessible.**

105. **In the absence of convincing reasons to the contrary, therefore, we recommend that they should not be used. Where the Government take the view that they have convincing reasons, then the use of these devices — and the level of scrutiny applied to them — should be clearly identified in the delegated powers memorandum and fully justified.**

106. **Where a department is uncertain as to whether use of one of these devices amounts to delegation of a legislative power, they should err on the side of caution and provide a clear explanation in the delegated powers memorandum about why the view has been taken that the power is administrative rather than legislative in character.**

Legislative sub-delegation of power

107. An Act of Parliament may confer a legislative power which may, in turn, include provision for further delegation of legislative power. This is called legislative sub-delegation of power and means, in effect, that a minister may make a statutory instrument which includes a delegated power conferring on themselves or another person power to make what may be described as "tertiary legislation". Legislative sub-delegation of power may be highly controversial in that, depending on the scope of the power set out in the primary legislation, it may enable an unelected body to amend and or even repeal an Act of Parliament.

108. The Committee has been critical about the scope and level of scrutiny applied to the exercise of a sub-delegation of power on several occasions. These include, for example, in session 2015–16: the Northern Ireland (Welfare Reform) Bill,[145] the Immigration Bill,[146] and the Housing and Planning Bill.[147] In its report on the last of these, the Committee said:[148]

> "Under subsection (3), the regulations may provide for the rent to be different for people with different incomes or for social housing in different areas (so that, for example, a high-income tenant in a council flat in Westminster may not have to pay the full market rent, while a tenant with the same income living in an identical flat in Liverpool may have to do so).
>
> It appears that the regulations are not to contain any detail about how a local housing authority is to determine the rent. Instead, this is to be sub-delegated to guidance issued by the Secretary of State, to which the

145 14th Report, Session 2015–16 (HL Paper58).
146 17th Report, Session 2015–16 (HL Paper 73).
147 20th Report, Session 2015–16 (HL Paper 90).
148 *Ibid.*, paras 30, 31 and 42.

regulations may require local housing authorities to "have regard" and for which there will be no Parliamentary procedure (see subsection (4))."

The Committee recommended that the power to sub-delegate should be removed from the Bill and replaced by a requirement to include such provision in regulations. The Government did not accept the recommendation.[149]

109. In its report on amendments to the Policing and Crime Bill, in session 2016–17, the Committee commented "with some surprise" that the period during which certain provision would remain in force could be specified "in or under" regulations, meaning that the period could be specified "*either* in the regulations themselves or in some other form provided for by the regulations". The Committee concluded: "We would expect to be given a compelling justification for any such power of sub-delegation, why it is needed and how it is intended to be exercised."[150]

110. More recently, the Committee criticised the sub-delegation of power in the European Union (Withdrawal) Bill where there was no requirement for the tertiary legislation to be subject to any parliamentary procedure nor even any requirement for it to be made by statutory instrument.[151] This was despite the fact that the powers to make tertiary legislation was extremely wide-ranging: "It could, for example, be used to create new bodies with wide powers to legislate in one of the many areas currently governed by EU law, including aviation, banking, investment services, chemicals and medicines. The regulations might also contain only skeleton provisions in relation to a particular activity, leaving the detailed regime to be set out in tertiary legislation made not by Parliament, or even by Ministers, but by one of the new bodies so created."[152] The Committee recommended that tertiary legislation should be subject to the same parliamentary control and time limits applicable to secondary legislation.[153] The Committee made a similar point in relation to the Taxation (Cross-border Trade) Bill.[154]

111. **Tertiary legislation has as much legal force as any other form of law. Conferring a delegated power on ministers to sub-delegate power is potentially a more egregious erosion of democratic accountability than a simple delegation to a minster to make secondary legislation. Where the government seek a legislative sub-delegation of power in a bill, the power should be limited and specific, and its exercise, and the exercise of sub-delegated powers, should be subject to parliamentary scrutiny. Consideration should also be given to including a statutory duty to consult those affected by the exercise of a sub-delegated power. The delegated powers memorandum should provide a compelling justification for the power, why it is needed, how it is intended to be exercised and how it is to be constrained. The memorandum should also explain the choice of parliamentary scrutiny to be applied to the exercise of the sub-delegated power and, where it differs from the level of scrutiny applied to the secondary legislation containing the sub-delegated power, provide a compelling justification for the divergence.**

149 26th Report, Session 2015–16 (HL Paper 125).
150 8th Report, Session 2016–17 (HL Paper 73), para 5.
151 3th Report, Session 2017–19 (HL Paper 22), para 27.
152 *Ibid.*, para 28.
153 *Ibid.*, para 31.
154 11th Report, Session 2017–19 (HL Paper 65), paras 28–30.

112. **Where, in turn, an instrument — made under powers delegated by primary legislation — delegates a power to either ministers themselves or another body to make tertiary legislation, the explanatory memorandum accompanying the instrument should state this and explain its scope and why it is needed. (This is a matter to which the SLSC refers in its parallel report.)**

Made affirmatives

113. From time to time, departments argue in favour of the negative procedure on the grounds that powers need to be exercised urgently. The negative procedure (see paragraph 18 above) enables a minister to make and then lay an instrument. There is a convention — called the 21-day rule — that a negative instrument should not come into effect until at least 21 days after laying (including the day of laying). Instruments may however come into effect before the end of the 21-day period[155] and, indeed, may come into effect before they are laid.[156] The negative procedure therefore enables a minister to make law which can have immediate effect.

114. Sometimes the Committee has questioned why the "made affirmative" procedure should not apply instead. Under this procedure, ministers may make a statutory instrument which has immediate effect, but the instrument cannot remain in force unless approved by both Houses of Parliament. On occasion, the Committee has taken the view that the significance of an instrument is such that it warrants the more robust affirmative procedure but, recognising that the power to make it may need to be exercised as a matter of urgency, the made affirmative procedure would be appropriate. In a report, in session 2016–17, on the Pension Schemes Bill, the Committee said:

> "We are … surprised that the memorandum does not acknowledge the existence of the made affirmative procedure, as a possible alternative to the negative procedure. Like the negative procedure, the made affirmative procedure allows for speed in that it can involve an instrument being made by the minister, and brought into force, before it is approved by Parliament, such approval being necessary, within a specified period of time, if the instrument is to remain in force".[157]

In a report on the Northern Ireland (Executive Formation and Exercise of Functions) Bill, in session 2017–19, the Committee made a similar point, although on that occasion the delegated powers memorandum addressed the issue of the made affirmative procedure.[158]

115. In evidence to the SLSC, First Parliamentary Counsel explained that frequent use of the made affirmative procedure is a recent occurrence:[159]

> "The made affirmative procedure is interesting. It is the procedure that has been used for a lot of the Covid regulations but, in fact, it is a very unusual procedure historically. The only legislation prior to this that I was aware of having this procedure was either civil contingencies

155 Although a minister will be expected to explain why this is necessary to the JCSI and the SLSC.
156 In which case, under section 4 of the Statutory Instruments Act 1946, the minister must write to the Speaker of the House of Commons and the Lord Speaker to explain why.
157 6th Report, Session 2016–17 (HL Paper 64), para 7.
158 36th Report, Session 2017–19 (HL Paper 204).
159 Oral evidence taken before the SLSC on 20 April 2021 (Session 2019–21), Q7.

legislation or a lot of indirect tax legislation where there is a concern about forestalling. … They are really the only places where we have encountered that procedure in the past. It was not the standard procedure that was used in run-of-the-mill primary legislation."

116. The made affirmative procedure has also been a feature of Brexit legislation, with provision under the European Union (Withdrawal) Act 2018 and the European Union (Future Relationship) Act 2020 for ministers to use the made affirmative procedure "by reason of urgency".

117. **When drafting a delegated powers memorandum, departments should ensure that where the negative procedure is chosen on the ground that there is insufficient time for an affirmative, the memorandum explains why the "made affirmative" procedure is not applied". The threshold between the negative and the affirmative procedure depends on the substance of the instrument and should not be determined by political expediency.**

118. We recognise, however, that we should add a cautionary note about the made affirmative procedure. If it is appropriate that the made affirmative, rather than the negative, procedure should apply, that is an indication that the substance of the instrument is such that the more robust procedure is needed. The made affirmative procedure, in contrast to the draft procedure, however, enables a minister to bring into effect a substantial piece of legislation without the approval of Parliament and the new law may remain in effect for a significant period depending on the length of the statutory approval period set out in the parent Act. (Under the two Brexit Acts mentioned in paragraph 103, it is 28 days). Given that made affirmative instruments tend only to be used in emergencies, it may be that the need for the new law is short term and the Government could decide against scheduling an approval motion but, instead, allow the instrument to lapse — possibly following it with a further made affirmative instrument. In this case, substantial law is made and brought into effect without any debate or approval by Parliament. With a negative instrument, it would be open to any member of the House to object to it — by way of a prayer to annul — and seek an early debate.

119. **We therefore recommend that, where an instrument is subject to the made affirmative procedure, the Government should undertake to schedule a debate on the instrument sooner rather than later.**

120. **We acknowledge that this will have implications for the ability of the SLSC and the JCSI to report on an instrument in time for the debate. We therefore further recommend that, where a debate is scheduled soon after a made affirmative has been laid, the formal approval motion should be deferred and taken later, either formally or as a second debate if either the SLSC or the JCSI raise matters of concern.**[160]

160 Some coronavirus made affirmative instruments were debated early in the statutory period. The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) (Amendment) (No. 3) Regulations 2020, for example, were made on 24 December 2020, came into force on 26 December, laid before Parliament on 29 December, and approved by both Houses on 30 December. The SLSC reported the instrument on 5 January 2021 and the JCSI considered it on 13 January. The statutory approval period ended on 31 January.

