HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

27th Report of Session 2022–23

# Economic Crime and Corporate Transparency Bill

# Strikes (Minimum Service Levels) Bill

# Energy Bill [HL]: Government Response

# Protection from Redundancy (Pregnancy and Family Leave Bill)

# Carer's Leave Bill

# Employment Relations (Flexible Working) Bill

Ordered to be printed 1 March 2023 and published 2 March 2023

Published by the Authority of the House of Lords

HL Paper 159

## *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 Bakewell of Hardington
Lord Carlile of Berriew
Lord Cunningham of Felling
Lord Goodlad
Lord Hendy
Baroness Humphreys
Lord Janvrin
The Earl of Lindsay
Lord McLoughlin (Chair)
Lord Rooker

## *Registered 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.

## *Publications*

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

## *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 hldelegatedpowers@parliament.uk.

## *Historical Note*

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

# Twenty Seventh Report

## ECONOMIC CRIME AND CORPORATE TRANSPARENCY BILL

1. This Bill came to the House of Lords on 27 January 2023. It makes provision about economic crime, corporate transparency, companies, limited partnerships, other kinds of corporate entity and the registration of overseas entities. The Home Office and the (then) Department for Business, Energy and Industrial Strategy furnished us with a delegated powers memorandum ("the Memorandum").

2. We draw attention to two provisions in the Bill.

### Clause 65

3. Clause 65 inserts a new clause 1098G into the Companies Act 2006, giving a wide margin of appreciation to the Secretary of State in conferring powers on the registrar of companies to suspend authorised corporate service providers (ACSPs). In turn, the registrar is allowed to exercise a discretion in suspending ACSPs.

4. The Bill says nothing about the grounds for suspension. The Memorandum gives one example where suspension might be appropriate - where an ACSP is under investigation, perhaps by the registrar or by a money laundering supervisor. A discretion is said to be necessary because the registrar will be best placed to assess an ACSP's suitability for ongoing authorisation.

5. The Memorandum offers two reasons for the regulation-making power in clause 65.[1]

   (a) "*The ACSP framework is newly introduced by this Bill and so the power to provide for a system of suspension of authorisation is necessary in order to enable processes to be adapted as learnings are taken from experience once the framework is operational.*"

   This sounds as if the Government wish the regulation-making power to fill any gaps that emerge. Even so, it would be helpful if the Bill said something about the reasons for suspension rather than leaving the matter entirely to regulations.

   (b) *"The power has been drafted in such a way so as to ensure that it has a focused scope. Section 1098G(2) clearly lays out what can be covered under the regulations, namely; the procedure for suspension, the period suspension is to last and the revocation of a suspension."*

   Clause 1098G(2) only says that the regulations may cover the procedure for suspension, its length and revocation. The Bill says nothing about why a person may be suspended.

6. **In our view, the inserted clause 1098G of the Companies Act 2006 should state the reasons why an ACSP may be suspended, rather than leaving the matter entirely to regulations.**

---

1 Paras 107 and 108.

### Clause 174(2) & (3)

7. Schedule 3ZA to the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 sets out the UK's "high-risk third countries" list, triggering enhanced due diligence. Schedule 2 to, and section 55 of, the Sanctions and Anti-Money Laundering Act 2018 require the list to be updated by regulations under the "made affirmative" procedure

8. Clause 174(3) of the Bill removes the requirement that the list be updated by secondary legislation, instead allowing the list to be updated administratively by the Treasury.

9. The Memorandum offers several reasons for this change.

   (a) First, it will be quicker to update the list administratively than legislatively.

   (b) Second, because the updates are based on a robust methodology used by the Financial Action Task Force (FATF), additional parliamentary scrutiny such as is provided by the affirmative procedure is not "essential".

   (c) Third, Parliament has asked the Government to consider a more streamlined process for changing the list of high-risk third countries given the pressures on parliamentary time.

10. We are not convinced by these arguments.

   (a) The current requirement for the "made affirmative" procedure means that a statutory instrument changing the list of high-risk third countries can come into force immediately, without the need for prior parliamentary debates. Accordingly it is difficult to see how the SI-making process is liable to cause significant delay. Historically, statutory instruments made in exercise of this power substitute one Schedule with another containing a revised list of high-risk third countries. They cannot take long to draft (they are normally two or three pages) and follow a standard template. The reason for the "made affirmative" procedure given by the Government during the passage of the Sanctions and Anti-Money Laundering Act 2018 was precisely so that decisions of the FATF could be implemented quickly.

