Delegated Powers and Regulatory Reform Committee

16th Report of Session 2016–17

Digital Economy Bill: Government Amendments

Technical and Further Education Bill

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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 (Chairman) Lord Moynihan
Lord Flight             Lord Thomas of Gresford
Baroness Gould of Potternewton Lord Thurlow
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.

Publications
The Committee’s reports are published by Order of the House in hard copy and on the internet at www.parliament.uk/hldprrcpublications.

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

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

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

DIGITAL ECONOMY BILL: GOVERNMENT AMENDMENTS

1. We reported on this Bill in our 11th and 13th Reports of this Session. Amendments containing delegated powers have been tabled for Committee Stage on 8 February. They are explained in a memorandum submitted by the Department for Culture, Media and Sport. We wish to draw one of the amendments to the attention of the House.

New clause inserted after clause 79—On-demand programme services: accessibility for people with disabilities

2. Amendment 225 inserts new sections 368BC, 368BD and 368CA into the Communications Act 2003 (“the 2003 Act”).

3. It has been tabled by Lord Borwick with the support of the Government. It would confer a power on the Secretary of State, by negative procedure regulations, to impose requirements on providers of “on-demand programme services”. This is for the purpose of ensuring that the services are accessible to people with visual or hearing disabilities.

4. A service is an “on-demand programme service” if—

   • “its principal purpose is the provision of programmes the form and content of which are comparable to the form and content of programmes normally included in television programme services;
   • access to it is on-demand;
   • there is a person who has editorial responsibility for it;
   • it is made available by that person for use by members of the public; and
   • that person is under the jurisdiction of the United Kingdom for the purposes of the Audiovisual Media Services Directive.”

(See the existing section 368A of the 2003 Act.)

5. The memorandum gives no examples of particular services that fall within this definition, but we assume that BBC iPlayer, ITV Hub and All 4 would do so. Those services enable viewers to access, via the internet, at any time of their choosing programmes they missed when first broadcast on TV.

6. The regulation-making power is skeletal in nature, conferring a broad discretion on the Secretary of State. There is a general description of three types of requirement that could be included by the regulations, namely that services have to be:

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1 Delegated Powers and Regulatory Reform Committee, (11th and 13th Reports, Session 2016–17, HL Papers 89 and 95)

7. However the Secretary of State could choose not to include one or more of these requirements, and indeed to specify other requirements not listed at all.

The regulator

8. The regulations will be enforced by the “appropriate regulatory authority”, which will have power under the new clause:

- to issue enforcement notifications;  
- to impose a financial penalty for a contravention of the regulations (which could be very substantial: the maximum penalty is one which does not exceed 5% of the provider’s “applicable qualifying revenue” or £250,000, whichever is the greater);  
- to apply to the Court for an injunction or for “any other appropriate relief or remedy”;  
- to publish a code giving guidance as to the steps to be taken by providers of on-demand programme services to meet the requirements of the regulations.

9. We are surprised that the new clause does not name the regulator, given that it will have the extensive enforcement powers described above–and will be influential in framing the regulations.

10. It is necessary to look at existing provisions of the 2003 Act to discover that the “appropriate regulatory authority” is either OFCOM or a body designated by OFCOM. The memorandum contains only one passing (and ambiguous) reference to this where it mentions that “detailed consultation with the regulator (Ofcom)” will be required about the regulations.

11. We recommend that “the appropriate regulatory authority” should be named in the new clause–unless the Government provide cogent reasons as to why this is impracticable, in which case there should be a power to name the regulator in the regulations.

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3 See new section 368BC(2), inserted by subsection (2) of the new clause.
4 See new section 368BD(1).
5 See the existing section 368J of the 2003 Act.
6 See new section 368BD(6).
7 See new section 368CA, inserted by subsection (4) of the new clause.
8 See the existing section 368B of the 2003 Act. According to OFCOM's website, they have designated the Advertising Standards Authority as “the appropriate regulatory authority” for the purposes of enforcing existing provisions in Part 4A of the 2003 Act about the content of on-demand programme services.
9 Para 8.
Parliamentary procedure

12. The memorandum explains that the Government consider it appropriate for the requirements to be set out in regulations rather than on the face of the Bill “because of the complexity of the intended requirements and the variety of the services to which they will apply”;\(^\text{10}\) and that the negative procedure should apply because this is “the general position under the Communications Act 2003” and “in light of [the regulations’] detailed and technical content”.\(^\text{11}\)

13. We anticipate that the regulations made under the new clause are likely to attract significant interest in both Houses. They will impose important new statutory duties on providers of on-demand programme services. The appropriate regulatory authority, who is not named in the clause, will have power to impose substantial financial penalties for a contravention of the regulations. It follows, in our view, that it is inaccurate for the memorandum to suggest that the regulations will be merely “detailed and technical” and that the negative procedure is adequate for that reason.

