

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

Guidance for Departments

on the role and requirements of the Committee

October 2007

The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session with the terms of reference “to report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate level of parliamentary scrutiny; to report on documents and draft orders laid before Parliament under the Regulatory Reform Act 2001; and to perform, in respect of such documents and orders and subordinate provisions orders laid under that Act, the functions performed in respect of other instruments by the Joint Committee on Statutory Instruments”.

Current membership

The members of the Delegated Powers and Regulatory Reform Committee are:

The Lord Armstrong of Ilminster GCB CVO
The Rt Hon Lord Boyd of Duncansby PC
The Lord Brett
The Viscount Eccles CBE
Lord Faulkner of Worcester
The Baroness Fritchie DBE
The Baroness Gardner of Parkes
The Lord Goodhart QC (*Chairman*)
The Lord Shaw of Northstead DL

Registered Interests

Members’ registered interests may be examined in the online Register of Lords’ Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the House of Lords Record Office and is available for purchase from the Stationery Office.

Publications

The Committee’s reports are published by the Stationery Office by Order of the House. All publications of the Committee are on the internet at www.parliament.uk/parliamentary_committees/dpr.cfm.

General Information

General information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at www.parliament.uk/about_lords/about_lords.cfm.

Contacts for the Delegated Powers and Regulatory Reform Committee

Any query about the Committee or its work should be directed to the Clerk of the Delegated Powers and Regulatory Reform Committee, Delegated Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020-7219 3103 and the fax number is 020-7219 2571. The Committee’s email address is dpr@parliament.uk.

Historical Note

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that “in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion” (Session 1991–92, HL Paper 35–I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, “be well suited to the revising function of the House”. As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. Following the passage of the Deregulation and Contracting Out Act 1994, the Committee was given the additional role of scrutinising deregulation proposals under that Act and the Committee became the Select Committee on Delegated Powers and Deregulation. In April 2001, the Regulatory Reform Act 2001 expanded the order-making power to include regulatory reform and the Committee, renamed the Delegated Powers and Regulatory Reform Committee, took on the scrutiny of regulatory reform proposals under that Act. The Committee will scrutinise regulatory reform orders under the successor to the 2001 Act, the Legislative and Regulatory Reform Act 2006.

Guidance for Departments

THE DELEGATED POWERS AND REGULATORY REFORM COMMITTEE

1. The Government have agreed to supply a memorandum to the Delegated Powers and Regulatory Reform Committee (DPRRC) on the delegated powers in Government bills. This note sets out the Committee's method of working and attempts to answer some common questions from departments on subjects such as timing and the content of memoranda.
2. Unless otherwise stated, references to reports in this note are references to reports of the DPRRC¹.

HOW THE COMMITTEE WORKS

3. The Committee has ten members and its Chairman is Lord Goodhart. It is supported by a Clerk, a Committee Administrator and a Legal Adviser. The contact details for the Committee can be found at the end of this note. More detailed information about how the Committee works can be found in Special Reports which are published by the Committee from time to time².
4. The Committee's terms of reference, with regard to its delegated powers function, are as follows:³

TERMS OF REFERENCE

"...to report whether the provisions of any bill inappropriately delegate legislative power or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny ..."

5. The Committee considers and reports on all public bills (except supply bills and consolidation bills⁴), including private members' bills. Although the Committee aims to report no later than the beginning of Lords committee stage, it often reports before second reading. If time allows, the Committee

¹ The Committee was initially called the Scrutiny of Delegated Powers Committee. Following the passage of the Deregulation and Contracting Out Act 1994 ("the 1994 Act"), the Committee became the Delegated Powers and Deregulation Committee. When the 1994 Act was replaced by the Regulatory Reform Act 2001, the Committee's name was changed to the Delegated Powers and Regulatory Reform Committee.

