# HOUSE OF LORDS

## Delegated Powers and Regulatory Reform Committee

## 1st Report of Session 2015–16

**Cities and Local Government Devolution Bill [HL]**
**Psychoactive Substances Bill [HL]**
**Charities (Protection and Social Investment) Bill [HL]**
**Medical Innovation Bill [HL]**
**Draft Legislative Reform (Further Renewal of Radio Licences) Order 2015**
**Draft Legislative Reform (Combined Authorities and Economic Prosperity Boards) (England) Order 2015**

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HL Paper 8

## 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:

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(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.

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

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Baroness Fookes (*Chairman*)
Lord Flight
Baroness Gould of Potternewton
Lord Jones
Lord Lisvane
Countess of Mar
Lord Moynihan
Lord Thomas of Gresford
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### *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.

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

# First Report

## CITIES AND LOCAL GOVERNMENT DEVOLUTION BILL [HL]

1. The Bill had its second reading on 8 June. It is concerned with enabling a wider range of functions to be devolved to a combined authority established under the Local Democracy, Economic Development and Construction Act 2009 ("the 2009 Act"). The Bill also allows a combined authority to have an elected mayor and for the mayor to be given sole responsibility for exercising some of the functions of the authority. Where a combined authority has an elected mayor, the Bill also allows the mayor to exercise the functions of the police and crime commissioner for the combined authority's area. Apart from the provisions relating to combined authorities, the Bill also contains provisions which will allow changes to be made both to the constitution, membership and governance of local authorities and to local authority areas and structures.

2. The Bill is in essence an enabling Bill in that it primarily confers delegated powers rather than containing operative provisions. The Department for Communities and Local Government and the Home Office have together provided us with a memorandum explaining the delegated powers in the Bill.[1]

### Schedule 1 - Election of Mayors

3. Schedule 5B to the 2009 Act (which is inserted by Schedule 1 to the Bill) makes provision about the election of mayors. The Bill does not specify the dates on which elections are to take place or the ordinary length of a mayor's term of office. Instead, paragraph 2 of Schedule 5B provides for these matters to be set out in an order made by the Secretary of State subject to the affirmative procedure.

4. The memorandum explains that these powers are needed because orders providing for there to be a mayor of a combined authority could be made at any time in the electoral cycle and they enable the Secretary of State to synchronise the timing of mayoral elections with other elections.

5. This does not in our view explain why it is not feasible to set out on the face of the Bill the date of elections and the length of the term of office, which are to apply once the process of synchronisation has taken place. Reliance is placed on section 9HB of the Local Government Act 2000 which contains similar powers in relation to the election of local authority mayors. However the memorandum fails to acknowledge that in that case the primary legislation still sets out the default position: that the mayor's term of office should be four years and that elections should take place on the ordinary day of election for local authorities in the election year.

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[1] Department for Communities and Local Government and Home Office, *Memorandum by the Department for Communities and Local Government and Home Office to the Delegated Powers and Regulatory Reform Committee*: http://www.parliament.uk/documents/DPRR/2015-16/Bills/Cities-and-Local-Government-Devolution/01-Cities-and-Local-Government-Devolution-DP-Memo.pdf

6. **Given the importance of the functions which a mayor is able to exercise, and the emphasis placed by the Government on the democratic accountability offered by an elected mayor, we do not consider it appropriate for the Bill to delegate to subordinate legislation the ordinary length of a mayor's term of office or the ordinary election dates. It seems to us that any power to provide for those things in subordinate legislation should be limited so that it can only be exercised to the extent necessary to allow synchronisation with other elections, when the office of a mayor is first established.**

### Clause 6 - Transfer of public authority functions

7. Clause 6 amends the 2009 Act to insert two new sections, sections 105A and 105B, into the provisions on combined authorities. Section 105A allows the Secretary of State by order to confer on a combined authority a function of any public authority (other than a district or county council). The powers under section 105A can be exercised where either the function is exercisable in relation to the combined authority's area, or it is exercisable in relation to another area.

8. Section105B limits the circumstances in which an order may be made under section 105A: an order may only be made where it has been proposed by the participating local authorities or, in a case where there is an existing combined authority, where that authority consents to it and the Secretary of State considers that the order is likely to improve the exercise of statutory functions in the authority's area. But there is no requirement on the Secretary of State to consult anyone else who may be affected by the proposal, including the public authority whose functions are being transferred.

