HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

18th Report of Session 2016–17

European Union (Notification of Withdrawal) Bill

Digital Economy Bill: Government Response

Neighbourhood Planning Bill: Government Response

Technical and Further Education Bill: Government Response

Ordered to be printed 22 February 2017 and published 23 February 2017

Published by the Authority of the House of Lords

HL Paper 118

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

Eighteenth Report

EUROPEAN UNION (NOTIFICATION OF WITHDRAWAL) BILL

1. There is nothing in this Bill which we would wish to draw to the attention of the House. Although the Bill confers a power on the Prime Minister to notify the European Council, under Article 50(2) of the Treaty on European Union, of the United Kingdom's intention to withdraw from the EU, this is not the conferral on the Prime Minister of a power to legislate. The Bill authorises the Prime Minister to act lawfully; it does not confer on her a power to make law.

DIGITAL ECONOMY BILL: GOVERNMENT RESPONSE

2. We considered this Bill in our 11th,[1] 13th[2] and 16th[3] Reports of this Session. The Government have now responded by way of a letter from Lord Ashton of Hyde, Parliamentary Under Secretary of State at the Department for Culture, Media and Sport, printed at Appendix 1.

NEIGHBOURHOOD PLANNING BILL: GOVERNMENT RESPONSE

3. We considered this Bill in our 15th Report of this Session.[4] The Government have now responded by way of a letter from Gavin Barwell MP, Minister of State for Housing, Planning and Minister for London at the Department for Communities and Local Government, printed at Appendix 2.

TECHNICAL AND FURTHER EDUCATION BILL: GOVERNMENT RESPONSE

4. We considered this Bill in our 16th Report of this Session.[5] The Government have now responded by way of a letter from Lord Nash, Parliamentary Under Secretary of State for the School System at the Department for Education, printed at Appendix 3.

1 Delegated Powers and Regulatory Reform Committee, (11th Report, Session 2016-17, HL Paper 89)
2 Delegated Powers and Regulatory Reform Committee, (13th Report, Session 2016-17, HL Paper 95)
3 Delegated Powers and Regulatory Reform Committee, (16th Report, Session 2016-17, HL Paper 107)
4 Delegated Powers and Regulatory Reform Committee, (15th Report, Session 2016-17, HL Paper 104)
5 Delegated Powers and Regulatory Reform Committee, (16th Report, Session 2016-17, HL Paper 107)

APPENDIX 1: DIGITAL ECONOMY BILL: GOVERNMENT RESPONSE

Letter from Lord Ashton of Hyde, Parliamentary Under Secretary of State at the Department for Culture, Media and Sport, to Baroness Fookes, Chairman to the Delegated Powers and Regulatory Reform Committee

I am grateful for the detailed reports we have received from the committee on the Digital Economy Bill. The government has given careful consideration to your recommendations and our response is enclosed.

The first day of the Bill's report stage will be on 22 February and will cover parts 1, 2 and 4 of the Bill. All but one of your committee's recommendations relate to parts 3, 5 and 6 of the Bill which will be covered at report stage on a further date yet to be announced. Our enclosed response sets out our intentions to table amendments, but today we are only tabling amendments required for the first day of report. We will table all further amendments as soon as possible and the Bill team will keep your committee's clerk informed so that there is time to adequately consider them.

Finally, I would like to draw your attention to the government's amendment tabled today on e-book lending which fulfills a commitment in the government's manifesto and has cross party support. It will extend the Public Lending Right so that it includes remote loans of e-books and audio-books. This will ensure that authors continue to be supported in the future as the way we borrow books in the digital world changes. The Public Lending Right Act 1979 provides that the Public Lending Right is determined in accordance with a scheme prepared by the Secretary of State, the amendment therefore affects the scope of this existing delegated power. I have supplied your committee with a supplementary memorandum.

Digital Economy Bill – response to the reports of the Delegated Powers and Regulatory Reform Committee

This document is the government's response to the recommendations of the Delegated Powers and Regulatory Reform Committee on the Digital Economy Bill as given in their 11th report of session 2016-17 published on 22 December 2016, their 13th report of session 2016-17 published on 19 January 2017, and their 16th report of session 2016-17 published on 2 February 2017.

