HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

11th Report of Session 2022–23

Energy Bill [HL]: Parts 7-13

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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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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.

Eleventh Report

ENERGY BILL [HL]: PARTS 7-13

1. We reported on Parts 1 and 2 of this Bill in our 8th report of this Session[1] and on Parts 3 to 6 in our 10th report.[2] In this report we consider the remainder of the Bill, Parts 7 to 13. Those Parts are concerned with:

   - the regulation of heat networks and heat network zones;
   - energy smart appliances;
   - energy performance of premises;
   - core fuel sector resilience;
   - oil and gas; and
   - the civil nuclear sector.

2. The Department for Business, Energy and Industrial Strategy has provided a delegated powers memorandum for the Bill ("the memorandum").[3]

Clause 165—Power to amend the definition of "heat network" etc.

3. Chapter 1 of Part 7 is concerned with the regulation of relevant heat networks. The term "relevant heat network" is defined in clause 165(1) to mean either a district heat network or a communal heat network. The expressions "communal heat network" and "district heat network" relate to the range and types of building to be served by the heat network, with "district" referring to a heat network which supplies to more than one building, and "communal" referring to a heat network which supplies a single building divided into more than one unit. "Heat network" is defined to mean:

   > "a network that, by distributing a liquid or a gas, enables the transfer of thermal energy for the purpose of supplying heating, cooling or hot water to a building or persons in that building".

4. Clause 165(4) confers powers on the Secretary of State by regulations to amend clause 165 for the purposes of changing the definitions of "relevant heat network", "district heat network", "communal heat network" and "heat network". Despite being a Henry VIII power, the regulations are subject to the negative resolution procedure.

5. In justifying the powers, the memorandum refers only to the power to amend the definition of a heat network.[4] The explanation refers to the potential need to extend the meaning of heat network to capture new technologies. The other definitions address different matters, and therefore the justification in the memorandum offers no explanation as to why it is necessary to have the power to amend the other definitions. **Given the lack of any explanation in the memorandum, we consider that extending the amendment**

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1 8th Report, Session 2022–23 (HL Paper 45).
2 10th Report, Session 2022–23 (HL Paper 65).
3 Business, Energy and Industrial Strategy, Delegated Powers Memorandum, dated 6 July 2022.
4 See in particular paras 516 to 518.

power to the other definitions is inappropriate unless the Minister is able to provide the House with a convincing justification for doing so.

6. There is a presumption that the affirmative resolution procedure will apply to Henry VIII powers. The memorandum justifies the use of the negative resolution procedure in this case on the grounds that the existing definition of "heat network" has been drawn broadly with a view to minimising the need for changes in the future. It is stated that "the power is not designed to capture technologies which are radically different to those which will already be captured". It is also suggested that it is a narrow power which could not be used to introduce a new set of regulatory requirements specific to any new technologies brought within the definition by an amendment.

7. We are not convinced by these arguments:

- The fact that the power may be exercised only rarely does not mean that a high level of parliamentary scrutiny is not required for when it is exercised.
- There is nothing in the way that the power is drafted which would prevent it from bringing significantly different technologies within the scope of the heat networks regulated by the Bill. The power is expressed simply as a power to amend the definitions set out in clause 165, without any limits on the nature of the changes that might be made.
- Under the Bill, the regulatory requirements which apply to heat networks will all be set out in regulations. The powers conferred by the Bill to specify regulatory requirements include powers to make different provision for different cases, and therefore would allow different regulatory requirements to be imposed for new technologies.

We also note that the explanation in the memorandum focuses solely on the definition of "heat network" and not the other definitions which are also all capable of amendment using the negative resolution procedure.

8. **In the light of these matters, we consider that, if and to the extent that the powers conferred by clause 165(4) are to be retained, they should be subject to the affirmative resolution procedure.**

Clauses 166 and 167—Power to amend regulations concerned with alternative dispute resolution for consumer disputes

9. Clause 167 allows the amendment of the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 ("the 2015 Regulations") so that the heat network regulator for Northern Ireland may be specified as a competent authority for the purposes of those regulations. Although the memorandum assumes that clause 166 makes similar provision for Great Britain, that clause does not expressly provide for the amendment of the 2015 Regulations. **Accordingly, the House may wish to ask the Minister to clarify whether the power has intentionally been limited to Northern Ireland, despite what is said in the memorandum; and, if not, to explain how the Bill confers powers to amend the 2015 Regulations in relation to Great Britain.**

Clause 168—Power to make provision for the regulation of heat networks etc.

10. Clause 168 allows regulations to make provision for the purposes of:

    - regulating relevant heat networks, or
    - conferring powers in relation to the development or maintenance of relevant heat networks.

    It constitutes skeleton legislation because there are no provisions on the face of the Bill relating to the regulation of heat networks. Instead, all of the substantive provisions are to be contained in the regulations. Although Schedule 15 contains detailed provision about the matters which may be included in the regulations, there is no requirement for the regulations to include the provision set out in Schedule 15.

11. We noted in our recent special report[5] that skeleton legislation signifies an exceptional shift in power from Parliament to the executive since it allows the real operation of the legislation to be decided by Ministers. Accordingly, skeleton legislation should only be used in the most exceptional circumstances. Where it is used, it should be accompanied by a full justification, including why no other approach was reasonable to adopt and how the scope of the skeleton provision is constrained.

