

HOUSE OF LORDS

Delegated Powers and Regulatory Reform  
Committee

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21st Report of Session 2015–16

**Armed Forces Bill**  
**Housing and Planning Bill:**  
**Parts 6–9**

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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.

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

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Baroness Fookes ( <i>Chairman</i> )	Countess of Mar
Lord Flight	Lord Moynihan
Baroness Gould of Potternewton	Lord Thomas of Gresford
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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.

# Twenty First Report

## ARMED FORCES BILL

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1. This Bill had its Second Reading on 11 February. Its primary function is to continue in force the Armed Forces Act 2006 (“the 2006 Act”) which sets out the single system of service law that applies to all service personnel wherever in the world they are operating. The Bill deals with the following other matters:
  - Testing for alcohol and drugs
  - Investigation and charging of service offences
  - Suspended sentences of service detention
  - Offenders assisting investigations and prosecutions
  - The 2006 Act outside the UK
  - Repeals relating to the discharge of homosexuals
  - War pensions committees
  - Ministry of Defence fire-fighters.
2. The Ministry of Defence has provided a delegated powers memorandum.<sup>1</sup> The Bill contains relatively few delegated powers. There is only one matter which we wish to draw to the attention of the House.

### **Clauses 10 and 11 – Appeal proceedings relating to discounted sentences**

3. Clauses 10 and 11 insert two new sections into the 2006 Act, sections 304D and 304E. The two sections are linked in that they both deal with the sentences of persons who either have offered to give, or have given, assistance to the investigator or prosecutor of an offence:
  - Section 304D deals with the situation where a person has offered to give, or has given, assistance for which no allowance was given on sentencing. In those circumstances, the Director of Service Prosecutions (DSP) may refer the case back to the Court Martial, and the court may substitute such lesser sentence as it thinks appropriate.
  - Section 304E deals with the reverse situation where a person has offered to give assistance, has received a reduced sentence and then knowingly fails to any extent to give the assistance promised. In those circumstances, the DSP may refer the case back to the Court Martial and the court may substitute a greater sentence.

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

4. Sections 304D and 304E largely replicate provisions which already exist in the civilian context and which are contained in section 74 of the Serious Organised Crime and Police Act 2005 (SOCPA).
5. Both sections 304D and 304E allow for appeals to be made to the Court Martial Appeal Court against the Court Martial's decision on sentence. The two sections do not however contain the detailed provisions governing the proceedings on an appeal. Instead they provide for these to be set out in regulations, with a power to make provision corresponding to that in Parts 2 to 4 of the Court Martial Appeals Act 1968 ("the 1968 Act"), with or without modifications. The 1968 Act contains the provisions which govern proceedings on other appeals to the Court Martial Appeal Court. There is a similar provision for appeal, and a similar delegated power, in section 74 of SOCPA.
6. The delegated powers conferred by sections 304D and 304E are subject to the negative procedure. We accept that it is reasonably common for provisions governing proceedings before a court to be set out in subordinate legislation subject to the negative procedure. To this extent we consider the delegated powers to be unexceptionable. However, there is one respect in which we consider the delegations to be inappropriate.
7. The 1968 Act makes provision about the recovery of costs and expenses in appeal proceedings. These provisions were amended by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the amended provisions include delegated powers which allow modifications to be made. These powers are subject to the affirmative procedure.
8. Since regulations under sections 340D and 340E are able to incorporate provisions of the 1968 Act with modifications, it would be possible for the regulations to make modifications to the costs provisions of the 1968 Act which, if made under that Act, would require the affirmative procedure. This issue does not arise in the civilian context because the provisions which can be applied under section 74 of SOCPA do not contain the same provisions on costs.
9. **We take the view that as a matter of principle the powers conferred by sections 304D and 304E should be limited so that they do not allow the making of modifications which under the 1968 Act would require the affirmative procedure.**

