



HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

41st Report of Session 2022–23

**Levelling Up and Regeneration
Bill: Government Amendments**

**Online Safety Bill: Government
Response**

Ordered to be printed 7 September 2023 and published 7 September 2023

Published by the Authority of the House of Lords

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.

Members

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/hldprcpublications.

General Information

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

Contacts for the Delegated Powers and Regulatory Reform Committee

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

Forty First Report

LEVELLING-UP AND REGENERATION BILL: GOVERNMENT AMENDMENTS

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. Report stage began on 11 July 2023 and is scheduled to continue until 13 September.
2. On 29 August, the Government tabled amendments to the Bill to be moved on Report.
3. A Supplementary Delegated Powers Memorandum (“the Supplementary Memorandum”)¹ has been provided for those amendments.
4. We draw the following powers to the attention of the House.

Amendment 247YY:² new clause 159A—power of Secretary of State to make regulations about the operation of legislation in connection with the effect of nutrients in water that could affect a habitats site

5. New clause 159A gives the Secretary of State a Henry VIII power to make such provision by regulations as the Secretary of State considers “appropriate” “about the operation of *any relevant enactment* in connection with the effect of nutrients in water that could affect a habitats site connected to a nutrient affected catchment area”.
6. “Habitats sites”³ are afforded special protection by legislation. For the purposes of clause 159A—
 - a habitats site is connected to a nutrient affected catchment area if water released into the catchment area would drain into the site;
 - a “nutrient affected catchment area” is a catchment area for a habitats site which site is “in an unfavourable condition by virtue of pollution from nutrients in water”; and
 - “nutrients” means nutrients of any kind.
7. The power allows the Secretary of State to make provision about the operation of “any relevant enactment” and this is broadly defined: it includes any Act of Parliament, statutory instrument or retained direct EU legislation that “relates to the environment, planning or development in England” save only for (a) new clause 159A itself, and (b) Part 6 (assessment of plans and projects) of the Conservation of Habitats and Species Regulations 2017.
8. The provision that could be made includes amending or repealing relevant primary legislation and providing for statutory obligations to be treated as discharged. It is notable that the new clause also disapplies regulations 9 and

1 Memorandum by the Department for Levelling Up, Housing and Communities and the Department for the Environment, Food and Rural Affairs, undated but sent to the DPRRC on 29 August: <https://bills.parliament.uk/publications/52436/documents/3885> [accessed 7 September 2023].

2 See the Sixth Marshalled List of Amendments to be Moved on Report, dated 4 September 2023.

3 For these purposes, “habitats site” means a European site within the meaning of the Conservation of Habitats and Species Regulations 2017 (S.I. [2017/1012](#)) (see regulation 8).

16A of the Conservation of Habitats and Species Regulations 2017, which impose duties on Ministers and others to (a) exercise “functions which are relevant to nature conservation” so as to ensure compliance with the requirements of the Habitats Directive and the Wild Birds Directive; and (b) manage protected sites with a view to contributing to the achievement of conservation objectives.

9. The power is subject to the affirmative procedure but is otherwise subject to little by way of constraint—
 - there is no requirement for consultation, for pre-conditions to be met or for criteria to be satisfied;
 - it is sunsetted but has effect until 31 March 2030.
10. The power appears to be broad and open-ended but, as it relates to a complex area of law, it is difficult to assess its significance and the range of situations in which it might be used. In such circumstances, the Supplementary Memorandum ought to assist but we consider that it falls well short of fully explaining the purpose of the power or justifying its full extent. It states⁴ that “the purpose of the power ... is to make incidental, consequential and similar provision” and that it will “control matters of procedural detail” but it fails to clearly explain why the power is considered to be limited to provision of that kind.
11. **The paucity of explanation provided in the Supplementary Memorandum is of particular concern given that the power is part of a package of measures that may prove highly controversial in policy terms: the Office for Environmental Protection has taken the step of issuing statutory advice to the Government warning that the measures “would demonstrably reduce the level of environmental protection provided for in existing environmental law” and amount to “a regression”⁵ and there appears to have been no public consultation or engagement with stakeholders prior to the publication of the measures.**
12. The power is subject to the affirmative procedure but, as we have repeatedly said, this “offers nothing like the scrutiny given to a bill. A bill typically goes through several substantive stages in each House and can be amended. An affirmative statutory instrument is unamendable during its making and is debated once in each House”.⁶
13. As we stated in our “*Democracy Denied?*” Report—“Henry VIII powers are controversial, and for good reason. Every such power, and its scope, must always be fully justified”.⁷
14. **We consider that the Supplementary Memorandum provides inadequate justification for giving the Secretary of State an apparently broad and open-ended Henry VIII power to change how**

⁴ At paragraphs 24 and 25.

⁵ [Letter](#) dated 30 August 2023 from Dame Glenys Stacey, Chair, Office for Environmental Protection to the Secretary of State for Levelling Up, Housing and Communities and the Secretary of State for Environment, Food and Rural Affairs containing advice under section 30 of the Environment Act 2021: [accessed 7 September 2023].

⁶ See, for example, [34th Report](#), (Session 2017–19, HL Paper 194), para 6 (on the Agriculture Bill).

⁷ “*Democracy Denied? The urgent need to re-balance power between Parliament and the Executive*”, (Session 2021–22, HL Paper 106), at para 83

what is potentially a wide range of legislation (including primary legislation) operates in relation to the effect of nutrients in water that could adversely affect protected habitats sites.

Accordingly, we consider that the delegation of power in new clause 159A that is inserted by Amendment 247YY is inappropriate and should not form part of the Bill.

