



Taking Back Control for Brexit and Beyond

Delegated Legislation, Parliamentary Scrutiny and
the European Union (Withdrawal) Bill

September 2017



Acknowledgements

This report was produced by Ruth Fox, Joel Blackwell and Brigid Fowler.

We would like to thank the officials in both Houses of Parliament who read the report in draft and provided many useful comments and insight. So too did a number of representatives of civil society organisations; we thank them for giving us advance sight of their briefings and making helpful suggestions about our proposals. This report draws heavily on previous research into delegated legislation, the results of which were published in 2014. That research was kindly funded by the Nuffield Foundation.

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Published by the Hansard Society
5th Floor, 9 King Street, London EC2V 8EA

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ABBREVIATIONS

DLC	Delegated Legislation Committee
DLSC	Delegated Legislation Scrutiny Committee
DPRRC	Delegated Powers and Regulatory Reform Committee
ECA	European Communities Act 1972
EDM	Early Day Motion
EM	Explanatory Memorandum
EU	European Union
ESC	European Scrutiny Committee
JCSI	Joint Committee on Statutory Instruments
LRO	Legislative Reform Order
PBO	Public Bodies Order
SI	Statutory Instrument
SLSC	Secondary Legislation Scrutiny Committee
SO	Standing Orders

EXECUTIVE SUMMARY

The government has said that *'the principal objective of leaving the EU is for Parliament to take back control of UK laws and policies'*. The European Union (Withdrawal) Bill is the first legislative test of what this means.

The Bill will confer significant powers on ministers to amend or repeal elements of the statute book, with limited parliamentary scrutiny of and control over how they might choose to exercise those powers. As such, it will strengthen the hand of the executive, not Parliament. Constitutional principles about the relationship between the executive and the legislature are at stake. The balance must be redressed in Parliament's favour by improving parliamentary scrutiny of both delegated powers and delegated legislation. This paper proposes a three-part solution:

- The EU (Withdrawal) Bill should be amended to circumscribe the powers it delegates more tightly;
- A new strengthened scrutiny procedure should be introduced for the exercise of the widest delegated powers in the EU (Withdrawal) Bill;
- The House of Commons should establish a new 'sift and scrutiny' system for delegated legislation in general.

THE POWERS IN THE EU (WITHDRAWAL) BILL

The precedents provided in previous legislation, including the Legislative and Regulatory Reform Act 2006, provide examples of how Parliament could introduce safeguards into the EU (Withdrawal) Bill to tighten the scope and application of the powers.

A NEW EUROPEAN UNION (WITHDRAWAL) ORDER SCRUTINY PROCEDURE

The Bill requires Parliament to agree in advance the scrutiny procedures that will apply to uses of delegated powers without knowing fully how the powers will be exercised. In doing so it pre-determines what Parliament should debate.

Other Acts which confer upon a minister a significant Henry VIII power to amend primary legislation have made the use of such a power subject to a strengthened scrutiny procedure. None is proposed in this Bill.

Eleven variants on a strengthened scrutiny procedure currently exist but none are suitable for the powers in the EU (Withdrawal) Bill. The provision of statutory consultation periods, a committee veto, and a trigger to extend the scrutiny period from 40 to 60 days make them impractical for the Brexit process.

The proposed new procedure will apply to the widest powers in the EU (Withdrawal) Bill. It will require amendment of the Bill and could also be applied to powers in other Brexit legislation that follows.

The key feature is that in the first 20 days of the scrutiny period Parliament (via its delegated legislation committees), not ministers, will decide how the exercise of the powers will be scrutinised. The committees will have the power to upgrade a negative SI to an affirmative. Once the scrutiny level has been determined, the SI will be subject to the new scrutiny system in the House of Commons and existing procedures in the House of Lords.

A NEW 'SIFT AND SCRUTINY' SYSTEM FOR THE HOUSE OF COMMONS

The current system of 'praying' against SIs using an Early Day Motion, and 90-minute Delegated Legislation Committee debates followed by a pointless vote on a consideration motion, would be abolished. In its place a new permanent Delegated Legislation Scrutiny Committee (DLSC) should be established for the scrutiny of *all* SIs in this and other bills. It would:

- be in the control of Members not whips, with the chair and members elected in the same way as other select committees;
- be supported by a set of sub-committees, some of whose members would also be members of relevant departmental select committees;
- have administrative, legal and research support via a committee secretariat;
- sift and scrutinise both negative and affirmative SIs and those subject to strengthened scrutiny procedures; and
- turn over to the whole House for further consideration those SIs of concern, with procedures in place to ensure that any SI reported to the House would have to be debated and voted on. Members would be granted a 'conditional amendment' power alongside procedural hurdles to ensure that ministers cannot ignore their concerns.

KEY FEATURES OF OUR REFORM PROPOSALS

If implemented, our proposals will:

- provide for more rigorous and systematic scrutiny, and reflect the fact that Parliament is delegating power to the executive, not subordinating itself to the government's wishes;
- make a government response to the legitimate concerns of parliamentarians about SIs a requirement not an option;
- give MPs a meaningful role and voice in the process, and make more efficient and effective use of the time they spend scrutinising SIs;
- retain the top-level architecture of the present delegated legislation system, including affirmative, negative and strengthened scrutiny procedures and the standard 28- and 40-day scrutiny periods for SIs, addressing government concerns about time and speed;
- require amendments to Standing Orders but not to the Statutory Instruments Act 1946, which would unhelpfully take up further parliamentary time.

INTRODUCTION

The government has said that *'the principal objective of leaving the EU is for Parliament to take back control of UK laws and policies'*.¹ But, as things stand, the way in which the government proposes to secure Brexit in legislative terms will significantly strengthen the hand of the executive, rather than Parliament.

The chief legislative vehicle for Brexit - and one of the first tests of the meaning of *'take back control'* - is the European Union (Withdrawal) Bill, which received its first reading in the House of Commons on 13 July 2017. The second reading debate is scheduled for 7 and 11 September. If the Bill is enacted in the form presented to Parliament, it will confer significant powers on ministers to amend or repeal elements of the statute book, with limited parliamentary scrutiny of and control over how they might choose to exercise those powers.

The broad scope of the powers in the Bill, the inadequate constraints placed on them, and shortcomings in the proposed parliamentary control of them are a toxic mix. Unless addressed, these factors will inhibit Parliament's ability to hold the government to account, and neuter its capacity to influence some of the policy choices arising from our withdrawal from the European Union. Steps must be taken to redress the balance in Parliament's favour by improving parliamentary scrutiny of both delegated powers and delegated legislation.²

The way in which Parliament, and particularly the House of Commons, deals with delegated powers and the delegated legislation (in the form of Statutory Instruments (SIs)) that flows from them has long been widely regarded as deficient. In 2014 we published the first in-depth study of parliamentary scrutiny of delegated legislation for over 80 years. In that report, *The Devil is in the Detail: Parliament and Delegated Legislation*, we concluded that the House of Commons scrutiny system was unfit for purpose and in need of wholesale reform.³ Various House of Commons Procedure Committee reports have also recommended reform but to no avail.⁴

The political salience of the European Union (Withdrawal) Bill, however, means that MPs can

¹ Letter from Rt. Hon. David Davis MP, Secretary of State for Exiting the EU, to Sir William Cash MP, Chairman, European Scrutiny Committee, 7 February 2017. <http://www.parliament.uk/documents/commons-committees/european-scrutiny/letter-david-davis-070217.pdf>

² The terms *'delegated'*, *'secondary'* and *'subordinate'* legislation are regularly used interchangeably by practitioners when referring to non-primary legislation. Throughout this report we use the term *'delegated legislation'*. Although it is commonly used in legal circles, we do not use the term *'subordinate legislation'*, as such nomenclature might convey to the reader that the law in question is less important than primary legislation.

³ R. Fox and J. Blackwell (2014), *The Devil is in the Detail: Parliament and Delegated Legislation*, (London: Hansard Society).

⁴ The time and resource dedicated to the Strathclyde Review in 2015-16 (set up after the House of Lords declined to consider an SI in relation to tax credits in autumn 2015) stands in marked contrast to the reluctance of successive governments to tackle real problems of democratic accountability in the House of Commons.

no longer be indifferent to the inadequacies in the system. They must now finally take seriously their democratic responsibility for delegated legislation.

Delegated powers and delegated legislation: what are they and why do they matter?

Acts of Parliament provide a framework into which much of the real detail and impact of the law will subsequently be added through delegated legislation. Acts contain powers that are delegated to ministers by Parliament to make Statutory Instruments (SIs). An SI is the 'child' of the power in the 'parent' Act. SIs can be used to fill out, update, or sometimes even amend primary legislation without Parliament having to spend time passing a new Act.

Some SIs are simply laid before Parliament and not subject to scrutiny. Some SIs come into effect – are therefore the law of the land – before Parliament looks at them. SIs subject to parliamentary scrutiny are assigned to one of three forms of procedure: the negative, affirmative, or strengthened or enhanced (sometimes referred to as super-affirmative) procedure.

SIs subject to the affirmative scrutiny procedure are automatically debated for up to 90 minutes. However, the debates are of poor quality and on average last just 26 minutes. The vote then takes place on a pointless 'consideration motion'. SIs subject to the negative scrutiny procedure are only debated if Members 'pray' against them within the 40-day scrutiny period and the government grants time for a debate. In the 2015-16 session just 3% of the 585 negative SIs laid before Parliament were debated by MPs and in 2016-17 just 0.9% of the 537 negative SIs were debated.⁵

The scrutiny of primary legislation is conducted sequentially by one House and then the other; they can debate and amend it at length. Scrutiny of SIs is conducted in parallel by both Houses, and – with only a couple of exceptions – Parliament cannot amend SIs, because this would undermine the principle of delegation of power to ministers. Parliamentarians face a 'take it or leave it' proposition: accept an SI even if they believe it is fundamentally flawed, or reject it entirely even if some elements are acceptable. Since 1950 the House of Commons has rejected just 11 SIs, and the House of Lords has rejected six and delayed consideration of another. This equates to approximately 0.01% of the total number of SIs considered.

⁵Data derived from the Hansard Society's *Statutory Instrument Tracker*. See also, Hansard Society (2017), *Westminster Lens: Parliament and Delegated Legislation in the 2015-16 Session*, (London: Hansard Society).

The unique legislative challenge confronting the Government

The government has said that, where Brexit will occasion major policy changes, these will be delivered through new primary legislation.

However, Brexit imposes a requirement for speed and flexibility. The combination of a tight deadline (29 March 2019) and protracted uncertainty over the content, timing and sequencing of negotiations and any resulting agreements makes it unavoidable that considerable delegated legislation will be needed.

In its White Paper, *'Legislating for the United Kingdom's withdrawal from the European Union'*, the government estimated that between 800 and 1,000 SIs would be required to 'correct' the statute book for Brexit.⁶ The EU (Withdrawal) Bill replaces the 1972 European Communities Act (ECA) which, in the shape of Section 2(2) gave ministers a widely drawn power to introduce legislation that in other circumstances would have been set out in primary legislation.

However, even compared to the ECA, the Brexit legislative exercise is unprecedented because of its volume and timescale, and the extent to which the future use of the broad range of powers proposed by ministers cannot be wholly known and defined in advance.

In the face of the need to take broad powers, the government seems inclined to take a 'trust us' approach. Earlier in their careers both the Prime Minister, Theresa May MP, and the Secretary of State for Exiting the EU, David Davis MP, argued that Parliament should not be a rubber-stamp for the executive and must check or restrain government through effective scrutiny mechanisms.⁷ Implicit in the government's approach now is the idea that these are not the kind of ministers to ride roughshod over the legislature and misuse the powers they are granted.

However, this approach misses the point. Parliament must assess delegated powers on the basis of not just how the current government proposes to use them but also how any future government might use them. Future governments – indeed, new ministers – might have entirely different intentions with the passage of time.

⁶ Department for Exiting the European Union (2017), *Legislating for the United Kingdom's withdrawal from the European Union*, Cm 9446.

⁷ See, for example, T. May and N. Timothy (2007), *Restoring Parliamentary Authority: EU Laws and British Scrutiny*, (London: Politeia). In 1999 David Davis promoted a Private Members' Bill entitled *'Parliamentary Control of the Executive'*. In the debate on the Bill he highlighted the extent to which EU legislation was often presented in unamendable form for Parliament's rubber stamp. This argument could equally be applied to the approach taken to delegated legislation today. See House of Commons, *Hansard*, 22 June 1999, col.930.

Broader constitutional principles about the relationship between the executive and the legislature are at stake and Parliament must - and we expect will - act accordingly.

The challenge facing Parliament

The overarching challenge facing Parliament is the conjunction of the wide powers in the EU (Withdrawal) Bill, including controversial Henry VIII powers (see page 19), with inadequate scrutiny procedures for the ways these powers might be exercised.

Previously, the House of Lords has insisted on a strengthened scrutiny procedure being used to control the use of such powers. We expect Peers to do so again, if MPs do not do so first, and so we make a key assumption in this paper: that Parliament will not allow the EU (Withdrawal) Bill to pass unamended, and will demand some form of strengthened scrutiny procedure for at least some of the delegated legislation arising from it. This will raise challenges of volume and capacity for Parliament, particularly if an existing or new but ill-conceived strengthened scrutiny procedure is introduced into the Bill.

A number of the key features of strengthened scrutiny previously imposed by Parliament on legislation with similarly wide powers - a committee veto, statutory three-month consultation periods, and up to 70 days for scrutiny rather than the usual 40 - are all undesirable if the government is to legislate flexibly and at speed in order to deliver a functioning statute book the day after we leave the EU.

Since 2007 only 74 Orders have been laid before Parliament for consideration under a strengthened scrutiny procedure. No more than 18 have been considered in any one session. If required, Parliament could scrutinise more such Orders. But if the majority of delegated legislation arising from the EU (Withdrawal) Bill were made subject to a strengthened scrutiny procedure, in barely more than 12 months Parliament might have to consider up to 10 times the number of strengthened scrutiny Orders that it has considered in the last decade. This is not beyond its capacity but it would have implications for other areas of parliamentary business.

Even if the majority of the Brexit SIs were scrutinised using existing procedures, Parliament would still face a huge challenge. The upper-end of the spectrum in terms of Parliament's scrutiny capacity in recent years is the 1,885 SIs laid in 2005-06. On average around 1,200 SIs are laid each session for parliamentary scrutiny, although in recent sessions the numbers have dropped below 1,000. An extra 800-1,000 SIs on top of a volume of similar magnitude generated by normal, non-Brexit business would significantly increase the recent scrutiny burden.

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It has been suggested that Parliament could scrutinise up to 3,000 SIs in a single session. The Joint Committee on Statutory Instruments (JCSI), which undertakes legal and technical scrutiny, might well have the necessary capacity. However, the policy-based committees, where debate is more broad-ranging and political as much as technical, face a much greater challenge.

The manageability of a volume of SIs on this scale will depend in part on the scrutiny procedures to which they are subject. In recent years, around 25% of SIs laid before Parliament have, on average, been subject to the affirmative procedure, requiring debates in either Delegated Legislation Committee (DLC) or the Chamber of the House of Commons. If this proportion were to increase, more Delegated Legislation Committees would need to be set up, with all the attendant pressures on Member and staff time. This would have knock-on effects for other areas of parliamentary activity.

In addition, it is not clear whether the government will need to introduce SIs drafted to address multiple possible scenarios, to reflect a range of potential developments in the withdrawal negotiations with the EU. If so, this will increase the complexity of the scrutiny to which they will be subject.

And SIs are also unlikely to be produced in a steady stream. If there is a 'peak and trough' approach to their production throughout the year, as is currently the case (particularly ahead of recess periods), this will pose problems for Parliament's capacity to scrutinise them.

A scrutiny solution

Parliament has felt obliged to insist on strengthened scrutiny procedures for delegated powers in some previous Acts only because the ordinary scrutiny procedures for delegated legislation, particularly in the House of Commons, are so inadequate. This has long been acknowledged – not least in successive Procedure Committee reports and our own study, *The Devil is in the Detail* – but the political salience of, and 'take back control' rhetoric surrounding, Brexit finally and fatally expose it.

We have previously advocated a wide-ranging review of the legislative process, and have sought to avoid proposing yet another variant of a strengthened scrutiny procedure. But Brexit requires compromise and pragmatism.

We therefore propose a three-part solution to the challenges outlined above:

- the EU (Withdrawal) Bill should be amended to circumscribe the powers it delegates

- more tightly;
- the House of Commons should establish a reformed system for the scrutiny of delegated legislation in general;
- a new strengthened scrutiny procedure should be introduced for the exercise of the widest delegated powers in the Bill.

The new scrutiny system in the House of Commons and the strengthened scrutiny procedure should – and could – be implemented by Spring 2018 to be in place before SIs made under the EU (Withdrawal) Act start to emerge.

The remaining chapters in this paper correspond to the three elements of our proposal.

