HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

8th Report of Session 2022–23

Energy Bill [HL]: Parts 1–2

Energy (Oil and Gas) Profits Levy Bill

Schools Bill [HL]: Government Response

Product Security and Telecommunications Infrastructure Bill: 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.

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Lord Cunningham of Felling
Lord Goddard of Stockport
Lord Haselhurst
Lord Hendy
Lord Janvrin
Lord McLoughlin (Chair)
Baroness Meacher
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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 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 certain instruments made under other Acts specified in the Committee's terms of reference.

Eighth Report

ENERGY BILL [HL]: PARTS 1–2

1. There is nothing in Parts 1 and 2 of this Bill which we would wish to draw to the attention of the House.

ENERGY (OIL AND GAS) PROFITS LEVY BILL

2. This money Bill contains no delegated powers.

SCHOOLS BILL [HL]: GOVERNMENT RESPONSE

3. We considered this Bill in our 2nd Report of this Session.[1] The Government have responded by way of a letter from Baroness Barran, Parliamentary Under-Secretary of State at the Department for Education. The response is printed at Appendix 1.

PRODUCT SECURITY AND TELECOMMUNICATIONS INFRASTRUCTURE BILL: GOVERNMENT RESPONSE

4. We considered this Bill in our 4th Report of this Session.[2] The Government have responded by way of a letter from Lord Parkinson of Whitley Bay, Minister for Arts at the Department for Digital, Culture, Media and Sport. The response is printed at Appendix 2.

1 2nd Report, Session 2022–23 (HL Paper 9).
2 4th Report, Session 2022–23 (HL Paper 23).

APPENDIX 1: SCHOOLS BILL [HL]: GOVERNMENT RESPONSE

Letter from Baroness Barran, Parliamentary Under-Secretary of State at the Department for Education, to the Rt Hon. the Lord McLoughlin CH, Chair of the Delegated Powers and Regulatory Reform Committee

Today, the Government has tabled amendments to the Schools Bill in advance of Report Stage scheduled for 12 July. I wanted to write to you to following the report of the Delegated Powers and Regulatory Reform Committee on the Schools Bill and your letter to the Secretary of State for Education, to provide further information on how these amendments affect the delegated powers proposed in the Bill.

The letter follows on from my letter to noble Lords on 30 June, which confirmed the Government's approach to the Clauses in the Bill relating to Academy Standards and Academy Trust Intervention (Clauses 1-18 and Schedule 1 and 2). The Government has tabled further consequential amendments necessary to remove the Academy Standards and Trust Intervention from the Bill.

I would like to thank you again for your careful and detailed scrutiny of the powers proposed in the Bill, which informed a productive debate in Committee. I wish to pay particular tribute to Baroness Meacher for her valuable contributions, particularly on the powers in clauses 1 to 4, which we have carefully considered and acted upon. I would also like to thank Lord Judge for his continuing challenge to the Government on this Bill and for his amendments tabled in support of the Committee's recommendation.

The Government will support the removal of Clause 3 and will not bring back a further Henry VIII power as part of its proposals to revise C1-4. It expects to bring back a much narrower power to set academy standards and the aim will be to meet the tests set out by Baroness Meacher on the expectations of your Committee in how Government should use delegated powers. The Government has listened directly to your Committee and I would like to put on record that our approach to removing or amending delegated powers in this Bill is intended to demonstrate our respect for the Committee's recommendations.

The Government has committed to undertake the first phase of the regulatory review to develop revised clauses for Academy Standards. Our intention is to table these amendments during the first amending stage in the House of Commons. The House of Lords will then be able to consider all revised clauses during Lords Consideration of Commons Amendment and a whole day will be allowed to consider the amendments brought forward on clauses 1–18 in a 'Committee of the Whole House' before the House returns to 'normal' ping-pong to consider amendments to the rest of the Bill.

There are government amendments to the delegated powers in the Bill in relation to the following matters which I wish to make you aware of:

- Schools with a religious character (Clause(s) 20, 29 and a new schedule (2A))
- Children not in School registration (Clauses 49-52)
- Independent Education Institutions (Clause 60)

Schools with a religious character

The government has tabled an amendment which changes clause 20 from being a *power* to make regulations to a *duty* to make regulations in relation to the governance of an Academy school with a religious character. The context, purpose and justifications for the regulations made under this clause set out in the Department's Delegated Powers Memorandum remain relevant to the clause as amended. We are making this amendment because the historic organisational structure of some schools with a religious character means they are more likely to fall outside of the scope of clause 19, under which the Secretary of State *must* make regulations. With this amendment, regulations for these schools *must* be made under clause 20 instead.

