HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

24th Report of Session 2022–23

Levelling-up and Regeneration Bill

Pensions Dashboards (Prohibition of Indemnification) Bill

Shark Fins Bill

Genetic Technology (Precision Breeding) 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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Contacts for the Delegated Powers and Regulatory Reform Committee

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Historical Note

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that "in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion" (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, "be well suited to the revising function of the House". As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and certain instruments made under other Acts specified in the Committee's terms of reference.

Twenty Fourth Report

LEVELLING-UP AND REGENERATION BILL

1. This Bill was passed by the House of Commons on 13 December 2022. It was introduced in the House of Lords on 19 December 2022 and had its Second Reading on 17 January 2023.

2. According to the Explanatory Notes to the Bill—

> "The Levelling-up and Regeneration Bill supports the Government's manifesto commitment to level up the United Kingdom. The Government's objective is to reduce geographical disparities between different parts of the United Kingdom by spreading opportunity more equally".[1]

3. The Bill contains 13 Parts and 18 Schedules. It deals with a range of topics including planning, combined county authorities, an Infrastructure Levy, community land auction pilots, environmental outcomes reports, nutrient pollution standards, development corporations, compulsory purchase, letting by local authorities of vacant high-street premises and information about interests and dealings in land.

4. The Department for Levelling Up, Housing and Communities has provided a Delegated Powers Memorandum ("the Memorandum")[2] for the Bill.

5. We draw the following powers to the attention of the House.

Clause 11—power to make provision about members of combined county authorities

6. Part 2 of the Bill establishes a new local government structure known as a combined county authority. A combined county authority (CCA) is an authority which exercises functions in respect of the combined area of at least one two-tier county council and one or more other such councils or unitary county or district councils. The provisions of Part 2 concerning CCAs substantially replicate the provisions for combined authorities in Part 6 of the Local Democracy, Economic Development and Construction Act 2009 ("the 2009 Act").

7. Clause 11 confers a power to make regulations about all types of members of a CCA, the mayor of a CCA and the nominating bodies of a CCA. Regulations under clause 11 are subject to the affirmative resolution procedure for the first exercise of the power, with the negative resolution procedure applying to subsequent exercises.[3] No explanation is given in the Memorandum for adopting this approach. The assumption made in the Memorandum is that the affirmative procedure will apply to all exercises of the power.[4] In this regard, the Memorandum notes that providing for the affirmative procedure to apply is consistent with the level of scrutiny which applies to regulations under

1 At paragraph 1.
2 Department for Levelling Up, Housing and Communities, Delegated Powers Memorandum, undated.
3 Clause 219(6) and (9) provides for the negative resolution procedure to apply to the second or any subsequent regulations made under clause 11. Otherwise, regulations under Chapter 1 of Part 2 are subject to the draft affirmative resolution procedure by virtue of clause 219(4) and (5)(a).
4 See paragraph 10.

clause 8 which also confer powers to make provision about membership, and which are also subject to the affirmative procedure in respect of all exercises of the power. We agree that the affirmative procedure offers an appropriate level of scrutiny for regulations relating to the membership of CCAs. It is difficult to make sense of a proposal requiring the affirmative procedure to apply only to the first exercise of the power. It seems likely that the power will be exercised separately for different CCAs. That being so, there does not appear to be any reason for providing for the affirmative procedure to apply only to the regulations relating to the particular CCA which happens to be the first one in respect of which the power is exercised.

8. **Accordingly, we consider that the affirmative resolution procedure should apply to all regulations made under clause 11.**

Clause 61—power to make regulations about the constitution of combined authorities

9. As well as providing for the establishment of CCAs, Part 2 also amends the provisions of the 2009 Act in relation to combined authorities. Clause 61 makes changes to the provisions dealing with the constitution of combined authorities, including providing for two new categories of member: a non-constituent member appointed by a designated nominating body, and an associate member appointed by the combined authority itself. The changes relating to the constitution of combined authorities are achieved by inserting new sections 104A to 104C into the 2009 Act.

10. Section 104C(1) confers a power which is equivalent to that conferred by clause 11 in relation to CCAs. Section 104C(4) contains additional regulation making powers which allow the Secretary of State to provide for the new provisions relating to non-constituent members and associate members not to apply to a combined authority which already exists before the new provisions come into force.

11. As with clause 11, regulations under section 104C are subject to a first-time affirmative procedure.[5] Again, the Memorandum assumes that the affirmative procedure will apply to all exercises of the powers, with the stated reason being the fact that the same procedure applies to the existing order making powers in the 2009 Act relating to membership of combined authorities.[6]

12. **In the circumstances, we consider that the affirmative resolution procedure should apply to all exercises of the powers conferred by new section 104C of the 2009 Act.**

Clauses 75 and 76—power to issue guidance with respect to council tax chargeable for long-term empty and periodically occupied dwellings

13. Clauses 75 and 76 amend the provisions of the Local Government Finance Act 1992 ("the 1992 Act") which make provision for discounts from council tax for unoccupied dwellings.

14. As things stand, section 11(2)(a) of the 1992 Act provides for a dwelling to be subject to a discount from council tax for a day if there is no person who

5 See the amendment to section 117 of the 2009 Act made by clause 65(5).
6 See paragraph 135 of the Memorandum.

is a resident of the dwelling on that day. This is subject to section 11B which applies to long-term empty dwellings. Section 11B confers a discretion on the billing authority so it can decide that the discount under section 11(2)(a) should not apply, but instead the amount of council tax should be increased by an amount which does not exceed the relevant maximum. The amount of the relevant maximum varies depending on the period for which the dwelling has been left unoccupied.

15. Clause 75 amends section 11B in two ways:

- It reduces the period for which a dwelling has to be unoccupied to qualify as a long-term empty dwelling; the reduction is from two years to one year.

- It requires a billing authority to have regard to guidance issued by the Secretary of State in exercising its functions under the section.

16. Clause 76 inserts a new section 11C into the 1992 Act. That section operates in a similar way to section 11B but applies instead to dwellings occupied periodically while being substantially furnished. Under section 11C, the billing authority can make a determination in relation to such dwellings that the discount under section 11(2)(a) is to be disapplied for any day on which there is no resident, and instead that it should be subject to an increased amount of council tax for that day, with the increase not exceeding 100%. As with section 11B, section 11C(4) requires a billing authority to have regard to guidance given by the Secretary of State in exercising its functions under the section.

17. We have in the past made clear the need for guidance to be subject to parliamentary scrutiny, where there is a duty on authorities to have regard to the guidance in exercising statutory functions.[7] We consider this is particularly likely to be the case where:

- the guidance relates to the exercise of functions which (as here) are capable of affecting the interests, including the financial interests, of individuals; and

- the duty to have regard to the guidance is liable to have a significant impact on the way in which the functions are exercised.

18. Sections 11B and 11C leave it entirely to the local authorities concerned to decide whether or not to use the powers conferred by those sections to charge a council tax premium on long-term empty dwellings and periodically occupied dwellings. They also leave it entirely to the discretion of the local authority to decide the extent of the increase to be charged, subject to the statutory maximum. There is nothing on the face of the provisions to indicate the matters to be taken into account by local authorities in deciding these issues, and it seems reasonable to assume that this void will in practice be filled by the guidance issued by the Secretary of State. As such the guidance is liable to have a significant impact on the way in which the powers are exercised by local authorities. **Accordingly, we consider that guidance under sections 11B and 11C should be subject to parliamentary scrutiny, with the draft negative procedure offering an appropriate level of scrutiny.**

7 See in particular paragraphs 91 to 97 of the *12th Report* of Session 2021- 22, "Democracy Denied? The urgent need to rebalance power between Parliament and the Executive".