9. There is no limit on the kinds of public authorities whose functions can be conferred on a combined authority, with subsection (4) making it clear that it includes Ministers and government departments. Also, the only restrictions on the kinds of functions which may be conferred on a combined authority are that:

- the function is exercisable in relation to a defined area (whether the area of the combined authority or another area); and
- it is not a function which is a power to make regulations or other instruments of a legislative character (see the definition of "function" in section 105A(4)).

10. **We do not consider that the departmental memorandum adequately explains the very wide powers conferred by section 105A. Paragraph 28 of the memorandum states that the purpose of the power is to widen the scope of the functions which may be conferred on a combined authority; and that the order-making power is necessary to give effect to devolution agreements between the Government and a particular city or other area. But it says nothing about how in practice these powers might be used, or why it is not appropriate or practicable to include a description of the types of function covered by the power on the face of the Bill.**

11. **We are also concerned that, while some protection is offered by the requirement for the local authorities concerned to consent to the**

**proposal, there is no mechanism for requiring the Minister to consult anyone else who may be affected by the proposal. Accordingly we consider that the delegation of powers by section 105A is inappropriate.**

### Schedule 3 - Overview and scrutiny committees

12. Schedule 5A to the 2009 Act (which is inserted by Schedule 3 to the Bill) requires a combined authority to appoint one or more overview and scrutiny committees. The functions of overview and scrutiny committees are set out in paragraph 1 of Schedule 5A. They are to review or scrutinise decisions of the authority and mayor, to make reports or recommendations about the discharge of functions, and to make recommendations about matters that may affect the authority's area or inhabitants. Paragraph 3 of Schedule 5A confers power on the Secretary of State by order to make further provision about overview and scrutiny committees.

13. The powers conferred by paragraph 3 of Schedule 5A are subject to the negative procedure. The departmental memorandum states that this affords an appropriate level of Parliamentary procedure because the provisions contained in the order will be operational and therefore procedural in nature. **We do not agree. The order-making powers conferred by paragraph 3 include the power make provision about the membership and who is to be the chair of the committee. The Department acknowledges in paragraph 31 of its memorandum that overview and scrutiny committees have a key role in ensuring effective and transparent accountability. In our view, this fact together with the nature of the provisions which can be included in an order under paragraph 3 of Schedule 5A make it appropriate for the affirmative procedure to apply.**

### Clause 10 - Governance arrangements etc. of local authorities in England

14. Clause 10 confers a regulation making power on the Secretary of State to make provision about the governance arrangements operated by local authorities, the constitution and membership of local authorities, and the structural and boundary arrangements for local authorities. Subsection (4) of clause 10 allows these powers to be exercised by amending, repealing etc. provisions of primary legislation. Regulations under clause 10 are subject to the affirmative procedure.

15. On the face of it, clause 10 constitutes a very broad power to make changes both to the membership and governance of local authorities in England, and to alter local authority areas and structures. The only limit on the Secretary of State's powers under clause 10 is that the regulations may only be made if the local authorities to whom they apply consent to their making.

16. The reasons for the delegation are set out in paragraph 43 of the departmental memorandum. It is intended to allow local authorities to agree a re-organisation of the local government structures for their combined areas, in circumstances where the establishment of a combined authority is not appropriate. The example given is of a single county council which covers a functional economic area. It is suggested that all the constituent councils for that area might agree that there is a need for strong and accountable

governance which requires the simplifying of the local government structures for the area. However the powers are not limited to such a case. They would also allow changes to be made to the governance, membership and constitution of individual local authorities.

17. Nothing is said on the face of the Bill about the purposes for, or the circumstances in, which the powers may be exercised. This contrasts with the position for combined authorities under Part 6 of the 2009 Act. In that case, the Secretary of State can only exercise the powers to establish a combined authority if doing so is likely to improve the exercise of statutory functions for the area concerned. There is also the requirement on the Secretary of State in exercising the powers to have regard to the need to reflect the identities and interests of local communities and to secure effective and convenient local government. Furthermore, a duty is imposed on the Secretary of State to consult not only the affected local authorities but also such other persons as he or she considers appropriate. **We are not convinced that requiring the consent of the local authorities affected is by itself a sufficient control over the very wide powers conferred by clause 10. In our view the delegation is inappropriate without the exercise of the powers being made subject to similar constraints and protections as those which apply to the establishment of a combined authority under Part 6 of the 2009 Act.**

*De-hybridising provision*

18. Clause 10(6) disapplies the hybrid instrument procedure for regulations under clause 10. **We draw this to the attention of the House, so that the House may consider whether the consent procedures provided by the clause are sufficient.**

**Clause 11 - Power to make minor and consequential amendments**

19. Clause 11(2) enables the Secretary of State to make consequential amendments by regulations. Such provisions are by now very familiar as a feature of almost every bill of any size. In this case, as in others, the powers may be exercised by amending, repealing, revoking or otherwise modifying a provision of primary or subordinate legislation. Where the regulations amend or repeal a provision of primary legislation, subsection (4) of clause 11 provides for the affirmative procedure to apply. In all other cases, the regulations are subject to the negative procedure. This includes where the powers are exercised by "otherwise modifying" a provision of primary legislation.

