Online Safety Bill [HL]
Constitutional Convention Bill [HL]
Accessible Sports Grounds Bill [HL]
European Union (Approvals) Bill
Childcare Bill [HL]: Government Response

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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 are:

Baroness Drake
Baroness Fookes (Chairman)
Lord Flight
Baroness Gould of Potternewton
Lord Jones

Lord Lisvane
Countess of Mar
Lord Moynihan
Lord Thomas of Gresford
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. The Register may also be inspected in the Parliamentary Archives. Interests related to this Report are in the Appendix.

Publications

The Committee’s reports are published by the Stationery Office by Order of the House in hard copy and on the internet at www.parliament.uk/hldprrcpublications.

General Information

General information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at http://www.parliament.uk/business/lords/.

Contacts for the Delegated Powers and Regulatory Reform Committee

Any query about the Committee or its work should be directed to the Clerk of Delegated Legislation, Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3103 and the fax number is 020 7219 2571. The Committee’s email address is 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 other acts specified in the Committee’s terms of reference.
Fifth Report

ONLINE SAFETY BILL [HL]

1. This Private Member’s Bill imposes obligations on internet service providers, mobile telephone operators and others with a view to protecting the public (in particular those under the age of 18) from exposure to “adult content”. It includes:

   - two powers to make provision by statutory instrument (clauses 1(1)(d) and 8(1));
   - provision for codes of practice (clause 2); and
   - a power to give directions (clause 10).

Clause 1(1)(d) - Regulations designating providers and operators

2. Paragraphs (a) to (c) of clause 1(1) list those to whom clause 1 applies. In addition, clause 1(1)(d) enables the Secretary of State to designate (by negative procedure regulations) further categories of “provider” or “operator”. Designation will mean that the provider or operator may provide "adult content" only to subscribers who confirm that they want it (subsection (3)), and must have an "age verification scheme" that has established that the subscriber is over the age of 18 (subsection (4)). Subsection (5) (which provides a defence to civil or criminal liability) may apply as well, where a further category of internet service provider or mobile telephone operator is designated.

3. The expressions “provider” and “operator” are not defined in the Bill, which leads to doubt about whether subsection (5) is intended to apply to all designated categories. It is not clear whether the intention is to confine designation under clause 1(1)(d) to new categories of internet service provider or mobile telephone operator only, or whether other classes of “provider” or operator” are contemplated. This is important because the effect of designation is to extend the “reach” of clause 1 beyond those specified in paragraphs (a) to (c).

4. We draw this uncertainty to the attention of the House, so that it may consider how the Bill might be amended to make clear the scope of the delegation in clause 1(1)(d).

Clause 2 - OFCOM codes

5. Under clause 1(5), an internet service provider or mobile phone (sic) operator has a defence to any “claims, whether criminal or civil” if acting in good faith and “following the standards and code provided for in clause 2”. Clause 2 places a duty on OFCOM to set standards and to publish them in a code or codes (subsections (1) to (6)). OFCOM is a well-established regulator and used to discharging these sorts of functions. Subsections (7) and (8), however, enable OFCOM to “designate” – though the Bill does not say how – any corporate body to carry out that duty. This power is important because compliance with the code may have consequences for a provider’s or operator’s potential legal liability. We, therefore, find the possibility of its
sub-delegation by OFCOM disturbing because clause 2(7) places no
restriction at all on the kind of body to whom such important functions
might be sub-delegated (beyond the matters mentioned in subsection (8)).

6. **We recommend that the power of designation in subsection (7) should
be exercisable by the Secretary of State by statutory instrument
subject to the affirmative procedure.**

Clause 8(1) - Regulations designating body as licensing authority

7. Clause 8(1) enables the Secretary of State to designate (by negative
procedure regulations) a body to be the appropriate licensing authority to
license “a foreign pornographic service” (defined in clause 7), and an offence
is committed if such a service is provided without a licence (see clause 9). It
is unclear what kind of body may be designated but, not only would it have
power to grant, refuse or revoke licences, and to charge fees for the purpose,
it would also have the very significant power proposed under clause 10
(which we deal with separately below). All of this leads us to conclude that
the body which is to be the licensing authority ought to be identified on the
face of the Bill.

8. **We therefore recommend that the power to designate conferred by
clause 8(1) is inappropriate.**

9. We note in passing a further difficulty with the clause. Before making a
designation, subsection (11) requires the Secretary of State to be satisfied
that the designated body will make adequate arrangements for appeals. Our
concern is that the provision appears to envisage that the body will make
arrangements for appeals from its own decisions.