Clause 99—amendments to the Town and Country Planning Act 1990: street vote development orders

19. Clause 99 inserts new sections into the Town and Country Planning Act 1990 to create a planning consent regime under which residents will be able to propose development in their "street area"[8] and, subject to the proposal meeting certain requirements, to vote on whether that development should be given planning permission. According to the Explanatory Notes to the Bill, "This is intended to encourage residents to consider the potential for additional development on their streets, and support a gentle increase in densities, in particular, in areas where additional new homes are needed".[9]

20. **In paragraphs 21 to 57 below, we draw the attention of the House to seven separate regulation-making powers relating to street votes. A common thread runs through them all: in each case, we consider that the power relates to matters that are too significant in policy terms to be left to be determined by regulations. Yet five of the seven powers are subject only to negative procedure scrutiny, with the Memorandum claiming that they relate only to matters of administrative, procedural or technical detail.**

Clause 99—new section 61QC(3) of the Town and Country Planning Act 1990: power to amend the list in the Bill of areas ("excluded areas") to which a street vote development order cannot apply

21. Under the new regime, planning permission may be granted in relation to a "street area" by a "street vote development order" ("SVDO") made by the Secretary of State.[10] The Secretary of State is required to make regulations about the preparation and making of SVDOs.

22. "Street area" is defined in new section 61QC as an area in England "which is of a prescribed description" and "no part of which is within an excluded area".

23. "Excluded area" means any of the areas listed in subsection (2) of that section. Six types of area are listed, each of which is afforded special protection by existing planning legislation. They include, for example, National Parks, sites of special scientific interest, areas of outstanding natural beauty and green belt land.

24. The Bill gives the Secretary of State a Henry VIII power[11] to amend subsection (2) by regulations so as to—

- add to the list of excluded areas;
- remove an excluded area from the list; or
- amend the list of excluded areas.

Such regulations are subject to the affirmative procedure.

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8 See new section 61QC(1) (inserted by clause 99 of the Bill).
9 At paragraph 590.
10 SVDOs are not subject to any Parliamentary procedure.
11 In new section 61QC(3).

25. The Memorandum provides the following justification for the power—

> "Street vote development orders are a new route to planning permission and the department considers it is important for Ministers to have the flexibility to adjust the scope of the measure if evidence emerges prior or following commencement that this is necessary to ensure the effective operation of the policy. The government anticipates using this power to extend the list to protect other sensitive locations and, in exceptional cases, to remove or amend existing ones, where protections can be secured through alternative means"[12].

26. We consider that a proposal to remove (in whole or in part) any of the areas that are currently listed in the Bill as "excluded" would be likely to be much more controversial than a proposal to expand that list. Extending the application of SVDOs to any of those areas that the Bill currently excludes would be a highly significant step in policy terms: it would involve extending — to areas in which development is currently subject to significant restrictions in the wider public interest — a planning regime that is designed to encourage development at the request of small groups of residents.

27. The Memorandum suggests[13] that the power would only be used to extend the application of SVDOs to any of the excluded areas "in exceptional cases" and "where protections can be secured through alternative means" but there is nothing on the face of the Bill to limit the power in this way and it is by no means obvious what sort of thing the Government has in mind when it refers to "exceptional cases" (and the Memorandum does not elaborate on this).

28. **We consider that the use of the Henry VIII power in new section 61QC(3) to extend the application of street vote development orders to any of the protected areas that the Bill currently excludes would be such a significant step in policy terms that, unless the Government can fully justify it, the power should be limited so that it cannot be used for that purpose.**

Clause 99—new section 61QD(2)(b) of the Town and Country Planning Act 1990: power to make provision as to the circumstances in which a street vote development order may be made

29. New section 61QD(1) requires the Secretary of State to make "SVDO regulations" about "the preparation and making" of SVDOs. Such regulations are subject to the negative procedure.

30. According to the Memorandum,[14] this is a power to provide for "matters of administrative and procedural detail to augment the fundamentals of the policy which are set out on the face of the Bill".

31. However, the matters about which provision must be made in such regulations include "the circumstances in which a street vote development order may be made".[15] We consider that this does not sound like a matter of administrative or procedural detail. The power would appear to allow the regulations to make provision that goes to a fundamental aspect of the policy. Yet such provision is left to regulations subject only to negative procedure scrutiny.

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12 At paragraph 637.
13 At paragraph 637.
14 At paragraph 643.
15 See new section 61QD(2)(b).

32. **We consider that—**

- **"the circumstances in which a street vote development order may be made" is too significant a matter in policy terms to be left to be determined by regulations subject only to the negative procedure and should instead be provided for on the face of the Bill; and**
- **accordingly, new section 61QD(2)(b) should be removed from the Bill.**

Clause 99—new section 61QE(1)(o) of the Town and Country Planning Act 1990: power to make provision as to the threshold of votes that must be met in a referendum on whether a street vote development order may be made

33. New section 61QE(1) gives the Secretary of State power to make provision in SVDO regulations about "referendums held in connection with street vote development orders". It contains a non-exhaustive list of matters that may be provided for in such regulations. The regulations are subject to the negative procedure.

34. According to the Memorandum, this power is concerned with "matters of procedural detail to augment the fundamentals of the policy which are set out on the face of the Bill".[16] However, the matters about which provision may be made include "the threshold of votes that must be met before a street vote development order may be made".[17]

35. We consider that provision as to the threshold of votes that must be met in a referendum on whether a proposed SVDO may be made (for example, as to whether the result is to be determined by simple majority or by a stronger mandate) is not merely a matter of procedural detail but is instead highly significant in policy terms. Yet the power to make such provision is subject only to negative procedure scrutiny.

36. The Memorandum states that "There is precedent for setting out detailed referendum procedures in secondary legislation in the context of planning permission granted by neighbourhood development orders, see for example the Neighbourhood Planning (Referendums) Regulations 2012 (S.I. 2012/2031)".[18]

37. However-

- those Regulations were subject to affirmative procedure scrutiny; and
- the threshold of votes that must be met in a referendum to which those Regulations apply is set out not in regulations but in primary legislation.[19]

38. **We consider that-**

- **the threshold of votes that must be met in a referendum on whether a street vote development order may be made is far too**

16 At paragraph 650.
17 See new section 61QE(1)(o).
18 At paragraph 651.
19 In section 61E(4) and (5) of the Town and Country Planning Act 1990.

significant a matter in policy terms to be left to be determined by regulations subject only to the negative procedure and should instead be provided for on the face of the Bill; and

- **accordingly, new section 61QE(1)(o) should be removed from the Bill.**

Clause 99—new section 61QF of the Town and Country Planning Act 1990: power to "provide for exemptions" in regulations which make provision about the preparation and making of street vote development orders

39. New section 61QF gives the Secretary of State a broad power to "provide for exemptions" in SVDO regulations.[20] The power is subject to the negative procedure.

40. According to the Memorandum,[21] the power provides "for matters of detail to be set out in secondary legislation to augment the pillars of the policy which are set out on the face of the Bill" and "the negative resolution procedure is appropriate … because the provisions mainly relate to administrative procedures and the effective operation of the street vote development order process".

41. However, as the power is broad and open-ended, it need not be used only in respect of mere "matters of detail" or "administrative procedures". The matters about which provision may be made in SVDO regulations include—

- "the circumstances in which a street vote development order may be made";[22] and
- "the threshold of votes that must be met before a street vote development order may be made".[23]

We consider that neither of these can reasonably be described as mere "matters of detail" or "administrative procedure", yet the power in new section 61QF would allow changes to be made in relation to such matters by regulations subject only to negative procedure scrutiny.

