

HOUSE OF LORDS

Delegated Powers and Regulatory Reform  
Committee

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41st Report of Session 2017–19

# Draft Legislative Reform (Horserace Betting Levy) Order 2018

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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*

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### *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 [hldelegatedpowers@parliament.uk](mailto: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.

# Forty First Report

## DRAFT LEGISLATIVE REFORM (HORSERACE BETTING LEVY) ORDER 2018

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### Introduction

1. This draft Legislative Reform Order (LRO) was laid on 9 October 2018 by the Department for Digital, Culture, Media and Sport (DCMS), together with an Explanatory Document (ED) and a *De Minimis* Assessment.<sup>1</sup> The draft Order is proposed to be made under section 1 of the Legislative and Regulatory Reform Act 2006 (“the 2006 Act”) which allows a Minister to make provisions by order to remove or reduce a burden, such as a financial cost or administrative inconvenience, subject to certain statutory tests and pre-conditions being met.
2. According to DCMS, the draft Order aims to streamline the administration of the Horserace Betting Levy (“the Levy”) and reduce administrative burdens and financial costs on those affected by the Levy. This is to be achieved by abolishing the Horserace Betting Levy Board (“the Levy Board”) that is currently responsible for Levy assessment, collection and enforcement and transferring these responsibilities to the Gambling Commission. The Levy Board’s responsibility for application of Levy funds is proposed to be passed to a new body (called the Racing Authority) managed by the racing industry. DCMS says that the expected savings will make available more Levy funding to support the wider horseracing industry. In addition to the abolition of the Levy Board, the draft Order would also result in the closure of the Levy appeals tribunals for England and Wales and Scotland.

### Tests and pre-conditions

3. The Committee’s role in scrutinising an LRO is not to consider in depth the policy in the draft Order but to apply an overarching, non-statutory “appropriateness” test, and the statutory tests set out in the 2006 Act.

#### *“Appropriateness” test*

4. The overarching test of “appropriateness” is not defined in statute. Previous reports by the Committee, however, provide some guidance. In session 1994–95, for example, in finding a draft Deregulation Order<sup>2</sup> on charging for public dances held on Sundays to be inappropriate, the Committee concluded that, in that instance, the controversy was such that, in the Committee’s view, “Parliament would expect to find the proposal in a bill, with the freedom of debate which that would allow”.<sup>3</sup> In session 2004–05, in relation to a draft Regulatory Reform Order on the registration of births and deaths,<sup>4</sup> the Committee said: “a proposal may be inappropriate for the

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1 A *De Minimis* Assessment is used where the estimated annual impact of proposed reforms is below the £5 million threshold for a full impact assessment.

2 Predecessor to Legislative Reform Orders, laid under the Deregulation and Contracting Out Act 1994 (“the 1994 Act”).

3 Delegated Powers Scrutiny Committee (15th Report, Session 1994–95, HL Paper 102), para 22, in relation to the draft Deregulation (Sunday Dancing) Order 1995 ([SI 2000/3372](#)). The 1994 Act was a predecessor to the Regulatory Reform Act 2001 (“the 2001 Act”) and the 2006 Act, and at that time the Committee was called the Delegated Powers Scrutiny Committee.

4 Predecessor to Legislative Reform Orders, laid under the 2001 Act.

regulatory reform order procedure if there is reason to believe that some of those directly affected by it, including members of the general public, have such significant concerns about some important element of it that there is a clear need for the greater level of Parliamentary scrutiny and debate to which bills are subject”.<sup>5</sup> Finally, in a report on the Legislative and Regulatory Reform Bill, in session 2005–06, the Committee said: “Appropriateness involves more than size and controversy: a proposal might sub-delegate too much power; might follow unreasonably soon after the legislation it amends; or it might be that the changes made by the Minister to a Law Commission recommendation, even if not controversial, are too significant”.<sup>6</sup>

### *Statutory tests*

5. The statutory tests set out in the 2006 Act are: that the Minister considers that the proposal removes or reduces a burden (section 1); that various pre-conditions have been met (section 3); and, that there has been consultation with relevant parties (section 13). The section 3 pre-conditions are:
  - the policy objective intended to be secured by the provision could not be satisfactorily secured by non-legislative means;
  - the effect of the provision is proportionate to the policy objective;
  - the provision, taken as a whole, strikes a fair balance between the public interest and the interests of any person adversely affected by it;
  - the provision does not remove any necessary protection;
  - the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise;
  - the provision is not of constitutional significance.

