1. The Secondary Legislation Scrutiny Committee (SLSC or “the Committee”) would like to thank the Procedure Committee for the opportunity to contribute to this important inquiry into the delegated powers in the “Great Repeal Bill” and for adopting a collaborative approach to ensuring Parliament’s preparedness for the implementation of the decision to withdraw from the EU. The call for evidence is wide-ranging. It covers issues relating both to the nature of the delegations of power contained in the Bill and to the scrutiny of the secondary legislation resulting from the exercise of those delegations. Given that the remit of the SLSC is to examine secondary legislation, the focus of this submission is on the latter and, in particular, on the scrutiny role currently undertaken by the Committee. We anticipate that the Delegated Powers and Regulatory Reform Committee (DPRRC) – like the SLSC, a Lords-only committee – may wish to comment on issues relating to the delegation of power in the Bill since the purpose of that Committee is to report on delegations in all bills introduced into the Lords.

Scope of this submission

2. This submission is split into Part A and Part B. In Part A, we set out:
   - how the SLSC came to be established
   - the SLSC terms of reference
   - information sources
   - the workload of the Committee
   - the impact of the Committee.

And in Part B, we set out:
   - procedures relating to secondary legislation in the House of Lords, and
   - the conclusions drawn by the Committee in our recent report on the Strathclyde Review about the quality of scrutiny of secondary legislation in the two Houses.
PART A

Historical note

3. In January 2000, the Royal Commission on the Reform of the House of Lords (under the chairmanship of Lord Wakeham) ("the Royal Commission") indicated that there was a good case for enhanced Parliamentary scrutiny of delegated legislation and recommended that a reformed House should establish a "sifting" mechanism, by way of either a joint committee of both Houses or a Lords-only committee, to identify those statutory instruments which were important and merited further debate or consideration (Recommendation 37).¹

4. The Report of the Leader's Group on the Working of the House of Lords, published in April 2002, took up the Royal Commission's recommendation and recommended that a committee should be established to examine the merits of every statutory instrument subject to Parliamentary scrutiny.² The House of Lords Liaison Committee agreed that such a committee should be established, and on 16 June 2003, the House, on a motion to approve the 3rd Report of the Procedure Committee, agreed the terms of reference of the Merits of Statutory Instruments Committee. The Committee was subsequently appointed on 17 December 2003.

5. At the start of session 2012-13, the name of the Committee was changed to the Secondary Legislation Scrutiny Committee to reflect an extension of its remit to include scrutiny of Public Bodies Orders (under the Public Bodies Act 2011).

Terms of reference of the SLSC

6. The current terms of reference of the SLSC are set out in full in Annex 1 to this submission. The Committee, in short, examines policy aspects of all instruments laid before both Houses and which are, or might be, subject to proceedings in either House. The majority of instruments before the Committee are statutory instruments subject to either the affirmative or the negative resolution procedure. Other types of instruments include, for example, treaties laid under the Constitutional Reform and Governance Act 2010. The SLSC complements the work of the Joint Committee on Statutory Instruments (JCSI) which examines the technical and legal aspects of instruments.

¹ Royal Commission on the Reform of the House of Lords, A House for the Future (January 2000), Cm 4534, pp 74-75, paras 7.23-7.27.
² Session 2001-02 (HL Paper 111), para 17.
7. The reports of the SLSC are advisory only. The Committee has no power to intervene formally in the procedural path of an instrument. It may, however, be regarded as a “sifting” committee in that its purpose is to highlight, from amongst a myriad of instruments, those which we judge to be of particular significance. Our principal task is to draw to the special attention of the House instruments to which one or more of the following grounds apply:

   (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;

   (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;

   (c) that it may inappropriately implement European Union legislation;

   (d) that it may imperfectly achieve its policy objectives;

   (e) that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument’s policy objective and intended implementation;

   (f) that there appear to be inadequacies in the consultation process which relates to the instrument.

Grounds (b) to (f), unlike Ground (a), imply criticism of some sort. Grounds (a) to (d) were in the Committee’s original terms of reference. Grounds (e) and (f) were added in Session 2014-15.

8. The Committee also publishes short Information Paragraphs on instruments which do not warrant being drawn to the special attention of the House but about which members of the House may welcome some extra information.