Amendments 247J, 247M and 247P:⁸ amendments to new sections 96C and 96D of the Water Industry Act 1991 in clause 158 - powers of Secretary of State to specify-

- by direction (in the case of Amendments 247J and 247M), and**
- by regulations (in the case of Amendment 247P)**

the maximum permissible concentration of nitrogen or phosphorus in treated effluent discharged by a sewage disposal works

15. These amendments give the Secretary of State powers to provide that the concentration of nitrogen or phosphorus in treated effluent discharged by a sewage disposal works may exceed the maximum permissible levels specified in new section 96F of the Water Industry Act 1991 (inserted by clause 158 of the Bill). The exercise of the powers is subject to no Parliamentary procedure.
16. According to the Supplementary Memorandum,⁹ the powers are—
 - “necessary to allow the Secretary of State to specify an alternative nutrient pollution standard to apply at an individual plant where it is deemed more effective to achieve reductions in nutrient pollution levels by differentiating the reduction in nutrient load across individual plants in the catchment”;
 - “technical and operational”; and
 - “only intended to modify the application of nutrient pollution standards to certain plants, based on an understanding of the specific features, technical capacity and regulatory requirements that apply to the plant in question”.
17. We find this wholly unconvincing—
 - it fails to adequately explain the case for allowing some plants to discharge effluent that contains higher concentrations of nitrogen or phosphorus than the maximum permissible levels specified in new section 96F;
 - it doesn’t justify the open-ended nature of the powers (the fact that their exercise is not subject to any requirement for pre-conditions to be met, for criteria to be satisfied or any other limiting factors);
 - the assertion that the powers are “technical” is not supported and does not seem credible; and

⁸ See the Sixth Marshallled List of Amendments to be Moved on Report, dated 4 September 2023.

⁹ At paras 10 and 18.

- although it is claimed that the powers are only intended to be exercised in relation to “certain plants” there is nothing to prevent their use being widespread.

18. **We consider that the Supplementary Memorandum fails to fully explain or to justify giving the Secretary of State broad and open-ended powers to allow the maximum permissible nitrogen and phosphorus concentration levels specified in primary legislation (in new section 96F of the Water Industry Act 1991) to be exceeded - and to do so without any Parliamentary oversight whatsoever.**

Accordingly, we consider that the delegations of power that Amendments 247J, 247M and 247P insert into clause 158 (in new sections 96C and 96D of the Water Industry Act 1991) are inappropriate and should not form part of the Bill.

ONLINE SAFETY BILL: GOVERNMENT RESPONSE

19. We considered Government amendments to this Bill in our 40th Report of this Session.¹⁰ The Government have responded by way of a letter from Lord Parkinson of Whitley Bay, Minister for Arts and Heritage for the Department for Culture, Media and Sport. The response is printed at Appendix 1.

¹⁰ *40th Report*, (Session 2022–23, HL Paper 242).

APPENDIX 1: GOVERNMENT RESPONSE TO THE ONLINE SAFETY BILL: GOVERNMENT AMENDMENTS

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

I am pleased to follow up on your Committee's report on the Government amendments made to the Online Safety Bill published on 31 August 2023. I am grateful for the Committee's continued commitment to providing expert scrutiny on the Bill, particularly during Summer Recess.

I would first like to apologise for the delay in providing you with the supplementary delegated powers memorandum and for the delayed response to your Committee's report. I was not made aware of the publication of this report and will review our monitoring of the publication of parliamentary reports to ensure that this is not repeated.

I have considered your report and have outlined below how we have sought to respond to your conclusion.

Paragraph 6 of your report asked me to explain to the House why steps were not taken to determine the policy on the regulation of app stores, before the Bill's introduction. The work on this Bill originated from the Online Harms White Paper, where the Government made clear that the focus of the legislation was on platforms that host or enable user-generated content. As a result the subsequent public consultation and evidence gathering was focused on the interventions Government could make in relation to those types of platforms.

In building the evidence base for the following Government responses in February and December 2020, the focus of stakeholder concerns were services that enable user-generated content and interaction, in particular social media platforms. The regulation of app stores was not an issue of significant concern raised by stakeholders.

Stakeholders were also clear that there needed to be targeted legislation that did not cause undue burdens to business. As a result the Government's policy leading up to and upon the Bill's introduction was that services which play a functional role in enabling online activity, such as app stores, were to remain outside of the scope of the bill. As such, there was no evidence base built on potential legislative interventions relating to app stores.

Paragraph 7 of your report states that your committee would find it preferable for the regulation of app stores to be dealt with in future primary legislation. The delegated power to allow for the regulation of app stores was developed following concerns from numerous parliamentarians and amendments tabled by Baroness Harding of Winscombe. When considering those amendments and the views of parliamentarians expressed in the House, it became clear that this Bill could be used to address concerns about some gateways to the regulated services - particularly when it comes to children's access to those services.

As a result, our Government amendments reflect that it was not possible to obtain the sufficient evidence needed to set out the detail of requirements on app stores at this time, and instead requires Ofcom to collect the evidence in their Report.

Following that Report, the Secretary of State can then only make regulations for the regulation of apps

stores if they consider there is a material or significant risk of harm to children presented by harmful content on app stores or from content on regulated apps, available via the app store.

Regulations made by the Secretary of State using this power are subject to the affirmative procedure, to ensure there is a sufficient level of parliamentary scrutiny.

As I made clear during Lords' Third Reading, we will share in advance any statutory instruments that we intend to table and that are relevant to your Committee's terms of reference.

In closing, I would like to repeat my belief that ongoing parliamentary scrutiny of the regime will be crucial towards ensuring its success.

6 September 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 7 September 2023, Members declared no interests.

Attendance

The meeting was attended by Lord Carlile of Berriew, Lord Goodlad, Lord Hendy, Baroness Humphreys, Lord Janvrin and Lord Rooker.