### *Level of parliamentary scrutiny*

6. As part of its scrutiny function, the Committee also makes recommendations about the level of parliamentary scrutiny to be applied to a draft Order. On this occasion, the Government proposed that the draft Order should be subject to the affirmative procedure. The Committee, however, recommended (under section 15(4) of the 2006 Act) that, because of concerns in relation to aspects of both the overarching test of “appropriateness” and the 2006 Act tests, the draft Order should be subject to the super-affirmative procedure. As a result, the period in which the Committee is able to report on the draft Order has been extended to 60 days (section 18(2) of the 2006 Act), during which time the Committee has taken further evidence.<sup>7</sup>

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5 Delegated Powers and Regulatory Reform Committee (3rd Report, Session 2004–05, [HL Paper 14](#)), para 26, in relation to the proposal for the draft Regulatory Reform (Registration of Births and Deaths) (England and Wales) Order 2004, laid under the 2001 Act. The areas of concern were: “safeguards in relation to the integrity, availability, security and accuracy of the central database; the implications of enabling registration by telephone and via the internet, along with the creation of a national call centre; safeguards in relation to the use to which the Registrar General may put the information collected through registration of births and deaths; restrictions on access to information; the phasing out of routine paper certificates; and co-ordination of reform of the civil registration services in England and Wales, Scotland and Northern Ireland” (para 45).

6 Delegated Powers and Regulatory Reform Committee (20th Report, Session 2005–06, [HL Paper 192](#)), para 49

7 Delegated Powers and Regulatory Reform Committee (38th Report, Session 2017–19, [HL Paper 219](#))

### Further evidence

7. On 21 November, sitting concurrently with the House of Commons Regulatory Reform Committee, the Committee heard oral evidence from the Minister, Mims Davies MP, Under Secretary of State at DCMS, and her officials, and also from Lord Lipsey who, in evidence, explained that he had “had many years in racing politics, including as chair as the Shadow Racing Trust, director of the Tote and chairman of the British Greyhound Racing Board” and was currently a racehorse owner and member of the Starting Price Regulatory Commission.<sup>8</sup> We are grateful to them for their assistance in giving oral evidence and in providing additional written evidence,<sup>9</sup> along with additional written evidence from the British Horseracing Authority, The Horsemen’s Group and the Racecourse Association.<sup>10</sup> We are particularly grateful to the Minister given that she had been in post only a matter of days. We would also like to express our thanks to the Regulatory Reform Committee. Sitting concurrently not only provided practical efficiencies for members and witnesses, but enabled each Committee to benefit from the different perspectives of the other.

### Findings

#### *Our approach*

8. As we have said, the role of the Committee is essentially procedural rather than substantive. In scrutinising the draft Order, we asked ourselves the following questions:
- Does the draft Order meet the “appropriateness” test?
  - If it does, does the draft Order satisfy the statutory tests?
9. In our view, the draft Order does not meet the “appropriateness” test. Our reasons are set out below.
10. Given this finding, it is not strictly necessary for us to make further findings in relation to the statutory tests. We set out below, however, some examples of the way in which the proposal appears to us to raise doubts as to whether the 2006 Act tests are fully satisfied. These examples reinforce our view that, on this occasion, the Legislative Reform Order procedure is inappropriate.

