

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

Guidance for Departments
on the role and requirements of the Committee

July 2014

The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session and has the following terms of reference:

(i) 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;

(ii) To report on documents and draft orders laid before Parliament under or by virtue of:

(a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,

(b) section 7(2) or section 15 of the Localism Act 2011, or

(c) section 5E(2) of the Fire and Rescue Services Act 2004;

and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and

(iii) To report on documents and draft orders laid before Parliament under or by virtue of:

(a) section 85 of the Northern Ireland Act 1998,

(b) section 17 of the Local Government Act 1999,

(c) section 9 of the Local Government Act 2000,

(d) section 98 of the Local Government Act 2003, or

(e) section 102 of the Local Transport Act 2008.

Membership

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

Baroness Andrews

Lord Bourne of Aberystwyth

Baroness Drake

Baroness Farrington of Ribbleton

Baroness Fookes

Countess of Mar

Lord Marks of Henley-on-Thames

Baroness O'Loan

Baroness Thomas of Winchester (Chairman)

Viscount Ullswater

Registered Interests

Committee 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 Parliamentary Archives. Interests related to this Report are in the Appendix.

Publications

The Committee's reports are published by the Stationery Office by Order of the House in hard copy and on the internet at www.parliament.uk/hldprcrpublications.

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 <http://www.parliament.uk/business/lords/>.

Contacts for the Delegated Powers and Regulatory Reform Committee

Any query about the Committee or its work should be directed to the Clerk of Delegated Legislation, 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. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and other acts specified in the Committee's terms of reference

Guidance for Departments

INTRODUCTION

1. Since the establishment of the Committee, the government of the day have provided a memorandum to the Delegated Powers and Regulatory Reform Committee (DPRRC) on the delegated powers in all 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. Unless otherwise stated, references to reports in this note are references to reports of the DPRRC. All Committee reports and delegated powers memoranda can be found on the Committee's webpage:
<http://www.parliament.uk/business/committees/committees-a-z/lords-select/delegated-powers-and-regulatory-reform-committee/>
2. This guidance supplements guidance issued by the Cabinet Office (*Guide to Making Legislation* (July 2014) which can be found at the following webpage: <https://www.gov.uk/government/publications/guide-to-making-legislation>). It is divided into two parts. **Part One** covers the following matters:
 - A. Terms of reference
 - B. Working methods
 - C. The practicalities of submitting memoranda
 - D. What happens after the Committee has considered a bill
 - E. Committee contact details.**Part Two** deals with the content of delegated powers memoranda.

PART ONE

A. Terms of reference

3. The Committee's terms of reference, with regard to its delegated powers function, 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 ...”.

B. Working methods

4. The Committee has ten members. The membership of the Committee is set out on the inside front cover of all DPRRC reports and on the Committee's webpage. It is supported by a Clerk, a Committee Administrator and two Legal Advisers. The contact details for the Committee can be found at the end of this Part of this guidance. More detailed information about how the Committee works can be found in Special Reports which are published by the Committee from time to time.¹
5. The Committee considers and reports on all public bills (except supply bills and consolidation bills), including private Members' bills (whether or not government handout bills). The Committee aims to report no later than the beginning of the committee stage in the House of Lords. If time allows, the Committee also considers government amendments (and certain non-government amendments (see paragraph 10 below)) 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 (a delegated powers memorandum (“memorandum”)), which may be supplemented by subsequent memoranda (“supplementary memoranda”) covering relevant amendments.
7. The Committee usually meets on Wednesdays at 10.30 am. The frequency of meetings will depend on the business going through the Lords. It is likely to be either weekly or fortnightly. Its reports are ordinarily available to the House, and more widely, either on the Thursday or Friday following the Wednesday meeting. Occasionally the Committee meets twice in one week. Reports are likely to include recommendations for amendment of a bill (but not the precise wording of an amendment) or draw matters to the attention of the House where it is suggested that the House may wish to press the Minister for further information. Reports will also include a link to the delegated powers memorandum which will be published on the Committee's webpage.

¹ See in particular: 1st 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, HL 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; 3rd Report, *Special Report: Strengthened Statutory Procedures for Scrutiny of Delegated Powers*, Session 2012-13, HL Paper 19.