Clause numbers in this document refer to the Digital Economy Bill as amended in Committee [HL Bill 102].

Clause 6 - power to make consequential provision in connection with the electronic communications code

This clause contains a power for the Secretary of State to make consequential amendments in connection with the electronic communications code by regulations. The Committee recommended that the Secretary of State should be required to consult with Devolved Administrations when amending legislation they have passed.

There is already an established commitment to consultation with the Devolved Administrations as set out in the Memorandum of Understanding and relevant concordats between the administrations, and so putting a consultation requirement on the face of the Bill is unnecessary and undermines the settled arrangements that have worked well to date. In practice the vast majority of consequential provision of this sort is relatively minor.

It should also be noted that the devolved legislatures in Scotland and Wales can make minor or consequential modifications to Acts of the UK Parliament so far is necessary to give effect to the purpose of the provisions in their Acts (see sections 42 and 43 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, sections 108 and 109 of the Burial and Cremation (Scotland) Act 2016, section 186 of the Regulation and Inspection of Social Care (Wales) Act 2016 and section 255 of the Renting Homes (Wales) Act 2016). These do not include any statutory consultation requirement or any specific role for the UK Parliament in the passing of such provision.

The devolution settlement in Northern Ireland is different to that in Wales and Scotland in that there are three levels of devolution rather than two (transferred, reserved and excepted). However, the general commitment to consultation described above applies equally to all three settlements, including the Northern Ireland settlement.

Clause 17(1) - power to designate age-verification regulator

The Committee recommended that the regulator be identified on the face of the Bill. The government has identified the regulator for some purposes but has still not done so for others. It is intended that the British Board of Film Classification ("BBFC") will make decisions as to whether a website is compliant with the age verification requirement, will be able to notify payment service providers and ancillary service providers under clause 22 and direct internet service providers under clause 23, as appropriate. However, it is not intended that the BBFC will be the designated regulator to issue financial penalties. The government accepts, however, that the identity of the regulator may merit additional scrutiny and will table amendments to adopt the affirmative procedure for the first exercise of the power in relation to any regulatory function. Thereafter the procedure would revert to negative.

Clause 17(4) - appeal arrangements

This clause states that the Secretary of State must be satisfied that the regulator will have arrangements for appeals in place before designation of the regulator. The Committee recommended instead that a statutory right of appeal should be on the face of the Bill.

The BBFC already has an appeals process for distributors of video works who are dissatisfied with the classification of their work. This involves reconsideration by the BBFC and/or an appeal to an independent authority, which in relation to video works is to the BBFC's Video Appeals Committee. This is a non statutory scheme which is effective and the government expects a similar scheme to be operated in respect of the regulatory scheme in the Bill. The government does not believe that a statutory right of appeal is necessary.

The government accepts, however, that the appeal must be considered by someone independent from the original decision maker and will table appropriate amendments to require the Secretary of State to be satisfied that the appeal will

be independent before designating the regulator. The government will also table amendments such that on laying the proposed designation under clause 18(1) the Secretary of State should accompany that designation with information about the proposed regulator's arrangements for appeals. Additionally, the Secretary of State may issue guidance to the regulator on this matter as detailed below.

Clauses 15(3), 21(9) and 22(7) - the regulator's guidance

The Committee raised a number of concerns over the scope for the regulator to produce guidance which could define terms, and whether certain elements of the guidance would better be placed on the face of the Bill or whether the guidance should be subject to Parliamentary oversight.

In relation to the power of the regulator to issue guidance on the interpretation of clause 15(1) the Committee recommended that the term "commercial basis" and the circumstances in which material is to be treated as "not normally accessible" to under 18s should be spelt out on the face of the Bill. The government's concern is that to further define the term "commercial basis" risks allowing pornographers to find ways of creating websites that avoided the definition. However, the government has carefully considered the Committee's recommendation, and is proposing to amend the Bill to make provision in regulations as to the meaning of "commercial basis". These will be made by the Secretary of State and will be subject to the affirmative procedure in the first instance followed by the negative procedure for any subsequent regulations.

