

HOUSE OF LORDS

Delegated Powers and Regulatory Reform  
Committee

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54th Report of Session 2017–19

# Rivers Authorities and Land Drainage 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](#)

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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.

# Fifty Fourth Report

## RIVERS AUTHORITIES AND LAND DRAINAGE BILL

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1. This Bill was passed by the House of Commons on 15 March 2019 and had its second reading in the House of Lords on 16 May. It is a private member's bill, but is supported by the Government and the Department for Environment, Food and Rural Affairs has provided a Delegated Powers Memorandum ("the Memorandum").<sup>1</sup>
2. We were surprised that a bill of such length and complexity, and including such a range of delegated powers, should be a private member's bill and—for a private member's bill—we have made an exceptional number of criticisms. It is for this reason that this report is longer than our reports on private members' bills are accustomed to being.
3. Our criticisms relate to the appropriateness of several of the delegations of power including, most importantly, delegations which, in our view, are designed to allow Ministers to create a significant public body without requiring a hybrid bill. Given the number and importance of the issues raised, the House will no doubt expect committee stage to be taken, exceptionally for a private member's bill, during prime time so that it may be subject to a wide-ranging debate.
4. The Bill deals with two separate topics:
  - clause 1 and the Schedules provide for the establishment of "rivers authorities", a new type of public body with flood risk management functions;
  - clauses 2 to 4 make provision with respect to the calculation of drainage rates and levies from which internal drainage boards meet their expenses.
5. We draw the following powers to the attention of the House.

### Rivers Authorities

*Clause 1(3)—New section 21A—Power for Secretary of State to establish rivers authorities*

6. Clause 1 inserts new sections 21A to 21J into the Flood and Water Management Act 2010 ("the 2010 Act"). New section 21A gives the Secretary of State power to establish, by regulations subject to the affirmative procedure, new bodies called "rivers authorities" for the whole of one or more local government areas in England.
7. New section 21E of the 2010 Act provides for the main functions of a rivers authority:

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<sup>1</sup> Department for Environment, Food and Rural Affairs, Rivers Authorities and Land Drainage Bill [Delegated Powers Memorandum](#)

- it must prepare and publish a plan of the activities that are to be carried out in its area in each financial year by “relevant risk management authorities”<sup>2</sup> in the exercise of their flood risk management functions;
  - it may advise such authorities if it thinks there are opportunities for cooperation between those authorities in carrying on the activities identified in the plan;
  - it must consider whether there are any activities which could be carried on by those authorities but which are not proposed to be carried on by them and which the rivers authority thinks should be carried on. If it determines that there are such activities, it must produce a plan which identifies them and specifies whether it proposes to (a) make payments to the relevant risk management authority to cover all or part of the costs of the activities, (b) carry on any of the activities itself, or (c) do both of those things.
8. Although the Bill provides for new rivers authorities to be set up anywhere in England, it is clear that there is only one such authority which the Government currently have in mind: a rivers authority for Somerset, where there is already a Somerset Rivers Authority which was established on a non-statutory basis in 2014. Paragraph 4 of the Explanatory Notes explains that:
- “... it is expected that risk management authorities in Somerset may wish to put forward a proposal to put the existing Somerset Rivers Authority on a statutory footing”;
  - “The Somerset Rivers Authority is currently funded through contributions from Somerset councils”;
  - “The current board of the Somerset Rivers Authority have called on the government to provide them with precepting powers;”<sup>3</sup> and
  - “... the government is not currently considering establishing rivers authorities in other parts of England”.
9. The Bill’s sponsor in the House of Commons, David Warburton MP, stated at report stage in that House that, “while the Bill nominally allows for new rivers authorities to be set up, with local support and after consultation, anywhere in the country, there is no particular desire or need for that at the moment”.<sup>4</sup> At committee stage in the House of Commons, the Parliamentary Under-Secretary of State for Environment, Food and Rural Affairs, Dr Thérèse Coffey MP, said:
- “It is fair to say that the creation of the rivers authority came about because of the situation in Somerset ... . If communities wish to come forward and take advantage of these powers, we will consider them, but

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2 Clause 1(2) inserts a definition of “relevant risk management authority” into section 6 of the 2010 Act. It means a risk management authority for an area within the area of a rivers authority or which exercises functions in relation to the area of a rivers authority. Under section 6 of the 2010 Act, “risk management authority” means the Environment Agency, the Natural Resources Body for Wales, a lead local flood authority, a district council for an area for which there is no unitary authority, an internal drainage board, a water company, and a highway authority.

