



# Compendium of Legislative Standards for Delegating Powers in Primary Legislation

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## Introduction

The delegated legislation system has two stages: the delegation of powers in Bills and the scrutiny of the delegated legislation that arise from those powers. In both of these stages, Parliament can control the scope of what delegated legislation is used for.<sup>1</sup> This paper concerns the first stage of the system, the delegation of powers in Bills. It presents the legislative standards for the delegation of powers in primary legislation that can be derived from the work of the House of Lords Delegated Powers and Regulatory Reform Committee (DPRRC).

## Work of the Delegated Powers and Regulatory Reform Committee

The DPRRC undertakes systematic and extensive scrutiny of all delegation of powers in Bills. On a case-by-case basis for each Bill introduced to the House of Lords, the DPRRC determines whether it contains any inappropriate delegation of legislative power, or subjects those powers to an inappropriate degree of parliamentary scrutiny. The work of the DPRRC provides the nearest thing to a form of 'jurisprudence' (or 'legisprudence') in the area of delegated powers. It has no House of Commons equivalent.<sup>2</sup>

In any given report, the DPRRC makes recommendations on specific clauses in a particular Bill. Both the DPRRC<sup>3</sup> and the House of Lords Constitution Committee<sup>4</sup> have previously concluded that it is not possible to prescribe "*a list of criteria which would give precision to the test of appropriateness*" for the delegation of power or the level of parliamentary scrutiny applied to its exercise, or to cater for the variety of circumstances in which delegation of legislative power is sought.<sup>5</sup> The DPRRC has considered since its inception that each power must be considered on its own merits.

However, recommendations in DPRRC reports are often indicative of wider underlying legislative standards that permeate the Committee's work reviewing delegated powers in primary legislation. This paper extracts and outlines these wider standards, to aid understanding of what the DPRRC considers to constitute 'inappropriate delegation'. Together, these standards elucidate underlying principles that permeate DPRRC reports.

## Scope and purpose of this paper

The standards presented in this paper have been derived from a comprehensive analysis of DPRRC reports over three parliamentary Sessions (2017-19, 2019 and 2019-21) – Sessions that have seen Bills introduced and delegated powers sought during exceptional and tumultuous social and political circumstances.

We are publishing this paper in April 2022 without waiting to be able to include consideration of DPRRC reports from the 2021-22 Session. This is in the interests of being able to inform consideration of Bills from the start of the 2022-23 Session – another that seems set to include some far-reaching and contentious primary legislation. We intend in due course to produce an updated version of this paper, incorporating DPRRC reports from the 2021-22 Session. These will include an

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<sup>1</sup> For more detail see Hansard Society (November 2021), *Delegated legislation: the problems with the process* (London).

<sup>2</sup> For a more detailed outline of the remit and practice of the House of Lords Delegated Powers and Regulatory Reform Committee (DPRRC) see Appendix I of this paper.

<sup>3</sup> DPRRC (2015-16), *Special Report: Response to the Strathclyde Review*, HL Paper 119, para. 21

<sup>4</sup> House of Lords Select Committee on the Constitution (2017-19), *The Legislative Process: The Delegation of Powers*, HL Paper 225, paras. 7, 39

<sup>5</sup> For example, while parliamentarians can be particularly exercised about 'Henry VIII powers', the DPRRC has noted that not necessarily all such powers warrant the affirmative procedure. Similarly, the DPRRC has noted how the exercise of certain powers can be potentially significant and intrusive in people's lives, thus warranting the affirmative procedure, but do not happen to amend or repeal primary legislation.

end-of-session report, after the DPRRC decided in its November 2021 Special Report *Democracy Denied?* to reinstate the “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”.<sup>6</sup>

We hope that this Compendium will be of interest and use to all those whose work is concerned with the legislative process, and particularly to all those involved in the production, scrutiny, interpretation and use of delegated powers and what they should – or should not – be used for. The Compendium is intended to inform and support stakeholders – especially those who may be new to these topics – as regards precedent, the politics of delegated legislation, and where the balance between primary and delegated legislation lies. By extracting and publishing these DPRRC standards, we hope to facilitate best practice and shared understanding of the role of delegated powers and delegated legislation.

We hope that, by drawing DPRRC standards across a range of issues together into a single document, this Compendium will prove a useful resource for civil servants in particular. By distilling over a hundred DPRRC reports, the Compendium should convey a sense of the Committee’s thinking and concerns, and the wider landscape of debate and recommendations about delegation and scrutiny procedures across government. This may be of use to government lawyers and other civil servants who, for example, may have had little opportunity to familiarise themselves with legislation outside that of their own department, or who may be part of a departmental Bill team for the first time and who may be unfamiliar with the prior work and recommendations of the DPRRC.<sup>7</sup> This Compendium may also be a useful tool for those who are expert in particular policy areas but lack familiarity with parliamentary procedures and the constitutional dynamics relating to delegated legislation.

The standards listed in this paper do not comprise an exhaustive list of reasons as to why the DPRRC may make recommendations, and are not necessarily determinative of the DPRRC’s view on any particular power. In its ‘Guidance for Departments’,<sup>8</sup> the DPRRC has outlined principles which provide the starting point for its consideration of delegated powers. For ease of reference, Parts One and Two of the Guidance are presented in Appendix II of this paper.

## Why do standards for the delegation of legislative power matter?

The delegation of legislative powers in Bills often raises important questions of constitutional, legal and procedural principle that matter, regardless of party allegiance or views on the policy merits of Bills.

Ultimately, in legislative matters, Parliament is sovereign and can delegate its legislative authority if it so wishes. However, there is no hard-edged line that clearly demarcates the boundary between what should be in primary and what should be in delegated legislation. The scope and design of the delegation of powers in any Bill thus has long-term implications for the balance of power between the legislature and the executive.

These implications can arise through two mechanisms:

First, when Parliament accepts powers in a Bill, it creates a precedent for delegated legislation to be used in that way. This precedent may be used by governments to justify taking similar powers in

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<sup>6</sup> DPRRC (2021-22), *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*, HL Paper 106, para. 162

<sup>7</sup> Previous Hansard Society research has found that it is rare for a civil servant to be on a Bill team more than once: Fox, R. & Blackwell, J. (2014), *The Devil is in the Detail: Parliament and Delegated Legislation* (London: Hansard Society), pp. 67-69

<sup>8</sup> DPRRC’s ‘Guidance for Departments on the role and requirements of the Committee’, November 2021

other Bills in the future. However, if Parliament has reluctantly or controversially accepted a power in exceptional circumstances (for example, during the Brexit process and in response to the Covid-19 pandemic, when there was a need to legislate at speed), the precedent created can be – and is – invoked to justify taking similarly broad powers where similar exigent circumstances do not exist.

Second, if Parliament delegates powers that are broadly defined and ambiguously worded, these may be used in ways that go beyond the original intention of the legislation. Such powers may have been taken with assurances given to Parliament about their use in a particular way by a particular government or a particular Minister, but they may nevertheless confer excessive discretion on Ministers. In many instances such powers will be available to Ministers in future governments of a different political stripe, possibly decades later. They may therefore be used by Ministers with radically different policy objectives from those who sought the powers in the first place.

These concerns raise further fundamental questions. For example, how can ministerial claims of exigency and convenience be balanced with the need for an appropriate level of parliamentary scrutiny? Given the inadequacy of the current parliamentary scrutiny procedures that apply to delegated legislation, can these procedures really remedy an inappropriately wide delegation of legislative power? Although ‘Henry VIII powers’ can be desirable in certain circumstances, when they are widely drafted they challenge the constitutional principle that Parliament makes the law. What standards apply to such powers?

This paper seeks to set out the DPRRC’s thinking in relation to some of these issues.

## Hansard Society Delegated Legislation Review

This paper forms part of the Hansard Society’s Delegated Legislation Review (which is being conducted with funding support from The Legal Education Foundation).

The Hansard Society has long argued that the delegated legislation system is not fit for purpose.<sup>9</sup> In the wake of Brexit and the Covid-19 pandemic, which brought the shortcomings of the current system to wider attention, the Review was launched in 2021 to develop proposals for reform of both elements of the system – the delegation of powers in Bills, and the parliamentary scrutiny of the resulting Statutory Instruments.

As part of the Review, we are examining the delegation of powers in a range of government Bills and drawing attention to some of the clauses of greatest concern.<sup>10</sup> We developed the list of DPRRC legislative standards which is presented here partly in order to inform this work: our analysis of the delegated powers in particular Bills draws heavily on these standards.

## How did we derive the legislative standards presented in this paper?

To derive the legislative standards presented in this paper, we analysed the 101 DPRRC reports published between 21 June 2017 and 29 April 2021. We recorded every instance in the reports where the DPRRC stated or applied reasoning that was not exclusive to the particular Bill in question. We then consolidated these instances into the list of distinct legislative standards that is presented here. To avoid repetition as far as possible, we collapsed or amalgamated, into a single standard, instances where there was a significant degree of overlap.<sup>11</sup>

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<sup>9</sup> For more detail see Hansard Society (November 2021), *Delegated legislation: the problems with the process* (London).

<sup>10</sup> For example, Hansard Society (September 2021), *The Health and Care Bill: Delegated Powers* (London); Hansard Society (October 2021), *The Nationality and Borders Bill: Delegated Powers* (London)

<sup>11</sup> In these instances, references in the relevant footnote should be read together to capture the relevant standard completely.

We found that the standards derived in this way could be grouped into four broad categories:

1. **General principles underpinning the delegation of legislative powers:** What may constitute inappropriate delegation of power, and are there certain principles that apply to assessing the scope of such delegation?
2. **Parliamentary scrutiny of the use of delegated powers:** What standards apply to prescribing parliamentary scrutiny procedures and requirements as to the nature of accompanying documents?
3. **Types of provision:** What standards apply to certain types of legislative provision?
4. **Policy areas:** What standards apply to delegated powers in certain policy areas?

In considering the standards presented in this paper, it should be noted that:

- We have sought to be faithful to the text of the DPRRC reports.<sup>12</sup> Where it is unclear whether the wording of a report indicates a standard, we have not included it in this paper.
- This paper does not analyse the rationale behind the legislative standards it identifies (although in some instances it notes the rationale provided by the DPRRC for additional information). For an understanding of the way in which any particular legislative standard outlined in this paper applies in the 'real world', the relevant DPRRC report(s) should be consulted.

The standards in this paper are presented in a similar style to two previous reports – one concerning the constitutional standards of the House of Lords Constitution Committee, published by the Constitution Unit at University College London,<sup>13</sup> and another presenting a rule of law analysis of Brexit-related delegated legislation, published by the Bingham Centre for the Rule of Law<sup>14</sup>. Those who find this paper useful may wish also to consult those reports.

## Structure of this paper

The remainder of this paper presents the list of legislative standards derived from DPRRC reports, arranged into their four categories.

Appendix I sets out in more detail the remit and practice of the DPRRC, utilising material from the Committee's own reports.

Appendix II comprises an extract from the DPRRC's 'Guidance for Departments'.

Appendix III comprises a glossary of key terms.

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<sup>12</sup> For the purposes of consistency, and in keeping with Hansard Society practice, this paper has changed any reference to 'secondary legislation', 'subordinate legislation', 'regulations', and 'orders' to 'delegated legislation'.

<sup>13</sup> Simson Caird, J., Hazell, R. & Oliver, D. (2017), *The Constitutional Standards of the House of Lords Select Committee on the Constitution* (London: The Constitution Unit, University College London)

<sup>14</sup> Simson Caird, J. & Patterson, E. (2020), *Brexit, Delegated Powers and Delegated Legislation: a Rule of Law Analysis of Parliamentary Scrutiny* (London: Bingham Centre for the Rule of Law)

# Legislative standards for delegating powers in primary legislation

In what follows, we list the legislative standards that the House of Lords Delegated Powers and Regulatory Reform Committee (DPRRC) applies to the delegation of powers in Bills, as we have derived them from a systematic analysis of DPRRC reports over three parliamentary Sessions (2017-19, 2019 and 2019-21). The standards are arranged into four broad categories:

1. General principles underpinning the delegation of legislative powers
2. Parliamentary scrutiny of the use of delegated powers
3. Types of provision
4. Policy areas

## 1. General principles underpinning the delegation of legislative powers

A central task of the DPRRC is to comment on any delegation of legislative power that it considers to be inappropriate. The DPRRC also frequently comments on the approach it takes when assessing and analysing the scope and nature of delegated powers and what it considers as inadequate justification for delegating legislative powers. This section lists the legislative standards we have derived in these areas.

