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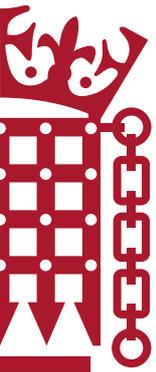
Select Committee on the Constitution

9th Report of Session 2019–21

Business and Planning Bill

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Select Committee on the Constitution

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Committee staff

The current staff of the committee are Matt Korris (Clerk) and Dan Weedon (Committee Assistant). Professor Stephen Tierney and Professor Jeff King are the legal advisers to the Committee.

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Business and Planning Bill

Introduction

1. The Business and Planning Bill was introduced in the House of Commons on 25 June 2020. All its stages in the Commons were taken on 29 June and it was brought to the Lords on 30 June. Second reading took place on 6 July. Committee stage is scheduled for 13 July and report and third reading for 20 July.
2. The Bill contains measures on a range of subjects, including: pavement and alcohol licensing; a “bounce back loans scheme”; vehicle licensing; construction working hours; and changes to the planning process. Most of these measures are temporary, although there are provisions regarding planning and vehicle registration which are intended to be permanent. The Government states that the Bill will “help businesses adjust to new ways of working as the country recovers from disruption caused by COVID-19.”¹

Fast-tracking and permanent changes to the law

3. The Bill is being fast-tracked through both Houses. We have previously examined the issues with fast-tracking legislation and found that it constrains parliamentary scrutiny, limits the opportunities for parliamentarians to table and debate amendments, restricts input from stakeholders and the public, and potentially leads to poor legislation.² While the fast-tracking of bills has become concerningly commonplace in recent years,³ they usually have been short measures with only a handful of clauses. This is the third bill to be fast-tracked to respond to the COVID-19 pandemic, following the Coronavirus Bill⁴ and the Corporate Insolvency and Governance Bill.⁵
4. **As with the Coronavirus Bill and the Corporate Insolvency and Governance Bill, all stages of consideration of this Bill in the House of Commons were taken in a single day. This makes the scrutiny of the Bill by the House of Lords all the more important.**
5. In our report *Fast-track Legislation: Constitutional Implications and Safeguards* we concluded that fast-tracking should “only occur where strictly necessary”.⁶ We recommended that the Explanatory Notes to a bill should explain the justification for fast tracking; this has been done for this Bill.⁷ The Government states:

“If legislation is not passed in time, hospitality businesses and their customers will not be able to benefit from flexibility on outdoor seating

1 Business and Planning Bill, [Explanatory Notes](#), para 1

2 Constitution Committee, [Fast-track Legislation: Constitutional Implications and Safeguards](#) (15th Report, Session 2008–09, HL Paper 116)

3 See, for example, Constitution Committee, [Northern Ireland \(Executive Formation and Exercise of Functions\) Bill](#) (15th Report, Session 2017–19, HL Paper 211); [Northern Ireland \(Executive Formation\) Bill](#) (26th Report, Session 2017–19, HL Paper 404); [European Union \(Withdrawal\) \(No. 5\) Bill](#) (19th Report, Session 2017–19, HL Paper 339)

4 Constitution Committee, [Coronavirus Bill](#) (4th Report, Session 2019–21, HL Paper 44)

5 Constitution Committee, [Corporate Insolvency and Governance Bill](#) (7th Report, Session 2019–21, HL Paper 76);

6 Constitution Committee, [Fast-track Legislation: Constitutional Implications and Safeguards](#) (15th Report, Session 2008–09, HL Paper 116), para 152

7 Business and Planning Bill, [Explanatory Notes](#), paras 64–88

and alcohol service over the summer months, limiting the effectiveness of these measures. Likewise, road hauliers and others dependent on heavy vehicle testing and HGV/PCV licensing may be hindered by backlogs, and construction projects may also be delayed or paused due to the need to apply for extended planning permissions.”⁸

6. While most of the provisions in the Bill are temporary, some are intended to be permanent. These are clause 13, which concerns a power to make temporary changes to vehicle registration requirements, and clause 20, a wide-ranging provision which gives the Secretary of State discretion to determine which planning procedure should be adopted in a range of planning proceedings, including planning appeals.
7. We commented on using fast-track legislation to make permanent changes to the law in our report on the Corporate Insolvency and Governance Bill. We concluded:

