

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

3rd Report of Session 2022–23

Procurement Bill [HL]

**Identity and Language
(Northern Ireland) Bill [HL]**

**Draft Legislative Reform
(Provision of Information
etc. Relating to Disabilities)
Order 2022**

Ordered to be printed 8 June 2022 and published 14 June 2022

Published by the Authority of the House of Lords

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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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.

Third Report

PROCUREMENT BILL [HL]

1. This Bill was introduced in the House of Lords on 11 May and had its Second Reading on 25 May.
2. The Bill contains 116 clauses and 11 Schedules. According to the Explanatory Notes, “The purpose of the Procurement Bill is to reform the United Kingdom’s public procurement regime following its exit from the European Union (EU), to create a simpler and more transparent system not based on transposed EU Directives”.¹
3. The Bill deals with—
 - public contracts: the award of contracts by most central government departments, their arms-length bodies and the wider public sector including local government, health authorities and schools;
 - utilities contracts: the award of contracts by utilities operating in the water, energy and transport sectors;
 - concession contracts: contracts for the supply of works or services where at least part of the consideration for that supply is a right for the supplier to exploit the works or services; and
 - defence and security contracts.
4. The Bill will regulate public procurements from the point at which a public body that is to be regulated (a “contracting authority”) is considering whether and what to procure, through the process of procurement and contract award, up to the point at which the resulting contract ends.
5. The majority of the provisions in the Bill apply to contracting authorities in England, Wales and Northern Ireland. In general, the Bill applies only to contracting authorities in Scotland which (a) are cross-border bodies, or (b) exercise wholly reserved functions.²
6. The Bill contains 53 delegated powers, 25 of which allow for the affirmative procedure. The Cabinet Office has provided a Delegated Powers Memorandum (“the Memorandum”).³
7. **This report identifies multiple failures in the Memorandum to adequately explain and justify very broad delegations of power which enable implementation of significant policy change by delegated legislation. This would give us cause for concern at any time but is particularly disappointing as it comes so soon after the publication of our report, *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*,⁴ in November 2021, and of**

1 See para 1 of the Explanatory Notes to the Bill.

2 See paras 38 to 43 of the Explanatory Notes.

3 Cabinet Office, [Delegated Powers Memorandum](#), dated 11 May 2022.

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

revised guidance for departments on the role and requirements of this Committee.⁵

Background

8. The UK has a complex body of public procurement legislation, much of which is derived from EU law. The UK was required, as a member of the EU, to put in place domestic legislation to achieve objectives set out in EU Directives (a process known as ‘implementation’). EU Directives on procurement were implemented in the UK by—
- the Public Contracts Regulations 2015;
 - the Utilities Contracts Regulations 2016;
 - the Concession Contracts Regulations 2016; and
 - the Defence and Security Public Contracts Regulations 2011.

The Bill repeals those Regulations⁶ and creates a new regime for regulating public procurement.

9. Those Regulations were made under a unique delegated power (in section 2(2) of the European Communities Act 1972), the purpose of which was to give Ministers power to make secondary legislation which implemented EU law in the UK. Despite being in many respects a power of considerable breadth (it could be used to make such provision as might be made by an Act of Parliament),⁷ the section 2(2) power was subject to a critical constraint: it gave Ministers power to make *laws to give effect to EU law*—not simply power to make laws that Ministers might have wished to make - and such laws were not open to domestic repeal or amendment in ways that might be inconsistent with EU law.
10. This Bill creates new delegated powers that are subject to no such constraints. Some would give Ministers new and significant scope to determine important aspects of the regulatory regime.
11. We draw the following powers to the attention of the House.

Clauses 51, 65, 70, 78, 79 and 84: powers to adjust financial thresholds by negative procedure regulations

12. In general, the regulatory regime in the Bill applies only in relation to procurements the estimated value of which equals or exceeds financial thresholds that are specified in the Bill.
13. The Bill confers Henry VIII powers to increase or decrease the following such thresholds by regulations—
- the value of a public contract to which the requirement in clause 51(3) to publish a copy of the contract applies;

⁵ DPRRC, *Guidance for Departments on the role and requirements of the Committee*, November 2021.

