

HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

20th Report of Session 2015–16

Housing and Planning Bill: Parts 1–5
Age of Criminal Responsibility Bill [HL]
Public Advocate Bill [HL]
**Road Traffic Act 1988 (Alcohol Limits)
(Amendment) Bill [HL]**
Trade Union Bill: Government Response
**Welfare Reform and Work Bill:
Further 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

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

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 hlddelegatedpowers@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.

Twentieth Report

HOUSING AND PLANNING BILL: PARTS 1-5

1. The Housing and Planning Bill had its second reading on 26 January. It is a wide-ranging measure which includes a number of significant delegations of power. The Department for Communities and Local Government has provided a memorandum on those powers.¹ We have so far confined our consideration of the Bill to Parts 1 to 5 which are about housing. We will report separately on the remaining Parts of the Bill.

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

2. According to clause 12(1), Part 2 of the Bill is about “rogue landlords and property agents”. This term, however, is not explained at all in the Bill. We understand it to mean persons who, following their conviction for a “banning order offence”, are banned from letting housing or from engaging in letting agency or property management work as a result of an order made by the First-tier Tribunal on the application of a local housing authority (see clause 15).
3. Persons subject to banning orders will also be banned from holding a house in multiple occupation (HMO) licence (see clause 24 and Schedule 2)) and may be placed on a database of rogue landlords and property agents (see clause 27). It would be a criminal offence to breach a banning order (see clause 20).
4. A “banning order offence” is not described on the face of the Bill. Instead clause 13(3) confers a power on the Secretary of State to specify its meaning in negative procedure regulations. Clause 13(4) would allow him to describe an offence by reference to:
 - its nature,
 - the characteristics of the offender,
 - the place where it was committed,
 - the court that passed the sentence, or
 - the sentence imposed.
5. There is *no* restriction on the type of offence that may be specified in regulations. It does not have to be one connected with the letting or management of housing, and it could even be one committed before the enactment and coming into force of the Bill.
6. The memorandum seeks to justify the delegation on the basis that it provides “flexibility in the event that it is considered necessary to amend the description of offences over time” (paragraph 21.3). It sets out the type of offences “it is envisaged” would trigger an application for a banning order.

¹ <http://www.parliament.uk/documents/lords-committees/delegated-powers/HousingandPlanningBillDelegatedPowersMemo.pdf>

These would include offences “involving fraud, drugs or sexual assault that are committed in or in relation to a property that is owned or managed by the offender”, and also “specified housing offences, which will include offences such as unlawful eviction and failing to comply with an improvement notice in relation to property conditions” (paragraph 21.5).

7. Since the types of offences are described in the memorandum, we cannot understand why the “banning order offences” are not listed on the face of the Bill, together with a delegated power to amend the list as necessary. This is especially puzzling, given that the Government have succeeded in devising a list of offences in clause 39, conviction for which could result in the First-tier Tribunal making a rent repayment order.
8. We accept that the First-tier Tribunal would be unlikely to impose a banning order under clause 15 where the offence concerned was a trivial one (see paragraph 21.5 of the memorandum). Nonetheless, the very fact that proceedings are commenced could have serious consequences for the landlord or letting agent concerned. **We consider it inappropriate that the determination of the offences that are to constitute “banning order offences” should be left entirely to the discretion of the Secretary of State and with only a modest level of Parliamentary scrutiny.**
9. **We therefore 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.**

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

10. Clause 22 would allow a local housing authority to impose a financial penalty of up to £30,000 on a person if it is satisfied that the person has committed a breach of a banning order (that is, that his or her conduct amounts to an offence under clause 20). This is an alternative to a criminal prosecution. It follows that the protections for defendants in the criminal courts would not necessarily apply, in particular the safeguard that there can be no conviction unless the case is proved beyond reasonable doubt. Indeed, it might be considered that this clause empowers an authority to act as if it were prosecutor, judge, jury and executioner!
11. 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, which contains supplementary provisions about the imposition of penalties, and provides for an appeal mechanism). As we observed in our recent report about the Immigration Bill,² a body that is required by statute to “have regard” to a code is normally, as a matter of public law, expected to follow the guidance in it, unless in particular circumstances it has cogent reasons for not doing so. The guidance under clause 22(9) is therefore likely to be highly influential when an authority determines whether to impose a financial penalty instead of bringing a prosecution, and when it decides the level of that penalty. The guidance could also deal with matters such as the appropriate standard of proof to be applied.

