HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

1st Report of Session 2016–17

Bus Services Bill [HL]

Children and Social Work Bill [HL]

Cultural Property (Armed Conflicts) Bill [HL]

Intellectual Property (Unjustified Threats) Bill [HL]

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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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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.

First Report

BUS SERVICES BILL [HL]

1. The Bus Services Bill had its second reading on 8 June. Its purpose is described in the Explanatory Notes[1] as providing Local Transport Authorities (LTAs) with "a wider set of tools to use to address inefficiencies in their local bus markets and to work with commercial operators to provide better bus services for passengers". To this end, the Bill contains provisions intended to:

   - provide the powers for combined authorities with directly elected Mayors to implement bus franchising;
   - allow LTAs to enter into Advance Quality Partnership Schemes and Enhanced Partnerships with local bus operators;
   - facilitate access by passengers to information about routes, fares and timetables;
   - enhance LTAs' powers to make multi-operator ticketing schemes covering new technologies;
   - clarify legislation dealing with rail replacement bus services and a Competition and Markets Authority remedy about deregistered and varied services.

2. There are several delegated powers in the Bill. The Department for Transport has provided a memorandum about these,[2] as well as a supplementary memorandum specifically about clause 18.[3] We wish to draw the following matters to the attention of the House.

Clause 4 – power to extending access to franchising schemes to authorities other than mayoral combined authorities

3. Clause 4 inserts new sections 123A to 123X into the Transport Act 2000 to provide for bus franchising schemes in England. According to the Explanatory Notes—

   > "franchising allows local transport authorities to replace the current deregulated model of local bus services in their area with a system under which the authority specifies the services to be provided, and bus operators bid to provide those services–akin to the system currently operated by Transport for London".[4]

4. Only a mayoral combined authority will be allowed to enter into franchise schemes as soon as clause 4 comes into force.[5] Other types of local authority have to be given permission by the Secretary of State, by way of affirmative

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1 See para 1.
2 Department for Transport, *Delegated Powers Memorandum*: http://www.parliament.uk/documents/lords-committees/delegated-powers/Bus-Services-Bill-DPM.pdf
3 Department for Transport, *Supplementary Delegated Powers Memorandum*: http://www.parliament.uk/documents/lords-committees/delegated-powers/Bus-Services-Bill-Supp-DPM.pdf
4 See para 5.
5 Clause 25(2) provides for clause 4 to come into force two months after the date of Royal Assent.

regulations, before they too can be franchising authorities. This is due to the delegated power conferred by the final sentence of new section 123A(4).

5. The memorandum (paragraph 23) gives the following justification for this power:

> "We do not want to provide for these powers to be available to such authorities automatically. This is because, before deciding whether to make regulations expanding the categories of franchising authorities, the Secretary of State would like to consider whether there is interest from authorities other than Mayoral Combined Authorities in pursuing a franchising approach, and consider any work that other authorities are undertaking on whether the outcomes they wish to achieve in relation to local bus services in their area could be realised through bus franchising. The Government considers that it is important to come back to Parliament to debate the benefits and implications of potentially opening up access to franchising powers to a wider group of authorities."

6. The memorandum does not explain, however, why a mayoral combined authority, alone among the authorities listed in new section 123A(4), would be permitted to become a franchising authority upon the coming into force of clause 4.

7. We are also puzzled by the implication in the memorandum that mayoral combined authorities have expressed an interest in pursuing a franchising approach, given that there are currently no combined authorities with a mayor. Although an order has been made providing for the Greater Manchester combined authority to be a mayoral combined authority, its mayor will not be elected until May 2017.[6]

8. The types of authority listed in new section 123A(4)(b) to (f) are all in existence, and so would be capable of expressing an interest in pursuing a franchising approach; and the merits of their doing so could be debated during the passage of the Bill through Parliament.

9. We have therefore found it difficult to assess, on the basis of the explanation in the memorandum, whether it is appropriate to delegate to the Secretary of State a power to allow the authorities referred to in section 123A(4)(b) to (f) to become franchising authorities, instead of this arising immediately upon the commencement of clause 4. **The House may therefore wish to ask the Minister to provide a fuller rationale for the power in new section 123A(4).**

Clause 17 – power to require provision of information about English bus services

10. Clause 17 inserts a new section 141A into the Transport Act 2000. This would confer a wide power on the Secretary of State to make regulations, under the affirmative procedure, compelling operators of local bus services and others to provide information.