The Committee had more general concerns about the regulator's ability to specify important matters in guidance, and where a website failed to follow this guidance, enforcement action could follow. The manner in which age verification technology operates will be fluid given the pace of technological change. The government's view is that the regulator should remain responsible for the production of guidance about the types of arrangements for making pornographic material available that it treats as complying with being "not normally accessible" to persons under the age of 18, but agrees that parliamentary oversight is necessary. The government will table amendments so that that the guidance must be laid before Parliament subject to the affirmative procedure for first exercise of the power and the negative procedure thereafter.

The Committee recommended that the regulator's guidelines on financial penalties should be laid before Parliament subject to the affirmative, then the negative procedure. The Bill currently requires the regulator to publish guidelines, mirroring equivalent Ofcom guidelines on which it is based. The government considers the Committee's proposal to be unnecessary, but will table amendments to require the guidance to be laid before Parliament, without any procedural requirement.

The Committee recommended that the definition of the term "ancillary service provider" should be on the face of the Bill or be set by regulations subject to Parliamentary oversight rather than left to the regulator's guidance. Ancillary service providers are not required by the legislation to act, they will only be *notified* of non-compliant sites. We therefore consider clause 22 in relation to ancillary service providers to be fundamentally different from other areas of the legislation such as clause 23 which relates only to internet service providers (who are required to act under clause 23). Further, the enabling and facilitation of making pornographic material available can be by a wide range of constantly evolving technologies. Defining these terms on the face of the Bill is not appropriate. The

government, however, will table amendments such that guidance must be made on these points, that the guidance must be approved by the Secretary of State and must be laid before Parliament subject to the procedural requirements proposed by the Committee (affirmative procedure in the first instance followed by the negative procedure for subsequent guidance).

We are planning to underpin these changes with the introduction of a clause which will give the Secretary of State Power to publish guidance, which the regulator must have regard to, as to how the its exercises its functions, including the guidance it produces. We intend to publish draft guidance before Report Stage to assist Parliament and in understanding how the regulation of online pornography is intended to operate. The final guidance from the Secretary of State will be laid before Parliament.

Clauses 31(2), 44(4) and 52(5) - power to define "specified person" for purpose of public service delivery, debt owed to the public sector and fraud against the public sector

The Bill provides powers for the Secretary of State to specify the persons who may disclose and receive information under chapters 1, 3 and 4 of Part 5 of the Bill. The Committee recommended that the list of persons should appear on the face of the Bill and the power to add persons to the list by regulations should be limited to only add persons engaged in the provision of the types of public service specified in the Bill (public service delivery), those which have difficulty in recovering debt, by reference to particular criteria in the Bill (debt owed to the public sector) and those taking action in connection with fraud against a public authority, again by reference to particular criteria in the Bill (fraud against the public sector).

The government will table amendments to specify the list of persons on the face of the Bill for these powers. In chapter 1, the list of persons will be narrowed from the list in the draft regulations. Specified persons will only be permitted to share information for the purposes of an objective which has been expressly specified as applicable to that person, rather than any specified objective. In chapter 3, additional criteria will be specified in the Bill relating to improving the recovery and management of debt by an authority. In chapter 4, additional criteria will be added to the Bill relating to sharing information which could improve the ability of a public authority which is assessed as being at risk of fraud to identify or reduce that risk.

Clauses 31(3); 44(5) and 52(6) - persons providing services to a public authority

The Committee recommended that the power to prescribe as a "specified person" should not extend to a person "providing services to a public authority" because this would include charities and commercial organisations. The government apologises for not explaining this in the memorandum to the Committee.

Bodies that will be defined as "public authorities" do not always directly deliver public services. The ability to use external partners and sub-contractors is essential to improving efficiency and obtaining value for money for taxpayers. In these situations, public authorities are likely to need to access data from external delivery partners and sub-contractors or to provide them with information so that they can fulfil their duties. These organisations will be required to handle information to the same standards as public authorities, including compliance with the codes of practice and the Data Protection Act.

The government understands that there are concerns that personal data, when accessed by private sector organisations, could be used for commercial advantage.