   (b) Second, the FATF's methodology may well be thorough. But there is nothing to prevent the Treasury from making amendments to the list of high-risk countries for other reasons. And there is no guarantee that the Treasury will always act consistently with the FATF. Accordingly, even if it were thought appropriate to rely on the FATF process without requiring additional parliamentary scrutiny, such scrutiny should at the very least be required where the power is used for purposes other than to implement FATF decisions.

   (c) The usual way in which Parliament expresses its collective will is by primary legislation. We wonder therefore how Parliament has asked for the streamlining of the process, given that the 2018 Act provided for a streamlined and speedy legislative mechanism for updating the list of high-risk third countries. In any event, it is difficult to see why the

"made affirmative" procedure no longer offers a robust mechanism for speedily implementing FATF decisions when it clearly did in 2018.

11. Clause 174(2) and (3) removes the requirement that a change in the list of high-risk third countries (in relation to enhanced due diligence under the money laundering regulations) be made by statutory instrument. Instead, the Treasury will be able to make the changes administratively, even though changes to the list might be controversial - depending on any particular addition to, or removal from, the list. **In our view, the substitution of an administrative procedure for an existing legislative procedure is inappropriate and should be removed from the Bill.**

## STRIKES (MINIMUM SERVICE LEVELS) BILL

12. This Bill came to the House of Lords on 31 January 2023. The Bill's long title states that the Bill makes provision about minimum service levels in connection with the taking by trade unions of strike action relating to certain services. The (then) Department for Business, Energy and Industrial Strategy furnished us with a delegated powers memorandum ("the Memorandum").

13. We draw attention to two delegated powers in the Schedule to the Bill.

### New section 234B(1) of the Trade Union and Labour Relations (Consolidation) Act 1992

14. Paragraph 2 of the Schedule introduces a new section 234B(1) in the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"):

> "*(1) The Secretary of State may, for the purpose of enabling work notices under section 234C to be given, make provision by regulations for levels of service in relation to strikes as respects relevant services ("minimum service regulations").*"

15. This is a Bill that deals with minimum service levels during strikes. Yet there is nothing in the Bill saying what those minimum service levels are. We shall only know when Ministers make regulations after the Bill is enacted. This is small comfort to Parliament, which is considering the matter right now.

16. The Memorandum says that new section 234B(1) of the 1992 Act empowers the Secretary of State to make regulations setting out levels of service that an employer can require its workers to provide in relation to strikes as respects relevant services.[2] Paragraph 14 of the Memorandum offers a mere nine lines of justification for a power that imposes a significant legal restriction on the right to strike.

17. First, the Government are "of the view that the detail required to set the level of service for each relevant service is not appropriate for primary legislation". But the Memorandum does not explain *why* setting out *any* detail on the face of the Bill would be inappropriate. Parliament is not allergic to matters of detail, particularly where it relates to an important matter such as the right to strike.

18. Second, the Memorandum mentions that the regulations will be made after mandatory consultation. But if the Government had undertaken pre-legislative scrutiny, the Bill could have contained appropriate detail *and* had the benefit of consultation.

19. The Government have chosen to put no detail in the Bill in relation to minimum service levels, leaving the matter entirely to regulations. Important matters of detail should be included on the face of the Bill, perhaps with a power to supplement those matters in regulations.

20. Third, the Memorandum acknowledges that this is a significant power because it will introduce a key provision in the industrial action regime.[3] This is true. But rather than being a reason for the regulations to be subject to the affirmative procedure, it is a reason why this matter should be on the

2 Para 12.
3 Para 15.

face of the Bill rather than be left entirely to regulations (even affirmative regulations).

21. Fourth, the Memorandum offers just the one example of what minimum service levels might contain: "the level of service in the transport sector might need to have regard to the service requirements at different times of day and at weekend or bank holidays".[4] Further examples in the Memorandum would have afforded more context for Parliament. The regulation-making power in new section 234B(1) of the 1992 Act could have set out an exhaustive or non-exhaustive list of the matters that could be included in regulations. This is common practice. But it was not followed here.

22. Finally, if indicative draft regulations had been published alongside the Bill, it would have assisted Parliament's scrutiny of the Bill. Indicative draft regulations can demonstrate that matters have (or have not) been properly left to secondary legislation. And the Government must have some idea how they propose to exercise these powers.