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6 See the Greater Manchester Combined Authority (Election of Mayor with Police and Crime Commissioner Functions) Order 2016 (S.I. 2016/448), made on 29 March 2016 under section 107A of the Local Democracy, Economic Development and Construction Act 2009 (inserted by section 2 of the Cities and Local Government Devolution Act 2016).

11. New section 141A(1) specifies that the power could be exercised to require:

- applicants for the registration of relevant local services, or for the variation or cancellation of a registration, to provide prescribed information in relation to the services or application;
- operators of registered relevant local services" to provide prescribed information in relation to the services;
- local transport authorities to provide prescribed information about relevant local services provided under specified types of arrangements;
- traffic commissioners to provide prescribed information that is held by them in relation to relevant local services.

12. Subsections (2) and (3) set out the type of information that could be prescribed. It could include information about routes, timetables, fares and tickets, and about the operation of services (including live information).

13. The new section does not specify the person or description of person to whom the information is to be provided. This is to be determined in the regulations: see subsection (4). No justification for this delegation is given in the memorandum.

14. Nor does new section 141A specify the purpose for which the information provided by bus operators and others under the powers is to be used. The memorandum indicates, however, that the Government wants—

> "to make route, timetable, ticket, fares and punctuality data 'open' so that anyone is free to use it subject, at most, to measures that preserve provenance of the information and integrity of the data. This will enable third parties to use the information to develop journey planning websites and applications for smartphones enabling passengers to have access to better information about bus services." (See paragraph 111.)

15. The memorandum adds—

> "Bus journey planning websites are already available. However, unlike for some other public transport modes (rail for example), information on fares and punctuality data is not always available for passengers. Where such information is available it is rarely contained in the same place for multiple operators so that passengers can make informed choices. The powers in new section 141A will enable regulations to prescribe information requirements that will apply to all operators in the deregulated bus market and to franchising authorities in England except London." (See paragraph 112.)

16. The memorandum does not explain why it is considered impractical to spell out the purpose in the clause itself.

17. The regulations could potentially impose significant burdens on operators of local services, LTAs and others to provide a mass of information, some of which may be commercially sensitive. The failure by an operator to comply with a disclosure requirement imposed by the regulations could lead to the imposition of sanctions under section 155 of the 2000 Act.

18. We were also struck by the following paragraph in the memorandum:

> "We intend to specify in regulations under this clause that information should be provided in several phases starting with timetable information, followed by fares data and then real time bus arrival information where that is available. *The precise definition of what information will be required in each case and the date by which it is to be provided will be developed through close consultation and discussion with bus operators, LTAs and potential users in parallel with the passage of the Bill.*" (See paragraph 113–emphasis added.)

19. This is a further instance of the Government including in a Bill a skeletal provision, conferring broad and ill-defined powers, because the policy has not been finalised in time for introduction, something which the Committee has deprecated on several recent occasions.[7] Be that as it may, we consider that the new section should require the Secretary of State to consult interested parties before making any regulations under new section 141A.

20. **We recognise that the affirmative procedure would apply to the regulations. Nonetheless, a higher level of scrutiny cannot justify the delegation of a power which is inappropriately wide.**

21. **We therefore recommend that new section 141A be amended to specify on the face of the Bill:**

- **the purpose for which the information can be used;**
- **the persons or description of persons to whom the information is to be disclosed;**
- **a duty on the Secretary of State to consult before making regulations.**

Clause 18 – variation or cancellation of registration: power to compel the provision of service information

22. Clause 18 inserts a new section 6C into the Transport Act 1985. This would enable the Secretary of State, by negative procedure regulations, to require a bus operator in England, who wishes to vary or cancel the registration of a service, to provide usage information to the LTA at the request of that authority within a prescribed period.

23. The proposed new power appears substantially to duplicate existing provisions in section 6(9)(k) of the 1985 Act which enables the regulations to be made:

> "for requiring the operator or prospective operator of a registered service to give, to such persons and at such times as may be prescribed, such information as may be prescribed with respect to the service, or proposed service, or any proposal to vary or cancel the registration of the service".

