We welcome the opportunity to respond to this Call for Evidence by the House of Lords Constitution Committee.

Who we are

2.1 The LITRG is an initiative of the Chartered Institute of Taxation (CIOT) to give a voice to the unrepresented. Since 1998 LITRG has been working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of those on low incomes. Everything we do is aimed at improving the tax and benefits experience of low-income workers, pensioners, migrants, students, disabled people and their carers.

2.2 LITRG works extensively with HM Revenue & Customs (HMRC) and other government departments, commenting on proposals and putting forward our own ideas for improving the system. Too often the tax and related welfare laws and administrative systems are not designed with the low-income user in mind and this often makes life difficult for those we try to help.

Our response

3.1 While the European dimension is predominant in VAT and to a lesser extent corporate taxes (both of which our CIOT colleagues have written to the Committee about), we come across it less often in the fields in which we are interested as representatives of those on low incomes – in personal tax, National Insurance contributions (NIC), tax credits and related social security. We have therefore not answered the first two questions in the Committee’s Call for Evidence on the consequences of Brexit. In answering the remaining questions, we have tried to take account of our knowledge and experience not only of tax but also of tax credits and other welfare matters which we come across in our work, where delegated legislation is more commonly used than it is in many areas of taxation.

3.2 When is it appropriate to delegate powers to make law to Government? Is there a clear boundary between subject-matters which are appropriate for primary legislation on the one hand, and for secondary legislation on the other?

3.2.1 As a rule of thumb, subordinate legislation (statutory instruments and other delegated legislation) is appropriate for matters of detail whereas matters of general principle should be dealt with by primary legislation where it can be subjected to full parliamentary scrutiny.

3.2.2 Thus, in the field of taxation, rates and thresholds and other measures imposing taxation have traditionally been, and always should be, exclusively for Parliament to determine (Customs & Excise Commissioners v Cure & Deeley Ltd [1962] 1 QB 340). Beyond that, the extent to which detailed provisions are delegated to Government
varies depending on the subject matter. In general, less use is made of delegated legislation in direct taxes than, say, in VAT or National Insurance, although there are exceptions. For example, the primary legislation governing the machinery by which some 29 million taxpayers are taxed – Pay As You Earn or PAYE – consists of around 30 pages and covers basic principles, definitions, some anti-avoidance provisions and enabling powers; whereas the secondary legislation, the PAYE regulations, stretch to nearly 200 pages. There is a similarly enhanced role for secondary legislation in respect of topics such as ISAs and other savings and investment vehicles, pensions schemes, money laundering enforcement, and so forth.

3.2.3 On the other hand, in the field of tax credits and social security benefits, primary legislation lays down only broad principles but gives wide powers to Government to determine rates at which benefits should be paid and rules to which they should be subject. For example, the Tax Credits Act 2002 establishes the tax credits system and sets out a framework for its structure, obligations of HMRC and claimants, appeals, penalties and so forth, then enacts a series of enabling powers defining what matters the regulations should cover and the parameters within which the regulation-making powers should be exercised.

3.2.4 It may seem odd that rates and thresholds of tax credits and benefits are set by regulation whereas levels of taxation are the preserve of Parliament. On the other hand, it is probably a constitutionally sound principle that how much is taken from the subject by way of taxation should be subject to oversight by elected representatives, while Government should have greater control over how that money is spent. Parliament can still challenge Government about its expenditure plans, and sometimes force it to rethink them – for example, in the autumn of 2015 tax credit regulations that would have drastically reduced levels of support for some of the most vulnerable claimants were voted down by the House of Lords (26 October 2015), and in the Autumn statement a month later (25 November 2015) the then Chancellor was sufficiently persuaded to announce the abandonment of most of the proposed cuts.

3.2.5 Other, legitimate, uses for delegated legislation include:

- to prescribe dates for entry into force where a piece of primary legislation is introduced in stages (commencement orders);

- to uprate thresholds, rates, allowances and so forth set by Parliament by (for example) a measure of inflation or some other appropriate yardstick. While the power to impose or vary taxation is too important to be delegated by Parliament, a flexible power to make regulations adjusting minor details and uprating by a measure determined in the primary legislation is acceptable and may be both necessary and desirable, although Parliament is at liberty to step in and uprate a threshold by more than the prescribed amount (as frequently happens with the income tax personal allowance);
• to supplement lists contained in primary statute (for example lists of medical
conditions attracting entitlement to a benefit, adding new ones to the list as
and when they are discovered or first diagnosed).

3.2.6 The advantage of leaving detailed provisions to be prescribed by ministers or officials
is clearly to save the parliamentary time, already in short supply, that would be
needlessly taken up if parliamentarians were obliged to debate and decide on such
minutiae themselves. Where the subject-matter of the delegated legislation involves a
particular technical expertise, again it is arguable that government officials and their
ministers are better placed to make the detailed rules as they have easier access to the
relevant expertise both within their departments and from external bodies that can
advise them.

3.2.7 But even if the case for the use of subordinate legislation is established, it must:
• only be exercised within the parameters clearly laid down by Parliament;
• be subject to effective parliamentary scrutiny; and
• be subject to effective control if it strays outside its powers.

3.2.8 We return to each of these desiderata during the course of this submission.

3.3 Is the Government consistent in its use of Delegated Powers?

3.3.1 We do not know enough about areas of law other than taxation to be able to comment.
Within taxation, and as between aspects of taxation and welfare, as discussed above,
there are variations in the extent to which use is made of secondary legislation
depending on the subject-matter.