² 18th Report, Session 2015–16, [HL Paper 83](#), para 12.

12. Nonetheless, there is *no* Parliamentary procedure associated with the guidance, or even a requirement to lay it before Parliament. We were unpersuaded by the explanation in the memorandum for the proposed delegation and lack of Parliamentary involvement, in particular the suggestion that the guidance is “likely to be uncontroversial and may contain a level of detail that is inappropriate for legislation” (paragraphs 23.2 and 23.3).
13. In July 2015, we considered a comparable provision in the Energy Bill which requires the Oil and Gas Authority to have regard to the Secretary of State’s guidance when determining the amount of a financial penalty, and recommended that it 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.³
14. Given the nature of the power conferred on local housing authorities by clause 22(1), which would deny the accused access to adjudication by a court as to whether he or she had committed a criminal offence, we consider that the guidance provided for in subsection (9) to be of even greater significance to that provided for in the Energy Bill. **We therefore recommend that the guidance should be laid in draft before Parliament and not brought into force without an affirmative procedure resolution of each House.**

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

15. Clause 67 enables the Secretary of State, by “determination”, to impose a levy on local housing authorities who own social housing stock in respect of the estimated market value of their interest in any “high value” housing which is likely to be become vacant in a given financial year. The housing concerned has to appear in the authority’s housing revenue account, and not have been excluded by negative procedure regulations (see clause 68).
16. A determination under clause 67:
- must set out the method of calculating the payment, which may be by reference to a formula (see subsections (5) and (6)); and
 - may also provide for assumptions to be made in making a calculation, whether or not these are, or are likely to be, borne out by events (see subsections (7)).
17. So, for example, the Secretary of State could calculate the payment on the assumption that:
- 10% of the local housing authority’s stock of “high value” housing would be likely to become vacant in a particular year, or
 - prospective purchasers would not be deterred by defects in the title or in the state of repair of the premises,
- regardless of whether these assumptions are, or are even likely to be, correct.

³ 6th Report, Session 2015–16, [HL Paper 31](#), paras 10 to 15.

18. A determination could relate to:

- a particular local housing authority,
- a description of local housing authorities, or
- all local housing authorities.

So it is clearly capable of having a legislative character (see section 69(1)).

19. The Bill, however, provides for *no* Parliamentary procedure at all for determinations made by the Secretary of State, even in respect of those which relate to *all* local housing authorities. The memorandum attempts to justify this on the basis that “whilst the technical detail of the calculation will be set out in the determination, the overarching principle on which the calculation will be based is set out in ... clause 67(2)” and that “the key component of the calculation — the definition of ‘high value’ — will be set out in regulations which will be subject to further Parliamentary scrutiny”. The Department therefore does not consider it necessary “for the exercise of the determination-making power to be subject to further Parliamentary scrutiny” (paragraph 31.9).

20. We have found it impossible to extract any “overarching principle” from clause 67(2). The provision appears to be designed to allow the Secretary of State maximum leeway to determine how the levy is to be calculated, untrammelled by anything beyond the sparse words of subsection (2) which provides merely that the amount of the payment must “represent an estimate of—

- (a) the market value of the authority’s interest in any high value housing that it is likely to become vacant during the year, less
- (b) any costs or other deductions of a kind described in the determination”.

It follows that the whole substance of the calculation of the levy will be in the determination: this is not a matter of mere “technical detail” as suggested in the memorandum (paragraph 31.9).