That is why we sought views on whether to include private sector/third sector organisations in our Better Use of Data consultation. There were eighty-two responses to this question of which the majority of respondents were supportive of the proposals as long as appropriate strict controls are in place to safeguard citizens' data against misuse. The Bill allows information to only be shared for the specific objectives listed and any specified persons found to be in breach of this, including external delivery partners and sub-contractors, will be subject to the same criminal sanctions.

Clause 31(6)- power to specify objectives of data sharing for public service delivery

The Committee recommended that the power in clause 31(6) be tightened so that it only becomes possible to specify closely delineated objectives. The government wishes to ensure the power in the Bill would allow for the specification of objectives such as that set out in regulation 3(2) of the draft regulations (identifying those who face multiple disadvantages) but will seek to ensure that all objectives are drafted as narrowly as is consistent with achieving the purpose of the objective. To further ensure that suitable objectives are set, the government intends to table amendments to insert a third condition on the use of the power to specify an objective. The additional condition will require the specified objective to support the delivery of a specified public authority's functions, which will include administration, monitoring or enforcement of the delivery of the function. This will require a national authority to apply its mind to the issue of whether any proposed objective supports the delivery of an identifiable function.

Clause 32(4) - disclosure of information to gas and electricity suppliers

The Committee recommended that the power to amend the list of fuel poverty schemes and persons with whom data can be shared should be narrowed to reflect the policy objectives set out in the memorandum submitted to the Committee. The government accepts this recommendation and will be tabling appropriate amendments.

Since the Committee reported on this part of the Bill, the government has amended the Bill to insert similar data sharing provision to address the take-up of water poverty schemes. The government inserted these additions without powers to keep the legislation up to date as consideration was still being given to the Committee's recommendations. The government will now table amendments so that equivalent powers to those in clause 32, narrowed as described above for the fuel poverty provisions, will be applied to the provisions to share information with water and sewerage companies.

Clauses 39, 42 (in new section 19AC), 48, 56, 66, 73 - codes of practice and statement of principles

Key protections to ensure safe and secure data sharing are set out in the codes of practice. The Committee recommended that the first codes of practice and the UK Statistics Authority's statement of principles should be laid before Parliament in draft, and not brought into force until they have been approved under the affirmative procedure. While normally the government does not believe codes of practice require parliamentary oversight, the government agrees that because these codes comprise such important safeguards and because public authorities would be acting unlawfully by failing to have regard to them, the government will table appropriate amendments to meet the recommendations. Subsequent revisions to the codes will be laid before Parliament under the draft negative procedure.

Clauses 40(3), 50(3), 58(3) - power to make consequential provision

The Committee views the Henry VIII power taken in the above clauses to have been taken "just in case" and recommended that they should be removed. During the passage of the Bill the government has considered the Bill further in the light of the Committee's recommendation and concluded that these powers are no longer required. The government will table appropriate amendments to remove them from the Bill.

Clauses 49(5), 57(5) - power to amend or repeal Chapters 3 and 4 of Part 5 following review

The Committee recommended that the powers to amend or repeal the debt or fraud clauses ought to be narrowed. These provisions are new ways to manage debt and prevent fraud and will be initially subject to carefully controlled pilots. After 3 years there will be a review of how the powers have operated and the Minister may amend or repeal the powers to reflect the outcome of that review. The government believes that the use of these powers is an open and transparent process with adequate parliamentary oversight. The government will, however, table amendments to the Bill to narrow the powers to ensure the power to amend after a review can only be used to improve or make more effective the operation of the debt and fraud powers, and to ensure that the Minister cannot broaden the powers conferred by Chapter 3 and 4 respectively or remove any safeguards from the face of the primary legislation.

Clause 85 - on-demand programme services: accessibility for people with disabilities

The Committee made three further recommendations on the new measure inserted into the Bill through the government supported amendment tabled by Lord Borwick on the accessibility of on-demand programme services.

First, the Committee recommended that the affirmative procedure should be used instead of the negative procedure for at least the first regulations made under the clause. The government agrees that the regulations will impose new statutory duties and that the regulator will have the power to impose substantial financial penalties for a contravention. The government will table appropriate amendments to implement the Committee's recommendation.

