

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

26th Report of Session 2015–16

**Armed Forces Bill:
Government Response**
**Housing and Planning Bill:
Government Response**
**Northern Ireland (Stormont
Agreement and Implementation
Plan) Bill: Government Response**

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The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session and has the following terms of reference:

(i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;

(ii) To report on documents and draft orders laid before Parliament under or by virtue of:

- (a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,
- (b) section 7(2) or section 19 of the Localism Act 2011, or
- (c) section 5E(2) of the Fire and Rescue Services Act 2004;

and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and

(iii) To report on documents and draft orders laid before Parliament under or by virtue of:

- (a) section 85 of the Northern Ireland Act 1998,
- (b) section 17 of the Local Government Act 1999,
- (c) section 9 of the Local Government Act 2000,
- (d) section 98 of the Local Government Act 2003, or
- (e) section 102 of the Local Transport Act 2008.

Membership

The members of the Delegated Powers and Regulatory Reform Committee are:

Baroness Drake	Lord Lisvane
Baroness Fookes (<i>Chairman</i>)	Countess of Mar
Lord Flight	Lord Moynihan
Baroness Gould of Potternewton	Lord Thomas of Gresford
Lord Jones	Lord Tyler

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Contacts for the Delegated Powers and Regulatory Reform Committee

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Historical Note

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that "in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion" (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, "be well suited to the revising function of the House". As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and certain instruments made under other Acts specified in the Committee's terms of reference.

Twenty Sixth Report

ARMED FORCES BILL: GOVERNMENT RESPONSE

1. We considered this Bill in our 21st Report of this Session.¹ The Government have now responded by way of a letter from Rt Hon. Earl Howe, Minister of State at the Ministry of Defence, published at Appendix 1.

HOUSING AND PLANNING BILL: GOVERNMENT RESPONSE

2. We considered this Bill in our 20th and 21st Reports of this Session.² The Government have now responded by way of a letter from Baroness Williams of Trafford, Parliamentary Under Secretary of State at the Department for Communities and Local Government, published at Appendix 2.

NORTHERN IRELAND (STORMONT AGREEMENT AND IMPLEMENTATION PLAN) BILL: GOVERNMENT RESPONSE

3. We considered this Bill in our 24th Report of this Session.³ The Government have now responded by way of a letter from Lord Dunlop, Lords Spokesperson on Northern Ireland, published at Appendix 3.

1 21st Report, Session 2015–16, [HL Paper 98](#)

2 20th Report, Session 2015–16, [HL Paper 90](#) and 21st Report, Session 2015–16, [HL Paper 98](#).

3 24th Report, Session 2015–16, [HL Paper118](#).

APPENDIX 1: ARMED FORCES BILL: GOVERNMENT RESPONSE

Letter from Rt Hon. Earl Howe, Minister of State at the Ministry of Defence, to Baroness Fookes, Chairman to the Delegated Powers and Regulatory Reform Committee

The Committee has drawn attention to provisions in clauses 10 and 11 of the Bill. These clauses insert new sections 304D and 304E into the Armed Forces Act 2006. The Committee is concerned about the powers in sections 304D and 304E which allow regulations to be made in relation to appeals against decisions of courts which review the sentences of offenders who give, or offer to give, assistance to investigations or prosecutions, or fail to give such assistance to investigations or prosecutions having offered to do so. Such regulations may contain provision corresponding to any provision in Parts 2 to 4 of the Court Martial Appeals Act 1968, with or without modifications.

I am considering carefully the Committee's view, that as a matter of principle the powers conferred by sections 304D and 304E should be limited so that they do not allow the making of modifications which under the Court Martial Appeals Act 1968 would require the affirmative procedure. Now that Grand Committee has concluded, I propose to update the House at report stage.