⁶ See clause 107 of, and Schedule 11 to, the Bill.

⁷ Save that Schedule 2 to the 1972 Act prevented the use of the power for taxation, retrospective provision, conferral of powers to legislate or the creation of criminal offences punishable by more than 2 years’ imprisonment.

- the value of a payment, made by a contracting authority under a public contract, to which the requirement in clause 65(1) to publish specified information applies;
 - the value of a “regulated below-threshold” works contract⁸ above which the bar in clause 78(1) does not apply. That bar prevents a contracting authority from restricting the submission of tenders below the threshold amount by reference to an assessment of a supplier’s suitability to perform the contract;
 - the value of a regulated below-threshold contract to which the following requirements in clause 79 apply—
 - the requirement to publish a notice containing information about any such contract before advertising it for the purpose of inviting tenders; and
 - the requirement to publish a notice containing details about any such contract after it is entered into;
 - the level of annual spend on procurement to which the requirement in clause 84 applies (the requirement to publish a “pipeline notice” setting out information about high-value contracts in respect of which a contracting authority intends to publish a tender notice or a transparency notice);⁹
 - the value of a “high-value contract” for the purposes of the requirement in clause 84;
 - the level of modification to a contract below which the requirement in clause 70(1) does not apply (the requirement to publish a “contract change notice” relating to that modification); and
 - the financial value of a public contract to which the requirement in clause 70(6) applies (the requirement to publish a copy of a modified contract).
14. The first six of these thresholds may be changed by regulations subject only to the negative procedure. It is unclear whether the Government intends that the negative procedure should also apply to changes to the last two thresholds (those in clause 70): the Memorandum states that the negative procedure does apply—and provides a justification for its application which is in very similar terms to the justifications provided in relation to the first six thresholds—but the Bill itself provides for the affirmative procedure to apply.¹⁰ It is unclear whether it is the Memorandum or the Bill that contains the error.

8 A “below-threshold contract” is a contract the value of which is below the financial thresholds set out in Schedule 1 to the Bill. The Bill provides for such contracts to be subject to less onerous regulation. Clause 77 defines “regulated below-threshold contract” as a below-threshold contract that is not (a) an exempted contract (see Schedule 2), (b) a concession contract (a contract for the supply of works or services where at least part of the consideration for that supply is a right for the supplier to exploit the works or services) or (c) a utilities contract (a contract for the supply of goods, services or works mainly for the purpose of a “utility activity” of a kind specified in Schedule 4).

9 A “transparency notice” is a notice under clause 43 setting out (a) that a contracting authority intends to award a contract directly, and (b) any other information specified in regulations under clause 86.

10 In clause 110(4)(f).

15. The argument given for taking the powers is a need for flexibility, to allow Ministers to make changes that take account of, for example, inflation and “other such economic changes”¹¹ and experience of the new procurement system in practice. However, there is nothing to prevent the powers being used to significantly raise thresholds—with a corresponding reduction in transparency in procurement.
16. We have often repeated our view that there should be a presumption that the affirmative procedure should apply to instruments made under Henry VIII powers. **We have no objection to the negative procedure applying to (a) increases in the thresholds in line with inflation, or (b) reductions in the thresholds (since these would serve to increase transparency) but we consider that above-inflation increases—which would inevitably reduce transparency in procurement—merit the fuller scrutiny afforded by the affirmative procedure.**
17. **We therefore consider that regulations that make above-inflation increases to any of the financial thresholds in clauses 51, 65, 70, 78, 79 and 84 of the Bill should be subject to the affirmative procedure.**

Clause 86: power to make provision about the content of notices, documents and other information that is required to be published or provided