3 Precepting powers would enable a precept to be added to council tax bills. The effect of the amendment made by paragraph 12 of Schedule 2 to the Bill is that a rivers authority will be a major precepting authority for the purposes of the Local Government Finance Act 1992.

4 HC Debs, 15 March 2019, [col 713](#)

as it stands the only expression of interest so far is from Somerset, which is the reason the Bill has arisen”.<sup>5</sup>

10. Given this background, it may be asked why the bill itself does not establish a rivers authority for Somerset (putting the existing Somerset Rivers Authority on a statutory footing), but instead creates a mechanism for the establishment of rivers authorities anywhere in England by statutory instrument. The following statement made at committee stage by Dr Coffey sheds light on this:

“It is worth pointing out to the Committee that one of the reasons for creating this wider opportunity for other people to come forward was to avoid the political difficulty of what is called a hybrid bill to create a specific authority, which can take anywhere between five and 10 years to get through, if it ever does. The Bill provides that opportunity, but it is not the Government’s intention to go around proactively creating rivers authorities. However, the door will be open if there is local support to do that”.<sup>6</sup>

### *Hybrid bills*

11. A hybrid bill is a bill the content of which, though of general application, would affect a particular private interest in a manner different from the private interests of other persons or bodies of the same category or class. The procedures followed in Parliament in considering hybrid bills incorporate aspects of both public bill and private bill procedures. For example, in each House, after a hybrid bill’s introduction, time is provided for members of the public who are specially and directly affected by the bill to submit a petition against it and, following second reading, the bill is committed to a select committee which considers those petitions and may amend the bill in the light of points raised in them.
12. Hybrid bills are likely to take longer to complete their passage than other public bills and this is for good reason: the need to allow petitioners to make their case effectively. However, the Minister’s suggestion that a hybrid bill to create a specific rivers authority could “take anywhere between five and 10 years to get through, if it ever does” is not accurate. Taking the most recent examples, the High Speed Rail (London - West Midlands) Bill, which was very controversial, took just over three years (it was introduced on 25 November 2013 and received Royal Assent on 23 February 2017), the Crossrail Bill took nearly three and a half years (it was introduced on 22 February 2005 and received Royal Assent on 22 July 2008), the Channel Tunnel Rail Link Bill took just over two years (it was introduced on 23 November 1994 and received Royal Assent on 18 December 1996), and the Cardiff Bay Barrage Bill took two years (it was introduced on 4 November 1991 and received Royal Assent on 5 November 1993).
13. **We consider that the delegation of powers to establish rivers authorities anywhere in England by statutory instrument is inappropriate because it is, in our view, a ploy to avoid having to pass a hybrid bill to establish the Somerset Rivers Authority.**

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5 HC Debs, 11 March 2019, [col 10](#)

6 *Ibid.*

14. **The hybrid bill procedures exist because Parliament considers that members of the public who are directly and specially affected by legislation should be able to make their case effectively in Parliament. Legislation establishing a Somerset Rivers Authority—a body which would have precepting powers—is precisely the kind of legislation that those procedures were designed for. We deprecate the subversion of those procedures and the troubling precedent that it would set.**