3.4 How effective is parliamentary scrutiny of provisions in primary legislation that
delegate power to the Government?

3.4.1 Parliamentary scrutiny of provisions in primary legislation that delegate power to the
Government is probably no more or less effective than parliamentary scrutiny of other
statutory provisions. We suspect it may fall by the wayside when parliamentary time
is short, and there are other more substantive pieces of primary legislation to be
debated – but we have no evidence.

3.5 Are there times when the use of ‘skeleton bills’ (where the details are to be added
later in secondary legislation) is appropriate?

3.5.1 We can think of no instance in the field of taxation or welfare in which the use of
skeleton bills would be appropriate. Arguably such bills are only appropriate in times
of national emergency, such as (for example) the imposition of direct rule in Northern
Ireland in 1972. As argued above, Parliament must keep to itself the power to
determine matters of general principle, including the power to impose or vary taxation.

3.6  **Is there a case for allowing either or both Houses of Parliament additional powers to delay or reject secondary legislation?**

3.6.1 This goes to the heart of the question what safeguards are appropriate for secondary legislation, and whether those that exist are adequate.

3.6.2 Currently, all statutory instruments (the most frequent method of delegated legislation) must be ‘laid’ before Parliament for a prescribed period before being ‘made’. Most instruments are laid subject to the negative resolution procedure, under which they take effect at the end of the prescribed period. Under this procedure, a member can move a ‘prayer’ to annul the instrument – or, if laid in draft, that it be not made. Some are subject to the affirmative resolution procedure under which, unless a resolution is passed within the prescribed period, the instrument ceases to have effect (or, if laid in draft, cannot be made).

3.6.3 Arguably these procedures are not only archaic, they are very rarely effective in that a statutory instrument, if challenged by either procedure, can only stand or fall – the offending provision or provisions cannot be isolated and rejected, or amended, while the remainder of the instrument stands. Also, the length of time it takes for a challenge to be scheduled for debate (usually by the Committee on Delegated Legislation) means that the legislation in question has been in effect for some time before it is debated. Ideally the debate should be scheduled much closer to the date on which the instrument is made. Maybe one way of allowing more time would be, in the rare instances when a statutory instrument is challenged within the period between it being laid and made, postponing the date for the making of the instrument by a further thirty days.

3.6.4 It is also strangely anomalous that while primary statutes can be amended by provisions being inserted, repealed or varied, statutory instruments – the very purpose of which is to contain the detail for which primary legislation sets out general principles – can only stand or fall as drafted. However useful it may be for the details to be tweaked, so that the instrument as a whole can be got right, it cannot be done. If Government is persuaded of the correctness of a challenge, it can of course introduce an amending instrument in due course, but that seems a cumbersome approach. A better way would be to agree that the instrument take immediate effect following the end of the proceedings amended as agreed during the debate (or as voted for if there is a division).

3.6.5 What no degree of parliamentary scrutiny can achieve is to ensure that an instrument, having been duly enacted, is implemented in accordance with its terms and with the enabling power. In practice the courts and tribunals exercise a degree of oversight.
after the fact. Arguably a more immediate safeguard would be for a parliamentary standing committee to conduct a post-implementation review of selected pieces of secondary legislation, to take evidence on the way it is being applied in practice, and report accordingly to Parliament.

3.6.6 Statutory instruments that are subject to consultation before being laid before Parliament generally benefit from the process. Currently consultation on delegated legislation is a rather hit-and-miss affair, only occurring where the subject matter is part of a wider consultation or where there is a statutory requirement for the relevant department to consult (for example, the Department for Work and Pensions (DWP) must submit most social security regulations to the Social Security Advisory Committee (SSAC) for scrutiny, and the Secretary of State is obliged to publish the SSAC’s formal reports. Arguably a more general requirement for outside experts to be consulted on regulations would encourage better scrutiny of delegated legislation before it got before Parliament.

3.7 How far is the intended content of secondary legislation made clear when the Bill is going through Parliament? Should draft secondary legislation be routinely made available when Bills are scrutinised by Parliament?

3.7.1 Secondary legislation is generally drawn up after the primary legislation which contains the enabling power, and according to a different timetable, whereas it would in fact be helpful to those scrutinising the primary legislation if they had some idea, when they saw an enabling provision, how it was intended to be used. To make available secondary legislation, at least in draft, at the time the primary enabling power is promulgated would in our view make for a much better informed process of scrutiny and debate.

3.7.2 A criticism often levelled at secondary legislation is that it is opaque and incomprehensible to most users. To alleviate this problem, Government usually publish explanatory notes at the foot of statutory instruments. These explanatory notes are of varied quality. Some do little more than repeat the order. Others are much more helpful. There should be a general requirement that they should all be written to be generally intelligible to non-expert readers, and elucidate the substance of what the statutory instrument is intended to enact rather than simply set out the process by which it does so.

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1 See for example *LH Bishop Electrical Co Ltd and others v HMRC Commissioners* [2013] UKFTT 522 (tax), in which regulations issued by HMRC were held, in their application to the appellants, to be in contravention of the European Convention on Human Rights and a breach of EU law as disproportionate. The regulations were subsequently amended to make them human rights compliant.