Chapter 1 analyses the delegated powers in the EU (Withdrawal) Bill and suggests where changes may be needed to constrain them further. Chapter 2 outlines the problems with the existing system of delegated legislation scrutiny in the House of Commons, and Chapter 3 details our proposed new system. Chapter 4 sets out our proposal for a new strengthened scrutiny procedure for the exercise of some of the powers in the EU (Withdrawal) Bill (and other Brexit bills that will follow). Chapter 5 highlights some modest proposals to improve scrutiny of delegated legislation by the House of Lords. The procedures in the Upper House are more robust and rigorous than those in the elected House, but the Brexit process will still pose challenges that need to be addressed.

We do not deal with procedures in the devolved legislatures. They, too, will face an increased volume of Brexit-related delegated legislation, and their executives may also be tempted to avoid the full scrutiny of the legislatures. This paper's fundamental principles apply equally to them.

Key features of our reform proposals

Although designed with the implications of the Brexit process in mind, our proposals are intended to be a long-term solution to a decades-old scrutiny problem. Better scrutiny should be a permanent feature of parliamentary life, not just for Brexit.

If implemented, our proposals will:

- enable Parliament, rather than government, to decide how to scrutinise the use of the widest powers in the EU (Withdrawal) Bill and other Brexit bills;
- abolish the worst aspects of the current scrutiny system for delegated legislation in

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the House of Commons (such as praying against SIs via an EDM that can be ignored by government, and Delegated Legislation Committee debates followed by votes on a pointless consideration motion);

- empower MPs - via a new select committee (a Delegated Legislation Scrutiny Committee), a 'conditional amendment' power, procedural mechanisms to elicit a government response to Members' concerns, and the power to decide which SIs should be debated;
- enhance MPs' ability to hold ministers to account in public for their policies and delegated legislation;
- retain the current top-level architecture of the delegated legislation system, including affirmative, negative and strengthened scrutiny procedures and the standard 28- and 40-day scrutiny periods for SIs, thereby addressing government concerns about flexibility, time and speed;
- require amendments to Standing Orders but not to the Statutory Instruments Act 1946, which would unhelpfully take up further parliamentary time.

A potential objection to our proposed reforms is that, although some resources could be re-deployed, they are not cost-neutral and would require significant investment to support the new system.

But such investment is warranted – indeed, arguably, demanded. Given the government's promise about Parliament '*taking back control*', the way in which Parliament manages this legislative process will be among the criteria for judging whether a success has been made of Brexit. Get it wrong, and Parliament and the political class could again incur untold reputational damage. Parliamentary accountability for the Brexit process must be secured, and doing so should be a matter of interest to 'leavers' and 'remainers' alike. Given the length of time it has been known that the House of Commons procedures for scrutiny of delegated powers and delegated legislation are deeply flawed, if Brexit is not the time to put things right, when will be?

1. THE EUROPEAN UNION (WITHDRAWAL BILL): DELEGATED POWERS AND THEIR SCRUTINY

What will the Bill do?

The European Union (Withdrawal) Bill will:

- **Repeal** the European Communities Act 1972 on the day the UK leaves the European Union (Clause 1);
- **Convert** the body of EU law – as it stands at the moment of exit – into UK law before we leave (Clauses 2-6);
 - Clause 2 is a saving clause that provides a new legal basis for delegated legislation (in the form of Statutory Instruments passed under Section 2(2) of the European Communities Act 1972) as well as other delegated legislation passed to give effect to an EU obligation;
 - Clause 3 is an incorporation clause that converts direct EU legislation into UK law, including EU regulations;
 - Clause 4 converts any remaining rights and obligations such as directly enforceable rights in EU treaties;
 - Clause 5 sets out the exceptions to the saving and incorporation clauses above; and
 - Clause 6 sets out how retained EU law is to be interpreted after the UK leaves the EU;
- **Enable the correction** of this body of EU ‘retained law’ (created under clauses 2-5) to ensure it ‘functions sensibly’ the day after we exit the EU (Clauses 7-8);
 - Clause 7 provides powers to enable ministers to deal with any ‘deficiencies’ arising from withdrawal;
 - Clause 8 provides powers to enable ministers to ensure the UK remains compliant with its international obligations by preventing or remedying any breach arising from withdrawal;
- **Implement** any withdrawal agreement reached with the EU (Clause 9);
- **Address issues arising from devolution** (Clauses 10-11);
 - Clause 10 confers power on devolved authorities to deal with deficiencies, comply with international obligations and implement the withdrawal agreement;
 - Clause 11 amends the devolution settlement to remove the legislative competence test whereby the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly must legislate in a way that is compatible with EU law;
- **Make financial provision** to enable ministers in the UK and devolved governments to incur whatever expenditure is required arising from the Bill (Clause 12);
- **Give effect to Schedule 7**, which sets out how powers granted to ministers to

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make regulations are to be exercised (Clause 16);

- Enable ministers, by regulation, to address consequential transitional, transitory, or saving provisions arising from the Bill (Clause 17);
- A further five clauses deal with issues such as publication of retained EU law (Clause 13), interpretation of terms (Clause 14) and defined expressions (Clause 15) used in the Bill, its territorial extent (Clause 18), and its commencement and short title (Clause 19).

This chapter is *not* a comprehensive analysis of all aspects of the Bill. Its focus is the delegation of power to ministers and the parliamentary scrutiny procedures to be applied to those powers.

Delegated powers in the Bill

1. Scope of the powers

The more broadly constructed a clause, the greater the risk that it will lead to arbitrary outcomes.

Clause 7(1-2) provides for the minister to make regulations to prevent, remedy or mitigate 'deficiencies' in EU law where the minister considers that the retained EU law contains '*anything which has no practical application*' in relation to the UK, or '*is otherwise redundant or substantially redundant*'. **Clause 7(2)** sets out what the concept of 'deficiencies' might cover, providing some attempt at definitional criteria; but it makes clear that these are illustrative, not exhaustive. The criteria '*include (but are not limited to)*' the examples set out in the Bill. What is considered a 'deficiency', a 'redundant' provision or of '*no practical application*' is therefore open to wide interpretation. It may be whatever a minister wishes it to mean. Ministers in different departments may interpret the terms differently, potentially introducing inconsistency into the post-exit statute book for which there will be no immediate parliamentary remedy.

Clause 7(5) states that regulations under this section may '*(among other things)*' provide for functions of EU bodies to be exercised by a similar UK body or to be '*replaced, abolished or otherwise modified*'. The term '*among other things*' leaves the legislative door wide open. Parliament will need to satisfy itself that the government's attempts at definition are sufficient, particularly given that the text makes clear that the use of a power may not be limited to the definition set out.

Clauses 7(4), 8(2) and 9(2) allow regulations to be made for '*any provision that could be made by an Act of Parliament*'. The latter clause extends further, to enable regulations to be made to modify the EU (Withdrawal) Act itself. It is not unusual for a Henry VIII power to be

conferred on ministers to amend a specific part of an Act; it is more unusual for such a power to be so broadly drawn that it could amend all parts of an Act.

Schedule 8 (3-5) provides that any SI arising from the Bill following Royal Assent could be amended by another SI made using any other power in existing or future legislation. This would potentially destroy any beneficial constraints in this Bill. If a power in another Act can be used to amend the body of retained EU law, within the overall policy purview of that parent Act, at any time in the future, this undercuts the utility of the restrictions set out in this Bill. There would also be nothing to prevent the amending SI, derived from a different parent Act, being subject to a lower parliamentary scrutiny threshold than would be the case were the body of retained EU law to be amended by an SI derived from this EU (Withdrawal) Bill.

Clause 9(1) authorises a minister to make regulations as (s)he *'considers appropriate for the purposes of implementing the withdrawal agreement if the minister considers that such provision should be in force on or before exit day.'* As drafted, there is a risk that this power could be used prior to a promised parliamentary vote on the withdrawal agreement. The clause could be made clearer, if, for example, it stipulated that the power could not be used until both Houses of Parliament had approved the withdrawal agreement. However, this could be highly contentious politically, owing to the government's resistance to putting the promised parliamentary votes on a statutory basis.

Clause 17(1) confers a wide power on ministers to, by regulations, *'make such provision as the minister considers appropriate in consequence of this Act'*. **Clause 17(2)** states that this power *'may (among other things) be exercised by modifying any provision made by or under an enactment'*, whilst **Clause 17(3)** clarifies that this does not include any primary legislation passed after the end of the Session in which the EU (Withdrawal) Bill itself is passed, so after early summer 2019.

The government's Delegated Powers Memorandum states that the power *'is limited to making amendments consequential to the contents of the Bill itself, and not to consequences of withdrawal from the EU'*, but given that the policy objective of the Bill is to secure the legislative basis for our withdrawal from the EU, which covers so many different policy areas, this distinction requires elaboration.⁸ Does it hand the government a legislative blank cheque?

⁸ European Union (Withdrawal) Bill, Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee, 13 July 2017, p.32, para.77.

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In many cases consequential provisions facilitate a tidying-up exercise on commencement of an Act or sections of an Act. Any power to make consequential provisions is limited by the fact that their use must be consistent with the core policy objectives of the Bill and the consequences that arise therefrom. [Clause 17\(2\)](#), however, seems to imply a potentially broader application, subject only to the restriction set out in [Clause 17\(3\)](#).

The way in which the government envisages exercising this power needs clarification. The Delegated Powers Memorandum states that an SI made under this power could, for example, *'make provision on whether retained direct EU legislation should be treated as primary or subordinate legislation for the purposes of another specified enactment'*⁹ This would imply that a regulation under this power could be used to determine the nature of some of this body of law, with implications for its interpretation by the courts. If this is the case, the provisions would go well beyond the *'fairly straightforward changes'* suggested in the Memorandum.¹⁰

The government proposes that this power be subject to the lowest form of parliamentary control, the negative scrutiny procedure. Given the potentially broad nature of its application and the fact that it is a Henry VIII power, it ought to be subject to the affirmative scrutiny procedure. The government seeks to justify the wide nature of the power by reference to precedents set for consequential provisions in other legislation. However, examination of these examples shows that the exercise of these powers (e.g. Section 92(2) of the Immigration Act 2016) is subject to the higher affirmative procedure where they involve amendment or repeal of other legislation.¹¹

2. Constraints on acceptable use of the powers

Reassuring statements from the government about its intentions with respect to delegated powers have no legislative force. The best way to constrain broad, ill-defined powers in an enabling Bill such as the EU (Withdrawal) Bill is to tighten the scope of their application through constraints on the face of the Bill, including safeguards to define restrictions on their use.

⁹ European Union (Withdrawal) Bill, Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee, 13 July 2017, p.32, para.77.

¹⁰ European Union (Withdrawal) Bill, Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee, 13 July 2017, p.33, para.78.

¹¹ European Union (Withdrawal) Bill, Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee, 13 July 2017, p.32, para.75. There also appears to be an error in this paragraph as it references '41 section 73(2) of the 2014 Act' without specifically naming the legislation concerned.

Henry VIII powers: the risk of distraction

A Henry VIII power is a delegated power in an Act of Parliament that enables ministers to amend or repeal primary legislation by Statutory Instrument. The use of such powers challenges the constitutional principle that Parliament is the sole legislative authority with the power to create, amend or repeal any law. Henry VIII powers have not been invented by the government for Brexit or this Bill. They are a relatively common feature of legislation¹² and, contrary to much recent media and civil society commentary, they are subject to parliamentary scrutiny.¹³

Given the nature of the Brexit legislative exercise, Henry VIII powers are an unavoidable feature of the EU (Withdrawal) Bill. Clause 7 (correcting), clause 8 (compliance with international obligations) and clause 9 (implementation) are all very wide Henry VIII clauses that, if passed, will confer extraordinary power on ministers to amend or repeal elements of our statute book. Clause 9 even provides a power to enable ministers to modify the future EU (Withdrawal) Act itself.

Viewed from a position of constitutional purity, Henry VIII powers are intrinsically bad, and should not be used.¹⁴ However, some Henry VIII powers can be quite anodyne in their application. The Welfare Reform Act 2012, for example, abolished several benefits and replaced them with a new Universal Credit system. Parliament assented to the policy change in the 2012 Act, but amendments to other pieces of primary legislation were needed to insert references in previous welfare legislation so that they correctly referenced Universal Credit instead of the benefits that had been abolished. Using a Henry VIII power in the 2012 Act, the government introduced The Universal Credit (Consequential, Supplementary, Incidental and Miscellaneous Provisions) Regulations 2013 which provided for the amendment of 18 previous Acts of Parliament in the welfare field.¹⁵

¹² For example, in the 2015-16 parliamentary session, of the 23 government bills that achieved Royal Assent, 16 contained a total of 96 Henry VIII powers to amend or repeal primary legislation. Sixty-five of these powers were included in the bills on introduction to Parliament; a further 31 powers were added to the bills during their progress through Parliament. See, Hansard Society (2017), *Westminster Lens: Parliament and Delegated Legislation in the 2015-16 Session*, (London: Hansard Society), pp.10-11.

¹³ For widely drawn powers, the House of Lords Delegated Powers and Regulatory Reform Committee, which polices the use of powers in bills, generally insists on the affirmative scrutiny procedure - which requires each House actively to approve the SI derived from the parent power following a debate - or a strengthened scrutiny procedure.

¹⁴ See for example The Rt. Hon. the Lord Judge, Lord Mayor's Dinner for the Judiciary, *The Mansion House Speech*, 13 July 2010; and 'A Judge's View on the Rule of Law', Lord Judge PC, Annual Bingham Lecture, 3 May 2017.

¹⁵ The Universal Credit (Consequential, Supplementary, Incidental and Miscellaneous Provisions) Regulations 2013. See <http://www.legislation.gov.uk/ukxi/2013/630/contents/made>.

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Treating Henry VIII powers as a uniform problem misses an important point: what, exactly, do the powers give rise to, in terms of ministerial authority; and is this something that Parliament is comfortable ministers should be able to do with less scrutiny than would be the case for primary legislation? When scrutinising bills, there is a risk that if Parliament focuses extensively on Henry VIII clauses, to the detriment of other aspects of the legislation, it may fail adequately to examine other powers that may prove to be just as important in terms of their potential policy and political impact on individual citizens, business, and civil society.

The government proposes some restraints on the powers in the Bill. The powers cannot be used to:

- impose or increase taxation (Clause 7 and 9 powers);
- make retrospective provision (Clause 7-9 powers);
- create a relevant criminal offence (Clause 7-9 powers);¹⁶
- implement the withdrawal agreement (Clause 7 and 8 powers);
- amend, repeal or revoke the Human Rights Act 1998 or any subordinate legislation made under it (Clause 7-9 powers);
- amend or repeal the Northern Ireland Act 1998 (Clause 7 power).

But these restraints are quite limited when compared to what Parliament has previously accepted as its bottom line for the acceptable delegation of powers, as set out in the Legislative and Regulatory Reform Act 2006. Here, the powers can be used to remove or reduce a burden if the burden means '*a financial cost*', '*an administrative inconvenience*', '*an obstacle to efficiency, productivity or profitability*', or '*a sanction, criminal or otherwise which affects the carrying out of any lawful activity*'.¹⁷

The Act also provides that the powers can only be used if:

- '(a) the policy objective intended to be secured by the provision could not be satisfactorily secured by non-legislative means;
- (b) the effect of the provision is proportionate to the policy objective;
- (c) the provision, taken as a whole, strikes a fair balance between the public interest and the interests of any person adversely affected by it;

¹⁶ Clause 14 of the Bill defines '*relevant criminal offence*' as being '*an offence for which an individual who has reached the age of 18 (or, in relation to Scotland or Northern Ireland, 21) is capable of being sentenced to imprisonment for a term of more than two years (ignoring any enactment prohibiting or restricting the imprisonment of individuals who have no previous convictions)*'.

¹⁷ Legislative and Regulatory Reform Act 2006, Clause 1(3).

- (d) the provision does not remove any necessary protection;
- (e) the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise;
- (f) the provision is not of constitutional significance.¹⁸

The 2006 Act also provides that the powers cannot be used to impose, abolish or vary any tax; to create a new criminal offence; or to authorise forcible entry.¹⁹

The precedents provided by (b), (d) and (e) above may be relevant given the concerns of civil society groups that the legislation may be used in a disproportionate way, or to roll back civil rights and environmental protections.

The exact wording of the safeguards in the 2006 Act may not be entirely suitable for the EU (Withdrawal) Bill. For example, the government proposes that the **Clause 7** power might be used (depending on what unfolds in the exit negotiations) to *'modify, limit or remove'* the current reciprocal arrangements that apply to EU citizens living in the UK and UK citizens in the EU. As such, the government may not be keen on any provisions guarding against the removal of protections. However, the 2006 Act at least provides a model against which to test options for safeguards in this new Bill.

Schedule 7, paragraph 3 sets out the parliamentary procedure to be used *'in certain urgent cases'*. However, there appear to be no constraints on the exercise of this power. There is no obligation, for example, that the minister should explain the *'urgency'* as is required for use of a similar urgency power under Section 41(8) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. An explanation is also required under the urgency procedure for Remedial Orders arising from the Human Rights Act 1998. Nor are there any safeguards on the use of the power - for example, defined limits on its use or a requirement to consult an advisory body - such as those found in other legislation, for example the Misuse of Drugs Act 1971.