*Hybrid instruments*

15. Even if, contrary to our conclusion in paragraph 12 above, the House accepted the appropriateness of the delegation, the House may have concerns about new section 21J(3) of the 2010 Act which disapplies the hybrid instrument procedure for statutory instruments made under the new powers created by the Bill, including instruments establishing rivers authorities. It provides that an instrument which is made under those powers, and would otherwise be treated for the purposes of the standing orders of either House as a hybrid instrument, “is to proceed in that House as if it were not a hybrid instrument”. Such a clause is commonly referred to as a “de-hybridisation clause”.
16. The hybrid instrument procedure applies in the House of Lords where an instrument subject to the affirmative procedure contains provisions which, if contained in a bill, would render it a hybrid bill. The instrument is subject to a petitioning procedure along the lines of that for hybrid bills, under which those whose private interests are directly and specially affected by the instrument may petition against it. Appendix 1 to our 21st Report of Session 2015–16<sup>7</sup> contains further information about the hybrid instrument procedure.
17. The Memorandum does not provide a full explanation for the de-hybridisation clause, saying only (at paragraph 6) that, “were [the hybrid instrument procedure] to apply ... [it] would not be proportionate to the aim of the regulations”.
18. It is usual for the Committee to draw a de-hybridisation clause to the attention of the House<sup>8</sup> so that it can satisfy itself that any interests that would be protected by the hybrid instrument procedure are afforded protection by some other means—for example, by consultation while the policy is still at a formative stage.
19. In this case, there are requirements for consultation:
- paragraph 2 of new Schedule A1 to the 2010 Act (which is inserted by Schedule 1 to the Bill) requires a relevant risk management authority to consult on a draft scheme for the establishment of a rivers authority before it submits the scheme to the Secretary of State. All persons whom the authority thinks would be affected by the scheme must be consulted, including council tax payers; and
  - paragraph 6 of new Schedule A1 provides that, before making any regulations to establish such a scheme, the Secretary of State must consult on any significant differences between the provision in those

7 Delegated Powers and Regulatory Reform Committee, *Twenty First Report* (21st Report, Session 2015–16, HL Paper 98)

8 *Ibid.*, para 35.

regulations and the scheme submitted by the relevant risk management authority (including consulting council tax payers).

20. We consider that the delegation of powers to establish rivers authorities by statutory instrument is inappropriate but, in any event, we are not convinced that the requirements for consultation in new Schedule A1 are an adequate substitute for the protection of interests afforded by the hybrid instrument procedure.
21. **Accordingly, as well as drawing the de-hybridisation clause to the attention of the House, we draw attention to the fact that provision is made to require consultation to protect interests which would otherwise be safeguarded by the hybrid instrument procedure, but we are not convinced that this is an adequate substitute for the protection afforded by that procedure. In coming to this view, and to that expressed above in paragraphs 12 and 13, we wish to emphasise that we are not commenting on the merits or otherwise of the policy underlying the Bill. Our criticism is directed at the protection afforded under the Bill's delegated powers to interests which would otherwise be safeguarded by the hybrid bill procedure or the hybrid instrument procedure.**

*Clause 1(3)—New section 21C—Powers for Secretary of State to make provision about the composition of a rivers authority*

22. Paragraph 12 of Schedule 2 to the Bill amends the Local Government Finance Act 1992 (“the 1992 Act”) so that rivers authorities are “major precepting authorities” for the purposes of that Act. This means that a rivers authority will have power to issue a precept to a council tax billing authority, which will then collect the money from council tax payers for flood risk management work.
23. According to both the Memorandum, at paragraph 3, and the Explanatory Notes, at paragraph 2, this follows the precepting model in the 1992 Act which applies to county councils, single purpose Fire and Rescue Authorities and Police and Crime Commissioners. Neither document elaborates on this. Yet there appears to be a significant difference between the provision made in the Bill for precepts by rivers authorities and the provision made in the primary legislation governing Fire and Rescue Authorities and Police and Crime Commissioners:
- under Schedule 5 to the Police Reform and Social Responsibility Act 2011 (“the 2011 Act”), a Police and Crime Commissioner may not issue a precept until it has been reviewed by a police and crime panel. The panel may make recommendations as to the precept and may even veto a proposed precept. Schedule 6 to the 2011 Act makes detailed provision about police and crime panels. They provide an important independent scrutiny function in relation to proposed precepts;
  - paragraph 12 of Schedule A2 to the Fire and Rescue Services Act 2004 provides that Schedule 5 to the 2011 Act applies in relation to a Fire and Rescue Authority as it applies in relation to a Police and Crime Commissioner.
24. By contrast, the Bill does not include provision requiring independent scrutiny of precepts issued by rivers authorities.

