

HOUSE OF LORDS

Select Committee on the Constitution

---

2nd Report of Session 2017–19

# Space Industry Bill

## [HL]

---

Ordered to be printed 6 September 2017 and published 8 September 2017

---

Published by the Authority of the House of Lords

### *Select Committee on the Constitution*

The Constitution Committee is appointed by the House of Lords in each session “to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.”

### *Membership*

The Members of the Constitution Committee are:

[Lord Beith](#)

[Baroness Corston](#)

[Baroness Drake](#)

[Lord Dunlop](#)

[Lord Hunt of Wirral](#)

[Lord Judge](#)

[Lord MacGregor of Pulham Market](#)

[Lord Maclennan of Rogart](#)

[Lord Morgan](#)

[Lord Norton of Louth](#)

[Lord Pannick](#)

[Baroness Taylor of Bolton](#) (Chairman)

### *Declarations of interests*

A full list of Members’ interests can be found in the Register of Lords’ Interests:

<http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests>

### *Publications*

All publications of the committee are available at:

<http://www.parliament.uk/hlconstitution>

### *Parliament Live*

Live coverage of debates and public sessions of the committee’s meetings are available at:

<http://www.parliamentlive.tv>

### *Further information*

Further information about the House of Lords and its committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is available at:

<http://www.parliament.uk/business/lords>

### *Committee staff*

The current staff of the committee are Matt Korris (Clerk), Nadine McNally (Policy Analyst) and Hadia Garwell (Committee Assistant). Professor Stephen Tierney and Professor Mark Elliott are the legal advisers to the Committee.

### *Contact details*

All correspondence should be addressed to the Constitution Committee, Committee Office, House of Lords, London SW1A 0PW. Telephone 020 7219 5960. Email [constitution@parliament.uk](mailto:constitution@parliament.uk)

# Space Industry Bill [HL]

## CHAPTER 1: INTRODUCTION

---

1. The Space Industry Bill [HL] was introduced into the House of Lords on 27 June 2017. It received its second reading on 12 July 2017. The committee stage had not been scheduled at the time of writing.
2. The Bill was prefigured by the *National Space Policy* published in December 2015, in which the Government said that it supported “the growth of a robust and competitive commercial space sector” in the UK.<sup>1</sup> Among other things, the Bill aims to: establish a framework for the regulation of spaceflight and associated activities in the UK; protect the safety and security of such activities; deal with issues of liability in this sphere; and require appropriate training for those involved in relevant activities.
3. Many of the provisions in the Draft Spaceflight Bill, published in February 2017, are also in the present Bill, in some cases in an amended form. The Draft Bill was the subject of scrutiny by the House of Commons Science and Technology Committee.<sup>2</sup> The House of Lords Delegated Powers and Regulatory Reform Committee (DPRRC) fed into that process.<sup>3</sup> The Government issued a response to the Science and Technology Committee’s report,<sup>4</sup> and the principal respects in which the Bill differs from the Draft Bill are helpfully set out in a House of Lords Library Note.<sup>5</sup> The DPRRC has subsequently reported on the Bill.<sup>6</sup>

---

1 HM Government, *National Space Policy* (2015), p 12: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/484865/NSP\\_-\\_Final.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/484865/NSP_-_Final.pdf) [accessed 22 August 2017]

2 House of Commons Science and Technology Committee, *The Draft Spaceflight Bill* (Fourteenth Report, Session 2016–17, HC 1070)

3 Letter submitted by Baroness Fookes, Chairman, House of Lords Select Committee on Delegated Powers and Regulatory Reform, to the House of Commons Science and Technology Committee, April 2017: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/science-and-technology-committee/the-draft-spaceflight-bill/written/49837.html>

4 HM Government, *Government Response to the Science and Technology Committee Report: The Draft Spaceflight Bill*, Cm 9465, June 2017: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/621179/cm-9465-print.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/621179/cm-9465-print.pdf) [accessed 22 August 2017]

5 House of Lords Library, *Space Industry Bill [HL]*, Library Note, [LLN-2017-0039](#), 5 July 2017

6 Delegated Powers and Regulatory Reform Committee, *Armed Forces (Flexible Working) Bill [HL]*, *Financial Guidance and Claims Bill [HL]*, *Space Industry Bill [HL]* (1st Report, Session 2017–19, HL Paper 10)