Conclusion

121. **As the examples in this chapter demonstrate, the long-standing issues of skeleton legislation and the use of Henry VIII powers remain matters of significant concern. Meanwhile new and complex issues have emerged. These developments cannot be explained simply as an aberration prompted by the recent "exceptional times". We have made some proposals which are intended to address aspects of the issues identified. In the following chapter, however, we consider how more radical change can be brought about so that the relationship between Parliament and the executive can be re-set and a balance restored.**

CHAPTER 5: WAYS TO RE-SET THE BALANCE OF POWER

122. Significant concerns about the delegation of legislative powers have persisted for decades. They have ebbed and flowed but not markedly diminished. In this chapter, we consider what might be done to bring about longer-term change. We make recommendations in three areas:

- The first involves changing the approach of departments towards the delegation of legislative powers by placing adherence to the **fundamental principles of parliamentary democracy — namely, parliamentary sovereignty, the rule of law and accountability of the executive to Parliament** — over and above any political or practical justification for a delegation of power.
- The second concerns **what departments can do** to ensure that this approach is embedded into the development of policy and bill drafting from the outset.
- The third concerns **what the DPRRC can do** to reinforce departmental efforts.

In the next chapter, we focus on two fundamentally important guidance documents, namely the Cabinet Office Guide to Making Legislation and the Committee's guidance to departments. We set out our revised guidance, updating the current version published in 2014, and make recommendations about how the Cabinet Office should amend its Guide.

Asserting the fundamental principles of parliamentary democracy

123. Maintaining the appropriate boundary between primary and delegated legislation is inextricably interlinked with protecting the integrity of Parliament; and the integrity of Parliament is based on the fundamental principles of parliamentary democracy, namely, parliamentary sovereignty, the rule of law and accountability of the executive to Parliament.

124. The Cabinet Office Guide to Making Legislation ("the Guide") provides bill teams with instructions about what they should do when they wish to include a delegated power in a bill. It states that all delegated powers, and the level of parliamentary scrutiny associated with them, should be justified because Parliament and, in particular, the DPRRC will scrutinise them closely. The minister, the Guide states, should be alerted to any proposed delegated powers which "may prove controversial".[161]

125. There is a great deal of useful material in the Guide. It is however a functional document, and, in our view, it lacks any sense of the fundamental principles underlying why Parliament and the DPRRC scrutinise delegated powers so closely. The Lord President, in oral evidence, reinforced this impression that the Government consider the inclusion of delegated powers as a political and practical decision, rather than a matter of principle: [162]

> "As I have pointed out to Ministers, if they want to take a power, they very often have to have the argument twice and spend the political capital twice. They first have the argument about what they may use the

161 Cabinet Office, *Guide to making legislation* (July 2017), p 138: https://www.gov.uk/government/publications/guide-to-making-legislation [accessed 5 November 2021].
162 Q7.

power for when it is going though either House. Then, when they bring forward the statutory instrument, they have the argument all over again. Both politically and timewise, the argument for detailed Bills is strong."

126. **It appears that bill teams are, in effect, being encouraged to regard the inclusion of delegated powers, and the preparation of a delegated powers memorandum, as merely a political or practical matter. The absence in the Guide of any explicit statement of the underlying principles is, in our view, a fundamental flaw. We therefore recommend that the Guide should be amended to include a statement of principles which should underpin any decision by ministers about whether a bill should include delegated legislative powers.** A proposed statement of principles is set out in Box 1 below.

Box 1: Statement of principles of parliamentary democracy

1. Parliamentary democracy is founded on principles of parliamentary sovereignty, the rule of law and the accountability of the executive to Parliament.
2. Sometimes it is appropriate for Parliament to delegate legislative powers to a minister or other body so that further legislative provision by delegated legislation can be made after Royal Assent.
3. Where any provision in a bill delegates legislative powers, departments must satisfy themselves that the delegation is framed in a way that takes into account to the fullest extent possible the principles of parliamentary democracy.
4. Departments may be asked to explain to Parliament how the principles of parliamentary democracy have been taken into account when seeking a delegation of legislative power. In the case of exceptional or controversial powers, this explanation should be set out in the delegated powers memorandum accompanying a bill.
5. Any explanation should be complete and not formulaic.[163]

What departments can do

Relationship between policy development and bill drafting

127. In correspondence about skeleton legislation (see paragraph 61 above), the Lord President said: "… Bills with substantial powers, though sometimes essential, should not be a tool to cover imperfect policy development." We found these words reassuring. We also welcome the comments made by the Lord President in oral evidence that the Parliamentary Business and Legislation (PBL) Committee of the Cabinet, which has oversight of the Government's legislative programme and which the Lord President chairs, works closely with departments "from the outset" and that meetings with ministers promoting bills take place early in the process of bill development.[164] The Lord President also described how Parliamentary Counsel have made clear to departments the need for early development of policy because, he said, "you need the policy set out so that you can be clear as to whether you need a power" — "a lack of policy development just leads, in the end, to a lack of

163 For further explanation, see para 21 of the revised Committee guidance to departments set out in Chapter 6 of this report.

164 Q6.

clarity all the way thorough".[165] Sir Jonathan Jones made a sharper comment about the consequences of poor policy development: "Policy developed at speed and finalised at the last minute, with minimal consultation even inside government, let alone outside, will tend to be worse policy — less well thought-through, more inconsistent, more prone to unintended gaps and anomalies".[166]

128. The Lord President said that, on occasion, the PBL Committee would push back bills if they needed more detail on the face of the legislation. But he also said that sometimes bills would proceed with an expectation of planned amendments "to add flesh to the bill when it is making its progress through either House", suggesting that sometimes there is a mismatch between the demands of the parliamentary legislative timetable and the process of policy and bill development.

129. **We welcome the Lord President's assertion that bills should be supported by well-developed policies and also the steps that he has taken to ensure that the PBL Committee reinforces this message in departments. We have no doubt however that, on occasion, the processes of policy development and bill drafting, and the parliamentary legislative timetable are misaligned. As a result, powers are included in bills which are, in effect, "a tool to cover imperfect policy development".[167] This is unacceptable, and we look to the Government to undertake the systemic reforms necessary to prevent its happening.**

Pre-legislative scrutiny

130. Pre-legislative scrutiny may take the form of formal parliamentary pre-legislative scrutiny by a select committee or publication in draft allowing for informal scrutiny by parliamentarians and the public.

131. Chapter 22 of the Guide states:[168]

> "22.1 The default position should be that bills will be published in draft prior to formal introduction. There should be a good reason not to publish the bill in draft. The Government is committed to publishing more of its bills in draft before they are formally introduced to Parliament, and to submitting them to a parliamentary committee for parliamentary pre-legislative scrutiny where possible. …
>
> 22.3 The Chair of PBL Committee will ask Ministers to consider whether bills for which they are bidding for legislative time are suitable for publication in draft, as well as inviting bids for bills specifically intended for publication in draft in the first instance.
>
> 22.4 There are a number of reasons why publication in draft for pre-legislative scrutiny is desirable. It allows thorough consultation on the

165 *Ibid.*

166 Sir Jonathan Jones KCB QC (Hon), Speech on The Rule of Law and Subordinate Legislation for the Statute Law Society (edited) (29 September 2021): https://www.ucl.ac.uk/laws/sites/laws/files/statute_law_society_re_secondary_legislation_edited_-_j.jones_27102021.pdf [accessed 5 November 2021], p 5.

167 Letter from the Leader of the House of Commons to the Chair of SLSC, 19 October 2020: https://committees.parliament.uk/publications/3230/documents/30049/default/.

168 Cabinet Office, *Guide to making legislation* (July 2017), p 163: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/645652/Guide_to_Making_Legislation_Jul_2017.pdf [accessed 5 November 2021].

bill while it is still in a more easily amendable form, and makes it easier to ensure that both potential parliamentary objections and stakeholder views are elicited. This can assist the passage of the bill when it is introduced to parliament at a later stage and increases scrutiny of government legislation."

132. In a report published in 2004, the Constitution Committee recommended that it should be the norm for bills to be published in draft.[169] The recommendation was later endorsed by the House of Lords Leader's Group on Working Practices in 2011.[170] In 2017, the Constitution Committee raised the issue again and stated: "At present, pre-legislative scrutiny is seen as an optional extra to the legislative process: it may or may not take place and it does so in relative isolation to the other stages of scrutiny which legislation undergoes. Pre-legislative scrutiny should be considered an integral part of the wider legislative process."[171]

133. The DPRRC has welcomed the opportunity to contribute to pre-legislative scrutiny of draft bills and shares the view of the Constitution Committee that such scrutiny "enhances the quality of scrutiny during the legislative process itself".[172] The DPRRC has submitted its views on draft bills to both joint pre-legislative scrutiny committees and to Commons-only inquiries. In 2017, for example, the Committee, in its report on the Space Industry Bill (following pre-legislative scrutiny by the House of Commons Science and Technology Committee), welcomed "the fact that the Government have incorporated so many of our recommendations in the new Space Industry Bill".[173] Recently, the Committee made a submission to the House of Commons Business, Energy and Industrial Strategy (BEIS) Committee inquiry into the draft Downstream Oil Resilience Bill. The report of the BEIS Committee on the draft Bill included several references to the DPRRC's submission and expressed an expectation that the Government would respond not only to the conclusions and recommendations of the BEIS Committee but also to the points raised in the DPRRC's submission.[174]