7 See, for example, our 28th Report, Session 2015–16, HL Paper 134, para 9 (concerning the Housing and Planning Bill).

24. As the memorandum[8] did not make clear why new section 6C is needed in light of the existing provisions of section 6(9)(k), we asked the Department for Transport for further information. This is given in a supplementary memorandum[9] which sets out that the policy intention behind new section 6C is "to enable local transport authorities to:

    (a) obtain information about revenue and patronage of a cancelled or varied service, where a reduction in the provision of the commercial service might reasonably be expected to give rise to the local authority issuing a tender for a supported service;

    (b) disclose this information to potential bidders for subsequent tenders, to prevent incumbent operators of commercial services having an unfair information advantage when tendering for newly supported services."

25. The supplementary memorandum goes on to explain that the Department and Parliamentary Counsel were not confident that the existing section 6(9)(k) would enable regulations to specify—

    - that the operator of a varied or cancelled service had to provide such historic information as may be requested;
    - that the procedure through which information is to be provided by the operator to the local authority included a pre-notification period;
    - that a local authority would be able to require information under certain conditions;
    - that failure to comply with the regulations would result in the application for variation or revocation not being accepted;
    - that any breach of the regulations was dealt with by way of a civil penalty under the Transport Act 2000 rather than as a criminal offence.

26. **In view of the further explanation and justification in the supplementary memorandum, we consider that neither the proposed delegation of power in new section 6C, nor the negative procedure, is inappropriate. It is disappointing, however, that the original memorandum failed to set out a proper rationale for the proposed new power or to refer to an existing power which appeared to cover much the same ground.**

Clause 22 – power to "otherwise modify" primary legislation

27. Clause 22(1) allows the Secretary of State by regulations to make consequential provision. This includes a power to "amend, repeal, revoke *or otherwise modify*" an Act passed before or in the same session as the one in which the Bill is passed: see subsection (2). Regulations under clause 22(1) are subject to the negative procedure, unless they amend or repeal any provision of primary legislation in which case the affirmative procedure applies: see subsections (4) and (5).

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8 See paras 117 to 120.

9 Department for Transport, *Supplementary Delegated Powers Memorandum*: http://www.parliament.uk/documents/lords-committees/delegated-powers/Bus-Services-Bill-Supp-DPM.pdf

28. We have expressed concern in some very recent reports about provisions in Bills which allow regulations to make consequential amendments by amending, repealing *or otherwise modifying* a provision of primary legislation, but only require the affirmative procedure where the regulations *amend or repeal* a provision of primary legislation.[10]

29. The implications of this distinction can be illustrated by the following example. Clause 13 confers a right of appeal to the Upper Tribunal, which is constituted under the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") against a decision of a traffic commissioner under clause 12 to cancel the registration of a local bus service. Clause 22 would allow a Minister to make regulations in consequence of that provision, including ones which amend or "otherwise modify" the 2007 Act itself. They would be affirmative procedure if direct textual amendments were made to the 2007 Act. However, if the regulations were drafted to say that the 2007 Act applied to appeals to the Upper Tribunal under clause 13 as if certain specified provisions were left out, they would attract only the negative procedure as the Act would be "otherwise modified" rather than amended. The effect in law however would be the same: it would still be a Henry VIII provision.

30. We are discouraged to find that the memorandum[11] fails to mention the "otherwise modify" provision, and indeed gives no indication that the Department are even aware of our reports on this topic.

31. **We remain firmly of the view that:**

- **a Bill should not as a matter of routine confer Henry VIII powers;**
- **where a Henry VIII power is included in a Bill, it must be fully explained and justified in the delegated powers memorandum;**[12]
- **the affirmative procedure should apply to the exercise of a Henry VIII provision–even if it is dressed up as a power "to otherwise modify" an Act–save in very exceptional circumstances which again must be convincingly justified in the memorandum.**

10 See, for example, our 9th Report, Session 2015–16, HL Paper 42, paras 17 to 21 (concerning the Enterprise Bill) and our 15th Report, Session 2015–16, HL Paper 64, paras 10 to 13 (concerning the Scotland Bill).

11 See paras 131 to 133.

12 See our Special Report on the *Quality of Delegated Powers Memorandum*, 7th Report, Session 2014–15, HL Paper 39, Appendix 4, para 35.