10 March 2016

APPENDIX 2: HOUSING AND PLANNING BILL: GOVERNMENT RESPONSE

Letter from Baroness Williams of Trafford, Parliamentary Under Secretary of State at the Department for Communities and Local Government, to Baroness Fookes, Chairman to the Delegated Powers and Regulatory Reform Committee

Housing and Planning Bill

1. The Government is grateful to members of the Delegated Powers and Regulatory Reform Committee for their consideration of the Housing and Planning Bill in their 20th and 21st Reports of Session 2015–16. I apologise that the Committee considered that certain parts of the Department’s memorandum could have been clearer, but I hope that this letter will provide some further explanation. I would like to place on record my thanks to the Committee for enhancing the debate on the Bill, and trust the following response will be useful to Members of the House during its remaining stages.

Clause 13(3) – Power to prescribe “banning order offence”

2. I thank the Committee for their consideration of clause 13(3), and the Rogue Landlord provisions in general. The Committee recommend that clause 13(3) be removed from the Bill and replaced with a provision listing the offences that constitute “banning order offences”, coupled with a delegated power to amend the list by affirmative procedure regulations.
3. We published a discussion paper last year which contained information on what was likely to constitute a banning order offence, and invited views on the issue.
4. As I said during the debate on 9 February, banning order offences are likely to include a serious offence where an offender has been convicted in the Crown Court of an offence involving fraud, drugs, sexual assault or violence that is committed in, or in relation to, a property that is owned or managed by the offender or which involves, or was perpetrated against, persons occupying such a property, any serious offence involving violence against the tenant by the landlord or property agent, and serious breaches of housing legislation. It should be noted, in response to the Committee’s concern, that a person will not be able to receive a banning order in relation to offences that were committed before the enactment and coming into force of the banning order provisions in the Bill.
5. However, we want to make sure that we get the details of these offences right and so, rather than list the offences that constitute banning order offences in the Bill at this stage, we plan to publish regulations in draft and consult on these before they are laid before the House.
6. Having carefully considered the Committee’s recommendation, I have decided that the regulations prescribing banning order offences should be introduced through affirmative regulations. I will table an amendment to the Bill accordingly.
7. This will give both Houses the opportunity to scrutinise these provisions and to consider whether the offences that we are proposing to designate as banning order offences are the right ones and whether any changes should be made.

Clause 22(9) – Financial penalty for breach of banning order: guidance

8. Clause 22(9) requires a local housing authority to “have regard” to any guidance given by the Secretary of State about the exercise of its functions under clause 22 (or Schedule 1). The Committee was concerned that there is no Parliamentary procedure associated with the guidance, or a requirement to lay it before Parliament.
9. The guidance for local authorities will be procedural and will provide advice on when it may be appropriate to issue a civil penalty, rather than prosecute, together with advice on what might be the appropriate level of penalty. In response to concerns raised by the Committee and during the debate, I have decided to bring forward amendments to make clear on the face of the Bill that local authorities should apply the criminal standard of proof, of beyond reasonable doubt, when imposing a civil penalty. The guidance will reflect this.
10. Given these reasons, I maintain the view that guidance, rather than regulations, is the right way forward. We will consult on the draft guidance before it is finalised. As the Committee has expressed concern over Parliamentary scrutiny of the guidance, I am happy to meet with any Member of the House who wishes to contribute to the consultation, and I will ensure that their views are taken into account.
11. We are introducing civil penalties as an alternative to prosecution for breach of a banning order. There will be a right of appeal against any civil penalty to the First Tier Tribunal, which may confirm, vary or cancel the penalty notice. I believe this will ensure that there is independence in the decision-making process.

Clause 67 – High value local authority housing: payments to the Secretary of State

12. I am grateful to the members of the Committee for their comments on the clauses relating to high value vacant local authority housing.
13. The Committee recommend that a determination under clause 67(1) should be made by statutory instrument laid before Parliament, and that it should attract the negative procedure where it applies to a particular local authority and the affirmative procedure where it applies to all local housing authorities or to all such authorities of a particular description. We regret that our previous memorandum did not sufficiently explain why we consider that it is appropriate for the calculation and authorities’ payments to be set out in a determination and I am pleased to explain this more fully here.
14. The Committee states that it was not able to extract any “overarching principle” from clause 67(2). However, we think it is important to clarify that this provision needs to be read in conjunction with the definitional provisions which apply to clause 67(2), and which place clear limitations on the amount of the payment that can be required from authorities under the calculation set out in the determination. These include: clause 68, which sets out the housing to be taken into account under the determination; clause 77, which defines when housing becomes vacant for the purposes of clause 67(2); and the definition of “high value”, which will be set out in regulations. Taken together, we think these provisions do provide an overarching principle which sets out clearly the scope of the determination-making power contained in clause 67.

