

WRITTEN EVIDENCE SUBMITTED BY THE HANSARD SOCIETY (GRB 032)

INTRODUCTION

1. Brexit poses the biggest legislative challenge ever undertaken by the UK Parliament.
2. Unless legislative safeguards are included in the Great Repeal Bill, the inclusion of broad, widely scoped delegated powers to enable ministers to act flexibly in uncertain circumstances, could result in a substantial transfer of power to the executive.
3. Furthermore, unless new scrutiny mechanisms are established in the House of Commons, the standard of parliamentary scrutiny and democratic accountability will be pushed to an unacceptably low level.
4. If MPs fail to act to fix their procedures, they will be acquiescent in empowering the executive at the expense of the legislature, according ministers immense power to determine vast swathes of the statute book untroubled by the inconvenience of detailed scrutiny.
5. In failing to address the weaknesses in their own approach to delegated legislation, MPs will also knowingly cede authority and power to the House of Lords in this process, because their scrutiny procedures are currently inferior to those of the Upper House.

RESTRICTING THE DELEGATION OF POWER

6. Past scrutiny of enabling bills (e.g. the Legislative and Regulatory Reform Act) demonstrates that the best way to constrain a broad, ill-defined power is to tighten the scope of its application through constraints on the face of the bill, including safeguards to define restrictions on its use.
7. This will be particularly important in the context of Brexit, as it may be very difficult for the government to fully define – or indeed anticipate – all the circumstances in which it might need to utilise the powers provided not only in the Great Repeal Bill but importantly also in the other pieces of primary legislation that it proposes to bring forward.
8. Statements from the government about its intentions with respect to delegated powers are of limited value. Intentions do not have legislative force, and future governments – indeed, new ministers within a government – might have entirely different intentions with the passage of time. And the more secure a majority the government enjoys, the greater the risk it could use that majority to bring forward an SI to achieve purposes not intended by Parliament when it granted the powers.
9. The concern that government might use the powers for circumstances beyond Brexit, and in ways not anticipated by Parliament, is entirely justifiable given past precedents. Powers provided in Acts of Parliament for national security purposes, for example, have been used domestically in ways not intended by Parliament. In 2010, several local authorities were found covertly spying on residents in order to tackle dog fouling, track use of litter bins, and check eligibility for school catchment areas using powers delegated in the Regulation of Investigatory Powers Act 2000. Similarly,

‘freezing’ order powers under the 2001 Anti-Terrorism Crime and Security Act were used to freeze all Icelandic bank assets in the UK following the collapse of the bankrupt bank *Landsbanki* – a domestic application of the powers in circumstances not involving terrorist activity.

10. A specific restriction on the use of the proposed powers should be included on the face of the Great Repeal Bill, to ensure that they cannot be used for circumstances beyond those required by Brexit, and no precedent for the broader use of such powers can therefore be created. The approach recommended by the House of Lords Constitution Committee – that the bill should state that the powers will only be used as far as necessary to adapt the body of EU law to fit the UK’s domestic legal framework, and to implement the result of negotiations with the EU, may suffice but much will depend on the wording of the bill and the powers proposed.¹ Decisions on changes to the law to make it ‘fit the UK’s post-exit circumstances’ might be anything but technical.²
11. Parliament could also impose sunset clauses on the powers within the bill to ensure that they are time-limited. Given the uncertainties of the Brexit process, and the unknown nature of the timetable – for example, whether there will be a transition period post-2019, and how long this might be – most sunset clauses will need to be longer than one or two years in duration, expiring after April 2019. If not, it is likely that some of these clauses will need to be renewed.
12. Further restrictions might also be imposed by specifically defining areas where a power cannot be used. The House of Lords Constitution Committee suggested that the powers might be mitigated in this way but did not define how this might be done.
13. The government’s White Paper indicates that it will consider constraints like those placed on the delegation of power in section 2 of the European Communities Act 1972.³ This power cannot be used to:
 - make any provision imposing or increasing taxation; or
 - make any provision taking effect from a date earlier than that of the making of the instrument containing the provision; or
 - confer any power to legislate by means of orders, rules, regulations or other subordinate instrument, other than rules of procedure for any court or tribunal; or
 - create any new criminal offence punishable with imprisonment for more than two years or punishable on summary conviction with imprisonment for more than three months or with a fine of more than level 5 on the standard scale or with a fine of more than £100 a day.⁴
14. We would also suggest that the model provided by the Legislative and Regulatory Reform Act 2006, a similarly broad piece of enabling legislation, might be useful: six safeguards were added to the face of this bill so that the powers could only be used if:

¹ House of Lords Select Committee on the Constitution, 9th Report of Session 2016-17, *The ‘Great Repeal Bill’ and delegated powers*, HL Paper 123, para.50, p.18.