21. The memorandum points to legislative precedents for the approach adopted in clause 67, including sections 168 to 175 of the Localism Act 2011 (see paragraphs 31.10 and 31.11). These provisions are concerned with the calculation of Government subsidies to local authorities. They appear to us be wholly different in character from a requirement on local authorities to pay over to the Secretary of State the market value of valuable assets on the basis of an estimate to be determined by him.

22. A precedent *not* mentioned in the memorandum is to be found in the Pensions Act 2004. Part 2 empowers the Pension Protection Fund to impose a levy on the pensions industry. Sections 174 to 181A contain detailed provisions about the levy. The contrast with clause 67 of this Bill is striking.

23. **In our view, it is inappropriate to delegate to the Secretary of State a power to determine the amount of the payment to be made by local housing authorities without any form of Parliamentary scrutiny, particularly in view of the paucity of detail on the face of the Bill to**

guide how the power is to be exercised. We therefore 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.**⁴

24. Deciding what housing is to be treated as “high value” is absolutely central to the operation of clause 67. This key expression is not defined in the Bill. Instead, the Secretary of State is given power to say what it means in negative procedure regulations (see clause 67(8)). Furthermore, clause 68(9) allows him to define “high value” in different ways for different areas. So, for example, a one-bedroom council flat in Westminster may fall within the definition, while a four-bedroom house in Liverpool may not.
25. The memorandum explains that defining “high value” in regulations will “provide greater flexibility over the definition than if it was included in primary legislation” (see paragraph 32.2). No doubt this is true, but it does not begin to justify the lack of detail in clause 67 to indicate when housing is to be considered as “high value”. The memorandum justifies the negative procedure on the basis that “the range of values within which it will be possible to set the definition of ‘high value’ will be limited by normal public law principles” (see paragraph 32.3). We do not regard this as being even remotely persuasive.
26. **In our view, the delegation of power in clause 67(8) to the Secretary of State to determine the meaning of “high value” is inappropriate without the inclusion on the face of the Bill of a detailed list of factors governing its exercise.**
27. **Furthermore, whether or not the Bill is amended to provide for such a list, we recommend that the affirmative procedure should apply to every exercise of that power.**

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

28. This group of clauses contains a series of powers designed to require local authority tenants in social housing on higher incomes to pay what the Explanatory Notes describe as “a fairer level of rent” (see paragraph 3).
29. Clause 78 enables the Secretary of the State to make “rent regulations” about the levels of rent that local housing authorities in England would have to charge to a “high income” tenant of social housing. Under subsection (2), the regulations could require the rent to be:
- equal to the market rate,
 - a proportion of the market rate, or

⁴ The Committee made a similar recommendation in relation to analogous powers of direction contained in Children and Families Bill in our 7th Report, Session 2013–14, [HL Paper 49](#), paras 3 and 4.