“While temporary measures to respond to the COVID-19 pandemic may meet the threshold of urgency and exceptional circumstances to warrant fast-tracking, long-planned and permanent changes to the law do not. It is inappropriate for such permanent changes to be fast-tracked through Parliament and so subject to less debate and scrutiny. We recommend the permanent provisions in the Bill are subject to a sunset clause.”⁹
8. While the scope of the permanent measures in this Bill is narrower than those in the Corporate Insolvency and Governance Bill, making permanent changes to the law via a fast-track bill is problematic as the scrutiny of those changes is significantly reduced. Although the Government does offer justification for these measures, their effect has not been subjected to adequate parliamentary assessment. **We therefore recommend clauses 13 and 20 are subject to sunset provisions such that their effects are temporary.**

Law, policy and guidance

9. The COVID-19 pandemic has necessarily resulted in a succession of urgent changes to the law. In a number of cases, ministers have announced an impending change in the law and the public perception has been that it often comes into force instantly. These changes have largely been implemented rapidly using emergency powers that are subject to the made affirmative procedure.
10. The most dramatic instance was the televised announcement by the Prime Minister on the evening of 23 March 2020 that the British public “must stay at home”, with immediate effect. However, the regulations giving effect to that obligation were made on 26 March 2020.¹⁰ Similarly, the local lockdown in Leicester was announced on 29 June and the regulations were made on 3 July.¹¹

8 *Ibid.*, para 66

9 Constitution Committee, *Corporate Insolvency and Governance Bill* (7th Report, Session 2019–21, HL Paper 76), paras 11–12

10 Except for Northern Ireland, where [The Health Protection \(Coronavirus, Restrictions\) Regulations \(Northern Ireland\) 2020](#) were made on 28 March 2020. While these emergency regulations come into effect immediately using the made affirmative procedure, they require subsequent approval by Parliament or the relevant devolved legislature. For the lockdown in England, the regulations made on 26 March were approved by the House of Commons on 4 May and the House of Lords on 12 May.

11 [The Health Protection \(Coronavirus, Restrictions\) \(Leicester\) Regulations 2020](#)

11. In respect of other announcements, such as people keeping 2 metres apart during much of the lockdown or limiting outdoor exercise to one hour per day in England,¹² these were widely perceived to be legal rules when they did not in fact form any part of the law and were for guidance only.
12. We recognise the difficulties inherent in sending clear public health messages under emergency conditions and we do not suggest that any of the Government's announcements or changes to the law have been improper. **We are nevertheless concerned that the practice may give the appearance that significant changes are given effect through ministerial announcement rather than enactment of law.**
13. The Corporate Insolvency and Governance Bill also illustrated this problem. That bill contained retrospective measures to make good on a policy that was announced over two months before the policy became law.¹³
14. This concern ties into Part 1 of this Bill, which amends licensing restrictions to permit the consumption of alcohol outside premises. This measure was announced to coincide with the reopening of restaurants and pubs in England on 4 July 2020, but the Bill which provides this flexibility has not yet been passed. While licensing adjustments may have been put in place by local authorities, there is at least the possibility that establishments in some areas are operating in anticipation of the provisions in this Bill becoming law, rather than complying with the law as it currently stands. **We are concerned about the potential for divergence between law, official guidance, and practice.** We will explore this further as part of our inquiry into the constitutional implications of COVID-19 and the use of emergency powers.¹⁴

Extendable temporary powers

15. Most of the provisions in the Bill are temporary and subject to sunset clauses which determine when they expire. However, the Secretary of State may, by regulations, extend the expiry date of the powers in clauses 10, 11, 16, 17, 18, 19 and 21. There is no restriction on the number of times these powers could be extended or for how long, nor is any reason required for the extension.
16. **The Delegated Powers and Regulatory Reform Committee recommended that “the power of the Secretary of State to substitute a later date in these provisions should only be exercisable where the Secretary of State considers doing so is necessary or appropriate for a purpose linked to the coronavirus pandemic.”¹⁵ We agree.**
17. We made a similar recommendation in respect of powers in the Corporate Insolvency and Governance Bill, that a limit be placed on the maximum length of any extension and the number of times the measures could be

12 S. Halliday, J. Meers and J. Tomlinson, ‘Public Attitudes on Compliance with COVID-19 Lockdown Restrictions’, *UK Constitutional Law Association*, 8 May 2020: <https://ukconstitutionallaw.org/2020/05/08/simon-halliday-jed-meers-and-joe-tomlinson-public-attitudes-on-compliance-with-covid-19-lockdown-restrictions/> [accessed 9 July 2020]