Clause 10 - Directions to persons operating in the financial sector

10. Where the licensing authority determines that a foreign pornographic service
is not a licensed service, clause 10 enables it to give a direction to “a person
operating in the financial sector” (defined in subsections (4) and (5) and
called a “relevant person”) in effect prohibiting that person from trading or
having any business relationship with “a designated person”. Because the
directions may apply generally, a delegation of legislative power is involved.
In our view, a power of this kind is quite unsuitable for exercise by an
unspecified category of body, particularly because the definition of
“designated person” in subsection (5) (which appears to us to be circular
when read with subsection (3)) is unsatisfactory. We further note that there
seems to be nothing in clause 10 that requires "a relevant person” to comply
with a direction, and so there is no sanction for non-compliance.

11. **We therefore recommend that the power conferred by clause 10 to
give directions of this kind is inappropriate.**
CONSTITUTIONAL CONVENTION BILL [HL]

12. This Private Member’s Bill provides for a convention to consider the constitution of the United Kingdom and to make recommendations. It makes provision for:

- the composition of the convention (clause 4 and regulations under clause 1(2)(d));
- its terms of reference (clause 2 and regulations under clause 1(2)(c)); and
- its proceedings (to be governed by regulations under clause 1(2)(b)).

The convention must publish its recommendations within a year of the day appointed by regulations under clause 1(2)(a), and the Government’s responses to the recommendations must be laid before Parliament within the following six months (see clause 3). All regulations are subject to negative procedure.

13. Although the Bill is vaguely drafted and is heavily reliant on regulations to supplement it, we have nevertheless concluded that the negative procedure should afford sufficient Parliamentary control over the exercise of the powers conferred by clause 1(2).

ACCESSIBLE SPORTS GROUNDS BILL [HL]

14. This Private Member’s Bill provides for greater accessibility to large sports grounds for spectators with disabilities. It makes the following provision:

- it enables a local authority to refuse to issue a safety certificate under section 1 of the Safety of Sports Grounds Act 1975 Act ("the 1975 Act") where it considers, or the Sports Grounds Safety Authority (SGSA) advises it, that the ground does not comply with “guidelines” published by the SGSA and amended from time to time (clause 1); and,

- it adds a mandatory condition (to those that may be included in a safety certificate under section 2 of the 1975 Act) requiring that the sports ground must comply with the SGSA’s guidelines (clause 2).

Non-compliance with the guidelines would result in contravention of the condition in the certificate, which could in turn render the holder of the certificate guilty of a criminal offence under section 12(1) of the 1975 Act.

15. We notice that what are described as “guidelines” in effect become requirements under clause 1, making them legislative in character, because any sports ground considered by the SGSA as non-compliant would be at risk of being refused a safety certificate. Clause 2 of the Bill has similar effect. We note moreover that the words "as amended from time to time" at the end of clause 1 mean that the advice in the "guidelines" that must be complied
with may be altered without any form of Parliamentary oversight. So the provisions are “ambulatory” in character.\(^1\)

16. We observed in our report on the Flood and Water Management Bill in Session 2009-10\(^2\) that it is surprising to see described as “guidance” provision which is apparently intended to be mandatory, and we consider the reference to "guidelines" in this Bill to be similarly misleading.

17. **We draw these aspects of the Bill to the attention of the House so that it may consider whether the Bill should be amended to substitute a requirement that is more appropriate for provision that is in the nature of guidance (for instance, an obligation "to have regard to" the guidelines).**

**EUROPEAN UNION (APPROVALS) BILL**

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

**CHILDCARE BILL [HL]: GOVERNMENT RESPONSE**

19. Following our consideration of this Bill in our 2nd Report (HL Paper 12) we wrote to Lord Nash, Parliamentary Under Secretary of State for Schools, Department for Education. This letter and Lord Nash's reply are printed at Appendix 1.

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\(^1\) A provision may be described as "ambulatory" where it gives legal effect to provision set out in some other document which can be changed from time to time and still have legal effect without the changes being subject to any Parliamentary Control.