² See in particular: First Report, Session 1992-93, HL Paper 57; 12th Report, Session 1993-94, HL Paper 90; 4th Report, Session 1994-95, HL Paper 48; Special Report, Session 1995-96, HL Paper 120; Special Report, Session 1996-97, HL Paper 72; Special Report, Session 1997-98, HL Paper 158; 29th Report, Session 1998-99, HL Paper 112; 37th Report, Session 1999-2000, HL Paper 130; 26th Report, Session 2000-01, H Paper 83; 3rd Report, *Special Report on Henry VIII Powers to Make Incidental, Consequential and Similar Provision*, Session 2002-03, HL Paper 21; 1st Report, Session 2003-04, HL Paper 9; 9th Report, Session 2003-04, HL Paper 43; 18th Report, Session 2004-05, HL Paper 110.

³ The Committee's full terms of reference are: "... to report whether the provisions of any bill inappropriately delegate legislative power or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny; to report on documents and draft orders laid before Parliament under the Regulatory Reform Act 2001; and to perform in respect of such documents and orders and subordinate provisions orders laid under that Act the functions performed in respect of other instruments by the Joint Committee on Statutory Instruments".

⁴ The Committee will report on Tax Law Rewrite Bills but only if asked to do so by the Joint Committee on Tax Law Rewrite Bills. See 18th Report, Session 2004-5, HL Paper 110, paras 30-33.

also considers Government amendments with significant delegated powers aspects tabled in the Lords. The Committee similarly considers Commons amendments when a bill returns to the Lords.

6. The Committee is assisted in its examination by written evidence from departments. This is the “delegated powers memorandum”, which may be supplemented by subsequent memoranda (“supplementary memoranda”) covering relevant amendments.
7. The Committee usually meets on a Wednesday morning at 10.30 and its reports are ordinarily available to the House, and more widely, on the following day. The reports will often contain recommendations which the Government almost always accept.

DELEGATED POWERS (AND SUPPLEMENTARY) MEMORANDA

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

8. The delegated powers memorandum is published at the same time as the bill, irrespective of the House of introduction. The Legislative Programme Secretariat in the Cabinet Office have issued their own guidance on the practical arrangements for fulfilling this undertaking⁵.
9. In the case of a bill beginning in the House of Lords, the memorandum should be received by the Committee before (or on) its introduction into the Lords.
10. In the case of a bill beginning in the House of Commons, the Government should send the Committee a copy of the memorandum published on the bill’s introduction in the Commons, but the Committee will not consider the bill until it has been brought to the Lords (unless it is emergency legislation⁶). A new version of the memorandum, reflecting the bill’s passage through the Commons, should be received by the Committee after the bill has left the Commons and before (or on) its introduction into the House of Lords.

What should be included in the delegated powers memorandum?

11. The memorandum should identify every provision for delegated legislation in the bill⁷; and:
 - explain its purpose;
 - describe why the power has been left to delegated legislation rather than included in bill;
 - explain the choice of parliamentary scrutiny procedure provided for each power (affirmative, negative or none at all)⁸.

⁵ Memorandum of 8 November 2006, to be incorporated in due course into their *Guide to Legislative Procedure*: www.cabinetoffice.gov.uk/secretariats/economic_and_domestic/legislative_programme/guide.asp

⁶ See, for example, the Northern Ireland Assembly (Elections and Periods of Suspension) Bill in 20th Report, Session 2002-03, HL Paper 104.

⁷ 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 must cover them. If a Department is unsure whether the power is legislative, it is better to include an explanation than to leave it out.

⁸ First Report, Session 1992-93, HL Paper 57, para 20.

The last bullet is important: departments often justify why a matter should be delegated, but neglect to justify the level of parliamentary scrutiny.

12. 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 basis⁹. The Committee will, however, look especially carefully at provisions which fall within the categories set out below. The memorandum should, therefore, pay particular regard to the following:

Precedent

13. Where there is a directly relevant precedent for a delegation or the choice of parliamentary procedure, the memorandum should indicate this and identify the precedent. The Committee will take any precedent into account in its examination of a bill although will not necessarily find a provision appropriate on the basis of precedent alone (especially if the precedent predates the Committee)¹⁰.