15. It may also help if we explain why we decided to use a formula approach, as opposed to one which requires authorities to sell properties as they become vacant and pay the receipts to Government. During early discussions with local authorities they indicated that they preferred the use of a formula to determine payments over basing payments on actual sales. This approach will give them greater certainty and predictability, which will help them better manage their finances. It will also provide greater flexibility for local authorities to choose what properties they sell in order to make the payments. Such an approach necessarily involves the use of estimates and assumptions but, as I have explained to the House during Committee stage, the amount local authorities will pay will be calculated on the basis of the most up-to-date information about their housing stock, which is being provided by local authorities themselves. Affected local authorities have provided detailed information about every local authority dwelling including: the type of dwelling; the number of bedrooms; the market value; the number of times it has become vacant over the last three years; and the reason for the vacancy.
16. The nature and amount of information that will be contained in the determination also means that it is appropriate to use a determination rather than a statutory instrument. The determination will contain the formula, the assumptions and the payments for each authority. It will also include the figures for each of the 165 local housing authorities that will have been inserted into the formula to determine the amount of each authority's payment including, amongst other things, the authority's vacancy rate, the value of its high value housing, the number of high value properties and amounts in respect of transaction costs and attributable debt (deductions which Government has committed to including in the determination). In setting out such a large and complex set of data there is the potential for errors to creep in, which would only be noticed by the relevant local authority. We therefore want to ensure that there is flexibility to amend the determination very quickly to correct any such errors.
17. The statutory requirement to consult before making a determination, as provided for in clause 69(1), means that the views and expertise of local authorities and bodies with the necessary expert and technical knowledge, such as the Chartered Institute of Public Finance and Accountancy, will feed into the development of the calculation and any assumptions which underpin the calculation.
18. The Committee explained that it did not agree that the powers of the Secretary of State to make determinations under sections 168 to 175 of the Localism Act 2011 were an appropriate precedent, as these provisions are concerned with the calculation of Government subsidies payable to local authorities. As set out in our memorandum, those provisions enabled the Secretary of State to make a determination requiring a local authority to make a settlement payment to Government as well as the other way around. Indeed the majority of authorities' settlement payments made under the self-financing determinations, 130 out of 165 local authorities, required local authorities to make payments to the Secretary of State. That calculation was also based on assumptions, as provided for in the determination. The payments made by local authorities under the determination ranged from £2 million to £433 million. I maintain the view, therefore, that those provisions do provide a relevant precedent.

19. The Committee offered what it considered to be a more appropriate precedent in the form of the provisions in the Pensions Act 2004, which provide for a levy on pension funds. We do not, however, consider that it is right to draw a comparison between the powers in the Pension Act 2004 enabling Government to levy private sector organisations in respect of private pension funds and the powers in Chapter 2 of Part 4 of the Bill, which do not apply to the private sector but to local government and concern the use of public housing assets and considerations about the best way to use public assets as a way of enabling home ownership and increasing housing supply.
20. The Committee also recommend that in relation to the regulation-making power in clause 67(8), which requires the Secretary of State to define “high value” for the purposes of the Chapter, a detailed list of factors governing its exercise should be included on the face of the Bill. The Committee also recommend that the affirmative procedure should apply to every exercise of the power.
21. We recognise the Committee’s concerns, but I hope what I have set out above goes some way to addressing their points. In light of these points, I believe the way we are intending to take this forward through the determination is appropriate in these circumstances.
22. As mentioned above, we have collected data from local authorities on a range of factors, including the market value, type and size of each dwelling, and have collected data about the wider housing market. The analysis of such large amounts of information takes time and we want to ensure that, in determining which housing falls within the scope of the regulations, the Secretary of State is able to take into account a range of relevant factors.
23. Placing a list of factors on the face of the Bill before all of the data has been worked through would limit Government’s ability to ensure that the definition included in the regulations is appropriate and proportionate.
24. We continue to consider that the negative resolution procedure would provide the appropriate level of Parliamentary scrutiny for these regulations. The implementation of this manifesto commitment is required to provide for the delivery of additional homes and to support people into home ownership, through the funding of the Right to Buy discount to housing association tenants. Whilst I recognise the views of those who disagree with the points I have made during Committee stage, I still believe it is important that it is implemented as quickly as possible following Royal Assent to enable this to be taken forward.