## HOUSING AND PLANNING BILL: PARTS 6–9

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10. We reported on Parts 1 to 5 of the Housing and Planning Bill in our 20th Report of this Session.<sup>2</sup> This report concerns a number of delegated powers in the remaining parts of the Bill, which are about planning and compulsory purchase.
11. The memorandum prepared by the Department for Communities and Local Government is a long and detailed document,<sup>3</sup> but we found it to be variable in quality. While some sections are well drafted, others are much less so. Too often, the document seeks to justify a delegation of wide powers simply on the basis that Ministers need “flexibility” but without properly explaining why this is considered appropriate. There is also an overuse of formulaic expressions. There are about 40 references to powers being “technical” or even “quasi-technical” in nature, although in many cases we found that this was not an accurate description of the provisions concerned. We were particularly unimpressed with paragraph 98.2 which informs us the power delegated by clause 183(5) is needed as a result of a “likely shifting matrix of considerations”!

### Clause 136 – Permission in principle for development of land

12. This clause amends the Town and Country Planning Act 1990 (“the 1990 Act”) and provides for a new planning consent model called “permission in principle” to be granted for development in England. According to the memorandum, it is designed “to separate the consideration of ‘in principle’ issues (such as land use, location and quantum of development) from the consideration of the technical details of the development within the planning process” (paragraph 73.1).
13. Clause 136(2) inserts a new section 59A into the 1990 Act. Under subsection (1) of the new section, the Secretary of State would have power by “development order”:
  - himself to grant permission in principle for the development of land that is allocated in a “qualifying document” described in the order; or
  - to provide for a local authority to grant permission in principle for development of a “prescribed description”.

The negative procedure would apply to the exercise of the power.

14. The term “qualifying document” is defined in new section 59A(2). Essentially it means a plan, register or other document “made, maintained or adopted” by a local planning authority, of a description to be prescribed in the development order, and indicating that the land in question is allocated for development for the purposes of new section 59A.
15. The memorandum records that the power<sup>4</sup> to prescribe the description of a “qualifying document” needs to be “flexible enough to enable the Secretary of State to prescribe new documents in the future” but that he “has made

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<sup>2</sup> 20th Report, Session 2015–16, [HL Paper 90](#).

<sup>3</sup> <http://www.parliament.uk/documents/lords-committees/delegated-powers/HousingandPlanningBill/DelegatedPowersMemo.pdf>

<sup>4</sup> The power is conferred by paragraph (b) of the definition of “qualifying document” in new section 59A(2).

an undertaking to Parliament that a document will only be prescribed as a ‘qualifying document’ if it is made or adopted by a public body and he is satisfied that the document has gone through a robust process before being made or adopted” (paragraph 73.14).

16. However the memorandum does not explain why this undertaking, *which would not bind future Governments*, has not been set out on the face of the Bill. We consider that it should be, bearing in mind the importance of the term “qualifying document” for the purposes of new section 59A.
17. **We recommend that the proposed new section 59A be amended to spell out the consultation and other processes that will have to be undertaken before a document is prescribed as a “qualifying document”.**
18. The memorandum goes on to say that the Government’s intention is that the power to grant permission in principle will be limited to “housing-led development”, although in the future it could be extended to other developments, and that the power “needs to be flexible to achieve this” (paragraph 73.15).
19. The Government’s policy for the introduction of the concept of planning permission in principle is to facilitate the building of new housing. It is a new and innovative policy which has the potential to be controversial, particularly in a case where permission is to be granted by the Secretary of State. Its extension to other types of development could be even more controversial. No reason at all has been given to justify its application to other types of development.
20. **We consider that the delegation of power in new section 59A is inappropriate to the extent that it would allow for permission in principle to be given in respect of developments which are not housing-led.**

#### Clause 137 – Local authorities to keep registers of land

21. Clause 137 confers powers on the Secretary of State which would enable him, by negative procedure regulations, to require local planning authorities to keep a register of particular types of land. The memorandum explains that this is “primarily to implement the manifesto commitment to require local authorities to have a register of brownfield sites suitable for housing” (paragraph 75.2).
22. The memorandum also explains that the term “brownfield land” is “commonly used for land which has previously been developed” and that “various types of land are excluded from the definition, for example land in built up areas such as private residential gardens, parks, recreational grounds and allotments” (paragraph 75.3).<sup>5</sup>
23. However, the *specific* policy intention referred to in the memorandum is not reflected in new section 14A of the 1990 Act, to be inserted by clause 137. The powers are drafted in very wide terms so that the regulations could require

