



HOUSE OF LORDS

Delegated Powers and Regulatory Reform  
Committee

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39th Report of Session 2017–19

**Fisheries Bill**  
**Healthcare (International  
Arrangements) Bill**  
**Divorce (Financial Provision)  
Bill [HL]**  
**Prisons (Interference with  
Wireless Telegraphy) Bill**

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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](#)

### *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*

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### *General Information*

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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](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.

# Thirty Ninth Report

## FISHERIES BILL

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1. The Fisheries Bill was introduced in the House of Commons on 25 October 2018. It provides a legal framework for the United Kingdom to operate as an independent coastal state once the United Kingdom has left the European Union and the Common Fisheries Policy (CFP). Given the significance of the Bill as part of the suite of Brexit-related bills, we have reported on it in time for Members of the House of Commons to consider it at committee stage in their House.<sup>1</sup>
2. The strategic aim of the Fisheries Bill is essentially the same as that of the Agriculture Bill. In both cases, the Government are seeking to create a new domestic regime to replace a common EU policy, respectively the CFP and the CAP. **However, the Fisheries Bill is a major improvement on the Agriculture Bill so far as delegated powers are concerned. We particularly commend the quality and thoroughness of Defra's Delegated Powers Memorandum.**<sup>2</sup>
3. It is instructive to compare how delegated powers are dealt with in the Fisheries Bill and in the Agriculture Bill. We were highly critical of the approach taken in the Agriculture Bill:
  - (a) It involves a major transfer of powers from the EU to the executive, bypassing Parliament and the devolved legislatures.
  - (b) It is skeletal and an ominous precedent for future Brexit legislation, conferring many Ministerial powers but few duties and requiring extensive bureaucratic regulation to fill in the gaps.<sup>3</sup>
  - (c) Consultation is almost entirely optional.<sup>4</sup>
  - (d) The Bill contains no sunset clauses.
  - (e) The “simplify or improve” test<sup>5</sup> is unsatisfactorily wide.
  - (f) The Bill was not accompanied by indicative examples of how delegated powers might be exercised.
  - (g) The Bill contains very little in terms of underlying principles, policies and criteria.

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1 We adopted the same approach in relation to the recent Agriculture Bill, as we did with the European Union (Withdrawal) Bill. We will, in due course, wish to report on the Fisheries Bill a second time in the form in which it comes to this House.

2 Department for Environment, Food and Rural Affairs, [Fisheries Bill Delegated Powers Memorandum](#)

3 The words “The Secretary of State may” occur 36 times in the Bill. The words “The Secretary of State must” occur three times.

4 Save for clause 24(5), relating to new sector-specific provision in regulations made under clauses 22 and 23.

5 In clauses 6, 9 and 11 of the Agriculture Bill, the Secretary of State has the power, by regulations, to modify legislation if the Secretary of State considers that it will simplify or improve the legislation—a highly subjective test.

4. By contrast, the approach to delegated powers in the Fisheries Bill is a considerable improvement:
- (a) Defra is reviving, modernising and otherwise improving powers dating from pre-accession legislation, notably the Sea Fish (Conservation) Act 1967 and the Sea Fisheries Act 1968. Defra is right to say<sup>6</sup> that the Bill represents a significant increase in the scrutiny that Parliament will have over fisheries policy compared to the last 45 years.
  - (b) There are fewer powers conferred on Ministers (16 in the Fisheries Bill compared to 36 in the Agriculture Bill) and more duties (11 in the Fisheries Bill compared to three in the Agriculture Bill). And there is considerably more explanation in the Delegated Powers Memorandum of the structure and exercise of the Fisheries Bill's delegated powers than was the case for the Agriculture Bill.
  - (c) There are more consultation requirements in the Fisheries Bill than in the Agriculture Bill: for example, clauses 19(1) and 29(7), and clause 36(1) in relation to the important power in clause 31. Schedule 1 provides for consultation in relation to the new fisheries statements in clauses 2 to 6 of the Bill, to which relevant national authorities in the UK must presumptively adhere.
  - (d) Although the Fisheries Bill does not contain sunset clauses, Defra has satisfactorily explained their absence.<sup>7</sup> The desirability of sunset clauses is correspondingly lessened when there is a proven need for powers of the width sought by the Government; likewise, when powers are accompanied by safeguards such as mandatory consultation and enhanced parliamentary scrutiny.
  - (e) There is no "simplify or improve" test in the Fisheries Bill.
  - (f) Although the Fisheries Bill is not accompanied by indicative statutory instruments, it has a Delegated Powers Memorandum that contains much helpful detail and engages with our known concerns. Clause 31, a wide and important power, is accompanied by 19 pages (including an annex) of analysis as to how it can be used.
  - (g) There is more detail on the face of the Bill in terms of underlying principles, policies and criteria than in the Agriculture Bill.
    - (i) Clauses 2–6 require Ministers to act compatibly with national policies expressed in various published fisheries statements against which Ministerial action (including the making of statutory instruments) will be judged.
    - (ii) Clause 9 (power of the Secretary of State to add, remove or vary exceptions to the prohibition on unlicensed fishing) is more transparent than, and offers fuller parliamentary scrutiny than, the present law.<sup>8</sup>

