

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

6th Report of Session 2015–16

Energy Bill [HL]

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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:
 - (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

Registered Interests

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the Parliamentary Archives. Interests related to this Report are in the Appendix.

Publications

The Committee's reports are published by the Stationery Office by Order of the House in hard copy and on the internet at www.parliament.uk/hldprcpublications.

General Information

General information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at <http://www.parliament.uk/business/lords/>.

Contacts for the Delegated Powers and Regulatory Reform Committee

Any query about the Committee or its work should be directed to the Clerk of Delegated Legislation, Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3103 and the fax number is 020 7219 2571. The Committee's email address is hldelegatedpowers@parliament.uk.

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 other acts specified in the Committee's terms of reference.

Sixth Report

ENERGY BILL [HL]

1. This Government Bill would:
 - establish the Oil and Gas Authority (OGA) as an independent regulator;
 - transfer to the OGA most of the Secretary of State's existing regulatory powers on oil and gas; and,
 - give the OGA additional powers, including access to company meetings, data acquisition, retention and transfer, dispute resolution and sanctions.
2. The Department of Energy and Climate Change has provided us with a memorandum explaining the delegated powers in the Bill.¹ We wish to say at the outset that, on the whole, we found the memorandum impressive: the format is a model of its kind, and the delegations are for the most part clearly explained and justified. We refer below to the small number of cases where unfortunately the memorandum did not live up to this high standard. We note also that the memorandum contains a number of unexplained references to “the basin” and we would urge Departments generally to ensure that jargon of this type is properly explained or, better still, not included in memoranda.

Clause 27(8) – Disclosure of information and provision of samples

3. Clause 26 of the Bill would enable the OGA to acquire information and samples (called “protected material”) from “relevant persons” (for example, holders or operators of petroleum licences).
4. Clause 27 would allow the OGA to use that material for preparing returns and reports, and also to disclose it to the Natural Environment Research Council (or any other similar body carrying on geological activities) to allow that body to prepare reports and surveys. Failure to comply with a notice from the OGA requiring the provision of such material would be sanctionable (clause 26(4))(see paragraph 10 below).
5. Clause 27(8) would enable the OGA:
 - to publish the protected material, or
 - to make it available to the public

at such time as the Secretary of State may specify in regulations (negative procedure) – a power which is described in the memorandum as a power to stipulate confidentiality periods.

¹ Department for Energy and Climate Change, *Delegated Powers Memorandum*:
[<http://www.parliament.uk/documents/DPRR/2015-16/Bills/Energy-Bill/24-Delegated-powers-memo-for-Energy-Bill-9-July.pdf>]

6. Clause 28(1) would allow regulations to permit this to be done *immediately* after the material has been provided (subject to a requirement to consult under clause 28(2)).
7. This provision may well be of significant concern to the oil and gas industry because, as the memorandum itself acknowledges, the material could be extremely costly to produce and of high commercial sensitivity. It is, therefore, surprising to say the least that there is nothing on the face of the Bill to say what factors the Secretary of State should take into account in exercising this power to specify confidentiality periods.
8. The Government's justification for the provision, set out in paragraphs 29 to 31 of the memorandum, we found to be unconvincing, not least because there is no reference to the power in clause 28(1) enabling immediate disclosure.
9. **We consider that the delegation of power in clause 27(8) is inappropriate without the inclusion of a list of factors governing its exercise. Furthermore, whether or not the Bill is amended to provide for such a list, we recommend that the affirmative procedure ought to apply to regulations under that provision.**

Clause 40(2) – Amount of financial penalty

10. Chapter 5 of Part 2 of the Bill confers extensive powers on the OGA to impose civil sanctions for the purpose of enforcing compliance with various obligations, including the requirement to provide information and samples to the OGA; and clause 39 would allow the OGA to issue a financial penalty notice obliging the recipient of the notice to pay to the Authority an amount not exceeding £1 million.²
11. Clause 40(2) requires the OGA:
 - to issue guidance about the matters to which it will have regard when determining the amount of the financial penalty; and
 - to have regard to that guidance when determining the amount of a penalty in a particular case.

The First-tier Tribunal, upon an appeal against a penalty, would also be under a duty to have regard to that guidance (see clause 47(7)).