23. **Given the absence of an exhaustive or non-exhaustive list in the Bill of the matters that can be included in regulations, the unconvincing reasons for this power in the Memorandum, and the absence of indicative draft regulations illustrating how the power might be exercised, the House may wish to press the Minister to provide an explanation of how the power to set minimum service levels in new section 234B(1) of the 1992 Act is likely to be exercised. In the absence of a satisfactory explanation, we regard the power as inappropriate.**

### New section 234B(3) of the 1992 Act

24. This Bill relates to minimum service levels in relation to relevant services. We have seen that the Bill does not define, or give any indication of, what is meant by minimum service levels. As for the meaning of "relevant services" we know nothing save that they must fall within one of six categories: health, fire and rescue, education, transport, nuclear, and border security.

25. The services covered by the Bill are as fundamental as the minimum levels of that service. Once again, the reasons offered by the Memorandum are not convincing.

26. First, the Memorandum says that the detail required accurately to describe the relevant services under each category of service set out in the Bill is not appropriate for primary legislation. But the Memorandum does not explain *why* setting out at least *some* detail on the face of the Bill would be inappropriate.

27. Second, regulations will enable the Secretary of State to make the decision at the appropriate time, after consultation and in the light of relevant evidence. But if the Government had undertaken pre-legislative scrutiny, the Bill could have contained appropriate detail *and* had the benefit of consultation.

28. Third, regulations will allow modifications to the list of relevant services as circumstances change. However, were the Bill to define more fully the meaning of relevant services, it would be possible to incorporate a power to make changes by regulations rather than the Bill being completely silent on

4 Para 14.

the matter with everything left to regulations. Once again, indicative draft regulations would have assisted us in scrutinising the powers in this Bill.

29. The Memorandum offers a precedent for the new power in section 234B(3). Under section 226(2E) of the 1992 Act, an enhanced majority is necessary in strike ballots (40% of those entitled to vote must have voted in favour) in relation to "important public services", a term that is defined in regulations.

30. We are not convinced by this precedent. The 40% enhanced majority appears on the face of the 1992 Act, albeit with a power to apply it to important public services. By contrast, the limitations on the right to strike in relation to minimum levels of relevant services do not appear on the Bill at all and are left to regulations.

31. The meaning of "relevant services" is as important as the meaning of "minimum levels of service". **For the reasons given earlier in relation to the power in new section 234B(1) of the 1992 Act, the House may wish to press the Minister to provide an explanation of how the power to define "relevant services" in new section 234B(3) of the 1992 Act is likely to be exercised. In the absence of a satisfactory explanation, we regard this power as inappropriate.**

## ENERGY BILL [HL]: GOVERNMENT RESPONSE

32. We considered this Bill in our 8th, 10th, and 11th Reports of this session.[5] The Government have responded by way of a letter from Lord Callanan, (then) Minister for Business, Energy and Corporate Responsibility at the Department for Business, Energy & Industrial Strategy The response is printed at Appendix 1.

## PROTECTION FROM REDUNDANCY (PREGNANCY AND FAMILY LEAVE) BILL

33. There is nothing in this private member's Bill which we would wish to draw to the attention of the House

## CARER'S LEAVE BILL

34. There is nothing in this private member's Bill which we would wish to draw to the attention of the House.

## EMPLOYMENT RELATIONS (FLEXIBLE WORKING) BILL

35. There is nothing in this private member's Bill which we would wish to draw to the attention of the House.

5 8th Report Session 2022–23; HL Paper 45, 10th Report Session 2022–23 HL Paper 65 and 11th Report Session 2023–23 HL Paper 66

## APPENDIX 1: ENERGY BILL [HL]: GOVERNMENT RESPONSE

### Letter from Lord Callanan, (then) Minister for Business, Energy and Corporate Responsibility at the Department for Business, Energy & Industrial Strategy to the Rt Hon. the Lord McLoughlin CH, Chair of the Delegated Powers and Regulatory Reform Committee

Thank you for your Committee's reports following its detailed scrutiny of the provisions of the Energy Bill ("the Bill"). As the Minister responsible for the Bill, I welcome these reports and the constructive debate that has taken place on the Bill at Committee stage.

The Committee provided a range of comments and recommendations in relation to the delegated powers contained in the Bill. I agree with the Committee that it is important to ensure the delegated powers are appropriate and subject to a sufficient level of Parliamentary scrutiny.

The Government has carefully considered the Committee's recommendations. This letter sets out the Government's response to each recommendation. I am pleased to accept a number of the Committee's recommendations and the Government intends to table several amendments to address points raised by the Committee. These will be considered during the upcoming Report Stage in the House of Lords.

