



**LORD PRESIDENT OF THE COUNCIL
LEADER OF THE HOUSE OF COMMONS
THE RT. HON. JACOB REES-MOGG M.P.**



The Lord Hodgson of Astley Abbotts C.B.E.,
Chairman of the Secondary Legislation Scrutiny Committee
House of Lords
London
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Our Ref: JRM/NMP2156

24 January 2022

Jacob Rees-Mogg,

Thank you for your letter dated 23 November 2021 and the enclosed copy of the SLSC's report entitled 'Government by Diktat: A call to return power to Parliament'. I am grateful for receiving a copy of the report in advance of its publication. I am also grateful for your letter of 6 January regarding the updated guidance on delegated legislation that will be issued soon. My office will ensure this is circulated to all departments as well.

The Secondary Legislation Select Committee conducts important work in holding the Government to account and on your consideration of delegated powers that are laid under the sifting process. Better scrutiny leads to better legislation and I am grateful to the Committee for all your work in this area. I understand the desire of your Committee to adopt a more rigorous approach to legislating, although note that there will invariably be times when greater flexibility may be needed when legislating, for example, as part of an emerging policy response. We need to strike the right balance in all instances.

Please find the Government's response overleaf. The response responds to the elements of your report that are for the Government and not to elements that are for the Houses to decide.

With every good wish,

JRM
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**GOVERNMENT RESPONSE TO THE SECONDARY LEGISLATION SCRUTINY
COMMITTEE'S TWENTIETH REPORT OF SESSION 2021-22 'GOVERNMENT BY
DIKTAT: A CALL TO RETURN POWER TO PARLIAMENT'**

End of session reports

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

There is an established mechanism for the debate of select committee reports in the House of Lords, either in the Chamber or in Grand Committee. It would be a matter for the Committees concerned whether they sought to combine debates on a number of reports, and for the Committee office who oversee the allocation of debate slots between Committees. In the House of Commons, the Leader of the House answers questions on a weekly basis at the Business Statement on all facets of the Government's programme including legislation and associated documents. In addition, there are opportunities to debate these matters if Members wish to seek a debate in the main Chamber or Westminster Hall through the Backbench Business Committee.

Threshold between primary and secondary legislation

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

The Government does not agree that bill teams are encouraged to regard the inclusion of delegated powers, and the preparation of a delegated powers memorandum, as a "political or practical matter¹". As the Leader of the House stated during his oral evidence session with the Committee, "PBL discusses every single power and every single Henry VIII power that comes forward. It has a note provided to it on the use of powers and the legal consequences of those powers. The law officers sit in and we have to be convinced that those powers are needed and are proportionate."²

¹ Secondary Legislation Select Committee (2021) [Government by Diktat: A call to return power to Parliament \(HL 105\)](#), paragraph 28 (viewed on 12 January 2022)

² Delegated Powers and Regulatory Reform Committee (2021) [Delegated Powers and Regulatory Reform Select Committee Corrected oral evidence: Delegation of legislative power](#) (viewed on 12 January 2022)

However, the Government will update the Guide to include the statement of principles recommended by the Delegated Powers and Regulatory Reform Committee (DPRRC) in their twelfth report of the 2020-21 session entitled *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive* (HL 106) which ministers and bill teams can use when considering the inclusion of delegated legislation in their bills.

Skeleton legislation

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

The Government does not agree that there should be exceptional procedures for bills with substantial delegated powers, nor does it agree with the DPRRC's recommendation to designate a bill as a 'skeleton bill'. As the DPRRC's report sets out, the definition of a framework bill would be difficult to prescribe. The Government brings forward legislation following rigorous internal scrutiny. It is then for Parliament to consider each bill on its own merits and agree or, as the case may be, disagree to delegating powers.

The Government's view is there are circumstances where it is appropriate for bills to contain substantial delegated powers, including to create framework bills or in relation to emergencies.