## CHAPTER 2: DELEGATED POWERS

---

### Breadth of certain delegated powers

4. The number of delegated powers granted by the Bill is notable—the Bill has 71 clauses and confers approximately 100 delegated powers. Some of those powers are very broad. For example, clause 17(1) states that regulations “may make provision with respect to the training, qualifications and medical fitness” of certain categories of individuals. Schedule 2 contains illustrative examples of such ‘training regulations’, but that list explicitly does not circumscribe the regulation-making power (clause 17(2)). A similar model is used in relation to ‘safety regulations’ (clause 18 and schedule 3) and ‘security regulations’ (clause 22 and schedule 5).
5. Some quite fundamental policy choices will be made via these delegated powers, rather than being determined on the face of the Bill. For instance, it is not clear from the face of the Bill who will perform the extensive regulatory functions created by the Bill: regulatory functions may be performed by the Secretary of State, or by the Civil Aviation Authority (if the CAA has been designated by regulations in respect of relevant functions), or by “another person” (clause 15).<sup>7</sup>
6. A Bill which contains a large number of delegated powers in lieu of policy detail can be challenging for Parliament to scrutinise meaningfully, as it is more difficult to form an accurate impression of what the legislative package as a whole will look like. In such circumstances, scrutiny can be aided by the publication alongside the Bill of illustrative regulations giving a sense of how the Government envisages using the delegated powers contained in the Bill. The Government has not published any draft regulations for this Bill, but has produced ‘policy scoping notes’ outlining the proposed content of the regulations.<sup>8</sup> Such notes are a relatively novel addition to the forms of explanatory material that may accompany a Bill, having been used once previously for the Bus Services Bill 2016–17.<sup>9</sup> The notes are relatively detailed, and, while not a full substitute for detail on the face of the Bill or for illustrative regulations, they go some way towards assisting scrutiny by giving a sense of how delegated powers are likely to be used. **We draw attention to this new form of supporting documentation for legislation.**

### Henry VIII power

7. Clause 66(2) provides: “The Secretary of State may by regulations make provision that is consequential on any provision made by this Act.” This is a Henry VIII power, since it can be used to “amend, repeal or revoke any enactment passed or made before this Act or in the same Session” (clause 66(3)). The affirmative procedure applies whenever the power is used to make regulations that amend primary legislation (clause 66(4)). However, the same is not true of regulations that repeal primary legislation: the use of the

---

7 The Government has, however, indicated that it anticipates that regulatory functions will be performed by the Civil Aviation Authority in relation to certain matters and by the UK Space Agency in respect of others: Department for Transport, *Space Industry Bill: Policy Scoping Notes* (2017), p 39: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/629967/space-industry-bill-policy-scoping-notes.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/629967/space-industry-bill-policy-scoping-notes.pdf) [accessed 22 August 2017]

8 Department for Transport, *Space Industry Bill: Policy Scoping Notes* (2017)

9 Department for Transport, *Bus Services Bill Policy Scoping Notes 2016–17* (June 2016): [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/558354/the-bus-services-bill-policy-scoping-notes.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/558354/the-bus-services-bill-policy-scoping-notes.pdf) [accessed 22 August 2017]

affirmative procedure is stipulated only in respect of amendment of primary legislation. Meanwhile, clause 66(5) provides that a “statutory instrument containing regulations under this section none of which amends primary legislation is subject to annulment.” We understand that the Government intend ‘amend’ to implicitly include ‘repeal’, as repealing a provision of an Act would constitute amending it. **We recommend that the Bill is explicit that the use of this power either to amend or to repeal primary legislation is subject to the affirmative procedure.**

8. This power has consequences for the devolved institutions. The Bill states that ‘primary legislation’ includes legislation enacted by the devolved legislatures (clause 66(6)). The Bill does not, however, make any provision for the devolved legislatures’ consent to be sought in respect of regulations amending or repealing devolved legislation.<sup>10</sup> We noted a comparable issue in our scrutiny of the Wales Bill 2016–17.<sup>11</sup> **The House may wish to consider whether it would be more appropriate for the consent of the devolved legislatures to be required when this power is used to amend or repeal legislation enacted by them—as, for example, is the case for certain statutory instruments made under the Legislative and Regulatory Reform Act 2006 and the Public Bodies Act 2011.**

