1. This is the response of Garden Court Chambers to the Constitution Committee’s inquiry into the use of delegation of powers in the legislative process.

2. Garden Court is a top ranked set of barristers based in central London, committed to human rights, social justice and equality. We specialise in civil liberties, criminal defence, family law, housing, immigration and public law.

3. Our submission to the inquiry is based on contributions by a number of our barristers based on experience and knowledge of the use of delegated powers, gained from both legal practice, research and campaigning. Our response, set out below, addresses some though not all of the issues raised by the call for evidence and we hope that it is of assistance to the committee. The response is split into two sections, dealing firstly with the scope of delegated powers and secondly, with the issue of Parliamentary scrutiny.

**The scope of delegated powers**

4. In general terms it is Parliament’s role to legislate and the Government’s role to implement that legislation. With that in mind, we take the view that delegated powers should be granted sparingly and should generally be limited to the logistical and practical matters necessary to ensure that the legislation can operate effectively. As such, delegated powers should not generally be available or used to legislate in areas of political controversy or legitimate democratic interest.

5. The dividing line between the acceptable and unacceptable use of delegated powers is not easy to define though, in our experience, it is easy to recognise. In our view, each of the following (set out in chronological order) provides an example of where delegated powers have been used by the Government to legislate by means of secondary legislation in areas of acute controversy, which should properly have been subject to primary legislation and the enhanced level of Parliamentary debate and scrutiny which that entails.

*The Criminal Legal Aid (General) (Amendment) Regulations 2013, SI 2013/2790*

6. These regulations removed large swathes of prison law from the scope of legal aid, save for matters directly involving release and certain matters involving the determination of a criminal charge. These came into force on 2 December 2013. The Lord Chancellor at the time Chris Grayling, giving evidence to the Justice Select Committee on 3 July 2013, accepted that the restrictions were ideological in nature, as opposed to being logistical or practical. Permission was granted by the Court of Appeal on 28 July 2015 to the Howard League for Penal Reform and the Prisoners Advice Service to seek judicial review of the legality of the regulations. See *R (Howard League for Penal Reform and the Prisoners’ Advice Service) v The Lord Chancellor* [2015] EWCA Civ 819. The Court took the view that it was arguable that the regulations gave rise to a risk of systemic unfairness in respect of certain decisions involving the treatment of prisoners, including decisions about segregation and eligibility for places on mother and baby units. Though the regulations were enacted pursuant to s15 Legal Aid, Sentencing and Punishment of Offenders Act 2012

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1 See [http://www.publications.parliament.uk/pa/cm201314/cmselect/cmjust/91/130703.htm](http://www.publications.parliament.uk/pa/cm201314/cmselect/cmjust/91/130703.htm), Q198.
LASPO), they not (as far as we are aware) foreshadowed by any of the Parliamentary debates on LASPO. Rather they were announced in a consultation paper released around one week after the relevant parts of LASPO came into force.²

The Civil Legal Aid (Procedure) (Amendment) Regulations 2014, SI 2014/814

7. These regulations amended the Civil Legal Aid (Procedure) Regulations 2012, SI 2012/3098 and came into force on 22 April 2014. The regulations were enacted pursuant to s12 LASPO and related to paragraph 12, Part 1, Schedule 1 of that Act which made provision for legal aid to be provided to a person who was, or was at risk of being, the victim of domestic violence. The amended regulations dealt with the evidence which a victim of domestic violence needed to produce in order to establish she (or he) was eligible for legal aid. Save for certain exceptions, legal aid would not be available unless documentary verification of domestic violence were provided within the 24-month period before the application for legal aid was made. The Court of Appeal in the case of R (Rights of Women) v Lord Chancellor [2016] EWCA Civ 91, [2016] 1 WLR 2543 held that this 24-month time bar frustrated one of the purposes of LASPO, namely that women suffering from domestic violence should be eligible for legal aid (provided that they met the relevant means and merits tests) since there were many situations in which victims of domestic violence needed legal aid more than 24 months after it was practical to obtain the kind of evidence required.

The Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014, SI 2014/607

8. These regulations, which came into force on 22 April 2014, amended the Civil Legal Aid (Remuneration) Regulations 2013, SI 2013/422 to limit the remuneration paid to lawyers in judicial review proceedings. In general terms, the regulations provided that lawyers would not be paid for legally aided judicial review claims save where the court granted permission to bring the claim. This, in the eyes of the senior judiciary among others, would have had a ‘chilling effect’ on ability of citizens to hold the state to account.³ The regulations were enacted pursuant to ss2 and 41 LASPO. Again, there was an ideological element to the regulations. Writing in the Daily Mail on 6 September 2013⁴ the Lord Chancellor Grayling derided the use of judicial review as ‘a promotional tool for countless Left-wing campaigners’⁵. And again the subject matter of the regulations was not one which had been discussed in the consultation paper that preceded LASPO⁶ or in any of the Parliamentary debates on LASPO. The Divisional Court, in R (Ben Hoare Bell Solicitors) v Lord Chancellor [2015] EWHC 523 (Admin), [2015] 1 WLR 4175, held that the regulations were unlawful as they were incompatible with the purposes of the civil legal aid scheme contained in LASPO.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014

² Transforming legal aid: delivering a more credible and efficient system (MoJ 9 April 2013) and c.f. Proposals for the Reform of Legal Aid in England and Wales (MoJ, November 2010), the consultation paper which preceded LASPO, which is silent on the matter.
³ Response of the senior judiciary to the Ministry of Justice’s consultation entitled “Judicial Review: Proposals for Further Reform” (Senior Judiciary, 1 November 2013) at paragraph 24
⁴ Coinciding with the announcement of the cuts contained in the consultation paper Judicial Review: Proposals for further reform (MoJ, September 2013).
⁵ Judicial Review Promotional Tool Left Wing Campaigners (Daily Mail, 6 September 2013)
⁶ Proposals for the Reform of Legal Aid in England and Wales (MoJ, November 2010)
The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014, which was due to come into force on 4 August 2014, was purportedly introduced under the powers contained in ss9 and 41 LASPO. The purpose of the regulations was particularly controversial: to make legal aid subject to a residence test which, in broad terms, would have meant that any person who could not prove that they were in the UK lawfully would not be eligible for legal aid and therefore, in practical terms, would be barred from access to the courts. The Public Law Project sought judicial review of the order, prior to it coming into force. The matter ended up in the Supreme Court where it was held that for the Government to restrict legal aid in this was ultra vires the powers conferred by LASPO. See R (PLP) v Lord Chancellor [2016] UKSC 39, [2016] AC 1531. Again, there was an obvious ideological element to the regulations and again the subject matter of the regulations was not one which had been discussed in the consultation paper that preceded LASPO or in any of the related Parliamentary debates.

**Summary and conclusions**

10. These are all examples of delegated powers being used to legislate in an area of acute controversy on which there is a wide spectrum of possible ideological positions. In a number of instances the powers were used in a manner not specifically envisioned at the time the parent legislation came into force. In others, the powers were used in a way which was unlawful. In our view these examples suggest that delegated powers are being used on a relatively frequent basis by the Government to legislate on matters which should properly be reserved to Parliament by means of primary legislation.

**Parliamentary scrutiny**

11. Turning to the level of scrutiny which delegated legislation receives, we should acknowledge at the outset that at least some of regulations above have been subject to a degree of Parliamentary oversight. For example the Order introducing the residence test was subject to short debate and vote before the Fifth Delegated Legislation Committee in the House of Commons on Tuesday 1 July 2014. Similarly, regulations restricting the availability of legal aid for judicial review proceedings were the subject of several reports and debates which we will return to below. Nevertheless, we have concerns about the nature and efficacy of this scrutiny for a number of reasons.

12. First, as we indicated at the outset, for reasons of constitutional principle we take the view that delegated powers should simply not be used in areas of controversy, save where the Government has been granted an express and clearly framed mandate within the parent legislation, and should be limited to the practical implementation of legislation. Outside of these circumstances we feel that primary legislation should be used with the maximal level of Parliamentary scrutiny which that entails.

13. The second point is an important (though somewhat convoluted) one, relating to the European Convention on Human Rights (ECHR). Where legislation results in discrimination contrary to the ECHR — for example because it impacts on women more severely than men, without sufficient justification — then an affected person may seek judicial review. But where, as is often the case, the legislation involves social or

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7 Proposals for the Reform of Legal Aid in England and Wales (MoJ, November 2010)
8 The residence test was first proposed in the consultation paper Transforming Legal Aid: Next Steps (MoJ, April 2013).
economic measures\(^9\) the courts will not interfere save where the objective pursued by the legislation is ‘manifestly without reasonable foundation’. See, for example, the treatment of the residence test by the Court of Appeal in *R (PLP) v Lord Chancellor* [2015] EWCA Civ 1193, [2016] 2 WLR 995, where it was held that the test did not result in unlawful discrimination. That is, the courts will take a very hands-off approach. The rationale being that economic and social measures are areas lying particularly within the expertise of national Parliaments and that the state should therefore be afforded a significant margin of appreciation in implementing those measure. But this rationale has limited force, where the measure in question has been implemented by means of secondary legislation and has not received the Parliamentary scrutiny which primary legislation would have done. The effect of all of this is that potentially discriminatory economic and social measures implemented by way of secondary legislation will receive only limited scrutiny from both Parliament and the courts, allowing the Government to operate with very limited oversight.