Departments with bills containing any delegated powers must produce a delegated powers memorandum, detailing each power and the justification for it, which is published on introduction. These powers are then scrutinised by parliamentarians during the passage of the bill, and by the DPRRC who report on each bill. The Office of the Leader of the House of Commons would welcome specific previous examples of where the Committee does not feel memoranda are to the standard required.

Legislative sub-delegation of power

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

As the Leader of the House of Commons set out in his letter to the Joint Committee on Statutory Instruments on 21 September 2021:

"The exceptional times of the pandemic have given rise to the need for exceptional legislation, however, I agree that this should not become an opportunity to relax the principles of the rule of law and depart from the presumption against the sub-delegation of legislative power. This is a long-standing and important principle and one that the Government will continue to consider in its approach to legislation. In preparing all our legislation relating to COVID-19 we have been conscious of the rule of law and the need to act within the relevant powers available."³

The Government continues to uphold a presumption against the sub-delegation of legislative power and so would expect any provision in a bill that allows sub-delegation to be fully justified.

However, we feel that including a specific heading in the explanatory memorandum for instances where such a power may be being taken in a statutory instrument is disproportionate. It is important that the explanatory memorandum is kept as concise as possible, and the introduction of a further heading may lead to the document becoming unmanageably complex. Instead, the Government will update existing guidance for drafters to make clear that the "Policy background" section should provide an explanation of any legislative sub-delegation.

Secondary legislation and guidance

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

These exceptional times have given rise to the need for exceptional legislation, and the response to the COVID-19 pandemic has required an increased amount of supplementary guidance. That is not different from previous practice, but it has had a wider reach. Throughout the pandemic, the Government has continued to evolve its approach to communicating clearly the effects of changes made to the law, alongside publication of the legislation and its associated guidance.

³ Leader of the House of Commons (2021) [Government response: Letter to Chair of JCSI from the Leader of the House of Commons](#). (viewed: 12 January 2022)

It is recognised that legislation needs to be detailed and clear enough that guidance does not need to be relied upon for the purposes of interpretation. However, guidance has continued to be an important and necessary way of supporting the public and supplementing legislation during this unique and difficult time. It would not have been possible or practicable to legislate for everything that the Government needed to do in response to the pandemic. Guidance can be a more proportionate way of encouraging changes in behaviour and has been an invaluable tool. It is for departments to make judgements about the right balance to strike between law and guidance in any particular case.

Quality of legislation and supporting information

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

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

The Government will always aim to ensure that there is enough analysis to explain decision-making. While temporary measures that are in force for less than 12 months do not require a full impact assessment for the purposes of the Better Regulation process (and therefore do not need to undergo formal scrutiny by the Regulatory Policy Committee), it is also clear that many regulations would result in long term impacts on society. Such measures will still need to undergo appropriate analysis which should be published in the explanatory memorandum of the regulation in question. The premise of an impact assessment is to identify causal relationships between individual regulations and the effects they lead to, and to do so with a significant level of precision and certainty. This has not proved possible over the course of the response to the pandemic, but the Government has aimed to mitigate this by publishing overall analyses about the impacts of the pandemic and of the measures taken to respond to it.

Impact assessments for coronavirus instruments

As we have indicated in relation to the quality of secondary legislation and supporting information, the exceptional demands of the twin challenges of Brexit and the pandemic provide some explanation for a fall in standards but, as those challenges abate, departments and their SROs must ensure that: (a) where an

instrument requires a full impact assessment, that assessment is always laid at the same time as the instrument; and (b) where an instrument does not require a formal impact assessment, the explanatory memorandum contains sufficient information to enable the effect of the instrument to be understood. In addition, we encourage departments to consider how independent validation of their policy choices can be demonstrated. This should also be described in full in the explanatory memorandum and should include a thorough description of any consultation exercise. (para 71)

The Government agrees that the provision of Impact Assessments is important for Parliament to be able to fully consider the impact of policy changes. We recognise the concerns set out by the Secondary Legislation Scrutiny Committee when the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 were laid. This is why, following the oral evidence given to the Committee on 13 July 2021, the Department for Health and Social Care (DHSC) published an Impact Statement to provide as much supporting evidence as they were able to at the time, whilst working to finalise a full Impact Assessment. On 9 November 2021 DHSC published the full Impact Assessment which can be found on GOV.UK⁴.