12. The Department has provided the following reasons for using skeleton legislation:[6]

    - There is a need for the heat network market to expand to meet Net Zero targets. The expected expansion is likely to lead to changes in the market landscape. Because of this it will be important for the Secretary of State to be able to quickly introduce changes to the legislation to adapt the regulatory regime to ensure that it is still fit for purpose.
    - The heat networks market encompasses a wide range of technologies. Technological changes in the future may introduce new regulatory challenges requiring changes to the regulatory regime so that it can remain robust despite innovations in the market.
    - There is a precedent in the powers conferred by section 2 of the Pollution Prevention and Control Act 1999 which confers skeleton powers to make provision for controlling pollution.

13. We are not convinced that these reasons provide a sufficient justification. While the fact that this is a developing area where changes may be needed to how the sector is regulated may justify leaving some matters to regulations, it does not in our view justify allowing every aspect of the legislation to be set out in regulations. The memorandum does not attempt to explain why it is not feasible to constrain the powers in any way, for example, by setting out the framework of the regulatory system on the face of the primary legislation, even if some of the details of the system are then left to regulations. It seems clear from the way in which Schedule 15 is drafted that the Government already have a reasonably clear idea of what the broad regulatory structure

5 *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*, 12th Report, Session 2022–23 (HL Paper 106), para 66.

6 See paras 536 to 540 of the memorandum.

should be. And, in this context, it is worth noting that the Scottish Parliament have enacted primary legislation in the form of the Heat Networks (Scotland) Act 2021 which sets out a similar system for how heat networks are to be regulated in Scotland.

14. As regards the precedent referred to in the memorandum, this Committee when it considered the relevant Bill expressed reservations about the skeleton powers conferred by it and said:[7]

> "This Committee, and clearly the House as a whole, have found this a difficult bill. We believe that this stems from the framework nature of the bill. We therefore wish to reiterate the following general remarks which we made in our 3rd report. "Even if the House accepts the bill with any such amendments as being justified for the reasons which the DETR give for proceeding by such wide-ranging enabling legislation, *the Committee would not wish this bill to be regarded as a precedent for the future* [our emphasis]"."

15. **Accordingly, we consider that the Government have failed to justify the skeletal nature of the provisions, in particular, by failing adequately to explain why it is not feasible to put any of the detail about the regulation of heat networks on the face of the Bill.**

16. Regulations under clause 168 are by default subject to the negative resolution procedure, with the affirmative procedure applying only in certain specified cases. These include where the power is exercised for the first time, or where it is used to amend primary legislation or create a criminal offence. In providing for the affirmative procedure to apply only to the first exercise of the powers, the Department states:[8]

> "We expect that, in the first instance, the regulations will introduce the bulk of the framework for regulating heat networks, such as provisions related to the responsibilities and functions of the regulator, authorisation and licensing, enforcement of conditions, investigatory powers, step-in and special administration, and consumer protections. … Further amendments or regulations will aim to refine the details of these regulations or update them to adapt to the changing landscape of the heat networks market and ensure the regulatory framework is fit for purpose. We expect that these will be relatively minor changes which would better suit the negative procedure."

17. We find it difficult to reconcile this reasoning with the reasons given for the skeletal nature of the provision; namely, the fact that the heat network market and technology are developing, and therefore the powers need to be as broad as possible to allow fundamental changes to be made to the regulatory system. If it is unlikely that the regulations will change in any significant way after the first exercise of the powers, it again begs the question why it is not feasible to set out more of the detail of the regulatory provision and structure on the face of the Bill.

18. **If, despite what we say in paragraph 15 above, the House decides that the scope of the powers conferred by clause 168 should remain**

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7 See para 8 of the Committee's 9th Report of the Session 1998–99.
8 See paras 543 and 544 of the memorandum.

unchanged, we consider that the affirmative resolution procedure should apply for all exercises of the power.

19. Paragraph 73 of Schedule 15 enables regulations under clause 168 to provide for the creation of offences. The power to create offences is not limited to specific purposes (for example, failure to comply with requirements imposed by the regulations). Instead, the purposes for which an offence may be created is left wholly at large. We make clear in our guidance[9] that, where the ingredients of a criminal offence are to be set by subordinate legislation, we would expect a compelling justification. The wider the scope of the power to create offences, the more compelling the justification has to be. Although the memorandum refers to the power to create offences, there is nothing in the memorandum which explains the reasons for leaving the elements of any offence to be set out in regulation and, in particular, why it is appropriate to frame the power to create offences in such broad terms without any limit on the purposes for which offences may be created. This is particularly significant given the very wide scope of the powers under clause 168 to make provision about relevant heat networks. **In the circumstances, we consider that, unless and until the Government are able to provide the House with a compelling reason for such a broad power to create offences, the power must be regarded as inappropriate.**

Clauses 171 and 172—Amendment of the Heat Networks (Scotland) Act 2021

20. Both these clauses make amendments to the Heat Networks (Scotland) Act 2021 ("the Scottish Heat Networks Act") which was enacted by the Scottish Parliament.

