

# Brexit, Delegated Powers and Delegated Legislation: a Rule of Law Analysis of Parliamentary Scrutiny

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# Executive Summary

Brexit has reopened long running debates over the impact of delegated powers and delegated legislation on Parliament's role in the legislative process. The legislative process in Parliament enables parliamentarians to hold the government to account for proposed changes to the statute book, to amend bills and to decide whether a government bill should be enacted. The government's reliance on delegated powers and delegated legislation to deliver Brexit has raised concerns that parliamentarians will be sidelined from the legislative process. This report aims to contribute to the debate on how parliamentary scrutiny of delegated powers and delegated legislation can be improved.

This report outlines two sets of standards, one on delegated powers and one on delegated legislation, both based on the reports of five parliamentary committees in the UK Parliament from the 2017-19 parliamentary session. For delegated powers, we examined the reports of the House of Lords Delegated Powers and Regulatory Reform Committee and the House of Lords Select Committee on the Constitution. For delegated legislation, we reviewed the reports of the Joint Committee on Statutory Instruments, the House of Lords Secondary Legislation Scrutiny Committee and the House of Commons European Statutory Instruments Committee. By extracting standards from the work of these committees, this report aims to clarify the normative basis of Parliament's scrutiny of delegated powers and delegated legislation.

The standards in this report highlight the centrality of the Rule of Law to the legislative process in Parliament. The normative framework applied by parliamentary committees when scrutinising delegated powers and delegated legislation is principally concerned with limiting the government's legal discretion to legislate, ensuring that both legislation and the reasons for legislating are as accessible and as clear as possible, and securing the opportunity for parliamentarians to hold the government to account for changing the law. These are not simply technical considerations, but instead a particular set of public law principles designed to defend Parliament's institutional role in the legislative process.

In considering how Parliament's scrutiny of delegated powers and delegated legislation can be improved, it is important to understand the normative framework that is currently applied by parliamentary committees. Parliamentary committees have limited powers to effect changes to the way that government approaches the legislative process. However, each of the parliamentary committees examined in this report may be able to strengthen their scrutiny by providing more detailed and specific guidance to government on the standards that they apply to delegated powers and delegated legislation based on their previous reports. A more prescriptive approach to scrutiny may help to address some of the concerns repeatedly raised by the committees in their reports and may also serve to strengthen the Rule of Law.

# 1. Introduction

Delegated powers and delegated legislation are a core part of the UK's constitutional system. Since the UK's decision to leave the EU, the Government has sought to create – and Parliament has granted – a large number of new delegated powers that would enable departments to pass delegated legislation and prepare the statute book for Brexit.<sup>1</sup> The Government's reliance on delegated powers and delegated legislation has highlighted their role and significance and raised the profile of the scrutiny of such powers and legislation. There is growing recognition that parliamentarians and civil society need to play closer attention to the government's use of its extensive delegated powers as in many areas – including Brexit – delegated legislation is being used to deliver important policy changes. In particular, the Government's reliance on so-called 'Henry VIII powers' (which enables delegated legislation to make changes to primary legislation) has proved controversial. When the European Union (Withdrawal) Bill was before the House of Commons, the House of Lords Constitution Committee described the powers in the Bill as “unprecedented and extraordinary” and added that they “raise fundamental constitutional questions about the separation of powers between Parliament and Government”.<sup>2</sup> Importantly, the perceived problems with such powers are not unique to Brexit bills: the Constitution Committee has reported that there is an “upward trend” in the Government seeking such powers across the board.<sup>3</sup> In relation to delegated legislation, the Hansard Society has concluded that the scrutiny system in Parliament is ‘broken’.<sup>4</sup>

This report aims to contribute to the debate on how parliamentary scrutiny of delegated powers and delegated legislation can be improved and seeks to ensure that this debate – which often focuses on procedural questions – considers the normative basis upon which parliamentary committees scrutinise delegated powers and legislation. It does so by examining five parliamentary committees and identifying and analysing the normative standards applied by those committees in their scrutiny of delegated powers and delegated legislation in the 2017-19 parliamentary session. In relation to delegated powers, the report examines the scrutiny of relevant government bills carried out by two parliamentary committees: the House of Lords Delegated Powers and Regulatory Reform Committee ('DPRRC') and the House of Lords Constitution Committee ('Constitution Committee'). In relation to delegated legislation, the report reviews the scrutiny of legislation carried out by three parliamentary committees: the Joint Committee on Statutory Instruments ('JCSI'), the House of Commons European Statutory Instruments Committee ('ESIC') and the House of Lords Secondary Legislation Scrutiny Committee ('SLSC').

The five parliamentary committees examined in this report cannot themselves solve all the problems associated with the Government's use of (or Parliament's scrutiny of) delegated powers or delegated legislation. None of these committees have any legal or parliamentary powers to amend a Bill or block a statutory instrument; nor can they change how Government or either House engages with delegated powers or delegated legislation. The focus of this report is to identify the normative basis of the scrutiny of the five committees

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<sup>1</sup> House of Commons Library, [Constitutional Implications of the Withdrawal Agreement Legislation](#) (CBP 08805) 20 February 2020.

<sup>2</sup> House of Lords Constitution Committee, [European Union \(Withdrawal\) Bill: Interim Report](#), (HL Paper 19) p2.

<sup>3</sup> Select Committee on the Constitution 16th Report of Session 2017–19 HL Paper 225 [The Legislative Process: The Delegation of Powers](#) HL Paper 225 para 35.

<sup>4</sup> The Hansard Society, [The Devil is in the Detail: Parliament and Delegated Legislation](#) (2014).

examined so as to begin a debate on whether this should be changed. To identify and categorise the standards applied by committees and to consider the strengths and weaknesses of the current scrutiny framework, the report uses Rule of Law principles. One of the principal conclusions of the report is that the primary object of parliamentary scrutiny of delegated powers and delegated legislation is to increase the level of accessibility of the law and the legislative process in order to protect Parliament's institutional role in the legislative process.

## What are delegated powers?

A delegated power is a provision in primary legislation which grants a government minister the ability to make delegated legislation to change the law for a particular purpose. This enables a government minister to change the law without using primary legislation. Delegated powers are routinely included in government bills. Their primary purpose is to enable the Government to enact detailed laws which would otherwise take significant parliamentary time to pass.

## What is delegated legislation?

Delegated legislation is a form of legislation made by ministers (or other bodies) under powers given to them by Parliament through primary legislation. The procedure for making delegated legislation is normally determined by the Act of Parliament which contains the delegated power. The most common form of delegated legislation is known as a statutory instrument. The standard procedures for making statutory instruments are known as 'affirmative' and 'negative' procedures and do not enable parliamentarians to amend instruments before they become law.

## An example of the process

In 2015, Parliament enacted the Deregulation Act 2015. Section 110 (1) of the 2015 Act contains a power for the Minister to issue guidance which must be approved by resolution of both Houses of Parliament. Once the guidance is approved, Section 110 (8) provides a power for the Minister to appoint the day on which the guidance comes into force through a statutory instrument. On 8 March 2017, the Minister made the Deregulation Act 2015 (Growth Duty Guidance) Order 2017 (a statutory instrument), which brings the guidance into force. The Joint Committee on Statutory Instruments [reported](#) on the Deregulation Act 2015 (Growth Duty Guidance) Order 2017 as the explanatory note did not set out how a hard copy of the guidance could be obtained.

## The approach of this report

The aim of this report is to examine the standards applied by committees when scrutinising delegated powers and legislation. To do this we compiled a set of standards on both delegated powers and legislation extracted from the reports of a number of parliamentary committees from the 2017-19 parliamentary session.<sup>5</sup> The set of standards included in this report are designed to provide a possible resource for interested parties within Parliament and Government, as well as for civil society groups engaged in the legislative process. This list

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<sup>5</sup> We also included standards from special reports published by the relevant committees in other sessions, for example: Joint Committee on Statutory Instruments: Excluding the inert from secondary legislation (HL Paper 6, HC 167, 1st Special report of session 2013-14).

supplements the code of constitutional standards based on all of the Constitution Committee's reports from 2001-2017 published by the Constitution Unit.<sup>6</sup>

The reason for setting out these standards is to start a discussion on whether the existing normative framework applied to delegated powers and delegated legislation in Parliament is fit for purpose. There are clearly many strengths to the approach of the committees examined in this report – indeed the approach taken in Westminster is well regarded internationally. However, the debate on the appropriate use of delegated powers (particularly Henry VIII powers) and delegated legislation has become rather circular. Powers are often described as 'unconstitutional' without sufficiently detailed analysis of where the relevant constitutional boundaries should be set. Moving beyond this requires a fair appraisal of Parliament's practical contribution to the process of making delegated powers and delegated legislation. The system is complex but the standards set out below provide a basis for critical analysis of how the normative framework could be improved.