134. The Committee has also commented on what may be regarded as "quasi-pre-legislative scrutiny" — circumstances where a Bill has been considered by the Committee in one session and then the Bill, having failed to complete its passage in time, is re-introduced in the next session in a different form. A recent positive example of this was the Agriculture Bill. When first introduced in session 2017–19, we said that we were "dismayed at the Government's approach to delegated powers" in the Bill.[175] On its re-introduction in session 2019–21, we said: "This new version of the Agriculture Bill has benefited substantially from the Committee's scrutiny of the original Bill. In reporting on the original Bill, the Committee has undertaken what may be regarded as the equivalent of pre-legislative scrutiny and, as we have said at several points in this report, we welcome

169 Constitution Committee, *Parliament and the Legislative Process: The Government's Response*, 16th Report, Session 2004–05 (HL Paper 114).
170 House of Lords Leader's Group on Working Practices, *Report of the Leader's Group on Working Practices*, Session 2010–12 (HL Paper 136), para 84.
171 Constitution Committee, 4th Report, Session 2017–19 (HL Paper 27), para 87.
172 *Ibid.*, para 69.
173 1st Report, Session 2017–19 (HL Paper 10), para 28.
174 House of Commons Business, Energy and Industrial Strategy Committee, *Pre-legislative scrutiny: draft Downstream Oil Resilience Bill*, 5th Report, Session 2021–22 (HC 820), para 4.
175 34th Report, Session 2017–19 (HL Paper 194), para 4.

the Government's positive response to a number of the Committee's earlier recommendations."[176]

135. **We endorse the Constitution Committee's view that pre-legislative scrutiny of bills should be regarded as an integral part of the wider legislative process. The Guide states that publication of a bill in draft is the "default position" and that draft bills should be submitted to parliamentary pre-legislative scrutiny where possible. We recommend that the Government should refresh their commitment to publishing more bills in draft.**

What the DPRRC can do

Impact of the Committee

136. The function of the Committee is to assist Parliament in achieving an appropriate balance of power between the Parliament and the executive by advising on an appropriate balance between primary and delegated legislation. The Committee has been working in support of this aim since its establishment in the early 1990s. The justification for the sessional re-appointment of the Committee remains undiminished.

137. Arguably, this is disappointing — because the success of the Committee in schooling successive governments towards adopting the appropriate balance between primary and delegated legislation should, we may hope, be reflected in a decrease, over time, in the number of substantive reports published by the Committee and the number of recommendations for change contained in them. But that would, in our view, be a simplistic analysis and would not take into account the broader political context and the practical realities of the legislative process. That said, we have already made recommendations about how change may be brought about by changes within government. We now turn to what more the DPRRC can do.

138. The Committee exercises influence in broadly two ways: (1) the pre-emptive impact — that is, the internal-discipline effect on departments, knowing that the Committee will be scrutinising their bills and, where appropriate, reporting on them; and (2) the response of the House and of the government to the Committee's recommendations.

Pre-emptive impact

139. During the debate, on 3 June 1992, moved by Earl Jellicoe (see paragraph 42 above), Earl Russell said " … perhaps it is not too much to hope that the existence of such a committee might, on some occasions, make Ministers refrain from using such a clause when they otherwise might have done so".[177] In its first report, in 1993, the Scrutiny of Delegated Powers Committee echoed that sentiment: "We accept that our primary aim is to inform debate with a view to saving time on the floor of the House. But we also believe that the existence of a new process for the scrutiny of delegated powers will serve to prevent inappropriate powers from appearing in bills."[178] The Lord President, in oral evidence, also referred to this pre-emptive impact, suggesting that the PBL Committee, when considering proposed bills, keeps in mind what it believes the Committee is looking for: the Committee's recommendations,

176 13th Report, Session 2019–21 (HL Paper 69), para 21.
177 HL Debs, 3 June 1992, col 948.
178 Para 32.

he said, "are taken into account before the bill is published" because the PBL Committee "knows the angle" the Committee is "going to be coming from. … What the DPRRC is going to say is built into the process of bill-making". The Committee, he said, had a "very profound influence … on the structure of the bill in the first place".[179]

140. This pre-emptive impact is reinforced by the requirement on departments to provide a delegated powers memorandum for each government bill introduced into Parliament. The principal purpose of a memorandum is for the government to explain and justify the delegated powers in a bill. In our 2014 report on the quality of delegated powers memoranda, we referred to the requirement to provide a memorandum as having a salutary effect on a department's selection of powers and choice of scrutiny procedure and we quoted Richard Heaton,[180] at that time First Parliamentary Counsel and Permanent Secretary at the Cabinet Office. He said that the establishment of the Committee had created a culture in departments where "people think quite carefully … about delegated powers" which contrasted with the period before the Committee existed when "more likely than not when you were thinking about how to wrap up the last clauses of the bill you would ask counsel to put something that broadly speaking allowed you to do what you liked because it was convenient". Mr Heaton also said that the fact that the memorandum went before the PBL Committee similarly had "a good internal-discipline effect".[181]

141. The Guide also makes this point: "DPRRC's recommendations must be considered seriously to see whether it is possible to accept them … There is, therefore, benefit in departments anticipating the views of the DPRRC when drafting the bill to avoid the need for amendments."[182]

142. **We have no doubt that scrutiny by the DPRRC has a pre-emptive effect, and we have noted the evidence of the Lord President that that effect has been "profound". It cannot however be measured, and earlier chapters of this report have caused us to have some reservations about the Lord President's assessment of the extent of the Committee's impact.**

How often are the Committee's recommendations accepted?

143. Firmer evidence of the impact of the Committee is provided by how often its recommendations are accepted.

144. Several years ago, an assumption prevailed that most, if not all, the Committee's recommendations would be accepted by the government. In 2016, during its inquiry into the Strathclyde Review, the Rt Hon. Earl Howe, then Deputy Leader of the House of Lords, said in evidence to the SLSC: "Governments, as we know, have traditionally implemented the recommendations contained in DPRRC's reports." The Strathclyde Review, itself, made a similar point: "The Committee's recommendations are usually

179 Q11.
180 Now Sir Richard Heaton.
181 7th Report, *Special Report, Quality of Delegated Powers Memoranda*, Session 2014–15 (HL Paper 39), p 6, para 5.
182 Cabinet Office, *Guide to Making Legislation* (July 2017), para 16.17: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/645652/Guide_to_Making_Legislation_Jul_2017.pdf [accessed 5 November 2021].

accepted by the Government."[183] With this in mind, the DPRRC — at that time — undertook an analysis of the Government response rate during session 2015–16. It found that the acceptance rate did not appear to be as high as was being suggested.[184] In evidence to the Constitution Committee, quoted in its 2018 report, the then Chair of the DPRRC, Baroness Fookes, estimated that about 66% of the Committee's recommendations were accepted.[185] Analysis of session 2019–21, indicated an acceptance rate of about 30%. For session 2021–22, we have received responses from the Government on 10 of our 22 recommendations, of which six have been accepted (60%).

145. This shift away from an assumption that the Committee's recommendations will usually be accepted by the government is reflected in a revision to the Guide between July 2015 and July 2017. In 2015, it stated that "it is usual for the Government to accept most, if not all, of the DPRRC's recommendations".[186] In the current, 2017 edition, those words do not appear. It states: "The Government can expect to be challenged on its response to any of the DPRRC's recommendations", and "DPRRC's recommendations must be considered seriously to see whether it is possible to accept them".[187]

146. This change in the Guide is disappointing. It appears to suggest a cultural shift in the Government's approach to the Committee's recommendations. **We urge the Government to amend the Guide so that it introduces an expectation that the Government will accept most, if not all, of the DPRRC's recommendations and, where any recommendation is not accepted, a full justification should be provided for not doing so in the Government's response.**

Committee guidance to departments

147. In our 2014 report on the quality of delegated powers memoranda, the Committee made recommendations intended to remedy what was perceived to be an inconsistency in the quality of memoranda. Amongst other things, revised guidance to departments was published as an appendix to the report which built on previous guidance. A further revision of the guidance is now set out in the next chapter of this report.

148. **Reference is made to the Committee's guidance in the Cabinet Office Guide and departments are told that they should consider it carefully.[188] We recommend that the Committee's new guidance should be set out in full in the Cabinet Office Guide.**

Commenting on the quality of delegated powers memoranda

149. Also in our 2014 report, we said that we would comment on memoranda in our reports on bills. We have done this, both to commend and to criticise. Recent commendations include memoranda accompanying two very

183 25th Report, *Special Report, Response to the Strathclyde Review*, Session 2015–16 (HL Paper 119), p 12, para 24.
184 *Ibid.*, para 26.
185 16th Report, Session 2017–19 (HL Paper 225), p 12, para 30.
186 Cabinet Office, *Guide to Making Legislation* (July 2015), para 16.16.
187 Cabinet Office, *Guide to Making Legislation* (July 2017), paras 16.16 and 16.17.
188 *Ibid.*, p 138.

substantial bills: the Financial Services Bill[189] and the Environment Bill.[190] In our report on the Medicines and Medical Devices Bill, however, we said:[191]

> "The Department of Health and Social Care has provided a Delegated Powers Memorandum ("the Memorandum") which runs to some 66 pages. It has also published six illustrative statutory instruments. We are grateful for the detail provided but we have concerns about the approach taken in the Memorandum. This Bill gives Ministers very broad powers indeed but, instead of acknowledging this and seeking to provide a full justification for it, the Memorandum—
>
> - downplays the significant differences between the existing law and what the Bill would put in its place;
> - presents a false dichotomy by suggesting that the only alternative to the extensive delegated powers in the Bill is to have every detail of the regulatory regimes in primary legislation, and
> - offers unconvincing arguments that the delegated powers in the Bill are subject to significant constraints.
>
> … In future, where a Bill confers broad powers, we will expect a more transparent approach in which the department acknowledges the breadth of the powers and seeks to fully justify it."

