

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

32nd Report of Session 2017–19

Taxation (Cross-border Trade) Bill: Government Response

Registration of Marriage Bill [HL]: Response

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The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session and has the following terms of reference:

- (i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;
- (ii) To report on documents and draft orders laid before Parliament under or by virtue of:
 - (a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,
 - (b) section 7(2) or section 19 of the Localism Act 2011, or
 - (c) section 5E(2) of the Fire and Rescue Services Act 2004;

and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and

- (iii) To report on documents and draft orders laid before Parliament under or by virtue of:
 - (a) section 85 of the Northern Ireland Act 1998,
 - (b) section 17 of the Local Government Act 1999,
 - (c) section 9 of the Local Government Act 2000,
 - (d) section 98 of the Local Government Act 2003, or
 - (e) section 102 of the Local Transport Act 2008.

Membership

The members of the Delegated Powers and Regulatory Reform Committee who agreed this report are:

[Baroness Andrews](#)

[Lord Blencathra](#) (Chairman)

[Lord Flight](#)

[Lord Jones](#)

[Lord Lisvane](#)

[Lord Moynihan](#)

[Lord Rowlands](#)

[Lord Thomas of Gresford](#)

[Lord Thurlow](#)

[Lord Tyler](#)

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Publications

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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 hlddelegatedpowers@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.

Thirty Second Report

TAXATION (CROSS-BORDER TRADE) BILL: GOVERNMENT RESPONSE

1. We considered this Bill in our 11th Report of this Session.¹ The Government have now responded by way of a letter from the Rt Hon. Mel Stride MP, Financial Secretary to the Treasury and Paymaster General, printed at Appendix 1.

REGISTRATION OF MARRIAGE BILL [HL]: RESPONSE

2. We considered this Private Member's Bill in our 21st Report of this Session.² The Lord Bishop of St Albans, the sponsor for the Bill, has responded by way of a letter printed at Appendix 2.

1 Delegated Powers and Regulatory Reform Committee (11th Report, Session 2017–19, [HL Paper 65](#))
2 Delegated Powers and Regulatory Reform Committee (21st Report, Session 2017–19, [HL Paper 122](#))

APPENDIX 1: TAXATION (CROSS-BORDER TRADE) BILL: GOVERNMENT RESPONSE

Letter from the Rt Hon. Mel Stride MP, Financial Secretary to the Treasury and Paymaster General, to the Rt. Hon Lord Blencathra, Chairman of the Delegated Powers and Regulatory Reform Committee

I am grateful to the Delegated Powers and Regulatory Reform Committee (“The Committee”) for its report of 17 January on the Taxation (Cross-border Trade) Bill (“The Bill”). The points raised in the Committee’s report were also raised during the Bill’s passage through the Commons, which was completed on 16 July.

As the report identifies, the Bill enables the government to establish a standalone customs regime, as well making necessary provision in relation to VAT and excise. The powers and procedures in the Bill have been drafted in a way that is consistent with other tax legislation, and recognises the need for the UK to be able to give effect to a smooth exit from the European Union.

The Committee’s report addresses five key themes. This response sets out the government’s approach in each case.

At Report Stage, the government made a series of amendments to the Bill. This response therefore also sets out any relevant instances where the government has revised or refined the drafting of the Bill following feedback from the Committee and others.

The balance between affirmative and negative instruments

The Committee’s report suggests that the scrutiny procedures provided for by the Bill are weighted too heavily in favour of the negative procedure, and makes specific recommendations as to the powers it believes the affirmative procedure should apply to.

In this Bill, the negative procedure is used where regulations make provision generally in relation to the collection, administration and enforcement of customs, VAT and excise. This is consistent with the approach that is taken in all existing UK tax legislation. The government believes that the negative procedure, where used in this Bill, provides a sufficient level of parliamentary scrutiny having regard to the frequency and speed with which regulations may need to be updated.

However, the government has accepted that it is appropriate for clauses 30, 42 and 47 to be subject to the made affirmative procedure. Clause 30 provides that the Treasury may make general provision for the purposes of import duty. And clauses 42 and 47 set out how EU law retained by the EU (Withdrawal) Act 2018 applies in relation to VAT and excise respectively, while providing the Treasury the ability to exclude or modify some retained EU law by statutory instrument. These powers are entirely necessary, and depending on the outcome of the negotiations may need to be exercised with some regularity. However, following the interest expressed by Parliament, the government has amended the Bill to apply the made affirmative procedure to their use.

