ILPA submission to the House of Lords Committee on Delegated Powers and Regulatory Reform: Inquiry into the quality of delegated powers memoranda

Summary

1. ILPA identifies that the amount of delegation and the breadth of delegated powers in legislation has been high since the late 1990s. We have seen a number of poor memoranda on immigration legislation since the late 1990s. We cannot point to an overall steady downward trend because there have been examples of poor memoranda over the whole period but we have not identified an improvement. In our experience memoranda by the Home Office have been of a lesser quality than memoranda we have considered produced by the Ministry of Justice, although we are reluctant to extrapolate from our experience.

2. Delegated powers memoranda are potentially helpful in providing an overview of delegation in a Bill and allowing the quality of explanation and justification by the Department to be compared across the Bill. When done well, memoranda set the power in context, including of similar powers in existing legislation, compare what has been delegated with current legislation and set out the Department's thinking in an honest attempt to identify the correct level of delegation, allowing the Department to benefit from the expertise of the Committee. They provide more precise and detailed information on the regulation-making powers than has previously been provided. However, all too often they are done badly.

3. The quality of memoranda can be defined and measured by experts (including those on and advising the Committee) who understand the field and are therefore in a position to comment on whether the Delegated Powers memorandum provides an adequate explanation or where the gaps are. There is scope to audit the secondary legislation produced, and even its implementation, against the Delegated Powers memorandum produced. Is the delegated legislation what was envisaged? We suggest that the Committee undertake this on a random sample of memoranda spread across departments.

4. To achieve and maintain quality we recommend restricting powers to debate legislation in committee until memoranda have been submitted to the Committee and it has had an opportunity to report and that consideration of those parts of a Bill that make provision for delegated legislation should then be delayed until a satisfactory memorandum has been produced, with recomimttal if necessary. This would operate for the convenience of parliament, rather than Government.

5. The guidance published by the Committee could be strengthened with more warnings to departments about bad practice.

6. Finally we comment on the extent to which legislation, including but not limited to delegated legislation, is receiving adequate scrutiny in parliament, express concerns as to recommendations that the first instrument under a power only be subject to the affirmative procedure and draw attention to the poor quality of too much delegated legislation. We make recommendations for the better scrutiny of Bills, including publication of relevant letters on the Bill's home page. We draw particular attention to the need to scrutinise powers to make commencement orders containing transitional provision.

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About ILPA

1. The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on advisory and consultative groups convened by Government departments, public bodies and non-governmental organisations.

1. Has there been a change in either the volume or the character of delegations in bills over recent years?

2. ILPA works primarily on immigration legislation, for example the Asylum and Immigration Act 2006, the Immigration and Asylum Act 1999, the Nationality, Immigration, Asylum and Asylum Act 2002, the Asylum and Immigration (Treatment of Claimants etc.) Act 2004, the Immigration and Nationality Act 2006, UK Borders Act 2007, the Criminal Justice and Immigration Act 2008, the Borders Citizenship and Immigration Act 2009 and the Immigration Act 2014) but also on legislation emanating from the Ministry of Justice, for example the Legal Aid Sentencing and Punishment of Offenders Act 2014, the Crime and Courts Act 2013, the Justice and Security Act 2013, and the Criminal Justice and Courts Bill. We make efforts to provide briefing on debates on secondary legislation in the areas with which we are concerned[1].

3. The amount of delegation and the breadth of delegated powers in legislation we have considered have been high since the late 1990s with many provisions amounting to little more than broad enabling powers under which a scheme can be worked out. In general we consider that this has been more of a problem in Home Office legislation than in legislation emanating from the Ministry of Justice but that may simply be because we have dealt with more Home Office bills. We cite Part 4 *Marriage and Civil Partnership* of the Immigration Act 2014 as a particularly egregious recent example, directing the Committee's special attention to Schedule 6 *Information*.

