

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

1st Report of Session 2017–19

**Armed Forces (Flexible
Working) Bill [HL]
Financial Guidance and
Claims Bill [HL]
Space Industry Bill [HL]**

Ordered to be printed 12 July 2017 and published 13 July 2017

Published by the Authority of the House of Lords

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 Dean of Thornton-le-Fylde	Lord Moynihan
Lord Flight	Lord Rowlands
Baroness Fookes (Chairman)	Lord Thomas of Gresford
Lord Jones	Lord Thurlow
Lord Lisvane	Lord Tyler

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Publications

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

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.

First Report

ARMED FORCES (FLEXIBLE WORKING) BILL [HL]

1. The Bill, which had its Second Reading on 11 July, makes provision for part-time working by members of the regular armed forces and to allow their service to be subject to geographic restrictions.
2. The Ministry of Defence has provided the Committee with a delegated powers memorandum.¹

Clause 1—Power to make provision for part-time service and geographic restrictions

Geographically-restricted service

3. Section 329 of the Armed Forces Act 2006 confers powers on the Defence Council to make regulations about the terms and conditions of service of members of the regular forces. Section 329(2) sets out a non-exhaustive list of the matters which may be included in the regulations under that section.
4. Clause 1 of the Bill amends section 329(2) by:
 - allowing Defence Council regulations to make provision enabling service to be on a part-time basis;
 - widening the scope of the geographic restrictions which may be attached to a person's service.
5. Currently, section 329(2) allows the regulations to require a person whose service is restricted to a particular area to serve outside that area on a prescribed number of days in a year. The new provision inserted by the Bill contains a similar exception but expressed in different terms. It refers to the regulations being able to require a person to serve outside their geographic restriction on a number of "occasions" not exceeding a prescribed maximum. Whereas a limit based on a number of days is clear and precise, the same cannot be said of a limit based on a number of occasions, since that word is capable of a range of different meanings. In our view this leads to a lack of clarity in the scope of the powers being conferred.
6. **We recommend that the House seeks clarification from the Minister about the scope of the new power, why the change is being made and how it is envisaged that the new power will be exercised.**
7. **We are disappointed that nothing is said in the memorandum to explain why the change from days to occasions is being made or how it is envisaged that the newly framed power will be exercised. It is essential that a department's delegated powers memorandum both fully explains the scope of the powers and the reasons they are being taken, particularly where they appear to widen the scope of the powers conferred under existing legislation.**

¹ Ministry of Defence, *Armed Forces (Flexible Working) Bill [HL]: Delegated Powers Memorandum*: <https://www.publications.parliament.uk/pa/bills/lbill/2017-2019/0013/18013-DPM.pdf> [accessed 13 July 2017]

Level of Parliamentary scrutiny

8. Regulations under section 329 are subject to the negative procedure. This is not being changed by the Bill and therefore the negative procedure will apply to the Bill's provisions.
9. The Ministry of Defence explains that the negative procedure is appropriate because the regulations will be "mainly procedural". Even if the intention is that the regulations should contain mainly procedural provisions, we consider that the level of Parliamentary scrutiny has still to be judged by reference to the whole range of provisions which *may* be included under the powers conferred by the Bill. The regulations will not be limited to making provision about procedural matters, but will also determine:
 - the nature and scope of the new rights conferred by the Bill,
 - the circumstances in which the new rights will be available to service personnel, and
 - the conditions which will apply to their enjoyment, including specifying the circumstances in which they may be varied, suspended or terminated.
10. **The Bill will confer novel and broad powers on the Defence Council to make provision for part-time service. They will also widen the scope of the geographic restrictions which may be attached to a person's service. These powers are conferred without any detailed provisions on the face of the Bill limiting or restricting how the powers are exercised. In the circumstances we consider that the affirmative procedure should apply, and that this is so despite the fact regulations under section 329 of the Armed Forces Act 2006 are generally subject to the negative procedure.**

FINANCIAL GUIDANCE AND CLAIMS BILL [HL]

11. This Bill had its Second Reading on 5 July and has two main purposes.
 - It creates a new financial guidance body, tasked with giving free and impartial financial guidance and debt advice to the public, replacing three existing bodies.
 - It transfers the regulation of claims management companies from the Ministry of Justice to the Financial Conduct Authority.
12. A delegated powers memorandum has been provided by the Department for Work and Pensions and HM Treasury.²
13. We draw three delegated powers to the attention of the House.

