



HOUSE OF LORDS

Delegated Powers and Regulatory Reform  
Committee

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2nd Report of Session 2017–19

**Air Travel Organisers’ Licensing  
Bill**

**Financial Guidance and Claims  
Bill [HL]: Government Response**

**Space Industry Bill [HL]:  
Government Response**

**Correspondence: Pre-legislative  
scrutiny**

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Ordered to be printed 13 September 2017 and published 14 September 2017

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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:

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

### *Registered Interests*

Committee Members' registered interests may be examined in the online Register of Lords' Interests at [www.publications.parliament.uk/pa/ld/ldreg.htm](http://www.publications.parliament.uk/pa/ld/ldreg.htm). The Register may also be inspected in the Parliamentary Archives.

### *Publications*

The Committee's reports are published by Order of the House in hard copy and on the internet at [www.parliament.uk/hldprcpublications](http://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 [hlddelegatedpowers@parliament.uk](mailto: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.

# Second Report

## AIR TRAVEL ORGANISERS' LICENSING BILL

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

## FINANCIAL GUIDANCE AND CLAIMS BILL [HL]: GOVERNMENT RESPONSE

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2. We considered this Bill in our 1st Report of this Session.<sup>1</sup> The Government have now responded by way of a letter from Baroness Buscombe, Minister for Work and Pensions (Lords) at the Department for Work and Pensions, printed at Appendix 1.

## SPACE INDUSTRY BILL [HL]: GOVERNMENT RESPONSE

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3. We considered this Bill in our 1st Report of this Session.<sup>2</sup> The Government have now responded by way of a letter from Rt Hon. John Hayes CBE MP, Minister of State at the Department for Transport, printed at Appendix 2.

## CORRESPONDENCE: PRE-LEGISLATIVE SCRUTINY

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4. In Session 2016–17, the House of Commons Science and Technology Committee conducted an inquiry into the “*Draft Spaceflight Bill*”.<sup>3</sup> At the invitation of the Science and Technology Committee the Delegated Powers and Regulatory Reform Committee submitted evidence to the inquiry.<sup>4</sup> Following the submission, the Chairman wrote to the Minister for the Cabinet Office on two important matters which were raised during the pre-legislative scrutiny of the draft Bill. These were, first, that a delegated powers memorandum should be made available at the pre-legislative scrutiny stage; and, second, that departments should be encouraged to provide illustrative statutory instruments during pre-legislative scrutiny. We have received a response from the Minister which is printed at Appendix 3.

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1 Delegated Powers and Regulatory Reform Committee, (1st Report, Session 2017–19, [HL Paper 10](#))

2 *Ibid.*

3 House of Commons Science and Technology Committee, *Draft Spaceflight Bill inquiry*: <http://www.parliament.uk/business/committees/committees-a-z/commons-select/science-and-technology-committee/inquiries/parliament-2015/inquiry10/> [accessed 14 September 2017]

4 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](#))

## APPENDIX 1: FINANCIAL GUIDANCE AND CLAIMS BILL [HL]: GOVERNMENT RESPONSE

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### Letter from Baroness Buscombe, Minister for Work and Pensions (Lords) at the Department for Work and Pensions, to Lord Blencathra<sup>5</sup>, Chairman of the Delegated Powers and Regulatory Reform Committee

I am grateful to the Committee for its careful consideration of the Financial Guidance and Claims Bill and I would like to take this opportunity to respond on the three areas to which the Committee drew attention in its report in order to assist the House with its deliberations on these points.

#### *Clause 1(3)—The name of the body*

The power referred to in clause 1(3) allows the Secretary of State to make Regulations to name the body via the negative resolution procedure.

I note that the Committee have concluded that this is an inappropriate delegation of power. The Committee's rationale was that the norm is for the name of a new public body to be set out on the face of primary legislation and that the Department has not demonstrated that there are sufficiently strong reasons to depart from this norm.

I remain concerned that naming the body on the face of the Bill would allow domain names to be acquired, imposter websites to be set up and fraudsters to otherwise impersonate the body before it is even set-up, and this would present a genuine risk that members of the public could be deceived, as well as cause damage to the body's brand. Importantly, I note that the creation of imposter websites was a significant issue when HMT was preparing for, and launching, the Pension Wise guidance service. I am keen to minimise this risk to members of the public in respect of the new body and I consider that this is best achieved by deferring the naming of the body.