4. There are copious examples of provisions which spell out the possible contents of delegated regulations in exhaustive (and exhausting) detail only then to quality this with "in particular" or include provision for "such other purposes as may be specified by the Secretary of State by order," rendering much of the list otiose. There may be a case for making express that regulations are intended to encompass particular powers where there might be doubt, but all too often, in our experience, lengthy lists of matters regulations "may" contain serve to confine debate to the powers listed, with the wider powers delegated forgotten. The Committee says in the guidance[2] to which reference is made in question 6:

   "*But the Committee will judge the power by reference to what could be done under it and what might be expected to be done under it by the current or any future government.*"

[1] See http://www.ilpa.org.uk/pages/parliamentary-briefings-submissions-and-responses.html for ILPA briefings
[2] http://www.parliament.uk/documents/DPRR/Guidance%20for%20Departments%20Nov%2009.pdf

5. All too often, only the Committee does this.

6. Examples of lists ending in a broad power in the Immigration Act 2014 include s 14(3)(e) *Use and retention of biometric information*; s 34(1)(d) Orders , Schedule 6 *Information* paragraph (3)(e) *Disclosures by Registration officials*. This is not a practice confined to the current Government. To give just two earlier examples: Schedule 3 *Provision of Support: Regulations* to the Immigration and Asylum Act 1999[3]; section 5 *Registration Regulations* of the UK Borders Act 2007.

7. Those are obvious examples, but other regulation-making powers may also scarce confine a Minister at all. See also, for example, new s 157A (3) and (4) *Pre-departure accommodation* of the Immigration and Asylum Act 1999 inserted by s 6 of the Immigration Act 2014, Schedule 5 *Sham Marriage and civil partnership: administrative regulations*, to the Immigration Act 2014, paragraph 3 *Evidence,* or s141 *EEA Ports Juxtaposed controls* of the Nationality Immigration and Asylum Act 2002. This problem is not confined to questions of delegated legislation.

2. **What, in your view, is the value of delegated powers memoranda to the work of the Delegated Powers and Regulatory Reform Committee and, more generally, to the capacity of Parliament to scrutinize delegations within bills effectively?**

8. Delegated powers memoranda are potentially extremely helpful in that they:
   - Provide an overview of the amount of delegation in a Bill;
   - Allow the quality of explanation and justification by the Department to be compared across different provisions in the same bill.

9. Isolating the question of secondary legislation from the other matters included in a Bill is extremely helpful. For the Committee, it speeds its work; for parliamentarians it may be the only reason they notice the powers at all. Regulation-making powers are often found in schedules and often these have not been studied by parliamentarians to the same extent as have clauses in a Bill.

10. When they are done well, the memoranda
    - Set the power in context;
    - Identify similar powers in existing legislation and compare what has been delegated and to which procedure with current proposals, which opens the possibility of examining how the previous delegation worked in practice;
    - Set out the Department's thinking in an honest attempt to identify the correct level of delegation;
    - Provide more precise and detailed information on the regulation-making powers than has previously been provided.

11. These allow the Committee to deploy its expertise most effectively and in turn allow the Department to benefit from the expertise of the Committee. For parliamentarians scrutinizing the Bill they provide starting points for research and challenge.

[3] Revoked from 6 April 2012, see SI 2010/22.

12. When done badly, the memoranda are of little use. Examples are where:
    - The memorandum is written by a person with limited understanding of the wider context of these powers. This may be because of the complexity of what has gone before so that the person may not fully understand what the powers replace and what they will do in practice. The successive Acts described above have amended and reamended the Immigration Act 1971 as well as scattering similar provisions across numerous acts and very few people are able to put all the pieces together. Or it may be because the Department has yet to work out exactly (or in some cases even broadly) what it will do with the power (see below) and there is no context to know. These problems are not confined to delegated legislation memoranda but to explanatory memoranda more generally. They can result in laconic memoranda with insufficient detail or errors and misstatements;
    - The Department does not have a clear idea of how it wishes to use the powers and has not adequately surveyed the matters they will need to address and negotiate;
    - The memorandum appears more focused on obfuscating the extent of the powers than illuminating them.

13. The Delegated Powers Committee bears a heavy responsibility. In our experience most parliamentarians, on most topics, are reluctant to advocate for a greater degree of scrutiny than the Committee has recommended and this reluctance is, unfortunately, all too often unrelated to the quality of the memorandum presented to the Committee.

3. How can the quality of delegated powers memoranda be defined and measured?

14. We suspect that this is at heart a question of qualitative work rather than counting. Quality can be evaluated by experts (including those on and advising the Committee) who understand the field and are therefore in a position to comment on whether the Delegated Powers memorandum provides an adequate explanation or where the gaps are.

15. Ideally organizations such as ILPA are able to find time to submit evidence directly to the Delegated Powers committee. Much depends upon the speed with which Bills go through parliament. It is always useful to know when the Committee is planning to consider a Bill to ensure that evidence reaches the Committee prior to its consideration of a Bill. In the course of a fast-moving Bill, if the Committee issues its report, it is easy for organizations such as ILPA to lay an incomplete submission aside and not complete it and send it to the Committee.