### Assessing the choice of legislative vehicle

- 1.1 The political sensitivity or scope of delegated powers may mean that the provisions should ordinarily be contained in primary and not delegated legislation. The appropriateness of delegated powers is not limited to the technical effectiveness and workability of the provisions.<sup>15</sup>
- 1.2 In the absence of a reasonable justification, delegated powers should not allow provision to be made in relation to matters which are provided for in primary legislation under existing law.<sup>16</sup>
- 1.3 Skeleton Bills, or a skeleton part of a Bill, inhibit parliamentary scrutiny, and it is difficult to envisage any circumstances in which their use is acceptable.<sup>17</sup> The government must provide an exceptional justification for them.<sup>18</sup>
- 1.4 Key terms should be defined on the face of the Bill, rather than leaving this to be dealt with exclusively in delegated legislation.<sup>19</sup> Any such term defined on the face of a Bill can be supplemented, if necessary, by a power to embellish the term's meaning in delegated

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<sup>15</sup> DPRRC (2017-19), 34<sup>th</sup> Report, HL Paper 194, para. 17; DPRRC (2017-19), 45<sup>th</sup> Report, HL Paper 274, para. 41; DPRRC (2017-19), 59<sup>th</sup> Report, HL Paper 408, para. 7

<sup>16</sup> DPRRC (2017-19), 21<sup>st</sup> Report, HL Paper 122, paras. 27, 28; DPRRC (2017-19), 54<sup>th</sup> Report, HL Paper 370, para. 43

<sup>17</sup> The DPRRC has previously stated that a comparatively large number of delegated powers in an otherwise small-to-medium-sized Bill is ominous. While the DPRRC accepts that it may not be practical or appropriate to set out detailed requirements for regulatory processes on the face of primary legislation, or for frequently required technical changes to be made through primary legislation, a justification for a 'skeleton' approach presents a false dichotomy by suggesting that the only alternative to the approach is to have every detail of regulatory regimes in primary legislation. Such arguments do not justify why it would not be appropriate to have aspects of regulatory regimes which are not 'detail' or 'technical' provided for on the face of the Bill that can be debated and combined with more focused delegated powers to fill in the detail by delegated legislation.

<sup>18</sup> DPRRC (2017-19), 16<sup>th</sup> Report, HL Paper 85, para. 3; DPRRC (2017-19), 21<sup>st</sup> Report, HL Paper 122, paras. 14, 15; DPRRC (2017-19), 22<sup>nd</sup> Report, HL Paper 123, paras. 2, 4; DPRRC (2017-19), 34<sup>th</sup> Report, HL Paper 194, paras. 1, 3, 4(b), 4(f), 8; DPRRC (2017-19), 46<sup>th</sup> Report, HL Paper 275, paras. 47, 48; DPRRC (2019-21), 19<sup>th</sup> Report, HL Paper 109, paras. 15, 16, 28(a), 50, 51; DPRRC (2019-21), 22<sup>nd</sup> Report, HL Paper 118, paras. 40, 41, 45

<sup>19</sup> The DPRRC's rationale is that this approach provides greater certainty and clarity.



legislation, or accompanied by a power limited to modifying the term's definition to take account of future changes.<sup>20</sup>

- 1.5 The substantive effect of the exercise of a power can be legislative, even if the power has not been labelled as a delegation of legislative power.<sup>21</sup>
- 1.6 In the absence of cogent reasons, the imposition of legal requirements or legally enforceable rules should be through primary legislation or delegated legislation subject to a parliamentary procedure.<sup>22</sup> 'Camouflaging legislation' as guidance, directions, public notice, or conditions set out in a protocol circumvents the publication requirements that accompany, and the parliamentary scrutiny that is afforded to, primary and delegated legislation.<sup>23</sup>

### Assessing the scope of delegated powers

- 1.7 Powers should be assessed on the basis not merely of how the government says that it proposes to exercise a power,<sup>24</sup> but on the power's actual scope and how it is capable of being used by the present or any future government.<sup>25</sup>
- 1.8 If a power could be used to make much more wide-ranging change than is necessary to achieve the stated aim, it is considered inappropriately wide. Such a power should be narrowed so that it may only be exercised within parameters which reflect the explanation given for taking it.<sup>26</sup>
- 1.9 While a power to make delegated legislation may be clearly defined, it can also be a wide power; and while it may be clear whether certain subject matter falls under the power, it does not follow that the subject matter should fall under the power.<sup>27</sup>
- 1.10 If a power is too wide, it is little reassurance that similarly wide powers exist elsewhere.<sup>28</sup>
- 1.11 Powers that are too wide are not the more attractive for being part of a "*forward-facing*" and "*forward-looking*" Bill.<sup>29</sup>
- 1.12 A failure to set out clearly the full range of powers conferred by a clause means that the clause either has to be construed very narrowly, with the risk that it would fail to deliver an effective and workable system, or has to be construed as conferring broad unspecified powers.<sup>30</sup>

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<sup>20</sup> DPRRC (2017-19), 13<sup>th</sup> Report, HL Paper 77, paras. 12-15; DPRRC (2017-19), 16<sup>th</sup> Report, HL Paper 85, para. 5; DPRRC (2017-19), 22<sup>nd</sup> Report, HL Paper 123, paras. 3(a), 8, 9, 13

<sup>21</sup> DPRRC (2017-19), 27<sup>th</sup> Report, HL Paper 141, para. 9

<sup>22</sup> The DPRRC states that this is not simply a matter of form, but it ensures that the relevant provisions are treated consistently with other legislation.

<sup>23</sup> DPRRC (2017-19), 3<sup>rd</sup> Report, HL Paper 22, paras. 93, 94; DPRRC (2017-19), 11<sup>th</sup> Report, HL Paper 65, paras. 25-27; DPRRC (2017-19), 12<sup>th</sup> Report, HL Paper 73, para. 49; DPRRC (2017-19), 31<sup>st</sup> Report, HL Paper 177, paras. 1-5, 11-13, 35(c), 36; DPRRC (2017-19), 54<sup>th</sup> Report, HL Paper 370, paras. 35, 36; DPRRC (2019-21), 17<sup>th</sup> Report, HL Paper 98, para. 4; DPRRC (2019-21), 19<sup>th</sup> Report, HL Paper 109, paras. 40-42

<sup>24</sup> The DPRRC highlights that government policy can change and therefore it is important that powers are considered on the basis of what they will in fact allow, rather than on the basis of what it is said they will be used for.

<sup>25</sup> DPRRC (2017-19), 1<sup>st</sup> Report, HL Paper 10, paras. 9, 33; DPRRC (2017-19), 3<sup>rd</sup> Report, HL Paper 22, paras. 10, 28, 46; DPRRC (2017-19), 12<sup>th</sup> Report, HL Paper 73, para. 23; DPRRC (2017-19), 39<sup>th</sup> Report, HL Paper 226, para. 11; DPRRC (2017-19), 42<sup>nd</sup> Report, HL Paper 255, paras. 3, 4; DPRRC (2017-19), 47<sup>th</sup> Report, HL Paper 289, para. 3; DPRRC (2019-21), 1<sup>st</sup> Report, HL Paper 3, para. 15(c); DPRRC (2019-21), 4<sup>th</sup> Report, HL Paper 17, paras. 2, 40; DPRRC (2019-21), 13<sup>th</sup> Report, HL Paper 69, para. 19

<sup>26</sup> DPRRC (2017-19), 54<sup>th</sup> Report, HL Paper 370, paras. 47, 61, 70

<sup>27</sup> DPRRC (2019-21), 8<sup>th</sup> Report, HL Paper 40, paras. 7, 10

<sup>28</sup> DPRRC (2017-19), 47<sup>th</sup> Report, HL Paper 289, para. 9

<sup>29</sup> DPRRC (2017-19), 47<sup>th</sup> Report, HL Paper 289, para. 10

<sup>30</sup> DPRRC (2017-19), 59<sup>th</sup> Report, HL Paper 408, paras. 5, 6

- 1.13 The absence of important limitations to the use of a power on the face of a Bill may suggest that the government proposes to use the power to do one or more of the things that are absent as limitations on the face of the Bill.<sup>31</sup>
- 1.14 Where specific matters are listed on the face of a Bill to describe the scope of a power, the power may still be considered wide if:
- that list is non-exhaustive;<sup>32</sup> or
  - that list appears to cover all elements of a regulatory regime.<sup>33</sup>
- 1.15 If a power is limited to a term, but that term is given a wide meaning, the power is not narrowly drawn, as it gives Ministers a broad discretion in determining the extent of the power.<sup>34</sup>
- 1.16 Powers that can amend or supplement delegated legislation that sets out a comprehensive regulatory regime may be considered wide.<sup>35</sup>
- 1.17 A power to change a provision must include a power to take things out of scope as well as to bring them within scope of the provision.<sup>36</sup>
- 1.18 A power that can be exercised to make "*other provision generally for the purposes of [a clause]*" goes beyond the typical 'supplementary' provision found in many Acts. A seemingly benign provision like this might take on a wholly new significance in practice.<sup>37</sup>
- 1.19 Where a power provides that delegated legislation "*may, in particular, include*" a specified matter, it implies that the delegated legislation may also include provisions which deal with matters other than the specified matter.<sup>38</sup>
- 1.20 The inclusion of 'catch-all' words in a clause, which allow delegated legislation "*to make other provisions in relation to*" a specified matter, does not have the effect of narrowing the focus of a power.<sup>39</sup>
- 1.21 Powers that provide for Ministers to be able to "*simplify or improve*" may be considered as conferring an unacceptably wide discretion on Ministers. Conscious that one person's improvement is another person's vandalism, a clearer, more focused and proportionate test is required.<sup>40</sup>
- 1.22 A power to prevent, remedy or mitigate "*any failure of law to operate effectively*" or "*any other deficiency*" is a very wide power and creates uncertainty.<sup>41</sup>
- 1.23 A power to make modifications which are considered "*expedient*" constitutes a significant widening of the powers conferred by a clause.<sup>42</sup>

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<sup>31</sup> DPRRC (2019-21), 1<sup>st</sup> Report, HL Paper 3, para. 23

<sup>32</sup> DPRRC (2017-19), 3<sup>rd</sup> Report, HL Paper 22, para. 18; DPRRC (2017-19), 16<sup>th</sup> Report, HL Paper 85, para. 9; DPRRC (2017-19), 21<sup>st</sup> Report, HL Paper 122, paras. 10, 19; DPRRC (2017-19), 26<sup>th</sup> Report, HL Paper 140, paras. 8, 10, 15; DPRRC (2019-21), 7<sup>th</sup> Report, HL Paper 28, paras. 4, 7

<sup>33</sup> DPRRC (2019-21), 19<sup>th</sup> Report, HL Paper 109, paras. 9, 11, 13, 26

<sup>34</sup> DPRRC (2017-19), 58<sup>th</sup> Report, HL Paper 391, paras. 7, 8

<sup>35</sup> DPRRC (2019-21), 19<sup>th</sup> Report, HL Paper 109, paras. 8-13

<sup>36</sup> DPRRC (2019-21), 25<sup>th</sup> Report, HL Paper 141, para. 3; DPRRC (2019-21), 30<sup>th</sup> Report, HL Paper 178, paras. 11, 12

<sup>37</sup> DPRRC (2017-19), 11<sup>th</sup> Report, HL Paper 65, para. 15

<sup>38</sup> DPRRC (2017-19), 16<sup>th</sup> Report, HL Paper 85, para. 6; DPRRC (2017-19), 21<sup>st</sup> Report, HL Paper 122, para. 19

<sup>39</sup> DPRRC (2017-19), 21<sup>st</sup> Report, HL Paper 122, para. 19

<sup>40</sup> DPRRC (2017-19), 34<sup>th</sup> Report, HL Paper 194, paras. 4(g), 14, 16; DPRRC (2019-21), 13<sup>th</sup> Report, HL Paper 69, para. 9