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<sup>5</sup> A more extensive definition appears in paragraph 13 of the Department’s consultation document “Building more homes on brownfield sites” published in January 2015: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/398745/Brownfield\\_Consultation\\_Paper.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/398745/Brownfield_Consultation_Paper.pdf)

local planning authorities to prepare, maintain and publish a register of land of *any* prescribed description or which satisfies *any* prescribed criteria.

24. New section 14A does not define or refer to “brownfield land” at all.
25. The memorandum does not explain satisfactorily why the power is drafted so broadly. It could potentially impose very significant burdens on local authorities.
26. **We consider that the power contained in the proposed new section 14A(1) is inappropriate unless it is recast so that it could be exercised only in relation to “brownfield land” suitable for housing, and with the term defined in the new section.**
27. New section 14A(7) requires local authorities to “have regard” to guidance issued by the Secretary of State for the purposes of the regulations (as well as to the development plan and national policies and advice) in carrying out their functions under the section. This gives the Secretary of State further leeway to elaborate on the new registration duties. There would be *no* Parliamentary scrutiny of the exercise of this sub-delegated power.
28. The memorandum explains that the intention behind the guidance “would be to assist local planning authorities by presenting examples and suggesting ways in which [they] could exercise these new functions” (paragraph 77.3). However, as we observed in our report about Parts 1 to 5 of the Bill, a body that is required to “have regard” to guidance may, as a matter of public law, depart from it only where it has cogent reasons for doing so.<sup>6</sup> The proposed guidance under new section 14A(7) would therefore go much further than simply assisting local planning authorities. The memorandum does not set out compelling reasons as to why the provision to be made in guidance could not appear in the regulations so that it may be scrutinised by Parliament.
29. **Accordingly, we recommend that the power in new section 14A(7)(c) to sub-delegate provision into guidance should be removed from the Bill, and that such provision be included in regulations.**

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

30. Section 303 of the 1990 Act enables the Secretary of State to set fees for planning applications by affirmative procedure regulations.
31. The memorandum explains that the Government “might move to a situation in which, instead of having one set of nationally prescribed planning fees for all local authorities in England, there could be two or even more national systems of planning fees in operation” (paragraph 82.3).
32. However, regulations made under section 303 which allowed for certain local planning authorities to set different levels of planning fees from other authorities might be treated as a hybrid instrument in the House of Lords. If so, persons with sufficient standing who wished to object to the regulations could lodge petitions with the House which would then be considered by a select committee, before which the petitioners could appear or be represented.

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6 20th Report, Session 2015–16, [HL Paper 90](#), para 11.

33. Clause 141 amends section 303 of the 1990 Act to provide that such regulations would not be treated as hybrid. The memorandum justifies this on the basis that “the hybrid procedure is unnecessary because petitions are unlikely to be made against a relevant fees instrument”. One of the reasons given for this assertion is that “in return for any change in fees, we would want to ensure that applicants for planning permission in affected areas receive an improved service from their local planning authority which may well be attractive to the application (for example a shorter determination time)” (paragraph 82.6).
34. **However, the memorandum does not say how the Government intend to achieve this intention to bring about an improved service. The House may wish to seek an explanation from the Minister.**
35. It is usual for the Committee to draw a de-hybridisation clause to the attention of the House so that it can satisfy itself that any interests that would normally be protected by the hybrid instruments procedure are afforded protection by some other means—for example by consultation while the policy is still at a formative stage. In this case, there is no requirement in section 303 of the 1990 Act for consultation or any other procedures for protecting private interests. **Accordingly, as well as drawing the de-hybridisation clause to the attention of the House, we draw attention to the fact that no provision is made to amend section 303 so as to require consultation or other means for protecting interests which would otherwise be safeguarded by the hybrid instrument procedure.**
36. Appendix 1 to this Report contains some further information about the hybrid instrument procedure which may be of value to the House. We may wish to reflect further on the general issue of de-hybridisation clauses, and proffer specific advice to the House in due course.