25. The Bill does include a requirement (in new section 21C(7)) for the Secretary of State to make regulations providing for a rivers authority to have a committee with sole responsibility for making the calculations in relation to setting the authority's council tax requirement and, at committee stage in the House of Commons, David Warburton MP said that:

“the Government will ensure that such a committee will have a majority of members from local authorities' elected members. That will ensure that those who are democratically elected are held accountable for the level of precept that a rivers authority raises”.<sup>9</sup>

26. However, this is not provided for in the Bill itself. New sections 21C(8) and (9) give the Secretary of State powers (exercisable by statutory instrument subject to the affirmative procedure) to make provision about such committees—including provision for a person who is not a member of the rivers authority to be a member of such a committee—but the Bill does nothing to ensure that such a committee contains such persons. Whether or not such committees contain elected members of local authorities is entirely a matter for Ministers.
27. We consider that the absence of provision on the face of the Bill for independent scrutiny of precepts issued by rivers authorities is all the more significant because rivers authorities are not directly accountable to council tax payers in the way that Police and Crime Commissioners are: they are not elected so may not be voted out of office by dissatisfied council tax payers.

28. **We consider that:**

- **leaving the issue of independent scrutiny of council tax precepts to be provided for in regulations, instead of on the face of the Bill, is an inappropriate delegation of power, particularly given the different approach taken in the legislation governing the issuing of precepts by Police and Crime Commissioners and Fire and Rescue Authorities; and**
- **there should be a requirement on the face of the Bill that a committee with sole responsibility for making the calculations in relation to setting a rivers authority's council tax requirement must have a majority of members from local authorities' elected members.**

*Clause 1(3)—New section 21G—Requirement for the Secretary of State to prepare and publish a “national framework” for rivers authorities*

29. New section 21G requires the Secretary of State to prepare and publish a “national framework” for rivers authorities. The framework:
- must set out priorities and objectives for rivers authorities;
  - may contain guidance to rivers authorities; and
  - may require rivers authorities to prepare “statements or returns of a kind specified in the framework”.

Rivers authorities must comply with any requirements or prohibitions contained in the framework and must otherwise have regard to it in exercising their functions.

30. The framework is not subject to Parliamentary scrutiny. New section 21G(1) requires the Secretary of State to publish the framework but it imposes no requirements as to the form or manner in which publication is to take place, leaving it to the discretion of the Secretary of State.
31. The Memorandum, at paragraph 25, states that “there are a range of statements and returns which it may be important for rivers authorities to prepare” but “these are matters which it would not be appropriate or proportionate to legislate for by way of regulations”. It does not explain why.
32. The Memorandum also states that the national framework “has precedent in comparable situations”. The example it gives is the national framework for Fire and Rescue Authorities.
33. Under section 21 of the Fire and Rescue Services Act 2004 (“the 2004 Act”), the Secretary of State must prepare a Fire and Rescue National Framework. Section 21 of that Act is similar to new section 21G but there is an important difference between the two. Unlike section 21, new section 21G gives the Secretary of State power to “require” rivers authorities to do certain things and rivers authorities must comply with those requirements. By contrast, Fire and Rescue Authorities are only required under section 21 to “have regard” to a Fire and Rescue National Framework. There is a separate power in section 22 of the 2004 Act under which the Secretary of State may require a Fire and Rescue Authority to do certain things—but only in certain circumstances (if it is failing, or likely to fail, to act in accordance with the framework). That power must be exercised by statutory instrument (subject to the negative procedure) and its exercise is subject to a protocol which the Secretary of State must establish under section 23. The protocol must include a requirement for consultation before any exercise of the power to make an order under section 22.
34. In our 31st Report of Session 2017–19,<sup>10</sup> we made recommendations in relation to the Ivory Bill and the Mental Health Units (Use of Force) Bill. Both contained a delegated power enabling the Secretary of State to issue guidance which was, in effect, mandatory. The Report stated (in paragraphs 1 to 5):

“While it is not unusual for a bill to contain a power to issue guidance, such a power is commonly expressed as including a requirement on the person to whom the guidance is addressed “to have regard to” such guidance, which ... means that that person has an element of choice in whether to follow it.