20. This Committee has on numerous occasions in the recent past recommended that, where a delegated power of the kind conferred by clause 11(2) can be exercised either by amending or by "otherwise modifying" a provision of primary legislation, then the affirmative procedure should apply to both exercises of the power, or otherwise the powers to otherwise modify should be removed. Underlying our view is the fact that a non-textual modification of primary legislation is capable of making changes which are no less significant than textual amendments. Until the end of the last Parliament the Government's response to these concerns was generally to amend the provision to make the "otherwise modifying" power also subject to the affirmative procedure, where it modifies a provision of primary legislation. However since then three Bills reached the Committee that contained

powers to make consequential modifications in primary legislation, and in those cases the "otherwise modifying" power did not require the affirmative procedure.

21. In one such case, the Small Business, Enterprise and Employment Bill, the Government set out a lengthy justification in its memorandum. The point was made that the kinds of modification which can be made to primary legislation are very diverse; and within this wide spectrum there are many in respect of which, because the modification of primary legislation is only very indirect, or because it only operates for limited purposes, it is inappropriate that it should be treated as equivalent to an amendment of the primary legislation and therefore made subject to the affirmative procedure. It was suggested that it will only be very rarely that a non-textual modification of primary legislation is made that is akin to a textual amendment; and in such a case the Government would undertake to exercise the powers in a way that would subject them to the affirmative procedure. In this case, the Department have referred in its memorandum to the justification provided with the Small Business, Enterprise and Employment Bill. As in that case, the Department undertakes that, where it is proposed to exercise the powers conferred by clause 11 by making a modification to primary legislation which is equivalent to a textual amendment, the power will be exercised in a way that requires the affirmative procedure to apply.

22. Although the Government consider that the negative procedure will generally be appropriate they acknowledge that a power to otherwise modify primary legislation can be exercised in a way that is equivalent to a textual amendment. Given that fact, we do not consider it acceptable that any current or future Minister should be the one to make the judgment in a particular case as to the Parliamentary procedure that is to apply. **In our view if the Government consider that particular kinds of modification of primary legislation only require the negative procedure, those particular cases should be set out on the face of the Bill. We remain firmly of the view that the general principle should be that modifications of primary legislation are subject to the affirmative procedure in line with the procedure for textual amendments.**

## PSYCHOACTIVE SUBSTANCES BILL [HL]

23. This Bill makes provision prohibiting the production, distribution, sale and supply of psychoactive substances in the United Kingdom, creates offences and introduces civil sanctions for breaches of those prohibitions, and confers a range of enforcement powers. The Bill contains five sets of delegated powers, in clauses 3, 10, 29 to 31, 55 and 57, which are explained in a memorandum submitted by the Home Office.[2] There are only two powers that we need draw to the attention of the House.

### Clause 3 - Amendment of list of exempted substances

24. A substance is not a psychoactive substance (see clause 2(1)(b)) if it is an "exempted substance", which is defined in clause 3(1) as a substance listed in Schedule 1. Clause 3(2) enables the Secretary of State, by regulations subject to the draft affirmative procedure, to amend Schedule 1: (a) to "add or vary any description of substance", or (b) to "remove any description of substance added under paragraph (a)". The effect of adding a description of substance to Schedule 1 is that the substance of that description would then be an exempted substance (and accordingly no longer a psychoactive substance). The effect of removing a description of substance would be the reverse, i.e. that it was no longer an exempted substance; but the power to remove is confined to descriptions that have been added by regulations under subsection (2)(a).

25. In the light of what is said in paragraphs 4 to 8 of the Home Office's memorandum, we are satisfied that both the delegation in subsection (2) of clause 3 and the level of Parliamentary control proposed in subsection (5) are, in principle, appropriate.