42. **We consider that, consistent with our recommendations in paragraphs 32 and 38 above, the power in new section 61QF to "provide for exemptions" should be amended so that it is not capable of being used to provide for exemptions in relation to—**

- **"the circumstances in which a street vote development order may be made"; and**
- **"the threshold of votes that must be met" in a referendum on whether a street vote development order may be made,**

as these matters are too significant in policy terms to be left to be determined by regulations.

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20 Regulations which make provision about the preparation and making of street vote development orders.
21 At paragraphs 655 and 656.
22 See new section 61QD(2)(b).
23 See new section 61QE(1)(o).

Clause 99–new section 61QG(2)(a) and (c) of the Town and Country Planning Act 1990: powers to prescribe (a) development for which planning permission may be granted by a street vote development order and (b) conditions that must be met in order for planning permission to be granted by a street vote development order

43. New section 61QG(2) gives the Secretary of State powers to make regulations to prescribe development for which a SVDO may provide for the granting of planning permission. A SVDO may only provide for the granting of planning permission for a development that—

- is of a kind prescribed by regulations;[24]
- is not "excluded development";[25] and
- satisfies any further conditions prescribed in regulations[26].

44. The Memorandum provides the following justification for the powers to prescribe—

- the kind of development for which a SVDO may grant planning permission; and
- further conditions that a proposed development must satisfy in order for planning permission to be granted by a SVDO—

> "These delegated powers allow the Secretary of State to prescribe in detail the requirements and criteria that development must meet before a proposal can be put to referendum. The government anticipates that these requirements will be highly technical in nature as they will need to take into account a wide range of urban contexts and circumstances. It would therefore not be appropriate to set out such a level of detail on the face of the Bill".[27]

45. The powers are subject to the negative procedure. The Memorandum argues[28] that the negative procedure is appropriate because-

- the powers relate to "detailed technical matters"; and
- "the government intends to seek the views of sector stakeholders to inform the drafting of the secondary legislation as part of a wider consultation on the detail of the policy".

46. We find this far from convincing. The Memorandum does not explain—

- why the Bill leaves it entirely to regulations subject only to the negative procedure to determine a matter of considerable significance in policy terms: what kind of development may be granted planning permission by a SVDO;
- why, if the powers are to be used only in respect of "detailed technical matters", they are so broad and open-ended;

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24 See new section 61QG(2)(a).
25 "Excluded development" is defined in new section 61QH.
26 See new section 61QG(2)(c).
27 At paragraph 660.
28 At paragraph 661.

- why, if the Government considers it important to "seek the views of sector stakeholders[29] to inform the drafting of the secondary legislation", the Bill does not require this; and
- why consultation with "sector stakeholders" lessens the requirement for Parliamentary scrutiny.

47. **We consider that—**

- **the issue of what kind of development may be granted planning permission by a street vote development order is too important in policy terms to be left to be determined entirely by regulations; and**
- **accordingly, new section 61QG(2)(a) and (c) should be removed from the Bill.**

Clause 99–new section 61QH(2) of the Town and Country Planning Act 1990: power to amend the list in the Bill of categories of development ("excluded development") for which planning permission cannot be granted by a street vote development order

48. A SVDO cannot grant planning permission for any development that is "excluded development".[30] "Excluded development" means any of the categories of development listed in subsection (1) of section 61QH. Five categories of development are listed, each of which is subject to special restrictions under existing planning legislation. They include, for example, development of a listed building and development of a scheduled monument.

49. The Bill gives the Secretary of State a Henry VIII power[31] to amend subsection (1) by regulations so as to—

- add a category of excluded development to the list in subsection (1);
- remove a category of excluded development from that list; or
- amend a category of excluded development in that list.

Such regulations are subject to the affirmative procedure.

50. The Memorandum provides the following justification for the power—

> "Street vote development orders are a new route to planning permission and the department considers it is important for Ministers to have the flexibility to adjust the scope of the measure if evidence emerges prior or following commencement that this is necessary to ensure the effective operation of the policy. The government anticipates using this power to extend the list to remove other development from scope or, in exceptional cases, to narrow or amend the list where equivalent protections can be secured through alternative means".[32]

51. We consider that a proposal to remove (in whole or in part) any of the categories of development that are currently listed in the Bill as "excluded"

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29 The Memorandum does not explain what it means by "sector stakeholder".
30 See new section 61QG(2)(b).
31 See new section 61QH(2).
32 At paragraph 664.

would be likely to be much more controversial than a proposal to expand that list. Extending the application of SVDOs to any of those categories of development that the Bill currently excludes would be a highly significant step in policy terms: it would involve extending - to categories of development that are currently subject to significant restrictions in the wider public interest - a planning regime that is designed to encourage development at the request of small groups of residents.

52. The Memorandum suggests that the power would only be used to extend the application of SVDOs to any of the categories of excluded development "in exceptional cases" and "where equivalent protections can be secured through alternative means" but there is nothing on the face of the Bill to limit the power in this way and it is by no means obvious what sort of thing the Government has in mind when it refers to "exceptional cases" (and the Memorandum does not elaborate on this).

53. **We consider that the use of the Henry VIII power in new section 61QH(2) to extend the application of street vote development orders to any of the categories of development that the Bill currently excludes would be such a significant step in policy terms that, unless the Government can fully justify it, the power should be limited so that it cannot be used for that purpose.**

Clause 99—new section 61QL of the Town and Country Planning Act 1990: power to modify or exclude the application of Schedule 7A (biodiversity gain in England) to that Act in relation to planning permission granted by a street vote development order

54. New section 61QL gives the Secretary of State power to make regulations that modify or exclude the application of Schedule 7A to the Town and Country Planning Act 1990 (biodiversity gain in England) in relation to planning permission granted by a SVDO. Schedule 7A was inserted into the 1990 Act by the Environment Act 2021. It requires grants of planning permission to be subject to a condition to secure that the "biodiversity value" attributable to a development for which planning permission is sought exceeds the pre-development biodiversity value of the onsite habitat by at least 10%. The power in new section 61QL to modify or exclude the application of Schedule 7A is subject to the negative procedure.

55. The Memorandum provides the following justification for the power-

> "It is necessary for the Secretary of State to have the flexibility to make changes in respect of the framework in Schedule 7A so that the biodiversity net gain objective referred to in … Schedule 7A can be met in the context of SVDOs".[33]

56. The Memorandum provides the following justification for the negative procedure applying-

> "the provisions mainly relate to tailoring administrative procedures to ensure they operate effectively for street vote development orders and so that biodiversity net gain can be achieved in relation to this consent route".[34]

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33 At paragraph 712.
34 At paragraph 713.

57. **We consider that-**

- **the power in new section 61QL is, in effect, an open-ended Henry VIII power;**
- **the Memorandum provides wholly inadequate justification both for the power itself and for the negative procedure applying to it; and**
- **accordingly, unless the Minister can provide a convincing justification for the power, it should be removed from the Bill.**

Clause 113—new section 196E of the Town and Country Planning Act 1990: power to provide relief from enforcement of planning conditions

58. Clause 113 amends the Town and Country Planning Act 1990 by inserting a new section 196E which gives the Secretary of State power to provide by regulations that a local planning authority may not take — or is subject to restrictions in how it may take — enforcement measures in relation to failures to comply with planning conditions which occur during a period of time specified in the regulations (the "relief period"). The power is subject to the negative procedure.