Information sources

9. The Committee is assisted in its work by the documentation routinely laid with an instrument. This always includes an Explanatory Memorandum and may also include an Impact Assessment, a Transposition Note and consultation responses. The Committee is supported by two Advisers who may request further information from the Government department where they take the view that the documentation is deficient or unclear. Usually that additional information is published by the Committee. The Committee has, from time to time, invited Ministers to give oral evidence. On occasion we receive submissions from individuals and organisations outside of Parliament.

Number of instruments
Every session, the SLSC publishes an end–of-term report setting out statistical information about the work of the Committee and a narrative about key themes (such as the quality of Explanatory Memoranda, the number of correcting instruments or the uneven flow of instruments during the course of the session). The following figures are for Session 2015-16. Figures for the current session will be available soon after the end of the session although, for reasons relating to the decision to withdraw from the EU, the number of instruments laid in Session 2016-17 cannot be regarded as typical.

Statistics for Session 2015-16

The SLSC published 35 reports on a total of 712 instruments (119 affirmatives and 593 negatives). 25 affirmatives and 42 negatives (67 in total) were drawn to the special attention of the House: a reporting rate of 21% for affirmatives and 7.1% for negative instruments (and, overall, 9.4% of the total considered). The grounds on which we drew the 67 instruments to the special attention of the House were as follows – as usual, most reports were made on the basis of Ground (a):

- 49 instruments (70%) on the ground of political importance or public policy interest (Ground (a));
- 13 (19%) on the ground that the explanatory material laid in support provides insufficient information (Ground (e));
- 3 (4%) on the grounds of imperfectly achieving its policy objective (Ground (d));
- 5 (7%) on the ground that there appear to be inadequacies in the consultation process (Ground (f)).

We published 97 Information Paragraphs, covering 110 (15.4%) of the total instruments.

Other work undertaken by the Committee

In addition to scrutinising individual instruments, the Committee has power to “consider such other general matters relating to the effective scrutiny of secondary legislation and arising from the performance of its functions”. From time to time, the Committee has conducted inquiries. The most recent was a substantial report, published in April 2016, on the Strathclyde Review following several sessions of oral evidence and a call for written submissions. Over a number of sessions, we have produced reports on the Government’s consultation practice, the latest being in January 2015. We have already mentioned the Committee’s end-of-term reports (in paragraph 10 above). We also

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produce thematic reports. For example, we published a report in January 2015 drawing attention to the increasing number of correcting instruments being laid;\(^5\) and this month, February 2017, we sent to the Cabinet Office our response to the Government’s post-legislative assessment of the Public Bodies Act 2011. That response was endorsed by the DPRRC and heavily referenced by the Hansard Society in its blog by Joel Blackwell entitled “Bonfire of the quangos” legislation fizzles out.\(^6\)

**Impact**

14. The SLSC is highly regarded both within and outside of the House of Lords. Measuring impact is of course a challenge but the high profile of the Committee in debates on instruments cannot be gainsaid. In December 2016, we drew five sets of Regulations to the special attention of the House in which the Department for Business, Energy and Industrial Strategy (BEIS) specified the important public services which would be subject to the requirement that any trade union ballot for industrial action must achieve a 40% threshold of support; and we voiced regret that BEIS had failed to publish the related guidance in parallel with laying the Regulations.\(^7\) In the same Report, we also criticised BEIS for failing to publish a summary of consultation responses on a further instrument which set at 12 months the length of a transition period after which union members would have to opt in if they wished to contribute to a trade union political fund. In the subsequent debate on these instruments in this House on 24 January 2017, members referred to these concerns, and the Government spokesman (Lord Prior) responded to them and to the Committee’s scrutiny report.

15. But impact is not simply a matter of assessing the causal relationship between reports produced and motions being tabled. The Committee also has a less visible, but nonetheless powerful, impact behind the scenes. We have in mind, for example, the salutary effect of –

- departments having to produce Explanatory Memoranda for all instruments which, if unsatisfactory, may lead to the Committee requesting further information, replacement of a Memorandum or a formal report on the ground of inadequate explanatory material;
- Ministers being called in to defend their department’s performance in relation to the quality of secondary legislation; and
- thematic reports highlighting departmental shortcomings. We note, for example, that the Committee’s report on the number of correcting instruments gave rise to the appointment of an SI Hub within government aimed at addressing the issues which we raised. In addition, an evidence session with three Permanent Secretaries in July 2016 has stimulated the


\(^6\) 14 February 2017. ADD REF

\(^7\) SLSC, 20th Report, Session 2016-17 (HL Paper 91).
development of a cross-Whitehall “improvement package” to strengthen policy officials’ understanding of Parliamentary procedure in general and the needs of scrutiny of secondary legislation in particular.