CHILDREN AND SOCIAL WORK BILL [HL]

32. This Bill had its Second Reading on 14 June. It has two substantive Parts:

- Part 1 is concerned with the provision of support for looked after children, and previously looked after children, in England and Wales. It also deals with the establishment of a new body, the Child Safeguarding Practice Review Panel, which will be responsible for the review of serious child safeguarding cases in England which are complex or raise issues of national importance.

- Part 2 makes provision for the establishment of a new regulatory regime for the social work profession in England.

33. The Department for Education has provided a memorandum on the delegated powers in the Bill[13]. We wish to draw the following matters to the attention of the House.

Clause 12 – functions of the child safeguarding practice review panel

34. Clause 11 provides for the establishment of the Child Safeguarding Practice Review Panel ("the Panel"), and clause 12 sets out the Panel's functions. Both clauses work by inserting new sections into the Children Act 2004: section 16A deals with the arrangements for the establishment of the Panel, and section 16B sets out its functions.

35. The functions of the Panel are:

(a) to identify serious child safeguarding cases in England which raise complex issues or issues of national importance, and

(b) where they consider it appropriate, to arrange for those cases to be reviewed.

36. The Panel is required to carry out those functions "in accordance with arrangements made by the Secretary of State" (section 16B(1)). Subsection (6) sets out a non-exhaustive list of the matters which the Secretary of State may include in the arrangements, such as:

- the criteria to be taken into account by the Panel in deciding whether serious child safeguarding cases raise issues that are complex or of national importance;

- who is to be eligible for appointment as a reviewer;

- the procedure for a review; and

- the form and content of the report of a review and the timing of its publication.

37. We consider that the delegation to the Secretary of State of the power to determine such arrangements constitutes the delegation of a legislative power. The functions of the Panel under section 16B are expressed in very general terms. The arrangements made by the Secretary of State will determine more precisely how those functions are to be exercised, and will

13 Department for Education, *Delegated Powers Memorandum*: http://www.parliament.uk/documents/lords-committees/delegated-powers/Children-and-Social-Work-Bill-DPM.pdf

accordingly play a significant role in shaping what the Panel is required to do and how it is required to do it. **For these reasons, we consider that the arrangements made by the Secretary of State under section 16B(1) should be contained in a statutory instrument subject to the affirmative procedure.**

38. The Secretary of State is further able to influence how the Panel carry out their functions by requiring the Panel to have regard to guidance (section 16B(7)). In previous reports, we have noted that a person who is required by statute to "have regard" to guidance will normally be expected to follow the guidance, unless in particular circumstances it has cogent reasons for not doing so.

39. **It is not clear how the guidance is intended to dovetail with the arrangements under subsection (1). But it seems to us that the two are likely to operate together in regulating how the Panel are required to exercise their functions. That being so, we consider that the guidance should also be subject to Parliamentary scrutiny with the negative procedure applying.**

Clause 13 – definition of "regulated setting"

40. Clause 13 inserts a new section 16C into the Children Act 2004. It requires local authorities to notify the Panel if certain kinds of events occur in their area. They are all cases where a child suffers death or serious harm, including the death of a child in a "regulated setting" (subsection 1(d)).

41. "Regulated setting" is not defined on the face of the Bill. Instead, it is to have the meaning given by the Secretary of State in regulations (section 16C(3)). On page 8 of the memorandum the Department gives examples of regulated settings which appear in legislation relating to childcare and fostering. The Department gives two reasons for leaving "regulated setting" in this case wholly to be defined in regulations. The first is the range of different settings which need to be covered, and the second is the likely need to update the definition to take account of new kinds of regulated setting which arise in the future.

42. Section 16C is the primary means for giving the Panel access to information which will allow it to identify serious safeguarding cases which raise complex issues or issues of national importance, and enable such cases to be reviewed. The definition of "regulated setting" is fundamental to determining the scope of a local authority's duty to provide information about cases falling within section 16C(1)(d). Given this context, we do not consider the Department's reasons are sufficient to justify leaving the definition wholly to regulations. While we acknowledge there may be a need to amend the definition of "regulated setting" to take account of future changes, this does not justify leaving the definition wholly to regulations, thereby giving the Secretary of State, in effect, unlimited discretion to decide what falls within it. The need to take account of future changes would still be met if the definition was set out on the face of the Bill, combined with a regulation-making power to make modifications.