Clause 1(3)—The name of the body

14. The Bill does not give the body a name. The body will obtain its name from negative-procedure regulations made by Ministers. Meanwhile it goes by the label “single financial guidance body”. The delegated powers memorandum gives several reasons for naming the body in regulations rather than on the face of the Bill.
 - Naming the body too early may lead the public to believe that the body exists.
 - It could cause confusion between the new body and the existing service providers.
 - A smooth transition will be best achieved by the body being named at a later date.
 - Deferring the naming will protect the new body’s brand and reduce the likelihood of imposter websites putting the public at risk.
15. We do not find these reasons convincing:
 - The first two reasons would be arguments for saying as little as possible about anything in any Bill creating a new public body.
 - Naming the body at a later date will not in itself achieve a smooth transition. A smooth transition will only occur if proper transitional arrangements are put in place.
 - Deferring the naming of the body could arguably *increase* the likelihood of imposter websites since anyone would be able to set up a website purporting to represent the body, use any name and claim that it was the official site. In any case, the possibility of imposter websites should not be a reason for taking away from Parliament the power to name a new statutory body and conferring it on Ministers instead.

² Department for Work and Pensions and HM Treasury, *Financial Guidance and Claims Bill [HL]: Delegated Powers Memorandum*: <https://www.publications.parliament.uk/pa/bills/lbill/2017-2019/0001/18001-DPM.pdf> [accessed 13 July 2017]

16. The name of any statutory body is something on which Parliament can be expected to have a view. There is a public interest in that name being in the public domain and on the face of the Bill from the outset. The delegated powers memorandum gives only one precedent for a body being named in regulations, namely the National Employment Savings Trust (NEST) Corporation. By contrast, there are ample precedents for naming a new body from the outset, in primary legislation.³
17. Given the usual presumption that the name of a new public body will be set out on the face of primary legislation, there ought to be strong reasons for departing from this norm. **We take the view that the Department's reasons do not meet this threshold and that it is an inappropriate delegation of power to allow Ministers, rather than Parliament, to name this new public body.**

Clause 5—Guidance from the Secretary of State

18. Clause 5 allows the Secretary of State to issue guidance to the single financial guidance body. The body “must have regard to” the guidance. The guidance is not subject to any Parliamentary scrutiny. There is a clear distinction between guidance that the recipient is free to disregard and guidance to which the recipient must have regard or must follow. People required by statute to have regard to guidance will normally be expected to follow the guidance unless they have cogent reasons for not doing so. **Accordingly we take the view that guidance issued under clause 5 should be subject to Parliamentary scrutiny, with the negative procedure providing an appropriate level of scrutiny.**

Clause 14—Power to dissolve the new body and transfer its functions to any other person

19. Although the new single financial guidance body will be created by Parliament, clause 14 allows Ministers by affirmative-procedure regulations to abolish the body and transfer its functions to any other person.
20. The normal principle is that what Parliament has created, Parliament alone should dissolve. In this case, the Minister:
- does not have to be satisfied as to anything before deciding to abolish the body,
 - does not have to consult,
 - does not have to conduct a formal review, and
 - does not have to wait a certain time before seeing whether the new body works well.
21. Where Parliament has previously legislated to abolish public bodies it has provided procedural safeguards. Under the Public Bodies Act 2011, a Minister proposing to abolish a public body must consult the body concerned and others affected by the proposal; he then has to allow 12 weeks for responses. The Minister has to lay before Parliament a detailed explanatory document. A committee of either House of Parliament may require an enhanced

³ For example, the Environment Agency in the Environment Act 1995, the Law Commission in the Law Commission Act 1965 and the Small Business Commissioner in the Enterprise Act 2016.

affirmative procedure and the power to abolish is time-limited. None of these procedural safeguards is included in the current Bill.

22. The power to abolish the body and transfer its functions to any other person is a very broad power. For example, it is important that the guidance is independent of any commercial interests. However the power to transfer functions to another body is, on its face, unlimited.
23. The Committee raised similar concerns in its report on the Enterprise Bill, 9th Report of Session 2015–16,⁴ where the power was to abolish the Small Business Commissioner by statutory instrument. In response, the Government acknowledged the Committee’s concerns and tabled amendments⁵ that made the abolition of the Commissioner dependent on a 12-week consultation, the laying before Parliament of an explanatory document in addition to draft regulations, and an enhanced affirmative procedure if required by either House.
24. **We take the view that it is inappropriate for the Bill to confer on Ministers a power to abolish the single financial guidance body. It is all the more unsatisfactory because the power is unaccompanied by the sorts of procedural safeguards found in the Public Bodies Act 2011 and the Enterprise Act 2016.**

4 Delegated Powers and Regulatory Reform Committee (9th Report, Session 2015–16, [HL Paper 42](#))

5 Enterprise Act 2016, [sections 11 and 12](#)

SPACE INDUSTRY BILL [HL]