Clauses 78 to 89 – Power to provide for mandatory rent levels for “high income” tenants of local authorities

25. The Committee was concerned about the level of scrutiny contained within clauses 78 to 89. As a result, they recommend a number of steps to place the definition of high income on the face of the Bill, and enshrine provisions within regulations subject to the affirmative procedure. I have listened carefully to the debates on these particular clauses, and the points raised by the Committee in their report. As a result, the affirmative procedure will apply to the first exercise of all the powers conferred by the HIST clauses. I believe this is an appropriate level of scrutiny.

26. As the Committee alludes to in its report, the Government clearly set out the starting thresholds for high income at Budget 2015 (£30k nationally, and £40k in London). The Government confirmed at Lords Committee that a taper will be introduced to ensure that the incentive to find and keep work is protected. The final design of the taper will be set in regulations following the conclusion of modelling work on the optimum level.
27. The Government has also confirmed that a reasonable amount of administrative costs can be retained by local authorities, and that there will be an exemption for people in receipt of housing benefit. As a response to the debate so far, I will provide further detail on the operation of the policy during the later stages of the Bill, in advance of regulations in the autumn.
28. Our preference is not to put detail on the face of the Bill in line with the Committee's recommendations, as this would limit the opportunities for a review of the impact of this new policy. Regulations will be informed by the on-going engagement work that my Department is taking forward with local authorities and housing associations. I am acutely aware of the pressures on Parliamentary time, and I do not believe it prudent to require further primary legislation if, in time, these thresholds become out of date. Given the level of debate over these thresholds, I believe regulations are the most sensible place to set these out so that the policy can be kept under review. Using the affirmative procedure, as I outline above, will allow for parliamentary scrutiny.
29. Similarly, the detail on determination of rent and calculation of income will be set out in regulations. The guidance would simply be there to give Government the ability to set out in plain English the approach to landlords and tenants. The guidance would not contain further detail that is not set in regulations—to which the affirmative procedure will apply. In effect, therefore, Parliament will have the opportunity to scrutinise its contents.

Clause 136 – Permission in principle for development of land

30. The Committee recommend that clause 136 should be amended to set out the consultation and other process that must be undertaken before a document is prescribed as a 'qualifying document' for the purposes of permission in principle.
31. The Government has given strong assurances about its intentions behind permission in principle and what would be prescribed as a 'qualifying document'. However, as the 'qualifying documents' are fundamental to the operation of permission in principle I agree that setting out the documents that would be qualifying documents would be helpful.
32. I will therefore table a Government amendment that specifies that the documents capable of granting permission in principle are development plan documents under Part 2 of the Planning and Compulsory Purchase Act 2004, neighbourhood development plans and registers of land required by regulations under the new powers to be introduced by clause 137. We consider this to be a straightforward approach that addresses the concerns raised by the Committee.
33. I also note the Committee's concern that the delegation of power in new section 59A of the Town and Country Planning Act 1990 ("the 1990 Act") is inappropriate to the extent that it would allow for permission in principle

to be given in respect of developments which are not housing led. I would like to take the opportunity to highlight that sub-section (1)(a) of the new section 59A will enable permission in principle to be granted on sites that the local authority or neighbourhood groups choose and allocate in their local or neighbourhood plan, or alternatively, identify on the new register of brownfield land. Permission in principle is therefore a measure that aims to strengthen the locally led plan led system and will help ensure development takes place on sites that people want to see built.