The set of standards outlined in this report also serve to highlight the issues that are most frequently of concern to the parliamentary committees charged with scrutinising delegated powers and delegated legislation. Unsurprisingly, many of the standards extracted here are concerned with facilitating effective parliamentary scrutiny. For example, many of the standards relate to the quality of explanatory material provided by the Government and make specific demands for specific matters to be addressed in either the Delegated Powers Memorandum or the Explanatory Note.

## Methodology

This report outlines a number of parliamentary standards on delegated powers and delegated legislation based on the reports of five parliamentary committees in the UK Parliament principally from the 2017-19 parliamentary session. Regarding delegated powers, we have used the reports of the Delegated Powers and Regulatory Reform Committee ('DPRRC') and the House of Lords Constitution Committee ('Constitution Committee'). For delegated legislation, we have looked at the reports of the Joint Committee on Statutory Instruments ('JCSI'), the European Statutory Instruments Committee ('ESIC') and the Secondary Legislation Scrutiny Committee ('SLSC'). For the SLSC we examined only the reports of Sub-Committee A and Sub-Committee B, which began reporting in October 2018. For every other committee we examined all reports from the 2017-19 session. We have also analysed the Special Reports of the JCSI and the DPRRC, dating from the 1997-98 session to the 2017-19 session to gain a fuller picture of these committees' approach to scrutiny.

To extract standards we sought to identify all clear normative statements relating to either delegated powers or delegated legislation. This is not an exact science and deciding what counts as a standard is of course a subjective exercise. As such it is important to stress that the standards listed in sections 3 and 4 are based on our own analysis on the contents of the relevant committees' reports. Those committees' reports are concerned with specific bills or statutory instruments and did not aim to promulgate general standards. We would like to thank Kelly Shuttleworth for her work on this report and all of the participants at the seminar organised by the Public Law Project in October 2019 who provided valuable feedback on a draft of this report.

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<sup>6</sup> Jack Simson Caird, Robert Hazell and Dawn Oliver, '[The Constitutional Standards of the House of Lords Select Committee on the Constitution](#)' Constitution Unit University College London (Third Edition) (2017).

## 2. The Rule of Law, Parliament and the process of making delegated powers and delegated legislation

The Rule of Law's centrality to the legislative process in Parliament is not always recognised. In relation to parliamentary scrutiny of delegated powers and delegated legislation, the Rule of Law is fundamental. The use of delegated powers and delegated legislation raise important Rule of Law questions relating to the discretionary power of the executive, accessibility of the law, the legislative process and legal certainty.<sup>7</sup> The Rule of Law's core requirements may not be directed at the legislative process but nevertheless the Rule of Law has major implications for how the legislative process works. For a legal system to flourish, government and parliamentarians should ensure that Rule of Law values are advanced through the law-making process.<sup>8</sup>

### The Rule of Law and delegated powers

The Venice Commission's Rule of Law checklist requires that the executive's legislative discretion is effectively constrained.<sup>9</sup> In practice this means that the legislature should ensure that there are effective legal parameters on delegated powers to make delegated legislation. If Parliament does not supply such limits, the courts can use the principle of legality (set out below) to supply them. Such parameters also mitigate the risks that broadly-framed powers will be used in ways that are impossible for the legislature to predict and which lessen legal certainty. The Venice Commission's Rule of Law checklist also stipulates that the primary law-making process must be transparent, accountable, inclusive and democratic.<sup>10</sup> If bills are principally made up of broadly-framed delegated powers, then this makes the law and legislation less predictable – and, to an extent, less accessible – because it is harder for parliamentarians and the public to evaluate how the statute book is being changed.

The transparency and openness of the law-making process is central to the legitimacy of parliamentary democracy as it provides the link between political accountability and the Rule of Law. If the primary law-making process provides an opportunity for an assessment of the effect of a legislative proposal to be made, both political accountability and the Rule of Law are enhanced. Conversely, if a government bill is “no more than a picture frame without a picture”, then there is a real risk of disconnect between the legislative process and political accountability.<sup>11</sup>

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<sup>7</sup> It is important to recognise that the Rule of Law overlaps core democratic concepts such as transparency and accountability. This overlap is an unavoidable consequence of moving beyond a formal or thin conception of the Rule of Law.

<sup>8</sup> N. W. Barber, *The Principles of Constitutionalism*, OUP (2019) 85.

<sup>9</sup> Venice Commission of the Council of Europe, [The Rule of Law Checklist](#) (2016) p20-21.

<sup>10</sup> Venice Commission of the Council of Europe, [The Rule of Law Checklist](#) (2016) p 21.

<sup>11</sup> Lord Hannay of Chiswick, [HL Deb 11 February 2020 Vol 801 col 1276](#).

## The Rule of Law and delegated legislation

In the context of parliamentary scrutiny of delegated legislation, the significance of the Rule of Law is also prominent. The Joint Committee on Statutory Instruments' Special Report on Transparency and Accountability in Subordinate Legislation states:

*Laying before Parliament is not a meaningless formality, but an important part of access to justice and the rule of law.<sup>12</sup>*

In practice, there is less political supervision of delegated legislation in Parliament; the scrutiny process is more technical in character. Some of this technical scrutiny is focused on ensuring that certain core Rule of Law standards are upheld: that the law is as clear as possible, that the principle of legality is respected, and that the law and the legislative process are as accessible as possible. The centrality of the Rule of Law to Parliament's role in supervising delegated legislation is apparent from the criteria applied by the Joint Committee on Statutory Instruments ('JCSI') when examining delegated legislation, which is set out in Box 1 below:

### Box 1: House of Commons Standing Order No. 151

The Joint Committee on Statutory Instruments is charged with scrutinising delegated legislation based on the following eight non-exhaustive criteria:

- (i) that it imposes a charge on the public revenues or contains provisions requiring payments to be made to the Exchequer or any government department or to any local or public authority in consideration of any licence or consent or of any services to be rendered, or prescribes the amount of any such charge or payment;
- (ii) that it is made in pursuance of any enactment containing specific provisions excluding it from challenge in the courts, either at all times or after the expiration of a specific period;
- (iii) that it purports to have retrospective effect where the parent statute confers no express authority so to provide;
- (iv) that there appears to have been unjustifiable delay in the publication or in the laying of it before Parliament;
- (v) that there appears to have been unjustifiable delay in sending a notification under the proviso to section 4(1) of the Statutory Instruments Act 1946, where an instrument has come into operation before it has been laid before Parliament;
- (vi) that there appears to be a doubt whether it is *intra vires* or that it appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made;
- (vii) that for any special reason its form or purport calls for elucidation;
- (viii) that its drafting appears to be defective.

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<sup>12</sup> JCSI 1st Special Report - [Transparency and Accountability in Subordinate Legislation - Twenty-Sixth Report](#) (HL Paper 151, HC Paper 1158) at 2.8.

The requirement set out above at (vi) of Box 1 – that the JCSI considers whether a particular instrument is lawful or *intra vires* – is significant because it provides a means for the courts to inform parliamentary scrutiny. This form of scrutiny creates a dialogue that can assist both the courts and Parliament in their examination of statutory instruments and provides a pre-enactment warning that there may be risk that an instrument might be held to be legally invalid. For example, the JCSI's fortieth report of 2017-19 drew attention to the Non-Contentious Probate (Fees) Order 2018 on the basis that there was "a doubt whether it is *intra vires*, and that it would in any event make an unexpected use of the power conferred by the enabling Act".<sup>13</sup> This highlights the way in which the JCSI's remit creates an important connection between legal and political scrutiny. Table 1 below highlights a series of notable cases where the courts have made significant rulings on the legality of delegated legislation and identifies principles which could inform parliamentary scrutiny.