59. According to the Memorandum[35]—

- "The purpose of the power is to ensure that business is not unreasonably burdened by planning conditions or limitations which may prevent appropriate response and recovery in times of disruptions"; and
- "In recent years, circumstances which resulted in businesses being overly burdened by planning conditions or limitations, included national lockdowns during the COVID-19 pandemic and the Heavy Goods Vehicle driver shortage (for which temporary measures were introduced to ease disruption)".

60. The Memorandum refers to the unpredictability of "novel circumstances in the future [that] may cause disruption and which would merit a temporary relaxation of enforcement action against specified planning conditions and limitations".[36] However, it doesn't explain why the power conferred is so broad and open-ended: its exercise is subject to no requirement for criteria to be met or for pre-conditions to be satisfied. There is nothing to limit the use of the power to "times of disruptions" or to "temporary relaxation" of enforcement measures.

61. The Memorandum refers[37] to two existing powers which it suggests are comparable—

- the first, in section 74A of the Town and Country Planning Act 1990, allows the Secretary of State to provide by statutory instrument that, where the grant of planning permission is subject to a condition which requires the approval of a local planning authority, such approval is deemed to have been given. However, that power is significantly limited by the fact that it can only provide for deemed approval where a person

35 At paragraph 877.
36 At paragraph 877.
37 At paragraphs 879 and 880.

has applied to the local planning authority for the approval in question and the period within which the authority is required to give notice of its decision on the application has elapsed without that notice having been given; and

- the second, in section 100ZA of that Act, allows the Secretary of State to provide by regulations that the requirement under that section for an applicant for planning permission to agree to the terms of certain conditions does not apply in circumstances prescribed in the regulations. However, that power (a) is limited to the applicability of conditions which must be complied with before any development or change of use has begun, and (b) can only be exercised after carrying out a public consultation.

62. **We consider that—**

- **the Government has failed to explain why a power that it says is intended for use only in "times of disruptions" for "temporary relaxation" of enforcement measures is so broad and open-ended; and**

- **accordingly, the power in new section 196E in its current form should be removed from the Bill.**

Clause 128—power to permit community land auction arrangements

63. Part 5 of the Bill establishes a new set of arrangements which will allow local planning authorities to raise money from land which is proposed for development. The Bill enables a limited number of local authorities to put in place a community land auction (CLA) arrangement. A CLA arrangement is where the local planning authority (LPA) invites anyone who has a freehold or leasehold interest in land to offer to grant the LPA what is known as a CLA option with a view to the land being allocated for development in the next local plan.

64. The provisions of Part 5 will only have effect for a period of 10 years. The plan is that they should be piloted by a limited number of local authorities. Provision is made in clause 128(1) for the LPAs to be chosen by the Secretary of State by direction. In our view, this constitutes the delegation of a legislative power because its effect is to determine which LPAs are able to exercise the powers conferred by Part 5. The power of direction is not however subject to any parliamentary scrutiny.

65. In our special report, "Democracy Denied?", we expressed concern about powers having legislative effect being placed outside of legislation:[38]

> "Provision in bills giving ministers powers to make determinations, directions, arrangements or to issue codes of practice, public notices etc.—where they are in effect camouflaged legislation—is an unacceptable ploy and, as matter of principle, should not be sought by the Government in the bills they put before Parliament. In the absence of convincing reasons to the contrary, therefore, we recommend that they should not be used.
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> …

38 See paragraphs 102 and 104.

> Where the Government take the view that they have convincing reasons, then the use of these devices—and the level of scrutiny applied to them—should be clearly identified in the delegated powers memorandum and fully justified."

66. the Department gives the following reasons for the direction power under clause 128(1) not being subject to any parliamentary scrutiny:[39]

- The giving of such directions is unlikely to be considered controversial. It does not require the LPA concerned to put in place a CLA arrangement but merely enables them to do so.
- It would not be practicable to bring the decision to Parliament each time it is decided that a particular LPA should be able to put in place a CLA arrangement.

67. We do not find these reasons convincing. Although the giving of a direction does not require the LPA concerned to put in place a CLA arrangement, it is nevertheless of significance because it is a necessary condition which has to be met before an authority is able to exercise those powers. It is not clear from the memorandum as to precisely what criteria will be used in deciding which authorities are given the powers to put in place CLA arrangements. The memorandum refers to the fact that the direction power will be enable the Secretary to retain control over the number of CLAs in place during the piloting period.[40] That suggests that not all local planning authorities who want to run a CLA arrangement will necessarily be able to do so, and therefore it is possible that the process of choosing will be controversial.

68. Nor do we find it convincing that it will not be practicable to bring to Parliament each decision to allow a LPA to put in place CLA arrangements. A statutory instrument specifying a LPA for the purposes of Part 5 is likely to be very short and is unlikely to be time-consuming to draft. It is only the draft affirmative procedure which could have the effect of delaying the implementation of the decision. Otherwise, the legislation would be capable of having immediate effect.

69. **We consider that the Department has failed adequately to justify using a direction making power to specify the local planning authorities which are to have the power to put in place CLA arrangements. In our view, the designation of the relevant authorities should instead be done by regulations contained in a statutory instrument, with the negative resolution procedure offering an appropriate level of parliamentary scrutiny.**

Part 6—environmental outcomes reports

70. Part 6 is intended to replace the EU processes of environmental impact assessment with a new framework for assessing proposals using environmental outcome reports. The new system will provide for an outcomes-based approach under which the Secretary of State will specify outcomes in relation to environmental protection, and the assessment will be done through environmental outcomes reports which will assess the extent to which proposals are likely to impact on the delivery of the environmental outcomes specified by the Secretary of State.

39 See paragraph 1271 of the Memorandum.
40 See paragraph 1270.

71. Part 6 constitutes skeleton legislation, with the result that all the key elements of the new environmental impact assessment regime are to be set out in subordinate legislation:

A. The specific environmental protection outcomes against which any proposal is to be assessed

At its heart are the outcomes relating to environmental protection which are the focus of environmental outcomes reports. Clause 138(2) defines environmental protection for these purposes in very wide terms: it includes protection of cultural heritage as well as the protection of the landscape and the protection of the natural environment (ie land, air and water; and plants, wild animals and organisms together with their habitats). The outcomes relating to environmental protection are left wholly to be specified in subordinate legislation. There is no requirement for specific matters to be included. Nor does the Bill provide any indication as to any principles to be applied in determining the outcomes except that there is a requirement for the Secretary of State to have regard to the current environmental improvement plan formulated under Part 1 of the Environment Act 2021. No indication is given on the face of the Bill as to the types of outcomes which are to be specified or how general or specific they are to be.

B. The types of proposal for which environmental outcomes reports are required

Part 6 leaves it wholly to regulations to determine the circumstances in which there will be a requirement for an environmental outcomes report. The requirement to have an environmental outcomes report applies where there is a "relevant consent" or a "relevant plan". By virtue of clause 140, what constitutes a relevant consent or relevant plan for these purposes is to be set out in regulations. "Consent" is defined to mean any consent, approval, permission, authorisation, confirmation or decision (however described, given or made) that is required, or otherwise provided for, by or under any enactment in relation to a project, where "project" is defined to mean a project in the UK involving any activity capable of affecting the natural environment, cultural heritage or landscape. "Plan" is defined to mean a plan or programme which relates to a project or to environmental protection in the UK. Accordingly, the requirement for an environmental outcomes report is capable of applying to virtually any activity which is subject to some form of statutory consent process or which can be described as a plan or programme as defined in the Bill.