² Department for Exiting the European Union (2017), *Legislating for the United Kingdom’s withdrawal from the European Union*, Cm 9446, para.3.13.

³ Department for Exiting the European Union (2017), *Legislating for the United Kingdom’s withdrawal from the European Union*, Cm 9446, para.3.17.

⁴ European Communities Act 1972, Schedule 2: Provisions as to subordinate legislation.

- the policy objective cannot be satisfactorily secured by non-legislative means;
 - the effect of the provision is proportionate to the policy objective;
 - the provision, taken as a whole, strikes a fair balance between the public interest and the interests of any person adversely affected by it;
 - the provision does not remove any necessary protection;
 - the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise; and
 - the provision is not of constitutional significance.
15. The 2006 Act constitutes what Parliament currently deems acceptable in terms of the ‘bottom line’ for delegation. Parliament would need to think very carefully about the implications of lowering that standard still further, if it decides not to include similar restrictions in the Great Repeal Bill. However, much will depend on the wording of the bill and the proposed application; in the context of the Brexit process, for example, it may be difficult to restrict the use of a power in relation to a provision of constitutional significance, or in relation to the exercise of rights.

OMISSIONS IN THE WHITE PAPER

16. There are two areas of the legislative process where the White Paper, ‘Legislating for the United Kingdom’s withdrawal from the European Union’ is silent in terms of the government’s intentions:
- with respect to SIs implementing EU law under Section 2.2 of the ECA 1972, whether their repeal - where felt necessary - could be achieved by statutory instrument, and the nature of the scrutiny procedure that would be applied to that SI, given that SIs made under 2.2 may have implemented policy that would normally have been made through primary legislation; and
 - how it will deal with legislation that has been adopted by the EU but is not yet in force, or transposed into UK law.

Parliament will need to seek elucidation on these points once the bill is brought forward.

HENRY VIII CLAUSES

17. A Henry VIII power enables ministers to amend or repeal primary legislation by statutory instrument and with little or no parliamentary scrutiny. Their use challenges the constitutional principle that Parliament is the sole legislative authority with the power to create, amend or repeal any law.
18. In scrutinising legislation, Members must also be mindful of the fact that Henry VIII powers may come in the form not only of powers explicitly to amend primary legislation, but also powers to ‘otherwise modify’ it – thereby allowing ‘non-textual amendment’ of primary legislation. This has been regularly highlighted as a matter of concern by the House of Lords Delegated Powers and Regulatory Reform Committee.
19. Henry VIII powers are not being invented by government for the Brexit process. Successive governments have regularly claimed such powers and Parliament has often granted them. For example, in the last decade ministers have sought broad, ill-defined

powers to ‘make provision for reforming legislation’, to repeal legislation deemed to be ‘no longer of practical use’, and to make provisions with retrospective effect if they ‘consider it necessary or desirable’.⁵

20. Our research shows that in the 2015-16 parliamentary session, of the 23 government bills that achieved Royal Assent, 16 contained a total of 96 Henry VIII powers to amend or repeal primary legislation. Sixty-five of these powers were included in the bills on introduction to Parliament; a further 31 powers were added to the bills during their progress through Parliament.⁶
21. Henry VIII powers may be added during a bill’s consideration because gaps are revealed during the scrutiny process, or they flow as a consequence of other amendments that are made to the legislative text. Sometimes they are included as a backstop because the government cannot be sure it has included all the consequential amendments arising from a change, and the power will enable them to resolve any problems if they occur.
22. Critics of Henry VIII powers tend to treat them as intrinsically bad. However, some of these powers can, in practical terms, be quite anodyne in their application – for example, the renaming of a public body. Treating them as a uniform problem misses the key point: what, exactly, do the powers give rise to, in terms of ministerial authority, and is this something that Parliament is comfortable ministers should be able to do with less scrutiny than would be the case for primary legislation?
23. It should be noted that section 2(2) of the European Communities Act is a broadly drawn power that created a drive to put things in delegated legislation which might, in other circumstances, have been better put in primary legislation. (In its report, the House of Lords Constitution Committee has already raised the need potentially to ‘re-enact’ some delegated legislation back into primary law post-Brexit.)⁷
24. Given the nature of the Brexit legislative exercise now to be undertaken, Henry VIII powers will be a necessary feature of the Great Repeal Bill and the other bills that the government proposes to bring forward. Such powers should be subject to the same scrutiny as all other clauses in this legislation. Otherwise, there is a risk that Parliament will focus its scrutiny efforts on these powers and, in the process, fail to examine adequately other powers that may be much more important in terms of their potential policy and political impact.