150. **We will continue our practice of commenting on the quality of delegated powers memoranda, in part to assist departments in preparing memoranda for future bills.**

Timing of Committee reports

151. It is the practice of the Committee to publish its reports after second reading and before the committee stage. This gives members of the House and the government time to consider whether to table amendments at committee stage in response to Committee recommendations. And, for reasons connected with the length of minimum intervals between stages of a bill, the practice makes practical sense. That said, as the Committee's first report in 1993 noted, on occasion it would be "very useful" if the Committee were to report before second reading.[192] Sometimes the Committee has done this, the most recent example being, in the current session, the Environment Bill, where the Committee was able to publish a report on the day of second reading in the Lords. (We have also proposed, in paragraph 69 above, that — exceptionally — the Committee might publish a short report before second reading where the Committee has taken the view that a bill was a skeleton bill.)

152. The Committee went one step further in relation to several Brexit-related bills and reported on them while they were still in the Commons. This included the European Union (Withdrawal) Bill on which we reported in September 2017,[193] while in the House of Commons, and then again in January 2018

189 34th Report, Session 2019–21 (HL Paper 215).
190 3rd Report, Session 2021–22 (HL Paper 16), para 6.
191 19th Report, Session 2019–21 (HL Paper 109).
192 Scrutiny of Delegated Powers Committee, 1st Report, Session 1992–93 (HL Paper 57), para 20.
193 3rd Report, Session 2017–19 (HL Paper 22).

following its introduction in the House of Lords.[194] We explained our reasons for taking the exceptional approach in the earlier report:[195]

> "Normally we report on a Bill in sufficient time to allow Members of the House of Lords to consider it before the Bill's committee stage in the House of Lords. This Bill is of exceptional constitutional significance. Central to the Bill is the balance of power between Parliament and Government, including the propriety of giving Ministers such unprecedented powers to override Acts of Parliament subject, in the great majority of cases, to no scrutiny whatsoever on the floor of either House. Accordingly, we have written this report in sufficient time for Members of the House of Commons to consider it at committee stage in their House. In due course, we will also report on the Bill in the form in which it comes to this House."

153. In its 2018 report, the Constitution Committee welcomed this departure from usual practice. It acknowledged however that the Committee was "unlikely to wish to report as a matter of routine on bills while they are in the Commons".[196]

154. **It will remain our usual practice to report on bills after second reading and before committee stage in the House of Lords. Exceptionally, however, where appropriate and where timing permits, the Committee may report on a bill while it is in the House of Commons or before second reading in the House of Lords.**

Government responses to DPRRC reports

155. The Guide indicates that a minister should respond to the Committee's recommendations and that he or she should do so before committee stage in the House of Lords.[197] The Constitution Committee, in its 2018 report, said: "Ministers should follow [DPRRC] recommendations unless there are clear and compelling reasons not to do so. These reasons should be fully explained by the Government in writing before committee stage".[198] Given that timing may be tight, the Guide urges departments to consider their response to the DPRRC "promptly".[199] We agree that timing is often tight and that, as a result, not infrequently, a response is received late.

156. **We recommend that the Government should refresh their commitment in the Cabinet Office Guide that a written response to Committee reports should be provided before committee stage. Where a written response cannot be provided in time, a written explanation should be given to the Committee before committee stage which should include an indication of when a response will be provided.**

Calling in ministers and "scrutiny reserve"

157. In our 2014 report, we referred to a suggestion that one way to ensure the quality of delegated powers memoranda would be for the Committee to delay consideration of a bill until any formal pre-report questions requesting

194 12th Report, Session 2017–19 (HL Paper 73).
195 3rd Report, Session 2017–19 (HL Paper 22), p 4, para 6.
196 16th Report, Session 2017–19, HL Paper 225, p 13, para 35.
197 Cabinet Office, *Guide to Making Legislation* (June 2017), p 142, para 16.16.
198 16th Report, Session 2017–19, HL Paper 225, p 13, para 33.
199 Cabinet Office, *Guide to Making Legislation* (June 2017), p 142, para 16.16.

clarification, elucidation and expansion of a memorandum had been answered, either by written answer or by an oral evidence session with the minister. We pointed out that, without a "scrutiny reserve",[200] requiring bill proceedings to await publication of the Committee's findings, there would be little opportunity, if any, for the Committee to make pre-report requests.[201] At that time, we did not recommend the introduction of a scrutiny reserve.

158. Soon after, however, in its response to the Strathclyde Review, the Committee stated:[202]

> "In 2014, we noted that the proposal to call in Ministers had practical difficulties to do with timing: namely that the Committee endeavours to report between second reading and committee stage and that, given the recommended minimum interval of 14 days between those two stages, there would be no time to hold an evidence session. We noted that the Committee has no "scrutiny reserve", by which we mean that there is no requirement under Standing Orders of the House for the Government to delay scheduling committee stage until the Committee has reported. Therefore, the Government would not have to wait for the Committee to report before proceeding with the bill. We concluded against proposing a "scrutiny reserve" on the grounds that we would wait to see if our recommendations in the Report had taken effect. We also said however that "should the expected improvements not result … , then it is, of course, open to the Committee to re-visit these, or any other, proposals for procedural change." During this session (up to 15 March), we have so far commented adversely on 17 delegated powers memoranda.
>
> We now take the view, for reasons to do with both the extent of delegations in bills as well as the quality of delegated powers memoranda, that there are grounds for re-visiting these proposals for procedural change. In suggesting the introduction of the "scrutiny reserve", we would not expect the progress of bills to be routinely delayed while the Committee completed its work. We would continue to observe our practice of respecting the agreed scheduling of business and ensure that we reported in accordance with it. The very existence of the "scrutiny reserve" would, however, act as a salutary reminder to Government departments of the importance of proper preparation of bills and memoranda."

159. We remain of the view that the existence of a "scrutiny reserve" would act as a powerful reminder to departments of the need to consider the delegations of power in a bill, and their justification, with care.

160. **We invite the Procedure Committee and the House to consider amending Standing Orders to allow the DPRRC a "scrutiny reserve" so that, in cases where a bill includes most exceptionally wide delegations for which there has been no satisfactory justification or the Committee takes the view that the bill contained skeleton provision (see paragraph 70 above), time will be available for the Committee to request a minister to provide further justification.**

200 The Joint Committee on Statutory Instruments has a "scrutiny reserve": no approval motion for an affirmative instrument can be moved in the House of Lords until that Committee has reported on the instrument (House of Lords Public Business Standing Orders 72(1) (a)).

201 7th Report, *Special Report, Quality of Delegated Powers Memoranda*, Session 2014–15 (HL Paper 39), p 16, paras 43–44.

202 25th Report, *Special Report, Response to the Strathclyde Review*, Session 2015–16 (HL Paper 119), p 20, paras 45–46.

Under the "scrutiny reserve" the committee stage could not proceed until the Committee had reported to the House.

End of session reports

161. As we explained at the beginning of this report (see paragraph 8), the Committee will resume the practice of publishing an end of session report. We are aware that the SLSC publishes an end of session report about the work of that Committee, highlighting concerns about issues relating to delegated legislation, illustrated by reference to specific instruments and the performance of specific departments. It provides an opportunity for the SLSC to consider, and draw attention to, overarching issues arising from its week in, week out scrutiny of statutory and other instruments. We commend the SLSC for this valuable work.

162. **We will resume the Committee's previous practice of publishing an end of session report to the House, raising concerns about issues relating to the delegation of powers and making specific comments about the quality of delegated powers memoranda and government responses. In preparing the report, we may also invite oral evidence from the Leaders of the two Houses.**

163. **We see these end of session reports, along with reports from other committees such as the SLSC, JCSI and the Constitution Committee, as an important resource which will inform, or prompt, regular debates in the House about the quality of legislation and the explanatory materials submitted in support of it, and about the wider issues raised in this report.**

CHAPTER 6: CULTURE CHANGE WITHIN DEPARTMENTS — CHANGING THE GUIDANCE

Committee's revised guidance to departments

164. In the previous chapter (paragraphs 147 and 148), we refer to updating the Committee's guidance to departments. The introduction and Parts 1 and 2 of the revised guidance are set out in Box 2 below, and Part 3, which contains practical information, is set out in Appendix 4 to this report. The complete guidance will be put on the Committee's webpages.

Box 2: Guidance to departments

1. The Delegated Powers and Regulatory Reform Committee (DPRRC) has two purposes: (1) to examine delegated legislative powers in bills and their associated parliamentary scrutiny procedures, and (2) to scrutinise certain instruments subject to strengthened scrutiny procedures. This guidance concerns the first of these and, in particular, the preparation of the delegated powers memorandum ("the memorandum"). The relevant part of the Committee's terms of reference is set out below.

Terms of reference

"… to report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny …".

2. This guidance replaces the Committee's guidance published in 2014 and has been informed by the Committee's report, *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*, published in November 2021 ("the Report") (12th Report, Session 2021–22, HL Paper 106). It is in three parts:

- **PART 1**: principles (paras 3–16)
- **PART 2**: content of the delegated powers memorandum (paras 17–25)
- **PART 3**: practical information about the Committee and assistance (paras 26–48)

PART 1: Principles

Statement of principles of parliamentary democracy

3. The decision to seek a delegation of legislative power should be founded on the fundamental principles of parliamentary democracy set out below.

Statement of principles of parliamentary democracy

1. Parliamentary democracy is founded on principles of parliamentary sovereignty, the rule of law and the accountability of the executive to Parliament.

2. Sometimes, it is appropriate for Parliament to delegate legislative powers to a minister or other body so that further legislative provision by delegated legislation can be made after Royal Assent.