\(^2\) 6th Report, Session 2009-10 (HL Paper 77), para 5.
APPENDIX 1: CORRESPONDENCE

Letter from Baroness Fookes, Chairman, to Lord Nash, Parliamentary Under Secretary of State for Schools, Department for Education

Thank you for your recent letter about the Childcare Bill. You mentioned that you were sending me the delegated powers memorandum ahead of the Second Reading debate (on 16 June). I am afraid that your letter did not reach me until 19 June and as far as I could see there was no memorandum enclosed. For the reasons set out below, this omission was perhaps particularly unfortunate.

Last week, the Delegated Powers and Regulatory Reform Committee considered the Childcare Bill [HL]. I enclose a copy of our report. I will not repeat its content in this letter except to say that, whilst we are always grateful to departments for providing a delegated powers memorandum, the Committee, on this occasion, felt critical of both its late arrival and its quality.

Our criticism must be seen against the background of a recent short inquiry which the Committee made into the quality of delegated powers memoranda. Following that inquiry, the Committee published revised guidance to departments, paragraph 9 of which states that the memorandum should be received by the Committee on (or before) introduction of a Bill. This requirement is supported by the Cabinet Office’s guidance, Guide to Making Legislation, at paragraph 15.7. The Committee was therefore concerned that the Childcare Bill memorandum was received two weeks after introduction. Given that the Committee, if it is to be effective and helpful to the House, must report before the Committee Stage of a Bill, this sort of delay is wholly unacceptable. The delay is also difficult to understand since, according to the Cabinet Office guidance on page 123, the memorandum is required from the outset by the Parliamentary Business and Legislation (PBL) Committee in any event.

We also had concerns about the quality of the memorandum. This is particularly disappointing given the encouraging response the Committee received in reply to its report on delegated powers memorandum in which Jonathan Jones, Treasury Solicitor and HM Procurator General, and Richard Heaton, Permanent Secretary at the Cabinet Office and First Parliamentary Counsel, set out a number of steps that were going to be taken to improve the patchy quality of memoranda. On this occasion, our concern is the scarcity of the explanations, particularly at paragraph 5(c) of the memorandum, for the very wide delegation of powers contained in the Bill. This point is explained in greater length in the enclosed report.

I am copying this letter to Mr Jones and Mr Heaton so that, if necessary, they can pass it on to the senior lawyer nominated to monitor the Committee’s reports.

Finally, I very much appreciate your courtesy in offering to discuss with the Committee any issues in of concern the memorandum. I hope that you will agree, however, that the better approach is for the Government to set out their case fully in the delegated powers memorandum, on the basis of which the Committee can advise the House. I know that our legal advisers do, on occasion and when time permits, seek to clarify with the bill team in question any issues about which they are not clear before the Committee meets. This seems to me a helpful way of sorting out possible problems and I hope that you would feel the same.

Baroness Fookes
Chairman of the Delegated Powers and Regulatory Reform Committee

29 June 2015

Letter from Lord Nash, Parliamentary Under Secretary of State for Schools, Department for Education to Baroness Fookes, Chairman.

Thank you for your letter of 29 June, which was received in my office on 6 July.

The Delegated Powers and Regulatory Reform Committee plays a critical role in the House and I greatly respect the work it has carried out under your chairmanship. As I said in my remarks in the House on 1 July, the department takes the Committee's recommendations in relation to the childcare bill most seriously. We will respond in full, and table any appropriate amendments, before Report in October.

Meanwhile, I note the points you have raised about the information that the Committee needs from Departments in order to do its work well. I know that my Bill Manager has now had a helpful conversation with the Committee Clerk, which has cleared up some misunderstandings. I will certainly take account of the Committee's needs in introducing future education legislation.

I also note that you have copied your letter to Richard Heaton and Jonathan Jones and am copying this response them too. I am have asked my Bill Manager, Jenny Preece, to share her experience of working with your Committee with the Cabinet Office Parliamentary Business and Legislation team, which supports Bill Teams across government.

Lord Nash

Parliamentary Under Secretary of State for Schools

Department for Education

13 July 2015
APPENDIX 2: MEMBERS AND DECLARATIONS OF INTERESTS

Committee Members’ registered interests may be examined in the online Register of Lords’ Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the House of Lords Record Office and is available for purchase from The Stationery Office.

For the business taken at the meeting on 15 July 2015 Members declared no interests.

Attendance:

The meeting on the 15 July 2015 was attended by Baroness Drake, Lord Flight, Baroness Fookes, Baroness Gould of Potternewton, Lord Lisvane, Countess of Mar, Lord Moynihan, Lord Jones and Lord Tyler.