Skeleton bills

14. If a bill is, in effect, a skeleton bill (so that the real operation of the Act would be entirely by the regulations made under it), the Committee will expect a full justification for the decision to adopt that structure of powers¹¹.

Henry VIII powers

15. All Henry VIII powers¹² should be clearly identified. Although the Committee recognises that the appropriate level of parliamentary scrutiny for such powers will not be the affirmative procedure in all cases¹³, 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.

Power to make incidental, consequential or similar provision

16. Where a Henry VIII power is to make incidental, consequential or similar provision, the memorandum should explain why the particular form of wording setting out the power has been adopted. In a report published in December 2002, the Committee concluded that there should be a presumption, in respect of such Henry VIII powers, that they should be

⁹ First Report, Session 1992-93, HL Paper 57, para 23. See also the Joint Committee on Delegated Legislation (“the Brooke Report”), Session 1971-72, HL Paper 184, HC 475, para 39, where the Joint Committee concluded that “on balance”, it was “not in favour of trying to formulate precise rules” governing the appropriateness of the choice of Parliamentary procedure with respect to a delegated power.

¹⁰ The Committee was first appointed in Session 1992-93.

¹¹ See, for example, Special Report, Session 1997-98, HL Paper 158, para 12 and n13 and 18th Report, Session 2004-05, HL Paper 110, paras 25-27.

¹² A “Henry VIII power” is a power in a bill which enables primary legislation to be amended or repealed by secondary legislation with or without further parliamentary scrutiny.

¹³ It is well understood, for example, that a power limited to uprating for inflation can appropriately be subject to negative procedure.

subject to the affirmative procedure. Therefore, where they are not, the memorandum should explain why not¹⁴.

17. Where there is a non-Henry VIII power to make incidental, consequential or similar provision 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 way¹⁵.

Devolution arrangements

18. The application of delegated legislative provision to Scotland and Wales should be clearly explained. In particular, the Committee has asked that memoranda for bills involving England and Wales should say whether, and if so how, the devolution arrangements influenced the Government's decision as to which parliamentary procedure should be applied in relation to delegations to Ministers¹⁶.

Delegation other than to a Minister or the Welsh Ministers

19. Where a power is delegated to a person or body other than a Minister, the memorandum should explain why the power has been conferred on that person or body.

Criminal offences

20. 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 not¹⁷.

Are there good example memoranda?

21. The person drafting a memorandum can find it helpful to see memoranda supplied for previous bills. Three examples of recent useful memoranda are those for (in increasing length of bill) the Northern Ireland (St Andrews Agreement) Bill (First Report 2006-07); the National Lottery Bill (15th Report 2005-06); and the Company Law Reform Bill (9th Report 2005-06). The memorandum is appended to the relevant Report and these three are also separately available under the link to this guidance document on the Committee's home page on www.parliament.uk.

Is a supplementary memorandum required for Government amendments affecting delegated powers in a bill?

22. A supplementary memorandum must be submitted when any Government amendment is tabled which introduces a significant new delegated power or significantly amends an existing one, but is not required if an amendment is

¹⁴ 3rd Report, Session 2002-03, HL Paper 21.

¹⁵ 18th Report, Session 2004-05, HL Paper 110, para 38.

¹⁶ 9th Report, Session 2002-03, HL Paper 45, para 5.

¹⁷ See 37th Report, Session 1999-2000, HL Paper 130, para 36.

simply giving effect to a recommendation by the Committee or addressing a point raised by it.

23. The Committee will comment on Government amendments if time allows. Early warning of relevant Government amendments is of considerable assistance to the Committee, as is advance sight of the text of amendments¹⁸. In those cases where the Committee has been unable to consider a significant relevant amendment, it may assist the House if the Minister in charge of the bill were to bring this to the attention of the House when the amendment is being considered.

Non-government amendments

24. The Government have agreed to submit a supplementary memorandum for any non-Government amendment with significant delegated powers which the Government are able to indicate that they will support¹⁹.