21. Clause 171 amends section 4 of the Scottish Heat Networks Act so that the licensing authority for the purposes of that Act may be the Gas and Electricity Markets Authority, if that authority is so designated by regulations made by the Secretary of State under clause 171.

22. Clause 172 enables the Secretary of State by regulations to amend the Scottish Heat Networks Act for the purpose of making provision about monitoring compliance with, or enforcement of, conditions of heat network licences issued under that Act. In particular, it allows the Secretary of State to amend the Scottish Heat Networks Act to make provision equivalent to the following paragraphs of Schedule 15:

- paragraphs 6 to 10, which are concerned with providing powers for the regulator to monitor and keep records about heat network activities in the UK;
- paragraphs 38 to 41, which are concerned with conferring enforcement powers on the regulator such as imposing financial penalties and making consumer redress orders;
- paragraph 44, which is concerned with allowing the regulator to monitor compliance with conditions by requiring the provision of information and inspection of premises etc.;
- paragraphs 73 and 74 which allow the creation of criminal offences.

9 DPRRC, *Guidance for Departments on the role and requirements of the Committee*, November 2021, para 12: https://committees.parliament.uk/publications/8225/documents/84262/default/ [accessed 5 October 2022].

23. Given that the powers will allow the Secretary of State to amend legislation recently enacted by the Scottish parliament, we consider it would be appropriate for there to be a requirement on the Secretary of State to obtain the consent of the Scottish Ministers before exercising the powers. In our view, the case for requiring the consent of the Scottish Ministers is even stronger with the exercise of the amendment powers under clause 172 since it is less clear cut as to what provision might be made in exercise of those powers. **Accordingly, we recommend that the powers conferred by clauses 171 and 172 should only be exercisable with the consent of Scottish Ministers.**

24. The powers conferred by clause 171 are subject to the negative resolution procedure. According to the memorandum, the powers conferred by clause 172 are also subject to the negative procedure.[10] This is so despite each of them being Henry VIII powers (since they allow the amendment of primary legislation, albeit an Act of the Scottish Parliament as opposed to an Act of the UK Parliament). The reason given by the Department for providing for the negative procedure to apply is the fact that the provision to be made in the regulations will be agreed with the Scottish Government.[11] But, as noted above, there is no requirement on the face of the legislation for the Secretary of State to obtain the Scottish Government's consent before making the regulations. **Accordingly, we consider that, in the absence of any such consent on the face of the legislation, the affirmative procedure should apply instead. We consider that the affirmative procedure should in any event apply to the power to create offences, particularly in the light of the width of the power (see paragraph 19 above) and the fact that regulations made under those powers in relation to the rest of the UK are subject to the affirmative procedure.**

Clause 174—Regulations about heat network zones

25. Chapter 2 of Part 7 is concerned with heat network zones. These are areas in England which have been designated as heat network zones on the basis that they are appropriate for the construction and operation of one or more district heat networks. Like Chapter 1 of Part 7, Chapter 2 does not itself contain any substantive provisions. Instead, clause 174, which is a skeleton provision, confers a power on the Secretary of State to "make provision about heat network zones". The only substantive provision contained on the face of the primary legislation is the definition of "heat network zone" in clause 174(2).

26. Although there is nothing to limit the scope of this power, clauses 175 to 185 set out specific matters which may be included in regulations under clause 174.

27. The Department does not make any attempt to explain why they are proposing to take such a wide power to make provision about heat network zones. The memorandum simply says[12] that the Department expects the power to be exercised in accordance with clauses 175 to 185, and refers to the explanations given for each of those powers. And because those explanations

10 See para 557. There is no provision in clause 172 for the regulations to be subject to parliamentary scrutiny. It appears therefore that, despite what is said in the memorandum, there is no requirement for Parliamentary scrutiny of regulations made under clause 172. If that is right, we assume the absence of parliamentary scrutiny is an oversight.

11 See paras 553 and 557 of the memorandum.

12 See para 559.

are focused on those specific provisions, there is nothing to explain why there is a need for the very general and broad power conferred by clause 174, or why generally it is necessary to leave the provision about heat network zones to be set out in regulations rather than on the face of the Bill.

28. **We consider that, the Department has failed adequately to justify the scope of the power conferred by clause 174; and that, if the intention is to exercise the powers in accordance with the specific provisions contained in clauses 175 to 185, then the power to make regulations should expressly be limited in that way.**

Clause 178(3) and (4)—Zoning methodology

29. Clause 178 allows regulations under clause 174 to make provision for the methodology to be used in identifying areas which are appropriate for the construction and operation of district heat networks. The powers include, by virtue of clause 178(3), not only specifying matters on the face of the regulations, but also providing for the Heat Network Zones Authority (HNZA) to be able to publish documents "elaborating on one or more aspects of the zoning methodology". Coupled with this, there is a power conferred by clause 178(4) for regulations to require zone coordinators, as well as the HNZA itself, to comply with requirements set out in such documents.

30. In effect, what the power does is to enable legal requirements to be imposed other than by legislation. In our special report,[13] we expressed concern about the use of "disguised law" and recommended that "Requirements which have legislative effect should always be expressed in legislative language, either in primary or secondary legislation, and subject to parliamentary oversight".