34. I would like to emphasise that the Secretary of State will have no part in the decision about which local sites are suitable for a grant of permission in principle. His role will be limited to setting out, in a development order, the criteria that a site or development must meet in order to qualify for a grant of permission in principle.
35. The Committee is right to emphasise that this measure will facilitate the building of vital new housing, by allowing permission in principle to be granted for housing-led development. That is, development that contains an element of housing but which can also include other compatible uses in the interests of encouraging mixed use and sustainable development.
36. However, because the measure aims to strengthen plan-led development, I consider it to be reasonable for permission in principle to be granted in future for other uses, such as retail or commercial space, where there is no housing element. There is no restriction on the types of development for which full or outline planning permission may be granted,
37. However, I've listened to concerns Noble Lords have about the way in which these clauses may be used in the future. I am happy, therefore, to table amendments making it clear permission in principle may not be used for fracking or mineral development.

Clause 137 – Local authorities to keep registers of land

38. The Committee recommend that the power in clause 137 be narrowed, so that it is clear that it relates only to “brownfield land” which is suitable for housing and that the term brownfield land should be defined in the new section.
39. We intend to use the power to require local authorities to compile registers of brownfield land which are suitable for housing led schemes, where housing is the predominant use with a subsidiary element of mixed use. However, this is not the only use of the power currently envisaged. We are currently consulting on a proposal to use the power to require local planning authorities to keep a register of small sites. This would increase the transparency of availability of small sites for all types of development (not just residential), supporting developers of smaller sites as well as making it easier for self and custom builders to find a suitable plot of land. Were we to narrow the power, as the Committee recommend, we would not be able to encourage development in this way.
40. I understand the Committee’s concern that the power could be used to impose burdens on local authorities. However, we do have a rigorous new burdens assessment process to ensure that local planning authorities receive sufficient resources to meet new statutory duties.

41. The Committee also recommend that the power in new section 14A(7)(c) of the Planning and Compulsory Purchase Act, inserted by clause 137, be removed. This is a power for the Secretary of State to issue guidance for the purposes of the regulations. Local authorities would have to have regard to this guidance in exercising their functions.
42. The Committee notes that such a duty imposes an obligation to follow the guidance, allowing an authority to depart from it only where it has cogent reasons for doing so. Whilst we agree that such guidance is more than advice which a local authority is free to follow or not as it chooses, as the Committee recognises it does carry an element of discretion: an authority must decide for itself what is appropriate in all the circumstances, on the basis of the relevant considerations in the case before it, and can depart from that guidance where it has cogent reasons for doing so. Guidance can have a crucial role in helping identify what information is required in different circumstances, to ensure proportionality and that decisions are appropriately informed without undue burdens being placed on local authorities.
43. In the case of the brownfield register, our intention is that guidance might deal with matters which would not normally form part of the Regulations because they carry an element of discretion. For example, the guidance might suggest ways in which the local authority might approach identifying sites for the brownfield register as part of their Strategic Housing Land Availability Assessment, or provide advice about how the local authority might approach the requirements of the Environmental Assessment of Plans and Programmes Regulations 2004 (S.I. 2004/1633) when preparing the register. I believe therefore, that guidance remains the right way forward.