- “determined by reference to other factors” (which are not specified on the face of the Bill).
30. Under subsection (3), the regulations may provide for the rent to be different for people with different incomes or for social housing in different areas (so that, for example, a high income tenant in a council flat in Westminster may not have to pay the full market rent, while a tenant with the same income living in an identical flat in Liverpool may have to do so).
 31. It appears that the regulations are not to contain any detail about how a local housing authority is to determine the rent. Instead this is to be sub-delegated to guidance issued by the Secretary of State, to which the regulations may require local housing authorities to “have regard” and for which there will be *no* Parliamentary procedure (see subsection (4)).
 32. Clause 79 requires the Secretary of State to define the meaning of “high income” in regulations. The memorandum indicates that “the income threshold for a high income social tenant will be based on a household income of £30,000 or £40,000 in Greater London” (paragraph 38.2). However, it fails to explain why it is impractical for this detail to appear in clause 79 itself, coupled with a delegated power to amend the provision.
 33. As it stands, clause 79 permits the Secretary of State to define “high value” in almost any way he chooses. Subsection (2) offers no guiding principles to indicate how the power should be exercised. Moreover paragraph (f) of that subsection contains a further sub-delegation: the regulations can require local housing authorities to have regard to guidance when calculating or verifying a person’s income. The guidance would not be subject to *any* Parliamentary procedure.
 34. Clause 80 would allow regulations to be made empowering local authorities to require their tenants to provide information about their income. If tenants fail to comply, the regulations can require the local authority to charge them the maximum rent permissible under the regulations.
 35. Under clause 82, the regulations may (but do not have to) include provision for the purpose of ensuring that the rent reverts to its original level where, for example, a tenant ceases to have a “high income” or where a tenant who is charged the maximum rent because of a failure to provide information, subsequently provides it.
 36. Under clause 83, the regulations could confer power on local authorities to change the rent payable under a tenancy for the purpose of complying with the obligations referred to above. This could result in any pre-existing contractual or statutory entitlement of the tenant being overridden. There is a Henry VIII power in subsection (4) which allows the regulations to amend primary legislation for this purpose.
 37. Clause 84 is particularly significant. It could be viewed as a form of taxation because it enables the regulations to require local housing authorities to make payments to the Secretary of State in respect of “any estimated increase in rental income because of the regulations”. The method of calculation is to be set out in the regulations. Provision can be made for deduction of administrative costs, and for interest to be charged in the event of late payment. The memorandum gives only the barest explanation or justification

for this power; indeed it seeks to dismiss this highly important provision as “quasi-technical” (see paragraph 43). **The intended meaning of that expression wholly eludes us, and the House may wish to ask the Minister for an explanation.**

38. The Henry VIII power in clause 83(4) will be subject to the affirmative procedure. Otherwise, the negative procedure applies to regulations made under all the other powers in this group of clauses. The justification in the memorandum is that the negative procedure follows “the clear policy framework that has been set in clause 78 and the related clauses of the primary legislation” (see paragraph 37.8). We strongly disagree with the suggestion that the clauses in question offer anything like a clear enough statement of discernible policy to justify the delegation, far less the negative procedure.
39. These are important provisions which could have a significant impact on large numbers of tenants, and are bound to be burdensome on local housing authorities. They will be required to:
 - gather information,
 - increase rents,
 - deal with appeals, and
 - make payments to central Government.
40. The clauses set out only a bare framework, and the Secretary of State is given broad discretion to determine key details, particularly as to what constitutes “high income” and what rents must be charged, and how much of the increased rental revenue is to be paid over to him by local authorities.
41. All this is to be done with only a minimal level of Parliamentary scrutiny.
42. **We therefore recommend that:**
 - **the affirmative procedure should apply to the first exercise of all the powers conferred by clauses 78 to 89;**
 - **the affirmative procedure should apply to every subsequent exercise of the power to make regulations under clause 84 about payments by local authorities to the Secretary of State;**
 - **clause 79 should be amended to set out the key definition of “high income” on the face of the Bill, but with power to amend this by regulations to which the affirmative procedure should always apply;**
 - **the powers in clauses 78(4) and 79(2)(f) to sub-delegate to guidance provision concerning the determination of rent and the calculation of income should be removed from the Bill and replaced by a requirement to include such provision in the regulations, so that it may be scrutinised by Parliament.**

AGE OF CRIMINAL RESPONSIBILITY BILL [HL]

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

PUBLIC ADVOCATE BILL [HL]

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

ROAD TRAFFIC ACT 1988 (ALCOHOL LIMITS) (AMENDMENT) BILL [HL]

45. This Private Member's Bill had its Second Reading on 29 January. Clauses 1 and 2 amend certain amounts, representing maximum concentrations of alcohol in breath, blood or urine, specified in sections 8(2) and 11(2) of the Road Traffic Act 1988.

Clause 3(2) – Power to appoint commencement date

46. Clause 3 includes a power enabling the Secretary of State to appoint, by regulations, the day on which clauses 1 and 2 are to come into force. **We recommend that subsection (2) should require those regulations to be made by statutory instrument.**

TRADE UNION BILL: GOVERNMENT RESPONSE

47. We considered this Bill in our 15th Report of this Session.⁵ The Government have now responded by way of a letter from Baroness Neville-Rolfe, Parliamentary Under Secretary of State and Minister for Intellectual Property, at the Department for Business, Innovation and Skills, published at Appendix 1.