3. Where any provision in a bill delegates legislative powers, departments must satisfy themselves that the delegation is framed in a way that takes into account to the fullest extent possible the principles of parliamentary democracy.

4. Departments may be asked to explain to Parliament how the principles of parliamentary democracy have been taken into account when seeking a delegation of legislative power. In the case of exceptional or controversial powers, this explanation should be set out in the delegated powers memorandum accompanying a bill.

5. Any explanation should be complete and not formulaic.

Additional principles

4. When the Committee was first set up, it concluded that it was not possible to set out a list of criteria which would give precision to the test of appropriateness. Instead, it was decided that the merits of the proposed use of a delegated power had to be considered on a case-by-case basis. Whilst the Committee continues to consider each delegation on its merits, experience has enabled the Committee to develop some principles which provide the starting point for its consideration of delegated powers.

Threshold between primary and secondary legislation

5. The appropriate threshold between primary and secondary legislation should not be dependent on the exigencies of timing but should be founded on the overarching principle that the principal aspects of policy should be on the face of a bill and only its detailed implementation left to delegated legislation.

Henry VIII powers

6. Every **Henry VIII power** — that is, a delegated power which enables a minister, by delegated legislation, to amend, repeal or otherwise alter the effect of an Act of Parliament — including where the power is expressed in terms of "modification", should be clearly identified in the memorandum.

7. The Committee recognises that the appropriate level of parliamentary scrutiny for such powers will not be the affirmative procedure in all cases. The Committee, however, applies a **presumption that the affirmative procedure will apply** and so where a Henry VIII power is subject to a scrutiny procedure other than affirmative, a full explanation giving the reasons for choosing that procedure should be provided in the memorandum.

Skeleton legislation

8. A bill is, in effect, a **skeleton bill** or a bill contains **skeleton clauses** where the provision on the face of the bill is so insubstantial that the real operation of the Act, or sections of an Act, would be entirely by the regulations or orders made under it.

9. **Skeleton legislation should only be used in the most exceptional circumstances**. Where the government decide that such exceptional circumstances apply, the delegated powers memorandum should make an

explicit declaration ("**a skeleton legislation declaration**") that the bill is a skeleton bill or clauses within a bill are skeleton clauses. Such a declaration should be accompanied by a full justification for adopting that approach, including why no other approach was reasonable to adopt and how the scope of the skeleton provision is constrained.

Disguised legislative instruments

10. Bills sometimes confer powers to make different types of legislative instruments — referred to in the Report as "**disguised legislative instruments**" — such as "must have regard to" guidance, directions, and codes of practice. The multiplicity of disguised legislative instruments is confusing to Parliament and to the public and does not promote the good law principles of law that is clear and accessible. **In the absence of convincing reasons to the contrary, these devices should not be used**. Where the government take the view that they have convincing reasons, then the use of these devices — and the level of scrutiny applied to them — should be clearly identified in the delegated powers memorandum and fully justified. Mandatory guidance is a contradiction in terms and can never be justified.

Power to make incidental, consequential or similar provision

11. Regarding **any power to make incidental, consequential or similar provision**,

- where it is a **Henry VIII power**, the memorandum should explain why the form of wording setting out the power has been adopted. **The presumption in respect of Henry VIII powers, that they should be subject to the affirmative procedure, applies**. Therefore, where they are not, the memorandum should explain why not. Where the power extends to the amendment of **future Acts**, the memorandum should explain clearly why it is thought such a power is necessary;
- where it is **a non-Henry VIII power** to include provision in a commencement order (and which will not therefore be subject to any parliamentary procedure), the Committee will expect such a power to be covered by the delegated powers memorandum and explained in the usual way.

Criminal offences

12. Where **a bill creates a criminal offence with provision for the penalty to be set by delegated legislation**, the Committee would expect, save in exceptional circumstances, the maximum penalty on conviction to be included on the face of the bill. Therefore, where this is not the case, the memorandum should explain why not, and at the very least the Committee would expect the instrument to be subject to affirmative procedure. Similarly, **where the ingredients of a criminal offence are to be set by delegated legislation**, the Committee would expect a compelling justification.

Legislative sub-delegation of power

13. Where a bill contains a **legislative sub-delegation of power**, the power should be limited and specific, and its exercise subject to parliamentary

scrutiny. The delegated powers memorandum should provide a compelling justification for the power, why it is needed, how it is intended to be exercised and how it is to be constrained. The memorandum should also explain the choice of parliamentary scrutiny to be applied to the exercise of the sub-delegated power and, where it differs from the level of scrutiny applied to the secondary legislation containing the sub-delegated power, provide a compelling justification for the divergence.

Ministerial discretion on choice of parliamentary procedure

14. The Committee deprecates provisions that give ministers a choice between parliamentary scrutiny procedures.

PART 2: content of the delegated powers memorandum

Skeleton legislation declaration

15. If the bill is, in effect, a skeleton bill or contains skeleton clauses, **a skeleton legislation declaration** should be made at the start of the memorandum, with a full justification for adopting that approach, including why no other approach was reasonable to adopt and how the scope of the skeleton provision is constrained.

Powers to be covered by a memorandum

16. The memorandum should identify **every provision for delegated legislation in the bill**.

17. **Powers to issue guidance, give directions, issue codes of practice, etc**. can also be delegated legislative powers (see paragraph 9 above). To the extent that they are, the memorandum should cover them as well. Where either there is doubt about whether a power is legislative or the view is taken that a power is not legislative, the memorandum should explain fully why there is doubt or why that view is taken.

Content of the explanatory paragraphs

18. After the italicised heading (described in paragraph 38 below), the explanatory paragraphs should:

- fully explain the **purpose of the power; and**
- describe **why the matter that is the subject of the power has been left to delegated legislation rather than included in the bill; and**
- fully explain **the choice of parliamentary scrutiny procedure** provided for each power; and, if there is no scrutiny, the justification for its absence.

Explaining the power

19. When explaining the power, **take particular care** to ensure that:

- the memorandum fully explains **why the delegation is necessary and why the matter cannot be included in the bill**. For example, if the reason is "we need flexibility", explain the circumstances which create the need for flexibility; if it is asserted "it is a reserve power", explain why a reserve power is needed and what events are likely to trigger its use in the future; or, if the reason is "we need to respond urgently", explain the reason for, and degree of, urgency;

- the memorandum justifies **the full extent of the power**. The memorandum should set out how it is proposed that the power will be exercised. Where the scope of the power is wider than is necessary to achieve the purposes for which it is being taken, the memorandum should explain why it is not feasible or appropriate to limit the power to those purposes. **The Committee will judge the power by reference to what could be done under it by the current or any future government and not only what the current government say they intend to use the power for. Avoid relying on reasons that amount, in effect, to "just in case", or that justify the width of the power on the ground that a consultation has yet to take place or that the policy has not been finalised**;
- where a power is delegated to a person or body other than a minister, the memorandum explains why the power has been conferred on that person or body; and
- the memorandum fully justifies **any unusual or novel delegations of power, powers to define, or amend definitions of, key expressions used in the bill, or powers to interfere with vested rights or legal (for example, ordinary contractual) relationships.**

Explaining the procedure

20. When explaining the procedure, **take particular care** to ensure that:

- the memorandum fully explains any **de-hybridising provision** — that is, provision which enables an order which would otherwise be hybrid because it would affect private interests to proceed as if it were not. Unless addressed in the memorandum, the Committee will invite the House to satisfy itself that private interests otherwise protected by the hybrid instruments procedure will be adequately protected under provision in the bill;
- unless a power is self-evidently concerned only with Money or Supply provision, the choice of a **Commons-only procedure** is fully explained. The Committee will wish to be satisfied that the subject matter of the power is such that the Lords would not expect to scrutinise the exercise of the power;
- in circumstances where it is proposed that there should be a **removal, or relaxation, of parliamentary control**, from the exercise of a power that presently requires it, the memorandum fully justifies the change;
- where the negative procedure is chosen on the grounds of urgency and that there is **insufficient time for an affirmative**, the memorandum explains why the "made affirmative" procedure is not applied; and
- where the chosen procedure is **first-time affirmative**, the memorandum fully explains why the negative procedure is thought to afford adequate scrutiny on subsequent exercises of the power, and on what that prediction is based, bearing in mind that the power will remain exercisable by future governments.

21. The procedure chosen for each power should be explained in the memorandum in its own context and on its own merits. **Avoid simple formulaic explanations** such as "the provision is procedural", "the regulations will be technical", "the order will make administrative provision".

Use of precedent

22. Where there is a precedent for a delegation or the choice of parliamentary procedure, the memorandum should indicate this, identify the precedent, and explain its relevance to the bill. The Committee will take any precedent into account in its examination of a bill although will not necessarily find a provision appropriate based on precedent alone. If the power is a re-enactment with modifications of an existing power, the memorandum should say so and explain the differences.

23. A precedent will hold less weight if:

- it predates the Committee (that is, pre-1993); and
- it is in an Act arising out of a private Member's bill; and
- the power cited was inserted by an amendment at a late stage in a bill's passage. (This applies particularly in those cases where lack of time prevented the Committee from considering and reporting on the amendments.)

Changes to the Cabinet Office Guide to Making Legislation

165. The Guide is an influential document. It tells bill teams in detail how legislation is made, including its navigation through Parliament. For this reason, we have indicated at various points in this report areas where we believe the Guide should be amended or strengthened. The Guide is drafted by officials in the PBL secretariat and issued in the name of the Cabinet Secretary.[203] The Lord President when asked about the Guide said that, as chair of the PBL Committee, he would be as helpful as he could with any suggestions made by the Committee for its revision.[204] In the light of that positive response, we are optimistic that the changes suggested in this report will be reflected in a revised Guide. To assist those drafting the revisions, we set out in Box 3 below a summary of the Committee's proposed revisions based on the conclusions in this report.