<sup>41</sup> DPRRC (2017-19), 3<sup>rd</sup> Report, HL Paper 22, paras. 15-18

<sup>42</sup> DPRRC (2017-19), 27<sup>th</sup> Report, HL Paper 141, para. 12

- 1.24 If a clause states that the exercise of a power "*may cover matters such as*", this implies that the exercise of the power may go beyond such matters.<sup>43</sup>
- 1.25 Whereas a limit based on a number of 'days' is clear and precise, a limit based on a number of 'occasions' leads to a lack of clarity in the scope of the powers being conferred, since 'occasions' is capable of a range of different meanings.<sup>44</sup>

### Inadequate justification for delegating powers

- 1.26 To "*avoid taking up parliamentary time unnecessarily*": While Parliament should not be overburdened with minor matters that are best dealt with in delegated legislation, 'avoiding taking up parliamentary time unnecessarily' is an insufficient justification when dealing with powers that can change major and permanent provisions of law.<sup>45</sup>
- 1.27 "*Changes to be made quickly*": The need to legislate quickly is an insufficient justification to confer powers with wide scope, as Ministers are not alone in being able to legislate quickly. Even if circumstances were to arise in which it was necessary to act swiftly, it is not clear that delegated, rather than primary, legislation would be needed. Recent years have shown, in the context of Brexit and Covid-19, that Parliament is able to respond to events extremely swiftly with primary legislation.<sup>46</sup>
- 1.28 Ensuring provisions remain "*fit for purpose*": When powers in a Bill are framed to allow the powers to be exercised merely on the basis of a change in policy, seeking a power to ensure that provisions remain 'fit for purpose' means little more than that the government wants to be able to change the provisions by delegated legislation if its policy changes. The presumption should be that where something needs changing which Parliament has enacted, Parliament should enact the changes by primary legislation rather than Ministers make the changes by delegated legislation.<sup>47</sup>
- 1.29 Specified matters "*are not capable of precise quantification*": If the specified matters are not capable of precise quantification, their quantification is not rendered easier merely because the choice of legislative vehicle is a Statutory Instrument rather than an Act of Parliament.<sup>48</sup>
- 1.30 "*Flexibility is required*": A claim that flexibility is required in the way that primary legislation can be modified constitutes insufficient justification, as Ministers through delegated legislation are not the only ones capable of legislating flexibly. Parliament is capable of legislating flexibly in primary legislation.<sup>49</sup>
- 1.31 "*...to reflect possible changes in society's perception of the value of [a specified matter] over time*": Society's perception of the value of the specified matter 'over time' is just that - something that changes over time rather than overnight. Slower changes can be accommodated by a new Act of Parliament.<sup>50</sup>

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<sup>43</sup> DPRRC (2017-19), 34<sup>th</sup> Report, HL Paper 194, para. 18

<sup>44</sup> DPRRC (2017-19), 1<sup>st</sup> Report, HL Paper 10, para. 5

<sup>45</sup> DPRRC (2019-21), 14<sup>th</sup> Report, HL Paper 74, paras. 10, 14(d)

<sup>46</sup> DPRRC (2017-19), 3<sup>rd</sup> Report, HL Paper 22, para. 47; DPRRC (2019-21), 14<sup>th</sup> Report, HL Paper 74, paras. 6, 9, 14(b); DPRRC (2019-21), 24<sup>th</sup> Report, HL Paper 130, paras. 10(b), 12(c), 19

<sup>47</sup> DPRRC (2019-21), 14<sup>th</sup> Report, HL Paper 74, para. 8

<sup>48</sup> DPRRC (2017-19), 22<sup>nd</sup> Report, HL Paper 123, para. 12(b)

<sup>49</sup> DPRRC (2017-19), 6<sup>th</sup> Report, HL Paper 29, paras. 11, 34; DPRRC (2019-21), 14<sup>th</sup> Report, HL Paper 74, para. 14(c)

<sup>50</sup> DPRRC (2017-19), 22<sup>nd</sup> Report, HL Paper 123, para. 12(c)

- 1.32 For "*situations that cannot currently be foreseen*": Powers conferred to address situations that cannot currently be foreseen is an insufficient justification, as new Acts of Parliaments are equally capable of addressing situations that are not originally foreseen.<sup>51</sup>
- 1.33 Because the subject matter is "*vibrant, active and developing*" or "*a dynamic area of law*": The same could be said of many areas. It does not follow that the law in such areas should be a matter only for Statutory Instruments rather than for Acts of Parliament, or that Ministers should be given extensive powers.<sup>52</sup>
- 1.34 "*Highly technical and specialised field of law*": All areas of law have their technicalities. Excluding certain matters of considerable public interest from being given the force of law by an Act of Parliament ought not to be based on the technical nature of the subject matter.<sup>53</sup>
- 1.35 "*In order to keep the details comprehensive and up to date*": A comprehensive list can as easily be set out in primary as in delegated legislation, and can – where it is necessary to do so – be kept up to date by a power to amend the list by delegated legislation made by the affirmative procedure. This would combine clarity and transparency with flexibility. Merely because a specified matter needs updating from time to time does not mean that it should not initially appear in primary legislation.<sup>54</sup>
- 1.36 "*Providing certainty to business and individuals*": Providing certainty to business and citizens does not require that primary legislation be amended by delegated legislation. Such certainty can be equally provided by an amendment by Act of Parliament. Amendment by Parliament arguably provides greater certainty because delegated legislation can be invalidated in the courts in ways that Acts of Parliament cannot.<sup>55</sup>
- 1.37 "*The reason for taking the power is that the new [subject matter] is still under development and is currently being tested*": The new subject matter cannot be put on the face of the Bill if it has not yet been devised and tested (or consulted on). However, this begs the question as to why the government has not waited for the new subject matter to be devised, tested and consulted on before proceeding to legislate.<sup>56</sup>
- 1.38 "*Nature and scale of the legislative changes required are as yet unknown*" and the "*Exact use of the power will of course depend on the contents of [an international agreement]*": Where significant and contentious policy issues are at stake and amendments are needed to primary legislation, it is for Parliament to make the changes through primary legislation rather than for Ministers to do so by delegated legislation.<sup>57</sup>
- 1.39 "*This may involve conferring functions on [bodies] which may, for example, be set up in the future*": The time for conferring functions on new statutory bodies is when the statute creating those bodies is enacted (see 4.25-4.27 of this paper).<sup>58</sup>
- 1.40 "*Without a power to amend [a clause] by statutory instrument there will be no way to change it*": On the contrary, there is a simple way of amending it - by further primary legislation. What Parliament enacts, Parliament can amend.<sup>59</sup>

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<sup>51</sup> DPRRC (2019-21), 14<sup>th</sup> Report, HL Paper 74, para. 14(a)

<sup>52</sup> DPRRC (2019-21), 8<sup>th</sup> Report, HL Paper 40, para. 8; DPRRC (2019-21), 13<sup>th</sup> Report, HL Paper 69, paras. 16, 17

<sup>53</sup> DPRRC (2019-21), 8<sup>th</sup> Report, HL Paper 40, para. 10

<sup>54</sup> DPRRC (2017-19), 22<sup>nd</sup> Report, HL Paper 123, para. 12(a); DPRRC (2019-21), 21<sup>st</sup> Report, HL Paper 117, paras. 5-7, 10, 13

<sup>55</sup> DPRRC (2019-21), 24<sup>th</sup> Report, HL Paper 130, para. 24

<sup>56</sup> DPRRC (2017-19), 54<sup>th</sup> Report, HL Paper 370, paras. 42, 43

<sup>57</sup> DPRRC (2017-19), 3<sup>rd</sup> Report, HL Paper 22, paras. 47, 49

<sup>58</sup> DPRRC (2017-19), 47<sup>th</sup> Report, HL Paper 289, para. 12

<sup>59</sup> DPRRC (2019-21), 24<sup>th</sup> Report, HL Paper 130, para. 16



- 1.41 "*Later changes are likely to be technical and minor*": Saying this implies that there may be cases where the changes are more than merely technical and minor.<sup>60</sup>
- 1.42 "*The Bill proposes to replace existing delegated powers from the 1972 Act with new powers to make such regulations under the new Act. This is not a new set of delegated powers; it replaces one set with another*": A Bill that proposes to replace delegated powers from the European Communities Act 1972 ('the 1972 Act'), under which delegated legislation containing an existing regulatory framework was made, with new delegated powers to amend the regulatory framework, is not a like-for-like replacement. The delegated power in section 2(2) of the 1972 Act was unique, as it was subject to a critical constraint - it gave Ministers power to make laws giving effect to EU law, not simply power to make laws that Ministers may wish to make. The contents of delegated legislation made under section 2(2) of the 1972 Act were, in effect, ring-fenced. A Bill that confers new powers on Ministers giving them free rein to amend, as they see fit, regulatory regimes that were made under section 2(2) of the 1972 Act – and that leaves little or nothing to be settled under the fuller scrutiny given to Bill provisions – could be seen as effecting a significant transfer of powers from the EU to Ministers, bypassing Parliament.<sup>61</sup>
- 1.43 "*Under the Constitutional Reform and Governance Act 2010 ("CRA Act 2010") Parliament has the opportunity to scrutinise the content of agreements and object to their ratification, before they become binding in the UK*": This does not bear on whether the implementation of the treaty in domestic law should be subject to an Act of Parliament or be achieved by delegated legislation. Nor is it necessarily true that the agreement will be properly scrutinised (if at all) by Parliament under section 20 of the CRA Act 2010, though Parliamentary scrutiny of treaties is in the process of being strengthened.<sup>62</sup>

## 2. Parliamentary scrutiny of the use of delegated powers

As well as noting inappropriate delegation of power, the DPRRC also makes recommendations as to the parliamentary scrutiny procedure that ought to apply to the exercise of delegated powers. Proper scrutiny of both delegated powers and delegated legislation requires the provision of good-quality accompanying material and supporting documents. The DPRRC has also expressed a number of views on the nature of these documents. This section lists the legislative standards we have derived in these areas.

### Affirmative procedure

- 2.1 Applying the affirmative procedure<sup>63</sup> to a power in a Bill does not in itself justify or remedy an inappropriate delegation of legislative power.<sup>64</sup>

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<sup>60</sup> DPRRC (2019-21), 1<sup>st</sup> Report, HL Paper 3, para. 15(c)

<sup>61</sup> DPRRC (2019-21), 19<sup>th</sup> Report, HL Paper 109, paras. 18-23, 28(b); DPRRC (2019-21), 22<sup>nd</sup> Report, HL Paper 118, paras. 46, 47

<sup>62</sup> DPRRC (2019-21), 8<sup>th</sup> Report, HL Paper 40, para. 13

<sup>63</sup> The DPRRC highlights that while subjecting the exercise of a power to the affirmative procedure could be seen as an acknowledgment that it covers matters of great importance, the affirmative procedure offers nothing like the scrutiny given to a Bill. An affirmative Statutory Instrument is unamendable during its making and is debated once in each House. In contrast, a Bill typically goes through several substantive stages in each House and can be amended: DPRRC (2017-19), 6<sup>th</sup> Report, HL Paper 29, paras. 20, 34; DPRRC (2017-19), 22<sup>nd</sup> Report, HL Paper 123, para. 12(d); DPRRC (2017-19), 34<sup>th</sup> Report, HL Paper 194, para. 6; DPRRC (2017-19), 45<sup>th</sup> Report, HL Paper 274, paras. 29, 41; DPRRC (2019-21), 19<sup>th</sup> Report, HL Paper 109, para. 17

<sup>64</sup> DPRRC (2017-19), 13<sup>th</sup> Report, HL Paper 77, para. 13; DPRRC (2017-19), 46<sup>th</sup> Report, HL Paper 275, para. 52; DPRRC (2017-19), 47<sup>th</sup> Report, HL Paper 289, para. 13; DPRRC (2019-21), 22<sup>nd</sup> Report, HL Paper 118, para. 43

- 2.2 The 'draft affirmative' procedure should be the norm. The 'made affirmative' procedure should be confined to urgent cases.<sup>65</sup>
- 2.3 Ministers using the 'made affirmative' procedure<sup>66</sup> should be required to make a declaration in the delegated legislation, or lay before Parliament a statement, setting out the reasons why he or she considers that certain conditions are met which allow him or her to make the delegated legislation without a draft of the Instrument being laid before Parliament and approved.<sup>67</sup>
- 2.4 The 'first-time affirmative' procedure may be an inappropriate parliamentary procedure and open to abuse where the scope of the powers remains the same on the first and subsequent exercises, as there is nothing in principle to prevent the changes made by subsequent exercises of a power from being as significant as the provision made on the first exercise. Therefore, if this procedure were to be applied to a power in a Bill, it is for the government to sufficiently justify why it is considered likely that changes made on subsequent exercises of the power will not be of such a nature as to require the affirmative procedure to apply.<sup>68</sup>
- 2.5 Statutory Instruments that include both provisions subject to the negative procedure and provisions subject to the affirmative procedure should usually be subject to the affirmative procedure.<sup>69</sup>