**Table 1: Notable cases on the legality of delegated legislation**

Case name	Relevant legislation	Principle
<i>RR v Secretary of State for Work and Pensions</i> <sup>14</sup>	Housing Benefit (Amendment) Regulations (SI 2012/304)	It is not unconstitutional for a public authority, court or tribunal to disapply a provision of delegated legislation which would result in their acting incompatibly with an ECHR right, where this is necessary in order to comply with the Human Rights Act 1998.
<i>R (Unison) v Lord Chancellor</i> <sup>15</sup>	The Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 (SI 2013/1893)	Even where a statutory power authorises an intrusion on the right of access to the courts, this only authorises a degree of intrusion that is <i>reasonably necessary</i> to fulfil the objective of the provision, and must not infringe on access to justice.
<i>R (Public Law Project) v Lord Chancellor</i> <sup>16</sup>	A draft order laid in September 2013 made pursuant to 9(2)(b), 41(1)(a) and (b), 41(2)(a) and (b), and 41(3)(b) and (c) of the Legal Aid, Sentencing and Punishment of Offences Act 2012.	Regulations that result in an outcome unrelated to the nature and issue of the parent legislation are <i>ultra vires</i> .

<sup>13</sup> Joint Committee on Statutory Instruments Fortieth Report of Session 2017–19, HL 247 HC 542-xl at 1.1.

<sup>14</sup> [2019] UKSC 52.

<sup>15</sup> [2017] UKSC 51.

<sup>16</sup> [2016] UKSC 39.

<i>Polestar Jowetts Ltd v Komori UK Ltd, Vibixa Ltd v Komori UK Ltd</i> <sup>17</sup>	Supply of Machinery (Safety) Regulations 1992	A statutory instrument may be invalid to the extent that it is not made under the enabling powers specified in the preamble.
<i>General Mediterranean Holdings SA v Ramanbhai Manibhai Patel, Kirit Kumar Ramanbhai Patel</i> <sup>18</sup>	Civil Procedure Rules 1998	Fundamental and substantive constitutional rights cannot be removed or infringed without express Parliamentary intention and notification in primary legislation.
<i>R v Secretary of State for Social Services, ex parte Camden London Borough Council</i> <sup>19</sup>	Supplementary Benefit (Requirements and Resources) Miscellaneous Provisions (No. 2) Regulations 1985 (SI 1985/1835)	Reference to a separate document which has not been laid in Parliament (e.g. a directory or guidance) in regulations does not invalidate the functioning of the regulations.

Even though delegated legislation can be quashed by the courts, “robust systematic scrutiny” in Parliament is necessary to ensure that the executive is held to account for its legislative decisions.<sup>20</sup> The technical criteria of the JCSI ensures that Parliament provides some political enforcement of the core legal standards relating to delegated legislation. Only Parliament can systematically apply core Rule of Law standards to all delegated legislation. If Government relies increasingly on delegated legislation to deliver significant policy changes, then such systematic scrutiny plays a vital role in maintaining political supervision of the legislative process.

## Scrutiny of delegated powers

At present, parliamentary committees in Westminster do not apply a fixed set of criteria to determine which legislative powers should or should not be delegated to government. Rather, parliamentary committees take a more pragmatic approach. The Delegated Powers and Regulatory Reform Committee (‘DPRRC’) have said that:

*“Setting the appropriate boundary between primary and delegated legislation is not a simple, objective exercise and it is for this reason that the Committee, at its inception, said that it would not offer a list of criteria but would consider each delegation in a bill on its merits.”*<sup>21</sup>

<sup>17</sup> [2005] EWHC 1674 (QB).

<sup>18</sup> [1999] EWHC J0719-7.

<sup>19</sup> [1987] 1 WLR 819.

<sup>20</sup> L. Neudorf, [‘The Constitutional Position of Delegated Legislation after Cherry/Miller \(No 2\)’](#), U.K. Const. L. Blog (27th Sept. 2019).

<sup>21</sup> DPRRC, Special Report: Response to the Strathclyde Review (HL Paper 119, 25th Report of Session 2015-16) at 21.

We agree that a rigid list of criteria is not the way forward, however, we are also concerned that a purely pragmatic approach is equally problematic. In written evidence provided to the House of Lords Select Committee on the Constitution ('Constitution Committee'), the Bingham Centre has previously highlighted the need to establish a set of principles "to underpin [the] assessment of the validity of clauses that delegate legislative authority".<sup>22</sup>

The DPRRC examines whether "the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of delegated power to an inappropriate level of parliamentary scrutiny".<sup>23</sup> The Committee considers each delegation on its merits. In practice, over the 20 years that it has operated, the Committee has built up a set of precedents that can be used to define what is 'inappropriate'. For example, the Committee's guidance outlines that there is a presumption that any Henry VIII power should be subject to the affirmative procedure, and if another procedure is used then the memorandum should provide a "full explanation giving the reasons for choosing that procedure".<sup>24</sup> This standard is typical of the DPRRC's approach, which is principally focused on ensuring that the use of any powers is justified and that the procedure attached to a power is commensurate to its potential significance (as is set out in Section 3 of this report).

The Constitution Committee examines and reports on whether delegated powers are constitutionally appropriate. Like the DPRRC, the Constitution Committee does not apply fixed criteria. The Constitution Committee's remit enables the use of a range of constitutional norms to analyse delegated powers. Since it was established, the Constitution Committee has set out a range of reasons in its reports as to why powers can be constitutionally unacceptable. These are set out in the Constitution Unit's analysis of the Committees reports 2001-2017.<sup>25</sup> This report builds on that analysis.

The Constitution Committee's 2018 report, 'The Legislative Process: The Delegation of Powers', set out their disquiet at the Government's approach to delegated powers:

*We do not accept that there is a "high threshold" for the inclusion of delegated powers in bills and it is unacceptable that the delegation of power is seen by at least some in the Government as a matter of what powers they can get past Parliament.*<sup>26</sup>

In that 2018 report, 'The Legislative Process: The Delegation of Powers', the Constitution Committee agreed with the DPRRC that it would be "hard to design a prescriptive list" to govern when it is inappropriate to use a delegated power or for when a particular procedure should be attached to a power.<sup>27</sup> Nonetheless, the Committee noted that the Government should conform to the principles set out in the DPRRC's guidance (set out in section 3).

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<sup>22</sup> Bingham Centre for the Rule of Law—Written evidence ([LEG0052](#)).

<sup>23</sup> DPRRC terms of reference (i).

<sup>24</sup> Delegated Powers and Regulatory Reform Committee 7th Report of Session 2014–15 Special Report: Quality of Delegated Powers Memoranda (HL Paper 39) p. 47.

<sup>25</sup> Jack Simson Caird, Robert Hazell and Dawn Oliver, '[The Constitutional Standards of the House of Lords Select Committee on the Constitution](#)' Constitution Unit University College London (Third Edition) (2017).

<sup>26</sup> Select Committee on the Constitution 16th Report of Session 2017–19 HL Paper 225 [The Legislative Process: The Delegation of Powers](#) HL Paper 225 para 15.

<sup>27</sup> Select Committee on the Constitution 16th Report of Session 2017–19 HL Paper 225 [The Legislative Process: The Delegation of Powers](#) HL Paper 225 para 35.

The principles set out by the DPRRC could be expanded and could perhaps include some of the standards applied by the Constitution Committee in its previous reports. If both committees wish to see the Government raise the threshold by which the government includes delegated powers, there may be a case for a stricter and more prescriptive approach in terms of delineating the boundary of what is constitutionally unacceptable. A dogmatic approach to the boundary between primary and secondary legislation is unlikely to be workable, however, that is not to say that parliamentary committees should not apply some pressure on the Government to adhere to a more principled approach.

In evidence given to the DPRRC in 2014, the then-First Parliamentary Counsel, Richard Heaton, noted that the Government has “no formal guidance” on the appropriate level of parliamentary scrutiny for delegated powers matters and that the civil service approach “has been to treat every delegated power on its merits”.<sup>28</sup> There is a risk that if both the Government and parliamentary committees take this pragmatic approach, then the principled basis for determining how to regulate delegated powers will remain under-developed.