Box 3: Summary of recommended revisions of the Guide to Making Legislation

The Guide should include:

- The **statement of principles of parliamentary democracy**, with a requirement that it should underpin to the fullest extent possible decisions about proposed delegations of legislative power. (Chapter 5, Box 1);
- The **DPRRC's guidance to departments**, set out in full. (Chapter 5, paragraph 148; Chapter 6, Box 3; Appendix 3); and
- The Committee's conclusions in relation to the use of **skeleton legislation** (Chapter 4, paragraphs 66 and 67) and **Henry VIII powers**. (Chapter 4, paras 83 and 84)

203 Q4.
204 Q5.

- The Committee's conclusions in relation to the delegation of power to issue **guidance and other instruments with legislative effect**, namely that:
  - "mandatory guidance" is a contradiction in terms and can never be justified; and
  - guidance which is **legislative in character** should be laid before Parliament and subject to parliamentary scrutiny.
  - **disguised legislative instruments** should not be used in the absence of convincing reasons to the contrary, and if used they – and the level of scrutiny applied to them – must be fully justified. (Chapter 4, paras 94, 103, 105 and 106)
- The Committee's conclusion that a clear and appropriate **distinction should be drawn between legislation and guidance**. (Chapter 4, para 100)
- The Committee's conclusions in relation to legislative sub-delegation of power, namely that:
  - where such a power is included in a bill, it should be limited and specific, and fully justified;
  - the exercise of the power and any sub-delegated power should be subject to parliamentary scrutiny; and
  - where the **level of parliamentary scrutiny** to be applied to the exercise of the sub-delegated power differs from the level of scrutiny applied to the secondary legislation containing the sub-delegated power, there should be a compelling justification for the divergence. (Chapter 4, para 112)
- A statement deprecating the **use of delegated powers as a substitute for imperfect policy development**. (Chapter 5, para 129)
- A refreshed commitment that publication of a bill in draft should be the "default position" and that draft bills should be submitted to parliamentary **pre-legislative scrutiny** where possible. (Chapter 5, para 135)
- A reinstatement of a presumption **that departments will accept most, if not all, of the DPRRC's recommendations** and, where any recommendation is not accepted, a requirement to provide a full justification. (Chapter 5, para 146)
- A refreshed commitment to undertaking that the **government response to a DPRRC report** will be available before committee stage of a bill or, if not possible, the minister should explain to the DPRRC why not and when the response will be provided. (Chapter 5, para 156).

166. **The Guide is currently a practical document to assist bill teams. With the addition of the new material, we believe that it has a broader purpose: to remind departments, both ministers and officials and also the PBL Committee, of the constitutional principles underlying the relationship between Parliament and the executive. Adoption and promulgation of a revised Guide will therefore be a powerful mechanism, we believe, for re-setting that relationship. We look forward to its introduction.**

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Chapter 1: An urgent need for change

1. A substantial groundswell of concern is developing about the shift in power from Parliament to ministers. We take the view that a critical moment has been reached where action is needed to bring about significant change in the way in which legislation is framed so that it is, first and foremost, founded on the principles of parliamentary democracy, namely parliamentary sovereignty, the rule of law and the accountability of the executive to Parliament. (Paragraph 5)

Chapter 2: Reasons for and against delegated legislation

2. Issues relating to whether delegated legislation should be amendable and whether parliamentary procedures could be changed to provide Parliament with a greater range of options than a simple "all or nothing" are beyond the scope of this report. That said, understanding what Parliament is currently able to do is integral to understanding why delegation of legislative powers by Parliament to the executive is constitutionally important. The limits on Parliament's ability to intervene in delegated legislation places an even greater significance on ensuring the appropriateness of the delegation in the first place. Where laws are passed with little or no scrutiny, Parliament must do more to ensure that they do not amount to an abuse of power. (Paragraph 35)

Chapter 3: "Considerable disquiet" – the problem of wide and ill-defined delegated powers

3. The "considerable disquiet" identified in the Jellicoe Report, and wider issues relating to the balance of power between Parliament and the executive, remain as live an issue in the current political environment as it was at the time of the Donoughmore Committee, brought to the fore in recent years by the circumstances surrounding the Strathclyde Review and then the impact of Brexit and the COVID-19 pandemic. It is for this reason that we say that a critical moment has been reached and it is now a matter of urgency that Parliament should revisit these important issues, take stock, and consider how the balance of power can be re-set. (Paragraph 55)

Chapter 4: Familiar and emerging grounds for continued "considerable disquiet"

Skeleton bills

4. The appropriate threshold between primary and secondary legislation should not be dependent on the exigencies of timing but should be founded on the overarching principle that the principal aspects of policy should be on the face of a bill and only its detailed implementation left to delegated legislation. There is a long-standing maxim that ignorance of the law excuses no-one but if Parliament is ignorant of the law passed in its name, then how can the public be expected to know and obey it. (Paragraph 65)

5. 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 legislation to be decided by ministers. As such, it will rarely be justifiable. (Paragraph 66)

6. We recommend that:

   - Should the Government introduce skeleton legislation, the delegated powers memorandum should make an explicit declaration that the bill is a skeleton bill or clauses within a bill are skeleton clauses.

   - Such a declaration should be accompanied by a full justification for adopting that approach, including why no other approach was reasonable to adopt and how the scope of the skeleton provision is constrained. (Paragraph 67)

7. We invite the Government to provide further examples of bills which were, in their view, *necessarily* skeletal — on grounds other than political expediency — and the justification for adopting the approach taken on each occasion. (Paragraph 68)

8. We propose below that consideration should be given to the DPRRC having a "scrutiny reserve", exercisable in exceptional circumstances only. A difference of opinion about whether a bill contains skeleton provision and requires a skeleton legislation declaration would amount to such an exceptional circumstance. This would allow the Committee time to take evidence from the minister and prepare a report before second reading. (Paragraph 70)

9. We support the SLSC recommendation that the Government, together with the two Houses of Parliament and their Procedure Committees, should consider, following consultation, how the democratic deficit inherent in skeleton legislation can be remedied. (Paragraph 74)

Henry VIII powers

10. Henry VIII powers are controversial, and for good reason. Every such power, and its scope, must always be fully justified. We will always deprecate the use of Henry VIII powers where they appear to have been included in a bill "just in case". (Paragraph 83)

11. That said, we acknowledge that, on occasion, it is appropriate to use them, albeit subject to the presumption that the affirmative procedure should apply to their exercise and that their scope should be constrained on the face of the bill. (Paragraph 84)

12. We welcome the offer made by First Parliamentary Counsel: (1) to ensure that departments are aware of the Committee's concern about Henry VIII powers and; (2) to consider developing guidance about examples of Henry VIII powers which are likely to regarded as appropriate. We will, of course, continue to consider each use of a Henry VIII power on its merits. (Paragraph 85)

Guidance

13. We share the view of the Leader of the House "that guidance should not be used to circumvent the usual way of regulating a matter". Mandatory guidance is such a circumvention. The very concept is a contradiction in terms and a power to make mandatory guidance will never be appropriate. Requirements which have legislative effect should always be expressed in legislative language, either in primary or secondary legislation, and subject to parliamentary oversight. (Paragraph 94)

14. When drafting a delegated powers memorandum for a bill which includes a power to issue guidance, departments must clearly explain and justify the character of the guidance. Where guidance is, in effect, legislative in character, it should be laid before Parliament and subject to parliamentary scrutiny. (Paragraph 97)

15. We share the concern of the SLSC, the JCSI and others about inconsistencies between legislation and guidance, and the use of guidance to fill gaps in legislation. We support the SLSC in its recommendation that it is crucial that departments ensure a clear and appropriate distinction between legislation and guidance. (Paragraph 100)

Other disguised legislative instruments

16. The number of occasions on which the Government have sought to acquire legislative powers under the guise of various devices not subject to parliamentary scrutiny is perhaps the most striking and disturbing of recent developments that have had the effect of shifting the balance of legislative power from Parliament to the executive. This finding is especially significant given that it has emerged so prominently at a time when Brexit and the pandemic have given so many other examples of a shift in power. (Paragraph 102)

17. We have already referred to the statement by the Leader of the House that guidance should not be used to circumvent the usual way of regulating a matter. The same is also true of these other devices. Provision in bills giving ministers powers to make determinations, directions, arrangements or to issue codes of practice, public notices etc. — where they are in effect camouflaged legislation — is an unacceptable ploy and, as matter of principle, should not be sought by the Government in the bills they put before Parliament. (Paragraph 103)

18. Furthermore, the multiplicity of disguised legislative instruments is confusing to Parliament and to the public, and does not, in our view, promote the good law principles of law that is clear and accessible. (Paragraph 104)

19. In the absence of convincing reasons to the contrary, therefore, we recommend that they should not be used. Where the Government take the view that they have convincing reasons, then the use of these devices – and the level of scrutiny applied to them – should be clearly identified in the delegated powers memorandum and fully justified. (Paragraph 105)

20. Where a department is uncertain as to whether use of one of these devices amounts to delegation of a legislative power, they should err on the side of caution and provide a clear explanation in the delegated powers memorandum about why the view has been taken that the power is administrative rather than legislative in character. (Paragraph 106)

Legislative sub-delegation of power

21. Tertiary legislation has as much legal force as any other form of law. Conferring a delegated power on ministers to sub-delegate power is potentially a more egregious erosion of democratic accountability than a simple delegation to a minster to make secondary legislation. Where the government seek a legislative sub-delegation of power in a bill, the power should be limited and specific, and its exercise, and the exercise of sub-delegated powers, should be subject to parliamentary scrutiny. Consideration should also be given

to including a statutory duty to consult those affected by the exercise of a sub-delegated power. The delegated powers memorandum should provide a compelling justification for the power, why it is needed, how it is intended to be exercised and how it is to be constrained. The memorandum should also explain the choice of parliamentary scrutiny to be applied to the exercise of the sub-delegated power and, where it differs from the level of scrutiny applied to the secondary legislation containing the sub-delegated power, provide a compelling justification for the divergence. (Paragraph 111)