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

37. Clauses 145 to 148 allow the Secretary of State to establish pilot schemes under which planning applications will be processed, but not decided, by “designated persons” instead of by local planning authorities for the period of the pilot. The powers conferred are drafted very widely and would be exercised by negative procedure regulations. They would permit the Secretary of State to provide in particular for:
- which local authorities are to be required to take part in the pilot;
  - the identity of the designated person who is to carry out the processing;
  - the length of the pilot—which could in fact last for many years, at the discretion of the Secretary of State, and would be extendable by subsequent regulations;
  - the procedures to be followed by the designated person, the local authority and the persons making planning applications—which could be significantly different from those which have to be followed under current planning law;
  - the fees payable to designated persons;

- the sharing of information between the local authority and the designated person.
38. These are important provisions which, in effect, empower the Secretary of State to require local authorities chosen by him to privatise the processing of planning applications for a trial period. The impact on local authorities and their staff, and on those submitting planning applications, could be considerable.
39. It is striking that the clauses contain no requirement on the Secretary of State either to consult before making pilot regulations, or to publish a report on the outcome of pilot schemes.
40. The memorandum justifies the power to create pilot schemes in the following terms:
- “It is important for the Secretary of State to have the flexibility to adjust the procedures, from time to time and where appropriate, to respond to particular problems in the processing of planning applications. In order to set up a pilot scheme to test the value of allowing persons other than planning authorities to process (but not decide) planning applications, it is necessary for the Secretary of State to provide detailed rules explaining each step in the processing of such applications. It is likely that different procedures may be trialled in different pilots, to see what works best. It is therefore essential that the Secretary of State has the flexibility to describe, by secondary legislation, the procedures to be followed in the processing of planning applications in pilot areas” (paragraph 88.3).
41. We do not consider that this adequately justifies the breadth of the powers conferred by the clauses, in particular the almost unfettered discretion conferred on the Secretary of State:
- to select the local authorities who will be required to participate in the pilot;
  - to choose the “designated person” who will undertake the processing of planning applications;
  - to determine the length and purpose of the pilot.
42. We are also not persuaded by the justification in the memorandum for the negative procedure, in particular the suggestion that the regulations will be “technical, detailed and procedural” and that the Secretary of State will need “to react quickly to amend the procedures for pilots” (paragraph 88.4). We do not consider that the negative procedure affords an appropriate level of Parliamentary scrutiny for such widely drafted and important powers.
43. Powers to provide in regulations for pilot schemes are not novel in themselves. For instance, section 29 of the Jobseekers Act 1995 enables the Secretary of State to test out certain types of benefit changes with a view to “ascertaining whether their provisions will, or will be likely to, encourage persons to obtain or remain in work or will, or will be likely to, make it more likely that persons will obtain or remain in work or be able to do so”. The maximum life of those pilot regulations is three years which is specified in section 29 itself, and the affirmative procedure always applies.

44. **We consider that safeguards and limitations of a similar type to those contained in section 29 should be included in clauses 145 to 148. We therefore recommend that those clauses should be amended:**
- **to set out the intended purpose of the pilot regulations;**
  - **to specify that the affirmative procedure should apply to every exercise of the powers conferred by the clauses;**
  - **to require the Secretary of State to consult local authorities and other interested parties before making regulations;**
  - **to provide on the face of the Bill for the maximum duration of pilot regulations.**
45. **We also consider it inappropriate for the Bill to confer these highly significant powers on the Secretary of State without also requiring him to prepare and lay before Parliament a report on the outcome and effectiveness of each pilot scheme.**