SCRUTINISING DELEGATED POWERS

25. Scrutiny of powers within bills is undertaken by the House of Lords Delegated Powers and Regulatory Reform Committee (DPRRC). Its scrutiny is rigorous and effective. However, it only considers bills when they arrive in the House of Lords. MPs do not have access to any information or advice about the powers in bills when legislation starts in the House of Commons. We have previously recommended that

⁵ See R. Fox and J. Blackwell (2014), *The Devil is in the Detail: Parliament and Delegated Legislation*, (London: Hansard Society).

⁶ Hansard Society (2017), *Westminster Lens: Parliament and Delegated Legislation in the 2015-16 Session*, (London: Hansard Society), p.10-11.

⁷ House of Lords Select Committee on the Constitution, 9th Report of Session 2016-17, *The ‘Great Repeal Bill’ and delegated powers*, HL Paper 123, para.67, p.22.

MPs would benefit from the work of the DPRRC and that if possible the Committee should scrutinise all bills on introduction, regardless of where a bill starts its legislative passage.⁸ The Committee has indicated it may indeed make an exception for the Great Repeal Bill and consider and report on the powers when the Bill is first published;⁹ the unique nature of the legislation entirely justifies such a break with precedent.

SCRUTINY AND VOLUME

26. In its White Paper, the government indicated that Brexit might require an additional 800-1,000 SIs to ‘correct’ the statute book. It is unclear whether this will be within Parliament’s scrutiny capacity. If most SIs brought forward are negative instruments, the answer may be ‘yes’. However, we do not know what the proportion of affirmative instruments will be. Under the current scrutiny procedure in the House of Commons, affirmative instruments require the setting-up of a Delegated Legislation Committee or the holding of a debate on the floor of the House. These absorb the time of Members, and valuable debating time in the Chamber. In the last parliamentary session, when output of SIs was relatively low, 114 SIs were considered in Committee and a further 13 on the floor of the House.¹⁰ If the volume of affirmatives were merely to double, it would have serious implications for the resourcing of the House, and Members’ workloads. However, it may be that the number of SIs generated by ‘normal’, non-Brexit-related business declines as the government’s focus is taken up entirely with the Brexit negotiation process. If so, the increased volume may prove more manageable than feared.

STRENGTHENING THE SCRUTINY PROCEDURES

27. The key problem with scrutiny of delegated powers in the Great Repeal Bill will be that if ministers cannot fully predict how a power might be used, it will be difficult for Parliament to assign a procedure to the scrutiny of that power for the future.
28. The government proposes that current negative and affirmative scrutiny procedures should be used. In the White Paper, it touches inaccurately on these procedures, demonstrating a level of ignorance at best, deception at worst.
29. Notably, despite having referenced both negative and affirmative scrutiny procedures, it comments only on the former, highlighting in paragraph 3.21 that ‘members of either House can require a debate, and if necessary, require a vote.’ This is not true. MPs can ‘request’ a debate and a vote but they cannot ‘require’ them. The government controls the parliamentary timetable in the House of Commons, and it must therefore agree to grant the time for any debate (further information on this point is set out later in this paper).
30. Interestingly, the government makes no mention of strengthened scrutiny procedures, although there are 11 to choose from, and they have increasingly become the

⁸ R. Fox and J. Blackwell (2014), *The Devil is in the Detail: Parliament and Delegated Legislation*, (London: Hansard Society), p.197.

⁹ House of Lords Delegated Powers and Regulatory Reform Committee, 23rd Report of Session 2016-17, *Special Report: Submission to the House of Commons Procedure Committee inquiry on the delegated powers in the ‘Great Repeal Bill’*, HL Paper 143, para.14, p.6.

¹⁰ Hansard Society (2017), *Westminster Lens: Parliament and Delegated Legislation in the 2015-16 Session*, (London: Hansard Society), p.19.

mechanism by which Parliament seeks to secure safeguards on the face of a bill, reining in delegation rather than resisting it. And these procedures were expressly designed for circumstances in which Parliament cannot know how a power will be deployed and therefore cannot agree a scrutiny procedure for the use of that power in advance.