Clause 141 – Planning applications: setting of fees: “de-hybridisation” provision

44. With regard to clause 141, I am pleased to be able to draw the Committee’s attention to the recently published “*Technical consultation on implementation of planning changes*”, which was published on 18 February 2016. This puts forward two proposals linking planning fees with the performance of planning services. First, an early and subsequently annual increase in nationally set fees for authorities that are performing well. Second, scope for some areas to bring forward proposals for radical service reforms and performance improvements in return for potentially higher increases in fees or some greater flexibility in the setting of fees. Subject to the responses we receive to our consultation, clause 141 would help implement this approach. I hope that this provides the information the Committee are seeking.
45. While there is no express requirement for consultation on changes to fees regulations, we will take responses received to the consultation into account as we finalise the policy. Where fee flexibility is granted to a local level, in return for radical service improvement as part of a devolution deal, we intend to ensure that there is the appropriate level of local consultation that is needed to ensure that local people are aware of, and not disproportionately affected by, the changes.
46. The appropriate level of consultation could be implemented in a number of ways, such as requesting consultation prior to the Government accepting a proposal for fee flexibility, or specifying the need for consultation as a condition in a devolution deal. We consider that this would be an effective route for individuals to express their views. I would also like to reiterate

the fact that the regulations will still be subject to robust Parliamentary scrutiny through the affirmative procedure, which would give individuals the opportunity to express their views to their local Member of Parliament.

Clauses 145 to 148 – Processing of planning applications by alternative providers

47. The Committee recommend that the affirmative procedure should apply to every exercise of the powers conferred by these clauses. I recognise that the pilots represent a significant change to the planning system and that there are understandable concerns about the potential impact on communities and local planning authorities of introducing alternative providers. Therefore, I agree that the affirmative procedure provides the appropriate level of scrutiny for the first exercise of these important powers.
48. However, I suggest that the affirmative procedure is not appropriate for every exercise of the powers. The Government may need to make procedural changes to the pilot scheme or act quickly to address a part of the processing of planning applications that is not working as effectively as it should in the pilots, so that applicants, communities and providers are not adversely affected for too long. There are circumstances where I think that the negative procedure is more appropriate.
49. Therefore, I propose to bring forward an amendment to the Bill which will set out when the affirmative procedure should apply, such as the first exercise of the powers and changes to fee setting, with the negative procedure applying in all other circumstances. This approach is not without precedent. It also effectively means that there will be Parliamentary debate on our regulations before pilot schemes are commenced.
50. The Committee made a number of other recommendations which I propose to address through amendments to the Bill:
 - Setting out the intended purpose of the clauses;
 - Bringing before Parliament an evaluation of the pilots;
 - Setting out the maximum duration of regulations brought forward under these clauses.
51. The Committee also recommend that the Secretary of State should be required to consult local authorities and other interested parties before making regulations. The Government is already consulting on how these pilot schemes might operate as part of the *Technical consultation on implementation of planning changes*. In parallel, we are also extensively engaging local authorities, professional bodies and the private sector in a discussion about how the pilots might operate. In the last six weeks we have met over 75 local authorities through a range of events. We will also consider establishing a working group including the Local Government Association, the Royal Town Planning Institute and the Planning Officers Society, among others, to advise on the design of the pilots and comment on draft regulations. I therefore do not consider that an amendment to the Bill is needed in respect of consultation.

Clauses 149 and 150 – Urban development corporations: change of Parliamentary procedure

52. The Committee recommended that the affirmative procedure should continue to apply to statutory instruments creating Urban Development Corporations and Areas. The Government will accept that recommendation.
53. We regret that the Committee does not consider that the Government has sufficiently justified the proposed removal of the right to petition which, as the Committee makes clear, could be removed whilst retaining the affirmative procedure. In our view, consultation at an earlier stage in the process is a better and more accessible way for interested parties to express their views than the existing right to petition. Our intention is that any future consultation on the creation of an Urban Development Area and Corporation should follow the model adopted for the Ebbsfleet Development Corporation, where we held a number of events to engage people locally and received over 4,000 visits to the consultation website.
54. I will therefore amend the Bill to require that the affirmative Orders establishing the Urban Development Corporation and Area should be expressly not hybrid. The removal of the right to petition will be offset by the new statutory consultation duty which is already included in the Bill.