In response to the Committee's other recommendations, this response provides further justification where the Committee felt insufficient explanation was provided in the Delegated Powers Memorandum. Please note that all Part, Chapter and Clause numbers contained in this letter are references to the Bill as introduced and therefore are consistent with the references contained in the Committee's report on the Bill.

#### *Civil Penalties and Rights of Appeal*

*Committee View*

The Committee expressed concern in relation to Part 3, Part 7 and Part 11 of the Bill, noting that powers are conferred to make provision for the imposition of civil penalties without a requirement for the regulations to also provide for a right of appeal. The Committee highlight the following clauses in particular:

- Clause 109 relating to the Hydrogen Village Conversion Trial.
- Clauses 179(2)(c), 182(2)(c), 183(1) relating to Heat Networks Zones
- Clauses 225 and 226 relating to Marine Oil Pollution and Habitats (reducing effects of offshore oil and gas activities etc.).

*Government Response*

The Government has noted the points raised in relation to the above clauses. We therefore intend to table amendments so that regulations made under clauses 109, 183, 225 and 226 which make provision for a civil penalty must also include provision for a right of appeal to a court or tribunal against the imposition of such a penalty.

In addition to the clauses highlighted by the Committee, we have identified further instances in the Bill where there is no requirement for regulations to provide for a right of appeal where civil penalties are imposed. To ensure a consistent approach

across the Bill, we plan to table amendments to ensure that regulations made under those clauses must also provide for a right of appeal. The relevant clauses are:

- Clause 67(3) relating to the functions of Hydrogen Levy Administrator
- Clause 83(3)(a) relating to Decommissioning of Carbon Storage Installations.
- Clause 105(1)(b) relating to Low Carbon Heat Schemes. •
- Clause inserted after clause 201 relating to ESOS Enforcement.
- Paragraph 3 of Schedule 12 relating to amendments of the Electricity Act 1989.
- Paragraphs 39(1)(d), 40(1)(c), 41(1)(d) of Schedule 15 relating to Heat Networks Regulation.

### Clause 165: Power to amend the definition of "heat network" etc

*Committee View*

The Committee considered extending the amendment power to the definitions of "relevant heat network", "district heat network" and "communal heat network", as well as "heat network", to be inappropriate without further justification. The Committee recommended that if and to the extent that the powers conferred by clause 165(4) are to be retained, they should be subject to the affirmative procedure.

*Government Response*

We acknowledge that the Delegated Powers Memorandum only referred to the powers to amend the definition of 'heat network'. We would like to provide further clarification to reassure the Committee that the other definitions in scope of the power ('relevant heat network', 'district heat network' and 'communal heat network') do not address different matters. As each of these definitions are themselves directly related to the wider definition of a heat network (as described in clause 165(1) and 2)), we consider that a similar justification for powers to amend these definitions applies. Namely, that changes in heat network technology in future may mean the current definitions do not capture all types of heat network and relevant technologies. Having considered the report, we agree with the Committee's recommendation that the powers conferred by clause 165(4) should be subject to the affirmative procedure. The Government intends to table an amendment to that effect.

### Clauses 166–167: Power to amend regulations concerned with alternative dispute resolution for consumer disputes

*Committee View*

The Committee suggested further clarification should be provided regarding how the Bill confers powers to amend the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 ("the 2015 Regulations") in relation to Great Britain

*Government Response*

The Government is pleased to provide further clarification in response to the Committee's view. The Bill confers powers to amend the 2015 Regulations in Great Britain in the following way. The Gas and Electricity Markets Authority ("GEMA") will be the initial heat networks regulator for Great Britain, under

clause 166. GEMA is designated as a 'competent authority' under the 2015 Regulations, in relation to the areas for which it has regulatory responsibility. As we are extending its responsibility to include heat networks, the scope of their competent authority role will follow.

However, there may be a future scenario whereby GEMA is replaced as regulator by regulations under clause 166. Under clause 238 the Secretary of State may make consequential provision to amend the 2015 Regulations and appoint a different competent authority in relation to heat networks.

The Northern Ireland Authority for Utility Regulation is not currently a competent authority under the 2015 Regulations so clause 167 makes separate provision in relation to Northern Ireland.

We hope this explanation provides reassurance to the Committee.

## Clause 168: Power to make provision for the regulation of heat networks etc

### *Committee View*

The Committee considered that sufficient justification of the broad nature of the provisions had not been provided, in particular, by failing adequately to explain why it is not feasible to put the detail about the regulation of heat networks on the face of the Bill. The Committee also raised concern that the power to create offences is not limited to specific purposes. The Committee recommended that if the scope of the powers conferred by clause 168 should remain unchanged, the affirmative procedure should apply for all exercises of the power.