16. It is immensely helpful that the Committee organizes its material by Bill on its website[4]. It would be marvelous if those pages also provided links to dates of forthcoming debates on both primary legislation and the delegated legislation to be made, as well as the dates of debates that have taken place on both primary and delegated legislation. It can be hard to keep track of all secondary legislation. It would also provide greater possibility for review of the quality of the memorandum. We have found the House of Lords' Public Information Office helpful in identifying when delegated legislation is to be debated but the House of Commons Public Information Office seems unaccustomed to requests for such information

[4] See http://www.parliament.uk/business/committees/committees-a-z/lords-select/delegated-powers-and-regulatory-reform-committee/bills-considered/ l

and we have made requests for dates of debates that it was unable to answer although the date had been agreed.

17. There is scope to audit the secondary legislation produced, and even its implementation, against the Delegated Powers memorandum produced. Is the delegated legislation what was envisaged in the Delegated Powers memorandum and accompanying letters? Would the Committee have been content with the parliamentary procedure proposed had it known that this delegated legislation would be the result? Are there examples of the memorandum presented to the Committee attempting to mask rather than illuminate controversial powers? This risks being a mammoth task but perhaps if the Committee undertook to do it on a random sample of memoranda, spread across departments, it would identify trends and departments that should be scrutinized more closely and also provide a template for other organizations/Parliamentarians/parliamentary committees to follow when scrutinizing secondary legislation.

4. **Has the quality of memoranda changed over time and, if so, how? Is there any variation between departments?**

18. We have seen a number of poor memoranda on immigration legislation since the late 1990s. We cannot point to an overall steady downward trend because there have been examples of poor memoranda, or poor parts of memoranda, over the whole period. But we have not identified an improvement.

19. In our experience memoranda by the Home Office have been of a lesser quality than memoranda we have considered produced by the Ministry of Justice, although since we have considered fewer Ministry of Justice than Home Office memoranda we are reluctant to extrapolate from these examples alone.

20. Immigration bills presented to parliament over the last 15-20 years have contained proposals that were inadequately thought through and where indeed the Department did not have a clear idea of how it intended to implement the legislation, not simply in terms of detail but more broadly (this problem also affects primary legislation: the "earned citizenship" provisions of the Borders, Immigration and Asylum Act 2009 are a memorable example).

21. In other cases it is suggested that flexibility is needed to allow for future developments, e.g.:

> *Paragraph 2 of Schedule 6 provides for the disclosure of information by registration officials to the Secretary of State and other registration officials for immigration purposes, such as preventing immigration offences. The Secretary of State may by order specify further immigration purposes to enable the disclosure power to keep pace with developments in the law and in operational requirements.* (Lord Taylor of Holbeach, 7 April 2014, col 1208)

22. This risks privileging the convenience of Government over scrutiny by parliament. The danger is that the two justifications become mixed up so that the flexibility argued for is the flexibility for Government to decide what it wants to do. The provisions on residential tenancies in the Immigration Act 2014 appeared to us to be a case in point.

5. **The Committee has recently drawn attention to a number of examples where the memorandum has fallen below standard. How do you think that the necessary quality of delegated powers memoranda can be achieved and maintained, both within and across departments?**

23. In its Twenty-Second report of Session 2013-2014, *Six bills considered,* in the section on the Immigration Bill, the Committee said

    In a number of respects the quality of the memorandum fell short of the standard the Committee expects. We repeat, therefore, the hope that we expressed in our 12th Report (HL Paper 72) that, in future, the Government will devote greater care to the preparation of these important explanatory documents.

