

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

2nd Report of Session 2022–23

Schools Bill [HL]

**Social Security (Special
Rules for End of Life)
Bill [HL]**

**UK Infrastructure Bank
Bill [HL]**

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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.

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[Baroness Browning](#)

[Lord Cunningham of Felling](#)

[Lord Goddard of Stockport](#)

[Lord Haselhurst](#)

[Lord Hendy](#)

[Lord Janvrin](#)

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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. The Committee's email address is hldelgatedpowers@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.

Second Report

SCHOOLS BILL [HL]

1. The Schools Bill was introduced in the House of Lords on 11 May. It contains provisions about academies, school funding, school attendance and independent educational institutions. The Department for Education has provided us with a delegated powers memorandum (“the Memorandum”).¹
2. We draw attention to two delegated powers—in clauses 1 and 3 of the Bill. Before explaining our concerns about these clauses, we would like to make a general comment. This is the first bill of the new session that has come before us. Following the publication of our report, *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*,² in November 2021, and of revised guidance to departments,³ we expected that bills introduced in the current session would reflect the principles set out in our report and revised guidance. These are: first, that primary legislation, and the powers conferred by it, should be drafted on the basis of the principles of parliamentary democracy (namely parliamentary sovereignty, the rule of law and the accountability of the executive to Parliament); and, second, that the threshold between primary and delegated legislation should be founded on the principle that the principal aspects of policy should be on the face of a bill and only its detailed implementation left to delegation. **The powers to which we draw attention in this report on the Schools Bill demonstrate that no heed has been taken by the Government of the concerns expressed by this Committee in *Democracy Denied?*, by the Secondary Legislation Scrutiny Committee in its report, *Government by Diktat: A call to return power to Parliament*,⁴ and expressed by members during debates in the House and by others outside of Parliament. We find this deeply disappointing and anticipate that others will feel the same.** As a result, we have taken the exceptional step of writing to the Secretary of State for Education, the Rt Hon. Nadhim Zahawi MP, to express our concerns. (The letter is set out in Appendix 1 to this report.

Clause 1: academy standards

3. This Bill is the first that has come to us this session. **The very first clause contains a most unsatisfactory delegated power.**
4. The Government’s plan in due course is that:
 - there will be no more maintained schools,
 - all schools will be academies,
 - all academies will sit within multi-academy trusts.

1 Department for Education, *Delegated Powers Memorandum*, 12 May 2022

2 DPRRC, *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*, [12th Report](#), Session 2021-22, HL Paper 106.

3 DPRRC, *Guidance for Departments on the role and requirements of the Committee, November 2021*.

4 SLSC, *Government by Diktat: A call to return power to Parliament*, [20th Report](#), Session 2021-22, HL Paper 105.

5. The current regime for maintained schools is exclusively statutory. The current regime for academies is primarily contractual. The Government wish to transfer academy arrangements into a new statutory scheme based on secondary legislation.
6. Although clause 1 is entitled “academy standards”, the clause contains neither academy standards nor the principles on which the standards will be based. According to the Government, therefore, the setting of standards is not a task for Parliament but a task for ministers, in regulations contained in an affirmative statutory instrument.
7. These regulations will give ministers the power to determine all the following matters. Clause 1(2) makes it clear that they are merely examples and that the power can go wider, perhaps much wider:
 - The nature and quality of education provided and the curriculum to be followed.
 - The spiritual, moral, social and cultural development of pupils.
 - The length of the school day, term, year and school holidays.
 - The assessment of pupils’ performance and the entry of pupils for public examinations.
 - The quality of leadership and management.
 - The suitability of proprietors of academies and of staff.
 - Admission procedures and criteria.
 - The spending of money by proprietors of academies.
 - Collaboration between proprietors of academies and other persons or bodies.
8. Although the delegated power in clause 1 is excessively wide, we note that the Department has not sought to allay possible concerns by providing us with draft regulations that would illustrate how the power might be exercised.
9. The Memorandum (page 5) offers two predictable and formulaic reasons why academy standards should be contained in secondary legislation rather than in primary legislation:
 - First, the standards regulations are likely to be lengthy, technical and detailed.
 - Second, the Government need to be able to respond swiftly and effectively to the changing needs of the education sector and of pupils. Ministers may need to amend the regulations more frequently and quickly than would be practicable if the standards were contained in an Act of Parliament.
10. **We find these reasons wholly unconvincing as a justification for denying Parliament the opportunity to deal with academy standards on the face of the Bill.**

