



Office of the Leader
of the House of Commons

70 Whitehall
London
SW1A 2AS

Tel: 020 7276 1005
commonsleader@cabinetoffice.gov.uk

Our Ref: AL/PEER1036
25 January 2019

Dear Baroness Taylor,

**GOVERNMENT RESPONSE TO THE LORDS CONSTITUTION COMMITTEE
REPORT: *THE LEGISLATIVE PROCESS: THE DELEGATION OF POWERS***

Enclosed is the Government's response to the Committee's report of November 2018: *The Legislative Process: The Delegation of Powers*.

As chair of the Parliamentary Business and Legislation Committee, I would like to place on record the importance the Committee attaches to consideration of the appropriate use of powers and the role of Parliament in scrutinising them. I am grateful for your Committee's thoughtful report.

Andrea Leadsom

**RT HON ANDREA LEADSOM MP
LEADER OF THE HOUSE OF COMMONS**

Baroness Taylor of Bolton
Chairman, Constitution Committee
House of Lords

GOVERNMENT RESPONSE TO HOUSE OF LORDS CONSTITUTION COMMITTEE'S REPORT ON THE DELEGATION OF POWERS

1. In its report titled "The Legislative Process: The Delegation of Powers"¹ the Select Committee on the Constitution discusses the important role of delegated legislation and seeks to make recommendations to improve it. The Government agrees that delegated legislation is an essential part of our legislative framework and that all legislation, including delegated legislation, should be clear, precise and proportionate and must also be subject to appropriate scrutiny. This document sets out the Government's response to the conclusions and recommendations contained in the Committee's report.

Summary of conclusions and recommendations: paragraphs 1 and 2

1. We accept the broad criteria outlined by David Lidington justifying the use of delegated powers (see para 9). If these criteria were rigorously applied, we would have fewer concerns with their use. 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. It is a responsibility for all, including Parliamentary Counsel, to uphold constitutional standards in relation to delegated powers. (Paragraph 15).

2. It is a constitutional obligation of Parliament to decide whether a proposed delegation of power is acceptable. Given the trend in the number and nature of delegated powers sought by the Government, the importance of Parliament's scrutiny of delegations is all the more important. (Paragraph 16)

2. The Government shares the Committee's view that there are various circumstances in which it may be necessary or valuable to grant delegated powers in bills.² The Government welcomes the Committee's agreement with the broad circumstances justifying the use of delegated powers set out in written evidence given by the Rt Hon David Lidington MP³, but notes the Committee's concern that these are not treated as criteria to be rigorously applied.
3. The Government is committed to ensuring that the appropriateness of any delegated powers included in a bill is fully tested as part of the bill preparation process by policy leads and departmental lawyers acting with advice from Parliamentary Counsel. There is also extensive guidance in relation to delegated powers available to bill teams in the *Guide to Making Legislation* published by the Cabinet Office.⁴ The inclusion of delegated powers is further tested before a bill's introduction at the Parliamentary Business and Legislation Cabinet Committee which challenges whether it is appropriate for the bill to be delegating power in the manner proposed.

¹ 16th Report of Session 2017-19.

² Paragraph 8 of the Committee's report.

³ The circumstances are set out at paragraph 9 of the Committee's report.

⁴ Chapter 16 of the Guide to Making Legislation, July 2017.

4. The Government explains in detail its justification for any delegated powers in its memorandum prepared for the Delegated Powers and Regulatory Reform Committee (“DPRRC”). The memorandum also explains why the proposed level of Parliamentary scrutiny is considered appropriate.⁵ It is in the nature of the parliamentary process that the Government will sometimes ask for powers which Parliament determines should not be granted or granted subject to particular constraints. The Government always gives the Committee’s recommendations serious consideration and provides written responses to each of them, and this frequently leads to Government amendments being tabled.
5. In relation to the Committee’s observation that there is a duty to uphold “constitutional standards” in relation to delegated powers, the Government believes it is not possible to prescribe a set of hard and fast rules that must be adhered to in all cases. Each delegation has to be considered on its merits on a case by case basis,⁶ although the Government agrees that a number of broad principles can be applied when considering delegated powers.⁷
6. Parliament will ultimately determine whether it considers a particular delegation of power by a bill to be appropriate. If a constitutional standard of general application can be said to operate in this area, it is that a delegation of power is appropriately granted if Parliament, when scrutinising the bill before it, is content for the matters in question to be dealt with in secondary legislation. The Government therefore agrees with the emphasis that the Committee puts on the constitutional obligation of Parliament to decide whether a proposed delegation of power is acceptable.