WELFARE REFORM AND WORK BILL: FURTHER GOVERNMENT RESPONSE

48. We considered this Bill in our 13th Report of this Session.⁶ The Government provided a response, published in our 19th Report.⁷ The Government have now provided a further response, by way of a letter from Rt Hon. Lord Freud, Minister of State for Welfare Reform at the Department for Work and Pensions, published at Appendix 2.

⁵ 15th Report, Session 2015–16, [HL Paper 64](#).

⁶ 13th Report, Session 2015–16, [HL Paper 56](#).

⁷ 19th Report, Session 2015–16, [HL Paper 85](#).

APPENDIX 1: TRADE UNION BILL: GOVERNMENT RESPONSE

Letter from Baroness Neville-Rolfe, Parliamentary Under Secretary of State and Minister for Intellectual Property, at the Department for Business, Innovation and Skills, to Baroness Fookes, Chairman of the Delegated Powers and Regulatory Reform Committee

The Report has focused on two delegated powers in the Trade Union Bill namely Clause 11 (union's annual return to include details of political expenditure) and Clause 12 (publication requirements in relation to facility time).

Both these powers are to be exercised in accordance with the negative resolution procedure and the Report has questioned whether this would afford sufficient Parliamentary control.

Clause 11

Clause 11 of the Bill inserts a new section 32ZB into the Trade Union and Labour Relations (Consolidation) Act 1992. This provides that where political expenditure by a trade union exceeds £2,000 in any calendar year, details of that expenditure is to be included in the union's annual return. New subsection 32ZB (2) provides that the sum of £2,000 can be substituted by a sum not less than £2,000.

This provision seeks to future-proof the requirement on trade unions and the intention is that it would be exercised in order to raise the baseline to make the requirement less onerous for unions. We have therefore said that this power should be subject to the negative procedure.

The Committee has however noted that using the word "substitute" means that whilst the amount which is substituted cannot be less than £2,000, the baseline amount could be increased to £3,000 or to £4,000 and then decreased again to £2,000. The Committee has said that it will draw this to the attention of the House so that the House can consider whether the negative procedure provides a sufficient level of Parliamentary scrutiny.

We are grateful for the scrutiny the Delegated Powers and Regulatory Reform Committee brings to this provision and we will give further consideration to the Committee's observations on this delegated power.

Clause 12 – facility time – “relevant public sector employer”

Clause 12 inserts new section 172A(9). This is a power to provide that a person or body, that is not a public authority, but has functions of a public nature and is funded wholly or partly from public funds, is to be treated as a public authority and is therefore subject to the publication requirements on the use of facility time.

The Committee comments that the delegated powers memorandum does not explain the kinds of organisation that the Government proposes to treat as a public authority under subsection (9). Further, the Committee understands that the provision could be used to bring within scope a private company which is funded wholly or partly by a local authority, and potentially charities.

In the light of what it regards as uncertainty, the Committee is therefore of the view that the affirmative resolution should apply to any regulations made under new section 172A(9).

We would like to reassure the Committee that it has never been the Government's intention to capture private or voluntary sector providers of contracted out public services or charitable organisations. We specifically stated that these bodies would not be included during the Committee stage in the House of Commons⁸. There may however be other employers whose functions are of a public nature and are publicly funded - and who ought therefore properly to be included - but which may not be considered as public authorities - or where the boundaries of whether they are or not is unclear. An example of this could be an academy trust or free school. That is the reason for including new section 172A(9).

I intend to make a statement during the Lords Committee debate on Clause 12 and will make clear which employers it applies to in the public sector. I will also be making draft regulations available during the passage of the Bill.

Once again, we are grateful for the comments made. We will also give full consideration to the Committee's observations on Clause 12.

