Rt Hon. David Lidington MP—Written evidence (LEG0040)

I am writing on behalf of the Government in response to the Committee’s call for evidence on the delegation of powers in legislation. I hope the Committee will find this submission helpful and I will ensure that civil servants continue to engage with the Committee’s inquiry.

Consistency of approach

The term ‘delegated legislation’ is perhaps misleading. In the vast majority of cases these are powers for Ministers to propose secondary legislation, with Parliamentary approval, within the narrow parameters set by Parliament. Ultimately, the powers to make secondary legislation are granted by Parliament and the use of these powers is subject to Parliament’s approval.

Each provision conferring a power to make delegated legislation has to be considered in its context, including that of the existing law (for example, if amending an area of law, the existing split between primary and secondary legislation will be important to consider). The Government will make its case for the inclusion of a particular delegated power to make secondary legislation, and ultimately it is for Parliament to decide what is appropriate.

There is a variety of reasons why, in a particular case, it might be thought apt to confer delegated powers. For example, delegated legislation may be used:

- to fill in a level of detail not thought appropriate for primary legislation, possibly as it needs to be updated on a frequent basis;
- to enable consultation to take place on the detailed implementation of a policy, this may include technical details or levels of fees;
- to deal with things which it is anticipated may change in future (e.g. uprating for inflation);
- to provide an acceptable level of flexibility to accommodate small policy changes (e.g. when operating in a novel area, where there may be a desire to retain flexibility to tweak the policy in the light of practical experience);
- to deal with matters, concerning the technical implementation of a policy, which cannot be known at the point when the primary legislation is being passed;
- to accommodate the fact that the detailed policy has to work differently for different groups of people, different areas etc. (e.g. the City deals).

In preparing legislation, the Government is aware of the previously expressed views of Parliament over matters it previously thought appropriate to legislate through delegated powers. The Cabinet Office is working with Government Departments to draw their attention to views expressed on this matter in Parliament, and in particular reports from the Delegated Powers and Regulatory Reform Committee (DPRRC).

In drafting provisions, the Government operates within the existing legal and constitutional framework. For example, the courts have established that clear words are needed for certain types of powers, for instance the powers to create or amend criminal offences, to confer powers of entry, powers to sub-delegate and powers to raises taxes.

The appropriate balance between primary and secondary legislation is considered as part of the drafting process. Whether that balance is appropriate is subject to stress-testing by the Parliamentary Business and Legislation Cabinet Committee.
Each bill is accompanied by a memorandum to the DPRRC setting out the extent and rationale for each new delegated power. These memoranda are published online.

In its call for evidence, the Committee asked if matters previously set out in secondary legislation are increasingly dealt with in statutory guidance and other publications. It is Government policy that guidance should not be used to circumvent the usual way of regulating a matter. If the policy is to create rules that must be followed, the Government accepts that this should be achieved using regulations subject to parliamentary scrutiny and not guidance. The purpose of guidance is to aid policy implementation by supplementing legal rules. The Committee will be aware that 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. There is nothing to prevent Parliament from scrutinising guidance at any time. In certain exceptional circumstances it may be appropriate for guidance to be laid before Parliament or subject to the negative procedure.

Scrutiny of secondary legislation

The question of whether secondary legislation should be amendable is not a new one, but the nature and volume of such legislation would make it a much less practical and necessary process than for primary legislation. Recognising the different nature of measures provided for in secondary legislation, there are robust scrutiny procedures in place that are not as lengthy and do not take up as much Parliamentary time as those for primary legislation. Parliament must, of course, approve the delegation of powers and the procedures that apply to their use. Where it has been felt necessary, enhanced scrutiny procedures have been applied. These procedures, sometimes referred to as super-affirmative procedures, often include an extended period (usually of 60 days) during which time a pre-draft is laid before Parliament for scrutiny. We do not think that such procedures would be appropriate for most secondary legislation.

Under the affirmative procedure, a draft of the statutory instrument is already laid before Parliament and scrutinised by the Joint Committee on Statutory Instruments and the Secondary Legislation Scrutiny Committee before being brought forward for approval by both Houses. It is not clear what additional procedures could be put in place to delay or reject secondary legislation but consideration needs to be given to the nature of secondary legislation and the need for clarity and certainty in the procedures applied to approve it.

Henry VIII powers

So-called Henry VIII powers range from the far-reaching powers to amend primary legislation found in Part 2 of the Civil Contingencies Act 2004 (emergency powers), to much more straightforward powers to update statutory cross-references made inaccurate by later legislation.

Powers may be far-reaching and yet involve no amendment of existing primary legislation. On the other hand, powers may be very limited and yet their exercise may give rise to the need to make extensive amendments across the statute book (e.g. the renaming of a body). Some older primary legislation contains a level of policy detail which would now be dealt with in delegated legislation (e.g. setting out the detail of forms or administrative procedures). Reflecting this, a bill might confer a delegated power to amend this material.