26. However, we note that subsection (2)(a) also enables a description of substance to be varied, and it appears to us that this could apply either to a description appearing in Schedule 1 on enactment, or to one that has been added by regulations under subsection (2)(b). The penultimate sentence of paragraph 5 of the memorandum envisages that the power of variation might be used to update references to legislation (see, for instance, paragraphs 2 to 5 of Schedule 1). But that power is clearly broader in scope and might in our view be used to vary a description of substance so that it no longer included something that previously fell within Schedule 1 – with the result that it ceased to be exempted, and so became a psychoactive substance.

27. **We draw this to the attention of the House, so that it may consider whether clause 3 should be amended to preclude the possibility of the power of variation under clause 3(2)(a) being exercised so that something which, on the enactment of Schedule 1, is an exempted substance ceases to be exempted.**

### Clause 55 - Consequential Amendments

28. Clause 55 confers powers enabling the Secretary of State to make, by regulations, consequential amendments in primary or subordinate legislation;

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2 Home Office, *Delegated Powers Memorandum*, 29 May 2015: http://www.parliament.uk/documents/DPRR/2015-16/Bills/Psychoactive-Substances/02-Psychoative-Substances-DP-Memo.pdf

and where the regulations amend, repeal or revoke primary legislation, they require affirmative approval; otherwise, they attract negative procedure. Subsection (2)(c) provides that the power "may be exercised by amending, repealing, revoking or otherwise modifying provision made by or under primary legislation …"; yet, the affirmative procedure is not required for regulations that "modify" primary legislation.

29. This issue is explained in paragraph 16 of the Home Office's memorandum. Substantially the same issue arises in relation to an equivalent provision in the Cities and Local Government Devolution Bill, and we have dealt with it more fully at paragraphs 19 to 22 above in the context of that Bill. **In line with our conclusions in paragraph 22 above, we consider that, if the Government believe that the negative procedure is the appropriate level of scrutiny for particular categories of modifications of primary legislation, they should specify those categories in clause 55.**

## CHARITIES (PROTECTION AND SOCIAL INVESTMENT) BILL [HL]

30. The Bill would amend the Charities Act 2011 ("the 2011 Act") to confer additional powers on the Charity Commission to take remedial action in connection with misconduct or mismanagement by charity trustees, in particular by allowing the Commission to disqualify a person from being a charity trustee for up to 15 years. The Bill would also expand the circumstances in which a person is automatically disqualified from being a trustee, and permit charities to make social investments (i.e. ones which make both a financial and social return).

31. The provisions of the Bill concerning the protection of charities and disqualification of trustees reproduce with a few changes the contents of the draft Protection of Charities Bill, published in October 2014. We made some observations on the delegated powers in the draft Bill to the Joint Committee, chaired by Lord Hope of Craighead, established to scrutinise it. The Joint Committee's report on the draft Bill was published on 3 February 2015.[3] Our advice is reproduced in Appendix 3 to that report. The Joint Committee recommended that the Government should consider the concerns that we expressed.

32. The Government's response to the Joint Committee's report was published in March 2015.[4] It dealt with only one of the points raised in our observations,[5] and the Bill as introduced contains no changes to reflect those issues. The delegated powers memorandum submitted with the Bill is substantially the same as that provided in relation to the draft Bill.[6] However, at the invitation of our adviser, the Cabinet Office did provide (on 8 June) a supplementary memorandum addressing the points made in our advice to the Joint Committee.[7]

33. In light of that supplementary memorandum, there is only one aspect of the Bill that we wish to draw to the attention of the House.

### Clause 9(7): automatic disqualification from being a charity trustee

34. Clause 9 would amend section 178 of the 2011 Act so as to provide for the automatic disqualification of a person from being a charity trustee if he or she is convicted of (a) any offence involving dishonesty or deception, or (b)

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3 Joint Committee on the Draft Protection of Charities Bill, *Draft Protection of Charities Bill* (Report, Session 14-15, HL Paper 108, HC 13).

4 Cabinet Office, *Government Response to the Joint Committee on the Draft Protection of Charities Bill*, CM 9056, March 2015:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/418027/Government_response_to_joint_committee_on_draft_protection_of_charities_Cm_9056_accessible.pdf

5 Cabinet Office, *Government Response to the Joint Committee on the Draft Protection of Charities Bill*, CM 9056, March 2015, paragraph 40.