31. The Department does not explain why it considers it appropriate to use non-statutory documents to specify requirements which have legislative effect. Nor does the memorandum make it clear how the line is to be drawn between what is set out on the face of the regulations and what will be set out in the non-statutory documents issued under the regulations. The memorandum refers to the precedent of section 6 of the Building Act 1984 (documents providing guidance on building regulations).[14] But there is a significant difference in that case in that the documents act as guidance and are not capable of imposing requirements on local authorities which have to be complied with separately from the requirements imposed by the building regulations.

32. **For these reasons, we consider that it is inappropriate for clause 178(3) and (4) to confer powers which would allow requirements relating to the zoning methodology to be set out in non-statutory documents.**

Clause 187—Energy smart appliances

33. Part 8 makes provision about energy smart appliances and load control. Clause 187 allows the Secretary of State to make regulations about certain types of energy smart appliance. The relevant types of appliance are charge points for electric vehicles and other appliances used for the purposes specified in subsection (2) of the clause.[15]

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13 12th Report, Session 2022–23 (HL Paper 106), paras 89-94.

14 See para 590.

15 The relevant purposes are refrigeration, cleaning, battery storage, electrical heating (of any kind) and air conditioning or ventilation.

34. This is another skeleton provision, with no limits on the type of provision that may be made about energy smart appliances. The power is expressed simply as a power to make provision "about" energy smart appliances, and therefore provided that the provision relates to energy smart appliances it will fall within the scope of the power irrespective of what it is intended to achieve. Clause 187(3) sets out matters which the Secretary of State must have regard to in making regulations under the clause, such as the desirability of ensuring that the energy smart function does not undermine the delivery of a consistent and stable supply of electricity, and that the energy smart function will respond to load control signals. But these do not limit the provision that may be made under the power. Clause 187(4) and (5) sets out the types of provision that may be contained in the regulations. These include imposing technical requirements for appliances and imposing prohibitions or requirements on persons who sell, import or distribute energy smart appliances. But this is indicative and does not limit the scope of the power.

35. The Department states that the overarching purpose of the clause is to allow the Secretary of State to ensure that energy smart appliances placed on the market in Great Britain meet minimum standards for interoperability, grid stability, cyber security and data privacy so that the appliances are safe and secure for both consumers and the grid. It is stated that this needs to be done through regulations for essentially two reasons:

    - the regulatory requirements will be highly detailed and technical in nature;

    - the regulatory requirements will need to reflect the technology and the market as it exists at the time the regulations are made. It is expected that both will change significantly over time and therefore that the regulatory provision will need to change to reflect that.

    Similar reasons apply for having the ability to make changes to the types of energy smart appliances to which the regulations are capable of applying and being able to prevent the sale of certain non-energy smart appliances.

36. We consider that the need to update the regulatory provisions in the light of changes to technology and the relevant market provide a suitable justification for using regulations to make provision about energy smart appliances. But we also consider that, given the skeletal nature of the provision, the Government have not adequately justified the width of the power which leaves it completely open as to the purposes for which provision may be made. The memorandum is quite specific as to the purposes for which it is necessary to be able to regulate energy smart appliances; that is to ensure interoperability, grid stability, cyber security and data privacy. But there is nothing to limit the regulation making power so that it is only exercisable for these purposes. Nor does the Department explain why it is not feasible or appropriate to limit the powers in this way.

37. **Accordingly, the House may wish to ask the Minister to explain the open-ended nature of the power, and why it is not feasible or appropriate to limit the scope of the power to reflect what is said in the memorandum about the purposes for which the power is being taken; and that, in the absence of a convincing explanation, the power in its current form is inappropriate.**

38. Regulations under clause 187 are subject to the negative resolution procedure except in the following circumstances: the first exercise of the powers; where the regulations create a criminal offence; or where they amend clause 187(2) to change the list of appliances which fall within the scope of the regulations. In those cases, the affirmative resolution procedure applies.

39. The reason for limiting the affirmative procedure to the first exercise of the powers, and allowing the negative procedure to apply to subsequent exercises, is because any changes to the regulations "will need to be agile and quickly amendable after the regulations have first been made in order to reflect the pace of technological change in the sector and the new risks which emerge over time".[16]

40. We are not persuaded by this reason. It would be possible to provide for the made affirmative procedure to apply where the Minister believed that changes to the regulations needed to be made urgently. Also, given the reasons for needing a skeleton provision, namely the need to react to significant technological changes and developments in the market, there does not seem to be any reason to suppose that changes made subsequently will be any less significant than the regulations that are put in place initially. **Accordingly, if the power is retained in its current form despite what we say above, then we consider that the affirmative resolution procedure offers a more appropriate level of parliamentary scrutiny.**

Parts 9 and 11—Power to make regulations in relation to matters currently covered in regulations under section 2(2) of the European Communities Act 1972

41. Parts 9 and 11 contain three sets of provisions where each of them confers framework (that is, skeleton) powers to make provision in connection with matters which are currently dealt with in regulations under section 2(2) of the European Communities Act 1972 (ECA).[17] In each case, the reason for the powers is to allow the existing regulations to be amended, which is not otherwise possible following on from the UK's withdrawal from the EU and the consequential repeal of the ECA.