C. The details of how the impact assessment process is to work

Clause 139 makes it clear how in general terms environmental outcomes reports are to work. Where an environmental outcomes report is required for a proposal, no step may be taken to give effect to the proposal until the report has been prepared, and the report must be taken into account in determining whether the proposal is to proceed. Also, clause 139(4) defines what constitutes an environmental outcomes report. Broadly, it is an assessment of (a) the impact of the proposal on the delivery of specified environmental outcomes, and (b) any steps for increasing the extent of that delivery and remedying, avoiding or mitigating effects which limit that delivery. However, key elements are still left to be set out in regulations:

- the effect which the report has on the implementation of the proposal,

- the specific circumstances in which a report is required,
- how the assessment is to be carried out,
- how and by whom a report is to be prepared, and
- how the report is to be consulted on and how it is to be subject to public engagement.

Given the very wide range of consents and plans which the requirement may apply to, these things are liable to differ significantly in different cases.

D. How the enforcement of the environmental impact assessment regime is to work

Clause 145 enables regulations, which set out the new environmental impact assessment regime, to make provision about the enforcement of any requirements imposed by the regulations. This includes:

- the power to create criminal offences (albeit with a limitation that the offences may not be punishable by imprisonment);
- enabling the enforcement authority (which is also to be identified in regulations) to impose civil sanctions;
- powers of entry;
- powers of inspection, search, seizure or detention;
- authorising the use reasonable force in connection with the powers referred to in the preceding two bullets.

All of these powers are at large with nothing to limit the circumstances in which they may be used.

72. The starting point for the Department in structuring Part 6 as skeleton legislation appears to be the fact that the existing environmental assessment framework which it is replacing is for the most part contained in subordinate legislation- i.e. regulations under section 2(2) of the European Communities Act 1972. According to the Department, there is therefore nothing new in these matters being the subject of delegated powers. The Department asserts that it would be odd if going forward the only ability to amend provision previously made by regulations is by way of primary legislation.[41]

73. We have in the past made clear our view (most recently in the report on the Energy Bill)[42] 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."

41 See in particular paragraphs 1399 and 1400 of the Memorandum.
42 *11th Report* of Session 2022–23. See, in particular, paragraph 44.

This is because of the very different context in which section 2(2) regulations are made as a means of implementing measures where required to do so under EU law.

74. The Department provides three other reasons in the memorandum for structuring Part 6 as skeleton legislation:[43]

- The evolving nature of environmental matters is a key driver for the need for delegated powers. The new system is designed to be more reactive to take account of changing science and best practice. The regular updating that this requires would not be achievable through primary legislation.
- The environmental assessment regime covers a very wide range of activity, and therefore how the assessment regimes are to apply will need to vary. In the absence of delegated powers, there would be a need for primary legislation each time one of the specific activity regimes needed to be changed.
- There are the safeguards in clause 142. Reference is also made to the requirement under clause 147 to carry out a public consultation.

75. We do not consider that the need to update the legislation to reflect scientific change and best practice etc. is a sufficient justification for the very wide, and wide ranging, powers granted by Part 6. Nor does it seem to us that the wide range of activities covered by the Part should be used to justify the scale of the powers being conferred. Arguably, this justification is circular because it relies on the wide scope of the powers being conferred (and the consequent need to make changes resulting from that) as a reason for conferring such wide powers. The safeguards contained in clause 142 do not affect or limit the width of the powers or the scope of the provision which may be made in exercise of them.

76. **In enacting Part 6, Parliament will have set no policy framework for assessing the environmental impact of proposals over as wide a range of activities as it is possible to imagine. This would enable successive Ministers to implement regimes of greatly different character and effect without the need for further primary legislation. In our report, "Democracy Denied?",[44] we set out our view that skeleton legislation is rarely justified, and we do not consider that the Department have provided adequate justification in this case, particularly with its reliance on the precedent of regulations under section 2(2) of the European Communities Act 1972. Accordingly, we consider that the delegated powers conferred by Part 6 are inappropriate in creating skeleton legislation.**

Clause 156—amendments to section 134 of the Local Government, Planning and Land Act 1980 to allow urban development areas to be designated and urban development corporations to be established by negative procedure statutory instrument; and

Clause 157—amendments to the New Towns Act 1981 to allow an area to be designated as the site of a proposed new town by negative

43 See paragraphs 1401 to 1403 and 1409 of the Memorandum.
44 See, in particular, paragraph 66.

procedure statutory instrument

77. Section 134 of the Local Government, Planning and Land Act 1980 gives the Secretary of State power, exercisable by statutory instrument, to designate an area of land as an "urban development area" if the Secretary of State considers this to be "expedient in the national interest". Where an area has been so designated, section 135 of that Act requires the Secretary of State to establish, by statutory instrument, an "urban development corporation" for the purposes of regenerating the area.

78. Clause 156 of the Bill amends section 134 to give the Secretary of State a new power, exercisable by statutory instrument, to designate an area of land as an "urban development area" where—

- a local authority has made a proposal (a "locally-led proposal") to the Secretary of State that the land should be so designated; and
- the Secretary of State considers designation to be "expedient in the local interest".

Where an area is designated via this new route, the Secretary of State is required by section 135 to establish, by statutory instrument, an urban development corporation for the purposes of regenerating the area.

79. A key distinction between (a) the Secretary of State's existing powers to designate an area as an urban development area and to establish an urban development corporation for that area, and (b) the new powers to do so in response to a "locally-led proposal" is that the existing powers are subject to the affirmative procedure but the new powers are subject only to the negative procedure.

80. Section 1 of the New Towns Act 1981 gives the Secretary of State power, exercisable by statutory instrument, to designate an area of land as the site of a proposed new town if the Secretary of State considers it to be "expedient in the national interest" that the area is developed as a new town by a corporation established under that Act.

81. Clause 157 of the Bill inserts a new section 1ZB into the 1981 Act to give the Secretary of State a new power, exercisable by statutory instrument, to designate an area of land as the site of a proposed new town where—

- a local authority has made a proposal (a "locally-led proposal") to the Secretary of State that the land should be so designated; and
- the Secretary of State considers it to be "expedient in the local interest" that the area should be developed as a new town by a corporation established under that Act.

82. A key distinction between (a) the Secretary of State's existing power to designate an area as the site of a proposed new town, and (b) the new power to do so in response to a "locally-led proposal" is that the existing power is subject to the affirmative procedure but the new power is subject only to the negative procedure.

83. According to the Memorandum[45]—

45 At paragraphs 1513 to 1515.

- exercise of the new powers to designate an area of land as (a) an urban development area, or (b) the site of a proposed new town merits only negative procedure scrutiny because it would be "locally-led" (with the exercise of the existing powers to make such designations meriting affirmative procedure scrutiny because, by contrast, it is 'centrally-led'); and

- were the affirmative procedure to apply to locally-led designations under the new powers then "this could lead to uncertainty and delay concerning the designation of the development area… eroding business confidence and potentially discouraging inward investment in the project, and impacting the delivery of the new settlement".

84. We consider that a proposal to reduce the level of Parliamentary scrutiny which applies to the establishment of urban development areas and new towns merits a convincing explanation. We find the explanation given - that maintaining the existing requirements for affirmative procedure scrutiny "could lead to uncertainty and delay"–entirely unconvincing.

85. The Memorandum fails to adequately explain—

- why the level of Parliamentary scrutiny that is to apply to the exercise of powers to establish urban development areas and new towns should depend on whether or not those powers are exercised following the making of a proposal by a local authority; and

- why the exercise of such powers—

  - is sufficiently significant in policy terms to merit affirmative procedure scrutiny where it is not in response to a proposal made by a local authority; but

  - is not sufficiently significant in policy terms to merit affirmative procedure scrutiny where it is in response to a proposal made by a local authority.