18. The Bill “seeks to bring greater transparency to procurement”¹² and, to that end, it imposes obligations on contracting authorities to publish or produce notices, documents and other information.
19. During the Second Reading debate on the Bill, Lord True (Minister of State at the Cabinet Office) stated¹³—
- “Running throughout the Bill are requirements to publish notices. **These are the foundations for the new standards of transparency which will play such a crucial role in the new regime.** Our ambitions are high, and we want to ensure that procurement information is publicly available, not only to support effective competition but to provide the public with insight into how their money is being spent”.
20. However, as the Memorandum acknowledges, “in general [the relevant provisions of the Bill] leave the content of such notices, etc to be set out in Regulations made under [the power in clause 86]”.¹⁴
21. Clause 86 contains a broad power to prescribe in regulations the information that must be set out in 16 different types of notices.¹⁵ These include notices—
- inviting suppliers to submit tenders;¹⁶
 - about contracts awarded without a competitive tender process;¹⁷

11 See paras 75, 98 and 137 of the Memorandum.

12 See para 139 of the Memorandum.

13 Hansard, 25 May 2022, [Col 859](#).

14 See para 139 of the Memorandum.

15 These are listed in para 142 of the Memorandum.

16 See clause 20 of the Bill.

17 See clause 43 of the Bill.

- about contracts that an authority intends to enter into or has entered into;¹⁸
 - about suppliers excluded from participating in a procurement exercise¹⁹;
 - about payments of more than £30,000 made by a contracting authority under a public contract;²⁰
 - about the performance of a contractor;²¹ and
 - about modifications to, or termination of, contracts.²²
22. We are surprised that the Bill leaves it entirely to regulations (albeit subject to the affirmative procedure) to determine the substance of these transparency obligations.
23. We are also disappointed that the Government have provided no illustrative regulations. **Illustrative regulations would have been very helpful and, without them, scrutiny of clause 86 is considerably hampered.**
24. The Memorandum provides the following justification for the power—
- “obligations around the content of notices... are detailed and technical matters”;²³ and
 - “we think that having obligations split between the Bill and various regulations would be unhelpful to users of the procurement system. Having all the provisions about the required content of notices in regulations will ease the administrative burden for contracting authorities which will have to consult only one document, rather than having to consult both the Bill and regulations”.²⁴
25. We find this wholly unconvincing—
- describing obligations imposed under this power as “detailed and technical matters” downplays their importance: they will go directly to the level of transparency delivered by the new regime; and
 - any perceived “administrative” advantages to having all provisions in one place should not be a relevant consideration: the question whether particular provision ought to be on the face of a Bill or can instead be left to regulations should depend entirely on the level of scrutiny that is merited by the significance of the provision.
26. **Accordingly, we consider that—**
- **the reasons given by the Government for leaving the substance of these 16 separate obligations to publish procurement information entirely to regulations are wholly inadequate;**

18 See clauses 48 and 51 of the Bill.

19 See clause 56 of the Bill.

20 See clause 65 of the Bill.

21 See clause 66 of the Bill.

22 See clauses 70 and 73 of the Bill.

23 See para 143 of the Memorandum.

24 See para 145 of the Memorandum.

- **more needs to be said in the Bill itself about the information that must be published, not least because one of the key aims of the Bill is to make procurement more transparent; and**
- **illustrative regulations would have assisted our deliberations.**

Clause 104: disapplication of duty in section 17 of the Local Government Act 1988

27. Clause 104 gives Ministers a Henry VIII power to make regulations that disapply the duty in section 17 of the Local Government Act 1988. Section 17 requires public authorities²⁵ to exercise functions in relation to procurement without reference to a range of “non-commercial matters” that are specified in that section.
28. The matters in question include—
- the terms and conditions of employment of a contractor’s workforce;
 - any involvement of the business activities or interests of contractors with irrelevant fields of Government policy;
 - the conduct of contractors or workers in industrial disputes between them or any involvement of the business activities of contractors in industrial disputes between other persons;
 - the country or territory of origin of supplies to, or the location in any country or territory of the business activities or interests of, contractors;
 - any political, industrial or sectarian affiliations or interests of contractors or their directors, partners or employees;²⁶ and
 - financial support or lack of financial support by contractors for any institution to or from which the authority gives or withholds support.
29. There is nothing on the face of the Bill to limit the power conferred by clause 104—
- it gives Ministers complete freedom to provide in regulations for the duty in section 17 to be disapplied as it relates to—
 - all public authorities to which that section applies,²⁷ or only some;
 - all functions that are regulated by that section, or only some;
 - contracts of all types mentioned in that section, or only some; and
 - all “non-commercial matters” specified in that section, or only some; and
 - the exercise of the power is not limited by any requirement for criteria to be met or pre-conditions to be satisfied.