42. In all three cases, there is an assumption that it is appropriate to make provision through regulations, because the purpose is to replace or extend provisions which are currently contained in regulations. But this disregards an important fact, that the existing legislation is contained in regulations because it implemented EU legislation, and therefore it was in circumstances where the UK was under an obligation to make the relevant legislation by virtue of its membership of the EU. That will of course no longer be the case following the UK's withdrawal from the EU. Accordingly, this is not like for like, and therefore the fact that the existing provisions are contained in subordinate legislation is not by itself a good reason for any replacement provisions also to be contained in subordinate legislation.

43. We have previously addressed this issue in our report on the Medicines and Medical Devices Bill,[18] where the Government also sought to justify wide skeleton powers on the basis that it was replacing one set of regulations with another. In that case we made the point in that case:

16 See para 686 of the memorandum.
17 The relevant provisions are clauses 198 to 201, clause 225 and clause 226.
18 19th Report, Session 2019–21 (HL Paper 109).

> "… the section 2(2) power is subject to a critical constraint: it gives Ministers power to make laws giving effect to EU law–not simply power to make laws that Ministers may wish to make".

44. **We wish again to make clear our view that the fact that provisions governing a subject area are currently contained in regulations made under section 2(2) of the ECA does not by itself make it appropriate to use a regulation-making power to amend and extend the provisions in that subject area. Instead, the proposal to confer regulation-making powers needs to be justified on its own merits, particularly where, as in these cases, they are framework powers which are therefore capable of providing a very broad scope of regulation making powers to the Secretary of State.**

45. In all three cases, the regulations are by default subject to the negative resolution procedure, with the affirmative procedure applying only where the regulations create a criminal offence or provide for a civil penalty. In each case, the use of the negative resolution procedure is justified on the basis that it is the procedure which applied to the regulations which are being replaced. **In our view, the level of scrutiny applied to regulations under section 2(2) of the ECA is not a reliable indicator of the appropriate level of parliamentary scrutiny for regulations making provision in the same subject area, which are not made under that section. The level of parliamentary scrutiny should be determined solely by the considering the nature of the new power.**

46. Despite these points, we are satisfied that in two of the three cases the proposed approach is unobjectionable, because the scope of the power is reasonably constrained. Paragraphs 47 to 53 below deal with the third of the provisions.

Clause 226—Power to make regulations for protecting habitats from oil and gas activities

47. Clause 226 confers a range of regulation making powers on the Secretary of State relating to the effect on natural habitats of offshore oil and gas activities and offshore production and storage of gas. These are:

- A power to require the Secretary of State "to take into account the implications for relevant sites" when carrying out a function relating to offshore oil and gas activities and offshore production or storage of gas (clause 226(1)).
- A power to prohibit activities from being carried out unless the consent of the Secretary of State has been obtained (clause 226(2)).
- A power to prevent licences from being granted unless an assessment specified in the regulations has been carried out and it is confirmed that the outcome of the assessment does not prevent the licence being granted (clause 226(3)).
- A power to authorise the Secretary of State to give a person a direction to take steps or to refrain from taking steps (with a legal obligation on the person to comply with the direction) (clause 226(4)).

48. In the case of the powers outlined in the final three bullets, there is nothing in the wording of the power which expressly links its exercise to the protection of habitats. Instead, clause 226(5) provides that those powers may be exercised only if the Secretary of State considers that the regulations would contribute to the protection of relevant sites from adverse effects of offshore oil and gas activities.

49. The powers conferred by clause 226 are very wide and open-ended:

- In clause 226(2) (the second of the bullets listed in paragraph 47, there are no limits on the types of activities which the requirement to obtain consent may be applied to. The activities do not necessarily have to be activities which are carried out by the offshore oil and gas industry. The only condition is that the Secretary of State considers that the requirement will contribute to protecting relevant sites from adverse effects of offshore oil and gas activities and offshore production or storage of gas. And the requirement that the provision contributes to the protection of relevant sites does not prevent the provision also achieving other policy objectives.

- In a similar vein, in clause 226(3) (the third bullet) there are no restrictions on the types of licence which the requirement to have an assessment may be applied to. Nor is there any limit on what type of assessment may be required. Again, the only thing to limit the scope is that the Secretary of State considers that the requirement will contribute to protecting relevant sites from adverse effects of offshore oil and gas activities etc.

- In clause 226(4) (the fourth bullet), there are no limits on the types of persons to whom a direction may be given, on the steps which a person may be required to take under a direction, or on the purposes for which a direction may be given. These matters are left completely at large subject to the condition about contributing to the protection of relevant sites.

- The expression "relevant site", which is key to many of the powers, is not defined on the face of the Bill. Instead, clause 226(6) provides for the term to have the meaning determined in accordance with the regulations (which could be different for different purposes). The only limitation is that the definition must be framed so that the term consists of natural habitats or habitats of species. But there is nothing to say which types of natural habitat or habitats of species must fall within that definition, or indeed what is meant by "natural habitat" or "habitat of species" for the purposes of the clause (on this, see also the bullet below).