## Negative procedure

- 2.6 Negative resolution scrutiny is necessarily scrutiny after the event. Scrutiny after the event is best avoided in significant matters.<sup>70</sup>
- 2.7 Inadequate justifications for the use of the negative procedure include:
- To "*save a disproportionate amount of parliamentary time and facilitate timely updating, there being no need for parliamentary debates*": If applied generally, this would argue for the adoption of the negative procedure - or no procedure at all - in all cases.<sup>71</sup>
  - To enable updating of delegated legislation to be "*nimble and proportionate*" in the subsequent use of a power that was initially subject to the affirmative procedure: If the subject matter is one that calls, in principle, for the affirmative procedure, it should not matter whether the delegated legislation is the first, second or third set. They should all be affirmative.<sup>72</sup>
  - The affirmative procedure might give rise to an unacceptable level of uncertainty: This is not a convincing argument, as it is only very rarely that an affirmative Instrument is not approved by one or both Houses (as necessary), and the negative procedure arguably carries with it a similar uncertainty because of the possibility that the Instrument may be prayed against.<sup>73</sup>

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<sup>65</sup> DPRRC (2017-19), 11<sup>th</sup> Report, HL Paper 65, para. 9

<sup>66</sup> The DPRRC states that the 'made affirmative' procedure strikes a sensible balance between effective parliamentary scrutiny and the need for the government to act quickly where the Secretary of State is satisfied that certain conditions are met.

<sup>67</sup> DPRRC (2017-19), 11<sup>th</sup> Report, HL Paper 65, para. 9; DPRRC (2017-19), 35<sup>th</sup> Report, HL Paper 202, paras. 14, 15

<sup>68</sup> DPRRC (2017-19), 1<sup>st</sup> Report, HL Paper 10, para. 33; DPRRC (2017-19), 11<sup>th</sup> Report, HL Paper 65, para. 11, 16; DPRRC (2017-19), 16<sup>th</sup> Report, HL Paper 85, paras. 4, 7-9; DPRRC (2017-19); 28<sup>th</sup> Report, HL Paper 147, paras. 4, 5; DPRRC (2019-21), 4<sup>th</sup> Report, HL Paper 17, para. 14; DPRRC (2019-21), 7<sup>th</sup> Report, HL Paper 28, para. 9

<sup>69</sup> The DPRRC states that this ensures that it is not possible to reduce the level of scrutiny given to provisions made under delegated powers by combining them with other provisions subject to a lower level of scrutiny: DPRRC (2017-19), 7<sup>th</sup> Report, HL Paper 38, para. 27

<sup>70</sup> A rationale by the DPRRC for this standard is that the consequences of a successful prayer against such an Instrument would lead to the matter being legally invalidated (albeit with prospective effect only) perhaps some weeks after it has taken effect: DPRRC (2017-19), 51<sup>st</sup> Report, HL Paper 340, para 5

<sup>71</sup> DPRRC (2017-19), 1<sup>st</sup> Report, HL Paper 10, para. 33

<sup>72</sup> DPRRC (2017-19), 1<sup>st</sup> Report, HL Paper 10, para. 33

<sup>73</sup> DPRRC (2017-19), 36<sup>th</sup> Report, HL Paper 204, para. 7

- The affirmative procedure would allow Parliament to prevent the government from complying with international obligations: The logic of this argument applies equally to the negative procedure as well as to the affirmative procedure.<sup>74</sup>
- The negative procedure is "*the clear will of the House of Commons*": The provisions should be judged on their own merits. The House of Lords, in scrutinising legislation, is a 'revising' chamber.<sup>75</sup> For the Lords to do anything other than to discharge this function unconstrained by the decision of the House of Commons would amount to a dereliction of duty.<sup>76</sup>
- The negative procedure will enable the government to act quickly: Delegated legislation using powers under the 'made affirmative' procedure can be made and laid as expeditiously as delegated legislation using powers subject to the negative procedure.<sup>77</sup> Indeed, delegated legislation subject to a parliamentary procedure of the negative or 'made affirmative' variety can be made as quickly as delegated legislation made using powers not subject to any parliamentary procedure.<sup>78</sup>

### 'Sifting mechanism' for delegated legislation

- 2.8 Where a decision is to be made on the appropriate level of parliamentary scrutiny, Parliament and not Ministers should be given the final decision. Ministers may propose the level of scrutiny that is to apply, but Parliament should have the opportunity to require a higher level of scrutiny.<sup>79</sup>
- 2.9 A provision for a 'sifting mechanism' in a Bill may be useful to ensure that the parliamentary scrutiny applied to delegated legislation laid under the Bill is in accordance with the importance and potential significance of the provisions made in the delegated legislation and is in line with the intended scope of the powers.<sup>80</sup> Under such a mechanism, a sifting committee can recommend an upgrade for delegated legislation that does not otherwise qualify for the affirmative procedure, but which deserves to be upgraded on grounds of its significance.<sup>81</sup>
- 2.10 A recommendation from a sifting committee of either House to upgrade the parliamentary scrutiny procedure should be determinative<sup>82</sup> save where the recommendation is rejected by a resolution of that House.<sup>83</sup>
- 2.11 In the context of uncertainty – such as the skeletal nature of a Bill, the absence of illustrative examples of the exercise of powers contained in the Bill, or delegated powers sought to implement future international agreements – a 'sifting mechanism' commends itself as a

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<sup>74</sup> DPRRC (2017-19), 7<sup>th</sup> Report, HL Paper 38, para. 24

<sup>75</sup> As the Royal Commission on Reform of the House of Lords stated in 2000, the role of the Lords is "*to require the Government and the House of Commons to reconsider proposed legislation and take account of any cogent objections to it*".

<sup>76</sup> DPRRC (2017-19), 59<sup>th</sup> Report, HL Paper 408, paras. 13, 14

<sup>77</sup> DPRRC (2017-19), 36<sup>th</sup> Report, HL Paper 204, para. 7; DPRRC (2017-19), 59<sup>th</sup> Report, HL Paper 408, para. 9; DPRRC (2019-21), 14<sup>th</sup> Report, HL Paper 74, paras. 20-23, 25; DPRRC (2019-21), 19<sup>th</sup> Report, HL Paper 109, paras. 36-38

<sup>78</sup> DPRRC (2017-19), 31<sup>st</sup> Report, HL Paper 177, para. 11; DPRRC (2019-21), 17<sup>th</sup> Report, HL Paper 98, para. 6

<sup>79</sup> DPRRC (2017-19), 3<sup>rd</sup> Report, HL Paper 22, paras. 78, 81, 82, 104; DPRRC (2017-19), 12<sup>th</sup> Report, HL Paper 73, paras. 54, 55, 57

<sup>80</sup> The DPRRC states that such an approach strikes a balance between the scrutiny requirements of Parliament and the business needs of government.

<sup>81</sup> DPRRC (2017-19), 3<sup>rd</sup> Report, HL Paper 22, paras. 107, 108; DPRRC (2017-19), 12<sup>th</sup> Report, HL Paper 73, paras. 56, 57; DPRRC (2017-19), 15<sup>th</sup> Report, HL Paper 84, paras. 9, 13; DPRRC (2019-21), 1<sup>st</sup> Report, HL Paper 3, paras. 14, 15, 16; DPRRC (2019-21), 32<sup>nd</sup> Report, HL Paper 207, para. 15

<sup>82</sup> The DPRRC states that not only does this mechanism have teeth but it accords with previous legislation.

<sup>83</sup> DPRRC (2017-19), 12<sup>th</sup> Report, HL Paper 73, para. 58; DPRRC (2017-19), 23<sup>rd</sup> Report, HL Paper 124, paras. 4-8

proportionate and sensible response to the uncertainty (see also 1.3, 2.22 and 4.10 of this paper).<sup>84</sup>

## Guidance, consultation, and the courts

- 2.12 Statutory guidance to which regard must be had should be subject to a parliamentary procedure.<sup>85</sup>
- 2.13 Where guidance will form part of a package with delegated legislation to which it relates, the same parliamentary procedure applied to the related delegated legislation should also apply to the guidance.<sup>86</sup>
- 2.14 The fact that guidance is published is not a reason for denying Parliament a role in scrutinising it.<sup>87</sup>
- 2.15 Consultation requirements imposed by Bill provisions are to be welcomed but consultations should not be presented as a substitute for parliamentary scrutiny.<sup>88</sup>
- 2.16 If the exercise of the power is of sufficient importance to merit extensive consultation, it is of sufficient importance to warrant the higher level of parliamentary scrutiny which the affirmative procedure affords.<sup>89</sup>
- 2.17 While certain powers may be construed strictly by the courts, this is not relevant to whether Parliament should be able to scrutinise the exercise of the powers under the appropriate procedure.<sup>90</sup>

## Delegated Powers Memorandum

- 2.18 The government should provide a detailed Delegated Powers Memorandum (DPM) to assist the DPRRC in its scrutiny of a Bill. The DPM should, in particular, engage with the DPRRC's known concerns from earlier legislation<sup>91</sup> and fully reflect the DPRRC's guidance about the preparation of a DPM.<sup>92</sup>
- 2.19 A department's DPM must fully explain both the scope of the powers in a Bill and the reasons they are being taken, particularly where they appear to widen the scope of the powers conferred under existing legislation.<sup>93</sup>

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<sup>84</sup> DPRRC (2017-19), 15<sup>th</sup> Report, HL Paper 84, paras. 9, 10, 13

<sup>85</sup> The DPRRC's rationale for this standard is that although there is an element of choice in whether to follow the guidance, a requirement "to have regard to" the guidance carries with it an expectation that the guidance will be followed unless there are cogent reasons for not doing so: DPRRC (2017-19), 1<sup>st</sup> Report, HL Paper 10, paras. 18, 31, 32; DPRRC (2017-19), 31<sup>st</sup> Report, HL Paper 177, paras. 5, 8; DPRRC (2017-19), 35<sup>th</sup> Report, HL Paper 202, paras. 52-55; DPRRC (2019-21), 7<sup>th</sup> Report, HL Paper 28, para. 15; DPRRC (2019-21), 17<sup>th</sup> Report, HL Paper 98, para. 10; DPRRC (2019-21), 37<sup>th</sup> Report, HL Paper 258, paras. 7(c), 7(d), 8, 9

<sup>86</sup> DPRRC (2019-21), 7<sup>th</sup> Report, HL Paper 28, para. 16

<sup>87</sup> DPRRC (2017-19), 31<sup>st</sup> Report, HL Paper 177, para. 35(b)

<sup>88</sup> DPRRC (2017-19), 31<sup>st</sup> Report, HL Paper 177, para. 35(a); DPRRC (2017-19), 54<sup>th</sup> Report, HL Paper 370, para. 37; DPRRC (2019-21), 19<sup>th</sup> Report, HL Paper 109, paras. 44, 45; DPRRC (2019-21), 37<sup>th</sup> Report, HL Paper 258, para. 7(a)

<sup>89</sup> DPRRC (2019-21), 19<sup>th</sup> Report, HL Paper 109, paras. 44, 45, 48

<sup>90</sup> DPRRC (2019-21), 1<sup>st</sup> Report, HL Paper 3, para. 10

<sup>91</sup> DPRRC (2017-19), 39<sup>th</sup> Report, HL Paper 226, para. 4(f); DPRRC (2019-21), 1<sup>st</sup> Report, HL Paper 3, para. 3

<sup>92</sup> DPRRC (2017-19), 13<sup>th</sup> Report, HL Paper 77, para. 5

<sup>93</sup> DPRRC (2017-19), 1<sup>st</sup> Report, HL Paper 10, para. 7



- 2.20 Where a Bill confers broad powers, a transparent approach is expected in which the department acknowledges the breadth of the powers and seeks to fully justify it.<sup>94</sup>
- 2.21 If an argument for delegating a power is the delay that would be caused by legislating for that issue by primary legislation, substantiating empirical evidence for this argument should be offered.<sup>95</sup>
- 2.22 It is helpful if, in addition to a DPM, the government provides alongside a Bill some illustrative examples of the exercise of its main delegated powers (however tentative and qualified), particularly where ‘the devil will be in the regulatory detail’. This enables Parliament to see how some of the powers in the Bill might in due course be exercised, without committing the government.<sup>96</sup>

Instances where the DPRRC has commended in whole or in part the supporting documents provided to assist it in its deliberations and scrutiny of a Bill are provided in the footnote to this paragraph.<sup>97</sup>

### 3. Types of provision

This section lists standards that can be said to underpin the DPRRC’s assessment of certain types of legislative provision that grant or relate to delegated powers.