31. The Legislative Reform Order (LRO) model is the strengthened scrutiny procedure that would best suit the Great Repeal Bill provisions and circumstances. A minister bringing forward an SI using a power in the Legislative and Regulatory Reform Act 2006 must recommend that the draft Order follow one of the three scrutiny procedures: negative, affirmative or super-affirmative. The assigned scrutiny committees in both Houses then have 30 days to consider the draft instrument and decide whether the procedure proposed by the minister is appropriate or should be upgraded. The merits of the policy in question are not considered. The committees consider whether the tests set out in the 2006 Act have been met – for example, a requirement for thorough consultation, and whether the proposal is appropriate to be delivered by an LRO. After the 40th day, the minister may make the negative Order or arrange the debates proposing that the affirmative Order be approved. If the LRO is upgraded, or already subject to the super-affirmative procedure, both Houses' scrutiny committees have 60 days from the date it was laid to consider it and produce a substantive report. The committees can recommend changes to LROs but they cannot amend them directly.
32. The LRO model is not perfect, and a 60-day process may not be appropriate given the time constraints inherent in the Brexit process. However, a principle element of the model – that the minister should recommend the scrutiny process when bringing forward an Order, and that both Houses should then consider whether the procedure is appropriate – would best deal with the problem of how to allocate scrutiny procedures to powers whose application is uncertain.
33. If Parliament allows the government to proceed with what appears to be its approach, namely assigning negative and affirmative procedures, Parliament will be acquiescing in a significant transfer of legislative power to the executive. With this approach, the more serious delegations of power would be assigned to an affirmative scrutiny procedure that is wholly inadequate for the task, particularly in the House of Commons.

A NEW HOUSE OF COMMONS SCRUTINY SYSTEM FOR DELEGATED LEGISLATION

34. MPs, academics, and legal practitioners have long complained about the inadequacies of parliamentary scrutiny of delegated legislation. 'Palpably unsatisfactory',¹¹ 'close to preposterous',¹² and 'woefully inadequate'¹³ are just some of the phrases used to describe it over the decades. In our own 2014 publication, *The Devil is in the Detail: Parliament and Delegated Legislation*,¹⁴ we concluded that the system is unfit for purpose and in need of wholesale reform.

¹¹ House of Commons Procedure Committee (1999-2000), *Delegated Legislation*, HC 48.

¹² Professor the Lord Norton of Louth (Chair) (2000), *Strengthening Parliament: Report of the Commission to Strengthen Parliament* (Conservative Party).

¹³ House of Commons Liaison Committee (1999-2000), *Shifting the Balance: Committees and the Executive*, HC 300.

¹⁴ R. Fox and J. Blackwell (2014), *The Devil is in the Detail: Parliament and Delegated Legislation*, (London:

35. It is worth noting that after Peers rejected just one SI, the government initiated and resourced the Strathclyde Review, and various parliamentary committees spent an extensive amount of time reviewing its recommendations, with further time spent debating the matter on the floor of the House of Lords. In contrast, despite a succession of House of Commons committee reports highlighting serious problems with the scrutiny of delegated legislation by the elected House, government has made no effort at all to engage seriously with the problems.
36. Some modest tweaks and changes have been made in recent decades but this *ad hoc*, piecemeal approach has created a patchwork of confusing procedures. It has papered over problems rather than tackled fundamental weaknesses in the system, particularly at the House of Commons end of the process.
37. But Brexit means MPs can no longer turn a blind eye to the deficiencies in the scrutiny system; it has heightened the need for reform. However, better scrutiny should be a permanent feature of parliamentary life, not just for Brexit.

PROBLEMS WITH THE CURRENT HOUSE OF COMMONS SCRUTINY SYSTEM FOR DELEGATED LEGISLATION?

38. We have identified 15 core problems with the system.

i. Use of the discredited Early Day Motion procedure.

If an MP wishes to object to a negative SI, they must table a ‘prayer’ as an Early Day Motion (EDM).¹⁵ EDMs are regarded by many MPs as a waste of time and money and tantamount to ‘political graffiti’.¹⁶ It is bizarre that the main mechanism for scrutiny of the most voluminous form of SIs is via a procedure in which so many Members have so little faith and confidence, and which for the public is not clearly identified or distinguished from motions advocating campaigns or lauding the success of local sports teams and the like.

ii. Many SIs come into force before they are scrutinised.

In the last parliamentary session, 468 (80%) negative SIs came into force within 40 days of being laid and therefore before the scrutiny period had expired.¹⁷ This puts parliamentarians off challenging this legislation. It also permits legislation deemed defective by the Joint Committee on Statutory Instruments to sit on the statute book until the government responds.

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¹⁵ The prayer motion reads: ‘That an humble address be presented to Her Majesty praying that the [name of the SI] be annulled’.