## Scrutiny of delegated legislation

The Joint Committee on Statutory Instruments (JCSI) uses a broadly framed set of technical grounds set out in the Standing Orders of the Lords and the Commons as the basis for its scrutiny of statutory instruments (see Box 1 above).<sup>29</sup> Daniel Greenberg, Counsel for Domestic Legislation in the House of Commons, describes the JCSI as “the most important technical scrutiny committee”.<sup>30</sup> The JCSI’s scrutiny criteria necessarily restricts the committee to ‘technical matters’, as wider questions on the legality of an instrument or whether it is an ‘unusual’ exercise of the power do sometimes raise matters of policy. The JCSI’s technical remit serves to distinguish its work from the other permanent parliamentary committee that examines delegated legislation: the House of Lords Secondary Legislation Scrutiny Committee (‘SLSC’). The SLSC conducts ‘merits’ scrutiny.

The SLSC’s terms of reference (Box 4 below) set out the grounds for drawing an instrument to the special attention of the House of Lords.

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<sup>28</sup> Delegated Powers and Regulatory Reform Committee 7th Report of Session 2014–15 [Special Report: Quality of Delegated Powers Memoranda](#) (HL Paper 39) para 33.

<sup>29</sup> House of Commons Standing Order No 151 and House of Lords Standing Order No 73 – See Erskine May’s treatise on the law, privileges, proceedings and usage of Parliament (25th edition, 2019) para 31.32.

<sup>30</sup> Daniel Greenberg, [Implications for Brexit legislation: technical scrutiny of statutory instruments](#) Legal Insights Europe Thomson Reuters 22 August 2018.

## Box 2: The SLSC's terms of reference

- (a) that it is politically and legally important or gives rise to issues of public policy likely to be of interest to the House;
- (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;
- (c) that it may inappropriately implement European Union legislation;
- (d) that it may imperfectly achieve its policy objectives;
- (e) that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation;
- (f) that there appear to be inadequacies in the consultation process which relates to the instrument;
- (g) that the instrument appears to deal inappropriately with deficiencies in retained EU

In practice, the SLSC draws most instruments to the attention of the House on the basis that they are politically and legally important or give rise to issues of public policy: in the twelve months from April 2018 to April 2019, 96% of the instruments reported by the SLSC were on this ground.<sup>31</sup> This ground allows the committee to make a value, or political judgment (as opposed to a technical judgment) on whether an instrument should be subject to special consideration. However, in practice whether an instrument is politically or legally important is also informed by 'technical factors', for example whether it amends an Act of Parliament. Some of the other grounds in the SLSC's terms of reference – such as the quality of the explanatory material (Box 4 above, criteria (e)) – are arguably more technical in nature. The distinction between 'technical' and 'merits' scrutiny may not be watertight, but in reality the form of scrutiny carried out by the SLSC is clearly distinct from that performed by the JCSI.

The European Statutory Instruments Committee (ESIC) and the SLSC both sift all the Brexit statutory instruments for which the Government proposes to use the negative procedure. Both the ESIC and the SLSC rely on the criteria of 'political and legal importance' (ground (a) from the SLSC's terms of reference) for determining if an instrument should be upgraded from the negative to the affirmative procedure. As a criteria it is designed to be flexible so that each instrument can be judged in context, but also can be used as the basis for identifying a range of issues within an instrument. The SLSC explain that in practice this amounts to a test of whether a proposed instrument covers matters which is 'of such significance that the House would expect to debate it'<sup>32</sup>

The process of sifting statutory instruments is primarily concerned with whether an instrument should be drawn to the attention of the House and made subject to the affirmative procedure, rather than whether the instrument itself is or is not problematic. In practice, by drawing

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<sup>31</sup> Secondary Legislation Scrutiny Committee 51st Report of Session 2017–19 [Work of the Committee in Session 2017–19: Second Interim Report](#) HL Paper 376 para 9.

<sup>32</sup> Secondary Legislation Scrutiny Committee 37th Report of Session 2017–19 Sifting "proposed negative instruments" laid under the European Union (Withdrawal) Act 2018: criteria and working arrangements HL Paper 174 para 32.

attention to the reasons for which an instrument should be debated in the relevant House, the SLSC and ESIC may identify principles that have been breached. As a result, the normative basis on which 'proposed negatives' are sifted by the SLSC and the ESIC is not all that different from the merits scrutiny performed by the SLSC for all instruments. Importantly, the ESIC has increased the House of Commons' capacity to scrutinise delegated legislation. As Adam Tucker has noted, proposed negatives are "among the best scrutinised in the UK constitution" as they are sifted by a specialist committee in both the Commons and the Lords.<sup>33</sup> However, the ESIC is limited in its capacity to develop its normative formative framework by the fact that it only examines proposed negatives under the EU (Withdrawal) Act 2018.

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<sup>33</sup> A. Tucker, '[A First Critical Look at the Scrutiny of Delegated Legislation in the Withdrawal Agreement Bill](#)', U.K. Const. L. Blog (24th Oct. 2019)

### 3. Legislating for Brexit: the role of delegation

This is an important moment for the debate on delegated powers and legislation and the role of parliamentary scrutiny. Delegated powers, including Henry VIII powers, and delegated legislation have been central to the Government's strategy of legislating for Brexit. The Government's justification for its programme's reliance on delegated powers and delegated legislation has been based on three main factors: uncertainty, the need to adjust policy, and technicality.<sup>34</sup>

The uncertainty over the outcome of the negotiations with the EU prompted the Government to ask Parliament to create a network of Brexit powers that can be used to legislate to prepare the statute book for a range of different Brexit scenarios. For example the powers in the EU (Withdrawal) Act 2018 were designed to enable ministers to make delegated legislation that can prepare for both leaving the EU without an agreement on exit day *and* the end of the transition period.

In terms of adjusting policy, the Government has pointed to a large amount of EU law which will remain part of the statute book post-Brexit and which will need to be adapted to work outside of the EU. The Government has also pointed out that many of the changes required to ensure that retained EU law operates effectively are technical in nature and therefore suitable for change via statutory instruments.

The treaty (or treaties) on the Future Relationship will cover a broad range of policy areas, and the Government will almost certainly rely on delegated powers to deliver the detailed legislation to implement the agreement (or agreements). The Government will ask for delegated powers that facilitate divergence from EU law, as in the Agriculture Bill introduced on 16 January 2020. If the Government decides to maintain alignment with EU law in specific policy areas, then delegated powers, as seen in the Financial Services Bill in the 2017-19 session, will be needed.<sup>35</sup> If the UK leaves the implementation period without a treaty on the future relationship, then delegated powers and delegated legislation may need to be enacted in a short time-frame.<sup>36</sup>

Parliament's response to this programme of delegated powers and delegated legislation on Brexit, through its principal scrutiny committees, will have long-term implications for the way in which the legislative process works. As the debate over the constitutionality of delegated powers is likely to continue and intensify in the course of the 2019 Parliament, it is important that lessons are learnt from the experience in 2017-19. The Rule of Law in the UK could be strengthened if parliamentary committees can push the Government to ensure that the

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<sup>34</sup> Department for Exiting the EU, [Legislating for the United Kingdom's withdrawal from the European Union](#), March 2017 para 3.9.

<sup>35</sup> European Scrutiny Committee - [Inquiry on Post-Brexit Scrutiny of EU Law and Policy Written evidence](#) submitted by Dr Jack Simson Caird 30 August 2019.

<sup>36</sup> Nyasha Weinberg, [No Deal Brexit, Business and the Rule of Law](#), The Bingham Centre for the Rule of Law, 4 October 2019.

highest possible levels of transparency and accessibility are maintained throughout the process of legislating for Brexit.

## Brexit and delegated powers in 2017–19

In the 2017-19 parliamentary session, the Government's Brexit Bills contained 269 delegated powers. Many of these did not reach the statute book because a number of Brexit Bills did not complete their parliamentary stages in the 2017-19 parliamentary session. Of course, the raw numbers do not tell the whole story. An individual delegated power (for example, the power to correct 'deficiencies' in section 8 of the EU (Withdrawal) Act 2018) could be more constitutionally and legally significant than all 145 delegated powers in the Taxation (Cross-Border Trade) Act 2018. Table 2 highlights the 269 delegated powers contained in the Brexit Bills in 2017-19 and references the powers which generated concerns from the DPRRC and the Constitution Committee.