For a period of time after the Bill would receive Royal Assent, the Money Advice Service, the Pensions Advisory Service and Pension Wise will all continue their work and I am also concerned that naming the new body on the face of the Bill could cause confusion in the public's mind by, for example, giving the impression that the new body had started to operate and the existing services had ceased before this was the case and leaving members of the public unclear as to where to seek guidance. I am concerned that this could exacerbate the risk posed by imposter websites and companies who could seek to take advantage of any such confusion.

I also note that there is precedent for the proposed approach. For example, this approach was used in section 75(2) of the Pensions Act 2008 in respect of NEST.

It is noteworthy that the Money Advice Service does not use the name used on the face of its enabling legislation, which is the consumer financial education body. My view is that it is better to allow the single financial guidance body to be named nearer to the time when it starts to operate. This will give the Chair, Chief Executive and the other members of the body the opportunity to be involved in the naming of the body, which should ensure that it then uses the same name when dealing with the public.

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5 Lord Blencathra was appointed Chairman of the Delegated Powers and Regulatory Reform Committee on 7 September 2017, in place of Baroness Fookes.

This approach will also give both Houses of Parliament an opportunity to scrutinise the name which the body will actually use when dealing with the public.

*Clause 5—Guidance from the Secretary of State*

In your consideration of powers under clause 5, you draw the House's attention to the power to issue guidance and conclude that the guidance issued under clause 5 should be subject to parliamentary scrutiny, with the negative procedure providing the appropriate level of oversight.

In your report you considered that guidance given by the Secretary of State under clause 5 would, in effect, be mandatory because the body would be expected to follow it. I note, however, that clause 5 enables the Secretary of State to issue both directions, which must be published and which the single financial guidance body must comply with, and guidance, to which it must only have regard. In this context, I consider that clause 5 makes a clear distinction between directions, which the body will have to follow and for which the Secretary of State shall be accountable, and which therefore must be published, thereby ensuring transparency, and guidance, which is non-binding and where the body may make its own decision for which it will be accountable.

You may be reassured to know that it is Government policy that guidance should not be used to circumvent the usual way of regulating a matter. If the policy is to create rules that must be followed, the Government accepts that this should be achieved using regulations subject to parliamentary scrutiny and not guidance.

I would also like to note that guidance is, in practice, likely to be informal and to include, for example, matters such as responses to queries received from the single financial guidance body, guidance to assist the body in how to interpret government policy and legislation, as well as guidance to help promote best practice. It is therefore highly likely to be dealt with at official level. There is no intention of setting out a whole guidance framework, which would be contrary to the purpose of establishing the single financial guidance body as an arm's length, non-departmental public body with operational independence.

There are many examples on the statute book of guidance powers which are not subject to Parliamentary scrutiny. A couple of recent examples include section 2E of the Academies Act 2010 (guidance to Academies) which was inserted by the Children and Social Work Act 2017, section 16K of the Children Act 2004 (guidance re safeguarding), also inserted by the 2017 Act, and various sections of the Anti-social Behaviour, Crime and Policing Act 2014 (guidance to chief police officers, e.g. sections 32 and 41).

I consider that a requirement to subject guidance in this context to Parliamentary scrutiny would represent a degree of oversight which would be unwarranted given its non-binding nature. As the guidance is also likely to frequently be provided in response to queries received from the body itself, given at official-level and often may be time sensitive, I also consider this requirement would be impractical and would be a time consuming and overly burdensome use of Parliamentary time, with the risk that helpful guidance desired by the body could not be given or given within the required time frame. I hope that this will assist the House to understand the nature of the power that we propose.

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

You have also drawn attention to clause 14 which allows the Secretary of State, by affirmative-procedure regulations, to abolish the body and transfer its functions to any other person.

The Bill does not provide for a fixed lifetime for the single financial guidance body. However, should it ever be necessary to dissolve the body, Parliament will have an opportunity to debate any regulations made using these powers as they will be subject to the affirmative procedure.

This clause was debated at day three of Committee on Monday 11 September. In light of the Committee's comments on this clause and the strength of feeling in the House, I will consider further whether there is anything more that we can do to meet the concerns that have been raised.

I will place a copy of this letter in the House libraries.