The House of Lords Constitution Committee proposed a *'necessity clause'* be included in the Bill to ensure that the powers cannot be used for circumstances beyond those required by Brexit, and that no precedent for the broader use of such powers can therefore be created. It proposed that the Bill should state that the powers will only be used as far as necessary to adapt the body of EU law to fit the UK's domestic legal framework, and to implement the result

¹⁸ Legislative and Regulatory Reform Act 2006, Clause 3(2).

¹⁹ Legislative and Regulatory Reform Act 2006, Clause 3(5-7).

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of negotiations with the EU.²⁰ **Clause 7(1)** is arguably a necessity clause but not in the explicit form the Committee envisaged. Parliamentarians must decide whether it is sufficient to address their concerns.

The Delegated Powers Memorandum states that Explanatory Memorandums accompanying SIs will include statements to the effect that powers are being used only as far as necessary, but the Memorandum is a supporting document only; it has no force in law. A provision requiring this be done in the Explanatory Memorandums might be better included on the face of the Bill.

3. Sunset clauses

The correcting power in **Clause 7** and the power for the purposes of complying with UK international obligations in **Clause 8** will cease to apply two years after exit day. As the exit day date is not specifically identified (**Clause 14(1-2)**), it remains unclear how long the powers might remain in force.

The **Clause 9** power to implement the withdrawal agreement will lapse on exit day. This power could only be used once the content of the withdrawal agreement is known. However, there could be a lack of clarity about when in the Brexit process this point is reached. This is because of the EU's complex procedures for concluding international agreements, and uncertainty - encouraged by changing government language - over exactly when in the process the UK Parliament will vote on the withdrawal deal. There is a risk that the power, as drafted, could be used prior to any parliamentary vote. **Clauses 9 and 17** could also, in theory, be used to amend or even remove the sunset provisions.

4. Devolution/territorial competence

Clause 10 effectively re-creates the powers in **Clauses 7-9** and confers them on the devolved administrations. Concerns about the wording, scope and restrictions on the use of the powers in **Clauses 7-9** (as set out above) are therefore reiterated in respect of **Clause 10**.

The Scottish and Welsh First Ministers have dismissed the Bill as a '*naked power grab, an attack on the founding principles of devolution*'.²¹ **Clause 11** is their principle concern. It provides that the body of EU retained law is reserved to Westminster, even in policy areas which have hitherto been a matter of devolved competence, unless explicitly devolved by an Order in

²⁰ House of Lords Select Committee on the Constitution, 9th Report of Session 2016-17, *The 'Great Repeal Bill' and delegated powers*, HL Paper 123, para.50, p.18.

²¹ See <http://www.bbc.co.uk/news/uk-wales-politics-40582756>

Council which will require the approval of both Houses and the devolved legislature concerned.

One solution to the evident lack of trust between Whitehall and the devolved capitals might be to ‘sunset’ this power for a set period - perhaps for two years after exit, in keeping with the other powers in the Bill. On expiry of the sunset clause, unless specific arrangements have been mutually agreed between the UK and devolved governments, the power to amend retained EU law would automatically devolve to the administrations in Scotland, Wales and Northern Ireland.

This is not without risk. The devolved administrations might simply stonewall on negotiations in the knowledge that they will secure the repatriation of all powers at the end of the two-year period. However, this would be a high-risk strategy when it is acknowledged that in some areas – fisheries, for example – a common UK policy framework will be required.

The Explanatory Notes confirm that *‘Not all changes to the devolution legislation have been included in the Bill on introduction’*.²² An important question at Second Reading will therefore be what progress, if any, has been made in the discussions with the devolved administrations, and whether the government is any clearer about what further changes it anticipates making.

5. Creation of public bodies by Statutory Instrument

Clause 7(5) provides ministers with the power to create a public authority by delegated rather than primary legislation.

Regulations are often used to provide for the operational detail involved in setting up or merging public bodies, but the framework for their governance, mandate, staffing and name²³ is normally provided for in primary legislation and thus subject to parliamentary scrutiny, debate and amendment. We know of only one other piece of legislation – the Legislative and Regulatory Reform Act 2006 – that provides a power to create a public body in its entirety by SI. But that power has only been exercised twice, and on only one of those occasions was it to create a new body.²⁴ The only other exercise of the power was to merge two existing bodies.²⁵

²² European Union (Withdrawal) Bill, Explanatory Notes, Bill 5-EN, 13 July 2017, p.42, para.195.

²³ A rare exception is the National Employment Savings Trust (NEST) Corporation, which was named in regulations arising from a power in the Pensions Act 2008. In the recent Financial Guidance and Claims Bill the government proposed that the name of the new arms-length body to replace the Money Advice Service, the Pensions Advisory Service, and the Department for Work and Pensions’ *‘Pension Wise’* should also be named in regulations. However, the House of Lords Delegated Powers and Regulatory Reform Committee has made clear its opposition to this approach. See House of Lords Delegated Powers and Regulatory Reform Committee, *1st Report of Session 2017-19*, HL Paper 10, p.4, paras.16-17.

²⁴ Legislative Reform (Overseas Registration of Births and Deaths) Order 2014.

²⁵ Legislative Reform (Health and Safety Executive) Order 2008.

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Under the powers in the EU (Withdrawal) Bill, a Statutory Instrument subject to the draft affirmative procedure will set out all the arrangements for a new body. The SI will not be amendable. Members will be confronted with a *'take it, or leave it'* proposition; they must accept the proposal in its entirety, or reject it entirely.

Two constraints in the process will be the need for Treasury consent to fund any new body, and then, once the Bill is enacted, the possibility of judicial review. However, the latter is an imperfect remedy, for it is not automatic and is possible only after the fact.

Parliamentary scrutiny ought to be a constraint on the process and provide the necessary level of democratic accountability. However, the scrutiny procedures for affirmative SIs, particularly in the House of Commons, are wholly inadequate. Chapter Two sets out the flaws and weaknesses in the process in more detail.

Under the current scrutiny system, the following scenario for an SI creating a public body will prevail:

1. The Joint Committee on Statutory Instruments (JCSI) and the House of Lords Secondary Legislation Scrutiny Committee (SLSC) may report serious concerns about the legal and drafting qualities and the political and policy implications of the SI. However, they are advisory bodies only. They cannot compel the government to withdraw the SI if they deem it to be deeply flawed.
2. The House of Lords may amend an approval motion recording their view of the SI, or calling on the government to take a specific action in relation to it. But this will not prevent its approval.
3. Scrutiny by House of Commons Delegated Legislation Committees is particularly poor. Unless the system is reformed (as we propose in Chapter Three) then:
 - 18 members will be nominated by the party whips to reflect the composition of the House. Only nominated members of the Committee will be able to vote but all MPs will be able to attend and speak.
 - Members will get only a few days' notice of the debate and receive little supporting information. DLCs are temporary committees. Unlike departmental select committees, they do not have a specialist secretariat and access to policy advice, and unlike legislative (Public Bill) committees they do not take public evidence.
 - The DLC members will be able to debate the SI for up to 90 minutes only.
 - The vote will be held on a consideration motion (that the Committee has considered the Instrument).
 - After the debate, an approval motion will be formally put to the House without

debate on a separate day. Unless they attended the DLC debate, many MPs will therefore not know much about the SI when they are asked to vote on it.

This process will simply not provide the necessary level of democratic control required for the creation of new public authorities.

There are two ways potentially to off-set this problem.

1. Fundamentally reform the scrutiny process - as we set out in Chapter Three - to enable MPs to exercise more influence over the process, not least through a 'conditional amendment' power; and
2. Introduce some restraints in the Bill, such as those set out below.

There is concern that, while the government will have the power to replicate reporting and governance functions (from the relevant EU body), it will not be obliged to do so. Governance arrangements may therefore lack the same level of stringency and rigor. Similarly, civil society campaigners are concerned that, in establishing new bodies, the government may strip out protections and rights.

The Public Bodies Act 2011 placed constraints on the use of powers by ministers to modify, merge or abolish public bodies. Section 8(1) of the Act requires ministers only to make an Order if it serves the purpose of the exercise of public functions in relation to (a) efficiency; (b) effectiveness; (c) economy; and (d) securing appropriate accountability to ministers. Section 8(2) requires that an Order should not remove any necessary protection and not prevent the exercise of rights or freedoms. Consideration could be given to whether any similar criteria should be set out in the EU (Withdrawal) Bill. Stringent requirements about the information that must be provided to accompany an SI creating a new public authority could also be set out on the face of the Bill.

Another option would be to set a sunset period on the creation of any public body by SI. Before the expiry of the sunset term Parliament would have to review the operation of the public body and decide if it was satisfied with the arrangements. If so, the public body could continue in existence. If not, the body's mandate and governance arrangements could be amended, with the new terms set out in primary legislation.

There would certainly be an appetite for post-legislative scrutiny of the arrangements. But whether there would be an appetite to make real and significant changes once a body has been operational for several years is debatable.

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6. Post-legislative review

Paragraph 18 of Schedule 7 disapplies Section 28 of the Small Business Enterprise and Employment Act 2015 in relation to any power to make regulations set out in the Bill. The 2015 Act requires a post-implementation review to be undertaken of any regulatory provisions in delegated legislation. Nowhere in the Explanatory Notes or the Delegated Powers Memorandum is this provision explained or justified.

7. Timing - when will the powers be used?

Clause 7(1) provides a power to enable ministers to deal with any deficiencies in EU retained law and any failures that inhibit its operational effectiveness. The power comes into effect immediately on enactment (**Clause 19 (1a)**).

However, it is likely that some deficiencies or operational problems with EU retained law will only be fully known once the terms of our withdrawal from the EU are confirmed. This raises important questions about the timetable ministers propose for bringing forward SIs using this power. Could we find ministers introducing an SI in 2018 in exercise of this **Clause 7(1)** power, only to find that the withdrawal arrangements necessitate a further change to remedy a deficiency? If so, the SI may have to be revoked and a new SI laid under the **Clause 9** power providing for implementation of the withdrawal agreement. This raises the prospect of a lot of SIs being produced late in the process, and considerable potential for duplication of work by government and Parliament.

8. Explanatory memorandums and provision of other supporting information

The government has said it will provide more detailed information than normal in the explanatory memorandums (EMs) that will accompany any SIs that flow from the powers in the EU (Withdrawal) Bill. The EMs will explain what any relevant EU law did before exit day; what is being changed and why; and confirm that the minister considers that the SI does no more than what is appropriate.

The House of Lords Secondary Legislation Scrutiny Committee (SLSC) has previously raised concerns about the quality of EMs: they may be good at explaining what an SI does, but they are often poor at explaining why it is required, or what its effects are expected to be. Commitments to augment the EMs will therefore only be meaningful if the government provides EMs that fully reflect the SLSC's guidance.²⁶

²⁶ See House of Lords Secondary Legislation Scrutiny Committee (July 2016), *Guidance for Departments Submitting Statutory Instruments to the Secondary Legislation Scrutiny Committee*, Part 2. <http://www.parliament.uk/documents/lords-committees/Secondary-Legislation-Scrutiny-Committee/SLSC-Guidance-for-Departments-July-2016.pdf>

The government has also promised to lay draft SIs during passage of the Bill, so that parliamentarians can see how the government thinks it may need to use the powers the Bill contains, and scrutinise its approach accordingly. There are several early examples at the back of the Delegated Powers Memorandum.

Although this promise is welcome, to be practically useful the draft regulations need to be produced early enough for MPs and Peers properly to consider them. Previous governments have promised to lay draft regulations, but in practice have often done so late in a Bill's scrutiny process, and in some cases even as late as the morning of the relevant committee-stage debate.

9. A flawed approach to parliamentary scrutiny

Schedule 7 sets out the government's proposals for parliamentary control of the delegated powers in the EU (Withdrawal) Bill. There are three important shortcomings:

(a) The Bill requires Parliament to agree in advance the scrutiny procedures that will apply to uses of the delegated powers without knowing fully how the powers will be exercised.

The government acknowledges that it cannot fully define all the circumstances in which each power in the Bill will be used, because it does not yet know - and much will depend on - the outcome of the Brexit negotiations. However, it specifies the categories of SI that will attract the affirmative scrutiny procedure, in terms of the broad type of action for which they provide.

But Parliament cannot be expected to grant a power to ministers with a fixed scrutiny procedure attached when it does not fully know how that power will be deployed. Parliament should therefore require that it, rather than ministers, decide the scrutiny mechanism for an SI, when it knows its scope and purpose.

(b) The Bill explicitly defines the policy areas in which the affirmative procedure will be used, thus pre-determining what Parliament should debate.

Schedule 7 provides that the affirmative procedure will be used for any Order which:

- establishes a public authority in the UK;
- provides for any function of an EU entity or public authority in a member state to be exercisable instead by a public authority in the UK established by regulations under section 7, 8 or 9 or Schedule 2;
- provides for any function of an EU entity or public authority in a member state of

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- making an Instrument of a legislative character to be exercisable instead by a public authority in the UK;
- imposes, or otherwise relates to, a fee in respect of a function exercisable by a public authority in the UK;
- creates, or widens the scope of, a criminal offence; or
- creates or amends a power to legislate.

The affirmative procedure is intended for those SIs likely to be of political and policy significance. Given the scope of the Brexit process, these six categories do not capture everything that MPs are likely to want to debate.

For example, under the power in [Clause 9](#), an SI regarding the reciprocal arrangements for UK and EU citizens would not be subject to the affirmative procedure. Under existing scrutiny arrangements, MPs would therefore have to 'pray' against the SI within the 40-day scrutiny period; whether a debate was granted would be in the gift of the government.

(c) The proposed scrutiny procedures for SIs do not provide adequate parliamentary oversight.

The government proposes that current negative and affirmative scrutiny procedures should be used for all powers in the Bill. A detailed analysis of the fundamental flaws in these procedures is set out in Chapter Two.

The Bill makes no mention of strengthened scrutiny procedures, although there are 11 to choose from. These procedures were expressly designed for circumstances in which Parliament cannot know how a power will be deployed and therefore cannot agree a scrutiny procedure for the use of that power in advance.

Other Acts which confer upon a minister a significant Henry VIII power to amend primary legislation have made the use of such a power subject to strengthened scrutiny procedures.²⁷ If the EU (Withdrawal) Bill is not amended to include a strengthened scrutiny procedure, it will therefore provide for less rigorous parliamentary scrutiny than similar previous legislation, making for a step backwards in the legislature's control of executive power.

²⁷ Including the Human Rights Act 1998, the Local Government Acts 1999 and 2000, the Legislative and Regulatory Reform Act 2006, the Public Bodies Act 2011 and the Localism Act 2011.

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'Palpably unsatisfactory',²⁸ 'close to preposterous',²⁹ and 'woefully inadequate'³⁰ are just some of the phrases previously used to describe parliamentary scrutiny of delegated legislation.

In 2014, well before the term Brexit entered the political lexicon, we concluded in *The Devil is in the Detail* that the House of Commons procedures were neither rigorous nor rational. The scrutiny system is unfit for purpose and in need of wholesale reform.³¹

As the nature and scope of public policy has become more complex, and the role of government has changed, this has had an impact on the volume and scope of delegated legislation and its importance in the governance process. But unlike the House of Lords, the House of Commons has not fundamentally altered the way it deals with delegated legislation to respond to these changes.

Despite a succession of parliamentary reports highlighting serious problems with scrutiny of delegated legislation, successive governments have made little or no effort seriously to engage with the problem.

What's the problem?

1. Control of parliamentary time: the government decides if an SI will be debated

In its White Paper, '*Legislating for the United Kingdom's withdrawal from the European Union*', the government stated that parliamentary procedures allow Parliament to scrutinise as many or as few SIs as it sees fit, and noted that Parliament can and regularly does both debate and vote on delegated legislation.³²

However, the White Paper omitted to mention that Early Day Motions (EDMs), which an MP must table in the form of a 'prayer' to object to a negative SI, are motions for which no fixed

²⁸ House of Commons Procedure Committee (1999-2000), *Delegated Legislation*, HC 48.

²⁹ Professor the Lord Norton of Louth (Chair) (2000), *Strengthening Parliament: Report of the Commission to Strengthen Parliament* (Conservative Party).

³⁰ House of Commons Liaison Committee (1999-2000), *Shifting the Balance: Committees and the Executive*, HC 300.

³¹ R. Fox and J. Blackwell (2014), *The Devil is in the Detail: Parliament and Delegated Legislation*, (London: Hansard Society).

³² Department for Exiting the European Union (2017), *Legislating for the United Kingdom's withdrawal from the European Union*, Cm 9446, p.23.

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parliamentary time is allocated.³³

Whether an MP's objection to an SI is ever debated therefore lies almost entirely in the hands of the government, not the House of Commons.

The White Paper also stated that members of either House can 'require' a debate and if necessary a vote.³⁴ This is not true. MPs can request a debate by praying against an SI, but they have no power to require a vote. The government controls the parliamentary timetable in the House of Commons, and its agreement is therefore necessary for parliamentary time to be granted.

