



HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

14th Report of Session 2022–23

Energy Prices Bill

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The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session and has the following terms of reference:

- (i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;
- (ii) To report on documents and draft orders laid before Parliament under or by virtue of:
 - (a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,
 - (b) section 7(2) or section 19 of the Localism Act 2011, or
 - (c) section 5E(2) of the Fire and Rescue Services Act 2004;

and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and

- (iii) To report on documents and draft orders laid before Parliament under or by virtue of:
 - (a) section 85 of the Northern Ireland Act 1998,
 - (b) section 17 of the Local Government Act 1999,
 - (c) section 9 of the Local Government Act 2000,
 - (d) section 98 of the Local Government Act 2003, or
 - (e) section 102 of the Local Transport Act 2008.

Membership

[Baroness Browning](#)

[Lord Cunningham of Felling](#)

[Lord Goddard of Stockport](#)

[Lord Haselhurst](#)

[Lord Hendy](#)

[Lord Janvrin](#)

[Lord McLoughlin](#) (Chair)

[Baroness Meacher](#)

[Lord Rooker](#)

[Lord Tope](#)

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

Publications

The Committee's reports are published by Order of the House in hard copy and on the internet at www.parliament.uk/hldprcpublications.

General Information

General information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at <http://www.parliament.uk/business/lords/>.

Contacts for the Delegated Powers and Regulatory Reform Committee

Any query about the Committee or its work should be directed to the Clerk of Delegated Legislation, Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3103. The Committee's email address is hldelatedpowers@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.

Fourteenth Report

ENERGY PRICES BILL

1. The Energy Prices Bill is a response to the current high price of energy. Its aims, amongst other things, are to facilitate the delivery of:
 - the Energy Price Guarantee for households in Great Britain (GB) and Northern Ireland (NI);
 - the Energy Bill Relief Scheme (EBRS) for GB and the EBRS for NI for all eligible non-domestic customers (including businesses, the voluntary sector and the public sector); and
 - the Energy Bills Support Scheme and other energy schemes in NI.¹
2. The Department for Business, Energy and Industrial Strategy (“the Department”) has provided a Delegated Powers Memorandum (“the Memorandum”).²
3. It is a fast-track Bill. It was introduced in the House of Commons on Wednesday 12 October 2022. It went through all remaining stages in that House on Monday 17 October. The second reading debate in the House of Lords is scheduled for Wednesday 19 October and all remaining stages on Monday 24 October.
4. Given this accelerated timetable, it has not been possible for us to examine the Bill in the detail to which the House is accustomed. This report does not therefore cover all the delegated powers to which we may have drawn the attention of the House had we more time. We have instead set a higher threshold and focused on three significant delegations of power which highlight issues we raised in our report, published in November 2021, entitled *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*.³ These are the delegations of power in clauses 9 and 11, and clause 22.

Clauses 9 and 11—Power to delegate functions, including the power to make tertiary legislation

5. Clause 9 confers a power on the Secretary of State to make provision by regulations for reducing the amounts which would otherwise be charged for GB non-domestic electricity or gas supply by licensed suppliers. The regulations are subject to the affirmative procedure.
6. Schedule 1 sets out specific provisions which may be contained in the regulations. They include the power to delegate functions, and in particular (at paragraph 3(2)) the power to sub-delegate the making of subordinate legislation and the giving of directions. There are no limitations on the persons by whom subordinate legislation may be made or directions given, or the circumstances in which or the purposes for which regulations under

1 [Explanatory Notes](#), paras 1 and 2.

2 Department for Business, Energy and Industrial Strategy, [Delegated Powers Memorandum](#), dated 17 October 2022.

3 [12th Report](#), Session 2021–22 (HL Paper 106).

clause 9 may confer the power to make subordinate legislation or give directions. The implication must therefore be that the power may be used for any of the purposes for which the regulation-making power in clause 9 can itself be exercised. Nor is there any requirement for subordinate legislation made under these powers (or directions imposing legislative requirements) to be subject to parliamentary scrutiny.

7. In the Memorandum,⁴ the Department suggests the sub-delegation of the power to make subordinate legislation will be used to supplement or modify the schemes established under clause 9. But nothing is said to explain why it would not be appropriate or feasible to use the regulation making powers conferred by clause 9 itself for these purposes.
8. With regard to the power to give directions, the Department states that this may be needed to enable “the Secretary of State to be able to take particular one-off action (such as changing a technical reference point used in discount calculations)”.⁵ But it is not clear from this explanation whether this is envisaged as giving specific directions to particular persons or whether such a direction would be capable of applying generally; and, if it is latter, why such a change could not be managed through amending the scheme using the regulation-making powers under clause 9.
9. Legislative sub-delegation of the kind proposed here is something that we specifically referred to in our *Democracy Denied?* report:

“Conferring a delegated power on ministers to sub-delegate power is potentially a more egregious erosion of democratic accountability than a simple delegation to a minister to make secondary legislation. Where the government seek a legislative sub-delegation of power in a bill, the power should be limited and specific, and its exercise, and the exercise of sub-delegated powers, should be subject to parliamentary scrutiny. Consideration should also be given to including a statutory duty to consult those affected by the exercise of a sub-delegated power. The delegated powers memorandum should provide a compelling justification for the power, why it is needed, how it is intended to be exercised and how it is to be constrained. The memorandum should also explain the choice of parliamentary scrutiny to be applied to the exercise of the sub-delegated power and, where it differs from the level of scrutiny applied to the secondary legislation containing the sub-delegated power, provide a compelling justification for the divergence.”⁶
10. **We are disappointed that, by including paragraph 3(2) of Schedule 1, the Government appear to have completely ignored the recommendations contained in our report. No attempt has been made to limit the powers or to ensure that they will be subject to parliamentary scrutiny. Nor do we consider that anything close to a compelling justification has been offered for these powers.**
11. **Accordingly, we consider that the legislative sub-delegation provided by paragraph 3(2) of Schedule 1 is inappropriate. We also take the view that the power to give directions is inappropriate to the extent**