14. **We therefore recommend that the affirmative procedure should apply at least to the first regulations made under the new clause.**

Consultation

15. The Secretary of State will have a duty to consult the appropriate regulatory authority before making the regulations.\(^\text{12}\) There is, however, no requirement to consult anyone else. This is even though the memorandum recognises that “engagement with providers of on-demand programme services and other stakeholders will be required to ensure that the requirements to be specified are appropriate, ambitious and yet not unduly burdensome”.\(^\text{13}\)

16. We assume that this reference to “stakeholders” is intended to include organisations representing persons with sight or hearing disabilities and which have expertise about their needs.

17. **We recommend that the Secretary of State should have a duty, before making the regulations, to consult:**

- on-demand programme service providers; and
- other stakeholders, in particular organisations representing persons with sight and hearing disabilities.

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\(^\text{10}\) Para 7.  
\(^\text{11}\) Para 9.  
\(^\text{12}\) See new section 368BC(3), inserted by subsection (2) of the new clause.  
\(^\text{13}\) Para 8.
This Bill was brought from the House of Commons on 10 January. It extends the remit of the Institute for Apprenticeships (“IfA”) to cover classroom-based technical education and introduces an insolvency regime for further education and sixth form colleges. A thorough memorandum from the Department for Education, marred only by minor errors, explains the 24 delegated powers. Of these, nearly half are existing powers extended to cover the wider remit of the IfA. We wish to draw one delegation to the attention of the House.

Clause 40—Power to make consequential provision

Clause 40 allows the Secretary of State to make consequential provision, including the repeal or amendment of any Act of Parliament from the beginning of time to the end of this Session. Where such Henry VIII powers are justified, we expect them to be made by the affirmative procedure save in exceptional circumstances. The Department has indeed made the power in clause 40 to repeal or amend Acts subject to the affirmative procedure.

Clause 40 does not mention non-textual modifications of Acts. By contrast, clauses 5 and 6 of the Bill expressly require regulations modifying Acts to be made by the affirmative procedure. Clause 5 allows well-established insolvency procedures under the Insolvency Act to be applied, with modifications or omissions, to FE Colleges and 6th Form Colleges.

We have previously expressed concern about provisions which require the affirmative procedure only for repeals and amendments of primary legislation, and which allow non-textual modifications to be made by the negative procedure. Non-textual modifications are capable of being no less significant than textual amendments. Accordingly, it seems to us that in principle the same level of Parliamentary scrutiny should apply to textual amendments and non-textual modifications.

We welcome the fact that modifications under clauses 5 and 6 must be made by the affirmative procedure. This accords with our long-standing view that textual amendments and non-textual modifications of Acts should both be subject to the affirmative procedure.

If the power to make textual amendments under clause 40 includes the lesser power to modify non-textually, we regard it as unacceptable that the Department can pick and choose the affirmative or the negative procedure depending on the type of non-textual modification.

We recommend that the affirmative procedure under clause 40 be used for consequential provision that not only repeals or amends but also modifies primary legislation. If the Department considers that some modifications of primary legislation only require the negative procedure, those particular cases should be set out on the face of the Bill. Otherwise, the general principle remains that modifications of primary legislation should be subject to the affirmative procedure.

APPENDIX 1: MEMBERS AND DECLARATIONS OF INTERESTS

Committee Members’ registered interests may be examined in the online Register of Lords’ Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the House of Lords Record Office.

For the business taken at the meeting on 1 February 2017 Members declared no interests.

Attendance

The meeting on the 1 February 2017 was attended by Baroness Drake, Baroness Fookes, Baroness Gould of Potternewton, Lord Jones, Lord Lisvane, Lord Moynihan, Lord Thomas of Gresford and Lord Tyler.