25 Section 17 applies to the public authorities listed in Schedule 2 to the 1988 Act. These include local authorities, urban development corporations, fire and rescue authorities, combined authorities and National Park authorities.

26 This means actual or potential membership of, or actual or potential support for, respectively, any political party, any employers’ association or trade union or any society, fraternity or other association (see section 17(8) of the 1988 Act).

27 With the exception of devolved Scottish authorities.

30. The power is subject to the affirmative procedure but the Memorandum contains little by way of explanation or justification for taking it, despite—
- it being a power to override primary legislation;
 - it being open-ended; and
 - it being far from clear why it might be considered appropriate to allow public authorities to take some of the matters in question into account when exercising procurement functions.
31. According to the Memorandum—
- the section 17 duty “risks cutting across certain provisions in this Bill, in particular around the National Policy Statement²⁸ and the extent to which social value can be considered as part of the expenditure of public funds on procurement”;²⁹ and
 - “powers are required to enable domestic policy considerations to be applied effectively ... Such policy might include that for which provision could be made under clauses 12 (national procurement policy statement) or 13 (Wales procurement policy statement)”.³⁰
32. No illustrative examples are given, nor is there any attempt to explain why it might be considered appropriate to allow a contracting authority to take into account any of the matters in question.
33. **The Government have failed to adequately explain why Ministers are to be given such a broad power to override the existing statutory bar on public authorities taking into account the matters specified in section 17 of the 1988 Act in the exercise of their procurement functions.**
34. **Accordingly, we consider that—**
- **Ministers should be asked to fully explain the Government’s proposed use of the power in clause 104; and**
 - **the breadth of the power should be narrowed unless the Government can fully justify it.**

Clauses 8, 33 and 109, paragraphs 17 and 34 of Schedule 2 and paragraph 7 of Schedule 4: powers to exempt types of contracts from the full regulatory regime

35. These six provisions each contain a power to exempt particular types of contracts from the full regulatory regime under the Bill. In each case, the power is of such breadth that the substance of the exemption is left entirely to regulations. The powers are all subject to the affirmative procedure but, **in each case, we consider that—**

28 Clause 12 gives Ministers power to publish a national procurement policy statement setting out the Government’s strategic priorities in relation to procurement. A contracting authority must have regard to the statement. Clause 13 gives the Welsh Ministers an equivalent power in relation to the Welsh Government’s strategic priorities in relation to procurement.

29 See para 173 of the Memorandum.

30 See para 176 of the Memorandum.

- **the reasons given by the Government for leaving matters entirely to regulations are inadequate; and**
- **the breadth of the power should be narrowed unless the Government can fully justify it.**

Example 1: clause 8—power to specify services, contracts for the supply of which are subject to the less onerous “light touch contract” regulatory regime

36. The Memorandum gives the following justification for this power³¹—
- “whilst the scope of what is to be included in the power is known, it is not practicable for the Bill to include a long list of detailed CPV codes³² to indicate which categories of contracts may benefit from the light touch regime”; and
 - “CPV codes may evolve over time, which would (absent a power) require amendment to the Bill”.
37. However, it does not explain why it is considered appropriate for the power to be so broad that the issue of which kinds of contracts are to be subject to the “light touch contract” regime is left entirely to regulations. There is nothing of substance on the face of the Bill to limit the discretion afforded to Ministers to allow less rigorous regulation for contracts of a kind that they choose to specify in regulations. Clause 8(4) lists three factors which Ministers must consider but without saying what effect these factors are to have. The Memorandum suggests that the provision made in exercise of the power will simply be a list of CPV codes but the power need not be exercised in that way.
38. **We consider that—**
- **the reasons given by the Government for leaving entirely to regulations the question of which contracts should be subject only to the “light touch” regulatory regime are inadequate; and**
 - **unless the Government can fully justify doing otherwise, the Bill should include criteria for determining which contracts should be subject to that regime.**