Summary of conclusions and recommendations: paragraphs 3 and 4

3. Delegating power to make provision for minor and technical matters is a necessary part of the legislative process. It is essential that primary legislation is used to legislate for policy and other major objectives. Delegated legislation, which is subject to less parliamentary scrutiny, should only be used to fill in the details. There has been an upward trend in the seeking of delegated powers in recent years and this should cease. (Paragraph 25)

4. It is constitutionally objectionable for the Government to seek delegated powers simply because substantive policy decisions have not yet been taken. It is our judgement that there has been a significant and unwelcome increase in this phenomenon. (Paragraph 26)

7. The Government agrees that delegated powers will most commonly be appropriate for the purpose of prescribing matters of detail. It is not always possible to set a clear dividing line as to what amounts to a matter of policy and what constitutes “filling in the detail”, but when drafting powers the Government seeks to ensure that the balance is struck in an acceptable way as to what is contained in the bill and what is left for secondary legislation made under powers conferred by the bill.

⁵ The Government’s usual practice now is to submit its memorandum at the time of introduction for publication on the Parliament website (regardless of whether the House of introduction is the Lords or the Commons) so as to ensure that members in both Houses are informed in a timely manner of issues relating to delegated powers.

⁶ As stressed by the DPRRC in their 1st Report, Session 1992-93, HL Paper 57, para 23.

⁷ See paragraph 12 below for further discussion of the principles.

8. There will always be some cases where the framework of a policy will need to be set out in the bill but where it is appropriate for the details that will implement that framework to be delegated to secondary legislation.⁸ Sometimes that policy framework may need to operate at a fairly high level because the detailed policy can only be worked out later based on the facts that exist in the future when the power is exercised. For instance, a power may need to be taken on a contingent basis to deal with a future emergency; in this kind of case it may be necessary to draft the power in broad terms to deal with a range of scenarios that may arise in the future.⁹
9. There may also be other cases where it is appropriate for matters of policy to be dealt with by way of delegated legislation rather than contained in primary legislation. One example is the level of certain social security contributions and benefits, where it has long been considered acceptable for policy decisions to be taken by the executive through delegated legislation made under the Social Security Administration Act 1992. A more recent example is the date of the EU referendum under the European Union Referendum Act 2015, a decision which was considered appropriate to be delegated to executive decision.

Summary of conclusions and recommendations: paragraph 5

5. The Delegated Powers and Regulatory Reform Committee provides an expert assessment of the appropriateness of proposed delegations of power. Its scrutiny has a beneficial effect on legislation presented to Parliament, both in securing government agreement to amend proposed powers of delegation in a bill and, less obviously, in concentrating the minds of ministers and their bill teams during the earlier process of drafting the legislation. Ministers should follow its recommendations unless there are clear and compelling reasons not to do so. These reasons should be fully explained by the Government in writing before committee stage. (Paragraph 33)

10. The Government agrees that the scrutiny undertaken by the DPRRC has a beneficial effect on legislation presented to Parliament.
11. The Guide to Making Legislation states that departments must consider DPRRC reports carefully and determine which of the recommendations can be accepted. As mentioned above, the Government regularly brings forward amendments to bills to implement recommendations. The Government agrees that where a recommendation is not accepted it should always provide a full written explanation of its reasons, and will continue the practice of providing formal Government responses to DPRRC reports.

⁸ For example, Part 2 of the Energy Act 2013 contains the framework legislation for enabling the technical implementation of market reform within the energy markets.

⁹ For example, the Civil Contingencies Act 2004 contains powers to deal with future emergencies in circumstances where it was impossible to determine the detailed policy for how to deal with such emergencies at the time when the bill was enacted.