6 Cabinet Office, *Delegated Powers Memorandum*, 27 May 2015 :
http://www.parliament.uk/documents/DPRR/2015-16/Bills/Charities-(Protection-and-Social-Investment)/03-Charities-(Protection-and-Social-Investment)-DP-Memo.pdf

7 Cabinet Office, *Supplementary Delegated Powers Memorandum*, 8 June 2015
http://www.parliament.uk/documents/DPRR/2015-16/Bills/Charities-(Protection-and-Social-Investment)/04-Charities-(Protection-and-Social-Investment)-DP-Supplementary-Memo.pdf

an offence, not involving either of those things, specified in a new section 178A inserted by clause 9(7). Subsection (1) of new section 178A specifies a number of criminal offences not involving dishonesty or deception conviction for which would result in automatic disqualification. The offences specified include ones under terrorism and money laundering legislation, the Bribery Act 2010, misconduct in public office, perjury and perverting the course of justice. It is a criminal offence to act as a trustee while disqualified: see section 183 of the 2011 Act.

35. The new section 178A(4) would enable the Minister for the Cabinet Office, by affirmative procedure regulations, to add new offences to those specified in section 178A(1) or to remove ones already specified.

36. We advised the Joint Committee that we were satisfied with the delegation and the level of scrutiny. We accepted the Cabinet Office's justification that it may be necessary in the future to take urgent steps to specify offences that should carry automatic disqualification, and agreed that the affirmative resolution procedure would provide a safeguard against any inappropriate exercise of the power.

37. Paragraphs 5 and 6 of the supplementary memorandum refer to a connected matter which we raised with the Joint Committee when we looked at the draft Bill. This relates to the commencement of new section 178A, and of the regulations that could be made under the power conferred by new section 178A(4), in respect of persons already convicted of the offences specified or that could be specified. We thought that it could be unfair to impose immediate, automatic disqualification, and the consequent risk of prosecution of the offence under section 183 of the 2011 Act, without giving such persons sufficient notice that they were required to withdraw from the affairs of the charity. The charity itself may need time to find a replacement trustee. We indicated that two months may be an appropriate period to allow, as it would reflect the convention that, except in cases of particular need, primary legislation does not come into force less than two months after the date on which it is enacted.

38. Paragraph 6 of the supplementary memorandum explains:

> "The Cabinet Office recognises the need for individuals to be alerted to the effect of new section 178A, and any regulations made under it, before they come into force. This will be taken into account in deciding when the Bill and any future regulations are commenced to ensure that sufficient time is allowed before the commencement of such provisions. It is not envisaged the Bill will be commenced less than two months after Royal Assent and, generally speaking, it is not envisaged that regulations will be commenced less than two months after being made."

39. The language used is equivocal, and contrasts with the clearer assurance given by the Government in paragraph 40 of its response to the Joint Committee's report ("… we commit to ensuring that sufficient time would be allowed before the commencement of [the] provisions").

40. **We therefore invite the House to seek at least a firmer commitment from the Minister than that given in paragraph 6 of the supplementary memorandum, or, better still, to consider amending the Bill to provide that a disqualification may not take effect under**

**new section 178A, in relation to a person previously convicted of a specified offence, sooner than two months after commencement of the section or (as the case may be) regulations made under subsection (4).**

## MEDICAL INNOVATION BILL [HL]

41. There is nothing in this Bill which we wish to draw to the attention of the House.

## DRAFT LEGISLATIVE REFORM (FURTHER RENEWAL OF RADIO LICENCES) ORDER 2015

42. This draft Legislative Reform Order (LRO) has been laid by the Department for Culture, Media and Sport (DCMS) with an Explanatory Document (ED). It is proposed to be made under section 1 of the Legislative and Regulatory Reform Act 2006 ("the 2006 Act"), which allows a Minister to make provision by order for removing or reducing any burden resulting directly or indirectly from legislation. DCMS states that the purpose of the LRO is to allow certain commercial radio licences which are due to expire between 2017 and 2021 to be renewed for a further five-year period.

### Background

43. DCMS sets the LRO in the context of the anticipated switchover from analogue radio (broadcasting on FM and AM) to digital radio (DAB). Amendments made to the Broadcasting Act 1990 ("the 1990 Act") by the Digital Economy Act 2010 ("the 2010 Act") allowed Ofcom (the communications regulator) to renew the licences of commercial radio stations, to support the migration to digital radio. In 2010 the Government and radio industry anticipated that, with good progress, the switchover could be completed in 2017 or 2018. The proposed seven-year duration for licence renewals in the 2010 Act reflected this expectation, as in such a scenario it made sense for analogue licences to begin to lapse around this time, as they would no longer be necessary.

44. However, the take-up of digital radio has been slower than expected, and in December 2013 the Government concluded that it was not the right time to commit to a radio switchover, or set a firm or indicative timetable for a future switchover. As a result, the licences of over 60 radio stations which were renewed following the 2010 amendment of the 1990 Act will expire between 2017 and 2021, before the date when a switchover is now likely to be possible.