- Clause 226(7) provides that regulations may make provision about the meaning of *any* expression used in the clause. Therefore, it is possible that key expressions used in the clause, such as "offshore oil and gas activities", "offshore production or storage of gas", "natural habitats" and "habitats of species" will be defined in ways that it is impossible to predict, particularly as they could each be defined differently for different purposes.

50. The Department's starting point in providing for the powers is the absence of any means of amending the existing regulations[19] relating to the protection of habitats from the activities of the offshore oil and gas industry. And because the existing regime is set out in regulations the Department regards "the proposal to use regulations as being consistent with current practice". However, as noted in paragraphs 41 to 45 above, this ignores the different context in which the existing regulations were made, namely in order to implement EU law.

51. Apart from this, the memorandum offers the following reasons[20] for the regulation making power contained in clause 226:

- The memorandum suggests that powers to amend the existing regulations are required to be able to respond to the development of new offshore technologies, and in this regard specific reference is made to offshore hydrogen production and storage. The memorandum states that the power will be used to extend regulation for environmental protection to such activities. It is also stated that, since the activities are different in nature to oil and gas extraction and production, it may be necessary to use the new regulation making power to modify the content of the existing regulations "to ensure full operability".

- Reference is also made in the memorandum to the need to amend the existing regulations to fill gaps in the existing regime such as by adding provision about monitoring compliance.

- There is also a reference in the memorandum to the need in the longer term to make changes to ensure ongoing alignment with regulatory changes in other areas relating to habitats and environmental impact assessment. In this context, specific reference is made to changes resulting from the use of powers in the Environment Act 2021, and to other changes which may be required as a result of future legislation, such as the Levelling Up and Regeneration Bill and the Brexit Freedoms Bill.

52. We do not consider that these reasons are sufficient to justify the wide and open-ended powers conferred by clause 226. To the extent that it is necessary to extend habitat protection to offshore hydrogen production and storage, there is no reason why it should not be possible for the Government to develop specific provisions for that purpose. We do not consider that the possibility of other new technologies and activities arising in the future is sufficient by itself to justify such wide and open-ended powers being conferred by the Bill. Those should be addressed by specific provision which can be formulated once those technologies and activities are developed and their impact becomes clear. Similarly, it is not clear why the need to ensure regulatory alignment arising as a result of future legislation should not be addressed in that legislation itself, when the nature of the changes required are known. **Accordingly, we consider the powers conferred by clause 226 to be inappropriate.**

53. Regulations under clause 226 are subject to the negative resolution procedure except where the regulations provide for the creation of offences or civil penalties in which case the affirmative procedure applies. In providing for the

19 Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001.
20 Paras 952 to 963.

negative procedure to be the default the Department relies on the fact that the negative procedure applied to the making of the existing regulations.[21] **If despite what we say in paragraph 52 the powers conferred by clause 226 are retained in their current form, then we consider that the affirmative resolution procedure should apply to all exercises of the powers.**

Part 10—Core fuel sector resilience

54. Part 10 contains provisions concerned with ensuring that economic activity in the UK is not adversely affected by disruptions to core fuel sector activities and reducing the risk of emergencies affecting fuel supplies.[22] It does this primarily by conferring powers on the Secretary of State to require persons carrying on core fuel sector activities, or who own facilities or infrastructure used for the purposes of core sector fuel activities, to take the actions specified by the Secretary of State. Similar provisions were previously contained in a draft Bill, the Downstream Oil Resilience Bill, on which we commented in a letter to the House of Commons Business, Energy and Industrial Strategy Committee sent on 28 October 2021.[23]

55. There are two different ways in which the Secretary of State is able to intervene in the core fuel sector: by the giving of directions and by making regulations. However, the circumstances which are liable to trigger the exercise of the powers are the same in each case. Similarly, what the Secretary of State can do in imposing requirements is also substantially the same in the case of both directions and regulations. A failure to comply with a requirement imposed by a direction or regulations is liable to constitute an offence punishable with up to 2 years imprisonment.

56. In the letter on the draft Bill, we expressed concern about the breadth of the powers conferred on the Secretary of State. In this regard, the letter noted:

- The Bill simply gives the Secretary of State power to require a person "to do *anything*[24]" without saying what a person can be required to do.
- Although the powers can only be exercised for specified purposes, these are framed by reference to broad - and somewhat vague—concepts such as "maintaining or improving … resilience", avoiding "disruptions" and maintaining "normal levels" of supply.
- The power to impose requirements "for the purposes of maintaining or improving" downstream oil sector resilience is particularly broad since it is not subject to the kinds of limitation which apply in the other cases—for example, there being disruption to or failure of continuity of supply, or a significant risk of such disruption or failure. Nor is it limited to things which the Secretary of State considers "necessary or expedient".

57. Some of the issues raised in our letter have been addressed in Part 10:

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21 See paras 961 to 963 of the memorandum.

22 The term "core fuels" is a reference to oil based fuels and renewable transport fuels, and "core fuel sector activity" refers to the storing, handling, carriage, transporting or processing of oil or renewable transport fuel, where it is done in the UK in the course of business and it contributes to the supply of core fuels to consumers in the UK or persons carrying on business in the UK.