Summary of conclusions and recommendations: paragraph 7

7. We agree with the Delegated Powers and Regulatory Reform Committee that it would be hard to design a prescriptive list to cater for the variety of circumstances in which delegation is sought. That said, the Government must adhere to the broad principles which are outlined in the DPRRC's guidance. (Paragraph 39)

12. The principles are intended to serve as guidance for departments and to provide a “starting point”¹⁰ for the DPRRC's consideration of delegated powers. The Government agrees that these principles provide departments with useful general pointers for assessing the appropriateness of delegated powers, and will continue to ensure that ministers responsible for, and officials working on, legislation are aware of these guidelines. Like the DPRRC, the Government recognises that there will be cases where departures from the guidelines are appropriate and agrees that these departures should be fully explained.

Summary of conclusions and recommendations: paragraph 8 and 9

8. Delegated powers should be sought only when their use can be clearly anticipated and defined. Broad or vague powers, or those sought for the convenience of flexibility for the Government, are inappropriate. There must be a compelling justification for delegated powers and it is for Parliament to decide if that justification is acceptable. (Paragraph 48)

9. It is incumbent on the Government to provide Parliament with a full explanation of, and justification for, the delegated powers it seeks. Where broad powers are sought, the Government should publish draft secondary legislation in time to allow Parliament to assess its potential usage when each House is considering the primary legislation. Alternative publications, such as “policy scoping notes”, may assist the process of scrutiny, but greater clarity will be achieved only through drafts of the statutory instruments. (Paragraph 49)

13. The Government does not agree that broad powers are, by definition, inappropriate; it will depend on the circumstances of the particular case which can only be judged on its own merits. But the Government agrees that, if broad powers are sought, draft secondary legislation ought to be provided in time to allow Parliament to assess how the powers may be used. We will continue to ensure that draft instruments are made available wherever possible.
14. The Government agrees that vague powers are inappropriate. In presenting legislation to Parliament the Government always seeks to ensure that powers are drafted with an appropriate degree of legal certainty, taking into account the policy context. We agree with the Committee that, in any particular case, it will be for Parliament to decide if it is satisfied that the Government has justified the level of detail contained in the power.¹¹

¹⁰ Paragraph 34 of DPRRC's “Guidance for Departments on the role and requirements of the Committee”, July 2014.

¹¹ Paragraph 48 of the Committee's report, last sentence.

Summary of conclusions and recommendations: paragraph 10

10. In recent years the Government has sought to create criminal offences and establish public bodies through delegated powers. This is constitutionally unacceptable. (Paragraph 50)

15. The Government agrees that the cases where it is justifiable to use powers to create criminal offences or to establish public bodies are likely to be few and far between. However, it does not agree that they are constitutionally unacceptable in all cases. Each case is different, and it is appropriate that Parliament decides on a case by case basis having regard to the Government's justification of the power. That said, the Government agrees that these kinds of powers must be approached with caution and the rationale for taking them must be explained with particular care to Parliament.
16. The Committee refers to the Trade Bill in the current session as an example of a bill containing broad powers of an inappropriate nature, saying in particular that it allows for the creation of a new public body by regulations.¹² An explanation of the Trade Bill provisions would perhaps allay the Committee's concerns. The new body is established by the bill, not under a power.¹³ The main elements of the body's constitution are also provided for by the bill itself.¹⁴ It is true that power is conferred on the Secretary of State to appoint certain members but that is not unusual in the case of a public body and does not amount to a delegation of legislative power. The DPRRC has reported on the bill but did not make any recommendations.¹⁵

Summary of conclusions and recommendations: paragraph 11

11. Skeleton bills inhibit parliamentary scrutiny and we find it difficult to envisage any circumstances in which their use is acceptable. The Government must provide an exceptional justification for them, as recommended by the DPRRC's guidance for departments; it cannot rely on generalised assertions of the need for flexibility or future-proofing. (Paragraph 58)

17. The Government agrees that bills which contain unduly vague powers because policy decisions have yet to be taken will usually be unacceptable to Parliament.¹⁶ But sometimes the term "skeleton bill" is used to describe a bill in which the overall policy framework is clearly set out with delegated powers being taken to fill in the details resting underneath that framework or to implement aspects of it. The Government believes that there have been and will continue to be sound reasons for the use of such bills in a limited number of cases. Parliament will, of course, determine whether the powers are adequately articulated and justified by the Government.

