



HOUSE OF LORDS

Select Committee on the Constitution

4th Report of Session 2014–15

Deregulation Bill

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Committee staff

The current staff of the committee are Nicolas Besly (clerk), Dr Stuart Hallifax (policy analyst) and Hadia Garwell and Philippa Mole (committee assistants). Professor Adam Tomkins is the legal adviser to the committee.

Contact details

All correspondence should be addressed to the Constitution Committee, Committee Office, House of Lords, London SW1A 0PW. Telephone 020 7219 5960. Email constitution@parliament.uk

Deregulation Bill

1. This report draws to the attention of the House four discrete matters arising from the Deregulation Bill.
2. There is much in the bill that will be welcomed. The bill is based on a draft bill which was the subject of pre-legislative scrutiny last session. The draft bill contained a very broad Henry VIII power which would have enabled ministers to provide by order that legislation should cease to apply “if the Minister considers that it is no longer of practical use”. The joint committee which undertook the pre-legislative scrutiny concluded that this provision was too wide and had inadequate safeguards.¹ We welcome the fact that the provision does not appear in the bill.²
3. Constitutional concerns arise in respect of four provisions in the bill.
4. Clause 16 of the bill amends the Clean Air Act 1993, reforming the procedure used to declare that a fuel is authorised within the meaning of that Act. If a fuel is “authorised” this provides a defence to a criminal charge under the Clean Air Act. At present fuels are authorised by the Secretary of State in secondary legislation. Clause 16 would amend this so that the Secretary of State would instead publish a list of authorised fuels on the department’s website.³ This has the effect of removing the ambit of the criminal law from Parliament’s oversight and placing it “into the realms of administrative lists”.⁴ The Joint Committee on the Draft Deregulation Bill recommended, on the advice of the House of Lords Delegated Powers and Regulatory Reform Committee, that the clause be removed from the draft bill. **We share the view that clause 16 should be omitted.**
5. Clause 59 requires the Secretary of State to review whether the current (criminal) sanctions for failure to possess a TV licence (under the Communications Act 2003) are appropriate. Clause 60 provides that the Secretary of State may make regulations creating alternatives to the current TV licensing offences. This is a Henry VIII power which is intended to be used, if necessary, following the review. One option in clause 60 is to replace TV licensing offences with civil monetary penalties. The other option is to amend the Regulatory Enforcement and Sanctions Act 2008 so that civil monetary penalties can be imposed as an alternative to criminal prosecution (with the offences remaining in place and prosecutions being brought by the BBC as desired). In 2007 we reported on the Regulatory Enforcement and Sanctions Bill, drawing the attention of the House to “the extent to which it is constitutionally appropriate for regulatory authorities—rather than the

¹ Joint Committee on the Draft Deregulation Bill, *Draft Deregulation Bill* (1st Report, Session 2013–14, HL Paper 101, HC 925), chapter 2.

² There are several further features of the bill to be welcomed, including the repeals of section 13 of the Defamation Act 1996 and of sections 17 and 18 of the Digital Economy Act 2010 (in 2010 we reported on an earlier version of what became section 17 of that Act: 6th Report, Session 2009–10, HL Paper 40).

³ Clause 16(4) of the bill provides, “The list must be published in such manner as the Secretary of State considers appropriate.” Paragraph 95 of the explanatory notes states, “The list will be published on the Defra smoke control webpages.”

⁴ Joint Committee on the Draft Deregulation Bill, *Draft Deregulation Bill* (1st Report, Session 2013–14, HL Paper 101, HC 925), paragraph 79.

ordinary courts—to make determinations as to whether a person has committed a criminal offence and to impose unlimited financial penalties.”⁵

6. Clauses 59 and 60 were not in the draft bill and so were not scrutinised by the joint committee. It seems illogical that Parliament should be invited to legislate for a review and at the same time for a possible outcome of that review. **If it is decided in due course to change the sanctions regime in respect of TV licence violations, the better course would be to introduce a bill at that point, rather than legislating now by means of a Henry VIII clause.**
7. Clause 78 and Schedule 19 repeal various duties on local authorities and other public bodies to engage in consultation “on the basis that [they] should be trusted to engage with local people without a duty being imposed on them to do so.”⁶ This may be concerning from a constitutional perspective: both this committee and the courts have recognised the importance of consultation as a means of safeguarding the responsiveness of public decision-making. The Joint Committee on the Draft Deregulation Bill stated that Parliament will wish to be “assured that the Government have taken full account of the possible consequences” of repealing such duties.⁷ **Given the constitutional importance of consultation, we agree with the joint committee’s view.**
8. Clause 83 provides that “a person exercising a regulatory function to which this section applies must, in the exercise of the function, have regard to the desirability of promoting economic growth.” In particular, such a person should ensure that regulatory action is taken only when needed and that any action taken is proportionate. Clause 84 provides that the regulatory functions to which clause 83 applies are to be specified by order. **It would be preferable for these functions to be specified in the bill, rather than in future subordinate legislation.** Additionally, the clause 83 duty may have the effect in some cases of inhibiting a regulator’s independence of action: this concern has been raised by the Joint Committee on Human Rights in respect of the Equality and Human Rights Commission, for example.⁸ The Joint Committee on the Draft Deregulation Bill also had concerns about this matter, recommending: “an economic growth duty on regulators is welcome provided that safeguards are in place to ensure that the growth duty does not take precedence over regulation and that the overriding and principal objective of regulators remains the protection of the public interest.”⁹ **The House may consider that clause 83 should be amended accordingly.**

⁵ Constitution Committee, *Regulatory Enforcement and Sanctions Bill* (1st Report, Session 2007–08, HL Paper 16), paragraph 5.

⁶ Explanatory notes, paragraph 385.

⁷ *Op. cit.*, paragraph 237.

⁸ Joint Committee on Human Rights, *Legislative Scrutiny: (1) Criminal Justice and Courts Bill and (2) Deregulation Bill* (14th Report, Session 2013–14, HL Paper 189, HC 1293), paragraph 2.20.

⁹ *Op. cit.*, paragraph 104.