24. Examples of problems highlighted included the failure to explain why a lesser degree of scrutiny was appropriate for provisions on the checking of documents by private landlords than by employers[5] (paragraph 7). The Committee said of the "de-hybridising" provision:

    10. Clause 29(2) provides that, where the draft of an instrument containing an order under or in connection with Chapter 1 of Part 3 would be a hybrid instrument under the standing orders of either House, it is to proceed in that House as if it were not a hybrid instrument. It is not immediately clear which particular affirmative order making power this is intended to apply to, and nothing is said in the memorandum to indicate the reasons for its inclusion. ***It is the usual practice of this Committee to draw de-hybridising provisions to the attention of the House so that it can satisfy itself that other mechanisms are available to protect the private interests that would otherwise be protected by the hybrid instrument procedure. In this particular case we also recommend that the Minister be asked to explain why a de-hybridising provision is considered necessary.*** *There is no obvious reason for its inclusion and we do not consider it is appropriate for such a provision to be included unless the powers to which it relates can reasonably be expected to be exercised in a way that would trigger the hybrid instruments procedure.*

25. The intention underlying this is, we consider, based on our scrutiny of the provisions and debates, to be an example of a Department that has not worked out how a scheme is intended to operate in practice asking parliament for powers that will allow the Department to operate it as it will.

26. Of the Information sharing powers in Part 4 of the bill on marriage and civil partnership the Committee said:

    The power conferred by section 28F to amend section 27 of the Marriage Act 1949 would on the face of it allow new information requirements to be imposed for purposes wholly unrelated to the immigration status of the parties to the proposed marriage. ***We recommend that the House ask the Minister to explain why this power is required. In the absence of an explanation, we consider the power to amend section 27 of the Marriage Act 1949 to be an inappropriate delegation of powers.***

27. Part 4 received scarce any debate at all in parliament[6] despite this powerful statement from the Committee. ILPA's training notes on the Act state

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[5] Paragraph 7.

It is nothing short of extraordinary that the Human Rights Memorandum makes no reference to Schedule 6 Information and the broad powers to share information thereunder. These may be relevant to consideration of Article 12 read with Article 14 [of the European Convention on Human Rights]…

28. Detail provided in those training notes on Part 4 Schedule 6 *Information* can be contrasted with detail provided in the delegated powers memorandum:

    Part 2: Disclosure of Information etc. for immigration purposes etc.

    Disclosures by registration officials *Allows a registration official to disclose any information or supply any document held to the Secretary of State or to another registration official for immigration purposes as (very broadly) defined and for purposes connected to the referral of proposed marriage and civil partnership notices. Allows a registration official to disclose to another registration official that a suspicion about a marriage or civil partnership has been reported to the Secretary of State under section 24 or 24A of the 1999 Act and the content of that report. …*

    Disclosures by the Secretary of State. The Secretary of State can disclose any information or supply any document to a registration official for a specified verification purpose as defined. On its face this does appear to be an incredibly broad power. Will it be argued that it permits the disclosure of watch lists containing information pertaining to persons who have never evidenced the slightest desire to enter into a marriage or civil partnership with anyone?

    Part 3: Disclosure of Information etc. for prevention of crime etc. *A registration official can disclose any information or supply any information to anyone who falls within the extensive definition of an "eligible person" or another registration official in England and Wales for the purpose of crime-fighting. The definition, this purpose and the powers of disclosure are astonishingly broad. The registration official must have reasonable grounds for suspecting that a criminal offence has been, is being, or will be committed. Once they have such grounds they can disclose information they hold or supply a document they hold (it is not specified that it need pertain to the suspected offence) for assisting in the prosecution, investigation, detection or prevention of a criminal offence. It is not specified that that offence must be the same one as the one they have reasonable grounds for suspecting has been, is being or will be committed.*

    Limitations on powers. *These are nugatory. The Schedule does not authorise a disclosure in contravention of the Data Protection Act 1998 of personal data not exempt from the provisions of the Act or a disclosure prohibited by Part 1 of the Regulation of Investigatory Powers Act 2000. Presumably therefore those applying to marry or enter into a civil partnership will be required to consent to the sharing of their information very broadly.*

    No breach of confidentiality etc. *Paragraph 7 provides for disclosure of information authorised by this Schedule not to breach obligations of confidence or restrictions on the disclosure of information.*

    Retention, copying and disposal of documents *Permits a person who is supplied with a document under this Schedule to retain it, copy it or dispose of it "in such a manner as the person thinks appropriate*

    Saving for existing powers *Provides that the Schedule does not limit existing powers to disclose information or supply documents.*

[6] See (7 April 2014, col 1208)

29. To improve the quality of memoranda it is important that the Committee continue, as it did for the Bill that became the Immigration Act 2014[7], to stick to its guns when Government provides an explanation, but not a good one, of the scrutiny for which it has made provision. In addition, the Committee's powers should be strengthened. This would be to strengthen the powers of parliament to hold Government to account. The following would in our view be of assistance:
    - There should be no power to debate legislation in committee until memoranda have been submitted to the Committee.
    - The Committee should be empowered to reject memoranda that do not come up to scratch and consideration of those parts of a Bill that make provision for delegated legislation should then be delayed until a satisfactory memorandum has been produced, with recommittal if necessary.

