1. The Secondary Legislation Scrutiny Committee (SLSC, or “the Committee”) has made a first submission of evidence to the Procedure Committee’s inquiry into the delegated powers in the “Great Repeal Bill”. In it, we said that we would welcome a further opportunity to contribute as more became known about the legislative framework to be adopted. The Procedure Committee’s second call for evidence for the inquiry provides such an opportunity, which we take up in this submission.

2. As regards the issues set out in the second call for evidence, we offer comment only on those which are relevant to the SLSC. The Delegated Powers and Regulatory Reform Committee (DPRRC) also provided a first submission to the Procedure Committee’s inquiry, which touched on some of these issues. We have no doubt that the DPRRC will be submitting their own comments in response to the second call for evidence.

3. Several of the other issues raised in the second call touch on procedures and practice in the House of Commons, as well as in the House of Lords, namely:
   - the claims made by the Government about present parliamentary scrutiny of delegated legislation, with particular reference to practice in the House of Commons: “Existing parliamentary procedures allow for Parliament to scrutinise as many or as few statutory instruments as it sees fit. Parliament can, and regularly does, both debate and vote on secondary legislation”;
   - the conventions and procedures to apply in providing for debates and votes on instruments under the negative procedure; and
   - the additional capacity, if any, required in the House of Commons for technical and policy scrutiny of the “800 to 1,000” instruments the Government anticipate will be necessary.

4. In our first submission, we set out the approach taken by the House of Lords to scrutiny of secondary legislation, and to debates on statutory instruments subject to both the affirmative and the negative resolution procedure. We recalled the conclusion of the Committee’s response to the Strathclyde Review that the scrutiny of secondary legislation was judged, in the evidence that we had received, to be more thoroughly undertaken in the Lords than in the Commons. We said that that the relationship between the two Houses should be regarded as one of “complementarity and not competition”.

5. In passing, and as regards the claim by the Government that “Parliament can, and regularly does, both debate and vote on secondary legislation”, it is worth pointing out that voting in the Lords, while not infrequent, is usually on the basis of “regret motions”, which do not affect the coming into force of a statutory instrument. A Lords vote to block a statutory instrument is very rare. Moreover, as was demonstrated by the reaction

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1 At paragraph 17.
to the debate in October 2015 on the Tax Credits Regulations, a blocking vote may well meet with a hostile reception on the part of the Government.

6. Nonetheless, our present intention is to ensure that the Lords’ scrutiny of secondary legislation resulting from the “Great Repeal Bill” is no less rigorous and timely than has been the case for all statutory instruments which have been subject to parliamentary procedure and laid before Parliament since the Committee’s establishment in 2003. We are currently considering how, and when, the House of Lords’ capacity for such scrutiny will need to be strengthened. In its Report on “The ‘Great Repeal Bill’ and delegated powers”, the Constitution Committee referred to evidence that it had received about Parliamentary scrutiny; and this included a suggestion by the Bar Council of specialist select committees to look at legislation on particular aspects of the acquis. This may be worth considering further. We re-emphasise, however, that we would continue to see our scrutiny work on behalf of the Lords as complementary to the parallel activity in the Commons.

7. Against this background, we have a particular interest in the following issues raised in the second call for evidence.

The adequacy of the statutory procedures set out in the Statutory Instruments Act 1946 to handle the anticipated scope and volume of delegated legislation.

8. In our first submission, we noted that in the 2015-16 Session the Committee scrutinised 712 statutory instruments. This is historically a relatively low number of instruments: in the 2014-15 Session, the Committee considered 1,153 instruments, and in broad terms over the last decade the number of instruments seen each Session has been around 1,000. With the exception of a small number of Orders laid under the Public Bodies Act 2011, and treaties laid under the Constitutional Reform and Governance Act 2010, these have all been subject to the procedures set out in the Statutory Instruments Act 1946; and, in our view, those procedures have allowed for adequate scrutiny by the Committee as a basis for consideration of the instruments by the House as a whole.

9. We would therefore not see the laying of 800 to 1,000 instruments resulting from the “Great Repeal Bill” as an overwhelming increase in the work of scrutiny. However, this may be a minimum estimate, and account needs also to be taken of any additional secondary legislation that may be required in parallel. There are clear implications for our capacity to complete scrutiny, as already mentioned; and, depending on what proportion of the instruments are affirmative, there will also be resource implications for the approval of instruments in both Houses.