Commons amendments

25. When a bill which starts in the Lords is returned by the Commons with amendments which introduce significant new delegated powers or significantly amend existing ones, a supplementary memorandum should be provided on the return of the bill to the Lords. The memorandum should be structured by reference to the relevant numbered Commons amendments and should not be an updated version of the entire original memorandum. Early warning of Commons amendments is particularly important as bill teams will be aware that the timing of ping-pong is not subject to a minimum interval and can be scheduled quickly.

How should a delegated powers memorandum be delivered?

26. A memorandum should be delivered electronically (by email) to the address below. It is the usual practice of the Committee to print a memorandum as an Appendix to its report on a bill. A Word document, with manually numbered paragraphs, is therefore the most helpful format. When supplying a supplementary memorandum, the text of the relevant amendments should be attached to the memorandum. Once the memorandum has been received by the Committee, the Government may publish the memorandum itself, for example on its website or by placing copies in the Library of the House.

COMMITTEE REPORTS

When will the Committee report?

27. The Committee will certainly report before committee stage and often reports before second reading²⁰. Reports are sent to the printers on the day the Committee meets, and published the next day (as well as being made available on the internet at:

www.parliament.uk/parliamentary_committees/dpr.cfm.

¹⁸ 5th Report, Session 2003–04, HL Paper 31, paras 17–19.

¹⁹ 19th Report, Session 2005–06, HL Paper 176, Appendix 4.

²⁰ See Companion to the Standing Orders and Guide to the Proceedings of the House of Lords (2005), para 6.32.

28. Committee staff will e-mail report extracts to relevant departmental teams as soon as the text is finalised (in advance of formal publication).

RESPONSES TO COMMITTEE REPORTS

Is a response required?

29. Although there is no formal obligation on departments to provide a response to the reports from the Committee, most departments do so and the Committee welcomes this on the ground that it helps the House in its consideration of Committee recommendations²¹. A response will be printed, for the record, as an Appendix to a Committee report. The response, in addition to being sent to the Committee, should at the same time be made available to members of the House (by being placed in the Library and being sent directly to relevant opposition spokesmen and other interested members).
30. The Committee takes the view that it is not appropriate for it to enter into negotiations with departments about its recommendations. The response will, therefore, be printed without remark unless, in the view of the Committee, the House would be assisted by some clarificatory comment²².

What form should a response take?

31. This is a matter for the department rather than the Committee. The usual practice, however, is for the Minister to write to the Chairman of the Committee. Such correspondence should always be copied to the Clerk.

How should a response be delivered?

32. Aside from sending the original to the Chairman, a Word version of the response, with manually numbered paragraphs, should be delivered electronically (by email) to the address below.

If the department disagrees with the Committee, what action should it take?

33. It is for the department to justify its decision to the House as a whole rather than to the Committee. In its Special Report of December 2003, the Committee emphasised that its function is to advise the House and that it is for the House to decide whether to adopt the Committee's recommendations. In forming a view, the House will take into account the Committee's report and any response by a Minister to its recommendations²³.
34. It is unusual for the Committee to engage in correspondence or discussions with a department where the Government disagree with the Committee's conclusions (see paragraph 30 above).

²¹ Special Report, Session 2003-04, HL Paper 9, para 27.

²² Special Report, Session 2003-04, HL Paper 9, paras 29-31, which refers to the Committee's reports on the Local Government Bill (21st Report, Session 2002-03, HL Paper 122, p 57) and the European Parliament (Representation) Bill (12th report, Session 2002-03, HL Paper 63).

²³ Special Report, Session 2003-04, HL Paper 9, para 32.

COMMITTEE CONTACT DETAILS

35. Address Delegated Powers and Regulatory Reform Committee
 Delegated Legislation Office
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 London SW1A 0PW
- Telephone 020-7219 3103
- Facsimile 020-7219 2571
- Email dpr@parliament.uk
- Internet www.parliament.uk/parliamentary_committees/dpr.cfm