30. This would require Government departments to be more disciplined in their consideration of late amendments to a bill and help to ensure adequate parliamentary scrutiny. In the case of the Immigration Act 2014 for example, drafts of amendments (in the case in point not containing delegated powers) were circulating over a month before they were tabled at the 11th hour.

6. **The Committee has issued guidance about what should be contained in delegated powers memoranda. Do you think that this document gives departments adequate guidance about the necessary content of a delegated powers memorandum? If not, how should it be changed?**

31. Paragraph 23 pf the guidance provides

    The Committee will comment on Government amendments if time allows. Early warning of relevant Government amendments is of considerable assistance to the Committee, as is advance sight of the text of amendments. In those cases where the Committee has been unable to consider a significant relevant amendment, it would assist the House if the Minister in charge of the bill were to bring this to the attention of the House when the amendment is being considered.

32. See our response to question 5 above. We do not consider that this is strong enough. Consideration of the Bill should be delayed. This needs to be automatic to ensure that undue pressure is not put on the Committee.

33. The guidance provides:

    29. Although there is no formal obligation on departments to provide a response to the reports from the Committee, most departments do so and the Committee welcomes this on the ground that it helps the House in its consideration of Committee recommendations18. A response will be printed, for the record, as an Appendix to a Committee report. The response, in addition to being sent to the Committee, should at the same time be made available to members of the House (by being placed in the Library and being sent directly to relevant opposition spokesmen and other interested members).

[7] 23rd Report 19 March 2014 http://www.publications.parliament.uk/pa/ld201314/ldselect/lddelreg/156/15602.htm

30. The Committee takes the view that it is not appropriate for it to enter into negotiations with departments about its recommendations. The response will, therefore, be printed without remark unless, exceptionally, in the view of the Committee, the House would be assisted by some clarificatory comment

34. This is fine but we emphasise how important was the Committee's returning to the Immigration Bill in its 23rd Report[8] and trust that a link to the 23rd Report will be added to the Bill documents on the Committee's website[9].

35. We consider that, unfortunately, the guidance would benefit from warning statements that it is not acceptable to seek to obscure the ambit of a power or to fail to set out the Government's reasoning in full.

Other remarks

36. The call for evidence states:

Whilst the focus of this inquiry is a narrow one, the Committee would also welcome evidence on issues within the scope of the inquiry but which are not raised in the above questions.

37. We comment on parliamentary scrutiny, recommendations pertaining to the first instrument made under a power, quality of delegation, scrutiny of commencement orders.

38. The Committee's terms of reference include:

"…to report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate level of parliamentary scrutiny…"

Level of parliamentary scrutiny in general

39. We contend that most legislation is not receiving adequate scrutiny in parliament. The volume of legislation is enormous and very many of the Acts that we see amend previous legislation so that they are incomprehensible on their face. Guillotine motions result in truncated debate. Too many members of parliament too often seem more concerned with how the media will report what they say than with scrutiny, making them reluctant to raise points brought to their attention by organisations such as ILPA (for fear of being branded "soft on immigration") even with caveats that they do not necessarily agree with the point made.

40. Explanatory notes may be poor and say little. Faced with enormous and complicated bills even the most diligent of Ministers may be very dependent on those producing their speaking notes and these may fall short of what should be expected. For example, the Explanatory Notes to the Immigration Bill[10] and even the subsequent Statement of Intent on

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[8] Op.cit.

[9] At http://www.parliament.uk/business/committees/committees-a-z/lords-select/delegated-powers-and-regulatory-reform-committee/bills-considered/ .

