



HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

17th Report of Session 2019–21

Business and Planning 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](#) (Chair)

[Baroness Browning](#)

[Lord Goddard of Stockport](#)

[Lord Haselhurst](#)

[Lord Haskel](#)

[Baroness Meacher](#)

[Lord Rowlands](#)

[Lord Thurlow](#)

[Lord Tope](#)

Registered Interests

Committee Members' registered interests may be examined in the online Register of Lords' Interests at <https://www.parliament.uk/hregister>. The Register may also be inspected in the Parliamentary Archives.

Publications

The Committee's reports are published 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. The Committee's email address is 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.

Seventeenth Report

BUSINESS AND PLANNING BILL

1. The Business and Planning Bill was introduced in the House of Commons on 25 June 2020. It contains 25 clauses and confers 15 powers on Ministers to make delegated legislation. The Bill's purpose is to help businesses adjust to new ways of working in the light of the COVID-19 outbreak. Most of the measures are temporary and relate to such matters as pavement licences for the consumption of food and drink outdoors, alcohol licensing, roadworthiness testing of certain vehicles, and planning law.
2. The Bill is accompanied by a Delegated Powers Memorandum ("the Memorandum") produced by the Department for Business, Energy and Industrial Strategy.¹

Conditions for pavement licences

3. Clause 5(6) allows the Secretary of State to specify conditions that will automatically be attached to a pavement licence issued under clause 3. The Secretary of State is able to impose such mandatory conditions merely by publishing them. There is nothing on the face of the Bill to specify how publication must take place. There is also nothing on the face of the Bill to limit the matters which might be provided for under such conditions.
4. Conditions impose legal requirements on licence-holders. If a licence-holder fails to comply with a condition of a pavement licence, the local authority can take enforcement action under clause 6, which includes revocation of the licence. Given that the conditions published by the Secretary of State are capable of imposing legal requirements on licence-holders, we would normally expect the conditions to be imposed through primary or secondary legislation. For example, section 19A of the Licensing Act 2003 allows the Secretary of State to impose mandatory conditions by order subject to the affirmative procedure.
5. The Government justify having no parliamentary procedure for the exercise of the power in clause 5(6) as follows:

"No procedure is justified to ensure that swift action could be taken, should the need arise, to respond to changes to social distancing measures."
6. The implication here is that regulations necessarily take longer to produce than published conditions. In fact, regulations of the negative or the made-affirmative variety can be made as quickly as published conditions (or guidance, for that matter).
7. The points raised here are similar to those we made in the Ivory Bill.² In that case, guidance was being used not merely to guide but to specify legal requirements. In the current Bill, legal requirements are imposed not by regulations but by "published conditions". Not only does this avoid

1 Delegated Powers Memorandum, Department for Business, Energy and Industrial Strategy: <https://services.parliament.uk/Bills/2019-21/businessandplanning.html>

2 [31st Report](#) (Session 2017–19, HL Paper 177).

the normal publication and scrutiny controls that apply to primary and secondary legislation, it also affords a wide discretion to the Secretary of State as to the form and manner in which publication is to take place.

8. In the absence of cogent reasons for not requiring mandatory conditions to be imposed through regulations, **we recommend that the power to impose legally enforceable conditions in clause 5(6) should be exercisable through regulations and that the negative procedure would afford an adequate level of parliamentary scrutiny.**

Guidance subject to no parliamentary procedure

9. Clauses 8, 16(2),³ 17(2)⁴ and 18(14) each contain provisions for the issuance of guidance to which regard must be had by various local authority bodies. In each case, the guidance is not subject to any parliamentary oversight. The justification offered by the Memorandum is as follows:

“The guidance relates to the operation of the provisions and as such it is appropriate for there to be no procedure attached to its publication.”

10. We have frequently taken the view that statutory guidance to which regard must be had (which in practice has to be followed in the absence of cogent reasons) should be subject to a parliamentary procedure.⁵ This is not to say that the guidance should have to be drafted like a statutory instrument, which might well be inappropriate given the language, form and purpose of guidance. The point is that guidance which has legal significance, and which may have—and may be expressly designed to have—a transformative effect on behaviour in important areas, requires a parliamentary procedure.
11. **We recommend that where bodies must have regard to guidance, it should be subject to a parliamentary procedure, and for clauses 8, 16(2), 17(2) and 18(14) the negative procedure would afford an adequate level of parliamentary scrutiny.**
12. In practice this would mean that:
- (a) before issuing the guidance, the Secretary of State would have to lay a draft of it before Parliament and if within (say) a 40-day period, either House of Parliament resolved not to approve the draft guidance, the Secretary of State could take no further steps in relation to it; or
 - (b) a statutory instrument bringing the guidance into force would be subject to the negative procedure.