16. The Advisers to the SLSC, by giving regular talks to departments, have been instrumental in assisting them in improving their performance in relation to secondary legislation, both in terms of the quality of legislation itself and in improving departmental understanding of the needs of Parliament.

PART B

Lords procedure relating to secondary legislation

17. The two Houses approach the scrutiny of secondary legislation differently. We describe the procedure in the House of Lords in our report in response to the Strathclyde Review:

“44. In the House of Lords, almost all instruments subject to a parliamentary procedure are also considered by [the SLSC], for which there is no equivalent in the House of Commons. The SLSC and the JCSI are complementary in that the SLSC considers the policy aspects of instruments. The DPRRC, alongside its principal work of considering the delegations in Bills (for which there is also no equivalent in the House of Commons), examines LROs and certain other instruments subject to strengthened scrutiny procedures. The Joint Committee on Human Rights examines proposals for remedial orders, draft remedial orders and remedial orders made under section 10 of the Human Rights Act 1998.8

45. Motions and amendments to motions on affirmative instruments may be debated in Grand Committee or in the House, but motions to approve an affirmative instrument can only be decided by the House. Approval motions may not be moved until a report on the instrument from the JCSI has been made (this is called the JCSI “scrutiny reserve”) and, although the SLSC does not have a “scrutiny reserve”, invariably such debates are not scheduled until the SLSC has also made its report. Annulment motions and critical amendments or motions relating to negative instruments are taken in the House. Neutral “take note” motions may be debated either in the House or in Grand Committee.”9

8 Remedial orders are a form of secondary legislation which seek to correct breaches of human rights, identified by either domestic courts or the European Court of Human Rights, between UK law and the European Convention on Human Rights.

We also draw your Committee’s attention to the analysis in the Hansard Society publication, *The Devil is in the Detail: Parliament and Delegated Legislation*, published in 2014.

**Quality of scrutiny in the two Houses**

18. In our Strathclyde response, we also describe at paragraphs 48 to 50 the evidence we received about the differences between the effectiveness of scrutiny of secondary legislation in the two Houses. We concluded in paragraph 51 that the scrutiny of secondary legislation was judged to be more thoroughly undertaken in the Lords than in the Commons. In saying that, we had no intention of being critical of the House of Commons but recognised that the relationship between the two Houses – “with their different characteristics and functions, and with the multiple competing pressures on the time of Members of the House of Commons” – should be regarded as one of “complementarity and not competition”.

**Conclusion**

19. Implementation of the decision to withdraw from the EU will, inevitably, present a significant challenge to Parliament if the two Houses are to perform their scrutiny task effectively. We would welcome a further opportunity to contribute to your inquiry as your Committee’s findings emerge and as more is known about the exact nature of legislative framework to be adopted.

*February 2017*
Annex 1

Terms of reference of the SLSC

(1) The Committee shall, with the exception of those instruments in paragraphs (3) and (4), scrutinise —

(a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;

(b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament, with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (2).

(2) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—

(a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;

(b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;

(c) that it may inappropriately implement European Union legislation;

(d) that it may imperfectly achieve its policy objectives;

(e) that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument’s policy objective and intended implementation;

(f) that there appear to be inadequacies in the consultation process which relates to the instrument.

(3) The exceptions are—

(a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;
(b) draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, and subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001;

(c) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.

(4) The Committee shall report on draft orders and documents laid before Parliament under section 11(1) of the Public Bodies Act 2011 in accordance with the procedures set out in sections 11(5) and (6). The Committee may also consider and report on any material changes in a draft order laid under section 11(8) of the Act.

(5) The Committee shall also consider such other general matters relating to the effective scrutiny of secondary legislation and arising from the performance of its functions under paragraphs (1) to (4) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.