[10] Bill 110 EN 2013-2014 and HL Bill 84-EB 2013-1

Bail[11] say very little about he Secretary of State's power to withhold consent to bail. They make no mention of existing power. Then, during the passage of the Bill, the Minister, Norman Baker MP, said

> *…this power replaces a much broader power, which is in paragraph 30 of schedule 2 to the Immigration Act 1971. That broader power is not limited to 14 days before removal. …we are actually narrowing the power from that which we inherited from the previous Government.* Norman Baker MP5 November 2014, col 166 (repeated by Lord Taylor of Holbeach at 3 Mar 2014: Column 1165)

41. This is misleading, not to say inaccurate. Paragraph 30(1) prior to amendment provides that an appellant shall not be released under paragraph 29 of the Immigration Rules without the consent of the Secretary of State if directions for removal are for the time being in force or the power to give such directions is for the time being "exerciseable". Paragraph 29 is concerned with those who have a pending appeal. The power under paragraph 29 is thus narrowed. But s 7(1) applies the provisions on the consent of the Secretary of State not only to paragraph 30 but to bail under paragraph 22, which is concerned with those detained under paragraph 16 of Schedule 2. A much wider group of persons will now stand in need of the Secretary of State's consent.

42. One thing that would generally assist scrutiny would be the ability rapidly to identify Ministerial letters pertaining to Bills. These should be placed in the library promptly during passage of the Bill. There are repeated examples during the debates on the Immigration Bill of parliamentarians not having seen relevant letters[12]. In addition we have written to the parliament Webmaster to request that letters pertaining to bills, currently published in the excellent (if a little cumbersome to use) deposited papers database[13] could also be linked to the pages on the relevant Bill. This would enormously improve scrutiny both during the passage of the Bill and subsequently, including when delegated legislation is debated.

43. As to delegated powers, the problems are very specific. As to measures subject to the affirmative procedure, while there may be a good debate in the House of Lords, in the House of Commons the Committee considering delegated legislation not debated on the floor of the House often does not contain those who had expressed an interest in the powers that provided for the delegation and were the recipients of assurances at that stage.

44. Organisations such as ILPA do not always manage to keep abreast of when a particular instrument, in particular a less controversial instrument, is being debated so that we can provide a briefing. Thus it is often the case that questions that ought to be asked, when one compares the instrument with what was said about it before it was brought into existence, are not asked.

45. We have seen many examples of parliamentarians debating bills proposing to convert an instrument subject to the negative procedure into one requiring the affirmative one, as a means of registering protest at a measure without tackling the problem (alternatives include making provision for a statutory review or a reviewer). Matters are kicked ahead to

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[11] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/254845/SoI_Bail.pdf
[12] See e.g. HL Report 7 Apr 2014 : Column 1157; 7 Apr 2014 : Column 1161
[13] http://www.parliament.uk/depositedpapers

delegated legislation. This can lead to instruments subject to the affirmative procedure because the matter is controversial as a means of noting protest. It does not produce the same degree of scrutiny as if a full debate on whether a measure were appropriate were had while primary legislation was being passed.

46. As to the negative resolution procedure, all too often the debate comes on after the instrument has come into force. At that point, as we are all too well aware, it is not considered cricket to reject it. The tactical decision is often made to debate on a "regret" motion rather than a prayer against the instrument, in an attempt to limit the extent to which the Government can claim, when a vote is defeated, that the instrument enjoyed the support of the House, the hope being that a regret motion, causing less of a headache for Government, will attract greater support, and that rebellion in support of it will not be seen as such a serious matter of disloyalty.

Recommendations as to the first instrument made under a power

47. We are concerned by recommendations such as that contained in paragraph 7 of the Twenty-Second report of session 2013-2014 on the Immigration Bill:

> *7. …given that the role played by the code of practice under clause 27 is wider than that of the code under section 19 and is liable to affect the circumstances in which a person is held liable to a penalty,* ***we recommend that the order bringing into force the first code under clause 27 should be subject to the affirmative procedure.***

48. We do consider that this is open to manipulation with the recommendation being accepted and then more controversial powers reserved for a subsequent amendment to delegated legislation.

Quality of delegated legislation

49. The quality of delegated legislation does appear to us to be falling, with errors and amendments all too frequent. The Immigration (Employment of Adults Subject to Immigration Control) (Maximum Penalty) (Amendment) Order 2014 (SI 2014/1262) started life as a draft instrument[14].

50. This draft legislation made provision for an increase in the maximum penalty that could be imposed on employers employing persons without permission to work in the UK. It had one substantive provision:

> *2. (1) The Immigration (Employment of Adults Subject to Immigration Control) (Maximum Penalty) Order 2008(1) is amended as follows.*
> *(2) In article 2 for "£10,000" substitute "£20,000".*

51. It was replaced with a new draft The Immigration (Employment of Adults Subject to Immigration Control) (Maximum Penalty) (Amendment) Order 2014[15] . This contains two substantive provisions:

[14] http://www.legislation.gov.uk/ukdsi/2014/9780111108949/contents
[15] http://www.legislation.gov.uk/ukdsi/2014/9780111110102/introduction

2. (1) In article 2 of the Immigration (Employment of Adults Subject to Immigration Control) (Maximum Penalty) Order 2008(1) for "£10,000" substitute "£20,000".