In the 2016-17 parliamentary session, MPs debated just 0.9% of 537 negative SIs laid before them. In 2015-16 they debated just 3% of the 585 negative SIs laid before them.³⁵ There is no guarantee that even a prayer motion laid by the official Opposition will be debated. In the 2015-16 session, the Leader of the Opposition and his front bench colleagues tabled 12 prayer motions for debate, but just five were granted.³⁶

Sometimes the government does not prevent a debate but runs down the clock, scheduling the debate after the expiry of the 40-day scrutiny period, by which time the SI has come into force.³⁷ If a debate is held after the 40-day 'praying against' period expires, the regulations are debated on a motion that '*the Order be revoked*'. However, if the House votes in favour of the

³³ The prayer motion reads: 'That an humble address be presented to Her Majesty praying that the [name of the SI] be annulled'. In our research for *The Devil is in the Detail* we found that some MPs did not realise that EDMs are the mechanism for raising objections to delegated legislation. EDMs are used for several procedural purposes including a no-confidence motion tabled by the Opposition. However, they are commonly known as a campaigning mechanism by which Members can draw the attention of the House to an issue of concern and invite other MPs to demonstrate their support by adding their own signatures to it. Our previous research suggests that many members regard these EDMs as 'political graffiti'. See for example, M. Korris (2011), *A Year in the Life: From Member of Public to Member of Parliament*, (London: Hansard Society), pp.10-11. It is unhelpful to use EDMs for both praying against SIs and campaigning on issues.

³⁴ Department for Exiting the European Union (2017), *Legislating for the United Kingdom's withdrawal from the European Union*, Cm 9446, para. 3.21.

³⁵ Data is drawn from the Hansard Society's *Statutory Instrument Tracker*. See also Hansard Society (2017), *Westminster Lens: Parliament and Delegated Legislation in the 2015-16 Session*, (London: Hansard Society), p.18.

³⁶ Hansard Society (2017), *Westminster Lens: Parliament and Delegated Legislation in the 2015-16 Session*, (London: Hansard Society), p.18.

³⁷ In the 2016-17 session, for example, 187 MPs prayed against the new Personal Independence Payment Regulations via an EDM, but the government did not schedule a debate on the regulations until after they came into force. Early Day Motion 985 tabled 27 February 2017: 'That an humble Address be presented to Her Majesty, praying that the Social Security (Personal Independence Payment) (Amendment) Regulations 2017 (S.I., 2017, No. 194), dated 22 February 2017, a copy of which was laid before this House on 23 February, be annulled.'

‘revoke’ motion, the regulations are not automatically revoked, because the Statutory Instruments Act 1946 specifically requires that SIs be annulled within the 40-day scrutiny period.

If the government declines to schedule time, the Opposition can use their Opposition Day debate allocation. Backbench MPs can request an urgent debate,³⁸ seek a debate via the Backbench Business Committee or possibly link the issue to an e-petition and seek debating time via the Petitions Committee. These are potential routes to raise concern but none, apart from the Opposition Day route, can result in the annulment of an SI.

Affirmative SIs are automatically referred to a Delegated Legislation Committee (DLC) for scrutiny unless notice has been given by the government of a motion that the SI should be debated on the Floor of the House. This is done by a minister, usually the Leader of the House, at Business Questions. There is no way for anyone but the government to refer an affirmative SI to the Floor of the House for debate, further evidence of its control over the process.

2. Many SIs come into force before they are scrutinised

A significant proportion of negative SIs come into force within 40 days of being laid and therefore before the scrutiny period has expired.³⁹ In the 2015-16 parliamentary session, for example, 468 (80%) negative SIs came into force before the 40th day. This deters parliamentarians from challenging this legislation. It also permits legislation deemed defective by the Joint Committee on Statutory Instruments to sit on the statute book until the government responds.

3. No power of amendment: a ‘take it or leave it’ proposition

Without the power to amend SIs (there are only two exceptional cases where amendment is possible),⁴⁰ both Houses of Parliament are confronted with a ‘take it or leave it’ proposition. This acts as a disincentive to engage. MPs have now largely withdrawn from trying to hold the government to account for delegated legislation.

³⁸ In the case of the Social Security (Personal Independence Payment) (Amendment) Regulations 2017 (S.I., 2017, No. 194), the matter was eventually discussed via an urgent debate granted by the Speaker under Standing Order No.24 on 29 March - but Members could not reject the SI, merely consider it. See <https://www.theyworkforyou.com/debates/?id=2017-03-28c.144.2&s=Debbie+Abrahams#g145.2> and <https://www.theyworkforyou.com/debates/?id=2017-03-29c.307.0&s=Debbie+Abrahams#g331.3>

³⁹ Hansard Society (2017), *Westminster Lens: Parliament and Delegated Legislation in the 2015-16 Session*, (London: Hansard Society), p.19.

⁴⁰ In relation to powers in the Census Act 1920 and the Civil Contingencies Act 2004.

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Even when MPs (or Peers) point out significant concerns with the drafting of an SI, and/or its ability to achieve the policy objectives set for it, it may proceed into law, regardless of the problems, because Members have no mechanisms at their disposal to force the government to think again.

4. Delegated Legislation Committees (DLCs): a punishment not a prize

In the 2015-16 parliamentary session, 114 affirmative SIs (75.4%) were considered by a DLC and 13 (8.6%) on the Floor of the House.⁴¹

Being assigned to a DLC is often a punishment for MPs, and those who actively contribute to the debates are perceived as a 'nuisance' by their party whips. MPs have variously described DLCs to us as 'farcical', 'an absolute joke', and 'a waste of time' and are often reluctant participants.⁴² Some MPs we interviewed for *The Devil is in the Detail* reported that the whips had told them it was perfectly acceptable – indeed preferable – to get on with their constituency correspondence during the Committee meeting, and we have observed this in practice during debates. In the words of one MP, 'you are told to sit quietly at the back and make sure you vote'.⁴³

5. Poor quality debates: no 'circle of learning' or development of expertise

It is not clear why a 90-minute debate was ever thought a good model for scrutiny of legislation that often involves highly technical changes. Although provision is made for 90-minute DLC debates, they rarely last more than half an hour. In the 2015-16 session, the average DLC debate lasted just 26 minutes.⁴⁴ The debates often focus on the general policy area rather than the specific provisions contained within the SI, even though the scope of the debate is supposed to be confined to the Instrument at hand. The lack of briefing material and time for MPs and shadow ministers to prepare affects the quality of the debates. Knowing that it will be

⁴¹ Hansard Society (2017), *Westminster Lens: Parliament and Delegated Legislation in the 2015-16 Session*, (London: Hansard Society), p.19.

⁴² During the debate on the Localism Bill 2010, Labour MP Barbara Keeley reflected candidly: 'I served in the Whips Office for some time, and I know that a debate goes on when one tries to get members to serve on SI committees. The debate hinges on members asking 'How long will it be for? Is it only five or 10 minutes? We should dispel here and now the notion that that constitutes rigorous scrutiny.' (House of Commons, *Hansard*, 1 February 2011, col.241).

⁴³ R. Fox and J. Blackwell (2014), *The Devil is in the Detail: Parliament and Delegated Legislation*, (London: Hansard Society), p.185.

⁴⁴ Hansard Society (2017), *Westminster Lens: Parliament and Delegated Legislation in the 2015-16 Session*, (London: Hansard Society), p.20.

over in less than half an hour means there is little incentive for ministers to do much more than turn up and read out their brief. Any MP who subjected the parent Act to detailed scrutiny and raised questions about the proposed delegation of powers is unlikely to be invited to sit on the DLC. The lack of external input and briefing material means there may be few people involved in the process who are aware of what assurances or concessions, if any, were previously promised.

6. No penalty for poor quality Explanatory Memoranda and supporting documentation

If parliamentarians are to scrutinise effectively both delegated powers and the Statutory Instruments that arise from them, it is imperative that the government clearly explains its decisions.

Through special inquiries and calling ministers and Permanent Secretaries to account at oral evidence hearings, the Delegated Powers and Regulatory Reform Committee in the House of Lords has sought to drive improvements in the quality of Delegated Powers Memorandums published alongside bills. The Secondary Legislation Scrutiny Committee in the House of Lords has also focused on the quality of Explanatory Memorandums for SIs. It has long complained about the long, legalistic, technical drafting style that renders many EMs impenetrable to users. Concern has also been expressed about the failure to provide an evidence base for SIs, particularly the results of any consultation process.

Ultimately, the quality of supporting information is unlikely to improve unless the government is forced to make changes and apply them consistently. But there are no minimum standards of legislative preparation, and Parliament cannot reject an inadequate, poorly prepared Explanatory Memorandum, or delay the introduction of an SI until the problem is rectified.

7. The government is not compelled to table a motion to annul an SI even if it loses a consideration motion in Committee

A prayer motion on a negative SI can be considered either on the Floor of the House of Commons or by a Delegated Legislation Committee. If the government chooses to refer a prayer motion to a Committee, the debate can only be held on a non-fatal 'consideration' motion. Even if MPs do not support this consideration motion, the SI can only be rejected if a further substantive vote to annul it is held, without debate, on the Floor of the House. But this almost never happens because there is no requirement for this subsequent motion to be tabled.

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8. Deferred voting means Members vote on issues about which they may know little or nothing

If a debate on an affirmative SI is held on the Floor of the House, the question to approve the motion is put immediately after the debate. However, if an SI is debated in Committee, an approval motion is put formally to the House without debate on a separate day. Of the 151 affirmative Instruments laid in the 2015-16 session, 12 approval motions (7.9%) went to a division, eight of which were deferred divisions. As a consequence, MPs are invited to vote on an issue about which they may know little or nothing if they have not been a member of the Committee that considered it. Although a record of the DLC debate is available to Members to read/watch, there is no written report from the Committee highlighting any concerns it may have about the relevant Instrument.

9. Mismatch between the scrutiny time accorded to negative and affirmative SIs

The alignment of parliamentary time to the scrutiny of different types of SIs is out of kilter and ripe for review.

MPs are currently unable to debate many of the negative SIs they are concerned about because the government does not grant time for their consideration. Conversely, plenty of time is automatically allocated to DLCs for scrutiny of affirmative SIs but is not being utilised. The average debate lasts only 26 minutes, when provision for 90 minutes is made.

At the extreme end of the spectrum, a DLC debate in December 2015 on the Draft Modern Slavery Act 2015 (Consequential Amendments) (No. 2) Regulations lasted just one minute and 43 seconds.⁴⁵ Apart from inviting ridicule for being utterly pointless, the setting up of this Committee wasted valuable resources, particularly the time of Members and staff.

10. The government is not required to respond in a timely way even when an SI is found to be defectively drafted

If the JSCI finds an SI to be defectively drafted, it can report this, but the government is not compelled to respond. The JCSI cannot require that the SI be withdrawn, prevent it taking effect, or require the government to remedy the defect within an agreed timeframe. In many cases departments react positively to the Committee's concerns, but there is no obligation on them to do so.

⁴⁵ [https://hansard.parliament.uk/commons/2015-12-16/debates/421012d9-9f0a-4841-8d1c-331946c7fb84/DraftModernSlaveryAct2015\(ConsequentialAmendments\)\(No2\)Regulations2015](https://hansard.parliament.uk/commons/2015-12-16/debates/421012d9-9f0a-4841-8d1c-331946c7fb84/DraftModernSlaveryAct2015(ConsequentialAmendments)(No2)Regulations2015)

11. The House of Commons does not always wait to hear the judgement of the Joint Committee on Statutory Instruments

House of Lords Standing Orders (SO 72) require the JCSI to report on an affirmative Instrument before a motion to approve can be moved in the House. No such requirement exists in the House of Commons. Thus, the Commons can debate an SI before the JCSI has concluded its deliberations, raising the possibility that the Lower House might approve an SI only for the Committee subsequently to raise serious questions about defective drafting or other technical matters. This obviates the purpose and value of the JCSI's deliberations.

12. Unnecessary complexity: eleven strengthened scrutiny procedures

Parliament has in recent years provided for a number of special scrutiny mechanisms for SIs made under a variety of parent Acts where there has been a judgement that the 'normal' process was inadequate. There are now 11 different forms of strengthened scrutiny procedure, each one a little different from the other.⁴⁶

Five of the strengthened scrutiny procedures require the government to lay a draft Order and then lay a revised draft after the scrutiny period is complete. The remaining six procedures require that the government lay a proposal, containing a draft Order, and then lay the draft Order following the completion of the scrutiny process. The wording and process is inconsistent although, in practical terms, the result is the same, as each approach enables the government to revise its intention in response to the consultation process without having to initiate a new scrutiny procedure.

However, in seven of the strengthened scrutiny procedures, phrases such as '*consider*', '*have regard to*' and '*take account of*' are all used in relation to the government's response to recommendations by the relevant scrutiny committees. It is not clear that these have the same meaning and effect. And in the other four procedures, the government is bound only by a general provision to consider representations made to it.

13. Language: inaccessible and confusing to Members as well as the public

The language of delegated legislation – '*made*' and '*laid*', '*negative*', '*affirmative*', '*strengthened*', '*enhanced*' and '*super-affirmative*' scrutiny procedures, '*prayers*', '*fatal*' and

⁴⁶See R. Fox and J. Blackwell (2014), *The Devil is in the Detail: Parliament and Delegated Legislation*, (London: Hansard Society), pp.81-83 and p.234.

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'non-fatal' motions, and *'Henry VIII powers'* – is confusing and has eluded reform. MPs we have interviewed for our research freely admit being baffled by it, and business and civil society groups with a real interest in a particular policy are often so confused by the process that they struggle to make their views known.

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Principles to inform the design of a new scrutiny system

Given the problems identified with the current scrutiny arrangements, in proposing a new system we have prioritised six principles.

The new system should:

1. Be more rigorous and systematic: the aim should be to reduce complexity and provide more transparency and accountability.
2. Reflect the fact that Parliament is delegating power to the executive, not subordinating itself to the government's wishes.⁴⁷
3. Make a government response to the legitimate concerns of MPs about SIs a requirement not an option - including making provision for debating time, and responding to critical reports. Ministers should have to defend their policies in public and be subject to challenge.
4. Give MPs a meaningful role and voice in the process, and make more efficient and effective use of the time they devote to the scrutiny of SIs.
5. Draw upon and encourage the development of knowledge and expertise among Members, so that they might contribute constructively to improvements in policy and legislative development.
6. Reflect a bi-cameral approach: it should not undermine the scrutiny undertaken by the House of Lords, but reflect a pragmatic view of the strengths and weaknesses of each House, in the context of the limited time available to look at the volume of delegated legislation produced in any one parliamentary session.

Options for reform

Select committees are the principal vehicle by which the House of Commons holds the government to account. They can undertake technical scrutiny as well as examine policy principles; they provide for a culture of consensual deliberation and inquiry; and, depending on

⁴⁷ See S. Argument, *Executive law-making in the 21st century: delegation not subordination*, Australia-New Zealand Scrutiny of Legislation Conference, July 2016, [http://www.parliament.wa.gov.au/WebCMS/WebCMS.nsf/resources/file-anzslc-paper-mr-stephen-argument/\\$file/Session%205%20Mr%20Stephen%20Argument,%20Executive%20law%20making%20in%20the%2021st%20century%20-%20Delegation%20not%20subordination.pdf](http://www.parliament.wa.gov.au/WebCMS/WebCMS.nsf/resources/file-anzslc-paper-mr-stephen-argument/$file/Session%205%20Mr%20Stephen%20Argument,%20Executive%20law%20making%20in%20the%2021st%20century%20-%20Delegation%20not%20subordination.pdf)

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their remit and resources, they can undertake that scrutiny in myriad ways. They are the most appropriate model the House of Commons has at its disposal to undertake the detailed scrutiny required of delegated legislation. The success of the committee system in the House of Lords in this area demonstrates the potential of this model. We have therefore considered whether an existing committee can be adapted to undertake the better scrutiny of delegated legislation we propose, or whether a new committee is required.

1. Scrutiny by departmental select committees

A core task of select committees is to '*assist the House in its consideration of Bills and Statutory Instruments, including draft Orders under the Public Bodies Act*'.⁴⁸ One option would therefore be to strengthen the role of select committees in addressing this task, and make changes to ensure that Members could then debate and vote on any SI brought to the attention of the House. In practice, however, scrutiny of SIs by committees is often negligible; committees have nine other core tasks which are accorded equal or greater priority. Imposing scrutiny of all SIs on committees would be deeply unpopular with Members. It would be perceived as an incursion on committees' freedom to determine their own agenda. It would also risk neutering the valuable wider work of committees, given the substantial SI-related scrutiny burden that would be placed on them.

The remit of the European Scrutiny Committee (ESC) could be expanded to include scrutiny of SIs. The ESC conducts largely document-based, often technical scrutiny; performs a sifting function in looking at the legal and/or political importance of draft EU legislation; and has an existing secretariat that could be expanded. It can also hold inquiries into subjects of relevant concern and recommend debates either in a European Committee or on the Floor of the House. And it is experienced in dealing with a significant volume of documents; it regularly scrutinises over 1,000 each session.

However, the ESC's sifting process is much slower than would be required for SIs. Stretching its remit and resources to scrutinise SIs would potentially put at risk the high-quality work it currently undertakes.