¹² Paragraph 47 of the Committee's report.

¹³ Clause 9 of the Bill, as introduced into the Lords.

¹⁴ Schedule 4 to the Bill.

¹⁵ Aside from noting that the affirmative procedure was applied in relation to one particular power in the bill, the DPRRC concluded "There is nothing more in the Bill relating to delegated powers that we would draw to the attention of the House.": paragraph 4, 33rd Report of Session 2017-2019 published 12 September 2018.

¹⁶ There may though be exceptions: see paragraphs 8 and 9 above.

Summary of conclusions and recommendations: paragraph 12

12. Henry VIII clauses are “a departure from constitutional principle. Departures from constitutional principle should be contemplated only where a full and clear explanation and justification is provided.” Such justification should set out the specific purpose that the Henry VIII power is designed to serve and how the power will be used. Widely drawn delegations of legislative authority cannot be justified solely by the need for speed and flexibility. (Paragraph 67)

18. The Government agrees that Henry VIII powers require a full and clear explanation and justification. The Government will continue to ensure that departments provide such information in the memorandum prepared for the DPRRC.
19. Henry VIII powers need to be considered on a case by case basis. For example, there might be a power to add to a list of matters set out in primary legislation. That power could either take the form of a Henry VIII power (i.e. a power to make textual amendments to the list so as to add new entries) or it could take the form of a power to prescribe in regulations additional matters (without textually amending the list itself). The legislative result is the same through either approach, but there may be good reasons for conferring a Henry VIII power. It will ensure that everything appears in one place rather than being split between primary and secondary legislation. This will enhance the clarity of the law and make it more accessible to users.¹⁷ The Government believes that it ought to be the substance of the power that is the key point for consideration, rather than the form that the power takes.

Summary of conclusions and recommendations: paragraph 13

13. Where UK ministers seek a power to amend devolved legislation, they must be subject to a statutory requirement to consult the relevant devolved administration. (Paragraph 70)

20. Powers under contemplation in this part of the Committee’s report essentially fall into two categories.
21. First, a power to amend devolved legislation may be exercisable only for a devolved purpose and therefore make provision that would be within the legislative competence of the relevant devolved legislature. This would engage the usual legislative consent procedures. The precise scope of the power – including whether it is subject to a consultation requirement (or, indeed, exercisable with consent) – would properly be a matter for discussion with the relevant devolved administration and, ultimately, subject to the consent of the devolved legislature.
22. Second, a power to amend devolved legislation may be exercisable only for a reserved purpose to enable consequential amendments to be made to devolved legislation for a reserved purpose. This would not engage the legislative consent procedure, but the UK Government

¹⁷ In paragraph 150 of its report *The Legislative Process: Preparing Legislation for Parliament* (4th Report, Session 2017-19, HL paper 27) the Committee noted the need to improve the accessibility and clarity of legislation.

remains committed to consultation with the relevant devolved administration.¹⁸ It is worth noting that there are reciprocal provisions in the devolution statutes (for example in paragraph 3 of Schedule 4 to the Scotland Act 1998) which permit the devolved legislatures to enact consequential or ancillary modifications of the law on reserved matters. These provisions do not impose a statutory requirement on the devolved legislatures to consult the UK Government.¹⁹

23. In view of these points, the Government believes that implementation of a rule of the type suggested by the Committee is unnecessary, would be insufficiently flexible and would cut across well-established administrative arrangements which work well in practice.

Summary of conclusions and recommendations: paragraph 14

14. Bills and statutory instruments should be sufficiently clear to ensure that guidance need not be relied on to interpret legislation. Guidance is not legislation and should not be treated as such. If there are policy lacunae in the legislation itself, it is unacceptable that guidance, which for the most part avoids parliamentary scrutiny, should serve to fill them. (Paragraph 81)

24. The Government agrees that guidance should not generally be used for the purposes of interpreting legislation and, in particular, that it should not stand in the place of anything that should be contained in legislative provision subject to appropriate scrutiny (in particular, provision that has the effect of imposing legal requirements). The Government notes, however, that guidance can play an important role in assisting the interpretation of legislation (for example, by assisting persons affected by legislation to carry out statutory functions or to abide by statutory requirements). There is a vast range of statutory guidance issued each year and it is important that guidance can be updated rapidly to keep pace with events. Parliament can scrutinise guidance at any time. In certain exceptional circumstances it may be appropriate for guidance to be laid before Parliament or be subject to the negative procedure.