C. The practicalities of submitting memoranda

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

8. According to the Cabinet Office guidance (page 123), the Parliamentary Business and Legislation (PBL) Committee (a Cabinet Committee) require a delegated powers memorandum before it will approve a bill for introduction, and this memorandum must be made available to both the Commons and the Lords on introduction of the bill to either House.
9. As far as the DPRRC is concerned, however, the following applies:
 - in the case of a bill beginning in the **Lords**, the memorandum must be received by the Committee **on (or before) its introduction into the Lords**; and
 - in the case of a bill beginning in the **Commons**, the Committee will not consider the bill until it has been brought to the Lords (unless it is emergency legislation).² A version of the memorandum, reflecting any changes during the bill's passage through the Commons, must be received by the Committee **when the bill arrives in the Lords**.

In what circumstances should supplementary memoranda be provided to the Committee?

10. A supplementary memorandum must be provided when
 - any **government amendment** is tabled which introduces a significant new delegated power or significantly amends an existing one. It is not required if an amendment is simply giving *full* effect to a recommendation by the Committee or addressing a point raised by it;
 - for any **non-government amendment** with significant delegated powers which the Government are able to indicate that they will support;³
 - **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.⁴

Early warning of amendments

11. Because of tight legislative timescales, the DPRRC reports on amendments on a "best endeavours" basis. Where possible, early warning of relevant government amendments should be given (along with advance sight of the text of amendments). This is particularly important with regard to Commons amendments as the timing of ping-pong is not subject to a minimum interval and can be scheduled quickly.
12. Where the Committee has been unable to consider a significant relevant amendment, it would assist the House if the Minister in charge of the bill

² See, for example, the Northern Ireland Assembly (Elections and Periods of Suspension) Bill in 20th Report, Session 2002-03, HL Paper 104.

³ 19th Report, Session 2005-06, HL Paper 176, Appendix 4.

⁴ See, for example, 26th Report, Session 2005-06, HL Paper 264, para 3 on the Companies Bill [HL] and paras 19 and 20 on the Safeguarding Vulnerable Groups Bill [HL].

were to bring this to the attention of the House when the amendment is being considered.

If a supplementary memorandum is required, when should it be received by the Committee?

13. Supplementary memoranda must be received **on (or before) the day an amendment is tabled.**

How should memoranda be delivered?

14. Memoranda, whether the original or a supplementary, should be delivered **electronically** (by email) to the address below as **a Word document**, with manually numbered paragraphs and numbered pages. When a supplementary memorandum is being provided, the text of the relevant amendments should be attached to the memorandum.
15. Once the memorandum has been received by the Committee, the Government may publish the memorandum themselves, for example on a website or by placing copies in the Library of the House.

Format of memoranda

16. Memoranda, whether the original or a supplementary, should adopt the following format: each power should be introduced by an italic heading which should set out
- the clause and subsection number
 - who is to exercise the power
 - by what means, and
 - subject to what level (if any) of Parliamentary scrutiny.

The power should then be explained in the paragraph(s) below the italic heading (see Part Two of this guidance).

17. **Do not** give the powers additional identifiers (such as “Power 1”, “Power 2” etc.).
18. **Take particular care**
- to ensure that the explanatory paragraph(s) apply to the provision identified in the italicised heading, and
 - when a bill is brought up from the Commons (especially if it has been extensively amended on report), to ensure that the references to clause and subsection numbers are up to date.⁵
19. **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, the supplementary memorandum should be structured by reference to the relevant numbered Commons amendments and should not be an updated version of the entire original memorandum.

⁵ See, for example, 12th Report, Session 2013-14, HL paper 72, para 2 on the Transparency of Lobbying, Non-party Campaigning and Trade Union Administration Bill, quoted in Appendix 3 to this report.

D. What happens after the Committee has considered a bill

When will the Committee report?

20. The Committee aims to report before the start of committee stage and reports are usually available within one to two days after the Committee has met (see paragraph 7 above).
21. Committee staff will e-mail report extracts to relevant departmental teams as soon as the text is finalised (in advance of formal publication).

Is a government response required?

22. There is no formal obligation on departments to provide a response but most departments do. The Committee welcomes this on the ground that it helps the House in its consideration of Committee recommendations.⁶
23. 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).

What form should a response take and how should it be delivered?

24. 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. **A Word version** of the response should also be sent **electronically** (by email) to the address below.

Will the Committee comment on the response?