In all other cases, the government believes that adopting the affirmative procedure would produce impractical results.

The Committee's report states that the use of the made affirmative procedure is inappropriate in anything but what it defines as "urgent cases", and that the draft affirmative procedure should be used instead. In the case of tax legislation, however, it is usual practice to use the made affirmative procedure for the protection of the public revenue and to ensure continuity in the administration of the tax system. These are the purposes for which the powers in this Bill may generally be used.

In this Bill, the made affirmative procedure will allow the government to give immediate effect to legislation where there would otherwise be a gap in UK statute. For example, the customs tariff may need to be amended swiftly (using the powers under clause 8) to reflect a change in international trade. However, such legislation would cease to apply after a short period of time in the event that it does not obtain the express approval of the House of Commons within 28 days. Recognising the unique interest in the power provided for by clause 31 (4), which allows the UK to give effect to a customs union arrangement with another territory or territories, the draft affirmative procedure will apply in this case. An Order in Council made under that power must be laid in draft and approved by the House of Commons before it can be presented to Her Majesty in Council. Again, this is consistent with a longstanding approach to such legislation, including that used to give effect to the provisions in double taxation treaties that the UK enters into.

'Henry VIII' powers subject to the negative procedure

The Bill contains four powers to amend primary legislation by regulations. These are contained in clauses 45, 51 and 56, and Schedule 3 (introduced by clause 10). Of these, only the Schedule 3 power is subject to the negative procedure. This can only be used to update the list of countries to which the UK grants unilateral trade preferences, in line with established UN and World Bank criteria, and so is necessarily limited. Otherwise, the government believes that the affirmative procedure is appropriate and proportionate in these cases, and the Bill is drafted to reflect this.

Of the two specific powers that the Committee's report identifies as 'Henry VIII' powers subject to the negative procedure:

- The powers in clause 31 (5) can only be used to ensure the government is able to effectively implement any customs union arrangements already given effect to by the Order in Council made under 31 (4). As that Order will already have been subject to the draft affirmative procedure, with further primary legislation required before it is used to give effect to any customs union arrangement with the EU, the government considers the negative procedure to be appropriate for these supporting powers.
- Only the first set of regulations made under clause 39 are subject to the affirmative procedure. The government considers this is appropriate as the first set of regulations would mirror the provisions in Part 1, as necessary to impose an Export Duty. Critically, any introduction or increase of export duty would be subject to the affirmative procedure, whereas the reduction or elimination of an existing export duty would be subject to the negative procedure. In practice, any regulation under this section (other than those relating to the duty itself) would be administrative in nature.

As with other areas of the Bill, both of these powers are consistent with the approach that has been taken to previous tax legislation.

The appropriateness of sunset provisions

The Committee's report identifies clauses 7, 8 and 9 of the EU (Withdrawal) Bill (now the EU (Withdrawal) Act 2018), which are subject to a two-year time limit, as analogous to some powers in the Taxation (Cross-border Trade) Bill, and proposes that a similar sunset provision would be appropriate for those powers. However, the powers in this Bill are more limited than those in the EU (Withdrawal) Act in that they relate only to customs, VAT and excise legislation. These powers are necessary to ensure that the UK has fully functioning tax regimes under a range of possible outcomes from the negotiations with the EU.

Nevertheless, the government has responded to concerns raised by applying, via amendments to the Bill, sunset provisions to some of the powers identified. These are the powers under clause 51 (which would be time-limited to three years from exit day) and the powers under clauses 42 and 47 (which are detailed above, and would be time-limited to four years from exit day). It would not be possible to apply a shorter time limit to any of these powers without inhibiting the UK's ability to respond effectively to developments in the negotiations.