**Table 2: Delegated powers in Brexit Bills in 2017–19 parliamentary session**

Name of Bill	No. of Delegated Powers	Delegated powers questioned by DPRRC	Delegated powers questioned by Constitution Committee
European Union (Withdrawal) Bill	14	<a href="#">Clauses 7, 8, 9, 11, 17, Schs 3 4, 5, 7</a>	<a href="#">Clauses 7, 8, 9, 17</a>
Nuclear Safeguards Bill	8	<a href="#">Clauses 1-2</a>	N/A
Sanctions and Anti-money Laundering Bill	17	<a href="#">Clauses 1, 16, 39, 41</a>	<a href="#">Clauses 1, 16, 39, 41, 44</a>
Trade Bill	7	N/A	<a href="#">Clause 2</a>
Taxation (Cross-Border Trade) Bill	145	<a href="#">Clauses 31, 32, 37, 39, 42, 45, 47, 51</a>	<a href="#">Clauses 32, 37</a>
Agriculture Bill	26	<a href="#">Clauses 3, 6, 9, 11, 20, 23, 25, Sch 1 3(1)</a>	N/A
Immigration and Social Security Co-ordination (EU Withdrawal) Bill	4	<a href="#">Clauses 4, 5</a>	N/A
Fisheries Bill	23	<a href="#">Clause 22</a>	N/A

Animal Welfare (Sentencing) Bill	0	N/A	N/A
Haulage Permits and Trader Registration Bill	17	<a href="#">Clauses 1, 2, 3</a>	<a href="#">Clauses 1, 2, 8 and 17</a>
Environmental Principles and Governance Bill (Draft Bill)	4	N/A	N/A
Healthcare (EEA and Switzerland) Bill	4	Clauses 2, 5	<a href="#">Clauses 2, 5</a>

### The delegated powers in the EU (Withdrawal) Act 2018

Before the EU (Withdrawal) Bill was published in July 2018, the issue of the Henry VIII powers in the Bill became a political football. Jeremy Corbyn, the then-leader of the Opposition, told 'Peston', ITV's main political programme in March 2017, that the proposed Henry VIII Powers could "override parliament, override democracy, and just set down a series of diktats on what's going to happen in the future".<sup>37</sup> When the Bill was going through Parliament, the two key parliamentary committees on delegated powers, the Constitution Committee and the DPRRC, were both extremely critical of the powers in the Bill. Despite the favourable parliamentary arithmetic, which resulted in a number of significant changes to other areas in the Bill, the legal limits in the powers were not significantly changed as a result of parliamentary scrutiny. It is important not to underestimate the impact of both of these committees' scrutiny on the basis that limited changes were made to the relevant powers as the Bills progressed through Parliament. Indeed in relation to the EU (Withdrawal) Bill the Government made it clear that it had sought to anticipate the Constitution Committee's concerns when drafting the powers in the Bill.<sup>38</sup>

### The delegated powers in the EU (Withdrawal Agreement) Act 2020

Parliament enacted the EU (Withdrawal Agreement) Act 2020 on 23 January 2020. The 2020 Act contains 24 delegated powers designed to enable the Government to use delegated legislation to implement the Withdrawal Agreement. The powers in the EU (Withdrawal Agreement) Act 2020 were much less controversial than the powers in the 2018 Act, principally because the powers in the 2020 Act are legally limited by their purpose: giving effect to the directly effective provisions in the Withdrawal Agreement.<sup>39</sup> The fact that these powers were not on their face as objectionable as those in the 2018 Act does not mean that the delegated legislation made through these powers will not be controversial. For example, statutory instruments made to implement the Ireland/Northern Ireland Protocol, through sections 21 and

<sup>37</sup> Josh May, [Jeremy Corbyn warns on 'dictatorial' Henry VIII powers in Great Repeal Bill row](#), Politics Home 26 March 2017.

<sup>38</sup> Department for Exiting the EU, [Legislating for the United Kingdom's withdrawal from the European Union](#), March 2017.

<sup>39</sup> House of Commons Library, [Constitutional Implications of the Withdrawal Agreement Legislation](#) (CBP 08805) 20 February 2020 p.40-41.

22, are likely to be high-profile and will raise concerns over how Parliament, and the devolved legislatures, scrutinise delegated legislation.<sup>40</sup>

## Brexit and delegated legislation in 2017–19

In the 2017-19 session, the Government laid a total of 2,323 instruments in Parliament and 523 Brexit statutory instruments were approved.<sup>41</sup> The number of Brexit statutory instruments was lower than was initially predicted by the Government: in March 2017, the Government had said that there might be between 800-1000 laid.<sup>42</sup> As with delegated powers, the number of statutory instruments does not tell us much in and of itself, as a number of these SIs have been exceptionally large. For example, the Draft Product Safety and Metrology etc (Amendment etc.) (EU Exit) Regulations 2019, which was introduced to Parliament in February 2019, was over 600 pages long. The Secondary Legislation Committee in the House of Lords outlined the scale of the task facing Parliament:

*Preparations for leaving the European Union have required Parliament to consider, in a short period of time, an extraordinary volume of secondary legislation, much of it complex, lengthy and making provision for the significant consequences of a 'no deal' exit from the EU.<sup>43</sup>*

The Public Law Project's SIFT project, in partnership with the Hansard Society, was established to monitor and scrutinise Brexit Statutory Instruments to "check they conform to public law standards and do not undermine fundamental rights". The research produced by this project has shown that some Brexit statutory instruments are "reforming law and government".<sup>44</sup> They cite the example of the 80-page Capital Requirements (Amendment) (EU Exit) Regulations 2018, which "transfers enforcement functions to HM Treasury, the Prudential Regulation Authority, and the Financial Conduct Authority" and therefore represents "serious law-making and governmental change".<sup>45</sup> A number of Brexit statutory instruments have been changed as a result of scrutiny by parliamentary committees and civil society groups. Sinclair and Tomlinson cite the example of the Transmissible Spongiform Encephalopathies and Animal By-Products (Amendment etc.) (EU Exit) Regulations 2018, which removed a statutory duty to ensure staff had appropriate education and training in relation to mad cow disease checks.<sup>46</sup> The Secondary Legislation Scrutiny Committee, which looks at the merits of statutory instruments, criticised its removal and as a result the duty was preserved.<sup>47</sup>

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<sup>40</sup> Jack Simson Caird and Oliver Garner, [The European Union \(Withdrawal Agreement\) Bill and the Rule of Law](#) Bingham Centre Report 10 January 2020

<sup>41</sup> House of Commons Sessional Returns Session 2017–19

<sup>42</sup> Department for Exiting the EU, [Legislating for the United Kingdom's withdrawal from the European Union](#), March 2017 p24.

<sup>43</sup> Secondary Legislation Scrutiny Committee, [Assessing the scrutiny work of the Committee and information resources relating to secondary legislation](#) (45th Report of Session 2017–19; HL 312) p.1

<sup>44</sup> A. Sinclair and J. Tomlinson, ['Eliminating Effective Scrutiny: Prorogation, No Deal Brexit, and Statutory Instruments \(Part 2\)'](#), U.K. Const. L. Blog (17th Sept. 2019); A. Sinclair and J. Tomlinson, ['Brexit Delegated Legislation: Problematic Results'](#), U.K. Const. L. Blog (9th Jan. 2020).

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> Secondary Legislation Scrutiny Committee (Sub-Committee B), 8th Report of Session 2017-19, HL Paper 244

The threat of legal challenge means that the system of scrutiny can have a major impact early on in the legislative process. In October 2019, the Government published the Cross-border Trade (Public Notices) (EU Exit) Regulations 2019. The instrument itself contained a power to amend primary legislation via notice. The Public Law Project sent a pre-action protocol letter to the Government raising doubts over whether the instrument was intra vires. Shortly after, the Government withdrew the instrument.<sup>48</sup>

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<sup>48</sup> M.Fouzder, [Government revokes Brexit regulation after judicial review threat](#), Law Society Gazette, 17.10.19

## 4. Parliament's scrutiny of delegated powers in 2017-19

This section contains a set of standards relating to delegated powers drawn from the reports of the DPRRC and the Constitution Committee (see box 3 below) during the 2017-19 Parliament (and in special reports from earlier sessions). We have divided these standards into four categories: general principles, limiting a power, justifying a power and the Delegated Powers Memorandum.