43. **The delegated power conferred by section 16C(3) of the Children Act 2004 is inappropriate in providing for the definition of "regulated setting" to be set out in regulations. In our view, the definition should**

be on the face of the Bill, combined with a regulation making power which allows for modifications to take account of future changes.

44. Regulations under section 16C(3) are subject to the negative procedure. The Department's gives the following explanation for this level of scrutiny:

> "This is a narrow power which will only provide for a list of regulated settings, not raising matters of substance which the House will need to debate."

For the reasons given in paragraph 42 above, we do not accept that this can be regarded as a "narrow power" or as a power which can be described as "not raising matters of substance which the House will need to debate". **In our view, this is a wide power which is also in the nature of a Henry VIII power since it directly affects the scope of a duty which is imposed by primary legislation. As such we consider it should be subject to the affirmative procedure even if changed in accordance with the recommendation in paragraph 43 above.**

Clause 15 – power to test different ways of working as regards children's social care

45. Clause 15 establishes a mechanism for allowing local authorities to test different ways of working in relation to children's social care. It does this through a regulation-making power which will allow the Secretary of State to exempt a local authority in England from one or more statutory requirements imposed on it by children's social care legislation, or to modify the way in which such a requirement applies. "Children's social care legislation" is defined for these purposes in clause 19 and includes a broad range of legislation.

46. The power is subject to limitations and safeguards:

(a) The purpose for which the power must be exercised is set out in clause 15(1): namely, to test different ways of working with a view to achieving better outcomes under children's social care legislation or the same outcomes more efficiently.

(b) It can only be applied to a local authority if the authority asks the Secretary of State to do so.

(c) There is a three-year limit on the period for which the regulations may have effect. That period can be extended for a further period of up to three years but only if, before extending the period, the Secretary of State has laid before Parliament a report about the extent to which the regulations have achieved the statutory purpose.

(d) There is a requirement to consult which is imposed both on the local authority before asking the Secretary of State to make regulations, and on the Secretary of State before making the regulations.

As we made clear when reporting on a piloting power in the Housing and Planning Bill[14], we consider these kinds of safeguards and limitations to be necessary if the delegation of such a power is to be appropriate.

14 21st Report, Session 2015–16, HL Paper 98, paras 37 to 45.

47. In this case the scope of the power is very broad in that it will allow changes to be made to a very wide range of children's social care legislation. This reflects the purpose of the provision which is to enable local authorities to have as much flexibility as possible in coming forward with ideas for testing new ways of working. However, it means that the power will allow, in a very wide range of circumstances which cannot yet be predicted, the removal of statutory requirements which may themselves have been imposed with a view to ensuring that children are given certain protections, rights or benefits. **We consider that in order to ensure effective Parliamentary scrutiny the Secretary of State should be under a statutory duty, at the same time as laying the regulations before Parliament, to lay an explanatory statement which:**

- **set outs how the regulations are expected to achieve the statutory purpose set out in clause 15(1), and**
- **explains how the local authority will ensure that any affected children continue to receive the protections, rights or benefits conferred under the legislation which is being removed or modified.**

48. All regulations under clause 15 are subject to the affirmative procedure unless:

(a) they relate to requirements imposed by subordinate legislation, or

(b) they revoke earlier regulations made under the clause.

49. We consider it is reasonable for the negative procedure to apply where the effect of the regulations is to remove or modify a requirement imposed under subordinate legislation which is itself subject to the negative procedure. **However, it seems to us that, as a matter of principle, where subordinate legislation is subject to the affirmative procedure, any power to amend that legislation should be subject to the same level of Parliamentary scrutiny. Accordingly, where regulations under clause 15 remove or modify a requirement which is contained in subordinate legislation subject to the affirmative procedure, we consider that the same level of procedure should apply.**

50. **We also consider that regulations under clause 15 should be subject to the affirmative procedure where they remove or modify a requirement in subordinate legislation which has been included as a result of an obligation imposed by primary legislation. In our view, even though contained in subordinate legislation, such a requirement is in substance being imposed by primary legislation, and therefore the affirmative procedure should apply.**

51. Clause 15(9) provides that, if regulations under that clause would otherwise be a hybrid instrument under the standing orders of either House, it is to proceed in that House as if it were not a hybrid instrument. It is the usual practice of this Committee to draw de-hybridising provisions to the attention of the House so that it can satisfy itself that other mechanisms are available to protect the private interests that would otherwise be protected by the hybrid instrument procedure. Since regulations under clause 15 will relate to particular local authorities, they are liable to affect the interests of those authorities in a way that is different from other local authorities. The interests

of local authorities will be protected to the extent that clause 15 only allows regulations to be made where asked for by the local authorities concerned.