The government does not believe that it would be appropriate, proportionate or practical to apply a sunset provision to the power provided by clause 45. The power provided in clause 45 ensures that after EU exit HMRC has the ability to deliver the legislative changes needed to maintain a functioning and legally operable excise regime. The UK's excise regime is largely set out in secondary legislation using a complex mix of powers, including secondary legislation-making powers in the European Communities Act 1972, which will be repealed by the EU (Withdrawal) Act. Without the powers provided in clause 45 of this Bill there is a substantial risk that there will be a gap in powers or that it will be necessary to replace whole sets of regulations rather than make amendments to existing provisions, creating less accessible legislation. Given one of the core objectives of this clause is to deal with that risk and ensure that after EU exit Government has the same ability which it has now to maintain a functioning regime for excise goods, it is not feasible to sunset this power. The government has however taken steps to limit the powers in this clause. For example, the definition of 'excise duty' in clause 49 limits the breadth of the power and ensures it can only be exercised in relation to excise duties under the Alcoholic Liquor Act 1979, Hydrocarbon Oil Duties Act 1979 or the Tobacco Products Duty Act 1979. These are the excise duties that are most affected by the UK's withdrawal from the EU.

The use of public notices

The Committee refers to the making of law by public notice as a "radical concept". The government does not accept this assessment. It is usual practice for public notices to be used in relation to the administration of tax regimes. Such notices make provision that is purely technical or administrative in nature, may be subject to regular updating or need to be changed quickly, or may be based on external sources. Examples in the Bill of where powers to make public notices are appropriately conferred include in relation to the form and content of a customs declaration, and the currency exchange rates that will apply for the calculation of import duties due.

The Bill also provides for trade remedy measures to be imposed by public notice. These measures will be determined by an independent and impartial body, following a rigorous and extensive investigation process. This process is informed by strict World Trade Organization (WTO) rules. The use of public notices here recognises the imperative to act quickly to give UK industries much-needed relief

when they are suffering injury, and is consistent with the approach taken by other WTO members.

The inclusion of tertiary legislative powers

It is not unusual for tax legislation to enable sub-delegation in regulations. This is because there is often a need for provisions that are highly technical, lengthy and purely administrative. An example of this is where there is a need to mandate the use of a particular form for a tax return. It would often not be proportionate for Parliament to be asked to consider the format and precise data fields of a form. The government has taken this approach in paragraph 5 of Schedule 1 to the Bill, which allows HMRC to specify, in a public notice, the electronic form that must be used for a Customs declaration and the method for lodging this electronic form.

The government therefore does not accept the Committee's recommendation that tertiary legislation should be subject to the same parliamentary control and time-limits applicable to secondary legislation.

I thank the Committee again for their report and hope that this response has been helpful.

23 July 2018

APPENDIX 2: REGISTRATION OF MARRIAGE BILL [HL]: RESPONSE

Letter from the Lord Bishop of St Albans to the Rt Hon. Lord Blencathra, Chairman of the Delegated Powers and Regulatory Reform Committee

I am most grateful to the Committee for its considered response relating to the provisions in the Registration of Marriage Bill 2017–2019. The Committee Stage of the Bill is scheduled to be debated on Friday 29 June, so I thought it would be helpful to explain what has happened in response to the DPRRC’s report in the hope that it might enable us to make progress.

Background

Under present legislation (the Marriage Act 1949 and associated regulations) the marriage register entry provides space for the name of the father of each of the couple to be entered, but not that of the mother. It is widely accepted that this situation is outdated and there has been growing pressure, both from within Parliament and from the public, for reform.

The Bill seeks to reform the way in which marriages are registered in England and Wales by moving to a ‘schedule’ based system, similar to that in place for marriages and civil partnerships in Scotland (since 1855), Northern Ireland and for civil partnerships in England and Wales.

Moving from a paper based system to registration in an electronic register will facilitate the updating of the marriage entry to include the parents of the couple without having to replace all register books. Such change would align with the Government’s digital agenda, make the registration of marriage process more efficient and secure.

Matters raised in the Committee’s report

The Committee was concerned that illustrative regulations had not been produced prior to Committee stage. At second reading Baroness Williams (Minister for State, Home Office) said it was the Government’s aim to make draft regulations available prior to Committee stage. I can confirm these were drafted by the Home Office and published in the Library of the House on 17 April.