22. Where, in turn, an instrument — made under powers delegated by primary legislation — delegates a power to either ministers themselves or another body to make tertiary legislation, the explanatory memorandum accompanying the instrument should state this and explain its scope and why it is needed. (This is a matter to which the SLSC refers in its parallel report.) (Paragraph 112)

Made affirmatives

23. When drafting a delegated powers memorandum, departments should ensure that where the negative procedure is chosen on the ground that there is insufficient time for an affirmative, the memorandum explains why the "made affirmative" procedure is not applied. The threshold between the negative and the affirmative procedure depends on the substance of the instrument and should not be determined by political expediency. (Paragraph 117)

24. We recommend that, where an instrument is subject to the made affirmative procedure, the Government should undertake to schedule a debate on the instrument sooner rather than later. (Paragraph 119)

25. We acknowledge that the recommendation above will have implications for the ability of the SLSC and the JCSI to report on an instrument in time for the debate. We therefore further recommend that, where a debate is scheduled soon after a made affirmative has been laid, the formal approval motion should be deferred and taken later, either formally or as a second debate if either the SLSC or the JCSI raise matters of concern. (Paragraph 120)

Conclusion

26. Long-standing issues of skeleton legislation and the use of Henry VIII powers remain matters of significant concern. Meanwhile new and complex issues have emerged. These developments cannot be explained simply as an aberration prompted by the recent "exceptional times". We have made some proposals which are intended to address aspects of the issues identified. In the following chapter, however, we consider how more radical change can be brought about so that the relationship between Parliament and the executive can be re-set and a balance restored. (Paragraph 121)

Chapter 5: Ways to re-set the balance of power

Asserting the fundamental principles of parliamentary democracy

27. It appears that bill teams are, in effect, being encouraged to regard the inclusion of delegated powers, and the preparation of a delegated powers memorandum, as merely a political or practical matter. The absence in the Cabinet Office Guide to Making Legislation of any explicit statement of the underlying principles is, in our view, a fundamental flaw. We therefore recommend that the Guide should be amended to include a statement of

principles which should underpin any decision by ministers about whether a bill should include delegated legislative powers. (Paragraph 126)

What departments can do

28. We welcome the Lord President's assertion that bills should be supported by well-developed policies and also the steps that he has taken to ensure that the PBL Committee reinforces this message in departments. We have no doubt however that, on occasion, the processes of policy development and bill drafting, and the parliamentary legislative timetable are misaligned. As a result, powers are included in bills which are, in effect, "a tool to cover imperfect policy development". This is unacceptable, and we look to the Government to undertake the systemic reforms necessary to prevent its happening. (Paragraph 129)

29. We endorse the Constitution Committee's view that pre-legislative scrutiny of bills should be regarded as an integral part of the wider legislative process. The Guide states that publication of a bill in draft is the "default position" and that draft bills should be submitted to parliamentary pre-legislative scrutiny where possible. We recommend that the Government should refresh their commitment to publishing more bills in draft. (Paragraph 135)

What the DPRRC can do

30. We have no doubt that scrutiny by the DPRRC has a pre-emptive effect and we have noted the evidence of the Lord President that that effect has been "profound". It cannot however be measured, and earlier chapters of this report have caused us to have some reservations about the Lord President's assessment of the extent of the Committee's impact. (Paragraph 142)

31. We urge the Government to amend the Guide so that it introduces an expectation that the Government will accept most, if not all, of the DPRRC's recommendations and, where any recommendation is not accepted, a full justification should be provided for not doing so in the Government's response. (Paragraph 146)

32. Reference is made to the Committee's guidance in the Guide and departments are told that they should consider it carefully. We recommend that the Committee's new guidance should be set out in full in the Cabinet Office Guide. (Paragraph 148)

33. We will continue our practice of commenting on the quality of delegated powers memoranda, in part to assist departments in preparing memoranda for future bills. (Paragraph 150)

34. It will remain our usual practice to report on bills after second reading and before committee stage in the House of Lords. Exceptionally, however, where appropriate and where timing permits, the Committee may report on a bill while it is in the House of Commons or before second reading in the House of Lords. (Paragraph 154)

35. We recommend that the Government should refresh their commitment in the Guide that a written response to Committee reports should be provided before committee stage. Where a written response cannot be provided in time, a written explanation should be given to the Committee before committee stage which should include an indication of when a response will be provided. (Paragraph 156)

36. We invite the Procedure Committee and the House to consider amending Standing Orders to allow the DPRRC a "scrutiny reserve" so that, in cases where a bill includes most exceptionally wide delegations for which there has been no satisfactory justification or the Committee takes the view that the bill contained skeleton provision, time will be available for the Committee to request a minister to provide further justification. Under the "scrutiny reserve" the committee stage could not proceed until the Committee had reported to the House. (Paragraph 160)

37. We will resume the Committee's previous practice of publishing an end of session report to the House, raising concerns about issues relating to the delegation of powers and making specific comments about the quality of delegated powers memoranda and Government responses. In preparing the report, we may also invite oral evidence from the Leaders of the two Houses. (Paragraph 162)

38. We see these end of session reports, along with reports from other committees such as the SLSC, JCSI and the Constitution Committee, as an important resource which will inform, or prompt, regular debates in the House about the quality of legislation and the explanatory materials submitted in support of it, and about the wider issues raised in this report. (Paragraph 163)

Chapter 6: Culture change within departments: a revised Guide to Making Legislation

39. The Guide is currently a practical document to assist bill teams. With the addition of the new material, we believe that it has a broader purpose: to remind departments, both ministers and officials and also the PBL Committee, of the constitutional principles underlying the relationship between Parliament and the executive. Adoption and promulgation of a revised Guide will therefore be a powerful mechanism, we believe, for re-setting that relationship. We look forward to its introduction. (Paragraph 166)

APPENDIX 1: LIST OF MEMBERS (AND LENGTH OF PARLIAMENTARY EXPERIENCE) AND MEMBERS' INTERESTS

Committee membership

Baroness Andrews (21 years)
Lord Blencathra (Chair) (38 years)
Baroness Browning (29 years)
Lord Goddard of Stockport (7 years)
Lord Haselhurst(48 years)
Lord Hendy (2 years)
Lord Janvrin (14 years)
Baroness Meacher (15 years)
Lord Rowlands (55 years)
Lord Tope (29 years)

Interests

Committee Members' registered interests may be examined in the online Register of Lords' Interests at https://www.parliament.uk/hlregister. The Register may also be inspected in the Parliamentary Archives.ck

APPENDIX 2: GLOSSARY OF KEY PARLIAMENTARY TERMS

Primary legislation

Acts of Parliament: laws passed by the House of Commons and the House of Lords, which are given Royal Assent by the sovereign. (It is more than 300 years since the sovereign last refused royal assent.)

How are Acts of Parliament passed? There are four main stages of debate in each House before a draft law (a Bill) can become law: second reading, committee stage, report stage and third reading, plus "ping-pong" to resolve any disagreements between the two Houses.

Primary legislation: another name for an Act of Parliament.

Henry VIII powers: powers given by Parliament to ministers allowing them to amend or repeal Acts of Parliament by delegated legislation. The exorbitant nature of this power is reflected in its name. In 1539 Parliament gave Henry VIII power to make proclamations having effect as if made by Parliament. The modern equivalent is for Ministers to be able to repeal Acts of Parliament without the need for a new Act of Parliament.

Secondary legislation

Secondary legislation: also called **delegated** or **subordinate legislation**: laws — including regulations, orders and rules — made by Ministers or public bodies under powers given to them by Act of Parliament. There are two main ways of making secondary legislation:

(a) Under **the negative procedure**: this means that Ministers make the law, they then lay it before Parliament and it usually comes into force within less than a month. Parliament has no say in any of this. The first it hears of the new law is after the Minister has made it. Either House can agree to vote the law down. It happens incredibly rarely. It last happened in the House of Commons in 1979.

(b) Under the **affirmative procedure**: this means that Ministers can only make the law if debate is needed). Instead of having four debates in both Houses (as with Acts of Parliament), secondary legislation requires just one debate in each House.

- A "**draft affirmative" statutory instrument** is secondary legislation that is laid in **draft** in both Houses and cannot be made by Ministers until both Houses have voted for it—after a debate lasting for no more than one-and-a-half hours.
- A "**made affirmative" statutory instrument** is secondary legislation that is made but can't come into force—or can't remain in force beyond a certain period (usually 28 or 40 days)—unless both Houses have voted for it. Many Covid laws were made under this procedure.

Statutory instruments: the legal form or "wrapper" containing most secondary legislation.

A regret motion: a motion which, if passed, expresses regret about a piece of secondary legislation without invalidating it. Since the Lords almost never vote against a statutory instrument (six Government defeats since 1968),[205] the

205 See Chapt 2, para 29 above.

Regret Motion is the next strongest signal of opposition to it and the only way opponents of a measure can signal their opposition to it.

A prayer to annul: a piece of secondary legislation will, if passed, result in the annulment of that legislation. "Prayer" means to petition, entreat, beseech, implore, supplicate, pray. In the case of a prayer to annul a negative instrument, the petition being to the sovereign, section 4 of the Statutory Instruments Act 1946 uses the formal (nowadays archaic) language of prayer to indicate a polite request.