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

46. Sections 134 and 135 of the Local Government, Planning and Land Act 1980 (“the 1980 Act”) enable the Secretary of State by order to designate an area of land as an urban development area (UDA), and to establish an urban development corporation (UDC) for the purpose of regenerating that area. The Act confers, or allows for the conferral, of important functions on a UDC in relation to the UDA.
47. Until March 2015, an order under section 134 or 135 had to be made by statutory instrument and laid before Parliament, but it had no effect until approved by resolution of each House. (So the order attracts what has become known as a “made affirmative” procedure.) To date, more than 20 orders have been made under each section to designate land as UDAs and to establish UDCs for them, and the orders have in this House been regarded as hybrid instruments. This is because such orders require an affirmative procedure, and the Chairman of Committees, in relation to each of them, reported his opinion that, apart from the provisions of the Act authorising them to be made, they make provision that would require to be enacted by a private or hybrid bill.<sup>7</sup>
48. The hybrid instruments procedure allows anyone whose private interests are directly and specially affected by the order to petition the House against it (see Appendix 1 to this Report). Many of the orders made under sections 134 and 135 have given rise to petitions.
49. Sections 46 and 47 of the Deregulation Act 2015 (“the 2015 Act”) temporarily amended sections 134 and 135 in relation to UDA and UDC orders made in a period of 12 months up to 31 March 2016. The amendments not only imposed on the Secretary of State a duty to consult various categories of interested party before making an order, but also provided that an order would be subject only to the negative procedure. The consequence of reducing the level of Parliamentary control from affirmative to negative

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<sup>7</sup> See House of Lords Private Business [Standing Order 216](#).

procedure was that an order under section 134 or 135 would no longer be liable to be regarded as a hybrid instrument in this House.

50. Sections 46 and 47 of the 2015 Act were passed to enable the Government to make negative procedure instruments establishing the Ebbsfleet UDA and UDC just before the end of the last Parliament, without the hybrid procedure applying in this House. The effect of clauses 149 and 150 of this Bill would be to remove the sunset provision provided for in the 2015 Act and make the amendments to the 1980 Act permanent (in relation to land in England).
51. The memorandum asserts that it not necessary for orders under sections 134 and 135 of the 1980 Act to be subject to the hybrid or affirmative procedure “provided that the use of those powers in subject to a statutory duty to consult” (paragraph 89.5). It also contains a number of further justifications for removing those procedures, including the following:
  - “the requirement for public consultation will be more accessible to local communities than the petitioning arrangements” (paragraph 89.6); and
  - “the hybrid process gives rise to considerable uncertainty about how long the decision-making process will take [which] is unhelpful to communities and business” (paragraph 89.12).
52. No indication is given, however, that the Secretary of State intends to make a further UDA and UDC order in the near future and, if he does, whether any undue delay or inconvenience would be caused if the hybrid procedure were to continue to apply.
53. Moreover, while we welcome the inclusion in sections 134 and 135 of the 1980 Act of an express consultation requirement which enables individuals to participate in a consultation exercise conducted by the Department when the policy is still at a formative stage, we are not convinced that this justifies the abolition of the right of persons whose private interests are directly and specially affected to petition the House of Lords after an order has been made.
54. **We accordingly invite the House to consider whether the Government have sufficiently justified the proposed removal of the right to petition; and whether a consultation exercise carried out by the Government while the policy is still being considered is an adequate substitute.**
55. The memorandum does not explain why the 1980 Act could not continue to require the “made affirmative” procedure for UDA and UDC orders but with a provision, similar to that contained in clause 141 of this Bill (see paragraphs 30 to 36 above), specifying that they are to proceed as if they were not hybrid.
56. We recommended against the change to the negative procedure when we considered the clauses in the Bill for the 2015 Act making the temporary amendment to the 1980 Act. In our report, we observed:
 

“... the Government appear to regard the negative procedure as affording no effective mechanism for Parliamentary control whatever: their explanation proceeds on the footing that certainty would be achieved, presumably because of an expectation that there would be no

Parliamentary intervention; and we regard it as very significant that there is no mention of even the possibility that either House might resolve that an order should be annulled.”<sup>8</sup>