23 One change which has been made is to extend the scope of the provisions so that they apply to renewable transport fuels as well as to oil.

24 Emphasis added.

- The power to impose requirements for the purpose of maintaining or improving core fuel sector resilience have been limited so that it is only exercisable where the Secretary of State considers that the persons concerned have failed to make sufficient progress with the steps that the Secretary of State considers necessary for maintaining or improving core fuel sector resilience.

- Also, in the context of maintaining or improving core fuel sector resilience, an example is given of actions that a person may be required to take to acquire and install specific equipment, or carry out specific works, at the person's own expense.

But neither of these matters go to the heart of our concerns. The first point still leaves the Secretary of State with a very broad discretion to decide when it is necessary to impose requirements for the purpose of maintaining or improving core fuel sector resilience. The second only provides an example in relation to the first of the three powers conferred on the Secretary of State; it does not indicate the kinds of action which might be taken where there is a disruption to or a failure of continuity of supply. And, in any event, it does not limit in any way the scope of the powers.

58. **In the circumstances, we repeat what we said in the letter on the draft Bill, namely that the relevant clauses "contain inappropriate delegations of power because the Bill lacks clear criteria or parameters for the exercise of the very broad powers in those clauses to impose requirements backed by criminal penalties".**

59. In the letter on the draft Bill, we expressed concern about having two powers (that is, the power to give directions and the power to make regulations), without any adequate explanation as to the circumstances in which one power should be used rather than the other. The explanation given in the delegated powers memorandum for the draft Bill suggested that regulations rather than directions would be used where the requirement was to apply to a "class of persons". But this was not reflected in the draft Bill itself which expressly allowed the Secretary of State to give both general and specific directions.

60. The provisions of Part 10 seek to address this concern. Clause 204 prohibits the use of the direction power unless either:

- the cases in which a direction will be used are not sufficiently numerous in the view of the Secretary of State to justify making regulations, or

- by reason of urgency, it is not practicable to achieve the aims of the direction by regulations.

61. We are not convinced that these measures adequately address our concerns. The test incorporated into the Bill is that directions will only be used where the cases are not sufficiently numerous to justify making regulations. But there is nothing on the face of the Bill to indicate the criteria which will be applied by the Secretary of State in deciding whether this test is met. And it is difficult to think of what those criteria might be; the issue of what number of cases justifies the making of regulations seems to be an entirely subjective and arbitrary matter. The Department says in the memorandum that this test will mean directions will be focused on specific persons rather than

classes of cases.[25] But that does not necessarily follow from the test itself. And, indeed, the fact that it is anticipated that the same directions may be given in multiple cases (even if the numbers are not so great as to justify the making of regulations) suggests that directions will still be used in relation to classes of cases.

62. The other ground which will justify the use of directions instead of regulations is urgency. But the Department does not explain why it considers that directions are better suited to urgent cases, and we find it difficult to see why that should necessarily be the case. Although the regulation making power is subject to the draft affirmative resolution procedure, there is nothing to prevent the Bill from providing for the made affirmative procedure to apply in cases of urgency. That would allow the regulations to come into force immediately after they were made. Also, it is noteworthy that there are more procedural requirements which apply to the direction making power than apply to the regulation making power. Thus, clause 205 requires the Secretary of State before giving a direction to give the person concerned at least 14 days' notice of the intention to give the direction. This is in addition to a requirement to consult various bodies such as the Health and Safety Executive and the Environment Agency. In the case of regulations, there is only the requirement to consult.

63. These are broad and significant powers. The scope and significance of the powers are reflected in the fact that, where the powers are exercised through regulations, the regulations are subject to the affirmative procedure. **Accordingly, in our view, it should only be in exceptional circumstances that such powers are capable of being exercised without parliamentary scrutiny; and it is only justifiable to provide for the power to be exercised by direction where it concerns a single case on the basis of the specific circumstances which apply in that case. Where the Secretary of State wishes to impose generic requirements on a class of persons, that should be done through the exercise of the regulation making powers so that the exercise of powers is subject to Parliamentary scrutiny.**

64. Where the powers are exercisable by direction there is no requirement for the directions to be laid before Parliament or even to be published. **In our letter on the draft Bill, we expressed concern about this lack of transparency and recommended that there should be a requirement for the Secretary of State to lay every direction before each House of Parliament unless the Secretary of State is of the opinion that disclosure of the direction would be against the interests of national security or the commercial interests of any person. There is still no requirement for the publication of directions and accordingly we make the same recommendation again.**

Clause 227—Power to establish charging scheme

65. Clause 227 inserts a new section 38C into Part 4 of the Petroleum Act 1998 which relates to the abandonment of offshore installations. Currently, Part 4 includes provisions which allow the Secretary of State to charge a fee to recover the costs incurred in carrying out specific functions. New section 38C will replace these individual provisions with a power conferred on the Secretary of State to make a scheme providing for the payment of charges to

25 See para 876.

the Secretary of State for or in connection with the carrying out of functions under Part 4.

66. The Department explains in the memorandum[26] that the current system is too inflexible in limiting cost recovery to only two fixed trigger points (both based on the submission of an application by the operator), when the functions of the Department are carried out over a period of many years. The proposal will enable the Department to bill regularly for work that it does over an extended period of time by charging on the basis of an hourly rate. This will enable a more efficient recovery of costs, and will be more transparent and predictable for operators.