### *Government Response*

We have considered the points made in the Committee's report and are pleased to provide the Committee with further justification regarding the breadth of this power. We remain of the view that it is appropriate and necessary for substantive provisions relating to the regulation of the heat network market to be contained in subsequent regulations. In particular, the nascency of the sector and its importance for meeting net zero targets, justifies the proposed approach as set out in the Delegated Powers Memorandum. The Government has published a detailed policy statement which provides further detail on provisions that we expect to be included in regulations.

I would also like to provide further clarification on how the power to create offences under clause 168 (and paragraph 73 of schedule 15) is limited. Having further considered the drafting following the Committee's comments, we consider it is implicit that the powers to create offences in Schedule 15 relate to breaches of requirements in the regulations and do not have wider application, given that the scope of Schedule 15 is limited by clause 168(1). I hope this will provide reassurance to the Committee.

With regard to the Committee's recommendation on the application of the affirmative procedure, I am pleased to inform the Committee that we plan to table amendments such that the affirmative procedure applies in more cases in relation to regulations made under clause 168. Specifically, the affirmative procedure will apply to regulations relating to:

- Part 8 of Schedule 15 of the Bill on the introduction of step-in arrangements in the event of heat network insolvency.

- Part 9 of Schedule 15 of the Bill on the introduction of a Special Administration Regime in the event of heat network insolvency.
- Paragraph 57 of Schedule 15 of the Bill on powers to enter premises for heat network regulated entities

We believe these cases to be suitable for the affirmative procedure given the nature of the powers provided to the Secretary of State and the likely Parliamentary interest in debating these areas of heat networks regulation.

However, we do not consider that the affirmative approach should apply in all cases. For example, there may be some instances where minor changes are needed, and the negative procedure would be more appropriate.

## Clauses 171–172: Amendment of the Heat Networks (Scotland) Act 2021

### *Committee View*

The Committee recommended that the powers conferred by clauses 171 and 172 should only be exercised with the consent of Scottish Ministers or, in the absence of a consent requirement, the affirmative procedure should apply.

### *Government Response*

The Government remains of the view that the current approach in the Bill is appropriate. In particular, conferring functions on the GEMA is reserved to the UK Government, with agreement between the Department for Business, Energy and Industrial Strategy (BEIS) and the Scottish Government on this proposed approach. The power as drafted in clause 171 will deliver the Scottish Government's preference for GEMA being appointed as licensing authority and ensure a consistent approach regarding the appointment of GEMA as heat networks regulator across Great Britain.

The power as drafted in clause 172 meets a request from the Scottish Government to allow for monitoring and enforcement powers for GEMA as licensing authority in Scotland, given the Heat Networks (Scotland) Act 2021 does not provide for these powers. There is no current intention for the Secretary of State to use this power under Clause 172 more than once and beyond this express purpose. The UK Government will consult with the Scottish Government over any exercise of the power. Given these clauses reflect the Scottish Government's policy intent and follow ministerial agreement on the approach, we do not consider that the exercise of the power should be subject to the consent of Scottish Ministers.

However, we welcome the Committee's recommendation on the use of the affirmative procedure in relation to this power. As such, we intend to table an amendment such that the affirmative procedure applies to regulations made under clause 171. I hope this reassures the Committee of our commitment to ensuring appropriate levels of Parliamentary scrutiny.

The Committee also noted in their report that there is no provision in clause 172 for the regulations to be subject to Parliamentary scrutiny, assuming that this was an oversight. I would like to thank the Committee for highlighting this and to reassure the Committee that we intend to table an additional amendment to ensure regulations made under clause 172 are also subject to the affirmative procedure

### Clause 174: Regulations about heat network zones

*Committee View*

The Committee considered that inadequate justification had been provided for the scope of the power conferred by clause 174; and that, if the intention is to exercise the powers in accordance with the specific provisions contained in clauses 175 to 185, then the power to make regulations should expressly be limited in that way.

*Government Response*

The Government considers that the scope of the power as drafted is necessary due to the relatively early stages in development of the zoning framework itself and nascency of the heat networks market more generally. We also note that the affirmative procedure would apply by default to the exercise of powers in relation to zoning (clause 174(5) sets out a very limited number of areas in which the negative procedure may instead apply).