Extension of statutory provisions

13. Clause 10(1) specifies the end of September 2021 as the date for the expiry of the provisions on pavement licences contained in clauses 1 to 9. Clause 10(2) confers a power on the Secretary of State by affirmative regulations to extend the period beyond the end of September 2021. Clause 10(2) also provides a power to substitute a later date for the expiry, pursuant to clause 4, of particular pavement licences. Clause 10 places no limit on how much

³ Inserting section 74D(6) into the Town and Country Planning Act 1990.

⁴ Inserting section 93B(14) into the Town and Country Planning Act 1990.

⁵ For example: [18th Report](#) (Session 2015–16, HL Paper 83) para 13; [20th Report](#) (Session 2015–16, HL Paper 90) paras 10–11; [21st Report](#) (Session 2015–16, HL Paper 98) para 27; [22nd Report](#) (Session 2015–16, HL Paper 102) para 19; [1st Report](#) (Session 2016–17, HL Paper 13) para 38.

later these dates may be. And there is no limit on how many times the power to substitute a later date may be exercised.

14. The reason for the power in clause 10(2) is linked to uncertainty surrounding the duration of the COVID-19 pandemic and the nature of future social distancing requirements. However, clause 10(2) is silent as to the circumstances in which the powers to specify a later date may be exercised. A later date could be substituted irrespective of whether it is required as a response to the COVID-19 pandemic. **We recommend that the powers in clause 10 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. The same point applies to the other provisions in the Bill that confer a power to substitute a later date: see clauses 11(14), 16(7), 17(7), 18(7), 19(3) and 21(3). **We recommend 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.**

APPENDIX 1: BUSINESS AND PLANNING BILL

Letter from the Rt Hon. Earl Howe, Deputy Leader of the House of Lords, to the Rt Hon. Lord Blencathra, Chair of the Delegated Powers and Regulatory Reform Committee

I am writing to inform you that yesterday (25 June) the Government introduced the Business and Planning Bill to Parliament.

As we emerge from this pandemic, the Government wants to do all it can to support our economic recovery, help businesses adjust to new ways of working and support jobs. This Bill introduces a series of urgent measures aimed at helping businesses get back to work safely and without delay, removing short term obstacles to their recovery and helping them to make the most of opportunities in the coming weeks and months.

All measures in the Bill will be temporary, with the exception of changes to make planning appeals more flexible and to future-proof emergency powers in relation to heavy vehicle testing. We intend the Bill, subject to parliamentary agreement, to proceed through both Houses on an accelerated basis, in view of its urgency.

Measures included in the Bill will:

- help restaurants, bars and pubs get ready for summer and adapt to social distancing by making it easier for them to serve drinks and set up outdoor seating – provisions on outdoor seating will apply in England and alcohol licensing in England and Wales;
- allow lenders to quickly issue Bounce Back Loans to small businesses across the UK;
- make changes to Heavy Goods Vehicle and Passenger Carrying Vehicle licensing in Great Britain and Northern Ireland, and roadworthiness testing for heavy vehicles in Great Britain, to keep drivers on the road and prevent a backlog of checks and tests whilst respecting safety considerations.
- enable developers in England to begin work quickly on new developments as the economy recovers by extending unimplemented planning permissions and listed building consents; and
- facilitate the safe resumption of construction work and new development without delay by introducing a new route for developers in England to seek permission for extended construction site working hours, for example in evenings and at weekends, and making planning processes in England more flexible (including allowing for greater digitalisation).

The Delegated Powers and Regulatory Reform Committee will be interested in the provisions of the Bill that confer powers to make delegated legislation, which are set out in the Delegated Powers Memorandum. In particular, the Bill contains powers to extend the duration of temporary measures if required due to the ongoing COVID-19 pandemic, and where appropriate they will be subject to the affirmative procedure. We consider these powers to be proportionate and necessary. We consider this strikes the right balance between enabling parliamentary scrutiny whilst minimising any further delay or disruption to industry should the need to use these powers arise.

Expiry of pavement licence provisions

Clause 10(2) contains a power to extend the period during which the fast track process for obtaining a pavement licence applies. These powers are required due to uncertainties relating to the duration and severity of the COVID-19 pandemic, which mean that it is very difficult to plan precisely for the termination of these temporary measures in September 2021. To enable appropriate parliamentary scrutiny, the regulations would be subject to the draft or made affirmative procedure. The made affirmative procedure would only be used in cases of urgency, for example when Parliament is unable to sit.

Alcohol licensing provisions

Clause 11(11) contains a power to make transitional, transitory or saving provision in connection with the expiry of the temporary alcohol licensing provisions. Uncertainties relating to the duration and severity of the COVID-19 pandemic mean that it is very difficult to plan precisely for the termination of these temporary measures in September 2021. It is possible that the measures may be extended, in whole or in part, or they may need to be exited in a phased manner. For this reason it is necessary to have a delegated power to allow for different outcomes in the autumn of next year. This power is subject to no procedure as is common practice for transitional provisions powers.