The government is proposing two amendments in relation to powers to apply for an Academy order. One amendment inserts a new clause, and the other amends clause 29 of the bill. For these two amendments, the phrase "appropriate religious body" is used. For both of these amendments, it is proposed that the identity of some of the "appropriate religious bodies" will be prescribed in regulations. The clause explicitly defines the religious body for a Church of England or Catholic school. For schools of any other religion, the clause states that the body is as prescribed under section 88F(3)(e) of the School Standards and Framework Act 1998, which is a power to prescribe in regulations the religious body for certain admissions purposes. The religious bodies are currently set out in regulations (schedules 3 and 4 of the School Admissions (Admission Arrangements and Coordination of Admission Arrangements) (England) Regulations 2012). This means that references to 'appropriate religious body' for certain faiths will mean as already set out in existing regulations.

The government's amendments also amend section 7(1)(b) of the Academies Act 2010, which currently applies where an Academy order is made in a certain circumstance. The amendment is to ensure that section 7 also applies following an application in the two new circumstances set out in the Bill (i.e. by a local authority, or by a certain body for schools with a religious character). Section 7 includes a regulation making power regarding the determination and payment of a surplus. These regulations already exist (the Academy Conversions (Transfer of School Surpluses) Regulations 2013). Therefore, this is not a new regulation making power. Instead, by extending the application of the clause to the two new categories of bodies that can apply for an Academy order, there is an extension of the existing regulation making power.

Children not in School (CNIS) registers

The government has tabled amendments aimed at providing reassurance to the families of children not in school over the information to be prescribed and its intended use.

We seek to make clearer the types of additional information that can prescribed for inclusion in the CNIS registers by local authorities, by setting out in section 436(1)(d) the types of information that can be prescribed, which will be focused on categories of information aimed at supporting the education, welfare and safety of the child. As we are aware that some of this information may be of a sensitive nature for families, and will not always be essential for the operation of the registers, we will ensure that parents are only asked to provide this information voluntarily and have the option to not disclose this to local authorities, should they not wish to do so.

We are seeking to amend the following delegated powers to the affirmative procedure for the first time they are used, and negative thereafter:

- section 436C(1)(c) prescribing details of the means by which the child is being educated for inclusion in the registers
- section 436(1)(d) prescribing other information for inclusion in the registers
- section 436C(3) concerning the maintenance and upkeep of the registers by local authorities
- section 436F(1) prescribing the information to be provided to the Secretary of State.

We anticipate that with the first time they are made will be the point where they are most likely to have an impact on, and be of highest interest to families. Any subsequent changes would most likely be for operational purposes only.

Furthermore, section 436F(2)—which allows the Secretary of State to prescribe those persons with whom local authorities can share information, where they consider appropriate, for the purpose of promoting the education, welfare or safety of a child—will be amended so the delegated power is the affirmative procedure every time. Given some of the concerns we heard from Peers and home educating families around the need for transparency of the individuals and organisations that information may be shared with, we feel it is appropriate that the use of this power be affirmative every time. I hope your Committee welcomes this increased role for Parliament in scrutinising and voting on relevant statutory instruments.

Independent Education Institutions

Amendments have also been tabled to the regulation-making power in clause 60. The first amendment is an amendment to ensure consistency in language between clause 60 and the Bill and the Education and Skills Act 2008 ("the 2008 Act")—which substitutes "provision" for "enactment" in new section 137A(1). The second amendment would have principally two effects. First, it corrects an error in new section 137A(2) of the 2008 Act. As currently worded, it would only permit enactments, to be applied under the regulation-making power in new section 137A(1), which had been made before, or in, the session in which the 2008 Act was passed. Section 137A(2) would be amended to allow for later enactments to be amended—i.e. provision in any Act passed before, or in, the session in which the Schools Bill is enacted or provision in any subordinate legislation made before, or in, that same session. This is consistent with how we described the regulation-making power in our original delegated powers memorandum. Secondly, the amendment ensures that Part 3 of the Schools Bill (and any subordinate legislation under that Part) is covered by the regulation-making power in section 137A. Other Parts of the Bill are not covered by the amendments.

The amendment in this second respect would enable regulations under section 137A to be a single piece of legislation containing provisions applying pre-existing primary legislation in relation to independent educational institutions that are not independent schools, including the Education Act 1996 ("the 1996 Act") as amended by Part 3 of the Bill. The 1996 Act in places is changed by Part 3 of the Schools Bill by, for example, substituting new England-only provisions on school attendance orders. Indeed, policy on how the pre-existing (but unchanged) sections 444 to 447 of the 1996 Act should be applied in relation to independent educational institutions that are not independent schools is likely to be closely

linked to the policy about how new provisions in the 1996 Act as inserted by the Bill (sections 443A and 443B) should be so applied.

I hope this has provided helpful detail as to how the Government's amendments for Report stage take account of the report from your Committee, and sets out the instances in which the Government's amendments affect the delegated powers within the Bill.

I am providing a copy of this letter to Lord Judge and intend to place a copy in the House Library.

5 July 2022

APPENDIX 2: PRODUCT SECURITY AND TELECOMMUNICATIONS INFRASTRUCTURE BILL: GOVERNMENT RESPONSE

Letter from Lord Parkinson of Whitley Bay, Minister for Arts at the Department for Digital, Culture, Media and Sport, to the Rt Hon. the Lord McLoughlin CH, Chair of the Delegated Powers and Regulatory Reform Committee

I am writing in response to the Delegated Powers and Regulatory Reform Committee's Fourth Report, which addressed the Product Security and Telecommunications Infrastructure Bill. I thank the Committee for their diligent care in scrutinising the Bill and the related delegated powers memorandum ('the memorandum'), and have provided a response to their recommendations below.