#### *Appropriateness*

11. Building on previous observations by the Committee (see paragraph 4 above), and in particular those in relation to the Legislative and Regulatory Reform Bill, we have applied the following generic test of “appropriateness”: are the proposed policy changes set out in the draft Order of a character that Parliament would expect them to be contained in a bill and afforded the greater level of parliamentary scrutiny and debate to which primary legislation is subject? We have concluded that they are.
12. Our conclusion rests principally on the following:
- the draft Order proposes to abolish a statutory body (the Levy Board)—a body which has power to collect a statutory levy amounting

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<sup>8</sup> [Q 1](#) and [Q 4](#)

<sup>9</sup> Written evidence from [Mims Davies MP, Parliamentary Under Secretary of State at the Department for Digital, Culture, Media and Sport](#) and [Lord Lipsey](#)

<sup>10</sup> Written evidence from [British Racing](#)

in 2017–18 to £95 million—and to replace it with a non-statutory body (anticipated to be the Racing Authority) designated by the Secretary of State;

- while the designation is subject to certain requirements (including, for example, that the Secretary of State is satisfied that it is a “suitable” body), there is no statutory requirement to consult prior to designation;
  - the designation of the non-statutory body is not subject to parliamentary scrutiny;
  - the designation can be terminated by the Secretary of State, and another body designated by the Secretary of State, again without any parliamentary intervention.
13. In evidence to us, Lord Lipsey, in addition to arguing that the LRO procedure was inappropriate, suggested that the draft Order was in breach of section 5(1) of the 2006 Act which states that an Order “may not make provision to impose, abolish or vary any tax”. The Minister rejected this argument,<sup>11</sup> and in her further written evidence she states that the Government do not accept that the Levy should be classified as a tax and that, in any event, the draft Order does not propose to “impose, abolish or vary” the Levy. Given our finding in relation to the “appropriateness” test, we take the view that it is unnecessary for us to make a finding in relation to this point.
14. The primary legislative route would also enable Parliament to challenge points of detail. For example, under proposed new section 338P of the 2005 Act (see Article 4 of the draft Order), the designated body is required to publish a strategic plan. In doing so, the body must consult those who represent the interests of “bookmakers, and betting exchange providers, whose business is concerned with leviable bets” and “such persons as the body thinks appropriate”, but there is no explicit requirement to consult the veterinary profession. In response to this point, the Minister said that the Racing Authority was in the process of setting up a veterinary sub-group and that the Levy would continue to support “equine veterinary projects and the breeds of horses.”<sup>12</sup> In her further written evidence, the Minister also referred to that fact that the statutory purposes for applying Levy funds include the advancement and encouragement of veterinary science and education (see proposed new section 338O in Article 4 of the draft Order) and that the designated body had to “command the confidence” of, amongst others, persons involved in veterinary science and education (see paragraph 1(3)(b) of proposed new Schedule 15A to the 2005 Act in Schedule 1 to the draft Order). Legislating by bill would enable members of both Houses to explore whether they were satisfied that the interests of the veterinary profession, for example, were appropriately protected and, if not, propose amendments to ensure that they were.

### *Statutory tests*

15. The Department explains in the ED why it considers that the statutory tests have been fully met. We have some doubts about aspects of the Department’s case. For example, the Department argues that, in accordance with section 1 of the 2006 Act, the draft Order would reduce burdens in terms of

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<sup>11</sup> [Q 75](#)

<sup>12</sup> [Q 64](#)

“financial cost” (subsection (3)(a)) and “administrative inconvenience” (subsection (3)(b)). We found the evidence in relation to “financial cost” unconvincing. According to the *De Minimis* Assessment, the Government estimate an annual administrative saving of £0.24 million. They concede, however, that, applying the Levy Board’s “best case estimate of potential future operating costs (£1.34m), which incorporates a review of operational structure, there would be a net annual cost of £0.05 m rather than a £0.24 m net annual saving”.<sup>13</sup> When questioned, the Minister argued that “the reforms are not just about the financial savings ... they are about reducing the administrative burdens and making the levy process more efficient”.<sup>14</sup> The Minister, however, admitted that “the exact ability to predict ... savings is a little more difficult to pin down”.<sup>15</sup> This point was taken up again in the Minister’s further written evidence which states: “It is the Government’s case that the draft Order will remove or reduce burdens relating to both financial costs and administrative inconveniences. However, in the unlikely event that costs do not reduce, then the Order is still within vires of the 2006 Act if administrative inconveniences are reduced.”