#### Consequential provision

- 3.1 A power to make consequential provision inherently lacks a clear definition to its scope and therefore potentially confers wide powers, particularly where it includes a power to amend primary legislation. It follows that such powers should not be conferred as a matter of routine, but only where there is a compelling justification.<sup>98</sup>
- 3.2 Consequential amendments are to be included in the Bill itself. A power to make further such amendments by delegated legislation is a sort of back-stop, to pick up amendments of a similar kind that may have been missed in the Bill.<sup>99</sup>
- 3.3 It is inappropriate for Ministers to be given widely drawn powers to make consequential changes that they consider ‘appropriate’ and ‘in connection with’ a part of the Bill.<sup>100</sup> Consequential changes should therefore be restricted by some type of objective test of ‘necessity’, rather than leaving this to the subjective judgment of Ministers.<sup>101</sup>

<sup>94</sup> DPRRC (2017-19), 6<sup>th</sup> Report, HL Paper 29, para. 51; DPRRC (2017-19), 35<sup>th</sup> Report, HL Paper 202, para. 40; DPRRC (2017-19), 47<sup>th</sup> Report, HL Paper 289, para. 4; DPRRC (2017-19), 58<sup>th</sup> Report, HL Paper 391, para. 18; DPRRC (2019-21), 1<sup>st</sup> Report, HL Paper 3, para. 5; DPRRC (2019-21), 19<sup>th</sup> Report, HL Paper 109, paras. 5, 53

<sup>95</sup> DPRRC (2017-19), 7<sup>th</sup> Report, HL Paper 38, para. 39; DPRRC (2019-21), 8<sup>th</sup> Report, HL Paper 40, paras. 7, 12

<sup>96</sup> DPRRC (2017-19), 15<sup>th</sup> Report, HL Paper 84, paras. 2-4; DPRRC (2017-19), 21<sup>st</sup> Report, HL Paper 122, para. 7; DPRRC (2017-19), 34<sup>th</sup> Report, HL Paper 194, para. 4(h)

<sup>97</sup> DPRRC (2017-19), 13<sup>th</sup> Report, HL Paper 77, para. 5; DPRRC (2017-19), 17<sup>th</sup> Report, HL Paper 102, para. 1; DPRRC (2017-19), 39<sup>th</sup> Report, HL Paper 226, para. 2; DPRRC (2019-21), 1<sup>st</sup> Report, HL Paper 3, para. 3; DPRRC (2019-21), 6<sup>th</sup> Report, HL Paper 27, paras. 2, 3; DPRRC (2019-21), 19<sup>th</sup> Report, HL Paper 109, para. 5; DPRRC (2019-21), 34<sup>th</sup> Report, HL Paper 215, para. 1

<sup>98</sup> The DPRRC states that for a large Bill dealing with a wide range of matters, or a complex Bill, it may be difficult to identify in advance all necessary consequential changes to other legislation. However, the DPRRC highlights that it is difficult to accept this argument in the case of a narrowly focused, single topic Bill - particularly in respect of those consequential changes which require the amendment of primary legislation: DPRRC (2017-19), 5<sup>th</sup> Report, HL Paper 26, paras. 9, 10

<sup>99</sup> DPRRC (2017-19), 46<sup>th</sup> Report, HL Paper 275, paras. 21, 32; DPRRC (2019-21), 22<sup>nd</sup> Report, HL Paper 118, paras. 16, 28

<sup>100</sup> The DPRRC explains that such tests based on subjective judgement would confer permanent powers on Ministers to make whatever legislation they considered appropriate, provided there was at least some connection with the part of the Bill, however tenuous.

<sup>101</sup> DPRRC (2017-19), 3<sup>rd</sup> Report, HL Paper 22, paras. 71, 72, 74; DPRRC (2017-19), 12<sup>th</sup> Report, HL Paper 73, para. 37; DPRRC (2017-19), 24<sup>th</sup> Report, HL Paper 128, para. 7; DPRRC (2017-19), 46<sup>th</sup> Report, HL Paper 275, paras. 15, 29, 30, 32; DPRRC (2019-21), 22<sup>nd</sup> Report, HL Paper 118, paras. 17-19, 28

## 'Henry VIII powers'

- 3.4 'Henry VIII powers' should be conferred only where there is very clear justification for them.<sup>102</sup>
- 3.5 In the absence of sufficient justification, it is inappropriate for all of the changes to primary legislation, which are intended to be made in connection with the establishment of a system, to be made by delegated legislation rather than by the Bill itself.<sup>103</sup>
- 3.6 An acceptable alternative to a Bill consisting entirely of powers to make delegated legislation is for the necessary amendments to an existing Act or Acts to appear on the face of the Bill itself, perhaps coupled with more focused powers to deal with detailed aspects of the relevant regulatory system by delegated legislation.<sup>104</sup>
- 3.7 Particularly compelling reasons are needed to justify 'Henry VIII powers' which allow the amendment of the Bill itself.<sup>105</sup>
- 3.8 There is a strong presumption for the affirmative procedure to apply to 'Henry VIII powers' (see also 2.1-2.5 of this paper).<sup>106</sup>
- 3.9 A power can be in substance a power to amend primary legislation, if the exercise of the power can have the effect of amending matter which is otherwise specified on the face of primary legislation. Accordingly, in the absence of convincing justification for applying a different procedure to the scrutiny of what is in essence a 'Henry VIII power', the affirmative procedure should apply to the exercise of such a power (see also 2.1-2.5 of this paper).<sup>107</sup>

## 'Necessary' vs. 'Appropriate'

- 3.10 In light of the width and significance of certain powers, Ministers should only be able to make delegated legislation using those powers if doing so is considered necessary<sup>108</sup> to achieve the purpose for which the delegated legislation is being made.<sup>109</sup>
- 3.11 Loosely drawn powers based on the subjective judgement of Ministers, such as the 'appropriateness' test,<sup>110</sup> should be circumscribed in favour of a test based on 'necessity'.<sup>111</sup>

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<sup>102</sup> The DPRRC states that under this country's constitution, it is for Parliament not Ministers to make laws. Therefore, unjustified 'Henry VIII powers' are fundamentally objectionable as a matter of principle: DPRRC (2017-19), 45<sup>th</sup> Report, HL Paper 274, paras. 28, 42

<sup>103</sup> DPRRC (2017-19), 21<sup>st</sup> Report, HL Paper 122, paras. 11, 16, 17

<sup>104</sup> DPRRC (2017-19), 21<sup>st</sup> Report, HL Paper 122, para. 15

<sup>105</sup> DPRRC (2017-19), 7<sup>th</sup> Report, HL Paper 38, para. 34

<sup>106</sup> DPRRC (2017-19), 3<sup>rd</sup> Report, HL Paper 22, paras. 73, 77, 102; DPRRC (2017-19), 11<sup>th</sup> Report, HL Paper 65, para. 21; DPRRC (2017-19), 12<sup>th</sup> Report, HL Paper 73, paras. 38, 53; DPRRC (2017-19), 31<sup>st</sup> Report, HL Paper 177, para. 22; DPRRC (2017-19), 34<sup>th</sup> Report, HL Paper 194, para. 27; DPRRC (2017-19), 59<sup>th</sup> Report, HL Paper 408, paras. 8, 15; DPRRC (2019-21), 1<sup>st</sup> Report, HL Paper 3, paras. 8, 11; DPRRC (2019-21), 9<sup>th</sup> Report, HL Paper 42, paras. 12, 13

<sup>107</sup> DPRRC (2019-21), 4<sup>th</sup> Report, HL Paper 17, paras. 18, 19

<sup>108</sup> The DPRRC explains that for a test based on 'necessity', the operative test would be whether it is necessary to deal with a problem, not whether only one solution follows inexorably. Once this 'necessity' threshold is met, Ministers may choose whichever solution most commends itself even if it is one of several possible solutions. The DPRRC highlights that if Ministers take the view that the concept of what is necessary needs elaboration, the Bill could do so.

<sup>109</sup> DPRRC (2017-19), 3<sup>rd</sup> Report, HL Paper 22, para. 26; DPRRC (2017-19), 7<sup>th</sup> Report, HL Paper 38, para. 18; DPRRC (2017-19), 12<sup>th</sup> Report, HL Paper 73, paras. 8-11; DPRRC (2017-19), 23<sup>rd</sup> Report, HL Paper 124, para. 10(h)

<sup>110</sup> The DPRRC explains that where the exercise of a power is circumscribed by a test of 'appropriateness', there is nothing to suggest that Ministers' judgment of what they consider appropriate will be confined to technical matters or purely mechanistic changes, and instead allows the exercise of a power to make substantial policy changes that ought to be made only in primary legislation.

<sup>111</sup> DPRRC (2017-19), 3<sup>rd</sup> Report, HL Paper 22, paras. 21-24, 31(a), 35, 40(a); DPRRC (2017-19), 12<sup>th</sup> Report, HL Paper 73, paras. 7, 12, 19(a), 20(a); DPRRC (2017-19), 23<sup>rd</sup> Report, HL Paper 124, para. 9

- 3.12 Legislating for a requirement to state ‘good reasons’ when laying certain delegated legislation is an inadequate substitute for a test based on ‘necessity’.<sup>112</sup>
- 3.13 In certain contexts, it is accepted that a condition on the exercise of a power is properly based on the subjective view of what is appropriate rather than on the more restrictive objective criterion of what is necessary. Such an ‘appropriateness’ test is acceptable where the scope of a power is naturally constrained by the scope of the particular matter that the power is intended to address, where a restrictive ‘necessity’ test would not work due to the government not being required to address a particular matter but rather being left with discretion, and where the use of a different test could lead to uncertainty. Although ‘appropriate’ is broader than ‘necessary’, it does not confer unfettered discretion, as courts construe powers with reference to context and legislative intent.<sup>113</sup>

### Retrospective provision

- 3.14 There is a strong presumption for the affirmative procedure to apply to powers where their exercise makes retrospective provision.<sup>114</sup>

### Sub-delegation and tertiary legislation

- 3.15 If a power enabling legislative sub-delegation is sought, the government should demonstrate, in a Bill’s Delegated Powers Memorandum, a convincing case for requiring the power to make tertiary legislation.<sup>115</sup>
- 3.16 Tertiary legislation should be subject to the same parliamentary control<sup>116</sup> and time-limits as are applicable to delegated legislation.<sup>117</sup>

### Time-limits and sunset provision

- 3.17 Delegated powers that do not need to exist in perpetuity should be time-limited.<sup>118</sup>
- 3.18 A sunset provision does not resolve an inappropriate delegation of legislative power.<sup>119</sup>

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<sup>112</sup> The DPRRC provides four points as a rationale: (i) The requirement to state good reasons is a very low threshold. Ministers are expected to have good reasons before doing anything, and certainly when making new law in delegated legislation; (ii) In law, if Ministers lack good reasons for doing something, they have either bad reasons or no reasons at all. In either event, their decision is liable to being quashed on judicial review. It does not advance matters for Ministers to commit to lay a document that merely confirms their belief that they are acting lawfully; (iii) The test for political decision-making is not simply whether there are good reasons. There may be good reasons for doing something and better reasons for not doing it; (iv) What happens if the reasons fail to convince either House? It is not enough to say that the Instrument could be annulled under ordinary rules. This would be the case regardless of a ‘good reasons’ requirement: DPRRC (2017-19), 23<sup>rd</sup> Report, HL Paper 124, paras. 10(b)-10(e)

<sup>113</sup> DPRRC (2019-21), 1<sup>st</sup> Report, HL Paper 3, paras. 6(a)-6(e)

<sup>114</sup> DPRRC (2019-21), 9<sup>th</sup> Report, HL Paper 42, paras. 12, 13

<sup>115</sup> DPRRC (2017-19), 3<sup>rd</sup> Report, HL Paper 22, paras. 39, 40(c); DPRRC (2017-19), 12<sup>th</sup> Report, HL Paper 73, para. 19(b)

<sup>116</sup> The DPRRC highlights that despite its greater inaccessibility, tertiary legislation is still the law. Therefore, sub-delegation of power without provision for parliamentary scrutiny of how that power is exercised breaks the important link between those empowered to make law and their accountability to Parliament. Where tertiary legislation is not made by Statutory Instrument, it evades the publication and laying requirements of the Statutory Instruments Act 1946. The DPRRC warns that if the widening of tertiary powers without parliamentary scrutiny is a sign of ‘tertiary powers creep’, then it is an unwelcome development. The DPRRC does not dispute the need for tertiary legislation. It simply says that, in its view, the same controls that apply to delegated legislation should also apply to tertiary legislation. Otherwise, these controls can be subverted by skeletal delegated legislation where all the detail (and further law-making power) will be found in tertiary legislation.