13 Constitution Committee, *Corporate Insolvency and Governance Bill* (7th Report, Session 2019–21, HL Paper 76), paras 16–32

14 Constitution Committee, *Constitutional implications of COVID-19*

15 Delegated Powers and Regulatory Reform Committee, *Business and Planning Bill* (17th Report, Session 2019–21, HL Paper 98)

extended.¹⁶ We commend Lord Callanan, on behalf of the Government, for his constructive response:

“I am grateful for this recommendation from the Committee and have considered it carefully. I am keen to ensure this power fulfils its purpose in enabling Government to support business through the unknown length of this emergency, while also being appropriately limited. We will add a limitation to clause 22 so that the expiry date cannot be extended beyond 2 years after Royal Assent.”¹⁷

18. **We therefore recommend that a limit is placed on the maximum length of any extension and the number of times the measures in this Bill can be extended.**

Made affirmative procedure

19. The powers in clauses 10, 11, 16, 17, 18, 19 and 21 are all subject to the made affirmative procedure, whereby regulations come into force immediately and must be approved by Parliament subsequently if they are to remain in effect. Clause 22(5) states that the Government can, alternatively, use the draft affirmative procedure for these powers and seek parliamentary approval for regulations prior to them coming into effect.
20. In our report *Fast-track Legislation: Constitutional Implications and Safeguards* we recognised that that in “very limited circumstances” the fast-track made affirmative procedure may be necessary, but that it was important that the Government exercised “self-restraint”.¹⁸ **We remind the Government of the importance of executive self-restraint and recommend that the affirmative procedure, rather than the made affirmative, is used whenever possible.**

Rule of law

21. Clause 16 creates a streamlined process for the temporary variation of construction working hours. This has a bearing on developers and construction companies, but also affects people living near construction sites who may be disturbed by work taking place.¹⁹ The clause sets out the process to be followed by an applicant seeking to modify these restrictions. The time limits for assessing these applications is tight. If the local planning authority does not give notice of their decision within 14 days, the working hours condition is automatically deemed to have been modified in accordance with the application.
22. We are concerned that the rule of law may be at risk where a private citizen or company may vary or repeal publicly determined licensing conditions without any affirmative decision of the relevant public authority. **The Government should set out its assessment of the capacity of local planning authorities to consider applications with the 14-day period to avoid this rule of law issue arising.**

16 Constitution Committee, *Corporate Insolvency and Governance Bill* (7th Report, Session 2019–21, HL Paper 76), para 42

17 Lord Callanan to the Chair, *Corporate Insolvency and Governance Bill: Government response*, 19 June 2020, p.7

18 Constitution Committee, *Fast-track Legislation: Constitutional Implications and Safeguards* (15th Report, Session 2008–09, HL Paper 116), para 139

19 The alcohol licensing provisions in the Bill may also potentially affect local residents in terms of noise and antisocial behaviour.

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members

Lord Beith
 Baroness Corston
 Baroness Drake
 Lord Dunlop
 Lord Faulks
 Baroness Fookes
 Lord Hennessy of Nympsfield
 Lord Howarth of Newport
 Lord Howell of Guildford
 Lord Pannick
 Lord Sherbourne of Didsbury
 Baroness Taylor of Bolton (Chair)
 Lord Wallace of Tankerness

Declarations of interest

Lord Beith
Honorary Bencher of the Middle Temple
 Baroness Corston
No relevant interests
 Baroness Drake
No relevant interests
 Lord Dunlop
No relevant interests
 Lord Faulks
No relevant interests
 Baroness Fookes
No relevant interests
 Lord Hennessy of Nympsfield
No relevant interests
 Lord Howarth of Newport
No relevant interests
 Lord Howell of Guildford
No relevant interests
 Lord Pannick
No relevant interests
 Lord Sherbourne of Didsbury
No relevant interests
 Baroness Taylor of Bolton (Chair)
No relevant interests
 Lord Wallace of Tankerness
No relevant interests

A full list of members' interests can be found in the Register of Lords' Interests:

<http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>

Professor Jeff King, University College London, and Professor Stephen Tierney, University of Edinburgh, acted as legal advisers to the Committee. They both declared no relevant interests.