¹⁶ See for example, M. Korris (2011), *A Year in the Life: From Member of Public to Member of Parliament*, (London: Hansard Society), pp.10-11. When asked how satisfied they were with aspects of the way Parliament works, 70% of newly elected Members after the 2010 general election said they were dissatisfied with the way Early Day Motions work – 19 points above the share dissatisfied with sitting hours, the second-ranked issue of concern.

¹⁷ Hansard Society (2017), *Westminster Lens: Parliament and Delegated Legislation in the 2015-16 Session*, (London: Hansard Society), p.19.

iii. Control of parliamentary time: the government decides whether an SI will be debated

In the Great Repeal Bill White Paper, the government states that parliamentary procedures allow Parliament to scrutinise as many or as few SIs as it sees fit, and notes that Parliament can and regularly does both debate and vote on secondary legislation.¹⁸ However, the White Paper omits to mention that EDMs are motions for which no fixed parliamentary time is allocated. Whether an MP's objection to an SI is ever debated therefore lies almost entirely in the hands of the government, not the House of Commons. The White Paper also states that members of either House can 'require' a debate and if necessary a vote.¹⁹ This is not true. As noted above, MPs can 'request' a debate by praying against the SI, but they have no power to 'require' a vote. The government controls the parliamentary timetable in the House of Commons, and its agreement is therefore necessary for parliamentary time to be granted.

In the last parliamentary session (2015-16), MPs debated just 3% of the 585 negative SIs laid before them.²⁰ There is no guarantee that even a prayer motion laid by the official Opposition will be debated. In the 2015-16 session, the Leader of the Opposition and his front bench colleagues tabled 12 prayer motions for a debate, but just 5 were granted.²¹

There has been speculation in recent weeks that 'remain'-supporting MPs might engage in guerilla tactics to hold up the Brexit process. However, the government's control of the parliamentary timetable neuters the potential impact of such tactics. Following the 1997 general election, the opposition's parliamentary strategy in the face of an overwhelming government majority was to table prayer motions against SIs as a matter of course. Three hundred were tabled in just one session, 279 of them in the name of the Leader of the Opposition, William Hague MP. But in practice, only 15 were debated.²²

Sometimes the government does not prevent a debate but runs down the clock, scheduling the debate after the expiry of the 40-day scrutiny period, by which time the SI has come into force. In recent months, for example, 187 MPs prayed against the new Personal Independence Payment Regulations via an EDM, but the government did not schedule a debate before the 'praying against' period had expired.²³ In these circumstances, if the government loses the vote the SI is not automatically annulled, as it would be if the vote had been scheduled earlier during the 40-day period.

If the government declines to schedule time, the Opposition can use their opposition day debate allocation in order to debate the matter. Backbench MPs can request an

¹⁸ Department for Exiting the European Union (2017), *Legislating for the United Kingdom's withdrawal from the European Union*, Cm 9446, p.23.

¹⁹ Department for Exiting the European Union (2017), *Legislating for the United Kingdom's withdrawal from the European Union*, Cm 9446, para 3.21.

²⁰ Hansard Society (2017), *Westminster Lens: Parliament and Delegated Legislation in the 2015-16 Session*, (London: Hansard Society), p.18.

²¹ Hansard Society (2017), *Westminster Lens: Parliament and Delegated Legislation in the 2015-16 Session*, (London: Hansard Society), p.18.

²² R. Fox and J. Blackwell (2014), *The Devil is in the Detail: Parliament and Delegated Legislation*, (London: Hansard Society), p.178.

²³ Early Day Motion 985 tabled 27 February 2017: 'That an humble Address be presented to Her Majesty, praying that the Social Security (Personal Independence Payment) (Amendment) Regulations 2017 (S.I., 2017, No. 194), dated 22 February 2017, a copy of which was laid before this House on 23 February, be annulled.'

urgent debate,²⁴ seek a debate via the Backbench Business Committee or, possibly, link the issue to an e-petition and seek debating time via the Petitions Committee. But these routes are clearly an unsatisfactory solution to the problem posed by government intransigence in declining to make time available in the first place.

iv. The government is not compelled to table a motion to annul an SI even if it loses a consideration motion in Committee

A prayer motion on a negative SI can be considered either on the floor of the House of Commons or by a Delegated Legislation Committee. If the government chooses to refer a prayer motion to a Committee, the debate can only be held on a non-fatal ‘consideration’ motion. Even if MPs do not support this consideration motion, the SI can only be rejected if a further substantive vote to annul it is held, without debate, on the floor of the House. But this almost never happens because there is no requirement for this subsequent motion to be tabled.