25. 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, exceptionally, in the view of the Committee, the House would be assisted by some clarificatory comment.⁷

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

26. It is for the department to justify its view to the House as a whole rather than to the Committee. The function of the Committee is to advise the House and 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 recommendations.⁸ It is unusual for the Committee to engage in correspondence or discussions with a department where the Government disagree with the Committee's conclusions.

⁶ Special Report, Session 2003-04, HL Paper 9, para 27.

⁷ For example, 12th Report, Session 2006-07, HL Paper 150, para 3 on the Local Government and Public Investment in Health Bill.

⁸ Special Report, Session 2003-04, HL Paper 9, para 32.

E. Committee contact details

Address Delegated Powers and Regulatory Reform Committee
 Delegated Legislation Office
 House of Lords
 London SW1A 0PW

Telephone 020-7219 3103 (Committee Assistant)
 020-7219 3233 (Clerk)

Facsimile 020-7219 2571

Email dpr@parliament.uk

Internet <http://www.parliament.uk/business/committees/committees-a-z/lords-select/delegated-powers-and-regulatory-reform-committee/>

PART TWO

A. Powers to be covered by a memorandum

27. The 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.

B. Content of the explanatory paragraph(s)

28. After the italicised heading (described in paragraph 16 above), an explanatory paragraph (or paragraphs) should
- fully explain the **purpose of the power**
 - describe **why the matter that is the subject of the power has been left to delegated legislation rather than included in the bill**
 - fully explain **the choice of parliamentary scrutiny procedure** provided for each power; and, if there is no scrutiny, the justification for its absence.

Explaining the power

29. With regard to explaining the power, **take particular care** to ensure that
- the memorandum fully explains **why the delegation is necessary and why the matter cannot be included in the bill**. For example, if the reason is “we need flexibility”, explain why it is needed; if it is asserted “it is a reserve power”, explain why a reserve power is needed and what events are likely to trigger its use in the future; or, if the reason is “we need to respond urgently”, explain the reason for, and degree of, urgency;⁹
 - the memorandum justifies **the full extent of the power**. If the government has in mind a particular proposed exercise, it is helpful for the Committee to be told of this. But the Committee will judge the power by reference to what *could* be done under it by the current or any future government and not only what the current government say they intend to use the power for;¹⁰
 - where **a power is delegated to a person or body other than a Minister**,¹¹ the memorandum explains why the power has been conferred on that person or body;¹² and

⁹ See, for example, 9th Report, Session 2012-13, HL Paper 64, para 13 on the Enterprise and Regulatory Reform Bill, quoted in Appendix 3 to this report.

¹⁰ See, for example, 1st Report, Session 2013-14, HL Paper 12, para 16 on the Offenders Rehabilitation Bill [HL], quoted in Appendix 3 to this report, and 5th Report, Session 2005-06, HL Paper 23, para 13 on the Identity Cards Bill

¹¹ “Minister” in this context includes the Scottish and Welsh Ministers.

¹² See, for example, 3rd Report, Session 2014-15, HL Paper 23, paras 24 to 26 on the Criminal Justice and Courts Bill.

- the memorandum fully justifies **any unusual or novel delegations of power**,¹³ **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**, and **powers to make provision by directions, or in codes or “guidance”**.

Explaining the procedure

30. With regard to explaining the procedure, **take particular care** to ensure that
- the memorandum fully explains any **de-hybridising provision** (that is, provision which enables an order which would otherwise be hybrid because it would affect private interests to proceed as if it were not). Unless addressed in the memorandum, the Committee will invite the House to satisfy itself that private interests otherwise protected by the hybrid instruments procedure will be adequately protected under provision in the bill;¹⁴
 - unless a power is self-evidently concerned only with Money or Supply provision, the choice of a **Commons-only procedure** is fully explained. The Committee will wish to be satisfied that the subject matter of the power is such that the Lords would not expect to scrutinise the exercise of the power;¹⁵
 - in circumstances where it is proposed that there should be **a removal, or relaxation, of Parliamentary control**, from the exercise of a power that presently requires it, the memorandum fully justifies the change;¹⁶
 - where the negative procedure is chosen on the ground that there is **insufficient time for an affirmative**, the memorandum explains why the “made affirmative” procedure is not applied;¹⁷ and
 - where the chosen procedure is **“first-time affirmative”**, the memorandum fully explains why the negative procedure is thought to afford adequate scrutiny on subsequent exercises of the power, and on what that prediction is based, bearing in mind that the power will remain exercisable by future governments.¹⁸
31. The procedure chosen for each power should be explained in the memorandum in its own context and on its own merits. **Avoid simple formulaic explanations** such as “the provision is procedural”, “the regulations will be technical”, “the order will make administrative provision”

¹³ See, for an example of a “wide and novel” delegated power, 9th Report, Session 2005-06, HL Paper 8, paras 34 to 36 on the Company Law Reform Bill [HL].