Clause 11(12) contains a power to amend the Licensing Act 2003 (modifications of Licensing Act 2003 (Premises licences and club premises certificates) Regulations 2005). The temporary alcohol licensing provisions contain a new review mechanism to allow for a quick review in the case of any irresponsible behaviour resulting from these measures. The review mechanism is modelled on existing review procedures in the Licensing Act 2003 but there are significant differences that might prove problematic in practice. It is possible that urgent amendment would be needed to ensure that the reviews operate effectively. To enable appropriate parliamentary scrutiny, the regulations would be subject to the draft or made affirmative procedure. The made affirmative procedure would only be used in cases of urgency, for example when Parliament is unable to sit.

Clause 11(14) contains a power to extend the period during which the temporary licensing provisions apply. This power is required due to uncertainties about the duration and impact of the COVID-19 pandemic and social distancing measures on the hospitality industry. To enable appropriate parliamentary scrutiny, the regulations would be subject to the draft or made affirmative procedure. The made affirmative procedure would only be used in cases of urgency, for example when Parliament is unable to sit.

Clause 11(15) contains a power to make consequential amendments necessary as a result of the temporary licensing provisions. The full impact of the provisions will not be known until they are in operation and it is possible that further consequential amendment might be needed. Where the power is used to amend primary legislation the affirmative resolution procedure is appropriate. Where secondary legislation is amended the negative resolution procedure is appropriate.

Certificates of temporary exemption for public service and goods vehicles

Clause 13 amends two delegated powers to broaden the Secretary of State's powers to make regulations governing the issue of certificates of temporary exemption from the test certificate requirement. These amended powers are required to manage the excessive demand for vehicle testing (caused by COVID-19 disruption) in the

coming months in a manner that prioritises road safety. The regulations would be subject to the negative procedure (following a consultation), in line with the existing powers in the Road Traffic Act 1988.

Modification of conditions relating to construction hours

Clause 16(7) contains a power (i) to extend the period during which a fast track application process for varying restrictions to construction working hours applies and (ii) to vary the date until which restrictions may be varied. This power is required due to uncertainties about the duration and impact of the COVID-19 pandemic and social distancing measures on the operation of construction sites. To enable parliamentary scrutiny, the regulations would be subject to the draft or made affirmative procedure. The made affirmative procedure would only be used in cases of urgency, for example when Parliament is unable to sit.

Extension of certain permissions and consents

Clauses 17 to 19 contain five delegated powers in clauses 17(7), 17(8), 18(7), 18(8) and 19(3). Clauses 17(7), 18(7) and 19(3) provide powers to amend (i) the duration of the extension of certain permissions and consents (ii) the permissions and consents to which an extension applies, (iii) the date after which no additional environmental approval may be granted, (iv) the expiry date of these provisions. Clauses 17(8) and 18(8) provide powers to make provision for additional approval requirements where the duration of the extension of planning permission is extended. These powers are required due to uncertainties about the duration and impact of the COVID-19 pandemic and social distancing measures on the construction industry. To enable appropriate parliamentary scrutiny, the regulations would be subject to the draft or made affirmative procedure. The made affirmative procedure would only be used in cases of urgency, for example when Parliament is unable to sit.

Electronic inspection of Spatial Development Strategy

Clause 21 contains a power to extend the period of application of the temporary provision allowing the Mayor of London to provide the Spatial Development Strategy by appropriate electronic means. These powers are required due to uncertainties about the duration and impact of the COVID-19 pandemic and social distancing measures, in particular on accessibility of GLA's offices and other places where spatial development strategy would be made available. To enable appropriate parliamentary scrutiny, the regulations would be subject to the draft or made affirmative procedure. The made affirmative procedure would only be used in cases of urgency, for example when Parliament is unable to sit.

Provisions in connection with expiry of measures

Clause 25 contains a power to make transitional, transitory or saving provision in connection with the expiry of the measures. This is required to deal with situations that straddle the change in the law when the temporary measures come to an end and we return to the pre-existing legal framework.

We hope that you will support the important, urgent measures contained in this Bill. In particular, we hope you will recognise the need for the delegated powers which provide an opportunity to extend the measures if required in order to support our hospitality, road and construction sectors during these uncertain times. I would be happy to meet to discuss these measures further should you wish.

26 June 2020

APPENDIX 2: MEMBERS' INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at <https://www.parliament.uk/hlregister>. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 8 July 2020 Members declared the following interests:

Lord Thurlow

Consultant for companies who make planning applications (listed in Register of Interests)

Attendance

The meeting was attended by Baroness Andrews, Lord Blencathra, Baroness Browning, Lord Goddard of Stockport, Lord Haslehurst, Lord Haskel, Baroness Meacher, Lord Rowlands, Lord Thurlow and Lord Tope.