v. Delegated Legislation Committees (DLCs): a punishment not a prize

Affirmative SIs are automatically referred to a Delegated Legislation Committee for scrutiny unless a motion is tabled for the instrument to be debated on the floor of the House. In the 2015-16 parliamentary session, 114 affirmative SIs (75.4%) were considered by a DLC and 13 (8.6%) on the floor of the House.²⁵

Being assigned to DLC is often a punishment for MPs, and those who actively contribute to the debates may be perceived to be a ‘nuisance’ by their party whips. MPs have variously described DLCs to us as ‘farcical’, ‘an absolute joke’, and ‘a waste of time’ and are often reluctant participants.²⁶ Some MPs we interviewed for *The Devil is in the Detail* reported that the whips had told them it was perfectly acceptable – indeed preferable – to get on with their constituency correspondence during the Committee meeting, and we have observed this in practice during debates. The influence of the party whips stifles effective debate: in the words of one MP, ‘you are told to sit quietly at the back and make sure you vote’. Members, particularly government backbenchers, are treated as ‘cannon fodder’, instructed to turn up on the day and go through the motions.²⁷

vi. Deferred voting keeps Members in the dark

If a debate on an affirmative SI is held on the floor of the House, the question to approve the motion is put immediately after the debate. However, if an SI is debated in Committee, an approval motion is put formally to the House without debate on a

²⁴ In the case of the Social Security (Personal Independence Payment) (Amendment) Regulations 2017 (S.I., 2017, No. 194), the matter was eventually discussed via an urgent debate granted by the Speaker under Standing Order No.24 on 29 March but Members could not reject the SI, merely consider it. See <https://www.theyworkforyou.com/debates/?id=2017-03-28c.144.2&s=Debbie+Abrahams#g145.2> and <https://www.theyworkforyou.com/debates/?id=2017-03-29c.307.0&s=Debbie+Abrahams#g331.3>

²⁵ Hansard Society (2017), *Westminster Lens: Parliament and Delegated Legislation in the 2015-16 Session*, (London: Hansard Society), p.19.

²⁶ During the debate on the Localism Bill 2010, Labour MP Barbara Keeley reflected candidly: ‘I served in the Whips Office for some time, and I know that a debate goes on when one tries to get members to serve on SI committees. The debate hinges on members asking ‘How long will it be for? Is it only five or 10 minutes? We should dispel here and now the notion that that constitutes rigorous scrutiny.’ (House of Commons, *Hansard*, 1 February 2011, col.241).

²⁷ R. Fox and J. Blackwell (2014), *The Devil is in the Detail: Parliament and Delegated Legislation*, (London: Hansard Society), p.185.

separate day. Of the 151 affirmative instruments laid in the 2015-16 session, 12 approval motions (7.9%) went to a division, eight of which were deferred divisions. This is problematic as MPs are invited to vote on an issue about which they may know little or nothing if they have not been a member of the Committee that considered it. Although a record of the DLC debate is available to Members to read/watch, there is no written report from the Committee highlighting any concerns they may have about the instrument.

vii. No power of amendment: a ‘take it or leave it’ proposition

Without the power to amend SIs (there are only three exceptional cases where amendment is possible),²⁸ both Houses of Parliament are confronted with a ‘take it or leave it’ proposition. As long as the government can bring SIs into force without parliamentary scrutiny, and muster a majority of disengaged Members in the House of Commons for any requiring scrutiny, and the House of Lords maintains its self-denying ordinance in not vetoing an instrument, then many SIs will proceed regardless of whether there may be problems with them. Proof of this can be found in the number of correcting SIs the government brings forward each year to correct its earlier work. In the 2015-16 session, 35 correcting instruments were laid but in previous sessions it has been as high as 10% of the overall number of instruments laid in any one session.²⁹ This is clearly not satisfactory in legal terms, but it also means a huge amount of precious parliamentary time – of both Members and staff – is wasted each year because of lazy consultation and sloppy drafting in Whitehall.

viii. Poor quality debates: no ‘circle of learning’ or development of expertise

Provision is made for 90 minute DLC debates but they rarely last more than half an hour. In the last session, the average DLC debate lasted just 26 minutes.³⁰ The debates often focus on the general policy area rather than the specific provisions contained within the SI, even though the scope of the debate is supposed to be confined to the instrument at hand. The lack of briefing material and time for MPs and shadow ministers to prepare affects the quality of the debates; conversely, knowing that it will be over in less than half an hour means there is little imperative for ministers to do much more than turn up and read out their brief. Any MP who subjected the parental Act to detailed scrutiny and raised questions about the proposed delegation of powers is unlikely to be invited to sit on the DLC. The lack of external input and briefing material means there may be few people involved in the process who are aware of what, if any, assurances or concessions were previously promised.

ix. Mismatch between scrutiny time accorded to negative and affirmative SIs

MPs are currently unable to debate many of the negative SIs they are concerned about because the government will not grant time for their consideration. Conversely, plenty of time is being allocated to DLCs for scrutiny of affirmative SIs but is not being utilized (the average debate lasting 26 minutes, when provision for 90 minutes is

²⁸ In relation to powers in the Census Act 1920, the Government of India Act 1935, and the Civil Contingencies Act 2004.