### Clauses 178(3) and (4): Zoning methodology

*Committee View*

The Committee considered it inappropriate for clause 178(3) and (4) to confer powers which would allow requirements relating to the zoning methodology to be set out in non-statutory documents.

*Government Response*

We welcome the Committee's views on these clauses. Following consideration of the Committee's comments, we plan to table an amendment to the Bill to ensure that any non-statutory documents do not have legislative effect.

### Clause 187: Energy smart appliances

*Committee View*

The Committee recommended further explanation of the open-ended nature of the power, and why it is not feasible or appropriate to limit the scope of the power. In the absence of further explanation, the Committee considered the power in its current form as inappropriate. The Committee made a further recommendation that if the power is retained in its current form, the affirmative procedure would offer a more appropriate level of Parliamentary scrutiny.

*Government Response*

The Government notes the Committee's comment on the open-ended nature of the power in clause 187 on Energy Smart Appliances ("ESAs") and we welcome the opportunity to provide the Committee with further explanation. The energy smart market is a nascent market, so for this power to function effectively it will need to be sufficiently broad. This will enable an agile and responsive approach to technological developments and emerging cyber risks. Subordinate legislation will specify how the powers will be used to regulate energy smart appliances. This will receive Parliamentary scrutiny, as the first statutory instrument to be laid will be subject to the affirmative procedure. We would also refer the Committee to the 2022 consultation on Delivering a Smart and Secure Electricity System, and the policy statement which accompanies these clauses. This statement sets out in more detail the policy intent of this power, including details of the proposed phased approach from now towards the mid-late 2020s.

The Government therefore considers that it is both proportionate and prudent not to limit the scope of the power by reference to the matters set out in clause 187(3), as there may be related matters, such as consumer protection, to which the Secretary of State may wish to have regard. Likewise, strict limitations on the scope of the power by reference to the types of provision set out in clause 187(4) and (5) would not be appropriate, since an exhaustive list of such provisions could quickly become too restrictive in the nascent market referred to above. We remain of the view that the indicative nature of subsections (3), (4) and (5) is appropriate, given that there will need to be further and continuing consultation with stakeholders as to how ESAs should be regulated.

The Government further notes the Committee's comments in relation to Clause 192, on the procedure to be used to lay secondary legislation relating to ESAs and load control. The affirmative procedure is not limited to only the first exercise of these powers, but also to any regulations which create a criminal offence, or any regulations which amend clause 187(2) to change the list of appliances which are in scope of the regulations. The negative procedure would be used in other circumstances to allow the regulations to be quickly amendable, to reflect the pace of technological change and respond to new risks, as the Committee notes. However, we acknowledge the Committee's comments that the made affirmative procedure could apply in some cases, in relation to regulations made under Clause 187. As such, we intend to table an amendment to apply the made affirmative procedure to regulations that contain particular kinds of provision. In addition to those already noted where the draft affirmative procedure will be retained, we propose the made affirmative procedure is used where energy smart regulations introduce significant changes such as: to bring other appliances into scope, to introduce a requirement to comply with a new standard or to introduce enforcement mechanisms or penalties

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

#### *Committee View*

The Committee noted three instances where provisions governing a subject area are currently contained in regulations made under section 2(2) of the ECA. They commented that this does not by itself make it appropriate to use a regulation making power to amend and extend the provisions in that subject area. The Committee highlighted that regulation-making powers need to be justified on their own merits.

Similarly, the Committee also commented that the level of scrutiny applied to regulations under section 2(2) of the ECA is not a reliable indicator of the appropriate level of Parliamentary scrutiny for regulations making provision in the same subject area. The level of Parliamentary scrutiny should be determined solely by considering the nature of the new power.

#### *Government Response*

The Government agrees with the Committee that the proposal to confer regulation making powers to amend provisions should be justified on merit and not because the ability to amend regulations was provided previously through the ECA section 2(2).

In relation to the Committee's comments on Part 9 of the Bill, this replacement power to amend the Energy Performance of Buildings regime will allow the Energy Performance of Buildings Regulations to be amended to reflect domestic policy aims in improving the energy efficiency of buildings to help meet the Government target of net zero carbon emission by 2050.

We are considering amendments to the Energy Performance of Buildings regime to make it fit for purpose to support domestic policy ambitions to reduce energy use and carbon emissions from buildings. Without the power in this Bill to amend the Energy Performance of Buildings regime, the Government will be unable to make changes to prioritise domestic policy aims of improving energy efficiency of buildings and reduce their energy use and carbon emissions. This is a part of the Government's Heat and Buildings Strategy (2021) to tackle fuel poverty and reduce carbon emissions to help meet the Government's net zero carbon emissions target by 2050.