Second, the Committee recommended that the identity of the "appropriate regulatory authority" be placed on the face of the Bill. It is important to understand the legislative context and the government apologises to the Committee for not making this clearer . The Bill inserts provisions into Part 4A of the Communications Act 2003 which already makes clear, at s.368B, that Ofcom is the regulator unless it has appointed a separate body for that purpose. The drafting therefore follows the approach in Part 4A of the 2003 Act, which uses the phrase "appropriate regulatory authority" throughout, so as to provide for a situation where Ofcom has appointed a separate body as regulator. The government is happy to clarify that Ofcom has not currently appointed any other such body and accordingly is the regulator of on-demand programme services.

Third, the Committee recommended that the Bill provide a statutory duty to consult with on-demand programme service providers and organisations representing persons with sight and hearing disabilities. The government intends to table amendments to place a duty on the appropriate regulatory authority (currently Ofcom) to consult with these groups of stakeholders on the new requirements. The appropriate regulatory authority would then be under a duty to report to the Secretary of State on the outcome of its consultation along with any other matters

of importance, who would develop the regulations in light of the outcome. In situations where Ofcom has appointed another body as the appropriate regulatory authority, the Secretary of State would also be under a duty to consult Ofcom as well.

16 February 2017

APPENDIX 2: NEIGHBOURHOOD PLANNING BILL: GOVERNMENT RESPONSE

Letter from Gavin Barwell MP, Minister of State for Housing, Planning and Minister for London at the Department for Communities and Local Government, to Baroness Fookes, Chairman to the Delegated Powers and Regulatory Reform Committee

The Department thanks the Delegated Powers and Regulatory Reform Committee ("the Committee") for its diligent consideration of the Neighbourhood Planning Bill. We have carefully considered the Committee's report which was published on 27 January, and respond to each of the recommendations (identified in bold) in turn below.

Restrictions on the imposition of planning conditions

16. We consider it inappropriate for the Government to be given a power which could be used to go well beyond the stated aims of the Bill; and so we recommend that it should apply only to planning conditions for housing developments.

The Department is committed to speeding up the planning process by eliminating unreasonable costs and delays to new development caused by the inappropriate use of planning conditions. The Department has good evidence to show that the improper use of planning conditions can lead to delays in the start of development and increased costs, including the report by the Home Builders Federation of 3 January 2017 on pre-commencement conditions.

The Bill measure seeks to help to bring forward new development, including new housing, which is a key focus for the Department, without delay but there is no reason why such benefits should be limited solely to housing development. Moreover, it is often the case that new housing comes forward as part of proposals for mixed use development including housing.

The Department is strongly of the view that a grant of planning permission should not be subject to planning conditions which do not meet the well-established national policy tests[6]. Furthermore, national policy is supported by planning guidance. Both national policy and planning guidance apply when granting planning permission for all types of development, not just housing. The Government wants to see only reasonable conditions applied to every grant of planning permission. If this clause was restricted to apply to only housing development, it may create inconsistency as to planning conditions within the planning system.

The power in the Bill to limit the use of conditions can only be exercised where the Secretary of State is satisfied that such provision is appropriate for ensuring that any planning condition imposed on a grant of planning permission meets the longstanding tests (see section 100ZA(2)). We currently intend to exercise the power in subsection (1) to prohibit six conditions which do not meet these tests, as demonstrated by the draft regulations the Department published in December 2016[7]. However, if we do in the future make further regulations, their making will

6 Paragraph 206 of the National Planning Policy Framework proides that planning conditions should only be imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects.

7 Neighbourhood Planning Bill - Further information on how the Government intends to exercise the Bill's delegated powers https://www.gov.uk/government/publications/neighbourhood-planning-bill-overarching-documents

be preceded by a public consultation. This would be in addition to the consultation the Department previously held last year on the use of these powers[8].

Finally, we hope that the Government amendments tabled on 16 February which would make the exercise of the power at section 100ZA (1) subject to the affirmative procedure, and the exercise of the power at section 100ZA (6) subject to public consultation, as recommended by the Committee's report at paragraphs 22 and 30, will allay the Committee's concerns about the power.

22. We therefore recommend that the affirmative procedure should apply to the exercise of the powers conferred by new section 100ZA (1).