11. First, although the Department contemplates that academy standards may need revising over time, it does not contemplate that the standards should be put on the face of primary legislation at any time—since otherwise it would have said so. The Government have embarked on a ten-year reform to the school system. If Ministers are not prepared to set out academy standards in this flagship Bill, it must be doubtful whether they will ever be prepared to do so on the face of primary legislation. In our experience, whenever ministers take legislative powers they rarely consider returning them to Parliament.
12. Second, material should not be excluded from a bill merely because it is lengthy, technical and detailed. In matters of the first importance, Parliament should have a determinative role. Parliament can and frequently does deal with bills that are lengthy, technical and detailed. Parliament will be considerably disadvantaged if the principle is admitted that bills should only be short, simple and lacking in detail and that everything else should be for ministers.
13. Third, it is unsatisfactory that foundational educational principles may need to be changed so “frequently and quickly” that Parliament will not be able to keep up with the changing needs of pupils.
14. Finally, it would be possible for the Bill to set out the standards that apply to academies coupled with a power to amend them where speed and necessity really did require this to be done by regulations. This would give Parliament control while preserving some flexibility for ministers.
15. **The delegated power in clause 1 is considerably too wide and should be removed from the face of the Bill. The Government’s reasons for dealing with academy standards in regulations are predictable and formulaic. Much more needs to be said about academy standards on the face of the Bill given the fundamental nature of the reforms and the length of the project. The Bill should contain details of both the standards themselves and the principles underlying them.**

Clause 3 and Schedule 1—academies: power to apply or disapply education legislation

16. Clause 3 contains a Henry VIII power allowing any Act of Parliament that applies to schools or other educational institutions to be applied to academies subject to any repeals or amendments that the minister sees fit to make.
17. Some Henry VIII powers allow ministers to make minor and consequential amendments or modifications to Acts of Parliament—essentially as a tidying-up exercise. The problem is that other Henry VIII powers allow ministers to make regulations that make wholesale changes to Acts of Parliament in major policy areas.
18. If the Government were to embark, say, on a fundamental review of how criminal offences were to apply to children, Parliament would no doubt regard it as unacceptable if the Government produced a one-clause Bill saying:

“(1) The Secretary of State may by regulations modify, amend, repeal or revoke any relevant provision of the criminal law that applies to an adult so that it applies to a child.

- (2) A relevant provision means any provision made by Act of Parliament or by subordinate legislation.”
19. The reason why this would be unacceptable is that ministers would be granted wholesale legislative powers in a very important area that is properly the province of Parliament. This is the fundamental objection to Henry VIII powers. And it is an objection that applies to clause 3(1).
 20. Schedule 1 to the Bill makes a limited attempt to apply some maintained school legislation to academies. But the power in clause 3(1) allows ministers to go much further. They can make changes to any Act of Parliament passed to date, including some future legislation and subject only to the three exclusions mentioned in clause 3(3). Ministers can apply law, in relation to academies, that is currently applicable to schools, independent educational institutions, Further Education and childcare providers with such modifications as ministers think fit.
 21. There is nothing that limits this power to minor and consequential changes. Clause 3(1) contemplates wholesale reform of the law by Ministerial regulation rather than by Parliament, including changes that will see academies entirely replace maintained schools.
 22. This power is not sun-setted, even though the reforms are part of a ten-year project. **There could be no clearer example, so early in the first Bill of the session, of Government taking wide delegated powers to make changes to important areas of social policy rather than set out the details in primary legislation.**
 23. The Government’s justification (Memorandum, page 8) is, once again, predictable and formulaic: it needs to be able to act “swiftly and responsively to changing needs and demands”.
 24. It is not good enough to say that ministers, rather than Parliament, should be able to make law because ministers can be responsive to the needs of the academy trust system. So can Parliament. There are few things more important to Parliamentarians than the education of children. If education law needs to be changed, we believe that ministers will find Parliamentarians highly responsive.
 25. As for the argument that regulations can be made speedily, it is over-used. We have often remarked that Parliament can act very swiftly if necessity demands. If ministers need to act more quickly than could Parliament, it perhaps casts doubt on the reliability and stability of the reforms in the first place. But even admitting that regulations may need to be made very swiftly, an option more conducive to parliamentary scrutiny would be to give ministers a power (subject to a sunset clause) to amend primary legislation where there is a proven need to act “swiftly” while allowing the basic law to be set out on the face of the Bill.
 26. Instead, clause 3(1) gives ministers a free rein to apply or disapply education legislation as they see fit in relation to academies.
 27. We are told (Memorandum, page 9) that the Department for Education is “embarking on a journey” to make academy standards statutory rather than contractual. We are told that further time is needed to consider certain aspects, including charging prohibitions. As for the Department’s journey, we

believe that Parliament is entitled to know more about the destination rather than simply being told that there will be a move from contract to statute. At present, clause 3 (like clause 1) looks premature, with the Government appearing to have no clear idea of the end result. As a consequence, they are seeking a power of considerable breadth to give them the flexibility to do whatever they like in order to achieve what they finally decide should be the end result.