The Government considers that the Parliamentary scrutiny of any future secondary legislation that is intended to make changes to the energy performance of buildings regulations is important. We consider that the Parliamentary scrutiny provided through the negative procedure is appropriate and sufficient to allow Parliament to examine and challenge amendments before they become law. The Government considers this approach justifiable because the nature of the regime is energy performance of buildings, rather than individuals. As such, it will not place significant burdens on individuals other than perhaps in the case of penalties which will be subject to the affirmative procedure.

The Committee's comments on **Part 11** are specifically addressed in our response to the below recommendations on clause 226.

The Government was pleased to note that the Committee was content that the powers contained in clauses 198–201 and clause 225 are appropriately constrained. As such, the Government does not intend to table any amendments in relation to these clauses.

### Clause 226: Power to make regulations for reducing effects of offshore oil or gas activities etc.

*Committee View*

In contrast with their comments on clauses 198–201 and clause 225, the Committee considered the broad powers conferred by clause 226 to be insufficiently justified in the delegated powers memorandum, and therefore inappropriate. The Committee also commented that if retained in their current form, regulations made under clause 226 should be subject to the affirmative procedure in all exercises of the power.

*Government Response*

The Government wishes to provide further justification to reassure the Committee that the powers conferred by clause 226 are appropriate and timely. We consider it is necessary to draft powers to deal with fast-moving technological change in a flexible and forward-looking way to encourage investment - particularly in technology vital for the energy transition. Waiting for the technology to develop and become operational, before taking powers to regulate, risks delay. Being over-prescriptive in primary legislation also risks definitions becoming quickly out-dated. Powers to make regulations for habitats assessment of offshore oil and gas

activities will ensure that the existing regime can be maintained going forward and serve as a suitable regime for inclusion of new offshore gas technology–such as hydrogen production and storage.

However, having considered the Committee's comment in relation to clause 226, we agree with the recommendation that the affirmative procedure should be applied to all new regulations that are made pursuant to clause 226 (i.e. even where such regulations do not create a criminal offence or provide for a civil penalty). The Government intends to table an amendment that adjusts clause 226 to that effect.

## Part 10: Core fuel sector resilience

### *Committee View*

The Committee repeated several comments made in their letter to the House of Commons Business, Energy and Industrial Strategy Committee on the draft "Downstream Oil Resilience Bill" on 28 October 2021. In their report on the Energy Bill, the then Committee said:

- The relevant clauses contain inappropriate delegations of power because the Bill lacks clear criteria or parameters for the exercise of the very broad powers in those clauses to impose requirements backed by criminal penalties.
- It should only be in exceptional circumstances that such powers are capable of being exercised without Parliamentary scrutiny; and it is only justifiable to provide for the power to be exercised by direction where it concerns a single case on the basis of the specific circumstances which apply in that case. Where the Secretary of State wishes to impose generic requirements on a class of persons, that should be done through the exercise of the regulation making powers so that the exercise of powers is subject to Parliamentary scrutiny.
- There should be a requirement for the Secretary of State to lay every direction before each House of Parliament unless the Secretary of State is of the opinion that disclosure of the direction would be against the interests of national security or the commercial interests of any person. There is still no requirement for the publication of directions and accordingly we make the same recommendation again.

### *Government Response*

The Government notes the Committee's comments on the direction powers, both in their letter on the draft Bill and their report on the Energy Bill. I would like to reassure the Committee that the Government has introduced further requirements parameters regarding the use of the direction powers, since the draft bill. These include the requirement to give notice of the direction, providing a reason why the direction is being issued and when the direction will come into force. The recipient is also allowed to make representations which must be considered by the Secretary of State before the direction is made.

The Government recognises the Committee's view regarding the discretion it has to issue a direction. This is why there are protections in the Bill as to the use of the powers and ensuring that any direction is fair, proportionate and reasonable. These safeguards include the requirement to consult with other parties–those responsible for the control of major accident hazards, and for the environment–and a right to appeal the direction notice if they wish to do so on the basis that it is wrong in fact or law or that it is unfair or unreasonable.

The Government's objective is to ensure the resilience of the downstream oil sector and renewable transport fuels. These measures are aimed to be proportionate and strike a fair balance between the general interest of the community and the protection of the individual's fundamental rights.