4 See paragraph 57.b.b.

5 See paragraph 57.b.c of the Memorandum.

6 *Democracy Denied?*, op cit, para, para 111.

that paragraph 3(2) enables general directions to be given which would have legislative effect.

12. Clause 11 and Schedule 2 make similar provision in relation to NI as is made for GB by clause 9 and Schedule 1. This includes at paragraph 3(2) of Schedule 2 the same power to sub-delegate the making of subordinate legislation and the giving of directions. **Accordingly, for the same reasons we consider that powers conferred by paragraph 3(2) of Schedule 2 are inappropriate.**

Clause 22—Power to give directions

13. Clause 22 confers a power on the Secretary of State to give a direction to a person holding an energy licence or the Northern Ireland Regulator. The power may be exercised where the Secretary of State considers that the giving of a direction is appropriate either:
- in response to the energy crisis,⁷ or
 - in connection with the Bill, regulations made under the Bill or anything done or proposed to be done under the Bill, or in connection with a domestic energy price reduction scheme.
14. In our view clause 22 constitutes the delegation of a wide legislative power:
- It allows requirements to be imposed on energy licence holders which are enforceable.
 - Clause 22(5) provides that, where a direction conflicts with the requirements of an enactment, those requirements are to be disregarded. This in effect makes it a Henry VIII power because it allows the effect of legislation, including primary legislation, to be modified by a direction.
 - It is possible for the powers to be used so that requirements apply generally, such as to all energy licence holders of a particular description.⁸ Paragraph 156 of the Memorandum suggests that the power is expected to be used in this way, when it refers to the power being used to set the terms of certain support schemes.
 - There are no limits on the kinds of requirements which may be imposed through the directions power.
 - The only thing to limit the power is the provision which defines the circumstances in which it can be used, namely in response to the energy crisis or in connection with the Bill or regulations under the Bill etc. But these circumstances are in our view drawn very broadly, and they are not time limited in any way (as other powers under the Bill are).
15. The power is explained at paragraphs 154 to 162 of the Memorandum. However, the Memorandum does not explain the full range of the things which can be done in exercise of the power. For example, it does not explain

7 By virtue of clause 28(1), something is done “in response to the energy crisis” if it is done for the purpose of responding to a change in the price of energy, where that change occurs on or after 1 January 2022 (including where the change occurs after the Bill is enacted, without any limit on when in the future the change must occur).

8 Although clause 22 provides for a direction to be given separately to each licence holder, there is nothing to prevent multiple directions from being given imposing the same requirement on all licence holders or all licence holders of a particular description.

the need for the power to give directions in response to the energy crisis. And it does not explain why it is considered appropriate or necessary to provide for a direction under clause 22 to be able to override legislation, including primary legislation.

16. We are also not convinced by the reasons given in the Memorandum for the power not being subject to parliamentary scrutiny.⁹ It is stated that the process of giving directions:

“will allow the SoS/Department for the Economy to proceed at pace to ensure the delivery of support as soon as feasible and tackle challenges with implementation and enforcement, including those unforeseen, to avoid comprising delivery of support to customers this winter.”

The argument therefore appears to be based on the need for speed. However, this does not explain why subordinate legislation would slow down the process. Subordinate legislation (whether negative or affirmative) can be made to come into force immediately and therefore there is no obvious reason why the directions power would lead to greater speed.

17. Despite the power conferred by clause 22 being capable of having legislative effect, there is no requirement for it to be exercised by means of subordinate legislation or to be subject to any parliamentary scrutiny. It therefore falls, in our view, within the “disguised law” category referred to in our report, *Democracy Denied?*¹⁰ In that report, we refer to the use of legislative devices which amount, in effect, to “camouflaged legislation” as an “unacceptable ploy” and, in the absence of convincing reasons to the contrary, we recommend that they should not be included in a bill.¹¹ **As we have said in relation to clauses 9 and 11 in paragraph 10 above, we are disappointed that the Government, in clause 22, appear also to have completely ignored a recommendation contained in our report.**

18. **Accordingly, we are firmly of the view that the power conferred by clause 22 is inappropriate. A full explanation of the power—in particular of the potential for it to be exercised in a way which would override legislation—is not provided in the Memorandum. But in any event, in our view, it is not possible for the power to be appropriate without the Bill:**

- **requiring it, where it is used to override legislation or to impose requirements which apply generally, to be exercised by means of subordinate legislation subject to parliamentary scrutiny, with the affirmative procedure applying at least where it is used to modify primary legislation; and**
- **imposing a time limit on the exercise of the power which is commensurate with the other time limits contained in the Bill.**

9 See paras 160 to 162.

10 *Democracy Denied?*, op cit, see paras 101 to 106.

11 *Democracy Denied?*, op cit, see paras 103 and 105.

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 18 October 2022, Members declared no interests.

Attendance

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