28. The Government's justification for the Henry VIII power in clause 3 might have been stronger were the contemplated changes minor or consequential. But this is a major education reform involving the elimination of all maintained schools. Although it is planned to be a major reform and a gradual process—something (one would imagine) for successive Acts of Parliament—the Government have provided themselves with a major Henry VIII power that represents a significant shift of power from Parliament to Ministers. The fact that the regulations must be affirmative is not sufficient compensation. Two one-and-a-half-hour debates (on a “take it or leave it” basis with no amendments allowed) are no substitute for the scrutiny provided by an Act of Parliament.
29. **The Henry VIII power in clause 3(1) is too wide and should be removed from the face of the Bill. It should not be for Ministers to make such wide-ranging reforms of the statute book. It should be a matter for Parliament in primary legislation, for example by an expanded Schedule 1 to the Bill.**

**SOCIAL SECURITY (SPECIAL RULES FOR END OF LIFE) BILL
[HL]**

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

UK INFRASTRUCTURE BANK BILL [HL]

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

APPENDIX 1: LETTER TO THE SECRETARY OF STATE ON THE SCHOOLS BILL [HL]

Letter from the Rt Hon. Lord McLoughlin CH, Chair of the Delegated Powers and Regulatory Reform Committee, to the Rt Hon. Nadhim Zahawi MP, Secretary of State for Education

I am writing in my capacity as Chair of the House of Lords Delegated Powers and Regulatory Reform Committee. The Committee considered the Schools Bill at its meeting today and will publish its report very shortly.

As you may be aware, in November 2021, the Committee published a report entitled *Democracy Denied?* The urgent need to rebalance power between Parliament and the Executive. In our report and accompanying revised guidance to departments, we set out two fundamental principles: first, that primary legislation, and the powers conferred by it, should be drafted on the basis of the principles of parliamentary democracy (namely parliamentary sovereignty, the rule of law and the accountability of the executive to Parliament); and, second, that the threshold between primary and delegated legislation should be founded on the principle that the principal aspects of policy should be on the face of a bill and only its detailed implementation left to delegation.

The Schools Bill is the first bill to be considered by the Committee in this session. We had expected, in the light of *Democracy Denied?* and of a report by the House of Lords Secondary Legislation Scrutiny Committee, Government by Diktat: A call to return power to Parliament, which raised similar concerns, that bills introduced in this new session would demonstrate a commitment by the Government to reset the balance of power between Parliament and the executive. This would have been shown by the Government avoiding very broad delegations of power which enable implementation of significant policy change by delegated legislation. We are therefore deeply disappointed to publish a report on the Schools Bill which draws attention to powers in clauses 1 and 3 of the Bill which we have concluded are excessively wide and should be removed from the face of the Bill, and for which the justification appears to us predictable and formulaic. We do not regard important policy issues relating to academy standards, even if they require lengthy, technical and detailed legislation, as appropriate for delegated legislation.

We look forward to the Government's response to our report. In addition, we would welcome your view on the wider issue of how the inclusion of these powers in the Schools Bill can be reconciled with the Government's statement in their response to *Democracy Denied?* that the Cabinet Office Guide to Making Legislation asks departments to consider the Committee's guidance (which includes the principles set out above) carefully.

This letter will be published in an appendix to the Committee's report and copied to the Lord President and Leader of the House of Commons, the Rt Hon. Mark Spencer MP, and Baroness Barran MBE, Parliamentary Under Secretary of State at the Department for Education.

25 May 2022

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 25 May 2022, Members declared no interests.

Attendance

The meeting was attended by Baroness Browning, Lord Cunningham of Felling, Lord Janvrin, Lord Goddard of Stockport, Lord Haselhurst, Lord Hendy, Lord McLoughlin, Baroness Meacher, Lord Rooker and Lord Tope.