²⁹ Hansard Society (2017), *Westminster Lens: Parliament and Delegated Legislation in the 2015-16 Session*, (London: Hansard Society), p.22. See also House of Lords Secondary Legislation Scrutiny Committee, 33rd Report of Session 2014-15, *Work of the Committee in Session 2014-15*, HL 149.

³⁰ Hansard Society (2017), *Westminster Lens: Parliament and Delegated Legislation in the 2015-16 Session*, (London: Hansard Society), p.20.

made). The alignment of parliamentary time to the scrutiny of different types of SIs is now out of kilter and ripe for review.

x. The government is not *required* to respond in a timely way even when an SI is found to be defectively drafted

If the JCSI finds an SI to be defectively drafted, it can report this, but the government is not compelled to respond. The JCSI cannot require that the SI be withdrawn, prevent it taking effect, or require the government to remedy the defect within an agreed timeframe. In many cases departments react positively to the Committee's concerns, but this is not required of them.

xi. The House of Commons does not always wait to hear the judgement of the Joint Committee on Statutory Instruments

The House of Lords does not generally scrutinise an SI before it has been considered by the JCSI. The House of Commons does not recognise this 'scrutiny reserve'. Thus, it can debate an SI before the JCSI has concluded its deliberations, raising the possibility that the Lower House might approve an SI only for the Committee subsequently to raise serious questions about defective drafting or other technical matters. This obviates the purpose and value of the Committee's deliberations.

xii. Unnecessary complexity: 11 strengthened scrutiny procedures

Acts of Parliament now emerge from the scrutiny process in Parliament with very marked differences in the type of scrutiny procedures proposed for delegated powers. There are now 11 different forms of strengthened scrutiny procedure, each one a little different from the other.³¹

Five of the strengthened scrutiny procedures require the government to lay a draft Order and then lay a revised draft after the scrutiny period is complete. In contrast, the remaining six procedures require that the government lay a proposal, containing a draft Order, and then lay the draft Order following the completion of the scrutiny process. The wording and process is utterly inconsistent although, in practical terms, the result is the same, as each approach enables the government to revise its intention in response to the consultation process without having to initiate a new scrutiny procedure. On this issue, differences in wording may have an anodyne effect.

However, in seven of the strengthened scrutiny procedures, phrases such as 'consider', 'have regard to' and 'take account of' are all used in relation to the government's response to recommendations by the relevant scrutiny committees. It is not clear that these have the same meaning and effect. And in the other four procedures the government is bound only by a general provision to consider representations made to it.

The growth in the range of scrutiny procedures is largely a result of the government's desire to avoid conceding a power of veto to a scrutiny committee. A form of veto power exists only in relation to Localism Orders and Legislative Reform Orders (LROs) and has rarely been utilized. In 2006, the government agreed that LROs

³¹ See R. Fox and J. Blackwell (2014), *The Devil is in the Detail: Parliament and Delegated Legislation*, (London: Hansard Society), pp.81-83 and p.234.

would not be used for highly controversial matters, such as constitutional changes. However, the value of such concessions is questionable given that they are subject to the changing whim of successive governments.

xiii. **Language: inaccessible and confusing to Members as well as the public**

The language of delegated legislation – ‘made’ and ‘laid’, ‘negative’, ‘affirmative’, ‘strengthened’, ‘enhanced’ and ‘super-affirmative’ scrutiny procedures, ‘prayers’, ‘fatal’ and ‘non-fatal’ motions, and ‘Henry VIII powers’ – has eluded reform. It confuses and intimidates, serving to wrap the process in a fog of obscurity. MPs we interviewed freely admitted being baffled by the process, and business and civil society groups with a real interest in a particular policy are often so confused by the process that they struggle to make their views known and exercise any influence on the implementation of measures that have a profound effect on the everyday life of citizens.

xiv. **Commons-only procedures: a lack of consensus**

It has been clear for some time, and was reinforced in the Strathclyde Report, that there is a lack of clarity about SIs which are subject to Commons-only procedures.³² This needs to be reviewed to establish clear principles for the future. If not, there remains the prospect of future disputes between the two Houses regarding the right of the House of Lords to scrutinise an SI, particularly those with a financial element to them.