16. Section 3 of the 2006 Act requires certain conditions to be met including that the provision does not remove any “necessary protections” and “does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise”. A question was put to the Minister about the fact that the designated body, unlike the Levy Board, would not be susceptible to Freedom of Information requests.<sup>16</sup> The Minister did not meet the point save to say that the Government were “working with the Authority in terms of the transparency expectations” and that there were “a number of safeguards in the legislation that ensure that the Authority will be open and transparent”.
17. With regard to the statement of accounts of the designated body, the ED states: “the Government maintains that transparency and openness over the use of levy funds are fundamental to ensuring appropriate oversight of the designated body ...”.<sup>17</sup> As a result, proposed new section 338Q of the 2005 Act (see Article 4 of the draft Order) requires the designated body to keep accounting records in respect of levy funds in such form as the Secretary of State may direct, and to prepare a statement of accounts also in the form as the Secretary of State may direct. The statement of accounts must be audited by a qualified accountant, and the statement of accounts and the auditor’s report must be published annually. While these arrangements, amongst others, provide some safeguards, they contrast with the more robust statutory requirements in relation to the accounts of the Levy Board. For the Levy Board, accounts must be audited by the Comptroller and Auditor General;<sup>18</sup> a report of its proceedings, including the statement of accounts and the auditor’s report, must be submitted to the Secretary of State, and the

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13 Department for Digital, Culture, Media and Sport, draft Legislative Reform (Horserace Betting Levy) Order 2018, *De Minimis* Assessment, [page 9](#)

14 [Q 29](#)

15 [Q 30](#)

16 [Explanatory Document to the draft Legislation Reform \(Horserace Betting Levy\) Order 2018](#), para 3.66

17 [Explanatory Document to the draft Legislation Reform \(Horserace Betting Levy\) Order 2018](#) para 6.52

18 Article 2 of the Government Resources and Accounts Act 2000 (Audit of Public Bodies) Order 2012, ([SI 2012/854](#))

Secretary of State is under a duty to arrange for a copy of the Levy Board's report to be laid before each House of Parliament.<sup>19</sup>

18. We note also that Article 3 of the draft Order would abolish the Horse Race Betting appeals tribunals. While we acknowledge that the last known hearing before a tribunal was 25 years ago, we would expect the ED to explain more fully the implications for bookmakers of having to seek judicial review in the event of a dispute with the Gambling Commission.

### **Conclusion**

19. **We have concluded that the draft Order does not meet the “appropriateness” test and that the proposed policy changes are of a character that Parliament would expect them to be contained in a bill and afforded the greater level of parliamentary scrutiny and debate to which primary legislation is subject.**
20. **Should the Minister decide to proceed with the draft Order, we anticipate that we would exercise our power under section 18 of the 2006 to find that no further proceedings be taken in relation to the draft Order.**
21. **Finally, we wish to make clear that, in stating these conclusions, we are not making a substantive comment on the proposed policy changes which, in our view, is a matter for the House.**

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<sup>19</sup> Betting, Gaming and Lotteries Act 1963, [section 31\(2\)](#).

## **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 5 December 2018, Members declared no interests.

### **Attendance**

The meeting on the 5 December 2018 was attended by Baroness Andrews, Lord Blencathra, Lord Jones, Lord Lisvane, Lord Moynihan, Lord Rowlands, Lord Thomas of Gresford, Lord Thurlow and Lord Tyler.