**12 September 2017**

## APPENDIX 2: SPACE INDUSTRY BILL [HL]: GOVERNMENT RESPONSE

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### Letter from Rt Hon. John Hayes CBE MP, Minister of State at the Department for Transport, to Baroness Fookes, Chairman of the Delegated Powers and Regulatory Reform Committee

I am grateful to the Committee for its in-depth consideration of the merits of the Bill.

The Government also noted the concerns of the Committee in their report to the Science and Technology Committee dated 5 April 2017. The Bill that was introduced into Parliament in June this year endeavored to take account of these concerns. More of the powers in the Bill are now subject to the affirmative resolution procedure at every use or at first use. I believe this now gives Parliament greater scrutiny of the associated secondary legislation.

I would like to take the opportunity to respond on the two areas to which the Committee drew attention in order to help the House with its deliberations on these points. I have carefully considered the Committee's analysis and its conclusions, and I respond to each recommendation in turn.

*(i) In our view, clause 9(8), the one provision that requires the regulator to have regard to guidance given by the Secretary of State, should be subject to parliamentary scrutiny given its legal significance, the negative resolution procedure should be sufficient.*

It is Government policy that guidance should not be used to circumvent the legal rules set out in primary and secondary legislation, which are themselves subject to parliamentary scrutiny. Government accepts that, if the policy is to create rules that must be followed, this should be achieved using regulations subject to parliamentary scrutiny and not guidance. The purpose of guidance is to aid policy implementation by supplementing legal rules. There is a vast range of statutory guidance issued each year and it is important that this can be updated rapidly to keep pace with events. It is proposed that guidance issued under the Bill will focus on the regulators' desired outcomes regarding compliance with requirements rather than defining in detail how these outcomes should be achieved.

On this basis it would not seem necessary or appropriate for such guidance to be subject to parliamentary procedure.

There is nothing to prevent Parliament from scrutinising guidance at any time. I can reassure the Committee that our approach to guidance will be transparent in a similar way to the guidance given to the Civil Aviation Authority (CAA) by the Department for Transport. An example of this is the guidance given to the CAA on environmental objectives in respect of their air navigation functions - the Transport Act 2000 s. 70(2)(d) requires the CAA to take account of this guidance when exercising those functions. This provides guidance to the CAA on the way in which they deal with airspace changes (such as segregating it) and is one of the elements that the CAA must take account of when making airspace decisions.<sup>6</sup>

The initial guidance will also be subject to a full consultation to enable scrutiny and comment from all those with an interest. This is intended to take place at the same time as the consultation on the draft statutory instruments in late 2018.

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6 <https://www.gov.uk/government/publications/air-navigation-guidance>

*(ii) 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.*

The Government has given careful consideration to this recommendation by the Committee and notes the concern raised that the parliamentary procedure proposed could be open to abuse in the future. I can assure the Committee that the first set of regulations covering range, range control services, licence conditions, safety and security will be comprehensive and cover all relevant aspects of these activities. This is the approach that the Government is committed to in the interests of accountability and transparency to provide certainty to Parliament and industry. The Government is aware that if it were to make the initial instruments skeletal and leave much of the detail to subsequent instruments, the Joint Committee on Statutory Instruments would be likely to regard this as an unexpected use of powers.

The development of the first sets of regulations (including those relating to safety and security) will also be subject to a rigorous stakeholder engagement process. This will include a number of meetings and events with a range of industry and other interested stakeholder over the coming weeks and months. The Government will be issuing a full and wide ranging consultation on each of the draft statutory instruments in late 2018.

Going forward, any subsequent regulations that would materially change the substance of the original instruments would also be subject to consultation. In light of this, the Government believes that the negative resolution procedure for subsequent regulations provides appropriate and proportionate parliamentary oversight.

**12 September 2017**

### APPENDIX 3: CORRESPONDENCE: PRE-LEGISLATIVE SCRUTINY

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#### Letter from Baroness Fookes, Chairman of the Delegated Powers and Regulatory Reform Committee, to Rt Hon. Ben Gummer MP, Minister for the Cabinet Office and Paymaster General at the Cabinet Office

I am writing as Chairman of the Delegated Powers and Regulatory Reform Committee (DPRRC) in the House of Lords.

At the invitation of the House of Commons Science and Technology Committee, the DPRRC recently contributed to the pre-legislative scrutiny of the draft Spaceflight Bill. The DPRRC welcomed the opportunity and looks forward to making similar contributions in the future.