2 February 2016

⁸ See col 346, the Public Bill Committee on the Trade Union Bill, 8th Sitting, 22 October 2015 <http://www.publications.parliament.uk/pa/cm201516/cmpublic/tradeunion/151022/pm/151022s01.htm>

APPENDIX 2: WELFARE REFORM AND WORK BILL: FURTHER GOVERNMENT RESPONSE

Letter from Rt Hon. Lord Freud, Minister of State for Welfare Reform at the Department for Work and Pensions, to Baroness Fookes, Chairman to the Delegated Powers and Regulatory Reform Committee

I am writing to follow up on my letter of 18 January on the points raised in the Delegated Powers and Regulatory Reform Committee's report on the Welfare Reform and Work Bill (thirteenth report of session 2015–16) with regards to the reduction in social housing rents.

The Government will table amendments in response to the Committee's recommendations in order:

- To restrict the clause 26 power to make alternative provision for excepted cases;
- To address the drafting inconsistency as regards 'formula rent' between paragraph 1(4)(a) and the related power in paragraph 1(7) and to clarify how the latter provision may be used;
- To address the Committee's concerns regarding inappropriate sub-delegation of the powers to define formula rent and affordable rent;
- To address the Committee's concerns regarding delegation of enforcement of regulations under clause 26 and of Part 1 of Schedule 2.

Where the Government believes that changes are not required, its justification is set out below.

Clause 26 – power to impose social housing rents control

The Committee expressed the view that clause 22, read with clause 26, gives too wide a power to prescribe alternate provision for excepted cases by way of negative procedure regulations. It recommended that, even if the power is amended to include a framework as to the type of rent control provisions and enforcement mechanisms that can be made in regulations, the affirmative procedure should be used. The Government notes the Committee's concerns and has brought forward amendments which restrict the use of the power (which may not be used to increase the annual reduction specified on the face of the Bill nor, in a case where an exception from Part 1 of Schedule 2 applies, to impose a maximum rent limit that is less than the social rent rate).

The Government has also brought forward amendments to address the Committee's concerns regarding the delegation of power to enforce regulations under s.26, as set out below, together with amendments which provide a greater clarity regarding how the power may be used to apply modifications of the provisions in excepted cases.

The Government acknowledges that the power as drafted remains a wide one, but considers it to be necessarily so. This will allow, as intended, the flexibility to put in place provisions which:

- soften the effect on providers of the rent restriction regime, where appropriate, for example to:

- modify the application of Schedule 2 in relation to supported housing;
- make provision for the application of the provisions in a case where a provider temporarily reduces a tenant's rent, to avoid requiring a double reduction; and,
- put in place protection for tenants where appropriate, for example to:
 - provide for how the rent of a tenant who was, but is no longer, a high income social tenant should be determined;
 - restrict rent increases in certain excepted cases to align with the expectations of current policy.

With clause 22, the clause 26 power to make alternative provision for excepted cases also enables the development of new housing rental products during 4 years of rent restrictions. This would be helpful as otherwise the only principles on which rent can be set would be those in paragraphs 1-3 of Schedule 2, whereas a new rent product, assuming for the sake of argument one might be developed, might have a completely different way of calculating rent. In that case the Government would look to except such cases and put new rules in place for rent setting in affected cases.

These are important flexibilities to ensure the proportionate application of the Welfare Reform and Work Bill provision so that it is aligned, so far as is possible, with the rent policy that currently applies. Using the affirmative procedure for regulations will make implementing measures intended to assist providers more burdensome and curtail the Government's ability to act quickly to modify the effect of provisions were it required. Given that these measures are broadly intended to be of assistance to providers and tenants, that the detailed measures themselves are technocratic in nature and that Parliament will have had the opportunity to debate both this amendment and the measures involved during the passage of the Bill, the Government's view is therefore that the negative resolution procedure provides the appropriate degree of parliamentary scrutiny for these measures.