45. DCMS says that, if it allowed analogue licences to expire, and a new competition were to take place, any new entrant might hold an analogue licence starting in 2018 only for three to five years (rather than the normal 12), given that Ofcom has the power to terminate licences with a two-year notice following Government confirmation of a timetable for a radio switchover. DCMS adds that this is unlikely to be enough time for a new entrant to be able to achieve a reasonable return on the investment of establishing a new analogue radio service.

### Proposed changes

46. After consultation, DCMS has decided to resolve these difficulties by means of the amendments to the 1990 Act contained in the LRO. These would allow Ofcom to renew for a further five-year period licences already renewed under sections 103B (national licences) and 104AA (local licences) of the 1990 Act.

### Tests in the 2006 Act

47. We obtained additional information from DCMS in support of its statements that the LRO does not remove any necessary protections, for either the radio

industry or public, and that it does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise. We also received additional information from DCMS about its view that the LRO does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise, which we requested in the knowledge that DCMS' own consultants, Value Partners, had taken a different view of the issue. We are publishing that additional information at Appendix 1.

### Parliamentary procedure

48. DCMS has proposed that the LRO be subject to the affirmative resolution procedure.

### Conclusions

49. **In the light of the Explanatory Document and the supplementary material provided by DCMS, we are satisfied that the Order meets the tests set out in the 2006 Act and is not otherwise inappropriate for the Legislative Reform Order procedure; and also that the affirmative resolution procedure proposed by the Government is appropriate.**

## DRAFT LEGISLATIVE REFORM (COMBINED AUTHORITIES AND ECONOMIC PROSPERITY BOARDS) (ENGLAND) ORDER 2015

50. This draft Legislative Reform Order (LRO) has been laid by the Department for Communities and Local Government (DCLG) with an Explanatory Document (ED). It is proposed to be made under section 1 of the Legislative and Regulatory Reform Act 2006 ("the 2006 Act"), which allows a Minister to make provision by order for removing or reducing any burden resulting directly or indirectly from legislation.

51. DCLG states that the purpose of the draft LRO is to amend provisions within Part 6 of the Local Democracy, Economic Development and Construction Act 2009 ("the 2009 Act"), which enables the establishment of combined authorities (CAs) and economic prosperity boards (EPBs).

### Background

52. DCLG states that the provisions of Part 6 of the 2009 Act are designed to enable local authorities in England to drive their own area's growth through asking the Secretary of State to establish a CA or EPB to help them collaborate across the boundaries of the local authorities within the functional economic area. There is no requirement for local authorities to set up such bodies.

53. The 2009 Act obliges local authorities that wish to establish a CA or EPB to undertake a review of their governance arrangements. The geographical area of the review needs to be the same as that for the proposed CA or EPB. The 2009 Act specifies a number of conditions that the geographical areas of a proposed CA or EPB need to meet. These conditions are set out in paragraph 15 of the ED to the LRO: they include in particular the requirements that only local authorities with contiguous boundaries may join to form a CA or EPB, and that the area of a CA or EPB must consist of the whole of two or more local government areas.

### Proposed changes

54. The LRO would make three changes to the provisions of the 2009 Act, in order:

- to enable local authorities with non-contiguous boundaries to join or form a CA or EPB, or to enable a "doughnut-shaped" CA or EPB. DCLG says that this would reduce burdens by enabling local authorities that could not currently form a CA or EPB to do so. As a result, they could collaborate effectively on economic development, regeneration (and for CAs, transport), and thus promote economic growth; and this would reduce an obstacle to efficiency, productivity or profitability;

- to enable the delegation or sharing of a county council's transport functions with a CA for part of the county council's area. This would enable a county council to delegate its powers to the CA only for the areas of the districts which are within the CA, and therefore provide greater flexibility to a county council. It would in turn reduce burdens by enabling CAs to cover areas that reflect the functional economic area where that does not align with the boundary of the country council; and

- to simplify the processes required to make less significant changes to an existing CA or EPB. This would reduce an administrative inconvenience.

**Tests in the 2006 Act**

55. We are satisfied that, in relation to the proposed changes which are identified in the ED, the Department has shown that they meet the tests set out in the 2006 Act and are not otherwise inappropriate for the Legislative Reform Order procedure.