Though the regulations are an early draft, they are illustrative of how the powers in Clause 1 of the Bill would be used to make the necessary changes to the Marriage Act and were drafted by the Home Office in conjunction with the local registration service and the Church of England.

I share the Committee’s disappointment with the lateness of the publication of the regulations and regret the inconvenience caused. The Committee’s feedback is extremely valuable, and hopefully the amendments to the Bill that I am proposing will abate the Committee’s concerns.

Structure of the Bill

The Committee’s report expresses concern that the Bill consists mainly of powers to make delegated legislation. It may help if I explain why this approach was taken by the Home Office.

Despite the need for reform of much of the antiquated legislation concerning the registration of births, deaths and marriages, legislative opportunities in this area are rare. There has been limited scope for reform of registration processes that have, for the most part, been in place since the early 19th century.

The report states that the Committee does not find the arguments in the Delegated Powers Memorandum persuasive. The Committee's criticisms at paragraphs 12–17 of their response are contested. The changes required to the Marriage Act to introduce the 'schedule' system are not controversial, have cross-party support, and will be made using the affirmative procedure ensuring Parliamentary oversight for the changes to primary legislation.

It is considered appropriate that all amendments to primary legislation are to be made by delegated legislation because:

- (a) It is necessary to be able to amend primary legislation during the implementation period as there may be unforeseen changes: for example, the Home Office will continue to work closely with all key stakeholders, e.g. the local registration service and the Church of England, when implementing the new provisions. Changes or amendments to the legislation may be identified to ensure all requirements have been captured and the process runs smoothly. The Home Office has worked closely with the National Records for Scotland in developing the 'schedule' system to consider areas of best practice.
- (b) Whilst Parliament will not be able to scrutinise the specific amendments at this moment, they will be debated in both houses during the affirmative resolution debates, ensuring Parliamentary oversight for the changes to primary legislation.

I have taken on board the Committee's criticisms and worked closely with the Home Office to prepare amendments to address the concerns raised which are set out below:

Clause 1—power for Secretary of State to make regulations about marriage registration

The Committee is critical in paragraphs 18–24 that Clause 1 confers very broad powers on the Secretary of State to make regulations about marriage registration. Clause 1 (2) includes a power to amend or repeal any provision made in any Act of Parliament. Committee expressed concern that the broad power was far wider than required to meet the policy aims of the Bill.

It is proposed to amend Clause 1 to narrow the scope of the broad enabling powers.

The following amendments will be tabled to Clause 1:

- (a) The scope of the enabling language in Clause 1(1) will be changed to more narrowly reflect the underlying policy intent to replace the existing certificate and marriage register based system of marriage with a 'schedule' based electronic registration system. The amendments to legislation, by regulations, to introduce these changes will be limited to the Marriage Act 1949.
- (b) The broad power in subsection (2) which allowed the Secretary of State to amend, repeal or revoke any provision made by or under any Act of Parliament passed before this Act or the same session, will be removed.

- (c) The catch-all provision at Clause 1(3)(g), which allowed regulations to amend the Marriage Act to make other provisions in relation to the registration of marriages, will be removed and replaced with a provision that enables existing provisions relating to the registration of marriage which do not form part of the new 'schedule' system to be removed.
- (d) A sunset clause will be included, limiting the power for the Secretary of State to make Regulations to a period of three years, beginning on the day the regulations are first made, to reassure Parliament that the use of the power will be limited to enacting the previously stated policy purposes.

I hope the proposed amendments to Clause 1 will address some of the concerns raised by Committee around the use of delegated powers and provide reassurance.

Clause 2

The committee's concerns at paragraphs 25–28 of their response, that the powers in Clause 2 may delegate matters that are currently provided for in primary legislation, have been considered.

Amendments will be tabled that limit the scope of the powers in Clause 2 to making regulations under s74(1) of the 1949 Act. This is to reassure Committee and the House that the intention is that these regulations are only intended to supplement the relevant provisions of the 1949 Act.

Conclusion

I hope that this response to the Report, and the proposed amendments to the Bill, will give the Committee and the House the assurance that we value the scrutiny which the House provides throughout the legislative process.

18 June 2018

APPENDIX 3: MEMBERS INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>. The Register may also be inspected in the Parliamentary Archives.