86. **Accordingly, we consider that—**

- **the new powers in clause 156 to designate an urban development area and to establish an urban development corporation in response to a proposal made by a local authority should instead be subject to the affirmative procedure; and**

- **the new power in clause 157 to designate an area of land as the site of a proposed new town in response to a proposal made by a local authority should instead be subject to the affirmative procedure.**

Clauses 66, 153 and 219(10)—de-hybridisation provisions

87. The following clauses each contain provision for statutory instruments that are made under specified powers and that would otherwise be treated as hybrid instruments for the purposes of the standing orders of either House of Parliament to instead proceed in that House as if they were not hybrid instruments-

- clause 66 (new section 23(10A) of the Local Government Act 2003);

- clause 153 (new section 96I(8) of the Water Industry Act 1991); and
- clause 219(10) (re regulations under (a) Chapter 1 of Part 2 of the Bill, or (b) clause 210 of the Bill).

88. Hybrid instruments are instruments considered to affect specific private or local interests in a manner different from the private or local interests of other persons or bodies of the same class. Under House of Lords Private Business Standing Orders, a special procedure allows anyone whose private interests are directly and specially affected by an instrument to petition against it. The petition may in due course be considered by a select committee of the House of Lords.

89. The clauses referred to in paragraph 98 above contain provision preventing this special procedure applying to instruments made under specified powers and that would otherwise be hybrid.

90. We routinely draw the attention of the House to such "de-hybridising" clauses so that the House can satisfy itself that any interests that would normally be afforded protection by the hybrid instruments procedure are afforded protection by other means, e.g. statutory consultation.

91. **We therefore draw to the attention of the House the de-hybridisation provisions in—**

- **clause 66 (new section 23(10A) of the Local Government Act 2003);**
- **clause 153 (new section 96I(8) of the Water Industry Act 1991); and**
- **clause 219(10) (re regulations under (a) Chapter 1 of Part 2 of the Bill, or (b) clause 210 of the Bill),**
- **with a view to the Minister being requested to explain how any interests, which might otherwise have been afforded protection by the hybrid instrument procedure, may be protected by other means.**

PENSIONS DASHBOARDS (PROHIBITION OF INDEMNIFICATION) BILL

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

SHARK FINS BILL

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

GENETIC TECHNOLOGY (PRECISION BREEDING) BILL: GOVERNMENT RESPONSE

94. We considered this Bill in our 19th Report of this Session.[46] The Government have responded by way of a letter from the Rt Hon. Lord Benyon, Parliamentary Under Secretary of State at the Department for Environment, Food and Rural Affairs. The response is printed at Appendix 1.

46 19th Report, Session 2022–23, HL Paper 109.

APPENDIX 1: GENETIC TECHNOLOGY (PRECISION BREEDING) BILL: GOVERNMENT RESPONSE

Letter from the Rt. Hon. Lord Benyon, Parliamentary Under Secretary of State at the Department for Environment, Food and Rural Affairs, to the Rt Hon. the Lord McLoughlin CH, Chair of the Delegated Powers and Regulatory Reform Committee

I would like to thank your committee for its report following its review of the provisions in the Genetic Technology (Precision Breeding) Bill. I welcome the report and the debate at Committee Stage which followed its publication. As the minister responsible for the Bill in this House, I am committed to ensuring the powers in the Bill are proportionate, and subject to the appropriate level of Parliamentary scrutiny. The Government has carefully considered the Committee's recommendations and I have set out our response to each recommendation below.

Powers to prescribe the information that must be provided to the Secretary of State by a person who wishes to release or market a precision bred organism (paragraph 14)

Committee view

The Committee stated that, without further justification, the power provided to Ministers in clauses 4(3) and 6(2) is considered "inappropriate". The Committee consider the information that those who propose to release or market precision bred organisms are to be required to provide to the Secretary of State is a matter of "significant public interest".

Government response

Clause 4 sets out the notification requirements for release of a precision bred plant or animal (precision bred organism or PBOs) and clause 6 sets out the notification requirements for the marketing of such organisms. While releases of PBOs will not need to be authorised, the information contained in release notices will enable the Government to exercise oversight and, insofar as that information can be required to be published pursuant to regulations to be made under clause 18(1), provide transparency over such releases. The information provided in a marketing notice would serve these functions too and will also be used to confirm that the organism is precision bred.

While the content of these notices will serve some important purposes, we do not feel it is appropriate to set out the content requirement on the face of the Bill. Precision breeding is a rapidly developing area, and it is important that we have the ability to adjust our requirements for the form and content of the notice, and any accompanying information from time to time. We will seek expert, independent advice on the technical details to ensure that the requirements are appropriate and up to date.

Regulations under clause 4(3) will set out what information must be provided in a release notice and any associated information requirements which we believe are administrative in nature, for example the types of persons which can be specified in a release notice, or the form such a notice needs to be given in.

We anticipate that the content and information required in a release notice will initially be equivalent to that in the Genetically Modified Organisms (Deliberate

Release) (Amendment) (England) Regulations 2022, which Parliament debated and agreed under the affirmative procedure last year.

Regulations under this power may also prescribe who may be specified in notices to release precision bred organisms. The intention is to allow notifiers to specify organisations and groups of individuals to carry out releases, allowing research institutes to nominate farmers who can then carry out field trials.

Regulations under Clause 6 will set out what information must be provided in a marketing notice and any associated information requirements which we believe are administrative and technical in nature.

A marketing notice will need to contain detailed technical information that enables the advisory committee to provide a report to the Secretary of State on whether it considers the organism to be precision bred. The criteria for this assessment are already established in Part 1 of the Bill, and the content requirements of the marketing notice will have to reflect these criteria by setting out technical and administrative details of the evidence that must be provided to satisfy the Secretary of State that those criteria are fulfilled. This will include evidence of the genetic changes made, and a confirmation that all functional transgenes have been removed. ACRE will analyse this evidence and provide a recommendation to the Secretary of State for Environment, Food and Rural Affairs on whether the organism is precision bred. If more evidence is required, ACRE may request additional information to aid their decision. Furthermore, ACRE will publish guidance to help researchers and developers with the technical details.

While we remain of the belief that the matters to be set out in regulations under these powers are administrative in nature, the Government acknowledges these provisions are of significant public interest, and we accept the Committee's concerns. While we do not believe that it would be appropriate for the content requirements of these notices to be set out on the face of the Bill as these requirements would be expected to change over time as the technology and the industry develop, we are tabling amendments to change the Parliamentary procedure from negative to affirmative for both powers. These changes will increase the level of Parliamentary scrutiny when the powers are used to prescribe the information that must be provided to the Secretary of State by a person who wishes to release or market a precision bred organism.

Power to make provision requiring a person to carry out an environmental risk assessment before they import or otherwise acquire a precision bred organism (paragraph 18)

Committee view

The Committee views that the issue of whether a person who wishes to import or otherwise acquire a precision bred organism should have to carry out an environmental risk assessment "may be considered significant in policy terms" and stated that "unless the Minister can provide the House with a convincing justification for leaving this entirely to ministerial regulations–and subject to negative procedure scrutiny–the power in clause 17(1) is inappropriate".

Government response

We believe the powers in this clause are justified. The scientific advice from the Advisory Committee for Releases to the Environment, supported by the Royal Society, the Royal Society of Biology, and the Roslin Institute, is that PBOs pose

no greater risk to the environment than their traditionally bred counterparts. As a result, clause 41 removes PBOs from Part VI of the Environmental Protection Act 1990. This means that, among other things, precision bred organisms will no longer be subject to the restrictions in that Part that are designed to control the exposure of genetically modified organisms to the environment, including requirements for prior authorisation of releases of such organisms into the environment. It also means that the provisions in section 108 of that Act will no longer apply to PBOs. This is the existing statutory provision which would require an environmental risk assessment before a precision bred organism is imported or acquired. In practice, this requirement currently applies in relation to PBOs imported or acquired to be kept under contained use conditions. The Genetically Modified Organisms (Contained Use) Regulations 2014 control the use of precision bred organisms under contained use conditions, such as laboratories. These regulations apply during the stage of development before a GMO is released into the environment. The Government considers that they are appropriate and operate in accordance with their intended purpose, and it is not necessary for the Genetic Technology (Precision Breeding) Bill to amend these Regulations or any other requirements of the contained use regime.