56. However, in one significant respect, we consider that DCLG has failed to identify and explain all the changes proposed to be made by the LRO. At present, the Secretary of State has the power to provide that an EPB can exercise a function of a local authority across the whole of a local authority's area where this falls within the area of the EPB: this power is conferred by Section 91(1) of the 2009 Act. Article 4 of the LRO would extend this power, so that the Secretary of State would be able to provide that an EPB could exercise a function of a local authority where only part of the local authority's area fell within the EPB's area. (The powers conferred by section 91(1) also apply in relation to CAs by virtue of section 105.) Nothing is said in the ED about the provision made by article 4 (either as it applies to EPBs or to CAs).

57. Our preliminary view is that the failure to include in the ED any explanation about the effect of article 4 is a breach of section 14(2) of the 2006 Act, which requires the ED to introduce and give reasons for the provisions which have been included in the draft LRO and to include an assessment of the extent to which a provision made by the draft LRO would remove or reduce any burden.

**Defective drafting**

58. We have in addition identified what appear to us to be defects in the drafting of the amendments made by articles 6 and 15. The point is the same in each case, as the articles amend parallel provisions (namely, sections 98(3) and 109(3) of the 2009 Act). In each case, the provision being amended sets out the requirements which must be met for the scheme area, where one or more local authorities are proposing to publish a scheme for the establishment of an EPB or CA. However, the words imposing the relevant requirement have been lost in the amending words. So, rather than as at present saying "the scheme area … *must meet* conditions A to C in section [88/103] …", the amended text says that "the scheme area … *meets* conditions A to C in section [88/103] , or … *meets* conditions A and D … and condition F…". These amendments are misconceived, because they describe a state of affairs about the scheme area rather than specifying the condition which the scheme area is required to meet.

**Parliamentary procedure**

59. DCLG has proposed that the LRO be subject to the affirmative resolution procedure.

## Conclusions

60. **In the light of the concerns set out above, we are not yet in a position to take a view on whether the draft LRO is appropriate to be made under the 2006 Act (and, if so, on whether it meets the tests in the 2006 Act). Given that our concerns are unresolved, we recommend that the LRO be subject to the super-affirmative procedure; and we look to the Department to respond to these concerns during the extended period entailed by that procedure.**

61. **We note that the Government have introduced the Cities and Local Government Devolution Bill, currently before this House, and that provisions in that Bill relate to the same policy area as that addressed by the LRO. It seems to us that operating in one policy area through two separate legislative vehicles, which are progressing in parallel though at different speeds, presents particular difficulties to the House in considering the combined effects of the changes proposed.**

## APPENDIX 1: ADDITIONAL INFORMATION FROM THE DEPARTMENT FOR CULTURE, MEDIA AND SPORT

Thank you very much for your email dated 20 May 2015, regarding the Legislative Reform (Further Renewal of Radio Licences) Order 2015. Please find below a response to the points of clarification you raised.

Firstly, you point to the conditions of the Act in your email:

*'As regards the conditions in section 3(2) of the 2006 Act, the ED states:*

***"4. The provision does not remove any necessary protection:***

*The provision does not remove any necessary protections, for either the radio industry or public.*

***"5. The provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise:***

*The provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise."*

*I fear that these simple assertions do not go far enough. We would expect the Department to offer some additional comments to show why these assertions are made.'*

Regarding the point that the provision does not remove any necessary protections, it is important to recognise that Ofcom has extensive obligations set out in the Communications Act 2003 and other legislation to protect consumers. For example, Ofcom has a statutory obligation to monitor competition and to ensure that the market is not dominated by a small number of players to the detriment of consumers and media plurality. This measure will not affect or change Ofcom's role in any way. In addition, there are protections for licence holders which are not affected by this Order. Ofcom may only deprive a person of their licence in particular circumstances, or include provisions about simulcasting on digital which are in line with the Broadcasting Act 1990. These are also unaffected by the Order.

On the specific issue around preventing the exercise of rights or freedoms, we must emphasise that no person or organisation has a right to hold a radio licence, nor to own or operate a radio station. This legislation therefore would in no way restrict an individual's right or freedom on this issue as there are no reasonable rights or freedoms to restrict. Nor are the rights or freedoms of existing licence holders restricted; the requirement to simulcast was introduced as part of the previous extension. There are no new terms to be included in the analogue licences. As indicated above, as regards consumers, their listening experience will be unaffected, as Ofcom remains required to ensure that services are delivered and that news plurality is maintained.