### Box 3: The DPRRC

[The Delegated Powers and and Regulatory Reform Committee](#) is Parliament's principal mechanism for scrutinising delegated powers in government bills. The DPRRC was established in 1994 following growing concern over the use of delegated powers. The Committee is composed of ten peers and is supported by a secretariat which includes a legal adviser. The Committee's terms of reference state that it should 'report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny'.

### The House of Lords Select Committee on the Constitution

[The House of Lords Select Committee on the Constitution](#) was established in 2001. The Committee reports on bills with constitutional implications. As part of its constitutional remit, it frequently makes recommendations relating to delegated powers in government bills. The Committee is composed of twelve peers and is supported by a secretariat which includes two legal advisers. The Committee also conducts inquiries into constitutional matters "to keep under review the operation of the constitution." The committee has produced a number of reports on the role of delegated powers in the legislative process, including '[The Legislative Process: The Delegation of Powers](#)', which was published on 20 November 2018.

### General principles

- Skeleton bills inhibit parliamentary scrutiny and should be avoided.<sup>49</sup>
- Politically sensitive matters should in principle be dealt with through primary rather than secondary legislation.<sup>50</sup>

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<sup>49</sup> Constitution Committee 16th Report (HL Paper 225) para 58.

<sup>50</sup> DPRRC 59th Report (HL Paper 408) para 11.

- Any delegated powers should be assessed not simply on how the present Government proposes to use them, but on how any future Government could use them.<sup>51</sup>
- Legislation should not be camouflaged as ‘guidance,’ especially where provisions are to have mandatory effect.<sup>52</sup>
- Guidance is not legislation and should not include matters that should properly be in legislation.<sup>53</sup>
- Delegated powers should be sought only when their use can be clearly anticipated and defined.<sup>54</sup>
- As a rule, the level of Parliamentary scrutiny required should be judged by reference to the whole range of provisions which *may* be included under the powers conferred by the Bill.<sup>55</sup>

### Limiting a power

- Subjective “appropriateness” tests should be circumscribed in favour of tests based on objective necessity.<sup>56</sup>
- Ministers must not have the power to choose whichever procedure they like for statutory instruments made under a Bill.<sup>57</sup>
- A delegated power should not be able to repeal the Act of Parliament from which it is drawn.<sup>58</sup>
- Delegated powers conferred for the purpose of converting EU law into UK law should not be used to implement new policies.<sup>59</sup>
- Limits on powers must be set out on the face of the Bill, not solely within the memorandum.<sup>60</sup>
- Any key terms should be defined on the face of the Bill, not through secondary legislation.<sup>61</sup>
- Delegated powers should be no wider than required to achieve the stated aims.<sup>62</sup>
- Delegated powers that have the potential to make policy changes must be tightly circumscribed on the face of the Bill.<sup>63</sup>

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<sup>51</sup> DPRRC 1st Report (HL Paper 10) at para 33; DPRRC 7<sup>th</sup> Report of Session 2014-15, Special Report: Quality of Delegated Powers Memoranda (HL Paper 39) para 32; DPRRC, Guidance for Departments, July 2014 para 29

<sup>52</sup> DPRRC 31st Report (HL Paper 177) paras 4, 8.

<sup>53</sup> DPRRC 31st Report (HL Paper 177) paras 4, 8.

<sup>54</sup> Constitution Committee, 16th Report (HL Paper 225) para 48.

<sup>55</sup> DPRRC 1st Report (HL Paper 10) para 9.

<sup>56</sup> DPRRC 3rd Report (HL Paper 22) para 21; DPRRC 12th Report (HL Paper 73) paras 12, 37; DPRRC 34th Report (HL Paper 194) para 16.

<sup>57</sup> DPRRC 12th Report (HL Paper 73) para 3.

<sup>58</sup> DPRRC 12th Report (HL Paper 73) para 22.

<sup>59</sup> Constitution Committee 3rd Report (HL Paper 19) para 39.

<sup>60</sup> DPRRC 16th Report (HL Paper 85) para 5.

<sup>61</sup> DPRRC 1st Report (HL Paper 10) paras 16-17; DPRRC 13th Report (HL Paper 77) paras 12-14; DPRRC 16th Report (HL Paper 85) para 5; DPRRC 22nd Report (HL Paper 123) para 9

<sup>62</sup> DPRRC 21st Report (HL Paper 122) para 11.

<sup>63</sup> Constitution Committee 9th Report (HL Paper 69) para 184.

- Henry VIII powers should be subject to the affirmative procedure, apart from in exceptional cases.<sup>64</sup>
- The inclusion of sunset clauses may mitigate constitutional concerns raised by broad delegated powers.<sup>65</sup>
- It is constitutionally inappropriate to establish public bodies through delegated powers.<sup>66</sup>
- Public bodies should be established via primary legislation and dissolved via primary legislation.<sup>67</sup>
- Revisions to the devolution settlements should not be dealt with by delegated legislation.<sup>68</sup>
- Where a power is sought to amend devolved legislation, it must be subject to a statutory requirement to consult the relevant devolved administration.<sup>69</sup>
- Tertiary legislation should be subject to the same parliamentary control and time limits as secondary legislation.<sup>70</sup>
- The affirmative procedure is required for consequential amendments to primary legislation.<sup>71</sup>
- Powers which are intrusive and liable to affect individual rights should be subject to the affirmative procedure.<sup>72</sup>
- If the subject matter of delegated legislation calls for use of the affirmative procedure, this procedure must apply each time regulations are updated in connection with that subject matter.<sup>73</sup>
- Where a power is open-ended and may change over time, the affirmative procedure should apply to all exercises of that power.<sup>74</sup>
- Where a statutory instrument includes provisions subject to both the negative and affirmative procedure, the higher level of Parliamentary scrutiny should apply.<sup>75</sup>
- Where a Bill allows for the Minister or regulator to issue guidance and there is a statutory requirement to have regard to the guidance, it should be accompanied by a parliamentary procedure.<sup>76</sup>
- If the subject matter of any guidance is sensitive, such matter should be contained in subordinate legislation made by Statutory Instrument, and should be subject to Parliamentary scrutiny.<sup>77</sup>

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<sup>64</sup> DPRRC 3rd Report (HL Paper 22) para 102; DPRRC 11th Report (HL Paper 65) para 21; DPRRC, Guidance for Departments, July 2014 para 37.

<sup>65</sup> DPRRC 15th Report (HL Paper 84) para 2.

<sup>66</sup> Constitution Committee 22nd Report (HL Paper 375) para 6.

<sup>67</sup> DPRRC 1st Report (HL Paper 10) para 20.

<sup>68</sup> DPRRC 12th Report (HL Paper 73) para 33; Constitution Committee, 16th Report (HL Paper 225) para 70.

<sup>69</sup> DPRRC 12th Report (HL Paper 73) para 33; Constitution Committee, 16th Report (HL Paper 225) para 70.

<sup>70</sup> DPRRC 11th Report (HL Paper 65) para 30.

<sup>71</sup> DPRRC 12th Report (HL Paper 73) para 38.

<sup>72</sup> DPRRC 7th Report (HL Paper 38) para 25.

<sup>73</sup> DPRRC 1st Report (HL Paper 10) para 33.

<sup>74</sup> DPRRC 16th Report (HL Paper 85) para 9.

<sup>75</sup> DPRRC 7th Report (HL Paper 38) para 27.

<sup>76</sup> DPRRC 1st Report (HL Paper 10) para 24.

<sup>77</sup> DPRRC 31st Report (HL Paper 177) para 36.