The ESC's efforts are probably best directed to continuing to scrutinise ongoing EU legislative proposals and the government's policy towards them. As such, the ESC could helpfully work co

⁴⁸ See House of Commons, *Guide for Select Committee Members*, April 2015, p.24. (<http://www.parliament.uk/documents/commons-committees/guide-select-ctte-members.pdf>)

-operatively with the Committee tasked with scrutinising SIs in the future. Beyond this, the long-term future of the ESC is uncertain following withdrawal from the EU. If a transition agreement is reached, the ESC may still be needed for a time-limited period. If the ESC is abolished after exit day, its resources could be invested elsewhere, for example in scrutiny of delegated legislation.

An alternative option would be to extend the remit of the Regulatory Reform Committee. This examines and reports on draft Legislative Reform Orders (LROs) made under the Legislative and Regulatory Reform Act 2006, and broader matters relating to regulatory reform. Its mandate could be expanded to look at all SIs. Unlike other select committees, there is scope to augment its workload. There have been only 32 LROs since 2006, and consequently the Committee meets only occasionally. However, given that it is so rarely used, it would be cleaner to abolish it and move the scrutiny of LROs to whichever committee model is chosen for scrutiny of delegated legislation.

2. Sequential rather than parallel scrutiny by each House

At present, scrutiny of SIs takes place in parallel in both Houses (with primary legislation, the scrutiny process is sequential). One reform option would be for the House of Lords Secondary Legislation Scrutiny Committee to scrutinise an SI first, before it is passed to the House of Commons for consideration, with MPs able to draw on the reports produced by the Upper House during their own scrutiny of the SI. Whereas the Lords might draw the attention of both Houses to the problems with an SI, it could lie with the elected Commons to reject an Instrument. In addition to limiting the potential for duplicative scrutiny, this approach would have the merit of avoiding the prospect of each House reaching a different conclusion about an SI. However, given the 40-day scrutiny period set out in the Statutory Instruments Act 1946, this approach would pose serious time management problems. Wherever possible the Commons might wait for the Lords to conclude its deliberations, but it ought not to be a requirement.

3. A joint approach with the House of Lords

Unlike the House of Commons, the Upper House has reformed its procedures for the scrutiny of both delegated powers and delegated legislation over the last two decades. Although not perfect, the Lords scrutiny system has many strengths and is widely regarded as superior to that of the Commons.

Wherever possible, it would be preferable to avoid duplicative scrutiny. The ideal approach might therefore be to adopt a joint scrutiny system for SIs. As regards delegated powers, the Delegated Powers and Regulatory Reform Committee in the Lords could be expanded to

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include MPs who would jointly undertake the scrutiny of delegated powers in all public bills, thereby making information about the powers available to all parliamentarians regardless of the House in which the relevant bill begins its passage.

As regards SIs, the technical merits of SIs are already considered jointly through the JCSI. A similar Joint Committee to sift and scrutinise the policy element of SIs could be created by expanding the Lords Secondary Legislation Scrutiny Committee to incorporate MPs.

However, joint committees are not popular with members of either House, and attendance tends to be better among Peers (reflecting the fact that most face fewer demands on their time, not least because they do not have constituencies). There is a danger that a wholly joint committee system would come, over time, to be heavily dominated by the Upper House and would thereby not fully address the fundamental issue of democratic accountability. There is also a risk it might jeopardise the level and quality of scrutiny available during any transitional period, as these committees settle into an established way of working.

On balance, we have concluded that while duplicative scrutiny is undesirable, the House of Commons must take its democratic responsibility for delegated legislation seriously. It would be better, in the first instance, to improve scrutiny by MPs and leave the approach in the Lords largely untouched. Once reform of the process in the Commons is embedded, the situation could then be reviewed and a bi-cameral approach considered.

A new 'Sift and Scrutiny' model for the House of Commons

Having concluded that no existing committee model would be appropriate, we propose that a new 'sift and scrutiny' system should be introduced for the House of Commons, modelled on the House of Lords European Union Committee and the House of Commons European Scrutiny Committee.

There has long been pressure for the creation of a delegated legislation 'sifting' committee for the Commons.⁴⁹ However, simply bolting such a committee onto existing mechanisms - praying against negative SIs, and DLC debates for affirmative SIs - would add little value to the process, given the flaws in these procedures.

A sifting committee must be linked to more robust mechanisms whereby MPs can more

⁴⁹ See for example, House of Commons Select Committee on Procedure, *4th Report, 1995-96 Session, Delegated Legislation*, HC 152; and House of Commons Procedure Committee, (1999-2000), *Delegated Legislation*, HC 48.

effectively scrutinise an SI and hold the government to account.

Key features of the proposed new scrutiny model

A new permanent Delegated Legislation Scrutiny Committee (DLSC) would be established. It would:

- be in the control of Members not whips, with the chair and members elected by the whole House and within party groups, respectively, as with other select committees;
- be supported by a set of thematic sub-committees;
- introduce a degree of policy knowledge and expertise into the scrutiny of SIs, by incorporating members of relevant departmental select committees on the sub-committees;
- have administrative, legal and research support via a committee secretariat and external specialist advice where necessary;
- sift and scrutinise both negative and affirmative SIs and those subject to strengthened scrutiny procedures; and
- turn over to the whole House for further consideration those SIs of concern, with procedures in place to ensure that any SI reported to the House would have to be debated and voted on.

Under the new system, Members would be granted a 'conditional amendment' power. This, coupled with procedural hurdles designed to ensure that ministers could not ignore their concerns, should encourage a degree of constructive engagement on the key policy issues.

The system of 'praying' against negative SIs by EDMs - which the government often ignores - would be abolished, as would 90-minute Delegated Legislation Committee debates for scrutiny of affirmative SIs, followed by a vote on a pointless consideration motion. In addition to removing an ineffectual part of the scrutiny process, this would free up resources that could be re-deployed to support the new scrutiny system.

Delegated Legislation Scrutiny Committee (DLSC)

As with other permanent select committees, the DLSC would be established for the lifetime of a Parliament and consist of up to 15 members, reflecting the party composition of the House.

The chair and members would be elected; the chair would be held by the official Opposition.

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The DLSC would have the power to send for '*persons, papers and records*', and have a secretariat to support the Members, including legal advisers, and with the option of appointing external specialist advisers to provide policy expertise as required.

The Committee would almost certainly need to meet weekly to ensure that the consideration of negative SIs was undertaken within the 40-day scrutiny period.

DLSC Sub-Committees

The DLSC would be supported in its scrutiny work by up to eight thematic sub-committees focused on broad, policy areas rather than government departments.

Each sub-committee could be established for the length of the Parliament, although this would be a matter for the DLSC to decide; depending on the volume and flow of SIs in certain areas the Committee might wish to review and rationalise the number of sub-committees from time to time within a Parliament.

Each sub-committee would have at least seven members and no more than nine. The chair of each sub-committee (and possibly another member, depending on the number of sub-committees established) would be drawn from the DLSC. Two members of the sub-committee would be drawn from one or more of the relevant departmental select committees. The remainder would be elected by MPs within their party groups, reflecting as far as possible the political composition of the House. Given the workload, we would recommend that Members be permitted to serve on only one sub-committee.

Like the main committee, each sub-committee would have the power to send for '*persons, papers and records*'. The sub-committees would be supported by the DLSC secretariat and, like the main committee, have access to research and legal support. Consideration might also be given to whether permanent extra-parliamentary support should be provided, perhaps in the form of expert advisory panels.

Like the DLSC, the sub-committees would need to meet regularly, although in some policy areas this might not need to be weekly. A 'peak and trough' approach to the sub-committees' workload may be unavoidable unless and until the government improves the way in which it manages and schedules the output of SIs.

Complementary scrutiny: working with existing Committees

Scrutiny of delegated powers

The House of Lords Delegated Powers and Regulatory Reform Committee (DPRRC) looks at all bills and reports whether any provisions *'inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny.'*⁵⁰ It also scrutinises and reports on Orders that are subject to a strengthened scrutiny procedure (for example, Legislative Reform Orders).

The DPRRC considers all public bills when they reach the House of Lords and, time permitting, considers government amendments tabled in the Lords that include significant delegated powers, and amendments tabled in the Commons when they return to the Lords. It restricts its consideration to the delegation in question, and not the merits of the overall policy. It plays an advisory role, providing information on which the House may act if it chooses.

The DPRRC is highly influential and provides the nearest thing to a form of parliamentary case law in the delegated legislation arena. Over the years it has built a formidable reputation, and estimates suggest that around 80% of its recommendations for changes to bills are subsequently introduced.⁵¹

Given its influence and expertise, ideally the DPRRC would report on all bills on publication rather than when they reach the House of Lords. This would ensure that MPs could benefit from its advice on delegations of power in a bill when the bill in question begins its legislative journey in the Commons. If such a reform were not forthcoming, however, the DLSC should consider what provision it could make to ensure that MPs are advised about the provisions for delegated powers made in all public bills. A sub-committee could be established for this purpose, and would benefit from drawing on the expertise of the DPRRC to inform its deliberations.

It would also be beneficial if the DLSC were to sample and report on the government's use of powers derived from the EU (Withdrawal) Bill following Royal Assent. Both Houses may scrutinise the individual SIs that derive from the Withdrawal Bill powers; but somewhere within the system there needs to be a scrutiny mechanism to look at the use of the powers collectively

⁵⁰ House of Lords Delegated Powers and Regulatory Reform Committee, *Guidance for Departments on the Role and Requirements of the Committee*, July 2014, para.3, p.4.

⁵¹ M. Russell (2013), *The Contemporary House of Lords: Westminster Bicameralism Revived*, (Oxford: Oxford University Press), pp.219-220.

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over time. Are the powers used as intended; does the government test the boundaries of what Parliament authorised; do ministers ever attempt to utilise the powers in a context entirely unrelated to Brexit? The DLSC could be the mechanism to provide this over-arching monitoring of the process.

Technical drafting

The Joint Committee on Statutory Instruments (JCSI) would continue to consider the technical quality of all SIs subject to parliamentary procedure that may warrant further consideration. The Select Committee on Statutory Instruments (the House of Commons element of the JCSI) would continue to consider the technical merits of Commons-only SIs.

The JCSI's role is to assess the technical qualities of all SIs that fall within its remit and decide whether to draw the special attention of each House to any Instrument on one or more of nine grounds for concern.⁵² If any concerns about an SI are not answered through dialogue with the relevant department, the Committee will report on the matter and draw the Instrument to the special attention of each House. It regularly draws attention to SIs that propose an unusual or unexpected exercise of powers, may be ultra vires, need further elucidation, or appear to be defectively drafted.

The DLSC, like the House of Lords committees, would observe a scrutiny reserve in respect of the JCSI's work wherever possible, thereby avoiding the prospect of approving an SI before its technical and drafting merits had been approved.

Policy merits

The House of Lords Secondary Legislation Scrutiny Committee (SLSC) considers the policy merits and implications of all SIs subject to parliamentary scrutiny, identifying and reporting to the House those that it believes warrant further consideration. The SLSC may report an Instrument if it is deemed politically or legally important, or if it is considered to implement EU legislation inappropriately, to be inappropriate given the passage of time since the parent Act was passed, or to achieve its policy objectives imperfectly. The SLSC may also report an SI for inadequate consultation, or insufficient supporting information. Since 2014-15 the Committee also reports on the quality of the consultation process and explanatory materials provided.

The SLSC analyses the documents provided by departments; pushes, challenges and cajoles

⁵² *Standing Orders of the House of Commons (2013), Public Business*, (London: The Stationery Office), Standing Order 151, pp.172-173.

civil servants and ministers for more information; and in some cases, persuades them to withdraw an SI deemed unacceptable.

The SLSC is similar in remit and approach to the proposed DLSC system. As such, we would hope the two committees would work together where appropriate, and the DLSC would learn from the SLSC's experience.

Strengthened scrutiny committees

At present, six of the 11 strengthened scrutiny procedures provide for a 'relevant' committee of each House or a joint committee to undertake the scrutiny of SIs subject to these procedures. For example, in the House of Commons, Legislative Reform Orders are considered by the Regulatory Reform Committee, and Public Bodies Orders (PBOs) are considered by the relevant departmental select committee.

Under the proposed new model, the DLSC would take over scrutiny of all SIs under strengthened scrutiny procedures, including our new European Union (Withdrawal) Order procedure (see Chapter Four). Remedial Orders would be the exception: they would continue to be considered by the Joint Committee on Human Rights.

DLSC: role and function

The DLSC's remit would be similar to, but not directly mirror, that of the House of Lords Secondary Legislation Scrutiny Committee (SLSC), with its core task being to assess the policy implications of all SIs.

It should be enshrined in the committee's terms of reference that its role is to improve SIs, not reject them, and that rejection should be an option of last resort.

The DLSC's remit would be to draw the attention of the House to any SI that, for example:

- is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
- may be inappropriate in view of changed circumstances since the enactment of the parent Act;
- gives rise to any issue in relation to devolution that may be of interest to the House;
- may imperfectly achieve its objectives.

Given the inherent difficulties of distinguishing, in the delegated legislation system, between

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technical and administrative detail on the one hand and policy and principle on the other, the Committee might also usefully report on any developments it perceives as relevant to this dividing line, in relation to what should be included in delegated legislation and what ought to be the proper preserve of primary legislation.

Like the SLSC, the DLSC may also wish to draw the attention of the House to concerns in relation to inadequate consultation, poor explanatory memorandums and supporting documentation, or other procedural matters.

Building on its remit to report issues in relation to devolution, there may also be an important role for the DLSC to play in liaising with the devolved legislatures about SIs with devolved implications, and how these might, perhaps in co-operation, be most effectively scrutinised.

The proposed new system would operate in four distinct stages:

1. Sift all SIs

An initial 'sift' would be undertaken by the DLSC, supported by clerks and legal advisers, to assess the policy implications of an SI.

- a. All affirmative SIs would be automatically referred to the relevant sub-committee.
- b. Those negative SIs deemed significant enough to warrant further detailed consideration would be referred to the relevant sub-committee.
- c. If the Committee determined that a negative SI needed no further attention, it would be cleared from scrutiny and would come into or remain in effect on the date specified in the Instrument.
- d. The decision to upgrade SIs subject to a strengthened scrutiny procedure would be made by the DLSC at this stage. Further consideration of these SIs would then be undertaken by the relevant sub-committee (see stage 2).
- e. The DLSC would publish a weekly report:
 - explaining its decisions to refer negative SIs to a sub-committee;
 - listing affirmative SIs also referred to the relevant sub-committee; and
 - providing updates on any live SIs currently being considered by the sub-committees.

2. *Sub-committee scrutiny*

Sub-committee members would determine how to scrutinise all referred Instruments and then undertake that scrutiny.

Consideration of SIs will need to take account of the statutory scrutiny period and coming-into-force dates, and groups of relevant/related SIs might be considered together. To clear an SI, the sub-committee must be satisfied that the regulation could be implemented effectively.

- a. The sub-committee would sift affirmative SIs, and decide whether or not an Instrument warrants further scrutiny. It could report any minor issues to the DLSC, with the concerns noted in the latter's weekly report.
- b. For those remaining negative and affirmative SIs that do require further scrutiny, it would be for the sub-committee to decide how this is carried out.

What might scrutiny look like? The sub-committee could choose from a menu of options. It could:

- invite the government to provide more evidence or respond to questions by correspondence;
- invite the minister (and opposition spokespersons) to appear before them during an oral evidence session;
- issue a public call for evidence and consult on its concerns;
- hold a debate not dissimilar to a DLC if desired.

The sub-committees could adopt a rapporteur-style model. Any MP could attend and participate in the proceedings, but only sub-committee members would vote.

The sub-committees should engage as early as possible with ministers and civil servants to try to resolve any impasse constructively, outlining areas of concern and indicating the changes necessary to bring the SI within the bounds of acceptability.

This will in effect provide a 'conditional amendment' power to MPs on the sub-committee, for they will have in reserve the option of recommending annulment or disapproval to the House if the SI is not suitably amended.

- c. The sub-committee would then decide whether an SI be cleared from scrutiny or, if it

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was still unhappy, it could refer the SI back to the DLSC and ask that body to consider recommending that the House reject the Instrument.

All SIs subject to a strengthened scrutiny procedure would automatically be referred back to the DLSC.

Any SI cleared from scrutiny at this stage would be reported and published by the DLSC as part of its weekly update.

3. Report and decision by the DLSC

For those SIs reported back to the DLSC, the purpose of this stage would be to decide whether a report should be made to the House recommending that an SI be rejected. The DLSC would not have the power to amend or veto an SI.

- a. The chair of the relevant sub-committee would report back to the DLSC, highlighting the areas of concern, what action had been taken, the response from the government, and why the sub-committee had concluded the matter should be brought back to the DLSC.
- b. The DLSC would then vote on whether it should recommend to the House that the SI be annulled/disapproved.

If the DLSC decided to clear the SI, no further action would be taken:

- a negative SI would come into or remain in effect on the date specified in the Instrument;
- for affirmative SIs, following the report being laid before the House an approval motion could be tabled by the minister and put forthwith (without debate).