Example 2: clause 33—power to specify services, contracts for the supply of which may be reserved for “public service mutuals”³³

39. This power is exercisable only in relation to services within the “light touch contract” regime.³⁴
40. The Memorandum explains that “the intention in reserving contracts for public service mutuals is to support public sector mutuals by providing them with a more protected environment in which to compete”.³⁵

31 See para 42 of the Memorandum.

32 Common Procurement Vocabulary (CPV) codes were introduced by the EU to categorise procurement contracts.

33 Clause 33(6) provides that a “public service mutual” is a body that (a) operates for the purpose of delivering public services, (b) is run on a not-for-profit basis or provides for the distribution of profits only to members, and (c) is under the management and control of its employees.

34 See clause 8 of the Bill.

35 See para 58 of the Memorandum.

41. However, it does not explain why it is considered appropriate for the power to be so broad that the issue of which kinds of “light touch contracts” are to be reserved to public service mutuals is left entirely to regulations. There is nothing of substance on the face of the Bill to limit the discretion afforded to Ministers.
42. **We consider that—**
- **the reasons given by the Government for leaving entirely to regulations the question of which contracts are to be reserved to public service mutuals are inadequate; and**
 - **unless the Government can fully justify doing otherwise, the Bill should include criteria for determining which contracts should be reserved to public service mutuals.**
- Example 3: clause 109—power to amend the Bill for the purpose of reducing the regulation of private utilities³⁶*
43. This broad Henry VIII power allows the Bill to be amended in order to reduce the regulation of private utilities.
44. The Memorandum explains that the Government “wishes to exempt [private utility companies] from the Bill to the extent practical”³⁷ because such companies “are already incentivised by industry regulation and competition to act properly and competitively in the market”.³⁸ It states that clause 109 provides power “to remove regulations that are unnecessarily burdensome”³⁹ for private utilities.
45. The justification given for taking the power is that “in a rapidly evolving commercial market it is not possible to set out on the face of the Bill those aspects of regulation that could most usefully be removed from private utilities”.⁴⁰
46. We are not convinced by the assertion that the Government’s only option is to leave the exemptions entirely to regulations made under a completely open-ended power.
47. **The Government have failed to provide adequate justification for taking such a broad Henry VIII power that leaves it entirely to regulations to determine how the Bill is to apply to private utilities.**
48. **Accordingly, we consider that—**
- **Ministers should be asked to explain more fully the Government’s proposed use of the power in clause 109; and**
 - **the breadth of the power should be narrowed unless the Government can fully justify it.**

36 Paragraph 185 of the Memorandum explains that ““Private utilities” are non-public sector entities that carry out utility activities on the basis of special or exclusive rights granted to them... [for example] a water company providing drinking water to the general public. Private utilities are generally covered by the Bill in the same way as public sector utilities”.

37 See para 187 of the Memorandum.

38 See para 189 of the Memorandum.

39 See para 188 of the Memorandum.

40 See para 190 of the Memorandum.

Example 4: paragraph 17 of Schedule 2—power to exempt from regulation under the Bill contracts for the provision of public passenger transport services

49. According to the Memorandum,⁴¹ this power is being taken because—
- procurement for public passenger transport services by rail and metro is to continue to be regulated by separate legislation and reflecting this in the Bill would be problematic because it “would involve provision for a number of complexities in UK legislation and retained EU law and how they interact”; and
 - the regulation of such services is to be “the subject of forthcoming changes”.
50. However, it does not explain why it is considered appropriate for the power to be so broad that the issue of which kinds of contracts for the provision of “public passenger transport services” are to be exempted is left entirely to regulations. There is nothing of substance on the face of the Bill to limit the discretion afforded to Ministers.
51. **We consider that—**
- **the reasons given by the Government for leaving entirely to regulations the question of which kinds of contracts for the provision of “public passenger transport services” are to be exempted from the Bill are inadequate; and**
 - **unless the Government can fully justify doing otherwise, the Bill should include criteria for determining which such contracts should fall within the exemption.**