#### *Delegated Powers Memoranda and draft Bills*

In undertaking its scrutiny work, whether in relation to Bills *or* draft Bills, the DPRRC relies entirely on the Government's Delegated Powers Memorandum which sets out the justification for the delegation of powers in a Bill and the Parliamentary scrutiny procedures to be applied to those powers. It was therefore with some surprise that we discovered that, unlike for Bills, there was no requirement for a Delegated Powers Memorandum to be prepared in respect of draft Bills. In its submission to the Science and Technology Committee, therefore, the DPRRC said:

“We are aware that, unlike the requirement in respect of bills, the Parliamentary Business and Legislation (Cabinet) Committee does not require a department to prepare a delegated powers memorandum for *draft* bills. In our report, published in July 2014, entitled “Special Report: Quality of Delegated Powers Memoranda”, we recommended “that the Government encourage departments, as best practice, to prepare a draft memorandum in parallel with the policy development and early drafting stages of the bill rather than leaving it until later in the process”. **We therefore recommend to the Cabinet Office that a delegated powers memorandum should be required in respect of bills and draft bills alike, and will be writing to the Cabinet Office accordingly.**” (paragraph 2)

#### *Illustrative statutory instruments and draft Bills*

The DPRRC also made the following comment with regard to the provision of illustrative statutory instruments at the pre-legislative scrutiny stage:

“It will be important—once the Bill is introduced into Parliament—that illustrative statutory instruments accompany the Bill. This will enable Parliament to have a clearer understanding of how some of these important powers are likely to be exercised in due course. When the illustrative statutory instruments come to be made, the principal changes to the drafts should be indicated and an explanation given. **Given the importance we attach to the provision of illustrative statutory instruments to accompany a bill, it follows that we would also welcome their being made available during pre-legislative scrutiny. This is also a matter which we shall be drawing to the attention of the Cabinet Office.**”

The DPRRC would welcome your views on these two important matters.

27 April 2017

### **Letter from Rt Hon. Ben Gummer MP to the Chairman**

Thank you for your letter of 27th April regarding the pre-legislative scrutiny of the draft Spaceflight Bill and the provision of a delegated powers memorandum.

As I am sure you are aware, following the dissolution of Parliament we are not in a position to respond substantively on the points you have raised. I value the vital role the Committee plays and I have asked my officials to consider this issue very carefully. I will ensure a response is prepared which addresses your concerns.

**7 June 2017**

### **Letter from Rt Hon. Damian Green MP, First Secretary of State and Minister for the Cabinet Office at the Cabinet Office, to the Chairman**

I am writing further to Ben Gummer's interim reply of 7th June and in response to your letter of 27th April.

I am extremely grateful to the Committee for the work it does in scrutinising Government legislation. I understand that the Cabinet Office have been working hard to ensure officials across Government are aware of the Committee's reports and recommendations.

We are hoping to publish several sets of draft legislation for pre-legislative scrutiny in this session. I can confirm that where Departments publish full draft bills, we will endeavour to produce memorandums for your Committee setting out the case for new delegated powers. We would be grateful to the Committee for its thoughts on such draft bills.

In most cases it will not be possible to produce draft regulations alongside draft bills. Whilst it is our intention to set out the rationale for delegated powers and how those powers would be used, producing draft regulations alongside draft bills would not allow for informal consultation with stakeholders on points of detail ahead of publication. Draft bills generally set out the overarching framework for a policy, so it is important that we have time to consult with colleagues within Government and beyond on the detail of a policy. In some cases this will involve formal consultations, but in most instances this will involve informal discussions with stakeholders as a policy is developed or needs to be adapted. In many cases Departments will know the key tenets as to how a delegated power will be used, but the minutiae will either be subject to spending controls within Government, discussions with industry or will be commercially sensitive. I would like to reassure you that if it is possible and appropriate, Departments will publish draft regulations alongside draft bills.

I look forward to working with your Committee.

**11 August 2017**

## **APPENDIX 4: MEMBERS AND DECLARATIONS OF INTERESTS**

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Committee Members' registered interests may be examined in the online Register of Lords' Interests at [www.publications.parliament.uk/pa/ld/ldreg.htm](http://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 13 September 2017 Members declared no interests.

### **Attendance**

The meeting on the 13 September 2017 was attended by Lord Blencathra, Lord Flight, Lord Jones, Lord Lisvane, Lord Moynihan, Lord Rowlands, Lord Thomas of Gresford, Lord Thurlow and Lord Tyler.