4. Final stage consideration by whole House

- a. If the DLSC voted to recommend that a negative SI be annulled, the government would be required to table an annulment motion, which would be debated on the Floor of the House for up to 90 minutes.
- b. If the DLSC voted to recommend to the House that an affirmative SI be disapproved, the approval motion tabled by the minister must be preceded by a debate on the Floor of the House for up to 90 minutes. If the DLSC voted against recommending disapproval, but was divided on the issue, the approval motion tabled by the minister

would also be preceded by a debate on the Floor of the House for up to 90 minutes.

Under current arrangements, there is nothing to compel the government to table an annulment motion for negative SIs. Standing Orders may therefore need to be amended to make automatic provision for this. The system might replicate that in use in the Canadian House of Commons, whereby, if a relevant report of the Committee is not brought for debate by the government within 15 sitting days, the Committee's recommendation is treated as an order of the House to the effect that the government must revoke the Instrument, and the negative SI falls. The Canadian disallowance procedure has only been invoked on eight occasions since its creation in the late 1980s, suggesting its effectiveness in obliging the government to provide parliamentary time.

Recommending that an SI be rejected would be a 'last resort'. If the system works as intended, excessive amounts of debating time on the Floor of the House should not be taken up with SIs.

The prospect of a minister being called to the House to answer questions about the failings of his or her department, the taking-up of valuable parliamentary debating time, and the embarrassing prospect of possibly losing a vote and seeing an SI rejected, ought to provide some impetus to encourage ministers to engage constructively with the Committee's concerns at an early stage.

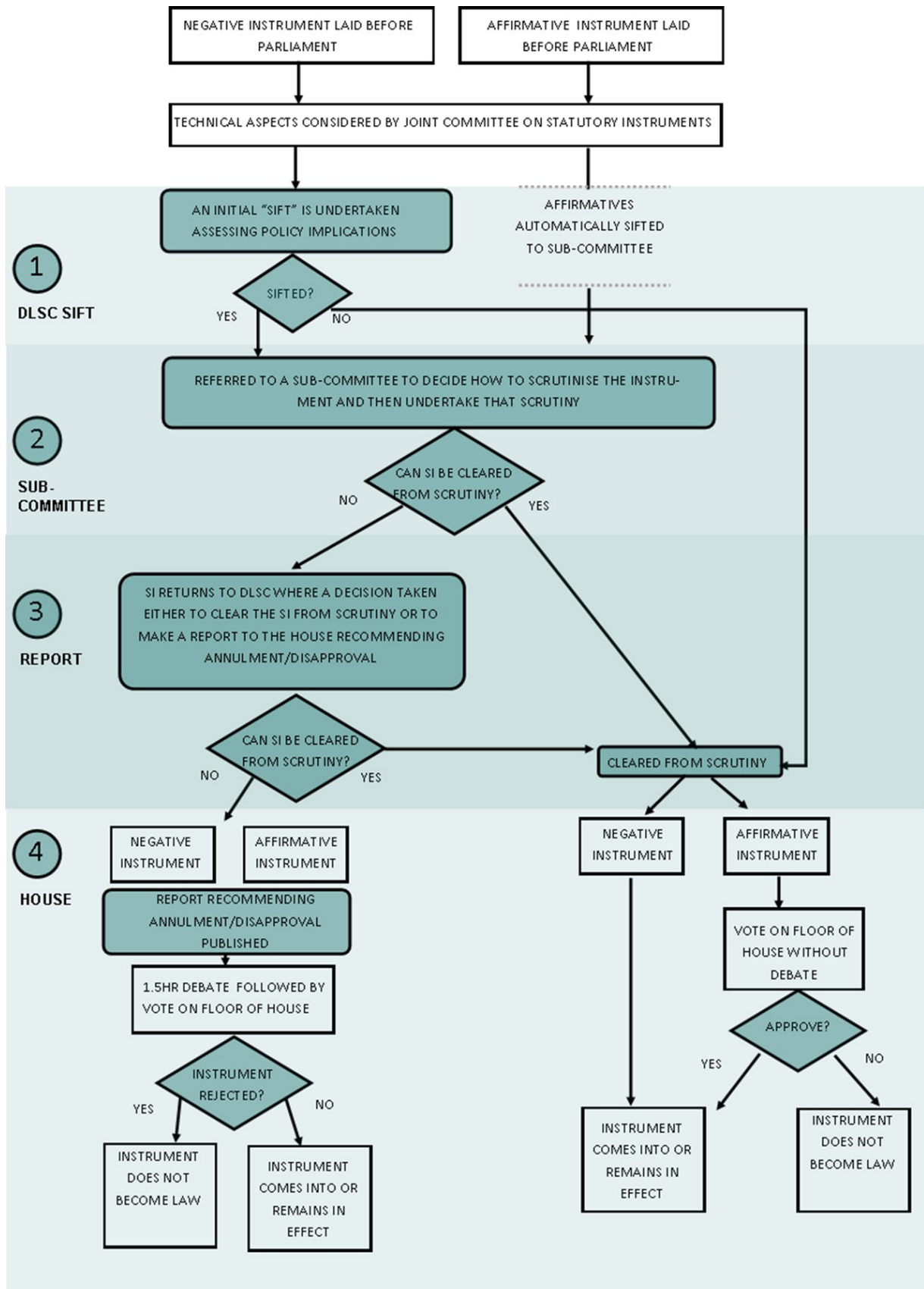
The system would not preclude the government rejecting the Committee's concerns and testing support for its position on the SI across the House. The government would also have the option of withdrawing the Instrument and laying another similar SI, if it wished. The Committee would have to be accorded a scrutiny reserve for affirmative SIs, so that no approval motion could be tabled by a minister until the DLSC had reported on the Instrument. If, in negotiations with the relevant department, the Committee were met with silence, it might find itself unable to make a report, and the minister would be unable to table an approval motion. This should ensure that the Committee receives a response to its concerns.

Role of backbench MPs not on the committee

Although they would not have voting rights, any backbench Member might attend the meetings of the DLSC and the sub-committees and be invited to speak at the discretion of the Chair. If they had concerns, insight, or information they wished to bring to the attention of the Committee they would be able to do so.

3. A NEW 'SIFT AND SCRUTINY' SYSTEM FOR THE HOUSE OF COMMONS

Figure 1: A 'sift and scrutiny' procedure through a new House of Commons Delegated Legislation Scrutiny Committee (DLSC)



If Members wished to debate negative SIs that the DLSC had cleared from scrutiny and not reported to the House, they would have a right of appeal to the DLSC to ask that it reconsider its decision. It would be for DLSC members to decide whether the MP's case warranted further consideration, or whether it was a personal hobby-horse that should not detain the House further.

It would, of course, remain open to individual Members to pursue alternative avenues for debate. For example, they could apply for Westminster Hall and adjournment debates in the usual manner. Opposition parties would also retain their right to use allotted Opposition Day time to debate annulment motions.

At what cost? Resourcing the new system

To properly scrutinise delegated legislation will require significant investment of resources. It is difficult to provide an accurate estimate of the costs of the proposed new system, as much will depend on the allocation of staff; the extent to which any staffing resources are shared with select committees; the time when the new committees sit and whether this has knock-on consequences for the staffing of other areas of parliamentary activity; and overtime and contract arrangements in areas such as Hansard reporting and the broadcasting service. Although the JCSI employs an array of lawyers, there may also be some need, in the next couple of years, for the DLSC to secure additional legal support from personnel with specialist knowledge of EU law, to grapple with the changes arising from Brexit and the EU (Withdrawal) Bill.

Staff costs for the House of Commons Committee Office in the financial year 2016-17 were estimated at £12.5 million.⁵³ A new select committee would cost in the region of £400,000 or more a year. The resourcing of policy sub-committees could more than double this sum. To put this in context, it is estimated that the year-long Parliamentary Commission on Banking Standards established in 2012 cost £980,000.⁵⁴ If resources can be provided for initiatives such as that, they ought to be provided for the proper scrutiny of delegated legislation, particularly when it has been an area of important scrutiny that has been under-resourced for decades due to political neglect.

There are some countervailing savings to be made. The abolition of Delegated Legislation Committees will save considerable staff time and resource. In the 2016-17 session, for example,

⁵³ *House of Commons Sessional Returns, Session 2016-17*, 18 May 2016 – 3 May 2017, HC-1, p.172.

⁵⁴ H. White (2015), *Select Committees Under Scrutiny: The Impact of Parliamentary Committee Inquiries on Government* (London: Institute for Government), p.16.

3. A NEW 'SIFT AND SCRUTINY' SYSTEM FOR THE HOUSE OF COMMONS

there were 150 DLCs,⁵⁵ and 114 during the 2015-16 session.⁵⁶ These will not be required under this new system. The Regulatory Reform Committee can also be abolished, and there will be no need for departmental select committees to consider SIs as part of their core tasks. Looking further ahead, the European Scrutiny Committee will likely be defunct after our withdrawal from the EU, and its resources will therefore be available for re-deployment.

Tests of the system: volume, time and capacity constraints

There are three vital and inter-related tests that underpin the effectiveness of any new scrutiny system for delegated legislation, and particularly its utility in the context of Brexit.

1. Time pressures

For most negative Instruments, the DLSC would have just over three weeks to consider an SI so that it could, if desired, recommend annulment and trigger a debate and vote on the Floor of the House within a 40-day scrutiny period. But negative SIs are supposed to be non-controversial and not politically significant. At present, the number of prayer motions laid each Session is only between 10 and 20. Dealing with this volume within the period required should not be unmanageable.

A majority of affirmative SIs are laid in draft and do not have a set scrutiny period. For these SIs, time management should therefore not be a problem. Parliamentary business managers advise that government departments should allow for a minimum of six sitting weeks for the passage of an affirmative Instrument through all its parliamentary stages.⁵⁷ During the 2015-16 session, the average passage of an affirmative SI took eight weeks. Even if two weeks were allowed for the government to table an approval motion and arrange a debate and vote on the Floor of the House, the DLSC would have between four and six weeks for scrutiny.

2. Volume pressures: the planning of SIs

The greatest risk lies in the 'peak and trough' approach adopted by the government to the laying of SIs. Those months when a lot of SIs are laid – in March at the start of the financial year, July prior to the long summer recess, and February and December prior to shorter recess

⁵⁵ *House of Commons Sessional Returns, Session 2016-17*, 18 May 2016 – 3 May 2017, HC-1, p.55.

⁵⁶ See, Hansard Society (2017), *Westminster Lens: Parliament and Delegated Legislation in the 2015-16 Session*, (London: Hansard Society), p.19.

⁵⁷ House of Lords Secondary Legislation Scrutiny Committee, *Guidance for departments submitting Statutory Instruments to the Secondary Legislation Scrutiny Committee*, p.5. See https://www.parliament.uk/documents/lords-committees/Secondary-Legislation-Scrutiny-Committee/SLSC_Guidance_for_Departments_submittingJuly15.pdf

periods – are where the greatest risk lies.

In Scotland, the Parliament receives regular reports from the Scottish government identifying what SIs will be laid in the coming weeks and months. This enables the relevant committee to plan ahead, decide what it wants to focus on and be more efficient in its scrutiny.

The Cabinet Office in Whitehall established a central SI-hub to improve planning and co-ordination, and more recently an SI-hub has been established in the Department for Exiting the European Union to co-ordinate all Brexit-related SIs.

But the UK Parliament has not benefited from the former development, and it remains to be seen whether it will benefit from the latter. Parliament should demand that the government do much more to improve its advance planning and reporting so that it too can plan its scrutiny work more effectively.

3. Capacity pressures

Business management: debating time in the Chamber

As the new scrutiny system settles in, there might be an increase in debating time in the short term; but we do not expect that there will be a substantial increase in the medium and long term.

Annulment and approval motions will be able to utilise time previously spent debating affirmative SIs. In the 2015-16 session, 13 affirmative SIs were debated on the Floor of the House,⁵⁸ and 10 in 2016-17.⁵⁹ In addition, terrorism-related SIs are always debated on the Floor. Under the DLSC system automatic referral of affirmative SIs to the Floor in some policy areas will end, so the time might be made available for other purposes.

Whether there is a substantial increase in time spent debating SIs in the Chamber will depend on the behaviour of ministers and MPs. If ministers decline to engage constructively with the DLSC, there will be a risk that it will report an increasing number of SIs to the House. For their part, if MPs elected to the DLSC seek to utilise the body for obstructive purposes rather than constructive engagement, then that too will cause problems.

⁵⁸ Hansard Society (2017), *Westminster Lens: Parliament and Delegated Legislation in the 2015-16 Session*, (London: Hansard Society), p.19.

⁵⁹ *House of Commons Sessional Returns, Session 2016-17*, 18 May 2016 – 3 May 2017, HC-1, p.55.

3. A NEW 'SIFT AND SCRUTINY' SYSTEM FOR THE HOUSE OF COMMONS

As in the Canadian and Australian parliaments, the test of the success of the system will be in the low number of SIs that are reported to the whole House and debated accordingly. If SIs are properly prepared, if high quality explanatory materials are provided, and if ministers engage constructively with the concerns of the DLSC and respond positively to suggestions for improvements, the number of debates required should be relatively small overall.

MPs' time and workload

For MPs sitting on the DLSC and its sub-committees (approximately 80 Members in total), there will undoubtedly be an increase in workload; the role will require time and commitment. However, dozens of MPs currently spend time fruitlessly attending DLCs to debate affirmative Instruments, and campaigning to get a debate on negative SIs, to no avail.

This new scrutiny system will make more constructive and effective use of MPs' time, and enable Members to exert genuine influence on the legislation. It will allow MPs to develop and deploy policy knowledge and expertise.

Given the importance of delegated legislation, particularly in relation to Brexit, we would expect the DLSC to be one of the more prominent of the select committees, and membership - and particularly the chairmanship - to be coveted positions.

Ultimately, however, it is for Members to decide: if they are serious about scrutinising Brexit and the legislative changes that will result, scrutiny of delegated legislation must be prioritised.

4. A NEW STRENGTHENED SCRUTINY PROCEDURE FOR THE EUROPEAN UNION (WITHDRAWAL) BILL

We have previously called for strengthened scrutiny procedures to be reviewed and consolidated, and have expressly opposed the creation of a twelfth variation. However, we have concluded that their drawbacks, particularly the absence of speed and flexibility, render the existing eleven procedures unsuitable for use in the EU (Withdrawal) Bill given the unique pressures – of time, volume and capacity - inherent in the Brexit process.

Why an existing strengthened scrutiny procedure will not work for the EU (Withdrawal) Bill

The most rigorous and stringent strengthened scrutiny model currently available to Parliament is the Legislative Reform Order (LRO) procedure, as provided for in the Legislative and Regulatory Reform Act 2006.

Following a 12-week period of statutory consultation, a minister brings forward a draft Order and makes an initial recommendation as to whether the Order should be subject to the negative, affirmative or super-affirmative procedure. The assigned scrutiny committees in both Houses then have 30 days to consider the draft Order and decide whether the procedure proposed by the minister is appropriate or should be upgraded. After the 40th day, the minister may make the negative Order or arrange the approval motion for the affirmative Order, unless the assigned committee recommends that the Order should not be made. For Orders upgraded, or already subject to, the super-affirmative procedure, both Houses' scrutiny committees have 60 days from the date it was laid to consider it and produce a substantive report recommending changes, for which the minister must take any representations into account.

Six other Acts contain a strengthened scrutiny procedure which provides for Parliament to decide the level of scrutiny to be assigned to the delegated legislation flowing from powers in these Acts. The most frequently used variant of these procedures is the Public Bodies Order (PBO) procedure (sometimes referred to as the 'enhanced-affirmative' procedure) created under the Public Bodies Act 2011.

As with the LRO procedure, there is a 12-week statutory consultation period after which a draft Order is laid before both Houses. This is subject to JCSI scrutiny in the normal way, and is referred to the SLSC in the House of Lords and a relevant select committee in the House of Commons. Either House can resolve within 30 days that an enhanced-affirmative procedure be used. If no such resolution is made, after 40 days a motion to approve the draft can be moved. The enhanced affirmative trigger extends to 60 days the period before a motion to approve

4. A NEW STRENGTHENED SCRUTINY PROCEDURE FOR THE EUROPEAN UNION (WITHDRAWAL) BILL

can be moved. Ministers are required to have regard to any representations or recommendations made and, after 60 days, can either move the original Order or lay a revised Order with a statement summarising the changes. A revised Order is then subject to the affirmative procedure.

The principal element of the LRO procedure – that the minister should recommend the scrutiny process when bringing forward an Order, and that both Houses should then consider whether the procedure is appropriate – would best deal with the problem in the EU (Withdrawal) Bill of how to allocate scrutiny procedures to powers whose application is uncertain.

However, the LRO's provision for a committee veto is, in the circumstances posed by Brexit, likely to prove impractical and the government is unlikely to agree to it. As such, a more politically viable proposition would be the PBO procedure, whereby Parliament - via the assigned committees - can suggest improvements of which the government must take account.

The LRO process is also much more time-consuming than the PBO model. Post-legislative review found that it was taking up to 18 months for an LRO to make its way onto the statute book.⁶⁰ The PBO procedure is less time-consuming but still extends the scrutiny process to 60 days, in addition to three months' external consultation.