In contrast, in the case of the Ivory Bill and Mental Health Units (Use of Force) Bill, the Secretary of State is given power to issue guidance which specifies legislative requirements.

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<sup>10</sup> Delegated Powers and Regulatory Reform Committee, *Thirty First Report* (31st Report, Session 2017–19, HL Paper 177)

The guidance is therefore not properly guidance at all but to all intents and purposes a form of legislation. Since it is not guidance it should not in our view be given that label. This is not simply a matter of form; but it ensures that the relevant provisions are treated consistently with other legislation.

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Where a power to issue guidance includes a requirement “to have regard to”, it has often been our practice to recommend that the guidance should be subject to some form of parliamentary scrutiny. This is because, although there is an element of choice, a requirement “to have regard to” carries with it an expectation that the guidance will be followed unless there are cogent reasons for not doing so. Where the provisions to be contained in guidance are to have mandatory effect, the arguments in favour of them being contained in subordinate legislation subject to parliamentary scrutiny are, we believe, so much the stronger”.

35. The Department has not explained why it considers it appropriate to use the national framework under new section 21G as a means not only for giving guidance but also for specifying legal requirements.
36. **We recommend that the framework should be contained in subordinate legislation made by statutory instrument, with the negative procedure offering an appropriate level of parliamentary scrutiny.**
37. New section 21J makes the exercise of a range of delegated powers under provisions inserted by the Bill subject to a consultation requirement. This does not extend to the preparation of a national framework under new section 21G. **The House may consider that, even if there were such a requirement, this would not justify the absence of a parliamentary procedure.**

### Internal Drainage Boards

#### *Clause 2(3)—New section 37(5ZA) to (5ZH)—Valuation of non-agricultural land*

38. Internal drainage boards are public bodies established under the Land Drainage Act 1991 (“the 1991 Act”). There are 112 such boards in England, covering approximately 10% of all land. They are responsible for exercising a general supervision over all matters relating to the drainage of land in areas of special drainage need. They are funded partly by drainage rates paid by agricultural landowners and partly by special levies paid by local authorities.
39. Section 37 of the 1991 Act provides for the proportions of a board’s expenditure that are met from drainage rates and special levies to be determined by comparing the total value of the agricultural land in the board’s area of responsibility with the total value of the non-agricultural land in that area. It also sets out the methodology for the calculation of the value of agricultural land and non-agricultural land.
40. Clause 2(3) of the Bill amends section 37 of the 1991 Act to enable the Secretary of State, by regulations subject to the affirmative procedure, to establish an alternative methodology for the calculation of the value of non-agricultural land in an English internal drainage district. Clause 2(8) amends section 83 of the Environment (Wales) Act 2016 (which amends the 1991

Act) to enable the Welsh Ministers, by affirmative procedure regulations, to establish an alternative methodology for the calculation of the value of such land in a Welsh internal drainage district.

41. Paragraph 5 of the Explanatory Notes to the Bill and paragraph 35 of the Memorandum explain that a new methodology is required because, currently, the special levy charge for such land must be determined by reference to the value of land as recorded in lists compiled in 1990 and, in some areas, these lists are not available or are incomplete. According to the Memorandum:

“The purpose of the delegated power is to provide a new methodology for valuing such properties, so that charges can be made by those [internal drainage boards], or proposed [internal drainage boards], where the 1990 ratings lists are missing or incomplete”.