<sup>117</sup> DPRRC (2017-19), 3<sup>rd</sup> Report, HL Paper 22, paras. 27, 31(b), 40(c); DPRRC (2017-19), 11<sup>th</sup> Report, HL Paper 65, paras. 28-30; DPRRC (2017-19), 12<sup>th</sup> Report, HL Paper 73, paras. 13-16, 20(b); DPRRC (2017-19), 23<sup>rd</sup> Report, HL Paper 124, para. 14(a); DPRRC (2017-19), 45<sup>th</sup> Report, HL Paper 274, para. 17

<sup>118</sup> DPRRC (2017-19), 11<sup>th</sup> Report, HL Paper 65, paras. 22-24; DPRRC (2017-19), 13<sup>th</sup> Report, HL Paper 77, paras. 19, 20, 25, 26; DPRRC (2017-19), 15<sup>th</sup> Report, HL Paper 84, paras. 8, 15; DPRRC (2017-19), 34<sup>th</sup> Report, HL Paper 194, para. 4(e)

<sup>119</sup> DPRRC (2017-19), 24<sup>th</sup> Report, HL Paper 128, paras. 7, 9

- 3.19 While a sunset provision may mitigate against the width of a power, it is not a sufficient justification for applying an inappropriate parliamentary procedure to the exercise of a power.<sup>120</sup>
- 3.20 The desirability of sunset clauses is correspondingly lessened when there is a proven need for powers of the width sought by the government; likewise, when powers are accompanied by safeguards such as mandatory consultation and enhanced parliamentary scrutiny.<sup>121</sup>
- 3.21 Where Parliament is to impose a deadline by which a delegated power is to be exercised, the power conferred should expire on a set date from Royal Assent rather than the date of its first use. Otherwise, the exercise of the power could be delayed indefinitely.<sup>122</sup>

## 4. Policy areas

This section lists standards that can be said to underpin the DPRRC's assessment of delegated powers in certain policy areas.

### Criminal offences

- 4.1 It is for Parliament, not Ministers, to legislate for imprisonable offences.<sup>123</sup>
- 4.2 A compelling justification is expected for the ingredients of criminal offences to be set by delegated legislation. This expectation applies to both powers to make delegated legislation that creates completely new criminal offences and powers to make delegated legislation that changes the ingredients of existing offences.<sup>124</sup>
- 4.3 Where the penalty for a newly created or existing criminal offence may be set by delegated legislation, the maximum penalty is expected to be included on the face of the Bill, save in exceptional circumstances.<sup>125</sup>
- 4.4 There is a strong presumption for the affirmative procedure to apply to powers where their exercise creates or widens the scope of a criminal offence (see also 2.1-2.5 of this paper).<sup>126</sup>

### Devolved matters

- 4.5 Where the exercise of a power relates to devolved matters, it is important that the Secretary of State consults bodies and interests in the relevant devolved nation(s) who are liable to be affected by the exercise of the power, before making the delegated legislation. This is normally expected to be the subject of a duty imposed by the relevant clause in the Bill.<sup>127</sup>

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<sup>120</sup> DPRRC (2017-19), 58<sup>th</sup> Report, HL Paper 391, para. 9; DPRRC (2019-21), 1<sup>st</sup> Report, HL Paper 3, para. 10; DPRRC (2019-21), 5<sup>th</sup> Report, HL Paper 24, para. 9

<sup>121</sup> DPRRC (2017-19), 39<sup>th</sup> Report, HL Paper 226, para. 4(d)

<sup>122</sup> DPRRC (2017-19), 45<sup>th</sup> Report, HL Paper 274, para. 18

<sup>123</sup> DPRRC (2019-21), 13<sup>th</sup> Report, HL Paper 69, para. 6

<sup>124</sup> DPRRC (2017-19), 7<sup>th</sup> Report, HL Paper 38, paras. 28-30; DPRRC (2019-21), 19<sup>th</sup> Report, HL Paper 109, para. 30

<sup>125</sup> DPRRC (2019-21), 19<sup>th</sup> Report, HL Paper 109, para. 30

<sup>126</sup> DPRRC (2017-19), 7<sup>th</sup> Report, HL Paper 38, para. 30; DPRRC (2019-21), 9<sup>th</sup> Report, HL Paper 42, paras. 12, 13; DPRRC (2019-21), 32<sup>nd</sup> Report, HL Paper 207, paras. 13, 14

<sup>127</sup> DPRRC (2017-19), 59<sup>th</sup> Report, HL Paper 408, para. 10



- 4.6 In the absence of a convincing justification, it is inappropriate for a Bill to contain a Henry VIII power that can be exercised by the government to amend a clause in the Bill that equally affects all the administrations of the UK.<sup>128</sup>
- 4.7 With regards to revisions to the three devolution settlements, it is unacceptable for Parliament to be presented with delegated legislation and given a simple choice of 'take it or leave it'.<sup>129</sup> The government should instead bring forward separate Bills.<sup>130</sup>

### Hybrid Bills and hybrid instruments

- 4.8 It is inappropriate to delegate legislative power that is designed to allow Ministers to create a significant public body in circumstances where the Bill containing the delegated power should more properly have been drafted as a hybrid Bill the purpose of which would be to create that body.<sup>131</sup>
- 4.9 Where a Bill contains a de-hybridisation clause, protection should be afforded under the Bill's delegated powers to interests which would otherwise be safeguarded by the hybrid instrument procedure, through provision for some other means – for example, consultation while the policy is still at a formative stage.<sup>132</sup>

### International law

- 4.10 The existence or otherwise of an international agreement<sup>133</sup> is not an argument for giving Ministers many law-making powers in a Bill that offers little substantive detail.<sup>134</sup>
- 4.11 A general power to implement international agreements on private international law<sup>135</sup> by Statutory Instruments, regardless of the nature or importance of the agreement, thereby obviating the need for an Act of Parliament,<sup>136</sup> is an inappropriate delegation of power.<sup>137</sup>
- 4.12 Where an international obligation leaves a large measure of discretion to the States as to how it is implemented,<sup>138</sup> Parliament must have the opportunity fully to scrutinise the choices that the government makes in implementing the international obligation.<sup>139</sup>

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<sup>128</sup> The DPRRC's rationale is that if a clause in a Bill that equally affects all the administrations of the UK turns out to be defective, it should be for Parliament to correct it rather than Ministers at Westminster. This is particularly so where the Secretary of State merely has an obligation to consult the other administrations rather than to obtain their consent: DPRRC (2019-21), 24<sup>th</sup> Report, HL Paper 130, paras. 10(a), 11, 12(b), 13

<sup>129</sup> The DPRRC highlights that revisions to the three devolution settlements will be of considerable constitutional significance. It is anticipated that both Houses of Parliament would wish closely to scrutinise proposed legislation amending the settlements, and to have the opportunity to amend it – as has happened with all major changes to devolution since 1998.

<sup>130</sup> DPRRC (2017-19), 3<sup>rd</sup> Report, HL Paper 22, paras. 58-60; DPRRC (2017-19), 12<sup>th</sup> Report, HL Paper 73, paras. 33-35

<sup>131</sup> The DPRRC emphasises that hybrid Bill procedures exist because Parliament considers that members of the public who are directly and specially affected by legislation should be able to make their case effectively in Parliament. The DPRRC deprecates the subversion of those procedures and the troubling precedent that it would set: DPRRC (2017-19), 54<sup>th</sup> Report, HL Paper 370, paras. 3, 13, 14

<sup>132</sup> DPRRC (2017-19), 54<sup>th</sup> Report, HL Paper 370, paras. 18-21, 52-54

<sup>133</sup> The DPRRC highlights that if the government has committed to legislating to give effect to an international agreement, then at that stage any necessary changes to the Bill in question can be made.

<sup>134</sup> DPRRC (2017-19), 34<sup>th</sup> Report, HL Paper 194, para. 8

<sup>135</sup> The DPRRC did not address implementing other types of international agreements during the three Sessions that this paper covers.

<sup>136</sup> The DPRRC states that traditionally the implementation of private international law agreements entered into by the UK has been done through Acts of Parliament. The DPRRC states that, for a Minister negotiating an international agreement, the knowledge that it will need to be implemented via an Act of Parliament is likely to have a more potent effect on negotiations than the knowledge that it can be implemented by Statutory Instrument that will attract considerably less parliamentary scrutiny.

<sup>137</sup> DPRRC (2019-21), 8<sup>th</sup> Report, HL Paper 40, paras. 5, 14

<sup>138</sup> The DPRRC highlights that it will not always be the case that the form of the delegated legislation presented to Parliament will be tightly constrained by the international obligation it is implementing. It may be the case that the international obligation imposes broad requirements on States, giving a large measure of discretion to the States themselves to determine the precise form and means by which those requirements are met.

<sup>139</sup> DPRRC (2017-19), 7<sup>th</sup> Report, HL Paper 38, para. 24

4.13 A delegation of power that allows Ministers to make delegated legislation that disregards any contrary provision of international or domestic law is an inappropriate delegation of power.<sup>140</sup>

### National emergencies

4.14 When sunset provisions are used as a safeguard for delegated powers in emergency legislation,<sup>141</sup> the expiry date should be set in the primary legislation without a power to extend.<sup>142</sup>

4.15 Powers conferred on the government for the purpose of addressing a national emergency should, on the face of the primary legislation, explicitly limit the exercise of those powers to circumstances arising from that national emergency.<sup>143</sup>

4.16 The presumption should be that where something needs changing which Parliament has enacted, Parliament should enact the changes by primary legislation rather than Ministers make the changes by delegated legislation. Consequently, to enact such changes by delegated legislation, as an important restriction on the use of such powers, the Secretary of State must consider there to be an urgent need to do so and that it would not be reasonably practicable to enact primary legislation within the period within which it was considered necessary to act.<sup>144</sup>

4.17 The exercise of powers to suspend or revive emergency measures might well be politically contentious and is therefore expected to be subject to a parliamentary procedure.<sup>145</sup>

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<sup>140</sup> The DPRRC provides six points as a rationale: (i) The power for delegated legislation to derogate from any international or domestic law, including any decision of any court of law, cannot be characterised as merely involving detailed and technical matters. It involves matters of the highest public interest, involving questions of law, politics, diplomacy, and integrity; (ii) A broad power to disapply or modify an international agreement cannot be said to provide certainty. The certainty found in an international agreement is to be replaced by delegated legislation that allow one signatory unilaterally to disregard it. Uncertainty must stem from the exorbitant nature of a power to disregard international or domestic law; (iii) The rule of law requires everyone, including Ministers, to be subject to the law. Parliament is sovereign. Ministers are not. Where Parliament authorises a Minister to make delegated legislation in disregard of international or domestic law, it places the Minister in a difficult position. The Minister's instinct and duty is to respect and obey the law. A Bill, in allowing Ministers to make delegated legislation that disregards international or domestic law, potentially represents an unprecedented challenge to the UK's commitment to the rule of law; (iv) The law involving judicial review of Ministers is premised on Ministers acting lawfully or facing the prospect of court action to correct and sanction them. A Bill that allows Ministers to make delegated legislation that disregards international or domestic law might place Ministers in court, given that courts have jurisdiction to review delegated legislation made by Ministers. The courts can invalidate delegated legislation on grounds that are inapplicable to Acts of Parliament; (v) Ministers have an overarching duty under the Ministerial Code to comply with the law and to protect the integrity of public life. A power conferred by Parliament which allows Ministers to make delegated legislation that disregards contrary international or domestic law does not sit easily alongside a duty under the Ministerial Code to comply with the law, including international law; (vi) Parliament frequently gives Ministers the power to make delegated legislation that amends or repeals Acts of Parliament, but it is a novel and wide power for Ministers to disregard treaties binding in international law. Apart from any diplomatic or reputational consequences, in an action for breach of an international obligation it is unlikely to be a defence that UK domestic law purports to protect Ministers from the consequences of breach: DPRRC (2019-21), 24<sup>th</sup> Report, HL Paper 130, paras. 38(a)-38(f)

<sup>141</sup> The DPRRC highlights that when Parliament is legislating in the midst of a developing national emergency, sunset provisions may be the principal safeguard in the face of significant powers being conferred on Ministers to address the developing national emergency at speed. Consequently, this standard enables the government to exercise necessary powers immediately whilst allowing time for a further Bill to be introduced and subject to parliamentary scrutiny at a slower pace.