## Justifying a power

- Widely-drafted and extensive delegated powers, and those with potentially far-reaching consequences, require a full, detailed, and compelling justification as to why such powers are necessary and appropriate.<sup>78</sup>
- “Flexibility” is not a good enough reason to pass laws by secondary instead of primary legislation – a more detailed explanation is necessary.<sup>79</sup>
- All delegated powers require compelling justification.<sup>80</sup>
- If a delegated power can create a criminal offence by delegated legislation, a compelling justification is required.<sup>81</sup>
- All Henry VIII powers must be identified, fully explained and justified.<sup>82</sup>
- If 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.<sup>83</sup>
- The need to react quickly in response to global events and ensure timely compliance with international obligations are acceptable justifications for delegated legislation.<sup>84</sup>
- If a bill is, in effect, a skeleton bill (so that the real operation of the Act would be entirely by the regulations, or orders made under it), or if part of a bill is, in effect, a skeleton part of a bill, the Committee will expect a full justification for the decision to adopt that structure of powers.<sup>85</sup>
- It is necessary to provide an explanation as to why a delegated power is cast in wide terms.<sup>86</sup>

## The Delegated Powers Memorandum

- A delegated powers memorandum must both fully explain the scope of the powers and the reasons they are being taken.<sup>87</sup>
- Where a power is delegated to a person or body other than a Minister, the delegated powers memorandum must explain why the power has been conferred on that particular person or body.<sup>88</sup>
- With regard to any power to make incidental, consequential or similar provision:
  - where it is a Henry VIII power, the memorandum should explain why the particular 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

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<sup>78</sup> DPRRC 6th Report (HL Paper 29) at 51; DPRRC 27th Report (HL Paper 141) para 12.

<sup>79</sup> DPRRC 6th Report (HL Paper 29) at 34; DPRRC, *Guidance for Departments*, July 2014 para 29.

<sup>80</sup> Constitution Committee, 16th Report (HL Paper 225) p. 3.

<sup>81</sup> DPRRC 7th Report (HL paper 38) para 28.

<sup>82</sup> DPRRC 3rd Report (HL Paper 22) para 8; DPRRC 7th Report (HL Paper 38) para 34; Delegated Powers and Regulatory Reform Committee 7th Report of Session 2014–15 Special Report: Quality of Delegated Powers Memoranda (HL Paper 39) p. 47.

<sup>83</sup> DPRRC 7th Report of Session 2014–15 Special Report: Quality of Delegated Powers Memoranda (HL Paper 39) p. 47.

<sup>84</sup> DPRRC 7th Report (HL Paper 38) para 16.

<sup>85</sup> DPRRC 7th Report of Session 2014–15 Special Report: Quality of Delegated Powers Memoranda (HL Paper 39) p. 47

<sup>86</sup> DPRRC 6th Report (HL Paper 29) at 51; DPRRC 27th Report (HL Paper 141) para 12.

<sup>87</sup> DPRRC 1st Report (HL Paper 10) para 7.

<sup>88</sup> DPRRC, [Guidance for Departments](#), July 2014 para 29.

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 which is included 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.<sup>89</sup>
- 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.<sup>90</sup>
- A delegated powers memorandum must fully justify: any unusual or novel delegations of power; powers to define, or amend definitions of, key expressions used in the bill; powers to interfere with vested rights or legal (for example, ordinary contractual) relationships; powers to make provision, by directions, or in codes or 'guidance'.<sup>91</sup>
- The delegated powers memorandum should identify every provision for delegated legislation in the bill. Given that powers to give directions, issue codes of practice etc. can be delegated legislative powers, to the extent that they are in a particular bill, the memorandum should cover them as well. Where a power is considered not to be legislative in character, the memorandum should explain fully why this is thought to be the case.<sup>92</sup>
- If the Government tables amendments to a bill involving further delegated powers, a further memorandum must be prepared and the DPRRC may report again.<sup>93</sup>

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<sup>89</sup> DPRRC 7th Report of Session 2014–15 Special Report: Quality of Delegated Powers Memoranda (HL Paper 39) p. 47–48.

<sup>90</sup> DPRRC 7th Report of Session 2014–15 Special Report: Quality of Delegated Powers Memoranda (HL Paper 39) p. 48.

<sup>91</sup> DPRRC, [Guidance for Departments](#), July 2014 para 29.

<sup>92</sup> DPRRC 7th Report of Session 2014–15, Special Report: Quality of Delegated Powers Memoranda (HL Paper 39); DPRRC, [Guidance for Departments](#), July 2014 p. 9.

<sup>93</sup> DPRRC, [Guidance for Departments](#), July 2014 p.10.

## 5. Parliament's scrutiny of delegated legislation in 2017-19

This section contains a set of standards relating to delegated legislation drawn from the reports of the JCSI, the SLSC and the ESIC (see box 4 below), published during the 2017-19 Parliament (and from special reports from earlier sessions). We have divided these standards into four categories: general principles, accessibility of the law, procedure and explanatory material.

### Box 4: The Joint Committee on Statutory Instruments

[The Joint Committee on Statutory Instruments](#) scrutinises consider statutory instruments made in exercise of powers granted by Acts of Parliament. The Committee is composed of seven MPs and seven peers. The secretariat of the Committee includes lawyers from both the House of Commons and the House of Lords. The Committee's remit is set out in [House of Commons Standing Order No. 151](#) and [House of Lords Standing Order No.73](#).

### The European Statutory Instruments Committee

[The European Statutory Instruments Committee](#) ('ESIC') was established in 2018 in order to sift "proposed negative instruments" under section 8 of the EU (Withdrawal) Act 2018. ESIC examines these instruments and can then recommend that the instrument be subject to the affirmative procedure. The Committee is composed of 16 MPs and the secretariat includes lawyers from the House of Commons. [The Public Engagement pages](#) of ESIC's website explains that the Committee considers whether an instrument proposes an 'important' change to the law, which it defines as 'whether it proposes to amend existing law or make new law in a way which is significant'.

### The Secondary Legislation Scrutiny Committee

[The Secondary Legislation Scrutiny Committee](#) examines the policy merits of statutory instruments and other types of secondary legislation that are subject to parliamentary procedure. The Committee is the successor to the Merits of Statutory Instruments Committee which existed until the end of the 2010-12 session. The Committee is composed of 11 peers.

Since 2018, the Committee has conducted two stages of scrutiny. Stage 1 scrutiny, looks at instruments the government proposes should be laid as negatives, or 'proposed negatives' under the European Union (Withdrawal) Act 2018, and makes recommendations about whether these instruments should remain as negatives or be 'upgraded' to the affirmative resolution procedure.

For stage 2 scrutiny the Committee examines all instruments and other types of secondary legislation that are subject to a parliamentary procedure. For stage 2 scrutiny, the Committee's scrutiny is based on [its terms of reference](#). The Committee's principle basis for reporting on an instrument is that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House (4(a)).

## General principles

- As a matter of principle, legislation should not use expressions that go beyond the intended policy, and then attempt to narrow them through guidance or advice (in the absence of express enabling power to operate in that way).<sup>94</sup>
- Provisions with no legal effect should not be presented as if they were operative provisions.<sup>95</sup>
- If a consultation is required, the preamble should state that it has taken place.<sup>96</sup>
- There is a strong presumption against subordinate legislation interfering with primary legislation. Where amendments are made to primary legislation (however minor) there must be express power to make those amendments.<sup>97</sup>
- Sub-delegations of power must be clearly authorised by the parent Act of Parliament.<sup>98</sup>
- Delegated legislation should not be used to impose taxation without the consent of Parliament, taxation must be embodied in statute and expressed in clear terms.<sup>99</sup>
- Combining wide ranging policy areas in one instrument impedes scrutiny and should be avoided.<sup>100</sup>
- It is not good practice to include in a proposed negative instrument corrections to other instruments which are not related to the main substance of the draft Regulations.<sup>101</sup>
- The Government should avoid bundling together a number of legislative measures into a single statutory instrument of exceptional size and complexity as this can result in a challenge to effective parliamentary scrutiny and risks compromising the accessibility of the law.<sup>102</sup>

## Accessibility of the law

- In order for citizens to understand the effect of the law, documents referred to in subordinate legislation should be made publicly available, via the internet and in hard copy.<sup>103</sup>
- Information that readers may reasonably require in order to understand the effect of the instrument should be included in the instrument itself.<sup>104</sup>
- It is a principle of legislative drafting relied on by the courts and other readers in legislative interpretation that a change of language should signal a change of meaning.<sup>105</sup>

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<sup>94</sup> JCSI 26th Report (HL Paper 155, HC Paper 542-xxvi) para 3.6.

<sup>95</sup> JCSI 39th Report (HL Paper 224, HC Paper 542-xxxvii) para 2.5.

<sup>96</sup> JCSI 4th Report (HL Paper 44, HC Paper 542-iv) paras 7.4-7.5.

<sup>97</sup> JCSI 4th Report (HL Paper 44, HC Paper 542-iv) para 5.5.