42. The Memorandum, at paragraph 36, gives the following explanation for dealing with this by delegated legislation:

“The reason for taking the power is that the new methodology for calculating the value of other land<sup>11</sup>... is still under development and is currently being tested. The intention is that once the methodology has been established to be workable, it will go out to consultation. Additionally, it is envisaged that there may need to be updates to the methodology, which will be required when updated taxation information is provided by HMRC; and the methodology will only apply to certain [internal drainage boards], and subsequently additional [internal drainage boards] may need to be specified in the regulations from time to time”.

43. We consider this explanation to be unsatisfactory:

- clearly, the new methodology cannot be put on the face of the Bill if it has not yet been devised and tested (or consulted on), yet this begs the question why the Department has not waited for the new methodology to be devised, tested and consulted on before proceeding to legislate;
- it does not explain why it is considered appropriate for the new methodology to be set out in delegated legislation when the existing methodology has, since 1991, been considered sufficiently important to be provided for in primary legislation;
- the references in paragraph 36 of the Memorandum to “updates to the methodology”, the methodology only applying to “certain [internal drainage boards]” and a possible need to specify additional internal drainage boards “from time to time” suggest that delegated legislation is considered preferable because it is much more easily updated, but this is not explained; and
- although it is stated in the Memorandum that “the methodology will only apply to certain [internal drainage boards]”, it is expressly provided in new section 37(5ZC) (c) that the power may be exercised so as to apply in relation to “all English drainage boards”.

44. Even if the appropriateness of the delegation were accepted, the power is drafted in a way that would allow it to be used to make much more wide-

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<sup>11</sup> In section 37 of the 1991 Act, non-agricultural land is referred to as “other land”.

ranging change than is necessary to achieve the stated aim of providing a new methodology where the 1990 ratings lists are missing or incomplete. It would allow the Secretary of State, by regulations, to provide a new methodology for valuing all non-agricultural land, replacing wholesale the methodology that is currently set out in the 1991 Act with methodology in delegated legislation.

45. Indeed, the breadth of the power is acknowledged in the second bullet in paragraph 35 of the Memorandum, where attention is drawn to a Henry VIII power inserted by clause 2(3) into section 37 (new section 37(5ZF)). The Memorandum explains that this power would allow regulations to “repeal any provisions of the [1991 Act] which are made redundant as a result of the regulations applying in relation to all [internal drainage boards]”.
46. The Memorandum does not explain why clause 2(3) confers such a broad power on the Secretary of State rather than a limited power focused on the stated aim.
47. **Accordingly, we consider that:**
  - **new section 37(5ZA) to (5ZH) in clause 2(3) contains an inappropriate delegation of power: it is not an appropriate substitute for, first, developing the new methodology for the calculation of the value of non-agricultural land and, second, setting it out on the face of the Bill; and**
  - **in any event, the power is inappropriately wide, as it could be used to make much more wide-ranging change than is necessary to achieve the stated aim.**

*Clauses 2(3) and 4(3)—New sections 37(5ZH) and 41A(14)—Disapplying the hybrid instrument procedure*

48. Clauses 2(3) and 4(3) each contain a similar provision to that in clause 1(3)<sup>12</sup> which disappplies the hybrid instrument procedure.
49. Clause 2(3) inserts new section 37(5ZH) into the 1991 Act. This provides that the hybrid instrument procedure does not apply to a statutory instrument made under new section 37(5ZA) to establish an alternative methodology for the calculation of the value of non-agricultural land.
50. Clause 4(3) inserts new section 41A(14) into the 1991 Act. This provides that the hybrid instrument procedure does not apply to a statutory instrument made under new section 41A to establish an alternative methodology for the calculation of the value of agricultural property.
51. For each of these clauses, the Memorandum repeats, in paragraphs 35 and 44 respectively, the explanation given in paragraph 6 in relation to clause 1(3) (rivers authorities), saying: “were [the hybrid instrument procedure] to apply... [it] would not be proportionate to the aim of the regulations”.
52. As explained in paragraph 17 above in relation to clause 1(3), it is usual for the Committee to draw a de-hybridisation clause to the attention of the House so that it can satisfy itself that any interests that would be protected

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<sup>12</sup> See paragraphs 14 to 20 above.

by the hybrid instrument procedure are afforded protection by some other means—for example, by consultation.