10. However, our overriding concern will be that the Government adhere to best practice in the preparation and presentation of secondary legislation to Parliament. This means that the Government should:

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2 9th report of Session 2016-17 (HL Paper 123).
3 Ibid, para. 93.
• carry out rigorous pre-planning and effective consultation\(^4\) before any statutory instruments are laid;
• ensure proper management of the flow of instruments and clustering of associated instruments, offering advance information about the planned flow;
• provide full and accurate information in support of the instruments, notably through Explanatory Memorandums, Impact Assessments, and any further material specifically required; and
• commit to ongoing co-operation from Ministers to assist Parliamentary scrutiny, notably in making themselves available at short notice to give evidence to scrutiny committees to explain groups of instruments in order, say, to explain the overarching policy or to address any other matters of concern.

The information to be provided to Parliament to demonstrate the exercise of the powers claimed in respect of each instrument (anti-transposition notes)

11. We note that, in referring to the scope of, and constraints on, delegated legislation in the White Paper, the Government state:

• “Crucially, we will ensure that the power will not be available where Government wishes to make a policy change which is not designed to deal with deficiencies in preserved EU-derived law arising out of our exit from the EU.”

We regard this as most important.

12. It will not be enough to rely on this overarching commitment in scrutinising individual statutory instruments. Each instrument must be accompanied by an Explanatory Memorandum (EM). At present, there is a given format for EMs which requires the relevant Department to present information under a series of headings, including “purpose of the instrument”, “matters of special interest to Parliament”, “legislative context” and “policy background”. We would look to the Government to give a clear explanation in the EM to any piece of secondary legislation under the “Great Repeal Bill” (once enacted) of the following points:

• what EU-derived legislation was being “domesticated” by the instrument;
• by what means;
• whether the effect of the resulting domestic legislation was exactly equivalent to the effect of the EU-derived legislation; and, if not, why not.

It may be appropriate to include an additional heading in the EM format for this: what matters is that a full and accurate explanation should be given in each case.

13. In its Report on “The ‘Great Repeal Bill’ and delegated powers”,\(^5\) the Constitution Committee looked in some detail at the information that should be included in EMs

\(^4\) We have taken a close interest in Government consultation policy and dealt with it in a number of our reports, most recently publishing relevant correspondence with the Cabinet Office Minister in our 26\(^{th}\) Report of the current Session (HL Paper 120).

\(^5\) 9\(^{th}\) report of Session 2016-17 (HL Paper 123).
which would amend the body of EU law, notably at paragraph 102(1) and (2). We are at
one with the recommendations set out there.

*Considerations to be taken into account when determining the ‘most pragmatic and
effective’ approach to take in balancing the need for scrutiny and speed*

14. In our view, the established framework for the vast majority of statutory instruments
subject to Parliamentary procedures, relying principally on the affirmative and negative
procedures, has allowed the Government, of whatever political composition, to progress
secondary legislation with speed. Whether that framework has served Parliamentary
scrutiny equally well is arguable. In the case of negative instruments, it is open to the
Government to bring them into force in a shorter period than 21 days after laying, which
is conventionally the period chosen by the Government for most instruments. The
Government may also lay negative instruments at the start of a Parliamentary recess, and
bring them into force before Parliament returns. In such cases, scrutiny has little or no
chance to be effective.

15. Both Houses and the Government will need to co-operate closely in meeting the
challenge posed by the need to promote legislation to “domesticate” the European *acquis*.
Such co-operation will best succeed if the Government match the readiness of Parliament
to prioritise the necessary scrutiny by making every effort to maximise the time available
to Parliament to complete scrutiny, and by being fully transparent in explaining the effect
of the relevant secondary legislation – including being ready to assist scrutiny committees
by Ministers’ giving evidence in person. Parliament must itself ensure that the work of
scrutiny is adequately resourced; and there may well be scope for enhanced cross-House
collaboration between scrutiny committees, especially if evidence is taken, whether from
Ministers or from other witnesses with specialist knowledge of the policy areas affected
by secondary legislation.

*April 2017*