Example 5: paragraph 34 of Schedule 2—power to exempt from regulation under the Bill concession contracts⁴² for air services provided by “qualifying air carriers”⁴³ specified in regulations

52. The Memorandum provides no explanation for taking this power instead of making provision on the face of the Bill. The power is so broad that the issue of which concession contracts for air services are to be exempted from the Bill is left entirely to regulations. There is nothing of substance on the face of the Bill to limit the discretion afforded to Ministers.
53. **The Government have failed to provide any justification for leaving entirely to regulations the question of which concession contracts for air services provided by air carriers are to be exempted from the Bill.**
54. **Unless the Government can fully justify doing otherwise, the Bill should include criteria for determining which such contracts should fall within the exemption.**

Example 6: paragraph 7 of Schedule 4—exemption determinations for utility

41 See paras 231 and 232 of the Memorandum.

42 These are contracts for the supply of works or services where at least part of the consideration for that supply is a right for the supplier to exploit the works or services.

43 Paragraph 34 provides that “air services” means a flight, or a series of flights, carrying passengers or cargo (including mail); and “qualifying air carrier” has the meaning given by regulations made under the power in that paragraph.

activities exposed to competition

55. The contracts to which the Bill applies include contracts for the supply of goods, services or works for the purpose of a “utility activity” of a kind specified in Schedule 4 to the Bill.⁴⁴ The activities specified in Schedule 4 include the supply of gas, electricity and water and the provision of transport services to the public.
56. Paragraph 7 of Schedule 4 gives Ministers power to make an “exemption determination” in relation to any such activity, the effect of which is to exempt the activity from regulatory requirements under the Bill. An exemption determination can only be made where (a) there is “fair and effective competition in the market in which the activity is carried out”, and (b) “entry to that market is unrestricted”.⁴⁵
57. Ministers are given power to set out in regulations matters including who is responsible for making determinations, who can apply for a determination and the factors to be taken into account in, and the procedure for, making determinations.
58. The Memorandum explains that the regulations will not simply be concerned with “administrative” matters but “will need to include matters such as the criteria to be met for a utility to be exempted from the regime”.⁴⁶
59. The justification given for taking the power is that the Cabinet Office “has not fully determined the detail of the procedure” and “The Bill therefore includes a power for [Ministers] to determine the procedure”.⁴⁷
60. **This is, in effect, a skeleton clause as the real operation of the exemption process is to be left to regulations. We are very concerned that the Government appears to have chosen this approach for no other reason than that it hasn’t yet developed the underlying policy. In our *Democracy Denied?* report, we drew attention to the issue of the inclusion of powers in bills which were, in effect, “a tool to cover imperfect policy development”. We said this was unacceptable and that we looked to the Government to undertake the systemic reforms necessary to prevent its happening. It is disappointing to find evidence in this Bill that this issue has not been addressed.**⁴⁸
61. **We consider that—**
- **the reasons given by the Government for taking the power are wholly inadequate; and**
 - **the breadth of the power should be narrowed unless the Government can fully justify it.**

Paragraph 3(3) of Schedule 10: new section 15(2), (2A) and (2B) of the Defence Reform Act 2014—power to specify an alternative method for determining the price payable under a defence contract and the

44 See clause 5 of the Bill (utilities contracts).

45 See para 7(2) of Schedule 4 to the Bill.

46 See para 257 of the Memorandum.

47 See para 256 of the Memorandum.

48 [12th Report](#), Session 2021–22, HL Paper 106, para 129.

circumstances in which that method is to be used

62. Section 15 of the Defence Reform Act 2014 requires provision to be made in regulations for the price payable under a “qualifying defence contract” to be determined in accordance with the formula in that section. A qualifying defence contract is one under which the Secretary of State “procures goods, works or services for defence purposes”.⁴⁹
63. Paragraph 3(3) of Schedule 10 to the Bill amends section 15 so that regulations under that section must instead provide for the price payable to be determined—
- in accordance with the formula in that section; *or*
 - in accordance with a method specified in the regulations—and that method is to apply in such circumstances as are specified in the regulations.

Such regulations are subject to the negative procedure.