The Department has accepted this recommendation and on 16 February tabled Government amendments accordingly.

30. We therefore recommend that the Secretary of State should be required to consult before making regulations under subsection (6). If this amendment is made, we would regard the negative procedure as an adequate level of Parliamentary scrutiny, otherwise we recommend the affirmative procedure.

The Department accepts the recommendation that the Secretary of State should be required to consult before making regulations under subsection (6) and has tabled a Government amendment accordingly on 16 February.

Part 2 of the Bill

39. We consider that subsection (2)(a) is inappropriately wide, and should be re-drafted to reflect the narrow policy intention referred to in the DCLG document.

The Department notes the concerns of the Committee. As indicated in the policy paper[9], development consent orders under the Planning Act 2008 can modify or exclude a statutory provision which relates to any matter for which provision has been made in the order. Similar provisions also apply to orders made under the Transport and Works Act 1992 and the Harbours Act 1964. Therefore, orders made under these regimes can include provisions allowing acquiring authorities to exclude or modify any of the temporary possession provisions in the Bill.

Furthermore, in the policy paper[10], we indicated that where a scheme is authorised by an Order/Authorisation under the Pipe-lines Act 1962 or the Gas Act 1965 there is currently no corresponding power to modify or exclude statutory provisions relating to matters for which provision has been made in the Order/Authorisation. The Department, therefore, proposed to explore with stakeholders how the power in clause 26(2) (a) to exclude or modify the temporary possession measures in the Bill could be exercised so that Orders/Authorisations under the Pipe-lines Act 1962 or the Gas Act 1965 will be able to include tailored temporary possession provisions similar to those that will be available to other similar bespoke consenting regimes.

---

8 Improving the use of planning conditions - https://www.gov.uk/government/consultations/improving-the-use-of-planning-conditions

9 Neighbourhood Planning Bill - Further information on how the Government intends to exercise the Bill's delegated powers https://www.gov.uk/government/publications/neighbourhood-planning-bill-overarching-documents

10 Neighbourhood Planning Bill - Further information on how the Government intends to exercise the Bill's delegated powers https://www.gov.uk/government/publications/neighbourhood-planning-bill-overarching-documents

Having further explored this issue with stakeholders, it has become apparent that the Pipe-lines Act 1962 and the Gas Act 1965 are not the only examples of legislation which do not contain the corresponding power to modify or exclude statutory provisions relating to matters for which provision has been made in the Order/Authorisation.

The Department fully accepts the Committee's concern that the power to exclude provisions, as drafted, could be used more widely and will, therefore, be tabling a Government amendment which removes the general power to exclude or modify in clause 26(2) (a) and limits the power to exclude provisions to the Pipe-lines Act 1962, the Gas Act 1965, the Gas Act 1986 and the Electricity Act 1989.

However, the Department considers that a much more limited general power should be retained to make limited modifications that appear to be necessary or expedient for giving full effect to a provision of Chapter 1, for example in relation to the time within which notice of intended entry must be served, and will be tabling a Government amendment to clause 26(2) (b) accordingly.

The other recommendations concerning the powers in Part 2 of the Bill are accepted and the Department will table Government amendments accordingly.

Power to make consequential provision

53. We consider that the power conferred by clause 38 of this Bill is inappropriate to the extent that it allows the Secretary of State to amend Assembly legislation without at least an obligation to consult Welsh Ministers.

The Department notes these concerns. However, in regard to modifying primary or secondary legislation made by the National Assembly for Wales or the Welsh Ministers, the power reflects well-established reciprocal arrangements. These enable the Welsh Ministers to modify legislation of the UK Parliament in consequence of Assembly legislation. Two-thirds of Acts passed by the Assembly in 2015 and 2016 include a power for the Welsh Ministers to make consequential amendments to Acts of Parliament without any requirement for consultation with the UK Government.

To give an example, the Assembly has recently passed the Renting Homes (Wales) Act 2016. Section 255 of that Act includes a power for Welsh Ministers to make consequential amendments to *any enactment*. "Enactment" is defined in section 252 of the Renting Homes (Wales) Act 2016, to include Acts of Parliament and secondary legislation made under Acts of Parliament. There is no requirement to consult the UK Government on such consequential amendments, so it seems inconsistent for there to be a role for the Welsh Ministers in relation to an equivalent power in the Neighbourhood Planning Bill.