Tertiary legislation

Tertiary legislation: laws made by people who have had law-making power conferred on them not directly by Parliament but indirectly by Ministers or public bodies. It is only allowed where an Act of Parliament expressly allows Ministers or public bodies to sub-delegate law- making powers to other people in this way.

APPENDIX 3: LIST OF BILLS WITH INAPPROPRIATE DELEGATIONS CITED IN THIS REPORT

Agriculture Bill (34th Report, Session 2017–19)

Armed Forces Bill (7th Report, Session 2021–22)

Childcare Bill (2nd Report, Session 2015–16)

Children and Social Work Bill (1st Report, Session 2016–17)

Cities and Local Government Devolution Bill (1st Report, Session 2015–16)

Civil Liability Bill (22nd Report, Session 2017–19)

Deregulation and Contracting Out Bill (8th Report, session 1993–94)

Digital Economy Bill (11th Report and 13th Report, Session 2016–17)

Domestic Abuse Bill (21st Report, Session 2019–21)

Draft Regulatory Reform Bill (37th Report, Session 1999–2000)

Education and Adoption Bill (10th Report, Session 2015–16)

Energy Bill (6th Report, Session 2015–16)

European Union (Withdrawal) Bill (3rd Report, 12th Report, 23rd Report and 24th Report Session 2017–19)

Financial Guidance and Claims Bill (1st Report, Session 2017–19)

Haulage Permits and Trailer Registration Bill (15th Report, Session 2019–17)

Healthcare (International Arrangements) Bill (39th Report and 47th Report Session 2017–19)

Housing and Planning Bill (20th Report, Session 2015–16)

Immigration and Social Security Co-ordination (EU Withdrawal) Bill (46th Report, Session 2017–19)

Immigration Bill (17th Report, Session 2015–16)

Ivory Bill (31st Report, Session 2017–19)

Legislative and Regulatory Reform Bill (20th Report, Session 2005–06)

Medicines and Medical Devices Bill (19th Report, 2019–21)

Mental Health Units (Use of Force) Bill (31st Report, Session 2017–19)

Northern Ireland (Executive Formation and Exercise of Functions) Bill (36th Report, Session 2017–19)

Northern Ireland (Welfare Reform) Bill (14th Report, Session 2015–16)

Pension Schemes Bill (6th Report, Session 2016–17)

Police, Crime, Sentencing and Courts Bill (6th Report, Session 2021–22)

Policing and Crime Bill (3rd Report and 8th Report, Session 2016–17)

Public Bodies Bill (5th Report, Session 2010–12)

Sanctions and Anti-Money Laundering Bill (7th Report, Session 2017–19)

Space Industry Bill [HL] (1st Report, Session 2017–19)

Taxation (Cross-border) Trade Bill (11th Report, Session 2017–19)

Tenant Fees Bill (35th Report, Session 2017–19)

APPENDIX 4: PART 3 OF THE GUIDANCE TO DEPARTMENTS

Practical information about the Committee

[Note: Parts 1 and 2 are set out in Chapter 6 of this report.]

Working methods

The Committee has ten members. The membership of the Committee is set out on the front cover of the DPRRC's reports and on the Committee's webpage. It is supported by a Clerk, a Committee Operations Officer and Counsel. The contact details for the Committee can be found at the end of this Part.

The Committee considers and reports on all bills (except consolidation and supply bills). In general, the Committee aims to report before the beginning of the committee stage in the House of Lords, although may on occasion report before second reading. In exceptional circumstances the Committee may report on a bill while it is still in the House of Commons.

If time allows, the Committee also considers government amendments (and certain non-government amendments (see paragraph 32 below)) with significant delegated powers aspects tabled in the Lords. The Committee may similarly consider Commons' amendments when a bill returns to the Lords.

The Committee is assisted in its examination by written evidence from departments (the delegated powers memorandum), which may be supplemented by subsequent memoranda ("supplementary memoranda") covering relevant amendments. In exceptional circumstances, the Committee may invite the minister to give oral evidence if it is not satisfied by the explanations provided in the memorandum.

The Committee usually meets on Wednesday mornings. The frequency of meetings will depend on the business going through the Lords. It is likely to be either weekly or fortnightly. Its reports are published either by the end of the week in which the Committee has met or early the following week. Reports may include recommendations for amendment of a bill (but not the precise wording of an amendment) or draw matters to the attention of the House where it is suggested that the House may wish to press a minister for further information.

Where the Committee has no comment to make about a bill, it will, for the record, publish a short report stating this. In contrast, the Committee will only publish a report on amendments to a bill if it has recommendations to make. If the Committee has no comment to make on an amendment or amendments, it will not publish a report.

The practicalities of submitting memoranda

When should the delegated powers memorandum be received by the Committee?

According to the Cabinet Office Guide to Making Legislation, the Parliamentary Business and Legislation (PBL) Committee (a Cabinet Committee) requires a delegated powers memorandum before it will approve a bill for introduction, and this memorandum must be made available to both the Commons and the Lords on introduction of the bill to either House.

As far as the DPRRC is concerned, however, the following applies:

- in the case of **a bill beginning in the Lords**, the memorandum must be received by the Committee on (or before) its introduction into the Lords; and
- in the case of **a bill beginning in the Commons**, the Committee will not ordinarily consider the bill until it has been brought to the Lords (unless it is emergency legislation, or the Committee considers that there is some other reason for early consideration). A version of the memorandum, reflecting where appropriate any changes during the bill's passage through the Commons, must be received by the Committee when the bill arrives in the Lords.

In what circumstances should supplementary memoranda be provided to the Committee?

A supplementary memorandum must be provided when:

- any government amendment is tabled during the passage of the bill through the Lords which introduces a significant new delegated power or significantly amends an existing one. (It is not required if an amendment is simply giving full effect to a recommendation by the Committee or addressing a point raised by it);
- for any non-government amendment with significant delegated powers which the Government are able to indicate that they will support; and
- when a bill which starts in the Lords is returned by the Commons with amendments which introduce significant new delegated powers or significantly amend existing ones.

Early warning of amendments

Because of tight legislative timescales, the DPRRC's reports on amendments on a "best endeavours" basis. Where possible, early warning of relevant government amendments should be given — along with:

- advance sight of the text of amendments and the supplementary delegated powers memorandum; and
- the likely date on which the amendment will be taken in the Lords.

This is particularly important with regard to Commons' amendments as the timing of ping-pong is not subject to a minimum interval and can be scheduled quickly.

Where the Committee has been unable to consider a significant relevant amendment, it would assist the House if the minister in charge of the bill were to bring this to the attention of the House when the amendment is being considered.

If a supplementary memorandum is required, when should it be received by the Committee?

Supplementary memoranda must be received on (or before) the day an amendment is tabled.

How should memoranda be delivered?

Memoranda and supplementary memoranda (in the case of the latter, along with the text of relevant amendments) should be sent by email to the address below as a Word document.

Publication of memoranda

Memoranda and supplementary memoranda are published by the two Houses on the parliamentary bills pages.

Format of memoranda

Memoranda and supplementary memoranda should adopt the following format: each legislative power should be introduced by an italic heading which should set out:

- **the clause and subsection number;**
- **who is to exercise the power;**
- **by what means; and**
- **subject to what level (if any) of parliamentary scrutiny.**

The power should then be explained in the paragraphs below the italic heading (see Part 2 of this guidance). Do not give the powers additional identifiers (such as "Power 1", "Power 2" etc.).

Take particular care:

- to ensure that the explanatory paragraphs apply to the provision identified in the italicised heading; and
- when a bill is brought up from the Commons (especially if it has been extensively amended on report), to ensure that the references to clause and subsection numbers are up to date.

When a bill which starts in the Lords is returned by the Commons with amendments which introduce significant new delegated powers or significantly amend existing ones, the supplementary memorandum should be structured by reference to the relevant numbered Commons amendments and should not be an updated version of the entire original memorandum.

What happens after the Committee has considered a bill

When will the Committee report?

The Committee report will be published either by the end of the week in which the Committee has met or during the following week, and always in advance of committee stage.

When should a government response be provided?

A government response should be sent to the Committee before committee stage. If, because of tight legislative timescales, this is not possible, then the minister should write to the Committee before committee stage explaining the reasons for the delay and stating when the response will be provided.

What form should a response take and how should it be delivered?

This is a matter for the department rather than the Committee. The usual practice is for the minister to address a letter to the Chair of the Committee which should be sent, as a Word document, by email to the address below.

Publication of the response

The Committee will, for the record, publish the response in an appendix to a Committee report. For the assistance of the House, the minister may also wish to place the response in the Library or send it directly to relevant opposition spokesmen and other interested members.

Will the Committee comment on the response?

It is usual for the Committee to publish the response without remark unless, exceptionally, in the view of the Committee, the House would be assisted by some clarificatory comment.

If the department disagrees with the Committee, what action should it take?

It is for the department to justify its view to the House rather than to the Committee. The function of the Committee is to advise the House and it is for the House to decide whether to adopt the Committee's recommendations. In forming a view, the House will consider the Committee's report and any response by a minister to its recommendations. It is unusual for the Committee to engage in correspondence or discussions with a department where the government disagree with the Committee's conclusions.

Committee contact details and assistance

The Committee contact details are set out below. If departments or bill teams have any further questions, they should not hesitate to contact the Clerk.

- Committee email address: HLDelegatedPowers@parliament.uk
- Webpage: https://committees.parliament.uk/committee/173/delegated-powers-and-regulatory-reform-committee/
- Clerk: Chris Salmon Percival, salmonc@parliament.uk, 0207 219 3233 or 07714 147043
- Committee Operations Officer: Louise Andrews, HLDelegatedPowers@parliament.uk, 0207 219 3103