25. This Bill had its Second Reading on 12 July. It provides for the creation of a regulatory framework to enable commercial spaceflight activities to be carried out from UK spaceports.
26. A delegated powers memorandum has been provided by the Department for Transport.⁶
27. The House of Commons Science and Technology Committee examined the draft Spaceflight Bill towards the end of the last Parliament and invited our views. Given the importance, novelty and intrusiveness of many of the Bill's provisions, we recommended that some delegated powers be removed altogether and that others be upgraded to the affirmative procedure.⁷
28. **We warmly welcome the opportunity that we were given to work so closely and productively with the House of Commons Science and Technology Committee on the draft Spaceflight Bill. We equally welcome the fact that the Government have incorporated so many of our recommendations in the new Space Industry Bill.**
29. We draw the attention of the House to two remaining matters.

Statutory guidance

30. There are several provisions in the Bill allowing the Secretary of State and the regulator to issue guidance⁸. No parliamentary procedure attaches to the issuing of this guidance. The Department for Transport justifies this on the ground that the guidance is intended to be “user-friendly, detailed and intended to aid policy implementation by supplementing regulations rather than being intended to substitute any legislative provision”.
31. We have mentioned at paragraph 18 the distinction between guidance that people must have regard to and guidance that they need not have regard to. Most of the provisions allowing the Secretary of State or the regulator to issue guidance do not require the recipient to have regard to it. If there is no statutory requirement to have regard to the guidance, we accept that there is no compelling reason for any parliamentary procedure.
32. **In our view, clause 9(8), the one provision that requires the regulator to have regard to guidance given by the Secretary of State,⁹ should be subject to parliamentary scrutiny given its legal significance, the negative resolution procedure being sufficient.**

Affirmative regulations

33. Clause 67 increases the number of regulations subject to the affirmative procedure from four to 13. However this is not quite the whole story. Of these 13 affirmative sets of regulations, five involve the first set of regulations being affirmative and subsequent regulations being negative. We have several observations to make.

6 Department for Transport, *Space Industry Bill [HL]: Delegated Powers Memorandum*: <https://www.publications.parliament.uk/pa/bills/lbill/2017-2019/0007/18007-DPM.pdf> [accessed 13 July 2017]

7 Written evidence to the House of Commons Science and Technology Committee inquiry on the Draft Spaceflight Bill from the Delegated Powers and Regulatory Reform Committee ([SFB0012](#))

8 For example, clauses 7(7), 9(7) & (8), 17(3), 18(3) and 22(3).

9 The guidance is about what the applicant for a spaceflight operator licence may, or must, do in order for the regulator to be satisfied that the operator has complied with health and safety requirements.

- The technique is open to abuse. The first set of regulations, the affirmative ones, might only be very short, leaving subsequent negative regulations to provide the real substance. We assess delegated powers not merely on how the present Government *propose* to use them but on how any future government *could* use them.
 - The Government say this approach will save a disproportionate amount of parliamentary time and facilitate timely updating, there being no need for parliamentary debates. This is unconvincing and, if applied generally, would argue for the adoption of the negative procedure - or no procedure at all - in all cases.
 - In the case of safety regulations under clause 18, the Government have justified their approach because the continuous updating of safety regulations should occur in a “nimble and proportionate” way. However, if the subject matter - for example, safety regulations - is one that calls, in principle, for the affirmative procedure, it should not matter whether the regulations are the first, second or third set of regulations. They should all be affirmative.
34. The commercial spaceflight industry is a new one. We do not know the hazards and the pitfalls. We do know that safety is not something that can be pushed into the background and that the precautionary principle obtains. **Our view is that the five powers, including safety and security, where the Government wish to make the parliamentary procedure “initially affirmative, subsequently negative” should be affirmative on all occasions.**¹⁰

¹⁰ The five cases are clauses 5(2), 7(6), 12(7), 18 and 22 dealing with “range”, “range control” services, licence conditions, safety and security.

APPENDIX 1: MEMBERS AND DECLARATIONS OF INTERESTS

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

For the business taken at the meeting on 12 July 2017 Members declared the following interests:

Armed Forces (Flexible Working) Bill [HL]

Lord Jones

President, Army Cadet Forces Association Wales

Space Industry Bill [HL]

Lord Moynihan

Lives in Prestwick.

Attendance

The meeting on the 12 July 2017 was attended by Lord Flight, Baroness Fookes, Lord Jones, Lord Moynihan, Lord Rowlands, Lord Thomas of Gresford, Lord Thurlow and Lord Tyler.