Therefore, the power in Clause 17 will be used to retain the proportionate environmental risk assessment requirements that currently apply to precision bred organisms imported or acquired for use under contained use conditions. The Government believes that it is appropriate to retain these requirements through regulations rather than on the face of the Bill to ensure that this can be done in the most effective and accessible manner. Section 108 of the Environmental Protection Act 1990 was drafted to cover numerous situations, but this provision has only been brought into force partially. It is now desirable to separate out the risk assessment requirements that currently apply to precision bred organisms imported or acquired for use under contained use conditions, into a clear and accessible provision that would meet modern drafting standards. It is also desirable in the interests of accessibility and transparency for substantive requirements relating to the contained use regime to be set out in regulations which relate specifically to that regime, rather than in a Bill which deals principally with the release and marketing of organisms.

As the intention is only to retain specific requirements which exist currently and do not require updating, the Government considers the negative procedure to be appropriate in this instance.

Power to prescribe information that must be included in the precision breeding register (paragraph 24)

Committee view

The Committee considers the obligation imposed on the Government to keep a public "precision breeding register" as a means of delivering transparency is "an important matter of public interest". The Committee view that it is "important that the provision prescribing that information is subject to the appropriate level of parliamentary scrutiny" and "unless the Minister can provide the House with a convincing justification for it, the power in clause 18(1) is inappropriate".

Government response

Clause 18(1) imposes a duty on the Secretary of State to establish and maintain a register containing information in relation to various matters arising under the Bill.

This clause enables information relating to a wide range of matters relating to precision bred organisms to be made public, in the interest of transparency and public reassurance. It is intended that this would provide a high level of transparency, and that the information would be published as soon as reasonably practicable.

The range of information that this clause would enable to be published includes, but is not limited to, information relating to the release and marketing notices, reports from the advisory committees, as well as enforcement notices. It is not practicable to specify on the face of the Bill details setting out specifically which information about these matters will need to be published, as the contents of many of the notices and other documents will themselves be prescribed by regulations which will need to be updated from time to time to reflect technological developments and industry practice in what is a rapidly developing area.

The Government acknowledges these provisions are of significant public interest, and we accept the Committee's concerns, therefore we are tabling an amendment to change the Parliamentary procedure from negative to affirmative.

This change will increase scrutiny when powers are used to prescribe information that must be included in the precision breeding register. The Government hopes the change of procedure from negative to affirmative will provide reassurance.

Power to prescribe the circumstances in which the health or welfare of an animal is to be regarded as "adversely affected by any precision bred trait" (paragraph 29)

Committee view

The Committee views that defining the circumstances in which the health or welfare of an animal is to be regarded as "adversely affected by any precision bred trait" for the purposes of the Bill is "significant in policy terms and is a matter of public interest". The Committee requested justification of leaving this definition to ministerial regulations and considered "unless the Minister can provide the House with a convincing justification for it, the power in clause 25(1) is inappropriate".

Government response

Clause 25 enables clarification to be provided on the particular circumstances in which the health or welfare of a relevant animal or its qualifying progeny is, or is not, to be regarded as being adversely affected by any precision bred trait for the purposes of clause 11(3) or 15(1)(b). Clause 11(3) relates to the requirement for an animal welfare declaration to be provided when an application for a precision marketing animal marketing authorisation is made, whilst clause 15(1)(b) relates to the revocation of a precision bred animal marketing authorisation on the basis of post-marketing health and welfare concerns.

We acknowledge that the content of any regulations made under clause 25 is likely to be a matter of public interest. However, we consider that our approach is justified by the level of detail that may be needed as identifying the necessary detail in relation to precision bred traits, likely to be a technical and complex matter and may vary according to the precision bred animal. It is therefore appropriate for the detail to be properly informed by engagement with experts and stakeholders. With this mind, we recently commissioned research to help us to gather the scientific evidence required to assist in the development of regulations under clause 25(1).

Furthermore, it may be necessary to change the criteria in which the health or welfare of a relevant animal or its qualifying progeny is, or is not, to be regarded as being adversely affected by any precision bred trait over time to reflect developments in scientific understanding. Regulations under clause 25 are subject to the affirmative procedure in acknowledgement of the relative importance and the likely public interest in the detailed criteria that may be included in the regulations.

Powers to make provision for regulating the placing on the market of food and feed produced from precision bred organisms (paragraph 38)

Committee view

The Committee views that "the Government have failed to justify the inclusion of skeleton clauses in Part 3 of the Bill that leave it entirely to ministerial regulations to determine the substance of the regulatory regime that is to govern the placing on the market of PBOs for food and feed use; and accordingly, unless the Minister can provide the House with a convincing justification for the delegations of power in clauses 26, 27, and 28, those powers are inappropriate".

Government response

The Government wishes to reassure the Committee that the Food Standards Agency (FSA), which is the department primarily responsible for developing recommendations to Ministers on the new regulatory framework for PBOs for food and feed use recognises the importance of the concerns highlighted by the Committee in relation to Part 3 of the Bill. We trust that this response will provide reassurance about the plans for the powers given to the FSA in clauses 26, 27, and 28.

As an independent Government department, the advice the FSA gives to ministers is driven by its statutory responsibilities to protect public health and represent consumer interest in relation to food. The FSA already implements processes for authorising food and feed products, such as novel foods, that are well established. The detailed regulatory design for PBOs for food and feed use will conform in all respects to the requirements of existing food law and will be consistent with the existing administrative processes for authorising food and feed products which are well-established and well-understood by industry and other stakeholders.

To assist the Committee, we have set out below more detail about these requirements and the process for regulated products approvals.

Food law

The purpose of food law is to ensure "a high level of protection of human health and consumers' interest in relation to food" (Article 1 of retained Regulation (EC) No 178/2002). In order to achieve this, food law is based on risk analysis (Article 6 of retained Regulation (EC) No 178/2002), and these requirements will be at the forefront of the considerations when developing recommendations to Ministers about the regulatory framework for authorising PBOs for food and feed use.

The Regulated Products Service

The FSA intends to build a proportionate regulatory regime for PBOs for food and feed use which is based on a two-tiered authorisation process. This will be developed as part of the regulated products service.

The FSA, alongside Food Standards Scotland, already has responsibility for managing applications for new regulated food and feed products to be placed on the GB market. The information required in an application comprises of administrative, technical, and safety information, including the developers' details, the identity of the food or feed, the compositional data and nutritional information, as well as toxicological information and allergenicity.1

Clause 26

FSA proposals for the regulatory framework for authorisation of PBOs for food and feed use will be based on the expert advice of the Advisory Committee for Novel Foods and Processes (ACNFP), extensive consumer research and engagement with key stakeholders in the food industry. The objective for the framework is to ensure that the products that go through the assessment process may be brought to market under a shortened timeframe (compared to other regimes), without compromising food safety or consumer confidence.