A significant problem with the PBO model is that all Orders laid under this procedure are first laid as draft affirmative Instruments. Parliament then has the option to recommend that the Order be subject to a 60-day 'enhanced-affirmative' procedure.

If the PBO procedure were to be adopted for SIs generated by the EU (Withdrawal) Bill, all the delegated legislation arising from the Bill would be subject to the affirmative procedure. But as the House of Lords Delegated Powers and Regulatory Reform Committee has acknowledged, given the volume of SIs that will be generated by this Bill in the limited time available 'it is inevitable that the process will require a substantial proportion of negative Instruments.'⁶¹ But of the 11 strengthened scrutiny procedures, only the LRO caters for these.

⁶⁰ Memorandum to the Business Innovation and Skills Committee, *Post Legislative Assessment of the Legislative and Regulatory Reform Act 2006*, Cm 8948, November 2014, p.11.

⁶¹ <https://publications.parliament.uk/pa/ld201617/ldselect/lddelreg/164/16404.htm>

A European Union (Withdrawal) Order strengthened scrutiny procedure

If Parliament is to exercise some democratic control over the powers in the EU (Withdrawal) Bill, a new procedure is required. In designing a new strengthened scrutiny procedure, we have sought to draw on the best aspects of the 11 existing variants, whilst being cognisant of the volume, time and capacity constraints that must be taken into account when considering the Bill.

Key features of the proposed new strengthened scrutiny procedure

- Parliament must decide the scrutiny procedure to be assigned to an SI.
- A statutory 12-week consultation period should not be required. Consultation by government should be required where time permits, and where consultation is not carried out this should be justified in the explanatory information provided to Parliament. An absence of consultation before an Order is laid before Parliament might make it more likely that the House committees might choose to conduct their own time-limited form of consultation.
- The system should penalise poor conduct on the part of the government. The power to call a minister before the committee to give evidence or even to extend the scrutiny period should have a deterrent effect, encouraging ministers and officials properly to prepare their policy and supporting materials.
- There should be no committee veto power on an SI, but government must have regard to the concerns of the committees and formally respond to them. As such, both Houses will have a 'conditional amendment' power to indicate what changes they believe should be made to the SI to bring it within the bounds of acceptability.
- The procedure should fit with the existing scrutiny architecture, providing for consideration of both negative and affirmative Instruments and within recognised existing scrutiny periods of 28 and 40 days.

The way in which this new procedure would work is set out below.

1. When the government wishes to exercise a power subject to the strengthened scrutiny procedure it will lay a draft Order before Parliament, together with an explanatory memorandum and other supporting documents to assist MPs and Peers in carrying out effective scrutiny.

4. A NEW STRENGTHENED SCRUTINY PROCEDURE FOR THE EUROPEAN UNION (WITHDRAWAL) BILL

2. The relevant minister will make an initial recommendation as to whether the Order should be subject to the negative or the affirmative procedure.
3. The Joint Committee on Statutory Instruments, the Secondary Legislation Scrutiny Committee in the House of Lords and the new Delegated Legislation Scrutiny Committee in the House of Commons will consider the compliance of the draft Order with the requirements set out in the parent Act and other general policy considerations. We would expect there to be some liaison between the committees and their secretariats.
4. In the first 20 days, the SLSC and DLSC will have the power to upgrade the Order: if a minister proposes it be subject to the negative procedure, they can choose to upgrade it to an affirmative.
5. If the two Houses reach a different view on the scrutiny procedure, the decision that favours the higher level of scrutiny will hold sway (as is the case now with other strengthened scrutiny procedures). The Committee's decision can be reversed only by a motion of either House.

Draft negative Orders

6. Unless upgraded within 20 days, negative Orders will become law on a stated date unless either House passes a motion within 40 days that the Order be annulled.
7. Rather than use the EDM system to 'pray' against a negative SI, MPs would lobby the DLSC to ask it to reconsider the decision not to upgrade the Order to enable a debate to take place.

Draft affirmative Orders

8. Where the affirmative procedure has been proposed, the SLSC and DLSC will make a report to the House assessing the proposal and recommending approval or disapproval. The minister will be formally required to take account of any representations and recommendations made by the committee(s). This has the effect of granting both Houses a 'conditional amendment' power. Depending on what the committees say, the minister must then decide whether to proceed with the original proposal or withdraw it and lay a revised Order.
9. Once 40 days has passed, the minister can table a motion that the draft affirmative Order be approved. Both Houses of Parliament must expressly approve the draft Order before it can become law.

If the SLSC or DLSC recommends approval unanimously, the question will be put forthwith without debate.

If the committees recommend either disapproval or approval only after a division in committee, the approval motion will be preceded by a 90-minute debate on the Floor of the House.

Made affirmative Orders

Made affirmatives are used in urgent circumstances where an SI may need to come into force immediately. The Order would not be laid in draft at stage 1 but would come into force straightaway. Made affirmatives would cease to have effect unless both Houses of Parliament approve the Instrument within one month⁶² of the Order being laid.

This strengthened scrutiny procedure is specifically designed for the EU (Withdrawal) Bill but could be replicated to provide for parliamentary control of the wide powers that are likely to appear in the other Brexit legislation.

However, following our withdrawal from the EU, a full review of all strengthened scrutiny procedures should be conducted with a view to rationalising them, ideally to adopt a system consisting of just two variants, one for strengthened scrutiny in urgent circumstances and another for non-urgent circumstances.

⁶² One month as defined by [Schedule 1 of the Interpretation Act 1978](#).

4. A NEW STRENGTHENED SCRUTINY PROCEDURE FOR THE EUROPEAN UNION (WITHDRAWAL) BILL

Figure 2: Overview of a new strengthened scrutiny procedure for EU (Withdrawal) Orders

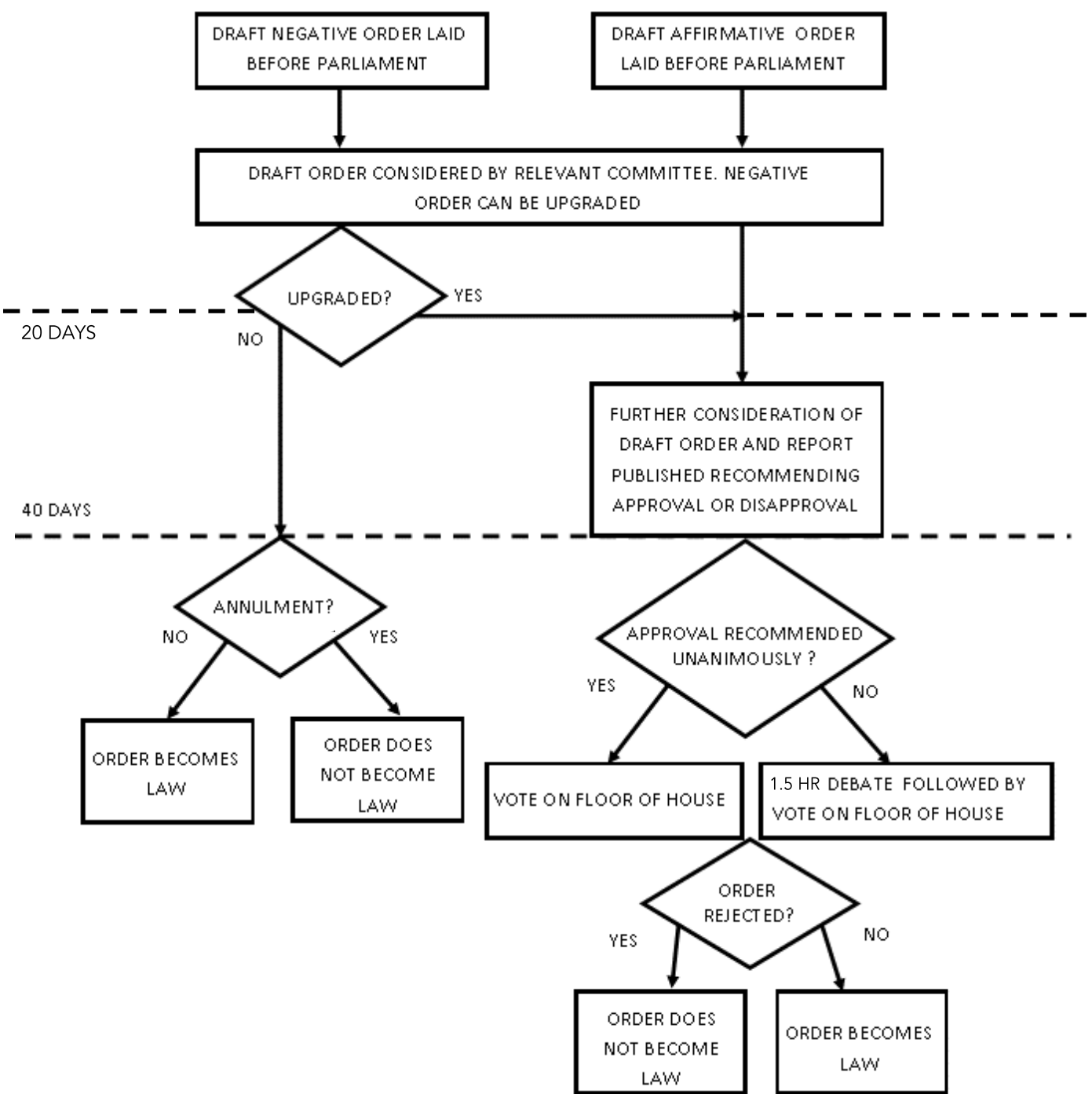
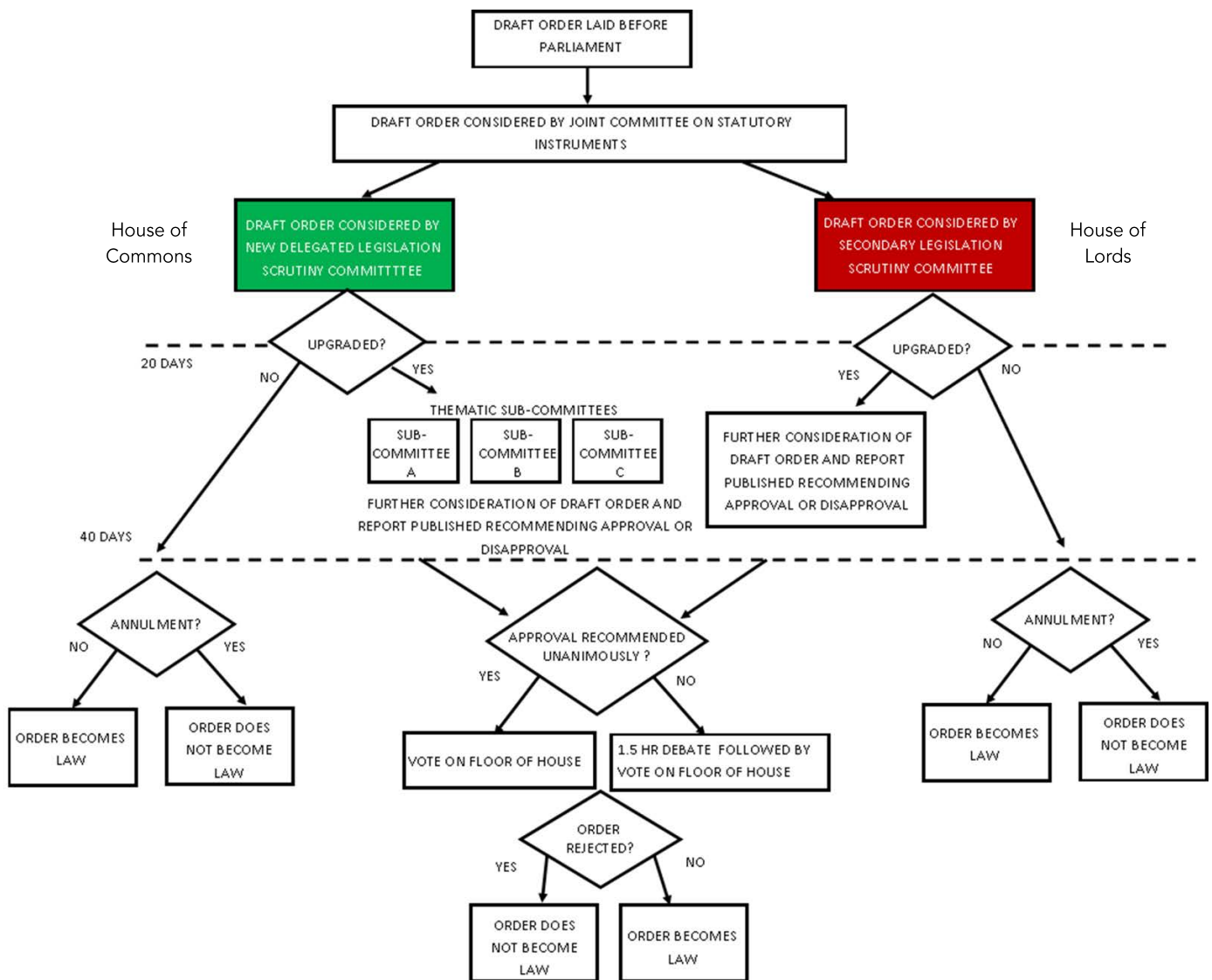


Figure 3: Committee scrutiny in the House of Commons and House of Lords under the new strengthened scrutiny procedure for European Union (Withdrawal) Orders



5. REFORM OF HOUSE OF LORDS SCRUTINY OF DELEGATED LEGISLATION

The procedures for scrutiny of delegated powers and delegated legislation by the House of Lords are not perfect, but they are more robust and rigorous than those in the elected House. Radical reform of the procedures in the Upper House is therefore not required. But there are some changes that could beneficially be made which may require amendments to Standing Orders, and some may require an increase in resources. Implementing these changes sooner rather than later may therefore be advisable. But given that the Lords scrutiny system generally works well, Peers may wish to adopt a ‘wait and see’ approach in relation to some of the reforms, acting if, and when, the scrutiny gears begin to grind under pressure.

A report by the Delegated Powers and Regulatory Reform Committee on introduction of a bill to either House

The Delegated Powers and Regulatory Reform Committee (DPRRC) examines the delegated powers contained in bills when they arrive in the House of Lords. MPs do not have an equivalent committee at their disposal. In *The Devil is in the Detail*, we recommended that MPs would benefit from the work of the DPRRC and that ideally the Committee should therefore scrutinise all bills on their introduction to Parliament, regardless of the House in which they begin their legislative journey.⁶³ This recommendation has not been adopted, but the Committee has indicated that it may make an exception in the case of the EU (Withdrawal) Bill and report on the powers whilst the legislation is being scrutinised first by the House of Commons.⁶⁴ Given that relevant select committees in the House of Commons will not be established before the Bill’s second reading in September, such a break with precedent by the DPRRC would be wholly justifiable and much needed. Providing a report on the Bill by the time Parliament returns in October, when the House of Commons is likely to begin committee stage consideration, would be a valuable resource to support the scrutiny process.

In order to smooth the path for this initiative, consideration needs to be given to the mechanisms to give effect to it. In governance terms the DPRRC’s responsibility is to report to the House of Lords, and there are processes and procedures in place for publication of the Committee’s reports and to draw them to Members’ attention. There are no such procedures to bring DPRRC reports to the attention of the House of Commons. For reasons of courtesy and propriety in their relationship with the Commons, Members of the DPRRC may prefer to act

⁶³R. Fox and J. Blackwell (2014), *The Devil is in the Detail: Parliament and Delegated Legislation*, (London: Hansard Society), p.197.

⁶⁴House of Lords Delegated Powers and Regulatory Reform Committee, 23rd Report of Session 2016-17, *Special Report: Submission to the House of Commons Procedure Committee inquiry on the delegated powers in the ‘Great Repeal Bill’*, HL Paper 143, para.14, p.6.

only at the invitation of MPs, for example from an individual select committee. If so, then some liaison with relevant officials and MPs may be required to put in place an agreed mechanism for making and accepting such an invitation to report early.

Mechanisms to compel a government response – a conditional amendment power

Both the Joint Committee on Statutory Instruments and the House of Lords Secondary Legislation Scrutiny Committee are advisory bodies. If the government breaches their good practice conventions, there are no sanctions available. The committees have no formal powers to compel the government to respond to their questions and concerns. Critical reports may be issued but these do not invalidate an SI, and there is no requirement for the government to respond to them. Ministers can simply redraft and resubmit an SI without explanation, and/or amend it in the future if necessary.

One way to persuade the government to think again would be to clarify and agree the concept of a 'conditional amendment', whereby Members would be given the power to delay an SI about which they had concerns, combined with the ability to indicate what steps the government might take that would render it acceptable in the future. This would not preclude the government from coming back with the same instrument if it so wished.

If applying this mechanism to SIs once laid is seen as 'too difficult', a similar effect could be achieved if the government undertook to publish pre-laying drafts of SIs and to wait for comments on those drafts from scrutiny committees before finalising and laying the SIs in accordance with established practice.