53. **In the present cases, there is no requirement for consultation or for any other procedures for protecting private interests.**
54. **Accordingly, as well as drawing these de-hybridisation clauses to the attention of the House, we draw attention to the fact that no provision is made to require consultation or other means for protecting interests which would otherwise be safeguarded by the hybrid instrument procedure.**

*Clause 3(2)—New section 37A(5)—Disclosure of Revenue and Customs information to qualifying persons for qualifying purposes*

55. Clause 3 of the Bill amends the 1991 Act to allow an officer of the Valuation Office of Her Majesty’s Revenue and Customs to disclose Revenue and Customs information to a “qualifying person” for a “qualifying purpose”.
56. Under new section 37A(3), “qualifying person” includes an internal drainage board and the Environment Agency. Under new section 37A(4), “qualifying purpose” includes enabling the qualifying person to whom the disclosure is made to carry out functions under the 1991 Act “or section 75 of the Local Government Finance Act 1988<sup>13</sup>”.
57. Under new section 37A(5), the Secretary of State (in relation to English internal drainage districts) or the Welsh Ministers (in relation to Welsh internal drainage districts) may, by regulations subject to the affirmative procedure, add, amend a reference to, or remove a qualifying person or add, amend or remove a qualifying purpose. Such regulations may only be made with the consent of the Commissioners for Her Majesty’s Revenue and Customs.
58. This is a Henry VIII power to amend section 37A(3) and (4) of the 1991 Act. Its exercise is subject to the consent of the Commissioners but there is nothing else to limit its use to amend the definitions in primary legislation of “qualifying person” and “qualifying purpose”.
59. The Memorandum explains, at paragraph 40, that the power to amend the definition of “qualifying person” is needed to ensure that other persons “who are identified through the consultation process and further testing” may be included within the definition and to enable other regulatory bodies to be included “where the framework of regulatory bodies operating in this area changes”. It explains that the power to amend the definition of “qualifying purpose” ensures that “any unintentional constraints which the current definition of qualifying purpose imposes on the information sharing required for [internal drainage boards] to be able to conduct their calculations, can be remedied”.
60. We consider that this provides inadequate justification for a power which (a) could be exercised so as to replace wholesale the definitions in the 1991 Act of “qualifying person” and “qualifying purpose”, and (b) is not required to be exercised within parameters which reflect the explanation given for taking it.

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<sup>13</sup> Section 75 of the 1988 Act confers power on a Minister to make regulations which give a body power to issue special levies.

61. **Accordingly, we consider that the power in new section 37A(5) is inappropriately wide and recommend that it should be narrowed so that it may only be exercised within parameters which reflect the explanation given for taking it.**

*Clase 4(3)—New section 41A—Alternative method of calculating value of agricultural property in drainage district*

62. Clause 4(3) of the Bill amends the 1991 Act by inserting a new section 41A which enables the Secretary of State (in relation to English internal drainage districts) or the Welsh Ministers (in relation to Welsh internal drainage districts), by regulations subject to the affirmative procedure, to establish an alternative methodology for calculating the annual value of agricultural land and buildings in an internal drainage district.<sup>14</sup>

63. The Explanatory Notes to the Bill, at paragraph 29, state that these provisions are needed:

“to ensure that any internal drainage boards who adopt the new methodology for calculating the value of other land [non-agricultural land] [under section 37 of the 1991 Act, as amended by clause 2 of the Bill] do not continue to apply the existing methodology for calculating the value of chargeable land [agricultural land], as this might distort the apportionment calculation”.

64. This is consistent with what the Memorandum says, at paragraph 45, about the purpose of the power. It explains that, where regulations made under the new power created by clause 2 provide for the value of non-agricultural land to be calculated by new methodology, the methodology for calculating the value of agricultural property will also need to be updated “if the balance between drainage rates and special levies is to remain similar or the same”.