The FSA has proposed a tiered approach that is proportionate, transparent, and based rigorously on the science and evidence. The ACNFP and its Products of Genetic Technologies (PGT) sub-committee have begun to define the criteria for which tier a precision bred organism could be assessed under. The criteria are likely to include:

- whether the organism would otherwise require assessment as a novel food;
- whether there is an impact on the nutritional quality that would potentially be disadvantageous, e.g., a significantly higher level of a nutrient;
- whether there is a significant increase in a toxicologically relevant component that would represent a safety concern, e.g., a compound increased to deter insects that could be a safety concern in humans.;
- whether there is a significant change in the allergenicity of the organism, e.g., significant increased levels of gluten in wheat flour.

Products similar to those that have already been obtained through traditional breeding, where the risks are well-understood, and where none of the above criteria apply are likely to be recommended to be placed in Tier 1. The FSA expects Tier 2 to be more in-depth and rigorous than assessment under Tier 1. It is important to note that under these proposals all products would be assessed rigorously and a decision about whether to treat products as Tier 1 or Tier 2 would be based on evidence.

The delegated powers in clause 26 will enable the implementation of a proportionate regulatory regime, which will build on the existing frameworks following expert scientific advice. This futureproofing is necessary as the specific technical details of the Precision Breeding Framework need to be science and evidence led. It is vital to take full account of the recommendations of the ACNFP as the detailed design of the regulatory approach is developed, and to not pre-empt their advice. The design of the regulatory regime for authorisation of precision bred organisms for food and feed use will be subject to full consultation, ministerial agreement and Parliamentary scrutiny.

Clause 27

The register for precision bred organisms authorised for food and feed uses is intended to be incorporated into the register of Regulated Food and Feed Products2 as part of ongoing work to provide public registers for all areas of

regulated products used in food and feed. The format of the register is likely to align with the information provided on other registers and the FSA will carry out a public consultation on the proposal for the public register. The register will provide enforcement authorities, international trading partners and consumers with vital information about what precision bred organisms are permitted for use in food and feed in England.

The Register of Regulated Food and Feed Products is an online, searchable database of all regulated products authorised for use in the GB market. This includes registers of authorised feed additives, flavourings, smoke flavourings and genetically modified organisms for use in food and feed, as well as a public register showing the progress of validated regulated product applications submitted to the application service. The registers give details on the authorised food and feed, including information such as the product type, the organisation that has applied to the regulated products application service, the product name, a summary of the product, and the phase of assessment it is currently in.

While the FSA board has committed to a public register of authorised precision bred organisms for food and feed use, the use of delegated powers in Clause 27 is considered appropriate because the specific information displayed on the register will be determined following appropriate consultation to consider what is necessary for consumers, industry, and enforcement officials. This includes largely technical details and is dependent on the regulatory framework adopted for precision bred organisms for food and feed use. The consultation will follow on from the decision on what constitutes the entire regulatory framework and is therefore more appropriate to secondary legislation. This clause is subject to affirmative procedure to ensure appropriate level of parliamentary scrutiny of the details of what the public register will contain.

Clause 28

Full compliance with the new regulatory regime is crucial to ensure food safety and to maintain public trust in the food system. The delegated powers in clause 28 are appropriate because the specific details of the regulatory regime will inform how compliance is enforced. The information provided by the applicant for the authorisation process will help shape enforcement tools, and the public register. As it is necessary to wait for scientific advice and ministerial decisions on the implementation of measures under the delegated powers in clause 26, it follows that the provisions to be made clause 28 will also be determined at a later date, to dovetail with the regulations under clause 26.

Paragraph 32 & 37: discretion afforded to ministers and requirement for consultation

The FSA is under a legal duty to conduct an open and transparent public consultation on the detailed proposals for the new authorisation process for precision bred food and feed, which acts as a safeguard to the exercise of such a wide discretion. This is required under Article 9 of retained Regulation (EC) 178/2002 (General Food Law), which states that "There shall be open and transparent public consultation, directly or through representative bodies, during the preparation, evaluation and revision of food law, except where the urgency of the matter does not allow it". This public consultation has not occurred yet, as it is intended to focus on specific proposals.

The FSA has been conducting consultation activities with relevant stakeholders and devolved administrations including stakeholder workshops, trade and industry forums, cross-government discussions and meetings with civil society and

academia. These activities are feeding into development of the technical details of the regulatory framework. Furthermore, the FSA has conducted extensive research with consumers, with a research project on perceptions of gene editing3 published in July 2021 and a follow up project concluded in October 2022. A full report of the most recent project is due to be published in early 2023 and is intended to give an accurate view of the current perceptions of precision bred organisms in food and feed, which will assist the FSA with building and maintaining consumer trust in the regulatory process moving forward.

While clauses 26 to 28 provide delegated powers for ministers, the use of the affirmative procedure and the requirement under General Food Law to carry out public consultation, as well as the independent advice supported by science and evidence provided by the FSA, should provide reassurance that there will be sufficient opportunity for public and Parliamentary scrutiny on the future regulatory framework.

Paragraph 35 & 36: skeleton clauses

The implementation of a regulatory system for food and feed derived from precision bred organisms is a highly technical and complex area, which the Government considers is not appropriate for primary legislation. The high level of detail needed to implement the regulatory framework is considered more appropriate as secondary legislation, as we trust is evident from the justifications and explanations above. The complexity of the science of precision bred organisms, combined with the need for openness and transparency, has required a high level of scrutiny by scientific experts to ensure the framework supports the FSA's mission of 'food you can trust', in which safety is a major component.

Power to make regulations that provide for enforcement measures in relation to failures to comply with requirements under Parts 2 and 3 of the Bill (paragraph 42)

Committee view

The Committee views the approach taken in clause 32(1)–which make provisions for ministerial regulation to determine whether the enforcement measures specified in that clause are to be put into place in relation to breaches of requirements under the Bill–"merits explanation; and unless the Minister can provide the House with a convincing justification for this approach, the power in clause 32(1) is inappropriate in its current form and should instead require regulations to be made to ensure that the enforcement measures in question are put into place."

Government response

The purpose of the Bill is to facilitate the development and commercial use of these new technologies in England. The technologies are novel, the science behind them is developing rapidly, and these technologies have not been commercialised to any significant extent to date. It is intended that the obligations created by this Bill will be backed by a proportionate enforcement regime which will encourage compliance, enforceable by civil rather than criminal sanctions. The Government wants to ensure that the enforcement regime remains appropriate and proportionate for what is expected to be a rapidly evolving industry, and that the enforcement regime takes account of–and, where appropriate, harnesses–relevant scientific developments in this area.

It is intended that the GM Inspectorate will be responsible for ensuring compliance with the new legislative framework in relation to release and marketing of precision bred organisms (other than for food and feed use).

The GM Inspectorate will also continue to be responsible for the assessment of suspected unauthorised Genetically Modified Organism (GMO) releases. Developers found to have released a GMO without authorisation will be subject to sanctions under existing GM legislation.

The enforcement regime in relation to food and feed from PBOs will need to reflect the substantive regulatory framework for these products, which is discussed above.

Part 4 already contains mandatory provisions in relation to each type of enforcement power, including safeguards such as requirements for any regulations made under these powers to provide for review and appeal. Furthermore, regulations under these powers are subject to the affirmative procedure, providing Parliament with the opportunity to scrutinise the sanction regime.

We therefore consider that the provisions on enforcement in the Bill strike an appropriate balance between the need to respond to a rapidly evolving industry on one hand, and providing certainty and accountability on the other.

I would like to reiterate my thanks to the Committee for its report and I am confident we have improved the bill as a result of its scrutiny.

January 2023

APPENDIX 2: MEMBERS' INTERESTS

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

For the business taken at the meeting on 25 January 2023, the following interests were declared:

Lord McLoughlin
Chair, Transport for the North

Attendance

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