The introduction of a conditional amendment power would be in keeping with the Upper House's role as a revising chamber. It would enhance the scrutiny process whilst avoiding the prospect of constitutional stand-offs, and preserve the government's ability eventually to get its SI if it remained determined to do so.

Until recently, it was widely accepted that the Upper House could either accept or reject an SI outright. However, in the last Parliament, amendment motions to two regulations – on Tax Credits and Universal Credit – led Peers to claim that a new 'delaying' power over SIs had been secured. The Tax Credits SI was eventually withdrawn but the government appears to have implemented the Universal Credit regulations, and ministerial commitments to report back to

5. REFORM OF HOUSE OF LORDS SCRUTINY OF DELEGATED LEGISLATION

the House about them have not been observed.⁶⁵

It is therefore not clear that the government does accept the concept of a Lords 'delaying' power. This needs to be clarified if confusion is to be avoided in the future. The idea of a 'delaying' power is arguably not that different to the concept of conditional amendment; it would therefore be useful to clarify the concepts and secure the government's acceptance of what will and will not be accepted practice in future.

Legislative standards: improving knowledge and understanding

The DPRRC and SLSC produce guidance, reports, end of session reviews and end of parliament legacy reports. Their findings and recommendations are thus found in numerous publications over many years, making the committees heavily dependent on the extensive body of knowledge and experience built up by their secretariats. While the Government Legal Service and Office of Parliamentary Counsel have made efforts to improve knowledge and understanding, particularly of the DPRRC's findings, there is still scope for improvement.

One useful step would be to draw together each Committee's findings in a 'standards' code or framework, similar to the *'Constitutional Standards of the House of Lords Select Committee on the Constitution'* put together by researchers at University College London.⁶⁶ Such codification of each Committee's work would serve to make its legislative interpretation more transparent. It would not be binding on the government or other actors in the process, but, by drawing together in one place a series of recommendations that have emerged incrementally over time, it would provide a potentially helpful resource for government and others to utilise in relation to legislative preparation and scrutiny.

It is clear from the government's White Paper, *Legislating for withdrawal from the European Union*, how limited knowledge of the delegated powers and delegated legislation process is in Whitehall. A core reference resource maintained by each committee might help address this in the future.

Supporting improved scrutiny by the House of Commons

Given that the Upper House has long had the more robust procedures for scrutinising

⁶⁵ See Hansard Society (2017), *Westminster Lens: Parliament and Delegated Legislation in the 2015-16 Session*, (London: Hansard Society), pp.21-22.

⁶⁶ See J. Simson Caird, R. Hazell and D. Oliver (2015), *The Constitutional Standards of the House of Lords Select Committee on the Constitution*, 2nd edition (London: UCL, Constitution Unit)

delegated powers and SIs, and that the proposed new 'sift and scrutiny' model for the Commons is in part modelled on the EU scrutiny system in the Lords, if this new model were to be adopted MPs and Commons staff would benefit from access to advice and support from their counterparts in the Lords about how best to make the system work most effectively. To avoid duplicative scrutiny as much as possible, it would also be advisable for Members and staff in each House to liaise and, where possible, agree joint working arrangements of either a formal or informal nature.

GLOSSARY

21-day rule: An informal convention by which, wherever possible, a Statutory Instrument is to be laid at least 21 days before it comes into effect.

Affirmative resolution procedure: Parliamentary scrutiny procedure whereby instruments require the active approval of both Houses.

Annulment motion: A proposal for a debate and decision to reject a negative Statutory Instrument.

Approval motion: A motion to approve a Statutory Instrument subject to the affirmative procedure.

Commencement date: The date when the provisions of an Act come into effect.

Commencement Order: A type of Statutory Instrument that brings into force all or part of an Act of Parliament at a date later than that of Royal Assent.

Delegated legislation: Also known as secondary or subordinate legislation. This is law made by ministers (and sometimes other authorised bodies) under powers deriving from Acts of Parliament.

Delegated Legislation Committee (DLC): A temporary committee of MPs that meets to debate an affirmative Statutory Instrument for up to 90 minutes in the House of Commons.

Delegated Powers Memorandum: The document produced by the relevant government department identifying every delegated power in a bill, its justification, and the proposed form of parliamentary scrutiny procedure for it. The Memorandum is scrutinised by the House of Lords Delegated Powers and Regulatory Reform Committee (DPRRC).

Delegated Powers and Regulatory Reform Committee (DPRRC): It considers all public bills on their introduction to the House of Lords, examining whether they contain any inappropriate delegation of power or subjects those powers to an inappropriate level of scrutiny.

Direction: A type of Statutory Instrument that gives legally binding instructions to a public body about the way it exercises its functions.

Early Day Motion (EDM): Motion submitted for debate in the House of Commons for which no time is formally allocated.

Enhanced scrutiny procedure: Under the procedure for scrutinising Public Bodies Orders the relevant committees can subject the draft Order to an additional 30 days scrutiny. Other less common variants of a strengthened scrutiny procedure have similar enhanced scrutiny.

Explanatory Memorandum (EM): A short document accompanying an SI which sets out, in plain language, what the instrument does and why.

Fatal motion: A motion in the House of Lords seeking to reject a Statutory Instrument.

Henry VIII power: A delegated power that enables ministers to amend or repeal primary legislation by secondary legislation.

Joint Committee on Statutory Instruments (JCSI): A committee made up of Members from both Houses which considers the technical qualities of all general instruments and Statutory Instruments subject to parliamentary procedure that may warrant further consideration.

Laid: Signifies the beginning of a Statutory Instrument's progress through Parliament. In practice, copies of the SI are delivered to the Vote Office in the House of Commons and its counterpart in the House of Lords.

Legislative Reform Order (LRO): A piece of delegated legislation made using a power conferred upon a minister by the Legislative and Regulatory Reform Act 2006 to remove regulatory burdens in primary legislation.

Made: When a Statutory Instrument is signed off by the responsible minister.

Motion: A proposal for a debate or decision that may be voted upon if contested.

Negative resolution procedure: Parliamentary procedure in which Statutory Instruments will become law on a stated date unless a motion is passed in either House annulling (rejecting) the Instrument. This has to be done within a certain time period (usually 40 days).

Non-fatal motion: A motion in the House of Lords critical of a Statutory Instrument but not seeking to reject it.

GLOSSARY

Order: A type of Statutory Instrument that is an exercise of executive power or a judicial or quasi-judicial decision.

Orders in Council: Issued 'by and with the advice of Her Majesty's Privy Council' these are used, for example, to transfer responsibilities between government departments.

Parent Act: Also known as the enabling Act, it is the primary legislation that grants a delegation of power to ministers or other bodies to make delegated legislation.

Post-legislative scrutiny: Assessment of the implementation and operation of legislation after it has been approved by Parliament. The government department responsible for an Act will publish a memorandum on its implementation three to five years after Royal Assent for a parliamentary committee to scrutinise.

Prayer: The name given to an Early Day Motion tabled by an MP or Peer calling for the annulment of a negative Statutory Instrument.

Pre-legislative scrutiny: Consideration of a draft bill by a parliamentary committee, including scrutiny of consultative documents and supporting materials.

Public Bill Committee (PBC): A cross-party committee in the House of Commons appointed to carry out line-by-line scrutiny of a bill. Each committee is named after the bill it considers.

Public Bodies Order: A piece of delegated legislation made using a power conferred upon a minister by the Public Bodies Act 2011 to abolish, merge and modify the functions of public bodies by amending primary legislation.

Regulation: A type of Statutory Instrument in which substantive and detailed law is made.

Regulatory Reform Committee (RRC): It considers and reports to the House of Commons on draft Legislative Reform Orders under the Legislative and Regulatory Reform Act 2006. (Previously known as the Deregulation and Regulatory Reform Committee.)

Remedial Order: A Statutory Instrument used to remove an incompatibility in UK law with the European Convention on Human Rights.

Scrutiny reserve: An undertaking by government that it should not take forward or agree a

proposal until a designated parliamentary committee has reported on it.

Secondary Legislation Scrutiny Committee (SLSC): It examines the policy merits and implications of any instrument (whether or not a Statutory Instrument) or draft instrument laid before the House of Lords that is subject to parliamentary procedure and may warrant further consideration. It also considers Public Bodies Orders and whether they meet the test set out in the Public Bodies Act 2011. (Previously known as the Merits of Statutory Instruments Committee.)

Select committees: In the House of Commons these mostly examine the expenditure, administration and policy of each government department and associated public bodies. They have the power to take evidence and issue reports. They are made up of MPs from across the parties in proportions reflecting the party balance in the Commons. In the House of Lords, select committees do not mirror government departments but cover broader issues such as science and technology, the economy, the constitution and the European Union.

Standing Orders: The written rules under which Parliament conducts its business. They regulate the way Members behave, bills are processed, and debates are organised.

Statutory Instrument (SI): The form by which most delegated legislation made after the Statutory Instruments Act 1946 is exercised. Statutory Instruments have the same force of law as Acts of Parliament.

Strengthened scrutiny procedures: Statutory parliamentary scrutiny procedures for instruments that amend primary legislation. Sometimes referred to as enhanced or super-affirmative procedures.

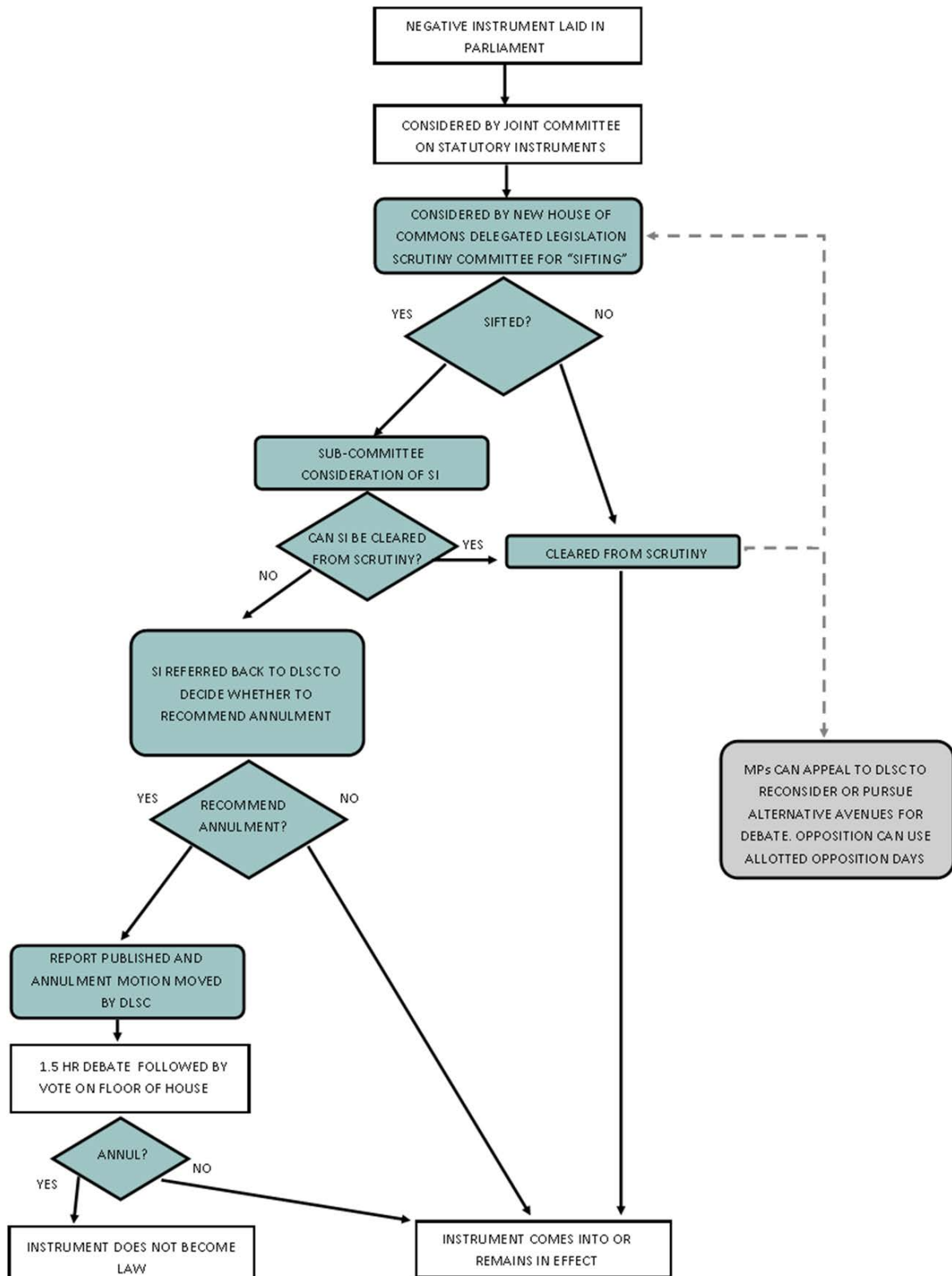
Sunset clause: A provision that sets an expiry date on part of a bill once it becomes law. These are included in legislation if Parliament feels it should have an opportunity to revisit the issue again after a fixed period.

Super-affirmative scrutiny procedure: Under the procedure for scrutinising Legislative Reform Orders the relevant committees can upgrade a draft Order so it is subject to an additional 30 days scrutiny. Under this procedure the committees also have a veto.

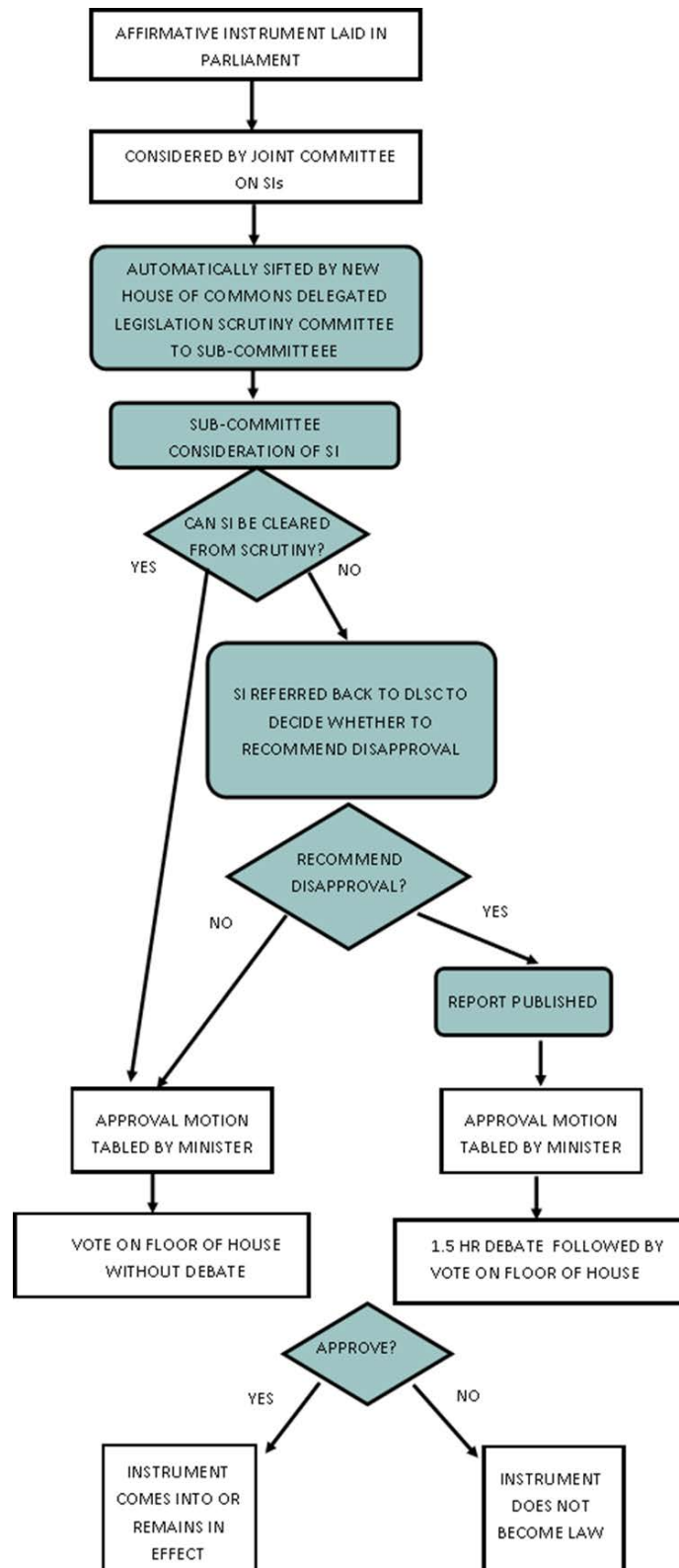
Ultra vires: Beyond the legal power or authority conferred upon a minister or body.

APPENDIX

THE NEGATIVE PROCEDURE UNDER THE PROPOSED NEW 'SIFT AND SCRUTINY' SYSTEM IN THE HOUSE OF COMMONS



THE AFFIRMATIVE PROCEDURE UNDER THE PROPOSED NEW 'SIFT AND SCRUTINY' SYSTEM IN THE HOUSE OF COMMONS



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European Union (Withdrawal) Bill

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ISBN: 978-1-911011-02-6