#### Catch-all regulation-making power

9. Clause 67(1) provides: “Regulations may make provision generally for carrying this Act into effect and for achieving the purpose set out in section 1(1).” Clause 1(1) provides that the Bill has effect for the purpose of regulating space activities, sub-orbital activities, and associated activities carried out in the UK. This is a catch-all regulation-making power. Such a power is not without precedent,<sup>12</sup> but it is unusual, and may have significant implications.
10. An important constitutional safeguard in relation to regulation-making powers lies in the possibility of judicial review should Ministers exceed the delegated authority conferred by the relevant provision. However, the existence of the general power in clause 67(1) may undercut judicial review in this context. In particular, the inclusion of such a power will make it more difficult to argue that the scope of regulation-making powers has been exceeded. The general power also makes the limits on particular powers set out elsewhere in the Bill less important, because, at least in some instances, it will be possible to meet the argument that the limits of a specific power have been exceeded by relying instead on the general power. This possibility is enhanced by the very broad terms in which the general power in clause 67(1) is framed, given its reference back to purposes set out in clause 1(1) in highly general terms. **We draw attention to this catch-all regulation-making power. The House may wish to seek clarification from the Government about its necessity and intended use.**

---

10 The Sewel convention—by which the UK Government will ‘normally’ seek the consent of devolved legislatures when legislating on their behalf—relates only to the enactment of primary legislation, and therefore does not apply here.

11 Constitution Committee, *Wales Bill*, (5th Report, Session 2016–17, HL Paper 59), para 88

12 For example the Civil Aviation Act 1982, [section 60\(2\)\(b\)](#) authorises the making of Air Navigation Orders containing “such provision as appears to Her Majesty in Council to be requisite or expedient ... generally for regulating air navigation”.

## CHAPTER 3: ENFORCEMENT AUTHORISATIONS

---

### Power to grant enforcement authorisation

11. An enforcement regime is set out in clause 31, whereby a justice of the peace may issue an ‘enforcement warrant’ in certain circumstances if, for instance, there are reasonable grounds for believing that a person is carrying out spaceflight activities without a licence or in breach of licence conditions. Enforcement warrants may authorise extensive powers, including powers to enter property and to use reasonable force. For urgent cases, an alternative regime is set out in clause 32. This allows the Secretary of State to grant an ‘enforcement authorisation’ if satisfied that the case is urgent and that relevant conduct or anticipated conduct gives rise to a serious risk (a) to national security, (b) of contravention of any international obligation, or (c) to the health or safety of persons. Such an authorisation permits a named person to do “anything necessary” for protecting national security, securing compliance with international obligations or protecting health or safety.
12. The power conferred by clause 32 is very broad, yet the Bill lays down no system of judicial oversight (either anticipatory or *post hoc*). The House of Commons Science and Technology Committee expressed concerns about this aspect of the Draft Bill.<sup>13</sup> The Bill differs from the Draft Bill in one significant respect: whereas the Draft Bill provided that enforcement authorisations endured for one month, the Bill limits them to two days. However, this is without prejudice to the range of things that can be done, without judicial authorisation, pursuant to such authorisations. This aspect of the Bill may be contrasted with the Investigatory Powers Act 2016, under which warrants issued urgently by the Secretary of State must be approved by a Judicial Commissioner within three working days.<sup>14</sup> Warrants issued under that Act are liable to remain in place for longer than enforcement authorisations—whose use will tend to be on a one-off basis—issued under the present Bill. Nevertheless, comparable issues are raised.
13. In its response to the House of Commons Science and Technology Committee, the Government said:
 

“In line with the Committee’s recommendation, we have reduced the period for which an authorisation would be valid from one month to 48 hours. This limits the Secretary of State’s power and if a longer authorisation is required, it will be necessary to get a warrant from a Justice of the Peace under clause 31 (Warrants authorising entry or direct action).”<sup>15</sup>
14. The reduction in the time for which an urgent authorisation may apply is welcome. However, we are concerned that such wide-ranging and potentially draconian powers would be exercisable without anticipatory or rapid *post hoc* judicial involvement. **We draw attention to these enforcement**

---

13 House of Commons Science and Technology Committee, *The Draft Spaceflight Bill* (Fourteenth Report, Session 2016–17, HC 1070), paras 75–80

14 Investigatory Powers Act 2016 [section 24](#) (interception warrants), [section 109](#) (equipment interference warrants), [section 180](#) (bulk equipment interference warrants), and [section 209](#) (specific bulk personal dataset warrants).

15 HM Government, *Government Response to the Science and Technology Committee Report: The Draft Spaceflight Bill*, Cm 9465, June 2017: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/621179/cm-9465-print.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/621179/cm-9465-print.pdf) [accessed 22 August 2017]

**authorisations and call on the Government to consider *post-hoc* judicial approval of their use.**