Chapter 1 of Part 2 – social worker regulations

52. Chapter 1 of Part 2 confers a power on the Secretary of State to make provision by regulations for the purpose of regulating social workers ("social worker regulations"). The matters which can be contained in social worker regulations are set out in clauses 21 to 35. They include:

    (a) the power to appoint the Secretary of State or another person to be the regulator, or to establish a new body to be the regulator;

    (b) the power to require a register of social workers to be kept and to make provision about eligibility for registration and suspension and removal from the register;

    (c) the power to make provision about professional standards and standards of conduct;

    (d) the power to make provision about education and training; and

    (e) the power to make provision about discipline of social workers and fitness to practise.

    Social worker regulations are subject to the affirmative procedure.

53. These are very wide powers indeed. However, as the Department explains in its memorandum, this approach reflects the way in which the regulation of social workers currently works: social workers are regulated by the Health and Care Professions Council (HCPC) under the Health and Social Work Professions Order 2001, an Order in Council made under section 60 of the Health Act 1999 ("the 1999 Act"). The main driver for these provisions of the Bill is the decision of Government to have a specialist regulator for social workers. The 1999 Act prevents amendments being made to the 2001 Order to transfer the functions of the HCPC to another regulator. Therefore, the decision was taken to enact new provisions for the regulation of social workers. The new provisions maintain the existing approach of using subordinate legislation for the regulation of social workers.

54. Appendix 1 to this Report gives a brief description of the legislative background to the regulation of social workers and the use of delegated powers for that purpose. The following conclusions can be drawn:

    (a) Since the enactment of section 124 of the Health and Social Care Act 2008 ("the 2008 Act"), there has been a power to regulate social workers by means of subordinate legislation.

    (b) Since the enactment of the Health and Social Care Act 2012 ("the 2012 Act"), the provisions governing the regulation of social workers have been solely contained in subordinate legislation.

    (c) The clauses in the Bill are more specific in setting out the provisions which may be included in the regulations. However, the matters covered by clauses 22 to 35 broadly cover the same matters which were authorised to be included in subordinate legislation by both the 2008 Act and the 2012 Act.

55. In the light of this legislative background, we do not consider it inappropriate for the Government to place the regulation of social workers in subordinate legislation, despite the width of the powers being conferred.

56. There are however two respects in which the provisions of the Bill will have a significantly different effect from those of the 2008 and 2012 Acts. Under both those Acts, it was clear on the face of the primary legislation *which body* was going to be responsible for the regulation of social workers. Further, under both the 2008 and 2012 Acts, the powers were limited so as to prevent the functions of the regulator from being transferred to another body.

57. **According to the Department's memorandum, the fundamental purpose of Chapter 1 of Part 2 of the Bill is to allow for the establishment of a specialist regulator for social workers. Despite this, there is nothing on the face of the Bill identifying who the regulator will be (whether it will be the Secretary of State or another body), or what its membership or constitution will be if it is a new body. We regard it as inappropriate, given the importance of the regulator to the operation of the regulatory system, for the Bill to contain nothing on its face about the identity of the regulator, or about its membership and constitution. We note that the Constitution Committee reached a similar view[15]. Similarly, we regard it as inappropriate, in the absence of convincing reasons, to include a power to abolish the existing regulator and transfer its functions to another body. This would represent a significant shift from the current position, and no reasons have so far been given justifying this extension of the powers.**

Clause 35(3) – powers to make subordinate legislation under social workers regulations

58. Clause 35(3) allows social worker regulations to include provisions which themselves would confer a further power to make, confirm or approve subordinate legislation. It says nothing explicitly about the person or persons on whom subordinate legislation making powers may be conferred, or about the matters to which the subordinate legislation might relate. We assume the intention is that the subordinate legislation making powers may be conferred on the regulator or a Minister of the Crown, and that they can relate to any matter dealt with in Chapter 1 of Part 2.