67. There is no requirement for a charging scheme under section 38C to be contained in regulations, and accordingly it will not be subject to parliamentary scrutiny. This contrasts with the existing fee provisions where the amounts of the fees are prescribed in regulations subject to the negative procedure. The Department argues that the functions for which charges can be made are set out on the face of the legislation, that in accordance with the requirements set out in the Treasury document "Managing Public Money" charges will be limited to a cost recovery basis, and that it would be an inappropriate use of parliamentary time to require Parliament to have to consider the new rates when they are uprated from time to time. It is also suggested in the memorandum that the proposed approach is consistent with other legislation.[27]

68. The charging powers conferred by section 38C are very open-ended to the extent that they leave all of the details to be determined by the Secretary of State, including the persons who are to be liable to pay the charges, how the amount of a charge is to be determined (including the matters to be taken into account by the Secretary of State in determining the amount), and when and how charges are to be paid.

69. Provisions governing the amount of fees are generally set out in secondary legislation. This is reflected in "Managing Public Money" (the document referred to by the Department) which states at paragraph 6.3.1:

> "When a charge for a public service is to be made, it is normally necessary to rely on powers in primary legislation. The legislation should be designed so that ministers decide, or have significant influence over, both the structure of the charge and its level. It is common to frame primary legislation in general terms, using secondary legislation to settle detail."

70. It is also noteworthy that the precedents referred to by the Department are not unequivocally supportive of its proposed approach. For example, the Department refers to Schedule 11 to the Space Industry Act 2018. But in that case, it is only where the Civil Aviation Authority makes a scheme for charging that there is no requirement for the scheme to be contained in regulations. Where the Scheme is made by the Secretary of State in respect of the Secretary of State's functions, the scheme has to be contained in regulations with the negative procedure applying to those regulations.

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26 See para 965.
27 See para 968.

71. **In the light of these matters, we consider that, consistently with the existing provisions on fees, a charging scheme made under the new powers introduced by clause 227 should be contained in regulations subject to the negative procedure.**

Clause 238—Power to make consequential provision etc.

72. Clause 238 confers a regulation making power on the Secretary of State to make such provision as the Secretary of State considers appropriate in consequence of or in connection with the Bill or any provision made under the Bill. The provision which may be made includes provision amending or repealing primary legislation, including Acts of devolved authorities as well as Acts of Parliament.

73. Although it is not uncommon for large Acts to include a power by regulations to make provision "in consequence of the Act", the powers in the Bill are wider than those which are usually conferred:

- They are not limited to consequential provision but also allow the Secretary of State to make such provision as the Secretary of State considers appropriate *in connection with* the Act. It is not entirely clear what this is liable to cover, but clearly it must go beyond making provision which is simply consequential and would appear to allow the regulations to supplement the provisions contained in the Bill by making further provision which is connected to the Bill's provisions.

- They allow the Secretary of State to make provision in consequence of, or in connection with, any provision contained in subordinate legislation made under the Bill. Powers are already conferred by clause 239(2)(b) which allow regulations made under the Bill to include supplementary, incidental or consequential provision. Accordingly, the only apparent purpose of this power would be to extend the range of additional provision that can be made using the "in connection with" aspect of the power. It would also allow the regulations to amend primary legislation, where that is not otherwise expressly provided for under the specific regulation making powers themselves.

74. The memorandum does not include any explanation of the powers. In fact, the memorandum does not include any explanation of the powers contained in Part 13, which also includes the standard commencement powers in clause 242(1).

75. **Given the unusual nature of the powers and the fact that the Department has offered no explanation for them, we consider that the powers are inappropriate.**

Parts 7 and 11—Civil penalties and rights of appeal

76. In our report on Parts 3 to 6 of the Bill, we expressed concern about clause 109 which confers a power to make regulations for the protection of consumers in locations in which hydrogen trials are conducted. Clause 109(7) allows provision to be included about the enforcement of requirements imposed by the regulations, including provision for the imposition of civil penalties. In our report, we noted that there was no requirement for the regulations to include a right of appeal to a court or tribunal where a civil penalty was imposed.

77. The same point arises in the following provisions in Parts 7 and 11, where again powers are conferred to make provision for the imposition of civil penalties without any requirement for the regulations also to provide for a right of appeal where a civil penalty is imposed:

- clauses 179(2)(c), 182(c) and 183(1) relating to heat network zones;
- clause 225, which enables regulations to be made about responding to marine oil pollution; and
- clause 226, which enables regulations to be made for reducing effects on habitats of offshore oil and gas activities.

Accordingly, we make the same recommendation in respect of these provisions; namely, that it is unacceptable for the Bill to give the Secretary of State power to choose whether to make provision to allow those on whom civil penalties are imposed to have a right of appeal, and that the Bill should instead require such provision to be made.

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 7 September 2022, Members declared the following interests:

Energy Bill [HL]

Lord Rooker

Director, Ludlow Hydro Co-operative Ltd (a registered society with a function to operate a community-owned hydro-energy on River Teme

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.