In some cases, the same results can be achieved by amending the primary legislation or by free-standing provisions in the delegated instrument. The preferable route may be influenced by what users of the legislation are likely to find most helpful. For example:
• if the law in a particular area is dealt with entirely in one Act, it might be most helpful for the user if a corresponding regime for a related subject-area is created by amending the Act. If this is done, the reader only has to consult the Act (as amended) to find the law covering both areas;

• including a detailed list in the primary legislation and taking a power to add to that list would be a Henry VIII power, but that might still be preferable to the alternative of taking a broader power to set out the detailed list entirely in regulations; and,

• similar issues arise when the choice is whether to specify a figure in the primary legislation, with a future-proofing power to amend that figure by regulations, or to provide that the figure will be the one specified, from time to time, by regulations.

The Government recognises that Parliament has a particular concern about powers to amend primary legislation. Usually these are subject to the affirmative parliamentary procedure. An example of a Henry VIII power which Parliament agreed should not be subject to any Parliamentary scrutiny is section 104 of the Deregulation Act 2014 which confers on Ministers a power to replace a reference in legislation to an event (e.g. the commencement of a provision) with a reference to the actual date the event occurred.

In preparing legislation, the Government is well-aware of the need to justify to Parliament any delegation, and so there are undoubtedly areas where great caution would be exercised.

Although relatively unusual, the statute book contains a number of powers conferred on someone other than a Minister of the Crown. Office-holders and public bodies on which powers to make statutory instruments have been conferred include the President of the Supreme Court, and a number of statutory regulators. It would be extremely unusual for these powers to extend to making textual amendments of the statute book. In a number of cases, where an instrument is made by a non-Minister, a Minister is then given a power, by statutory instrument, to make consequential amendments to the statute book (e.g. the Lord Chancellor’s power under Section 4 of the Civil Procedure Act 1997 to make provision consequential on statutory instruments made by the Civil Procedure Rule Committee).

Section 106 of the Legal Services Act 2007 confers a power on a licensing body to make orders which modify or disapply Schedule 13 to that Act as it applies in relation to a particular not for profit body or community interest company (ensuring a lighter touch regulatory regime applies to them). This is an example of an order made by a non-Minister which may modify the effect of a statutory provision. However, because it does so on a case by case basis, Parliament thought it apt that the order was not a statutory instrument and that it could be made without any Parliamentary scrutiny. This example perhaps illustrates why black and white rules in this area as to when a Henry VIII power ought to be conferred, or the level of Parliamentary scrutiny required, are not appropriate, and why each proposal must be considered in its own context.

Information provision

At the beginning of this Parliament the Government introduced a new format of Explanatory Notes for bills which followed a pilot and extensive public consultation. The new template is easier to navigate, has better links to online resources and includes more information on the territorial extent of each part of a bill. The Government acknowledges that more work is needed to improve the content of the notes and First Parliamentary Counsel noted this in her evidence to the Committee in December 2016.
The call for evidence asked if the Explanatory Notes that accompany a bill contain sufficient information about what the proposed secondary legislation will do. The notes accompanying bills are designed to explain the provisions in the bill, including what delegated powers are designed to achieve.

For each bill, the Government publishes a memorandum setting out and justifying the delegated powers in that bill and setting out why, in the Government’s view, the level of Parliamentary procedure is appropriate.

In addition bills are regularly accompanied by draft secondary legislation or policy papers to illustrate how delegated powers may be used. It is not always possible to publish draft secondary legislation alongside a bill, but this does not mean that the framework has not been thought out. Not only will the detail in secondary legislation need to be discussed with stakeholders and subject to consultations, but it may also be dependent on international negotiations or spending reviews within Government.

When bills are passing through each House, Government Departments regularly produce written briefs on bills and arrange briefings sessions with MPs and peers.

**Brexit**

The call for evidence asked about the use of secondary legislation to convert the ‘acquis’ (the body of existing EU law) into British law. The Great Repeal Bill will end the authority of EU law and return power to the UK by repealing the European Communities Act 1972. The Bill will convert current EU law into domestic law, while allowing for amendments to take account of the future negotiated UK-EU relationship.

The Bill will not pre-judge the negotiations or future relationships, but the timetable set by Article 50 means that we have to undertake the legislative process in tandem with the negotiations under Article 50.

The Government’s aim in preserving EU law on our exit is to give consumers, workers and businesses as much certainty as possible. We will need to make secondary legislation to achieve this. Without this approach, there would be large gaps in the UK statute book after exit. Many of the reasons cited earlier in this submission as to why it is appropriate to use delegated legislation in certain circumstances are likely to be relevant in the context of EU exit. For example, where EU law makes reference to an EU regulator, it might be necessary to substitute the name of a UK regulator.

The Government will set out the content and implications of the Bill in due course; but this Committee’s inquiry is timely as the Government will be keen to work with Parliament in helping to manage the programme of secondary legislation arising from our departure from the EU.

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