As stated in the Government response to the Committee's letter on the draft Bill, dated February 2022, the primary distinction between the direction-making power and the regulation-making power is that the former will be made in respect of identified specific persons that need to take urgent action. The latter is intended to apply to a whole class of persons who are required to carry out certain actions to improve the industry's resilience over a longer period of time or to deal with a specific issue.

The direction-making powers only apply to persons carrying out core fuel activities with the threshold set out in the Bill. The purpose of this is to allow the Government to direct specific persons rather than a class of persons. The persons who meet the threshold requirement for the direction-making power are considered to be critical contributors to the resilience of the sector as a whole. It is therefore important to have the power to direct them individually to take action to minimise the risk of disruption. It is important that the Government can act swiftly to put these directions in place and a requirement for Parliamentary scrutiny would lead to delay and significantly reduce the effectiveness of the power.

In contrast, the regulation-making powers are to be used in circumstances where an entire class of persons i.e. a specific segment of the industry is needed to take action, and therefore regulations directed at a class or category of operators or owners would be more appropriate than individual directions. The Committee states that directions require a two-week consultation, thereby undermining the urgency rationale for this power. The Government considers this timing sufficient in order to make an informed decision as to whether a direction should be issued given the potential impact, and a draft direction can be drafted swiftly following consultation. This is considered suitable to be used in a case of urgency in comparison to putting measures in place by regulations.

The Government has considered the recommendation to lay every direction before each House of Parliament and publish each direction. We recognise the importance of Parliamentary scrutiny and are in the process of agreeing a protocol of engagement with the BEIS Select Committee to enable Parliamentary scrutiny regarding the directions made. This includes those that have to remain unpublished due to commercial sensitivity and national security. The protocol of engagement includes a commitment to disclose every direction to the Select Committee after issuing, in order to maintain transparency and will consider any requests from the Select Committee regarding the publication of a direction.

### Clause 227: Power to establish charging scheme

#### *Committee View*

The Committee highlighted that, for consistency with the existing provisions on fees, a charging scheme made under the new powers introduced by clause 227 should be contained in regulations subject to the negative procedure.

#### *Government Response*

The Government welcomes the Committee's comment on clause 227 and agrees that any charging scheme made under the powers introduced by clause 227 should

be made by regulations and subject to the negative procedure. We intend to table an amendment to the Bill to that effect.

### Clause 238: Power to make consequential provision etc.

*Committee View*

The Committee commented on the unusual nature of the powers contained in clause 238 and highlighted that without further explanation the Committee consider the powers inappropriate.

*Government Response*

The Committee provided a general criticism that the powers in this Part were not explained or justified within the Delegated Powers Memorandum. This was an oversight, and we welcome the opportunity to provide suitable justification in this response. The Committee considered the power contained in clause 238 to be unusual in nature. As the Committee acknowledges, powers to make consequential amendments are routinely included in Bills in order to enable the Government to make consequential amendments to other primary legislation or secondary legislation 'as a consequence of' measures contained in or provided for in an Act.

For example, the Energy Bill makes provision for a new Independent System Operator and Planner (Part 4) which will have functions in relation to the electricity transmission systems and the gas network. Provision is also made for an overhaul of the system of codes which govern the operation of the electricity and gas systems (Part 5). There are significant system changes, which will require a large number of amendments to existing pieces of legislation to reflect the change of system operator and the new basis for the codes. We note that the Committee's comments in relation to the inclusion of the words "in connection with" in clause 238. We consider the nature of the amendments that will need to be made as a result of the Act (when enacted) justifies this additional wording and we note that this formulation in a consequential amendment provision is not unprecedented (see s. 5 of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020)

I hope this provides sufficient reassurance for the Committee, and that they will agree with the Government's view that the powers in clause 238 are appropriate and necessary.

Once again, I would like to reiterate my thanks to you and the Committee for your engagement, particularly given the size and complexity of the Bill. The Committee raised many important issues, and we are pleased to have accepted a number of these recommendations to improve the drafting of the Bill. I hope that the Committee is reassured by the points set out in this letter and I look forward to continuing to work constructively with the Committee during the remaining stages of the Bill's passage.

If the Committee requires any further detail on the Government's plans for secondary legislation, I would be happy to discuss.

**31 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 1 March 2023 Members declared no interests.

### Attendance

The meeting was attended by Baroness Bakewell of Hardington Mandeville, Lord Cunningham of Felling, Lord Goodlad, Lord Hendy, Baroness Humphreys, Lord Janvrin, The Earl of Lindsay, Lord McLoughlin and Lord Rooker.