



Delegated Powers and Regulatory Reform Committee

GUIDANCE FOR DEPARTMENTS

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DELEGATED POWERS AND REGULATORY REFORM COMMITTEE

The Government has 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.

Unless otherwise stated, references to reports in this note are references to reports of the DPRRC.¹

A. HOW THE COMMITTEE WORKS

1. The Committee has nine members and its Chairman is Lord Dahrendorf. It is supported by a Clerk, a Committee Assistant 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 time.²
2. 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”

3. The Committee examines, and reports on, all public bills (except Supply Bills and consolidation bills), including private Members' bills.⁴ Although the Committee aims to report no later than the beginning of the committee stage of a bill, 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: 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, 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 the Joint Committee on Tax Law Rewrite Bills requests it to do so. See 18th Report, Session 2004-5, HL Paper 110, paras 30-33.

also examines, and reports on, significant Government amendments with a delegated powers aspect.

4. 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.
5. 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 follows.

B. DELEGATED POWERS (AND SUPPLEMENTARY) MEMORANDA

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

6. Ordinarily, the memorandum should be received by the Committee as follows:
 - in the case of a bill beginning in the House of Lords, before (or on) its introduction into the Lords;
 - in the case of a bill which began in the House of Commons, after it has left the Commons and before (or on) its introduction into the House of Lords. (Very occasionally, where a bill begins in the Commons and is timetabled to pass through Parliament very quickly (because it is emergency legislation), it would assist the Committee if it were to receive the memorandum before the bill has left the Commons.)⁵

What should be included in the delegated powers memorandum?

7. The memorandum should identify every provision for delegated legislation in the bill;⁶ 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).⁷
8. 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.⁸ The Committee will, however, look especially carefully at provisions which fall

⁵ See, for example, the Northern Ireland Assembly (Elections and Periods of Suspension) Bill in 20th Report, Session 2002-03, HL Paper 104.

⁶ 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.

⁷ 1st Report, Session 1992-93, HL Paper 57, para 20.

⁸ 1st 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.

within the categories set out below. The memorandum should, therefore, pay particular regard to the following:

Henry VIII powers

All Henry VIII powers⁹ 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,¹⁰ 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

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 subject to the affirmative procedure. Therefore, where they are not, the memorandum should explain why not.¹¹

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 way.¹²

Skeleton bills

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 powers.¹³

Criminal offences

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.¹⁴

Devolution arrangements

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

⁹ 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.

¹⁰ It is well understood, for example, that a power limited to uprating for inflation can appropriately be subject to negative procedure.

¹¹ 3rd (Special) Report, Session 2002-03, HL Paper 21.

¹² 18th Report, Session 2004-05, HL Paper 110, para 38.

¹³ 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.

¹⁴ See 37th Report, Session 1999-2000, HL Paper 130, para 36.

as to which parliamentary procedure should be applied in relation to delegations to Ministers.¹⁵

Delegation other than to a Minister or the Assembly

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

Precedent

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).¹⁶

9. Committee staff are able to supply examples of memoranda that have been particularly useful.

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

10. A supplementary memorandum will be required for any *significant* amendment which introduces new delegated powers or amends existing ones, but will not be required if an amendment is simply giving effect to a recommendation by the Committee or addressing a point raised by it.
11. 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 amendments.¹⁷ 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.

How should a delegated powers memorandum be delivered?

12. A memorandum should be delivered electronically (by e-mail) to the address below. It is the usual practice of the Committee to print a memorandum as an Annex to its report on a bill. A Word document, with 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.

C. COMMITTEE REPORTS

When will the Committee report?

13. The Committee will certainly report before committee stage and often reports before second reading.¹⁸ Reports are sent to the printers on the day

¹⁵ 9th Report, Session 2002-03, HL Paper 45, para 5.

¹⁶ The Committee was established in Session 1992-93.

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

¹⁸ See Companion to the Standing Orders and Guide to the Proceedings of the House of Lords (2003), para 6.32.

the Committee meets, and published the next day (as well as being made available on the internet at:

http://www.parliament.uk/parliamentary_committees/dpr.cfm).

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

D. RESPONSES TO COMMITTEE REPORTS

Is a response required?

15. Although there is no formal obligation on Departments to provide a response, there has recently been an increase in the number of formal responses by Government to Committee reports and the Committee has welcomed this development (on the ground that it assists the House in its consideration of Committee recommendations).¹⁹ A response will be printed, for the record, as an Annex 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).
16. 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 comment.²⁰

What form should a response take?

17. 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.

How should a response be delivered?

18. Aside from sending the original to the Chairman, a Word version of the response should be delivered electronically (by e-mail) to the address below.

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

19. It is for the Department to justify its decision to the House as a whole rather than to the Committee. In its Special Report, published in 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 recommendations.²¹
20. It is unusual for the Committee to engage in correspondence or discussions with a Department where the Government disagrees with the Committee's conclusions (see paragraph 16 above).

¹⁹ See 1st (Special) Report, Session 2003-04, HL Paper 9, para 27.

²⁰ See 1st (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).

²¹ 1st (Special) Report, Session 2003-04, HL Paper 9, para 32.

E. COMMITTEE CONTACT DETAILS

21. The address of the Committee is the Delegated Powers and Regulatory Reform Committee, Delegated Legislation Office, House of Lords, London, SW1A 0PW. The telephone numbers of the Clerk and Committee Assistant are given below. The office fax number is 020 7219 2571 and the office e-mail is dpr@parliament.uk. The website address of the Committee is http://www.parliament.uk/parliamentary_committees/dpr.cfm
22. The Clerk of the Committee is **Andrew Mackersie** (tel number 020 7219 3233, e-mail mackersieaj@parliament.uk) and the Committee Assistant is **Ian Sewell** (tel number 020 7219 3103; e-mail sewelli@parliament.uk)