Clauses 184 and 185 – Duty on “public authorities” to prepare report of surplus land holdings, and power to direct them to dispose of surplus land

55. I thank the Committee for their scrutiny of clauses 184 and 185. I am minded to look favourably on the recommendations and will provide further detail before we conclude our deliberations on the Bill.
56. Once again, I thank the Committee for their consideration of the Bill. As I have said on the floor of the House, I would be happy to meet any Member who wishes to meet with me so I can explain in more detail any aspect of our response to the issues raised by the Committee.

23 March 2016

APPENDIX 3: NORTHERN IRELAND (STORMONT AGREEMENT AND IMPLEMENTATION PLAN) BILL: GOVERNMENT RESPONSE

Letter from Lord Dunlop, Lords Spokesperson on Northern Ireland, to Baroness Fookes, Chairman to the Delegated Powers and Regulatory Reform Committee

I am grateful for the work of the Delegated Powers and Regulatory Reform Committee in considering and reporting on the Northern Ireland (Stormont Agreement and Implementation Plan) Bill in its 24th Report of Session 2015–16, published on 18 March (HL 118).

The Committee drew the attention of the House to two delegated powers in the Bill. I would like to take this opportunity to respond to the points raised by the Committee and offer further information before the Bill has its Second Reading in the House of Lords, in order to assist the House with its consideration of the relevant provisions.

Clause 2(5)

In relation to clause 2(5) -the duty on the Secretary of State to issue guidance to the Independent Reporting Commission (“the Commission”) - the Committee requested further explanation, in order that the House may consider whether the guidance should be subject to Parliamentary scrutiny before it takes effect.

The subject matter of the guidance to be issued by the Secretary of State to the Commission is constrained by the provisions of the Bill and there are a number of relevant precedents of statutory guidance which do not attract any Parliamentary procedure.

The guidance to be issued does not relate to the delivery of the Commission’s functions in a broad sense - indeed, this would not be appropriate, given that the Commission is an international body, independent in the exercise of its functions -but rather to exercise of its functions in relation to information, the disclosure of which might prejudice the national security interests of the United Kingdom, or put at risk the life or safety of any person.

In order to fulfil its broad objective of promoting progress towards ending paramilitary activity connected with Northern Ireland, the Commission is likely to seek information from a broad range of sources. Engagement with stakeholders is also one of the Commission’s express functions, as set out in the November 2015 agreement, *‘A Fresh Start: the Stormont Agreement and Implementation Plan’* (“the Fresh Start Agreement”). It is likely therefore that the Commission will receive information which, if it became public, could pose a risk to the safety of individuals, for instance. For this reason, the Bill places the Commission under duties not to do anything which might prejudice legal proceedings, the prevention, detection and investigation of crime, national security in the UK or Ireland, or put at risk the life or safety of any person (clause 2(3)).

The guidance to be issued by the Secretary of State will therefore relate to information that it receives in the exercise of its functions (as defined in clause

1 (1)⁴) which has the potential to put at risk the life or safety of any person, or prejudice UK national security (a subset of the duties in clause 2(3)).

Parliament is therefore asked to agree the key functions of the Commission and the duties at clause 2(3) - those at clause 2(3)(a) and (b) are relevant in this context - which set the context for the guidance to be issued under clause 2(5). The guidance will then deal with how the Commission may operate within these duties with respect to the types of information referred to above. It is likely to cover operational matters about how the Commission receives, holds and discloses information, e.g. the premises at which any sensitive material can be viewed and the storage of any such material.

In its report, the Committee noted that no specific precedents for such provision were offered in the Government's delegated powers memorandum. We would therefore now like to draw the Committee's attention to several examples of provisions in relation to guidance issued by the Secretary of State to which persons must have regard.

The Policing and Crime Act 2009 (section 47), Infrastructure Act 2015 (section 13), Health and Social Care Act 2012 (section 63) and Natural Environment and Rural Communities Act 2006 (section 15) all contain duties or powers to issue guidance to which the recipient "must have regard". In addition, the Sexual Offences Act 2003 includes a number of guidance-making powers and duties, including one at section 136P to which the recipient "must have regard".