59. Further, there is nothing on the face of the Bill about the level of Parliamentary scrutiny (if any) that would be required for subordinate legislation made under the powers conferred by clause 35(3). We consider the implication must be that clause 35(3) would allow subordinate legislation making powers to be conferred *without any Parliamentary scrutiny*.

60. Although there are brief references to the powers conferred by clause 35(3) on pages 18 and 19 of the Department's memorandum, no explanation is given as to how it is expected that these powers will be used. There are however precedents: both the 1999 Act and the 2008 Act confer powers to make subordinate legislation in identical terms.

15 Constitution Committee, *Children and Social Work Bill [HL]*, 2nd Report, Session 2016–17, HL Paper 10, para 5.

61. We were disappointed that the Department failed to provide any explanation for including the subordinate legislation making power in clause 35(3), particularly given its breadth, the lack of any explicit constraints on how it might be used and the absence of any requirement for Parliamentary scrutiny. **Although we appreciate there may be a need for the regulator to have power to make rules governing matters which properly fall with its competence, we consider any powers need to be clearly defined and to indicate the specific matters which they may cover. On the face of it, clause 35(3) would allow social worker regulations to confer subordinate legislation making powers about any matter covered by clauses 21 to 35, and to do so without the need for Parliamentary scrutiny let alone requiring the affirmative procedure. In our view this makes the delegated powers conferred by clause 35(3) inappropriate despite the precedents in existing legislation**.

CULTURAL PROPERTY (ARMED CONFLICTS) [HL]

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

INTELLECTUAL PROPERTY (UNJUSTIFIED THREATS) [HL]

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

APPENDIX 1: LEGISLATIVE BACKGROUND TO THE REGULATION OF SOCIAL WORKERS

Care Standards Act 2000 ("CSA")

- The CSA made provision for the regulation of social care workers. "Social care workers" for these purposes included social workers and others (such as workers in care homes).
- The CSA established the General Social Care Council to be the regulator for social care workers, including social workers.
- Provisions governing the regulation of social care workers were set out on the face of the primary legislation.
- Specific provisions conferred powers on the regulator to make rules and codes of practice, governing things such as removal from the register, procedure for registration, standards of conduct and practice, training and approval of courses.

Health and Social Care Act 2008 ("HSCA 2008")

- Section 124 of the HSCA 2008 created a new regulation making power (subject to the affirmative procedure) which allowed the Secretary of State to modify the provisions governing the regulation of social workers.
- Schedule 9 to the HSCA 2008 set out the detailed provision which could be contained in the regulations which included:
  - (a) the functions of the regulator;
  - (b) the keeping of registers of social care workers;
  - (c) education and training;
  - (d) privileges of registered persons;
  - (e) standards of conduct;
  - (f) criminal offences;
  - (g) charging of fees.
- The changes made by the HSCA 2008 did not affect the position of the General Social Care Council as regulator. The legislation included provision preventing the regulations from abolishing the General Social Care Council or transferring its functions to another body.
- The powers conferred under section 124 and Schedule 9 were based on those relating to health professions in section 60 and Schedule 3 to the Health Act 1999.

Health and Social Care Act 2012 ("HCSA 2012")

- Sections 209 to 214 of the HSCA 2012 made the following changes to the regulation of social workers:
  - (a) to provide for the regulation of social workers to fall within the scope of the delegated powers conferred by section 60 of the Health Act 1999;
  - (b) to amend the Health Professions Order 2001 which was made under section 60 so that social workers were regulated by the Health Professions Council under that Order.

(c) to change the name of the Order and the Council to reflect the changed scope. They are now called respectively the Health and Care Professions Council and the Health and Social Work Professions Order 2001.

- Since section 124 of, and Schedule 9 to, the HSCA 2008 were modelled on section 60 and Schedule 3 to the Health Act 1999, the change did not involve any substantial alteration of the delegated powers. Section 60 is subject to the affirmative procedure in the same way as section 124.

APPENDIX 2: MEMBERS AND DECLARATIONS OF INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the House of Lords Record Office and is available for purchase from The Stationery Office.

For the business taken at the meeting on 15 June 2016 Members declared no interests.

Attendance

The meeting on the 15 June 2016 was attended by Baroness Drake, Lord Flight, Baroness Fookes, Baroness Gould of Potternewton, Lord Jones, Lord Moynihan, Lord Thomas of Gresford and Lord Tyler.