65. However, exercise of the power to make regulations under new section 41A is not made conditional on either (a) a change to the methodology for calculating the value of non-agricultural land, or (b) ensuring that the balance between drainage rates and special levies remains similar or the same. There appears to be nothing to prevent regulations being made under new section 41A whether or not new methodology for calculating the value of non-agricultural land has been adopted.

66. The Memorandum, at paragraph 45, gives the following explanation for dealing with this by delegated legislation:

“The methodology for the new calculation of the values of chargeable properties is still under development and is currently being tested. The intention is that once the new methodology has been established to be workable, it will go out to consultation.

Additionally, it is envisaged that there may need to be updates to this part of the methodology when HMRC provide updated taxation [information] to ensure a fair distribution of the charges between the special levy and drainage rates; and the methodology will only apply to certain [internal drainage boards], and subsequently additional [internal drainage boards] may need to be specified in the regulations”.

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<sup>14</sup> In the 1991 Act, agricultural land and buildings are referred to as “chargeable property”.

67. We consider this explanation to be unsatisfactory for the same reasons as those set out in paragraph 42 above in relation to the very similar explanation given in the Memorandum for taking the power in clause 2(3) (valuation of non-agricultural land).
68. As with the power in clause 2(3), even if the appropriateness of the delegation were accepted, the power is drafted in a way that would allow it to be used to make much more wide-ranging change than is necessary to achieve the stated aim, which in this case is updating the methodology for valuing agricultural property where there has been a change to the methodology for valuing non-agricultural land:
- it is not limited to the provision of a new methodology where regulations made under the new power created by clause 2 provide for the value of non-agricultural land to be calculated by new methodology. It would allow the Secretary of State, by regulations, to provide a new methodology for calculating the value of agricultural property whether or not there had been any change to the methodology for calculating the value of non-agricultural land;
  - it is not limited to updating the methodology for calculating the value of agricultural property to ensure that the balance between drainage rates and special levies remains similar or the same; and
  - it would allow the Secretary of State, by regulations, to provide a new methodology for valuing all agricultural property, replacing wholesale the methodology that is currently set out in the 1991 Act with methodology in delegated legislation. This is acknowledged in paragraph 43 of the Memorandum, where attention is drawn to a Henry VIII power inserted by clause 4(3) (new section 41A(11)). The Memorandum explains that this power would allow regulations to “repeal any provisions of the [1991 Act] which are made redundant as a result of the regulations applying in relation to all [internal drainage boards]”.<sup>15</sup>
69. The Memorandum does not explain why new section 41A confers such a broad power on the Secretary of State rather than a limited power focused on the stated aim.
70. **Accordingly, we consider that:**
- **new section 41A in clause 4(3) contains an inappropriate delegation of power: it is not an appropriate substitute for, first, developing the new methodology for the calculation of the value of agricultural property and, second, setting it out on the face of the Bill; and**
  - **in any event, the power is inappropriately wide, as it could be used to make much more wide-ranging change than is necessary to achieve the stated aim.**

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<sup>15</sup> New section 41A(7) of the 1991 Act (inserted by clause 4(3) of the Bill) provides that regulations under new section 41A(1) which establish a methodology for the calculation of the value of agricultural land “may apply in relation to all English drainage boards”.

### Conclusion

71. **We were not only surprised but concerned at the proposals in this Bill. It is an attempt, upon flimsy grounds, to set aside the procedures which Parliament has put in place to protect the interests of citizens who would be unfairly affected by legislation. It would authorise the issuing of precepts—in effect, taxation—in a way which would be unaccountable and unscrutinised. It would allow the framing of Ministerial guidance in a way which would have legislative effect, without Parliamentary scrutiny. It would allow rules in primary legislation about the valuation of agricultural property to be replaced wholesale by statutory instrument with no requirement for consultation or other procedures for protecting private interests. And in order to set up one rivers authority in one part of England it would make provision for this approach to be replicated in every part of the country.**

## APPENDIX 1: MEMBERS' 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.