14. Third, the current level of Parliamentary scrutiny applied to secondary legislation does not always ensure that errors are picked up in time. By way of a technical example, a recent drafting error in the Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2016, SI 2016/965 which amended regulations dealing with the eligibility of persons from abroad for an allocation of social housing and for homelessness assistance, was only identified by the Joint Committee on Statutory Instruments a fortnight after the regulations had come into force and six weeks after they had been laid.\(^10\)

15. Fourth, such Parliamentary scrutiny as is available to oversee secondary legislation is not always effective. Using the Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014, SI 2014/607 (the judicial review regulations) as an example, these regulations were laid before Parliament on 14 March 2014. On 24 March 2014 Ed Miliband MP tabled an Early Day Motion asking for the regulations to be annulled.\(^11\) On 27 March 2014 the Secondary Legislation Scrutiny Committee published its report drawing the regulations to the special attention of Parliament ‘on the grounds that they are legally important and raise issues of public policy’.\(^12\) The regulations came into force on 22 April 2014. Then, on 30 April 2014 the Joint Committee on Human Rights published its report on the totality of the Governments judicial review changes, including those contained within the regulations\(^13\). The report expressed a number of trenchant concerns about the package of reforms as a whole. Finally, on 7 May 2014 a regret motion was tabled by Lord Pannick QC ‘to move that this House regrets that the Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014 make the duty of the Lord Chancellor to provide legal aid in judicial review cases dependent on the court granting permission to proceed. (SI 2014/607)’. Following what was described as ‘a debate of the highest quality’ the motion was withdrawn following a commitment by Lord Faulks to ask the Lord Chancellor to reflect on what was said

\(^9\) All of the examples in this paper would meet this description.

\(^10\) Thirteenth Report of Session 2016–17 (Joint Committee on Statutory Instruments, November 2016)

\(^11\) http://www.parliament.uk/edm/2013-14/1220

\(^12\) See 37th Report of Session 2013-14 (HoL Secondary Legislation Scrutiny Committee, March 2014)

\(^13\) The implications for access to justice of the Government’s proposals to reform Judicial Review (JCHR, April 2014)

\(^14\) HL Deb Col 1568, 7 May 2014
during the course of the debate\textsuperscript{14}. But in the event, the regulations remained in force with no amendment until they were declared to be unlawful by the High Court.

16. The point which we draw from this, is that while secondary legislation may on occasion take up a good deal of Parliamentary time, the scrutiny which it receives does not necessarily achieve its purpose. This is regrettable and in our view may be linked to the lack of tools available to Parliament to amend secondary legislation leaving only the ‘nuclear option’ of annulling the instrument in question, which for constitutional reasons the House of Lords in particular is likely to be very reluctant to take.

**Conclusion**

17. The examples and arguments set out above, we feel, point toward the conclusion that delegated powers are being used too often, too widely and with insufficient or ineffective scrutiny. This trend, in our view, is undesirable. The following suggestions might go some way toward rectifying this trend:

i. A new Parliamentary convention, properly publicized and enforced, setting out in clear terms when and how it is appropriate to use delegated powers.

ii. When primary legislation is proposed, the scrutiny arrangements for the use of and delegated powers therein together with the policy aims underpinning those powers, should be specified in the bill itself.

iii. Parliament should divest itself of its self-imposed reluctance to vote on any subordinate legislation and timetables should be adjusted to allow for full consideration and debate.

iv. Parliament should be given a power to amend secondary legislation. The ‘take it or leave it’ approach, as described in the call for evidence does not seem to be working.

v. In Australia the Joint Parliamentary Committee on Migration was assigned counsel whose task was to advise the Committee on its the scrutiny of all migration regulations. Their oversight extended to an assessment of the likely impact of the changes and whether the proposed changes breached fundamental rights. The Committee reports were much cited because the delegated legislation was explained in its context as an adjunct to existing legislation. A similar model might be considered here.

vi. The Law Commission could undertake a greater role in the scrutiny of delegated legislation.

18. We hope that these points are of use to the inquiry. The committee should not hesitate to contact us if we can provide any further assistance or information.

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