64. **We are surprised and disappointed that the Memorandum does not acknowledge that this is, in effect, a power to disapply primary legislation by regulations subject only to the negative procedure.**
65. The Memorandum seeks to justify the use of the negative procedure on the basis that—
- only a limited number of the regulation-making powers in the 2014 Act are subject to the affirmative procedure;⁵⁰ and
 - the provision in question is “likely to be technical in nature”.⁵¹
66. **We find this wholly unconvincing. Unless the Minister can fully justify allowing primary legislation to be overridden by regulations subject only to the negative procedure, the regulations should instead be subject to the fuller scrutiny afforded by the affirmative procedure.**

49 See section 14(2) of the 2014 Act.

50 See para 277 of the Memorandum.

51 See para 278 of the Memorandum.

IDENTITY AND LANGUAGE (NORTHERN IRELAND) BILL [HL]

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

DRAFT LEGISLATIVE REFORM (PROVISION OF INFORMATION ETC. RELATING TO DISABILITIES) ORDER 2022

68. This draft Legislative Reform Order (LRO) has been laid before Parliament by the Department for Transport (DfT), together with an Explanatory Document (ED) and a *de minimis* Impact Assessment, under section 1 of the Legislative and Regulatory Reform Act 2006 (“the 2006 Act”) which allows a minister to amend primary legislation by order to remove or reduce a burden, such as a financial cost or administrative inconvenience. The draft Order applies to Great Britain.

Background

69. Applicants for, or holders of, a driving licence, are required by law to notify the Driver and Vehicle Licensing Agency (DVLA) if they develop a medical condition that may affect their ability to drive safely. Section 94 of the Road Traffic Act 1988 (“the 1988 Act”) requires medical evidence to be obtained on their fitness to drive if this is in question, or if they have a relevant or prospective disability. The DVLA currently seeks this information by questionnaire from a doctor authorised by the driver who has given them medical advice or attention.
70. The draft Order amends section 94 of the 1988 Act. To reflect changes in current clinical practice, this draft Order:
- enables the required information to be given not only by a doctor but also by a person who is a “registered healthcare professional” on the register of one or more of the bodies listed in a new section 94(10), inserted by the draft Order;
 - removes a requirement that the person authorised must have personally given medical advice to the driver, meaning a relevant medical professional would be able to respond to the DVLA on the basis of the patient’s medical records (article 2(2)); and
 - inserts new subsections (6A) and (6B) into section 94, which allow the authorisation to be passed to a healthcare professional not named by the driver in the authorisation (article 2(3)).
71. The changes made by new section 94(6A) and (6B), would allow GP surgeries and hospital teams greater flexibility to decide where these requests for information should be directed, but, because it effectively amends the authorisation process, the reasons behind the changes and how they reduce or remove a burden should have been more clearly explained in the ED.

Tests in the 2006 Act

72. The Committee considers that the proposals meet the statutory tests set out in the 2006 Act. There are approximately 267,080 medical questionnaires completed each year under section 94 of the 1988 Act and it appears that the draft Order would reduce a burden by streamlining the process to allow the relevant medical practitioner to respond, rather than channelling all requests via the GP. It may also reduce the time a driver has to wait for the licence to be (re)approved.

73. A consultation was carried out, which received 411 responses, including from the public, medical and healthcare professionals and road safety groups. Almost 82% of respondents agreed with the proposal on the grounds that it would reduce bureaucracy and improve efficiency, resulting in quicker licensing decisions by the DVLA for some drivers.

Parliamentary Procedure

74. DfT has proposed that the LRO be subject to the affirmative resolution procedure.

Conclusion

75. **We are satisfied that the draft Order meets the tests set out in the 2006 Act, is not otherwise inappropriate to the Legislative Reform Order procedure; and also that the affirmative resolution procedure proposed by the Government is appropriate.**

APPENDIX 1: 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 June 2022, Members declared the following interests:

Procurement Bill [HL]

Lord McLoughlin
Chairman of Airlines UK

Draft Legislative Reform (Provision of Information etc. Relating to Disabilities) Order 2022

Baroness Browning
A Vice President, National Autistic Society
Ambassador, Alzheimer's Society

Attendance

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