Other examples of Assembly legislation which contain a power that allows UK legislation to be amended without a requirement to consult the UK Government on such amendments include: section 59 of the Qualifications Wales Act 2015, section 198 of the Social Services and Well-being (Wales) Act 2014, section 16 of the Agricultural Sector (Wales) Act 2014, and section 58(3) of the Mobile Homes (Wales) Act 2013. Assembly legislation which have amended either Acts of Parliament or statutory instruments made by UK Ministers are: the Qualifications Wales Act 2015 (Consequential Amendments) Regulations 2016 (SI 2016/236), the Mobile Homes (Wales) Act 2013 (Consequential Provisions) Order 2016 (SI 2016/964), the Social Services and Well-being (Wales) Act 2014 (Consequential

Amendments) Regulations 2016 (SI 2016/413), the Social Services and Well-being (Wales) Act 2014 (Consequential Amendments) and Care Planning, Placement and Case Review (Miscellaneous Amendments) (Wales) Regulations 2016 (SI 2016/216), the Social Services and Well-being (Wales) Act 2014 (Consequential Amendments) (Secondary Legislation) Regulations 2016 (SI 2016/211), and the Agricultural Sector (Wales) Act 2014 (Consequential Modification) Order 2015 (SI 2015/2001).

These reciprocal arrangements allow minor and consequential amendments to be made to other enactments. This ensures that the legislative programmes of both the Welsh Government and the UK Government run smoothly. In practice, the UK Government would liaise with the Welsh Government about the use of this power as necessary.

55. We are far from convinced that it is appropriate for Ministers to be given such loosely-drawn powers. We therefore invite the House to consider whether a power to make consequential provision should be restricted by some type of objective test of necessity, rather than leaving this to the subjective judgment of the Secretary of State.

The Department notes the concerns of the Committee. The power in clause 40 could only be used to make provision which is consequential on the provisions of the Bill. It could not be used to make regulations which give effect to new policy, for example to make further substantive changes to the basis on which compensation for the compulsory purchase of land is assessed. The Government accepts that provision which is not purely consequential on this Bill would need to be made by a further Bill. If amendments to other legislation are made by regulations under the power, these will ensure that the policy which has been endorsed by Parliament can operate as envisaged.

In this connection *Craies on Legislation* (11th edition) states at paragraph 3.4.10.1 that powers to make consequential provision "will be construed strictly against the legislature". This passage goes on to state that provision made in reliance on the power "will be strictly tested to determine whether it can fairly be presented as a mere consequence (whether absolutely necessary or clearly desirable) of the principal provisions." So powers of this kind are not loosely drawn but subject to well-established limitations on their use.

Moreover, where this power is used to amend primary legislation, the affirmative procedure will apply so it will be subject to appropriate parliamentary scrutiny. The Department is not aware of the use of these powers being criticised by the courts or by the Joint Committee on Statutory Instruments (JCSI).

The power in clause 40 does not enable the Bill itself to be amended and does not apply to future Acts.

The Department has concerns that placing express limitations on the power could prevent it from being used to ensure that the provisions of the Bill work properly. A requirement that provision made under the power should be necessary would be legally uncertain as it would be unclear *for what* the amendments would have to be necessary. The risk would be that the court or the JCSI would construe the power too narrowly for the Department to be able to give effect to what was in fact a purely consequential provision designed to make the policy agreed by Parliament work properly. Additionally, as the passage from *Craies on Legislation* cited above indicates, the fact a power extends beyond amendments that are

absolutely necessary does not mean that it is unacceptably wide. There is also a category of amendments which are clearly desirable to enable the Bill to operate as intended, but which are nevertheless still strictly consequential on the Bill.

The Government will nevertheless table an amendment to restrict the power to Part 2 of the Bill where it is most likely to be needed. The existing legislation on compulsory purchase is complex and spread across a number of existing enactments, and there is a real possibility that consequential amendments will need to be made to that legislation to reflect the changes made by Part 2 of the Bill.