'Formula rent' – drafting inconsistency

I am grateful to the Committee for drawing attention to the inconsistency between the drafting of paragraph 1(4)(a) and the power in paragraph 1(7) relating to the definition of formula rate / rent. The Government intends to bring forward an amendment to address the drafting inconsistency. It will further provide that the power to define includes, in particular, the power to prescribe that it is a rent set in accordance with a method specified in regulations.

'Formula rent' – delegation of the power to define

The Committee further expressed the view that delegation of the power to define 'formula rent' is inappropriate in absence of a proper justification and includes unacceptable sub-delegation.

We regret that our previous memorandum did not sufficiently address the justification and I am pleased to set this out more fully here.

Formula rent is a principle that is well understood in the social housing sector and a key element of the current rent policy regime. The Government has been very clear that the reference 'rate of formula rent' used as the basis of the calculation of

rate of social rent for the new rent setting purposes will effectively mirror provision regarding the rate of formula rent that applied via the rent standard and guidance on the reference date. This is with the qualification that the flexibility to, in certain circumstances, deviate from formula rent under the previous policy will no longer be available.

Regulations will be used to set out the method for determining formula rent for the reference date. Putting such detailed technical provision and tables of related data in primary legislation would be unusual and overly complicate the legislation. The policy intention has been subject to Parliamentary scrutiny, therefore I remain of the view that it is appropriate to set out in secondary legislation the definition of formula rent by reference to the method used for determining it, cross-referring, where appropriate, to the historic guidance documents that applied at the reference date.

The Government does not accept that cross-reference to historic documents is inappropriate sub-delegation, but it accepts that the drafting did not make the intentions in this regard clear. It will therefore accept the Committee's recommendations in part by tabling an amendment to confine cross-reference to the relevant standard and guidance applicable on the reference date.

Affordable Rent – delegation of power to define

The Committee also expressed the view that delegation of the power to define 'affordable rent' in paragraph 4(5) of Schedule 2 is inappropriate in absence of a proper justification and that the proposed sub-delegation is unacceptable.

We regret that our previous memorandum did not sufficiently address the justification and I am pleased to set this out more fully here.

'Affordable rent housing' and 'affordable rent' are principles that are well understood in the social housing sector and a key element of the current rent policy regime to which, as the Government has made clear, the application of paragraph(3) is intended to be aligned. It is therefore necessary to ensure that the definition of affordable rent is aligned with the terms of affordable housing agreements which have not always been consistently expressed and, in addition, have often cross-referred to historic regulatory standards and guidance which have evolved over time.

We consider that such complexities of definition are more suitably addressed in secondary legislation, which may be adjusted if necessary to ensure that all intended affordable housing agreements are captured.

There is also a need to accommodate future agreements and definitions of affordable rent as well as existing ones and secondary legislation provides the flexibility to do this. For these reasons the Government considers that it is appropriate to put the definition in secondary legislation.

However, we accept the Committee's criticism of sub-delegation and are bringing forward amendments to address this point. Instead of defining affordable rent by cross referring to the guidance and standards applicable we will specify that it is rent set in accordance to methods specified or of a description specified in regulations.

Provisions on enforcement

On the provisions in paragraph 7 of Schedule 2 concerning the enforcement of the rent controls contained in that schedule, the Committee expressed concern that this provision inappropriately delegates enforcement of regulations under s.26 and the requirements of part 1 of Schedule 2. The Government accepts the Committee's recommendation that this be addressed by an amendment to the face of the Bill and we are accordingly bringing forward amendments to effect this and ensure consistent treatment of enforcement of clause 21 and of clause 26 regulations and of Part 1 of Schedule 2.

21 January 2016

APPENDIX 3: 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 3 February 2016 Members declared no interests.

Attendance:

The meeting on the 3 February 2016 was attended by Baroness Drake, Baroness Fookes, Baroness Gould of Potternewton, Lord Jones, Lord Lisvane, Lord Moynihan, Lord Thomas of Gresford and Lord Tyler.