57. **The creation of a UDA and UDC could have important consequences for the area concerned which, in our view, ought to be debated in each House. We do not consider that the negative procedure affords an appropriate level of Parliamentary scrutiny. We therefore recommend that an affirmative procedure should continue to apply in relation to an order establishing a UDA and UDC. This applies regardless of whether persons affected should have the right to petition the House of Lords under the hybrid instrument procedure.**

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

58. Clause 184 requires a “relevant public authority” to prepare and publish a report containing details of “surplus land”.
59. “Surplus land” is defined in subsection (2), but the clause contains no definition of “relevant public authority”. Instead subsection (4) confers a power on the Secretary of State to specify its meaning by negative procedure regulations. The justification in the memorandum is that “the delegated power is required to reflect the changing nature of public authorities that should be covered by this duty” and to provide “flexibility to respond to changes in the functions of individual public authorities or types of authority, so as to ensure flexibility to ensure accountability regarding how they deal with their assets” (paragraph 100.2).
60. The power in clause 184(4) is also highly relevant for the purposes of clause 185(2). This contains provisions empowering the Secretary of State, in circumstances to be specified in negative procedure regulations, to direct a “relevant public authority” to take steps for the disposal of the body’s freehold or leasehold interest in any land or any lesser interest in the land. (See new subsection (A1) to be inserted into section 98 of the 1980 Act.)
61. Although it does not do so expressly, clause 185 in effect supersedes the existing, more limited provisions of section 98 of the 1980 Act. This allows the Secretary of State to direct a body to whom Part 10 of that Act applies to dispose of land where the following conditions are satisfied:
- (a) that the body or a subsidiary of the body owns a freehold or leasehold interest in the land concerned;
  - (b) that the land is situated in an area in relation to which Part 10 of the Act is in operation; and
  - (c) that in the opinion of the Secretary of State the land is not being used or not being sufficiently used for the purposes of the performance of the body’s functions or of carrying on their undertaking. (See section 95 of the 1980 Act.)
62. Part 10 of the 1980 Act applies to the bodies listed in Schedule 16, which are mainly local authorities. The Secretary of State has power to add to the

list, or to amend or delete an existing entry, by negative procedure order, after first notifying the authority that he proposes to make an order and allowing it a period of 42 days to make representations (see section 93). The memorandum does not say why that procedural requirement is not carried forward in relation to the power to prescribe “public authorities” for the purpose of the proposed new section 98(A1).

63. In summary, the effect of clauses 184 and 185 taken together is to enable the Secretary of State to require “public authorities”, of a description to be specified by him in negative procedure regulations, to prepare and publish a report containing details of surplus land that they own. He can then direct them to dispose of the land in circumstances he chooses to specify in regulations under the new section 98(A1) of the 1980 Act. He has *no* duty to consult before making the regulations setting out which public authorities the provisions apply to or the circumstances in which they can be required to dispose of land.
64. The memorandum fails more generally to explain why:
- the existing powers in the 1980 Act are considered inadequate;
  - “the relevant public authorities” (clause 184(4)) and “the specified circumstances” (clause 185(2)) are not to be in primary legislation as is the case with the 1980 Act.
65. **We therefore consider that—**
- **in the absence of a proper explanation of those matters from the Government, the delegations of power are inappropriate;**
  - **even if an explanation were provided and the House found the delegations to be justified, the affirmative procedure should apply to regulations defining “relevant public authorities” and the “specified circumstances”;**
  - **the power to prescribe “public authorities” should be subject to the same consultation requirements as apply to the existing provisions of the 1980 Act.**

## APPENDIX 1: HYBRID INSTRUMENTS

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### House of Lords Private Business Standing Order 216