¹⁴ See, for example, 22nd Report, Session 2013-14, HL Paper 136, para 10 on the Immigration Bill.

¹⁵ See, for an example of the DPRRC recommending that a delegated power should be subject to control in both Houses rather than Commons-only, 12th Report, Session 2007-08, HL Paper 148, para 26 on the Planning Bill.

¹⁶ See, for example, 9th Report, Session 2010-12, HL Paper 94, paras 4 and 5 on the Pensions Bill [HL] and 5th Report, Session 2014-15, HL Paper 29, paras 14 to 16 on the Deregulation Bill.

¹⁷ See, for example, 13th Report, Session 2010-12, HL Paper 141, paras 14 and 15 on the Police Reform and Social Responsibility Bill. In this case, the Government substituted the “made affirmative” procedure.

¹⁸ See, for example, 9th Report, Session 2013-14, HL Paper 55, para 5 on the Children and Families Bill.

or “the provision will be detailed” without analysing the effect of the power to explain why this is thought to be the case.¹⁹

Use of precedent

32. Where there is a precedent for a delegation or the choice of Parliamentary procedure, the memorandum should indicate this, identify the precedent and explain its relevance to the bill. The Committee will take any precedent into account in its examination of a bill although will not necessarily find a provision appropriate on the basis of precedent alone. In particular, if the power is a re-enactment with modifications of an existing power, the memorandum should say so and explain the differences.²⁰
33. A precedent will hold less weight if
 - if it predates the Committee (that is, pre-1993)
 - it is an Act arising out of a private Member’s bill²¹
 - the power cited was inserted by an amendment at a late stage in a bill’s passage.

C. Some principles applied by the Committee

34. When the Committee was first set up, it concluded that it was not possible to set out a list of criteria which would give precision to the test of appropriateness. Instead it was decided that the merits of the proposed use of a delegated power had to be considered on a case by case basis.²² Whilst the Committee continues to consider each delegation on its merits, the accumulation of over twenty years of experience has enabled the Committee to develop a number of principles which provide the starting point for its consideration of delegated powers. These principles are set out in the following paragraphs.

Principles

35. Every **Henry VIII power** (that is, a delegated power which enables a Minister, by delegated legislation, to amend, repeal or otherwise alter the effect of an Act of Parliament), including where the power is expressed in terms of “modification”, 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 cases,²³ 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.

¹⁹ See, for example, 7th Report, Session 2013-14, HL Paper 49, para 6 on the Children and Families Bill, quoted in Appendix 3 to this report.

²⁰ See, for example, 6th Report, Session 2014-15, HL Paper 36, paras 5 and 6 on the Insurance Bill. See also, as an example of a poor precedent, 8th Report, Session 2009-10, HL Paper 106, para 5 on the Crime and Security Bill.

²¹ See, for example, 8th Report, Session 2009-10, HL Paper 106, paras 10 to 13.

²² 1st Report, Session 1992-93, HL Paper 57, para 23.

²³ It is well understood, for example, that a power limited to uprating for inflation can appropriately be subject to negative procedure.

36. 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.²⁴
37. 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 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;²⁵
 - 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.²⁶
38. 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,²⁷ 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.

²⁴ See, for example, Special Report, Session 1997-98, HL Paper 158, para 12 and 13; and 12th Report, Session 2007-08, HL Paper 148, paras 22 to 25.

²⁵ 3rd Report, Session 2002-03, HL Paper 21.

²⁶ 18th Report, Session 2004-05, HL Paper 110, para 38.

²⁷ See 37th Report, Session 1999-2000, HL Paper 130, para 36; and, for example, 16th Report, Session 2012-13, HL Paper 142, para 5 on the Groceries Code Adjudicator Bill [HL].