<sup>142</sup> DPRRC (2019-21), 9<sup>th</sup> Report, HL Paper 42, paras. 4, 16, 28

<sup>143</sup> DPRRC (2019-21), 9<sup>th</sup> Report, HL Paper 42, para. 9; DPRRC (2019-21), 14<sup>th</sup> Report, HL Paper 74, para. 24; DPRRC (2019-21), 17<sup>th</sup> Report, HL Paper 98, para. 14

<sup>144</sup> DPRRC (2019-21), 14<sup>th</sup> Report, HL Paper 74, paras. 8, 18

<sup>145</sup> DPRRC (2019-21), 9<sup>th</sup> Report, HL Paper 42, para. 15

## Retained European Union law

4.18 Delegated legislation that amends or repeals retained direct principal EU legislation<sup>146</sup> should be subject to the affirmative procedure.<sup>147</sup>

## Rights of individuals

4.19 The exercise of wide powers that affect the determination of the rights of individuals to compensation should be subject to the affirmative procedure (see also 2.1-2.5 of this paper).<sup>148</sup>

4.20 Powers that can be exercised to intrude into commercial relationships between third parties should be governed by the affirmative procedure. Included in such powers are ones that may require the imposition of certain contractual terms or require parties not to include certain specified contractual terms (see also 2.1-2.5 of this paper).<sup>149</sup>

4.21 It is inappropriate to delegate powers that can be exercised to specify all provision about appeals. In the absence of a strong and convincing case to the contrary, matters such as the identity of the body which is given responsibility for determining appeals, the grounds on which an appeal may be made, and the powers of the appeal body in determining an appeal should be set out on the face of the Bill.<sup>150</sup>

4.22 Where a Bill confers a power to remedy by delegated legislation a provision in primary legislation that is incompatible with the European Convention on Human Rights, it is inappropriate for the Bill to confer a different power with a less stringent parliamentary procedure to the order-making power conferred by the Human Rights Act 1998.<sup>151</sup>

## Setting dates

4.23 Where considerable political and legal significance attaches to a date, the exercise of a power that specifies that date should be subject to a parliamentary procedure.<sup>152</sup>

4.24 Standard commencement powers, in accordance with usual practice, are not subject to any parliamentary procedure.<sup>153</sup>

## Statutory bodies

4.25 The usual presumption is that the name of a new public body should be set out on the face of primary legislation.<sup>154</sup> There ought to be strong reasons for departing from this norm.<sup>155</sup>

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<sup>146</sup> The DPRRC highlights that retained direct principal EU legislation is given a status similar to primary legislation by section 7 of the European Union (Withdrawal) Act 2018 and this approach is in keeping with the general approach in the European Union (Withdrawal Agreement) Act 2020.

<sup>147</sup> DPRRC (2019-21), 1<sup>st</sup> Report, HL Paper 3, paras. 8, 11; DPRRC (2019-21), 22<sup>nd</sup> Report, HL Paper 118, paras. 13, 23, 28

<sup>148</sup> DPRRC (2017-19), 58<sup>th</sup> Report, HL Paper 391, paras. 23, 24

<sup>149</sup> DPRRC (2017-19), 34<sup>th</sup> Report, HL Paper 194, paras. 25; DPRRC (2019-21), 13<sup>th</sup> Report, HL Paper 69, para. 13

<sup>150</sup> The DPRRC's rationale is that that these are not procedural matters, nor are they things which are liable to need to be changed in the light of experience over time. Instead, they are fundamental to the nature and scope of the appeal rights which are being conferred: DPRRC (2017-19), 31<sup>st</sup> Report, HL Paper 177, paras. 15-18

<sup>151</sup> DPRRC (2017-19), 45<sup>th</sup> Report, HL Paper 274, para. 27

<sup>152</sup> DPRRC (2017-19), 3<sup>rd</sup> Report, HL Paper 22, paras. 64, 65; DPRRC (2017-19), 51<sup>st</sup> Report, HL Paper 340, para. 3

<sup>153</sup> DPRRC (2019-21), 32<sup>nd</sup> Report, HL Paper 207, para. 3

<sup>154</sup> The DPRRC's rationale is that the name of any statutory body is something on which Parliament can be expected to have a view. There is a public interest in that name being in the public domain and on the face of a Bill from the outset, rather than there being a delegation of power to allow Ministers, rather than Parliament, to name the new public body.

<sup>155</sup> DPRRC (2017-19), 1<sup>st</sup> Report, HL Paper 10, paras. 14-17

- 4.26 The power to abolish a public body and transfer its functions to any other person is a very broad power, as the normal principle is that what Parliament has created, Parliament alone should dissolve. Where Parliament has previously legislated to delegate powers to abolish public bodies it has provided procedural safeguards such as making the abolition of the public body dependent on a period of consultation, the laying before Parliament of an explanatory document in addition to a draft Statutory Instrument, an enhanced affirmative procedure if required by either House, and time-limiting the power to abolish.<sup>156</sup>
- 4.27 A power that can be exercised to amend primary legislation to confer functions on what are currently non-existent bodies is inappropriately wide.<sup>157</sup>

### Taxation, charges, and fees

- 4.28 It is unacceptable for the government to have power to impose taxes and tax-like charges by delegated legislation.<sup>158</sup> The government should demonstrate a convincing case before the supremacy of the House of Commons in financial matters gives way to taxation by Statutory Instrument.<sup>159</sup>
- 4.29 Fees and charges for services or functions should operate on a cost-recovery basis, leaving taxation for a Finance Bill.<sup>160</sup>
- 4.30 All delegated legislation imposing a fee or charge should be made by Statutory Instrument either by UK government Ministers or by Ministers in a devolved administration.<sup>161</sup>
- 4.31 The affirmative procedure should apply to all delegated legislation which introduces or increases fees or charges, either in both Houses of Parliament or in the relevant devolved legislature.<sup>162</sup> An acceptable proviso is that the negative procedure can apply where the amounts are merely updated to take account of inflation (see also 2.1-2.5 of this paper).<sup>163</sup>
- 4.32 Fees or charges should not be levied by tertiary legislation (see also 3.15-3.16 of this paper).<sup>164</sup>

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<sup>156</sup> DPRRC (2017–19), 1<sup>st</sup> Report, HL Paper 10, paras. 20-23

<sup>157</sup> The DPRRC states that the time for conferring functions on new statutory bodies is when the statute creating those bodies is enacted (see 1.39 of this paper): DPRRC (2017-19), 47<sup>th</sup> Report, HL Paper 289, para. 12

<sup>158</sup> The DPRRC highlights that the imposition of taxes and tax-like charges are matters for Parliament – a principle enshrined in Article 4 of the Bill of Rights 1688.

<sup>159</sup> DPRRC (2017–19), 3<sup>rd</sup> Report, HL Paper 22, paras. 37, 40(b), 88, 91(a); DPRRC (2017-19), 6<sup>th</sup> Report, HL Paper 29, paras. 67-70; DPRRC (2017-19), 12<sup>th</sup> Report, HL Paper 73, paras. 20(c), 44, 45, 67; DPRRC (2017-19), 23<sup>rd</sup> Report, HL Paper 124, para. 3; DPRRC (2017-19), 24<sup>th</sup> Report, HL Paper 128, para. 9

<sup>160</sup> DPRRC (2017–19), 3<sup>rd</sup> Report, HL Paper 22, para. 91(a); DPRRC (2017-19), 12<sup>th</sup> Report, HL Paper 73, paras. 45, 67; DPRRC (2017-19), 23<sup>rd</sup> Report, HL Paper 124, para. 3(a)

<sup>161</sup> DPRRC (2017–19), 3<sup>rd</sup> Report, HL Paper 22, para. 91(c); DPRRC (2017-19), 12<sup>th</sup> Report, HL Paper 73, paras. 46, 68

<sup>162</sup> The DPRRC's rationale is that parliamentary scrutiny of the imposition of fees is important, even where the fees do not overtly involve a tax or a tax-like charge, as permitting organisations full cost recovery of their services without parliamentary scrutiny allows them to 'gold-plate' the services they offer. Therefore, the decision to impose a new fee or charge is a policy issue warranting affirmative scrutiny. Likewise, the DPRRC states that the decision to amend the fee or charge equally involves a policy issue and may be open to abuse if subjected to a lower level of scrutiny.

<sup>163</sup> DPRRC (2017–19), 3<sup>rd</sup> Report, HL Paper 22, paras. 87, 89, 90, 91(d); DPRRC (2017-19), 12<sup>th</sup> Report, HL Paper 73, paras. 43, 47, 68; DPRRC (2017-19), 24<sup>th</sup> Report, HL Paper 128, para. 4

<sup>164</sup> DPRRC (2017–19), 3<sup>rd</sup> Report, HL Paper 22, para. 91(b); DPRRC (2017-19), 12<sup>th</sup> Report, HL Paper 73, paras. 46, 68; DPRRC (2017-19), 23<sup>rd</sup> Report, HL Paper 124, para. 14(b)

## Appendix I: What is the Delegated Powers and Regulatory Reform Committee and what does it do?

The Delegated Powers and Regulatory Reform Committee (DPRRC) is a House of Lords Select Committee appointed to examine almost all Bills on their introduction to the House of Lords, to determine whether they contain any inappropriate delegation of power or subject those powers to an inappropriate degree of parliamentary scrutiny.<sup>165</sup>

The DPRRC's remit does not extend to commenting on the overall merits of a Bill or questioning its fundamental purpose.<sup>166</sup> It is also beyond the remit of the DPRRC to comment on clauses not involving delegated powers.<sup>167</sup> Powers concerning administrative designations (i.e., not legislative powers) are not within the DPRRC's remit.<sup>168</sup> The DPRRC does not report on supply Bills save in exceptional circumstances.<sup>169</sup>

The DPRRC makes it its practice to consider each Bill on its own merits. Powers conferred by clauses in a Bill and the degree of parliamentary scrutiny applied to the exercise of the powers are considered on their own merits, notwithstanding the acknowledgement of equivalent powers conferred under earlier legislation.<sup>170</sup>

Where the DPRRC has considered a Bill and its accompanying Delegated Powers Memorandum (DPM) and has concluded that there is nothing in the Bill to which it would wish to draw the attention of the House, it is its usual practice to publish a report that states this without further explanation.<sup>171</sup>

It is the DPRRC's practice to report on Bills introduced into the House of Lords after their Second Reading and before their Committee stage. In certain circumstances (for example, owing to the speed at which a Bill is proceeding), this may not be possible.<sup>172</sup>

In certain circumstances, the DPRRC may consider some Bills that start in the House of Commons before they are introduced to the Lords. If there are time constraints, or if a Bill contains significant delegation of powers, the DPRRC may produce a report on a Bill in sufficient time for Members of the House of Commons to be able to consider it at Committee stage in their House. This has been the DPRRC's practice in relation to significant Brexit-related Bills. The DPRRC will also report on the Bill in the form in which it comes to the House of Lords.<sup>173</sup>

