

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

Guidance for Departments

on the role and requirements of the Committee

November 2021

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 hlddelegatedpowers@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.

Guidance for Departments

INTRODUCTION

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 (paragraphs 3 to 14)
 - **PART 2:** content of the delegated powers memorandum (paragraphs 15 to 23)
 - **PART 3:** practical information about the Committee and assistance (paragraphs 24 to 47)

PART ONE: PRINCIPLES

A. 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.**

B. 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 TWO: CONTENT OF THE DELEGATED POWERS MEMORANDUM

A. 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.

B. 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 10 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.

C. 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**
 - describe **why the matter that is the subject of the power has been left to delegated legislation rather than included in the bill**
 - 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)
 - it is in an Act arising out of a private Member’s bill
 - 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.)

PART THREE: PRACTICAL INFORMATION ABOUT THE COMMITTEE

A. Working methods

24. The Committee has ten members. The membership of the Committee is set out on the inside front cover of DPRRC 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.
25. 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.
26. 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.
27. 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.
28. 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.
29. 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.

B. The practicalities of submitting memoranda

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

30. 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.
31. 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?

32. 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;
 - 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

33. Because of tight legislative timescales, the DPRRC 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.

34. 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?

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

How should memoranda be delivered?

36. 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

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

Format of memoranda

38. 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.).

39. **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.

40. **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.

C. What happens after the Committee has considered a bill

When will the Committee report?

41. 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?

42. 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?

43. 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

44. 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?

45. 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?

46. 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.

D. Committee contact details and assistance

47. 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.**

- **Generic email address:** HLDelgatedPowers@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, HLDelgatedPowers@parliament.uk. 0207 219 3103.