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6 Department for Environment, Food and Rural Affairs, [Fisheries Bill Delegated Powers Memorandum](#), para 11

7 *Ibid.*, para 12

8 *Ibid.*, paras 14–19

- (iii) Clause 18 (determining the maximum quantity of sea fish that may be caught by British fishing boats and the maximum days they may spend at sea) sets out what would otherwise be a prerogative power and makes the process of determining UK quota more transparent.
- (iv) Clause 28 (financial assistance must be given in accordance with a scheme made pursuant to affirmative regulations) has no parallel in the Agriculture Bill. Clause 1 of the Agriculture Bill allows the Secretary of State to give financial assistance without the delegation of any legislative power.
- (v) Of the Bill's 15 delegated powers that have a parliamentary procedure, only four are solely governed by the negative procedure, and justifiably so.

### Clause 22—Sale of English fishing opportunities for a calendar year

5. We draw attention to one power in the Bill. Clause 22 allows the Secretary of State, by affirmative regulations, to sell rights to use English fishing opportunities for a particular calendar year. Currently, English fishing opportunities (total allowable catch, and maximum days spent by vessels at sea) are distributed according to an EU allocation. The power under clause 22 to distribute extra quota envisages increased fishing opportunities for British fishing boats once the UK takes back control of access to its fishing waters.
6. Regulations made under clause 22 do not need to be preceded by a statutory consultation. Although the Government say that the sale of fishing opportunities exclusively on the basis of price is not intended,<sup>9</sup> the Bill does not say so explicitly.<sup>10</sup> The Government's aspiration that clause 22 would allow "some English quota to be allocated in a different way than under the current system"<sup>11</sup> does not find adequate translation on the face of the Bill. **We recommend that this be clarified, that the exercise of the power in clause 22 be preceded by consultation,<sup>12</sup> and that clause 22 should enshrine the Government's stated intention that fishing opportunities will not be sold exclusively on the basis of price.**

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9 [Explanatory Notes to the Fisheries Bill](#) [Bill 278 (2017–19)-EN], para 153

10 Although para 32 of the Delegated Powers Memorandum says that the purpose of any such scheme would not be cost recovery or revenue raising ("eligibility rules could, for example, require those bidding for the quota to demonstrate they are engaged in sustainable fishing"), the Bill is silent on this point.

11 Department for Environment, Food and Rural Affairs, [Fisheries Bill Delegated Powers Memorandum](#), para 34

12 As in the case of clause 29(7), for example.

## HEALTHCARE (INTERNATIONAL ARRANGEMENTS) BILL

7. The Healthcare (International Arrangements) Bill was introduced in the House of Commons on 26 October 2018 and was read a second time on 14 November. As with the Fisheries Bill, we have reported on it in time for Members of the House of Commons to consider it at committee stage in their House.
8. The Government say that the Bill is being introduced “as a result of the decision to leave the EU and is intended to enable the Government to respond to the wider range of possible outcomes of EU Exit in relation to reciprocal healthcare including the implementation of new reciprocal healthcare agreements.”<sup>13</sup> Such agreements typically involve the mutual waiving of healthcare charges for migrants, workers or visitors.

### Clause 2—Healthcare and healthcare agreements

9. We draw attention to clause 2 of the Bill. If the reason for the Bill’s introduction is to protect British citizens if a ‘no deal’ scenario affects current reciprocal healthcare agreements with other EU countries, clause 2 of the Bill goes considerably wider. It allows the Secretary of State to make regulations:
  - (a) in relation to the payment by the Secretary of State of the cost of all forms of healthcare (whether relating to mental or physical health, including related ancillary care<sup>14</sup>) provided by anyone anywhere in the world;<sup>15</sup>
  - (b) for and in connection with the provision of any such healthcare, provided by anyone anywhere in the world;<sup>16</sup> or
  - (c) to give effect to international healthcare agreements.<sup>17</sup>
10. **Clause 2 has a breath-taking scope. Indeed, the scope of the regulations could hardly be wider.**
  - There is no limit to the amount of the payments.<sup>18</sup>
  - There is no limit to who can be funded world-wide.<sup>19</sup>
  - There is no limit to the types of healthcare being funded.<sup>20</sup>
  - The regulations can confer functions (that is, powers and duties, including discretions) on anyone anywhere.<sup>21</sup>

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13 [Explanatory Notes to the Healthcare \(International Arrangements\) Bill](#) [Bill 279 (2017–19)-EN], para 2

14 See the definition of healthcare in clause 3. Para 34 of the Explanatory Notes says that the additional element of ancillary care is included to enable the Secretary of State to provide, where necessary, for ancillary costs such as travel costs. Ancillary healthcare does not naturally include the concept of travel costs.