Secondly, you also noted:

'*There seems to be a wide gap between DCMS and Value Partners (VP) on the issue of maintaining stability in the commercial radio sector, or rather the threat to such stability that Option 1 would pose. I assume that DCMS commissioned a report from VP because the Department regarded the consultancy as expert in the field. In that case, it would be helpful for the Department to set out more fully what evidence it has for disagreeing with*

*VP's recommendation – since it is disagreement on this issue which underlies the statement in the ED that "**we consider that a relicensing process could be detrimental to the listener experience: we note that responses to our consultation have highlighted a real risk that the cost and business impact to licensees of reapplying for their licences would undermine investment in content.**"'*

Our proposed Order affects those licences which were renewed under the terms of the Digital Economy Act 2010; specifically stations that have received or are able to receive a further licence renewal of 7 years, on the condition that they provide an equivalent service on DAB.

There are in total around 280 commercial radio licences, of which over 120 would not be entitled to an automatic renewal under this Order, as they do not provide an equivalent DAB service. These licences would therefore be re-advertised - i.e. licensees would have to re-compete, against other potential entrants - in an open competition, in line with the terms of the Broadcasting Act 1990 - they would not be granted a further renewal. As such, we do not consider that new entrants are excluded from the analogue commercial radio market. By way of illustration, the Greater London AM licence was recently re-advertised and Ofcom received six bids for this frequency (N.B. the licence was eventually re-awarded to the incumbent Sunrise Radio). The local commercial FM licence for Portsmouth was also recently put out to competition and attracted two bids; again, the licence was re-awarded to the incumbent. These two recent examples demonstrate that new entrants will continue to have the opportunity to access the analogue market. The Portsmouth example however, with only two bids, could suggest that interest in acquiring analogue radio licences is declining, given radio's future as a digital medium.

Furthermore, we are firmly of the opinion that DAB provides a rich platform for potential new entrants. DAB is a more efficient use of spectrum and provides far greater capacity for new stations than analogue. Ofcom recently let the second national digital radio multiplex licence which was awarded, following a competition, to the Sound Digital consortium. When launched in 2016, the new service will provide 15 new national radio stations initially, with room for further new entrants in the future.

The Value Partners' report was commissioned to consider the competition issues arising from the proposed changes and not to consider the wider impacts on consumers. We do not disagree with their basic conclusion that there would be interest from both other existing licensees and new entrants in the affected licences, but Value Partners were unable to provide quantitative evidence of the scale of the likely demand for each licence that is due to expire. Although it may be possible over time to collect more data here, it is very difficult to demonstrate conclusively that there would be significant challenge to incumbents given the options available for new stations either on digital platforms or on line. Indeed, one of the key challenges is the separation of possible expressions of interest (which Value Partners' report alluded to) from the real likelihood of that interest arising in 3-6 years' time.

Therefore, whilst we acknowledge that there is a theoretical benefit emerging from open competition highlighted by Value Partners (i.e. of a potentially greater range of stations and content), we do not consider that the value of this hypothetical benefit to listeners and industry of a small number of new services outweighs the cost and significant impact to the wider radio industry of a wholesale re-

advertisement process. It is worth noting that over 80% of listeners are satisfied with their local radio station (Attitudes to Local Radio [a summary of the findings of a quantitative survey of local radio listeners], Ofcom, July 2013). This also suggests there is little consumer benefit to be gained from a widespread re-advertising process. In any event, throughout the history of the current licensing regime, only around 10 % of re-advertised licences have been awarded to anyone but the incumbent.

We also consider that the report gives insufficient weight to the quantifiable costs to industry of re-licensing, the cost to Ofcom, plus the risk that content quality is reduced. Further detail of the costs to industry of a relicensing process can be found in our Impact Assessment, as well as the consultation responses. This Impact Assessment has been validated by the independent Regulatory Policy Committee, and I have attached their findings to the same email as this letter.[8]

**8 June 2015**

[8] We are not including the validation by the Regulatory Policy Committee in this Report.

## APPENDIX 2: 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.

For the business taken at the meeting on 17 June 2015 Members declared the following interests.

**Charities (Protection and Social Investment) Bill [HL]**

Lord Flight, Baroness Fookes, Baroness Gould of Potternewton, Lord Lisvane and Lord Moynihan

*Trustees of various charities*

**Draft Legislative Reform (Further Renewal of Radio Licences) Order 2015**

Lord Thomas of Gresford

*Daughter-in-law employed by a radio company*
*Formerly Director and Chairman of an independent radio company*

Attendance:

The meeting on the 17 June 2015 was attended by Baroness Drake, Lord Flight, Baroness Fookes, Baroness Gould of Potternewton, Lord Lisvane, Countess of Mar, Lord Moynihan, Lord Jones, Lord Thomas of Gresford and Lord Tyler.