12. We note that there is no Parliamentary procedure associated with the guidance. Indeed, there is not even a requirement to lay it before Parliament. The memorandum (paragraph 39) explains that the Bill follows the approach of section 38 of the Competition Act 1998 under which there is no Parliamentary procedure in relation to guidance issued by the Competition and Markets Authority on the exercise of its power to impose financial penalties.
13. It fails however to mention more recent examples which do not support its case! These include:

² Clause 40(6) enables the Secretary of State by affirmative procedure regulations to increase that amount maximum to a maximum of £5 million.

- Section 34 of the Identity Cards Act 2006 (since repealed). This provided for a code of practice about the imposition of civil penalties to be laid before Parliament in draft and brought into force by order. The affirmative procedure applied to the first order, and the negative procedure to subsequent orders.
 - Section 19 of the Immigration, Asylum and Nationality Act 2006 which requires the Secretary of State to issue a code of practice about financial penalties imposed on persons who employ illegal immigrants. This must be laid in draft before Parliament and brought into force by affirmative procedure order.
 - Section 55C of the Data Protection Act 1998, inserted by section 144 of the Criminal Justice and Immigration Act 2008, which requires the Information Commissioner to issue guidance about the monetary penalties he can impose for breaches of that Act. There is no Parliamentary procedure applicable to the guidance, but it does have to be laid before Parliament.
 - Section 32 of the Immigration Act 2014. This requires the Secretary of State to issue a code of practice specifying factors for determining the amount of a penalty imposed on residential landlords who grant a tenancy to illegal immigrants. The code must be laid in draft before Parliament, and it comes into force in accordance with a negative procedure order.
14. We note that the guidance will be highly influential in determining the amount of what could be a substantial financial penalty imposed by the OGA – up to £1 million (with provision for this maximum to be increased to £5 million (see footnote 2)). We further note that the OGA is a brand new institution and even the memorandum refers to its “nascent enforcement framework” which is “as yet untested” (paragraph 41). In the light of this, the Committee has concluded that the guidance should be subject to some Parliamentary oversight.
15. **We therefore recommend that guidance under clause 40 should be laid in draft before Parliament, and that the affirmative procedure should apply to the order bringing the initial or any revised guidance into force.**

Clause 57 – Powers to charge fees

16. Clause 57 inserts:
- new section 82OA of the Energy Act 2008, giving the Secretary of State power to charge fees in connection with the licensing of oil and gas-related works which may be “detrimental to navigation”; and
 - new section 110A of the Marine and Coastal Access Act 2009, allowing the Secretary of State to charge fees in connection with marine licences relating to oil and gas activities (for example, a licence to deposit waste from a vessel moored in UK territorial waters).
17. With respect to each of the two new sections:

- not only does subsection (2) specify that the fees are to be determined by or in accordance with regulations made by the Secretary of State (subject to the negative procedure); but,
 - subsection (3) also allows the regulations to provide for the fees to be determined in accordance with a separate scheme made by the Secretary of State (for which sub-delegation no Parliamentary procedure is specified).
18. It is not clear to us why subsection (3) has been included in each new section: the Department's memorandum neither explains nor justifies it, and the power in subsection (2) appears to be wide enough to accommodate in the regulations all the material that could go in a scheme.
19. **We consider it inappropriate for the Secretary of State to have power to determine the new fee regime in a scheme for which there is no form of Parliamentary oversight. We therefore recommend that, unless this sub-delegation of power can be justified to the satisfaction of the House, the proposed new section 82OA(3) of the Energy Act 2008 and new section 110A(3) of the Marine and Coastal Access Act 2009 should be removed from the Bill.**

APPENDIX 1: MEMBERS AND DECLARATIONS OF INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the House of Lords Record Office and is available for purchase from The Stationery Office.

Energy Bill [HL]

Lord Moynihan

Chairman, Buckthorn Partners LLP (private equity fund specialising in water; mining; oil and gas)

Attendance:

The meeting on the 22 July 2015 was attended by Baroness Drake, Lord Flight, Baroness Fookes, Baroness Gould of Potternewton, Lord Lisvane, Countess of Mar, Lord Moynihan, Lord Jones and Lord Tyler.