Summary of conclusions and recommendations: paragraph 15

15. The proliferation of scrutiny procedures for statutory instruments, many with only minor differences, adds unnecessary complexity. We recommend that the Government use an existing model of the enhanced affirmative procedure in any future bill, when strengthened scrutiny is required, rather than creating a new variation. (Paragraph 89)

25. The Government agrees with this recommendation and will seek to ensure that existing models are used wherever possible.

¹⁸ See for example paragraph 7 of Devolution Guidance Note 10 (November 2005) in relation to category 2.

¹⁹ These existing processes are underpinned by paragraph 4 of the Memorandum of Understanding of 2013 between the UK Government and the devolved administrations by which each commit to principles of good communication and consultation, particularly where the work of one administration has a bearing on the work of another.

Summary of conclusions and recommendations (paragraph 17)

17. There is no provision for amending statutory instruments and we are not proposing one. However, this means that Parliament's only options when presented with an inappropriate or defective statutory instrument are to accept it or reject it. This places a greater onus on the Government to respond to the concerns raised by parliamentarians, and to withdraw and re-lay statutory instruments where appropriate. (Paragraph 106)

26. The Government notes that the Committee is not proposing a mechanism for Parliament to amend statutory instruments and agrees with that conclusion. An amending mechanism would be a significant change, blurring the distinction between primary and secondary legislation, and between the legislature and the executive. The Committee says that, in the absence of such a mechanism, the onus is on Government to respond to concerns raised by parliamentarians by withdrawing and re-laying statutory instruments. This is one mechanism by which the Government can respond to such concerns, but there are others, including consulting before a statutory instrument is laid, amending the instrument after it has been made and adjusting the underlying policy in ways which do not affect the proposed instrument. The Government already responds in these ways where appropriate, and will continue to do so.

Summary of conclusions and recommendations (paragraphs 18 to 21)

18. If the Government uses delegated powers to propose secondary legislation which makes technical provision within the boundaries of the policy and has previously been agreed in primary legislation, Parliament is unlikely to wish to block statutory instruments. However, we are concerned, and this report has shown, that these boundaries are not always respected and that ministers may seek to use statutory instruments to give effect to significant policy decisions. Without a genuine risk of defeat, and no amendment possible, Parliament is doing little more than rubber-stamping the Government's secondary legislation. This is constitutionally unacceptable. (Paragraph 110)

19. The Government already has a mechanism to remedy faults in statutory instruments which are identified by parliamentary scrutiny. SIs subject to the affirmative procedure are made only when signed by a minister after parliamentary debates have taken place; until they are signed, they can be withdrawn, revised and re-laid. SIs subject to the negative procedure come into force on the date specified on the instrument, but the Government already has the power to lay a second SI to revoke and replace the first. (Paragraph 111)

20. However, for these processes to work, the Government must take account of the scrutiny of statutory instruments and respond promptly to remedy any deficiencies. Where it does not do so, in exceptional circumstances Parliament may use its existing powers to block such instruments. The Government should recognise that parliamentary defeat on a statutory instrument need not be considered momentous nor fatal. It does not prevent the Government subsequently tabling a revised SI having listened to and acted on parliamentarians' concerns. (Paragraph 112)

21. If the Government's current approach to delegated legislation persists, or the situation deteriorates further, the established constitutional restraint shown by the House of Lords towards secondary legislation may not be sustained. (Paragraph 113)

27. The Government recognises the valuable role that Parliament plays in the scrutiny of delegated powers and the subordinate legislation made under them and will take the Committee's observations into account. The Government agrees that all those involved in the preparation of legislation have a responsibility to assess thoroughly whether a proposed grant of a delegated power is appropriate. The Government will continue to work to ensure that this is something that is properly scrutinised during the bill preparation phase so that powers are included in bills only where appropriate and where their use can be justified to Parliament.