20 February 2017

APPENDIX 3: TECHNICAL AND FURTHER EDUCATION BILL: GOVERNMENT RESPONSE

Letter from Lord Nash, Parliamentary Under Secretary of State for the School System at the Department for Education, to Baroness Fookes, Chairman to the Delegated Powers and Regulatory Reform Committee

I am grateful to the members of the Delegated Powers and Regulatory Reform Committee (the "Committee") for their consideration of the Technical and Further Education Bill (the "Bill").

I regret that the initial memorandum did not sufficiently explain why we consider the relevant delegated power to be appropriate for this Bill. I hope this letter of response provides you with the necessary information.

Clause 40: Power to make consequential provision: non-textual modifications

Clause 40 of the Bill provides that consequential amendments which amend, revoke or repeal primary legislation must be made in regulations which are subject to the affirmative procedure, but that any other consequential amendments can be made in regulations which are subject to the negative procedure. This would therefore mean that non-textual modifications of primary legislation could be made by regulations subject to the negative procedure. The Committee has reported that in its view both textual amendments and non-textual modifications of Acts should be subject to the affirmative procedure. It points to clauses 5 and 6 of the Bill which expressly require regulations modifying Acts to be made by the affirmative procedure.

The Government supports the principle that textual changes to primary legislation by secondary legislation should generally be subject to the affirmative procedure, as is provided for by clause 40(3). As consequential changes to primary legislation are, wherever possible, made by textual amendment, the affirmative procedure will therefore be used in the vast majority of cases when consequential amendment is being made to primary legislation.

We note the Committee's recommendation that the affirmative procedure under clause 40 should be used for consequential provision that not only repeals or amends but also modifies primary legislation. However, we do not intend to table amendments to give effect to this recommendation since we consider that doing so would create legal uncertainty. This is because there may be outlying cases where it is not always clear when a provision non-textually modifies primary legislation and such modifications could be really quite indirect. Our concern is that there may be cases where it will not be clear whether a consequential amendment non-textually modifies primary legislation (for example the consequential amendment may be to secondary legislation which itself impacts on primary legislation), and requiring such a modification to be subject to the affirmative procedure would mean that there would be cases where either it wasn't clear which procedure needed to be used or, alternatively, the affirmative procedure would need to be used to put the matter beyond doubt resulting in disproportionate Parliamentary procedure.

The Committee has referred to the fact that clauses 5 and 6 of the Bill expressly require regulations modifying Acts to be made by the affirmative procedure. In our view, the nature and significance of what can be done under those powers is different, which is why it is appropriate for non-textual modifications made under those powers to be subject to 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. Adapting the whole law of insolvency to make it work for further education bodies is likely to be a significant exercise involving a number of policy judgements, so it is appropriate to have a higher degree of parliamentary scrutiny for that exercise. Moreover, clauses 5(2) and 6(1) define the scope of the enabling powers and set out a complete statement of what can be done under them (both in terms of substance and form). By contrast the scope of the regulation-making power in clause 40 is set out in subsection (1) of that section and the substance is narrow, being limited to consequential provision. In contrast, clause 40(2) is not a complete statement of all the forms that the regulations could take and it does not define the scope of the power.

We are not suggesting that all non-textual modifications of primary legislation should be subject to the negative procedure. There may be provisions which could be regarded as non-textual modifications where the negative procedure is suitable. The practice of drafting consequential provision is such that, wherever possible, non-textual modifications of primary legislation which have the same weight as a textual amendment, are avoided in favour of textual amendment. This means that a non-textual modification which is of the same "weight" as a textual amendment will be very rare and, on those very rare occasions, it will be possible for the Government to ensure that the non-textual modification is subject to the affirmative procedure by including it within an instrument which contains textual amendments and which is therefore subject to the affirmative procedure under clause 40(3).

20 February 2017

APPENDIX 4: 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 22 February 2017 Members declared no interests.

The meeting on the 22 February 2017 was attended by Baroness Drake, Lord Flight, Baroness Fookes, Lord Jones, Lord Lisvane, Lord Moynihan, Lord Thomas of Gresford, Lord Thurlow and Lord Tyler.