DHSC fully acknowledges that this delay was not best practice and is very clear that this approach was only taken due to the urgent nature of these regulations and the overriding need to ensure they were in force in time for the winter months.

Sunset provision

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

Secondary legislation with an impact on business above +/- £5 million (annually) is required to contain a statutory review clause, unless the responsible minister makes a statement on why this would not be appropriate. Secondary legislation with an impact below this threshold may also be reviewed at the discretion of the responsible minister.

In recent years, Government has moved away from requiring sunset provisions in regulatory secondary legislation as a matter of course, to enable departments the flexibility to deliver Government's priorities proportionately. A sunset provision is not

⁴ Department of Health and Social Care (2021) [Making vaccination a condition of deployment in older adult care homes](#) (viewed on 12 January 2022)

the only method by which departments have sought to ensure SIs are time limited and only in effect for as long as they need to be.

The decision whether to include a sunset provision lies with the relevant department and is always carefully considered. The length of the sunset period depends on a number of factors, including the policy aims of the legislation and the length of time it is expected to be required. Given the nature of some of the SIs made to deal with the current situation, it is quite right that some do include a sunset provision in order to ensure that they are only in place for the specific duration that is necessary and expires thereafter. The length will naturally differ for each individual SI depending on the policy objectives and subject area of the legislation.

Sunset provisions continue to be used in emergency coronavirus regulations. Recent examples include *The Health Protection (Coronavirus, Wearing of Face Coverings) (England) Regulations 2021* and *The Health Protection (Coronavirus, Restrictions) (Entry to Venues and Events) (England) Regulations 2021*, both of which contained short-term sunset provisions ensuring Parliament would be consulted on any extension of the regulations.

The Government continues to assist the Committee in their scrutiny of regulations by providing monthly updates on coronavirus SIs containing specific sunset provisions.

Whether statutory review clauses should be used more frequently as a matter of course is being considered as part of the government's potential reforms to the framework for better regulation. The consultation 'Reforming the Framework for Better Regulation' was open from July to October 2021, and the government response will be published in due course.

Restricting parliamentary scrutiny

As we said in our end of session 2019–21 report, while the pandemic may have provided a justification for some instruments to be subject to an accelerated timetable, this was not the case for all instruments that were dealt with in this way—including some pandemic-related instruments. We repeat our view that parliamentary scrutiny should not be curtailed save in exceptional circumstances and with a full justification clearly set out in the explanatory memorandum. We are aware of the DPRRC's concerns about the use of the made affirmative procedure—that it enables significant policy change without prior parliamentary approval—and we support the DPRRC's recommendation that consideration should be given as to whether it would be feasible to hold a debate at an early stage and for the approval motion to be taken later, either formally or as a second debate if either the SLSC or the JCSI raises matters of concern. (para 73)

Parliament has a crucial role in scrutinising and approving legislation. This is why for significant national measures with effect in the whole of England or that are UK-wide, the Government has committed to consulting Parliament and, wherever possible, to holding votes before such regulations come into force.

However, sometimes it is necessary to move quickly, for example, to limit the spread of COVID-19, with regulations needing to come into force as soon as possible. In those instances, the regulations remain subject to parliamentary scrutiny and approval in the normal way as set out in the terms of the parent Act.

Looking ahead: volume and flow of statutory instruments

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

Given the unprecedented amount of secondary legislation needed to prepare the UK for departure from the European Union, the Government felt it was appropriate to provide a forward look of the anticipated volume and flow of statutory instruments to assist the Committee in its planning. However, as we return to a more usual situation, we do not believe it is appropriate to provide this information on an ongoing basis, as the exact volume and flow of secondary legislation can be difficult to anticipate for a variety of reasons. For example, secondary legislation can often be reactive in nature and inherently difficult to predict, and even where statutory instruments can be predicted, their exact timings are frequently subject to change which makes it difficult to provide accurate forecasts.