15 Clauses 1 and 2(1)(a).

16 Clause 2(1)(b).

17 Clause 2(1)(c). “Healthcare agreement” is defined in clause 3 to mean agreements between the UK and foreign governments or international organisations concerning healthcare provide outside the UK funded by the UK government or healthcare provided in the UK funded by foreign governments.

18 Clause 2(2)(a).

19 Clause 2(2)(b).

20 Clause 2(2)(c).

21 Clause 2(2)(h).

- The regulations can delegate functions to anyone anywhere.<sup>22</sup>
  - The regulations can amend or repeal any Act of Parliament ever passed, for the purpose of conferring functions on people or for giving effect to a healthcare agreement.<sup>23</sup>
  - The Government say that clause 2 “enables the Secretary of State to address essential matters relating to healthcare abroad”.<sup>24</sup> But the powers in the Bill go much wider than essential matters.
  - The Government say that the clause 2 powers “are necessary to enable the Secretary of State to respond appropriately after EU exit, when the EU reciprocal healthcare arrangements will no longer apply in the UK in their current form”.<sup>25</sup> But the Bill applies to countries throughout the world, not just to the EU.
  - The Government acknowledge that the powers in the Bill are broad, but they argue that the subject matter is narrow: “they can only be used to arrange for provision of and payments relating to healthcare abroad and to give effect to healthcare agreements. This remit is small and contained”.<sup>26</sup> Actually, the scope of regulations made under clause 2—relating to the provision and funding of healthcare throughout the world—is exceedingly wide.
11. All regulations made under clause 2 are subject only to the negative procedure, save where they amend primary legislation.<sup>27</sup> If, without such amendment, the Secretary of State wished to fund wholly or entirely the cost of all mental health provision in the state of Arizona, or the cost of all hip replacements in Australia, the regulations would only be subject to the negative procedure. Of course, these examples will not be priorities for any Secretary of State in this country. But we judge powers by how they are capable of being used, not by how governments say that they propose to use them. The fact that the powers could be used in this way suggests that they are too widely drawn.
  12. At paragraph 5 of the Delegated Powers Memorandum, the Department of Health and Social Care has indicated its desire to respond “flexibly and swiftly to changing and at present unknown circumstances as a result of the UK exiting the EU”. But regulations under clause 2 could apply to the funding of all types of healthcare worldwide.
  13. At paragraph 11 of the Delegated Powers Memorandum, the Department says that the delegated powers in the Bill will be needed regardless of the outcome of negotiations with the EU. It is one thing to introduce skeletal legislation needed in the event of no EU withdrawal agreement. But this Bill is as much to do with implementing future reciprocal healthcare agreements entered with non-EU countries.<sup>28</sup> Indeed, it goes much wider than merely giving effect to healthcare agreements and covers the provision

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22 Clause 2(2)(i).

23 Clause 5(3).

24 Department for Health and Social Care, [Healthcare \(International Arrangements\) Bill Delegated Powers Memorandum](#), para 15

25 *Ibid.*, para 18

26 *Ibid.*

27 In which case they must be affirmative: clause 5(5) and (6).

28 Department for Health and Social Care, [Healthcare \(International Arrangements\) Bill Delegated Powers Memorandum](#), para 12

of any healthcare provided by anyone anywhere in the world.<sup>29</sup> **In our view, the powers in clause 2(1) are inappropriately wide and have not been adequately justified by the Department. It is particularly unsatisfactory that exceedingly wide powers should be subject only to the negative procedure.**<sup>30</sup>

#### **DIVORCE (FINANCIAL PROVISION) BILL [HL]**

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14. This Bill contains no delegated powers.

#### **PRISONS (INTERFERENCE WITH WIRELESS TELEGRAPHY) BILL**

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

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<sup>29</sup> See clause 2(1)(a) and (b).

<sup>30</sup> Save only where they amend primary legislation.



## **APPENDIX 1: MEMBERS AND DECLARATIONS OF INTERESTS**

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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.

For the business taken at the meeting on 14 November 2018, Members declared no interests.

### **Attendance**

The meeting on the 14 November 2018 was attended by Lord Blencathra, Lord Flight Lord Jones, Lord Lisvane, Lord Rowlands, Lord Thomas of Gresford, Lord Thurlow and Lord Tyler.

The Chairman recused himself from the deliberation on the Fisheries Bill and took no part in it because of his role as Deputy Chairman of Natural England.