Some of these provisions are more wide-ranging, or operational in nature than others (for instance the Health and Social Care Act provides a guidance-making power which is construed relatively broadly, relating to objectives and exercise of functions), and some require prior consultation with expert stakeholders (e.g. in the example given above of section 15 of the Natural Environment and Rural Communities Act 2006), or specify that the guidance (as issued or published) must be laid before Parliament. However, none attract a requirement for prior Parliamentary scrutiny.

There is also an example which relates specifically to the issue of disclosure of information in the Northern Ireland context. Provision has recently been approved by the Northern Ireland Assembly in the Justice (No. 2) Bill (clause 38), in respect of the Prison Ombudsman. This clause provides that the Secretary of State may issue guidance to the Prison Ombudsman in relation to any matter connected with national security (including some specified matters listed in prisons legislation) and that the Ombudsman must have regard to any such guidance. There is no provision in that Bill for the Northern Ireland Assembly to scrutinise the guidance prior to its issue. While the Secretary of State is not obliged to issue any guidance under this provision, draft guidance has already been produced and was issued to the Prison Ombudsman, pending passage of the Bill.

As outlined above, the Government considers that the duty to issue guidance in clause 2(5) of the Northern Ireland (Stormont Agreement and Implementation Plan) Bill is about an important, but limited, aspect of the Commission's functions and that the guidance is constrained by provisions on the face of the Bill. Moreover, it is our intention to consult with expert stakeholders, including the Police Service

4 Clause 1 (I) defines the Commission's functions as those in paragraph 5.1 of Section A of 'A Fresh Start: the Stormont Agreement and Implementation Plan,' which is available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/479116/A_Fresh_Start_-_The_Stormont_Agreement_and_Implementation_Plan_-_Final_Version_20_Nov_2015_for_PDF.pdf

of Northern Ireland and security services in compiling the guidance. Clause 2(8) also requires the Government to publish the guidance and we have further committed to placing a copy in the library of each House.

In light of this, the Government continues to consider that it is appropriate for the guidance itself not to be subject to further Parliamentary scrutiny.

Clause 4(2) and (3)

In relation to clause 4(2) and (3) of the Bill, the Committee draws attention first to the multiple agreements which will form the basis for the Independent Reporting Commission. To clarify, the UK Government and Irish Government committed to establishing a new Commission to report on progress towards ending paramilitary activity as part of the multi-party Fresh Start Agreement.

As the Committee notes, this document outlines some key aspects of the new Commission, including its functions (to which clause 1 (1) refers). It also makes clear that the Commission is intended to be an “international body”. To confer on it international status, the UK Government and Irish Government will therefore establish the Commission through a bi-lateral international agreement, or treaty. This international agreement, referred to in the Bill as the “agreement relating to paramilitary activity”, will define the parameters of the regulation making power in clause 4(2) and (3).

Discussions on the international agreement are at an advanced stage. However, the Government will not be in a position to finalise it until a new Government is formed in Ireland. Once finalised, it will be laid before Parliament for scrutiny under the provisions of the Constitutional Reform and Governance Act 2010.

The Committee suggests that the power in clause 4(2) and (3) for the Secretary of State to make regulations to give full effect to the international agreement could be expected to be concerned only with the structure and operation of the Commission, while noting that it could be exercised more broadly. It therefore invites the House to seek further assurances about the character of the provision intended to be made under it.

I thank the Committee for their comments. It is the case that this power is intended to be used to provide further detail on the operations, structure and governance arrangements of the Commission, as these are finalised in discussion with the Irish Government. It may therefore be used to make provision about such matters of detail as majority decision-making on the contents of reports, arrangements for their publication, audit and accounts.

Making provision in secondary legislation will also provide the necessary flexibility to react to any further circumstances which may arise in the course of finalising the treaty and establishing the Commission. Parliament will have the opportunity to give its approval to any regulations made under this power, which, in view of its breadth, is subject to the affirmative procedure.

I thank the Committee again for their comments on the Bill.

I am placing a copy of this letter in the libraries of both Houses.

6 April 2016