In certain circumstances, the DPRRC may undertake what may be regarded as the equivalent of pre-legislative scrutiny of a Bill, providing recommendations from which a revised Bill can benefit substantially.<sup>174</sup> The Committee may also undertake post-legislative scrutiny of an Act of Parliament, with the purpose of informing a debate in the House.<sup>175</sup>

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<sup>165</sup> DPRRC (2017–19), 3<sup>rd</sup> Report, HL Paper 22, paras. 3, 10, 51, 59; DPRRC (2017-19), 11<sup>th</sup> Report, HL Paper 65, para. 5; DPRRC (2017-19), 12<sup>th</sup> Report, HL Paper 73, para. 5; DPRRC (2017-19), 51<sup>st</sup> Report, HL Paper 340, para. 2; DPRRC (2017-19), 61<sup>st</sup> Report, HL Paper 418, para. 2; DPRRC (2019-21), 1<sup>st</sup> Report, HL Paper 3, para. 3; DPRRC (2019-21), 24<sup>th</sup> Report, HL Paper 130, para. 4

<sup>166</sup> DPRRC (2017–19), 3<sup>rd</sup> Report, HL Paper 22, paras. 10, 51; DPRRC (2017-19), 12<sup>th</sup> Report, HL Paper 73, para. 5; DPRRC (2019-21), 1<sup>st</sup> Report, HL Paper 3, para. 3; DPRRC (2019-21), 24<sup>th</sup> Report, HL Paper 130, para. 4

<sup>167</sup> DPRRC (2017-19), 12<sup>th</sup> Report, HL Paper 73, para. 26; DPRRC (2017-19), 47<sup>th</sup> Report, HL Paper 289, para. 7

<sup>168</sup> DPRRC (2019-21), 32<sup>nd</sup> Report, HL Paper 207, para. 3

<sup>169</sup> DPRRC (2017-19), 16<sup>th</sup> Report, HL Paper 85, para. 10; DPRRC (2019-21), 18<sup>th</sup> Report, HL Paper 107, para. 1

<sup>170</sup> DPRRC (2017–19), 1<sup>st</sup> Report, HL Paper 10, para. 10; DPRRC (2017-19), 35<sup>th</sup> Report, HL Paper 202, paras. 39, 40; DPRRC (2019-21), 5<sup>th</sup> Report, HL Paper 24, para. 4; DPRRC (2019-21), 37<sup>th</sup> Report, HL Paper 258, para. 7(b)

<sup>171</sup> DPRRC (2019-21), 35<sup>th</sup> Report, HL Paper 225, para. 2

<sup>172</sup> DPRRC (2017-19), 59<sup>th</sup> Report, HL Paper 408, para. 2

<sup>173</sup> DPRRC (2017–19), 3<sup>rd</sup> Report, HL Paper 22, para. 6; DPRRC (2017-19), 11<sup>th</sup> Report, HL Paper 65, para. 6; DPRRC (2017-19), 34<sup>th</sup> Report, HL Paper 194, para. 2; DPRRC (2017-19), 36<sup>th</sup> Report, HL Paper 204, para. 1; DPRRC (2017-19), 37<sup>th</sup> Report, HL Paper 212, para. 1; DPRRC (2017-19), 39<sup>th</sup> Report, HL Paper 226, paras. 1, 7; DPRRC (2017-19), 46<sup>th</sup> Report, HL Paper 275, para. 2; DPRRC (2017-19), 47<sup>th</sup> Report, HL Paper 289, para. 1; DPRRC (2017-19), 61<sup>st</sup> Report, HL Paper 418, para. 1; DPRRC (2019-21), 26<sup>th</sup> Report, HL Paper 148, para. 1

<sup>174</sup> DPRRC (2017–19), 1<sup>st</sup> Report, HL Paper 10, paras. 27, 28; DPRRC (2019-21), 13<sup>th</sup> Report, HL Paper 69, para. 21

<sup>175</sup> DPRRC (2019-21), 32<sup>nd</sup> Report, HL Paper 207, para. 2

## Appendix II: Extract from the Delegated Powers and Regulatory Reform Committee's 'Guidance for Departments'

### PART ONE: PRINCIPLES<sup>176</sup>

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#### 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

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<sup>176</sup> DPRRC's 'Guidance for Departments on the role and requirements of the Committee', November 2021, pp. 4-9

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 subdelegated 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**

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### **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.)

## Appendix III: Glossary

**Act of Parliament:** Legislation that has been approved by Parliament and received Royal Assent. Acts of Parliament are primary legislation.

**Affirmative procedure:** Parliamentary scrutiny procedure under which delegated legislation requires the active approval of the House of Commons and in most cases also the House of Lords. Under the 'draft affirmative' procedure, delegated legislation is laid before Parliament as a draft, and cannot be made into law by the Minister unless and until it has been approved by the House of Commons and in most cases also the House of Lords. Under the 'made affirmative' procedure, delegated legislation is laid before Parliament after it has been made – signed – into law by the Minister, but cannot remain law unless it is approved by the House of Commons and in most cases also the House of Lords within a statutory period – usually 28 or 40 days.

**Annulment motion:** A motion tabled for parliamentary debate within the 40-day scrutiny period proposing that an SI which is subject to the 'made negative' procedure be rejected. In the House of Lords, annulment motions are among the types of motions known as 'fatal' motions.

**Bill:** A proposal for a new Act of Parliament, once it has been introduced to Parliament (at First Reading) and before it has received Royal Assent. A Bill goes through several stages in both Houses and can be amended. If a version of a Bill is agreed by Parliament and receives Royal Assent it becomes an Act of Parliament. A draft Bill may be published and subject to pre-legislative scrutiny by a parliamentary committee before being formally introduced to Parliament.

**Commencement power:** A type of delegated power that can be exercised to bring into force all, or part, of an Act of Parliament at a date later than that of Royal Assent.

**Consequential provision:** A clause, typically at the end of a Bill, enabling Ministers to make delegated legislation to tidy up the statute book in consequence of substantive changes in the law made by earlier clauses in the Bill. Amendments to previous legislation that are required for this 'tidying-up' reason are known as 'consequential amendments'.

**De-hybridisation clause:** A clause in a Bill that disapplies the hybrid instrument procedure for delegated legislation made under the new powers conferred by the Bill.

**Delegated legislation:** Law made by Ministers (and sometimes other authorised individuals and bodies) using delegated powers granted to them in Acts of Parliament. Statutory Instruments (SIs) are the most common form of delegated legislation. Orders and Regulations are among the categories of delegated legislation enacted in SIs. Delegated legislation is also known as secondary or subordinate legislation.

**Delegated power:** A power to make delegated legislation which is conferred on Ministers (and sometimes other individuals and bodies) in an Act of Parliament.

**Delegated Powers Memorandum (DPM):** A document produced by the government department responsible for a Bill and published with the Bill when it is introduced to Parliament. The DPM identifies every delegated power in a Bill, its justification, and any parliamentary scrutiny procedure that is proposed for it. The DPM assists the House of Lords Delegated Powers and Regulatory Reform Committee (DPRRC) when that Committee scrutinises and reports on the delegated powers in a Bill.

**Delegated Powers and Regulatory Reform Committee (DPRRC):** House of Lords Select Committee appointed to examine almost all Bills on their introduction to the House of Lords, to determine

whether they contain any inappropriate delegation of power or subject those powers to an inappropriate level of scrutiny. In certain circumstances, the DPRRC may consider some Bills that start in the House of Commons before they are introduced to the Lords.

**Explanatory Notes:** A document that accompanies a Bill when the Bill is introduced to Parliament, setting out what the Bill does and why.

**'First-time affirmative' procedure:** A parliamentary scrutiny procedure for delegated legislation whereby the first use of a power is subject to the affirmative procedure and subsequent uses to the negative.

**'Henry VIII power':** A type of delegated power. A 'Henry VIII power' enables Ministers to amend, repeal, or otherwise alter the effect of primary legislation by delegated legislation. In a Bill, a clause that contains a 'Henry VIII power' is a 'Henry VIII clause'.

**Hybrid Bill:** A Bill the content of which, though of general application, would affect a particular private interest in a manner different from the private interests of other persons or bodies of the same category or class. The procedures followed in Parliament in considering Hybrid Bills incorporate aspects of both public Bill and private Bill procedures, such as providing time for members of the public who are specially and directly affected by the Bill to submit a petition against it.

**Hybrid instrument procedure:** A procedure that applies in the House of Lords where an instrument subject to the affirmative procedure contains provisions which, if contained in a Bill, would render it a hybrid Bill. The instrument is subject to a petitioning procedure along the lines of that for hybrid Bills, under which those whose private interests are directly and specially affected by the instrument may petition against it.

**Lay/laying/laid:** Formally presenting a Statutory Instrument (SI) or other document to Parliament. When an SI is subject to a parliamentary scrutiny procedure, laying is the start of the process. Some SIs are laid before Parliament but not subject to a parliamentary procedure; in this case, they are 'laid only' SIs. The date on which an SI is laid is its 'laid date'.

**Make/making/made:** A Minister or other authorised individual signing a Statutory Instrument (SI) into law. The date on which this takes place is an SI's 'made date'. Once an SI has been made, it may come into force: there is no minimum or maximum period between an SI being made and it coming into force. However, there is a convention – the 21-day rule – by which, wherever possible, a Statutory Instrument which is subject to the 'made negative' procedure is laid before Parliament at least 21 calendar days before it comes into force.

**Negative procedure:** Parliamentary scrutiny procedure under which a piece of delegated legislation or other measure does not require active parliamentary approval. Under the 'made negative' procedure, a piece of delegated legislation is laid before Parliament after it has been made – signed – into law by the Minister. If Parliament does not reject it within 40 days, it is deemed to have consented. For a 'made negative' Statutory Instrument, if, within 40 days of the SI being laid, either House agrees a motion – known as a 'prayer' – to annul the SI, the government must revoke it. Under the 'draft negative' procedure, an SI is laid before Parliament as a draft, and if Parliament does not reject it within 40 days, it is deemed to have consented and the Minister can make the SI into law.

**Parent Act/parent legislation:** Legislation that grants a delegation of power to Ministers or other individuals or bodies to make delegated legislation. It may also be known as an 'enabling Act' or 'enabling legislation'.

**Prayer/prayer motion:** A motion tabled by an MP or Peer calling for the annulment of a Statutory Instrument which is subject to the 'made negative' procedure. Such a motion may also be known as an annulment motion. In the House of Lords, such motions are among those also known as fatal motions (because, if passed, they would be 'fatal' to the piece of delegated legislation in question).

**Primary legislation:** For the UK, law made by Parliament (subject to Royal Assent) and comprising Acts of Parliament. Primary legislation is not subject to judicial review.

**Private international law:** Private law is the law which governs relations between individuals or entities, such as the law governing banking, property, professional negligence, divorce, and defamation, to name but a few. Private international law covers all areas of private law that contain a foreign element.

**Revoke/revocation:** Only an SI that has already been made into law can be revoked. Revocation means that such an SI is no longer law. Revocation is the equivalent, for SIs, of repealing an Act of Parliament (or provisions thereof). It is possible to revoke only some (rather than all) provisions of an SI. An SI may be revoked by either primary or delegated legislation. In Parliament, a motion that an SI should be revoked is a revocation motion. If parliamentarians wish to reject a 'made negative' SI after the 40-day scrutiny period for such SIs has ended, they must do so through a revocation motion (instead of an annulment motion).

**Statutory Instruments (SIs):** The most common form of delegated legislation. The term 'Statutory Instrument' is given to most, but not all, forms of delegated legislation made after the Statutory Instruments Act 1946 came into force in 1948.

**Strengthened scrutiny procedure:** A higher level of parliamentary scrutiny than the 'affirmative' procedure. Strengthened scrutiny is usually reserved for the exercise of significant powers that are conferred on a Minister to amend primary legislation. It involves scrutiny by a designated committee(s) and can include, among other possible required elements, statutory consultation and even a committee veto. Examples include 'enhanced affirmative' and 'super-affirmative' procedures.

**Skeleton Bills:** A Bill, or part of a Bill, that consists entirely of delegated powers, meaning that the real operation of the Bill, or part of the Bill, would be entirely by delegated legislation

**Tertiary legislation:** Acts of Parliament (primary legislation) can confer power on Ministers and others to make delegated legislation. Exceptionally, Parliament allows delegated legislation to confer power on other people to make law. This is 'legislative sub-delegation'. Law made at this third level is tertiary legislation.

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