<sup>98</sup> JCSI 30th Report (HL Paper 181, HC Paper 542-xxx) para 3.29.

<sup>99</sup> JCSI 42nd Report (HL Paper 247, HC Paper 542-xi) para 1.18.

<sup>100</sup> SLSC Sub-Committee A 17th Report of Session 2017–19 HL Paper 292 para 8.

<sup>101</sup> SLSC Sub-Committee A 18th Report of Session 2017–19 HL Paper 297 para 3.

<sup>102</sup> SLSC Sub-Committee B 17th Report of Session 2017–19 HL Paper 293 paras 52-57.

<sup>103</sup> JCSI 4th Report (HL Paper 44, HC Paper 542-iv) paras 1.5, 3.5; JCSI 5th Report (HL Paper 47, HC Paper 542-v) paras 3.4, 5.6; JCSI 7th Report (HL Paper 57, HC Paper 542-vii) para 2.4; JCSI 11th Report (HL Paper 72, HC Paper 542-xi) para 7.3; JCSI 17th Report (HL Paper 108, HC Paper 542-xvii) para 2.4.

<sup>104</sup> JCSI 7th Report (HL Paper 57, HC Paper 542-vii) para 1.3; JCSI 11th Report (HL Paper 72, HC Paper 542-xi) para 2.4.

<sup>105</sup> JCSI 19th Report - 7 Statutory Instruments reported (Nineteenth Report) (HL Paper 121, HC Paper 542-xix) para 1.3.

- Any changes to subordinate legislation must be transparent and accountable.<sup>106</sup>
- Statutory Instruments should be sufficiently clear, precise, and certain to ensure that guidance need not be relied on to interpret them.<sup>107</sup>
- Provisions must be drafted clearly and precisely in regards to who will be affected, and any differences or changes in terminology must be explained.<sup>108</sup>
- Expressions which have no obvious everyday meaning must be defined.<sup>109</sup>
- Statutory Instruments must be internally consistent, avoid ambiguity, avoid duplicatory powers, and should accord with statements of intention. Unusual or unnatural expressions must be defined in the Instrument.<sup>110</sup>
- Correction slips cannot be used to make substantive changes: corrections which affect legislative intent must be made by an amending instrument, not a correction slip. They should only be issued when there are obvious errors and there is no possibility a court or users of the legislation can interpret it in any way other than that which was intended.<sup>111</sup>
- Given that legislation that governs statutory instruments does not expressly specify what provisions in an instrument count as operative, there should be a clear presentational distinction between operative and inert material in a Statutory Instrument.<sup>112</sup>
- The auxiliary verb “will” should only be used in legislation with straightforward future effects.<sup>113</sup>

## Procedure

- An instrument, which in disengaging from EU obligations, and results in a diminution of rights, should be subject to affirmative resolution.<sup>114</sup>
- Every provision purporting to impose a legal obligation should make clear either by express provision or by necessary implication who is the intended recipient. Such a provision should be enforceable by way of a sanction or other identifiable consequence.<sup>115</sup>
- A delay of 10 calendar days or more will amount to an unjustifiable delay when laying before Parliament.<sup>116</sup>
- It is appropriate to use the affirmative procedure when amending EU exit instruments which were themselves originally subject to the affirmative procedure.<sup>117</sup>

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<sup>106</sup> JCSI 1st Special Report - Transparency and Accountability in Subordinate Legislation - Twenty-Sixth Report (HL Paper 151, HC Paper 1158) para 3.5.

<sup>107</sup> JCSI 18th Report (HL Paper 117, HC Paper 542-xviii) para 1.2.

<sup>108</sup> JCSI 7th Report (HL Paper 57, HC Paper 542-vii) para 1.2.

<sup>109</sup> JCSI 20th Report (HL Paper 127, HC Paper 542-xx) para 1.4.

<sup>110</sup> JCSI 4th Report (HL Paper 44, HC Paper 542-iv) at 4.6, Appendix 2 at 2; JCSI 17th Report (HL Paper 108, HC Paper 542-xvii) paras 1.4, 3.3.

<sup>111</sup> JCSI 5th Report (HL Paper 47, HC Paper 542-vi) at 6.4, 9.4; JCSI 26th Report (HL Paper 151, HC Paper 1158) para 3.10.

<sup>112</sup> JCSI 1st Special Report of Session 2013-14 (HL Paper 6, HC Paper 167) para 6.

<sup>113</sup> JCSI 1st Special Report of Session 2013-14 (HL Paper 6, HC Paper 167) para 13.

<sup>114</sup> ESIC 9th Report (HC Paper 1700) at 3.5; ESIC 10th Report (HC Paper 1794) para 4.3.

<sup>115</sup> JCSI 5th Report (HL Paper 47, HC Paper 542-v) at 6.3; JCSI 34th Report (HL Paper 188, HC Paper xxxii) para 3.6.

<sup>116</sup> JCSI 5th Report (HL Paper 47, HC Paper 542-v) para 10.5; JCSI 15th Report (HL 89, HC 542-xv) para 2.4; JCSI 17th report (HL Paper ) para 1.3; JCSI 21st Report (HL Paper ) para 3.3.

<sup>117</sup> ESIC 19th Report (HC Paper 1934) para 2.4.

- The following will generally be regarded as unacceptable delays in laying before Parliament: delays in printing and publication, desirability of package of documents being laid at the same time, administrative matters (such as cross-Government business planning concerns), machinery of Government delays, political or presentational reasons, and delay in clearing the impact assessment.<sup>118</sup>
- Regulations that create an uneven regulatory playing field between the UK and the EU should be subject to the affirmative procedure.<sup>119</sup>
- For instruments of political and legal importance, or where an instrument introduces a new scheme (and thus an added layer of bureaucracy), the affirmative procedure is recommended.<sup>120</sup>
- The Government should respect the 21-day rule.<sup>121</sup>

### Explanatory material

- The explanatory memorandum should give sufficient detail of the changes being made, and provide a full picture of their effect.<sup>122</sup>
- If the Government proposes that an instrument that proposes to make technical changes to an important and highly sensitive policy area should be subject to the negative procedure, then the accompanying explanatory memorandum should provide a clearer rationale for the chosen approach and an extensive explanation of why the proposed changes do not change policy.<sup>123</sup>
- The explanatory material laid in support of an instrument should provide sufficient information to gain a clear understanding about the instrument's policy objective and intended implementation.<sup>124</sup>
- The impact of a regulation should be clearly explained in the Explanatory Memorandum.<sup>125</sup>
- Explanatory information provided in support of secondary legislation should be sufficiently comprehensive to enable effective Parliamentary scrutiny.<sup>126</sup>
- The impact assessment should be published at the same time as the instrument is laid before Parliament.<sup>127</sup>

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<sup>118</sup> JCSI 26th Report (HL Paper 151, HC Paper 1158) para 2.12.

<sup>119</sup> SLSC Sub-Committee A 4th Report of Session 2017–19 Proposed Negative Statutory Instruments under the European Union (Withdrawal) Act 2018 HL Paper 217 para 2.

<sup>120</sup> ESIC 1st Report (HC Paper 1532) paras 1.4, 2.4, 3.3 and 4.4; ESIC 13th Report (HC Paper 1838) para 3.6.

<sup>121</sup> SLSC Sub-Committee A 15th Report of Session 2017–19 HL Paper 280 paras 22 and 23.

<sup>122</sup> SLSC Sub-Committee A 3rd Report of Session 2017–19 HL Paper 210 para 12.

<sup>123</sup> SLSC Sub-Committee A 9th Report of Session 2017–19 HL Paper 251 para 3.

<sup>124</sup> SLSC Sub-Committee A 14th Report of Session 2017–19 HL Paper 272 paras 4 and 40; SLSC Sub-Committee A 17th Report of Session 2017–19 HL Paper 292 para 1.

<sup>125</sup> SLSC Sub-Committee B 5th Report of Session 2017–19 para 1; SLSC Sub-Committee B 15th Report of Session 2017–19 HL Paper 281 para 34.

<sup>126</sup> SLSC Sub-Committee B 10th Report of Session 2017–19 HL Paper 257 para 5.

<sup>127</sup> SLSC Sub-Committee B 17th Report of Session 2017–19 HL Paper 293 para 36.

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