1. Standing Order 216 provides that where, in the opinion of the Chairman of Committees, an affirmative instrument is such that, apart from the provisions of the Act authorising it to be made, it would require to be enacted by a private<sup>9</sup> or hybrid<sup>10</sup> bill, he must report his opinion to the House. A special procedure then applies which allows anyone whose private interests are directly and specially affected by the order to petition against it within 14 days of the Lord Chairman making his report. There is no equivalent procedure in the Commons.
2. An example of a hybrid instrument might be one (perhaps made under the Legislative and Regulatory Reform Act 2006) which confers specific, additional powers on a named local authority. Assuming that the affirmative procedure applies, it is very likely that Standing Order 216 would be engaged. The Hybrid Instruments Committee then determines whether the matters complained of in any petition lodged ought to be considered by a select committee of the House of Lords.
3. If a select committee is established, petitioners may appear or be represented before it. The committee would report to the House with recommendations about whether the instrument should be allowed to proceed.
4. The last time that Standing Order 216 was invoked was in 2011 in connection with an affirmative procedure Legislative Reform Order which allowed for part of Epping Forest to be reserved for police use during the Olympics. Some petitions were lodged against the Order, which were considered by the Hybrid Instruments Committee. However, that Committee decided against referring the Order to a select committee.
5. No instrument has been referred to a select committee since the West Northamptonshire Development Corporation (Area and Constitution) Order 2004. The Hybrid Instruments Committee reported that the petitions lodged against that Order ought to be considered by a select committee. The select committee heard evidence and submissions on behalf of petitioners and the Government. It then reported to the House recommending that the Order be allowed to proceed, subject to the Government giving undertakings in connection with the constitution of the new urban development corporation.

### De-hybridisation clauses

6. A number of Government Bills in recent years have included provisions—known as “de-hybridising” clauses—specifying that affirmative instruments are to proceed as if they were not hybrid. It is usual, in these circumstances, for the Committee to draw a clause of this type to the attention of the House so that it can satisfy itself that any interests that would normally be afforded

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9 A private Bill is proposed legislation of a special kind for conferring particular powers or benefits on any person or body of persons—including individuals, local authorities, companies or corporations—in excess of or in conflict with the general law. A private Bill is promoted by the individual or body, rather than by the Government or a member of either House.

10 A hybrid Bill is one promoted by the Government but which affects a particular private interest in a manner different from the private interest of other persons or bodies in the same category or class.

protection by the hybrid instruments procedure are afforded appropriate protection by some other means (such as by statutory consultation).<sup>11</sup>

### Historical Background

7. A recognisable form of the present hybrid instruments procedure dates back to 1925, when (on the recommendation of the Select Committee on Legislation by Special Orders 1924–25) the House of Lords established a Special Orders Committee (“SOC”) to consider affirmative instruments. At that time, significant numbers of orders being made under Acts were in the nature of private legislation (many concerned the supply of water, electricity and gas). Part of the SOC’s remit was to decide whether provision in an order would, if enacted by bill, require a private or hybrid bill—and, if so, to consider petitions from those whose private interests were affected, with a view to reporting on whether those interests ought to be considered by a select committee set up for the purpose.
8. There was no equivalent committee in the House of Commons until their Statutory Instruments Committee was set up in the 1940s, but it had no specific jurisdiction over orders that specially affected private rights. The separate arrangements in each House continued until 1972, when the Joint Committee on Statutory Instruments (“JCSI”) was established. At that point, the SOC’s special jurisdiction over “private instruments” passed to the Chairman of Committees and the new Hybrid Instruments Committee. The SOC’s jurisdiction over other instruments was absorbed into the JCSI’s remit.

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11 See, for example, [11th Report](#), Session 2014–15, HL Paper 79, para 17, on clause 70(3) of the Small Business, Enterprise and Employment Bill.

## APPENDIX 2: MEMBERS AND DECLARATIONS OF INTERESTS

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Committee Members' registered interests may be examined in the online Register of Lords' Interests at [www.publications.parliament.uk/pa/ld/ldreg.htm](http://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 10 February 2016 Members declared the following interests:

### **Armed Forces Bill**

Baroness Fookes

*President, War Widows Association of Great Britain*

### **Attendance:**

The meeting on the 10 February 2016 was attended by Baroness Drake, Lord Flight, Baroness Fookes, Baroness Gould of Potternewton, Lord Jones, Lord Lisvane, Lord Moynihan, Lord Thomas of Gresford and Lord Tyler.