(2) The amendment made by paragraph (1) does not apply in respect of a penalty notice issued to an employer who has acted contrary to section 15(1) of the Immigration, Asylum and Nationality Act 2006 if, in respect of any employment to which the notice relates, the contravention occurred solely before the coming into force of this Order.

52. If this can happen to an instrument subject to the affirmative procedure, what of those subject to the negative procedure? The Immigration Rules are a special case but they are subject to the negative procedure. All too frequently they are of poor quality, creating chaos for applicants, their lawyers and Home Office staff until they are amended to correct errors. Statement of Changes in Immigration Rules HC 1201[16] was laid on 1 April 2014 to come into force on 6 April 2014. The Explanatory Note explains why and we consider that no further comment from us is required:

7.1 The Statement of Changes in Immigration Rules laid on 13 March 2014 (HC 1138) made changes to the Rules on curtailment and stated that these changes will come into force from 6 April 2014. It was always intended that the change set out in paragraph 67 of the Statement of Changes will come into force on the day section 1 of the Immigration Act 2014 comes into force.

7.2 Due to a typographical error, the Statement of Changes in Immigration Rules laid on 13 March 2014 (HC 1138) stated that an amendment to Appendix A will come into force on 5 May 2014. This amendment will come into force on 6 April 2014. The change that is intended to come into force on 5 May 2014 is to the visa requirements for Venezuela in Appendix 1.

7.3 The Statement of Changes in Immigration Rules laid on 13 March 2014 (HC 1138) correctly allowed Tier 2 (Intra-Company Transfer) Migrants to extend their leave beyond five years if they entered the route under the Rules in place before 6 April 2011. Due to a drafting oversight, however, the similar provision for intra-company transferees who entered under the previous work permit arrangements was inadvertently removed. This provision is being reinstated.

7.4 The Statement of Changes in Immigration Rules laid on 13 March 2014 (HC 1138) did not include that a change to Appendix C will come into force for applications decided on or after 6 April 2014. This was the intention.

7.5 Changes to Appendix Armed Forces were not labelled clearly enough in the Statement of Changes in Immigration Rules laid on 13 March 2014 (HC 1138). To avoid confusion, these are corrected.

7.6 Paragraph 134 of the Statement of Changes in Immigration Rules laid on 13 March 2014 (HC 1138) was included in error and has therefore been deleted.

7.7 Other changes correct erroneous numbering within the Statement of Changes in Immigration Rules laid on 13 March 2014 (HC 1138) or the Immigration Rules, or are minor drafting or punctuation corrections.

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[16] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299927/38645_HC_1201_accessible.pdf

Commencement orders

53. Most Bills contain powers to make commencement orders and we consider that all too often these are inadequately covered in Delegated Powers memoranda. Difficulties in commencement orders of immigration legislation have repeatedly had to be addressed by the Tribunals and Courts, see for example *Pardeepan** [2000] UKIAT 00006; *AH (Notices required) Bangladesh* [2006] UKAIT 00029; *JM (Rule 62(7); human rights unarguable) Liberia* * [2006] UKAIT 00009; *Shahzad (s 85A: commencement)* [2012] UKUT 81 (IAC). In the latter the Tribunal said

> *"41. For these reasons it appears to us that Article 2 of the Commencement Order should be construed as affecting substantive rights not merely procedure, and that Article 3 should be interpreted narrowly. Article 2 should not be interpreted retrospectively save in relation to any cases that might be found to fall within the words of Article 3. The result is that, in order to avoid any other retrospective effect, Article 2 is to be interpreted as having effect only where the appellant's application to the Secretary of State was made on or after 23 May 2011.*
>
> *42. We appreciate that our interpretation of the Commencement Order is bold and, in addition, we have not reached it on the basis of the submissions Mr Malik made to us. Anyone seeking to defend any other interpretation, however, will have to explain why any of the results set out in paragraphs 27 to 33 above either were intended or are desirable."*

54. ILPA would be happy to provide the Committee with further examples if this would be helpful.

Adrian Berry
Chair
ILPA
4 June 2014