Clause 3 (1)—Power to deem compliance with security requirements

Subsection (1) of clause 3 provides the Secretary of State with the power to deem by regulations that a person has complied with the security requirements. The Committee asked for further clarity as to why the power is so broad.

The Government views the breadth of the power to be necessary in order to provide flexibility to deem compliance with specific elements and interpretations of international standards and regulatory regimes as they evolve. Some businesses which supply products to customers in the UK are already compliant with, or are working to comply with, the standards mentioned in the memorandum. As technology changes, so will the regulatory and standards landscapes; the power in this clause will ensure the regime continues to minimise unnecessary industry burden without compromising security outcomes. This flexibility will also allow us continually to evaluate how best to remove any disproportionate burdens on small and micro businesses for future security requirements.

The Committee also recommended that the affirmative resolution procedure is more appropriate if the breadth of the regulation making-power is to be retained. I accept this recommendation in relation to the resolution procedure and have tabled an appropriate amendment.

Clause 9 (7)—Power to treat manufacturers as having complied with the duty to provide a statement of compliance

Clause 9 sets out that a manufacturer may not make a consumer connectable product available in the United Kingdom unless it is accompanied by a statement of compliance. The power in subsection (70) allows the Secretary of State to provide that a manufacturer is treated as having complied with this duty when specified conditions are met. The Committee requested further clarity as to why the Government considers it necessary for the power to be so wide and, if it is indeed necessary, the Committee recommended that the affirmative resolution procedure is more appropriate.

I wish to assure the Committee that the approach taken to the power in clause 9 is not inadvertent. We must retain this flexibility to allow for future approaches in the market, such as an international certification regime, whereby compliance

is signalled in an alternative form, for example, an international digital labelling scheme. Further, this power is another tool to ensure that, if ever the administrative

requirement of compliance became 'burdensome for small and micro business, the Government could act quickly to remove it.

I agree with the Committee's recommendations that the affirmative resolution procedure is more appropriate here and have tabled an amendment to implement it.

Clauses 11, 18, 19, 24, 25—Powers to require relevant persons to notify customers of compliance failure

These clauses set out the responsibilities of relevant persons (manufacturers, importers, and distributors) when they become aware, or ought to be aware, of a failure to comply with a security requirement in relation to a product. These duties include the notifications of persons including the enforcement authority, and other businesses in the supply chain. These clauses also allow the Secretary of State to specify_ in regulations certain conditions which, when met, will require the notification of customers in the United Kingdom to whom a relevant person has supplied the product.

The Committee recommended that the power should be reframed as a duty for the Secretary of State to make regulations. It was also recommended that the regulations must specify that relevant persons must notify customers of compliance failures if the customers would be placed at significant risk without being notified.

I recognise that the intention behind the recommendation is to protect consumers, but I do not believe that the recommended changes are necessary to achieve this. It may be disproportionately burdensome to businesses to require them to notify all customers where there is a security breach, and they consider there may be a significant risk, especially if action can be taken to resolve the compliance failure and the risk to customers has been mitigated.

Detailed conditions which clearly set out when a business should notify its customers will be set out in regulations for the use of this power. These conditions will provide clarity to importers and distributors, who often may lack their own technical expertise meaningfully to determine if a specific breach constitutes a significant risk. Without guidance, this would potentially lead to a large volume of unnecessary notifications to the consumer. For those reasons the Bill requires relevant persons to inform the manufacturer of the product, who is best able to resolve the compliance failure.

Even if these powers were not exercised, we intend for consumers to be notified of compliance failures when such a failure exposes them to significant risk. This is why the Bill empowers the enforcement body to take action to inform customers as appropriate. The powers to require relevant persons to, inform customers is supplementary to the functions of the enforcer and will be applicable only in instances where immediate action is necessary and suitable.

The power must remain flexible to allow further nuance to be made in regulations with reference to specific security requirements and types of breaches. This will ensure that a notification will-not inadvertently place the consumer at risk, for example, by informing attackers of an unresolved vulnerability. For these reasons, I cannot accept the Committee's recommendations on these clauses.

Clause 27—Power to delegate enforcement functions

This clause empowers the Secretary of State to authorise any person to exercise an enforcement function and to provide payments to that person. I agree with

the Committee's recommendation that Parliament should have an opportunity to scrutinise any such decisions and therefore have tabled an amendment that would require delegation of enforcement functions under clause 27 to be made through regulations subject to the affirmative resolution procedure.

I would like to thank the Committee again for their comprehensive and careful scrutiny of the powers in this Bill and for their constructive recommendations. I look forward to continuing to engage with them and noble Lords across the House during the passage of this Bill.

11 July 2022

APPENDIX 3: 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.