xv. **No penalty for poor quality Explanatory Memoranda and supporting documentation**

If parliamentarians are to scrutinise both delegated powers and the resulting Statutory Instruments effectively, it is imperative that the government provides clear explanations for its decision-making. Through special inquiries and calling ministers and Permanent Secretaries to account at oral evidence hearings, the Delegated Powers and Regulatory Reform Committee in the House of Lords has sought to drive improvements in the quality of Delegated Powers Memorandums published alongside bills. The Secondary Legislation Scrutiny Committee in the House of Lords has also focused on the quality of Explanatory Memorandums for SIs in recent years. It has long complained about the long, legalistic, technical drafting style that renders many EMs impenetrable to users. And concern has also been expressed about the failure to provide an evidence base for the legislation, particularly the results of any consultation process prior to bringing forward a Statutory Instrument. Whilst there have been some improvements, these are not embedded. Ultimately, the quality of supporting information is unlikely to improve permanently and across the board unless the government is forced to make changes. But there are no minimum standards of legislative preparation, and Parliament cannot reject an inadequate, poorly prepared Explanatory Memorandum, or delay the introduction of an SI until the problem is rectified.

WHAT PRINCIPLES SHOULD UNDERPIN THE DESIGN OF A NEW SCRUTINY SYSTEM?

³² Cabinet Office, *The Strathclyde Review: Secondary legislation and the primacy of the House of Commons*, Cm 9178, Dec 2015.

39. Given the problems identified with the current scrutiny arrangements, any new system should prioritise five principles, as follows.

The new system should:

- I. be more rigorous and systematic: the aim should be to reduce complexity and provide more transparency and accountability.
- II. reflect the fact that Parliament is delegating power to the Executive, not subordinating itself to the government's wishes.³³ Parliament's power to disallow or reject an Instrument must therefore be real, not illusory. And a government response to the legitimate concerns of MPs about SIs should be required, not optional - including making provision for debating time, and responding to critical reports.
- III. give MPs a meaningful role and voice in the process, thereby ensuring proper democratic accountability, and more efficient and effective use of the time which Members devote to the scrutiny of SIs.
- IV. draw upon and encourage the development of knowledge and expertise among Members, so that they might contribute constructively to improvements in policy and legislative development.
- V. reflect a bi-cameral approach: it should not undermine the scrutiny undertaken by the House of Lords, but reflect a pragmatic view of the strengths and weaknesses of each House, in the context of the limited time available to look at the volume of delegated legislation produced in any one parliamentary session.

A NEW 'SIFT AND SCRUTINY' MODEL FOR THE HOUSE OF COMMONS

40. At the start of the new Parliament in June 2017 we will be publishing a detailed proposal for a new House of Commons scrutiny '*sift and scrutiny*' system modelled on the House of Lords European Union and the House of Commons European Scrutiny Committee.
41. There has long been pressure for the creation of a 'sifting' committee for the Commons. However, simply bolting such a committee onto existing procedures would add little value to the process. A sifting committee must be linked to more robust mechanisms whereby MPs can more effectively scrutinise an SI and hold the government to account.
42. Under our proposed system, a new permanent Delegated Legislation Scrutiny Committee (DLSC) would:
- be supported by a set of permanent policy sub-committees;
 - sift and scrutinise both negative and affirmative SIs; and

³³ See S. Argument, *Executive law-making in the 21st century: delegation not subordination*, Australia-New Zealand Scrutiny of Legislation Conference, July 2016, [http://www.parliament.wa.gov.au/WebCMS/WebCMS.nsf/resources/file-anzslc-paper-mr-stephen-argument/\\$file/Session%205%20Mr%20Stephen%20Argument,%20Executive%20law%20making%20in%20the%2021st%20century%20-%20Delegation%20not%20subordination.pdf](http://www.parliament.wa.gov.au/WebCMS/WebCMS.nsf/resources/file-anzslc-paper-mr-stephen-argument/$file/Session%205%20Mr%20Stephen%20Argument,%20Executive%20law%20making%20in%20the%2021st%20century%20-%20Delegation%20not%20subordination.pdf)

- turn over to the whole House for further consideration those SIs of concern, with procedures in place to ensure that any SI reported to the House would have to be debated and voted on.

43. The proposal is designed with the implications of the Brexit process in mind, but intended to be a long-term solution to a decades-old scrutiny problem, not a quick fix for this legislative challenge alone.

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