

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

2nd Report of Session 2021–22

**Professional Qualifications
Bill [HL]**

Dormant Assets Bill [HL]

**Skills and Post-16 Education
Bill [HL]**

Ordered to be printed 26 May 2021 and published 27 May 2021

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.

Membership

The members of the Delegated Powers and Regulatory Reform Committee who agreed this report are:

[Baroness Andrews](#)

[Lord Blencathra](#) (Chair)

[Baroness Browning](#)

[Lord Goddard of Stockport](#)

[Lord Haselhurst](#)

[Lord Hendy](#)

[Lord Janvrin](#)

[Baroness Meacher](#)

[Lord Rowlands](#)

[Lord Tope](#)

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/hldprcrpublications.

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 hldelgatedpowers@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.

Second Report

PROFESSIONAL QUALIFICATIONS BILL [HL]

1. This 19-clause Bill was introduced in the House of Lords on 12 May and had its Second Reading on 25 May.
2. The purpose of the Bill, according to the Explanatory Notes, is to “create a new framework for the recognition of professional qualifications and experience gained overseas and take steps to reform regulators’ practices”.¹
3. Existing legislative provision in this area is complex, covering over 160 professions and more than 50 regulators.
4. The Bill includes provision to—
 - end the interim system for recognition of professional qualifications that derives from the UK’s membership of the European Union;
 - create a framework for the recognition of professional qualifications and experience obtained outside the UK;
 - enable Government to implement provisions in international agreements so far as they relate to the recognition of professional qualifications;
 - enable UK regulators to enter into recognition agreements with regulators overseas to recognise professional qualifications; and
 - require UK regulators to publish information and provide information to overseas regulators and other UK regulators.
5. The Department for Business, Energy and Industrial Strategy has provided a Delegated Powers Memorandum (“the Memorandum”).²
6. The Bill primarily confers delegated powers rather than containing operative provisions. This is acknowledged in both the Explanatory Notes and the Memorandum. According to the former, “The Bill primarily enables other legislation to be made”.³ According to the latter, “With some exceptions, the substantive changes to the law envisaged by this Bill will be made through delegated powers rather than the Bill itself”⁴ and “The Bill... sets the framework under which profession-specific provisions can be made in regulations”.⁵
7. The Bill’s main provisions are found in clauses 1 to 6. Clauses 1, 3, 4, 5(2) and 6 all begin with the words, “The appropriate national authority may by regulations”.⁶ Each of these delegated powers is a Henry VIII power.

1 At para 1.

2 Department for Business, Energy and Industrial Strategy, Delegated Powers Memorandum: <https://bills.parliament.uk/publications/41509/documents/255> [accessed 27 May 2021].

3 At para 97.

4 At para 4.

5 At para 5.

6 Under clause 14 of the Bill, “appropriate national authority” means the Secretary of State, the Lord Chancellor, the Welsh Ministers, the Scottish Ministers or a Northern Ireland department.

8. We draw three powers to the attention of the House. **In relation to each of these, we note a failure to provide adequate explanation in the Memorandum. This is particularly disappointing given that (a) as the Government have acknowledged, most of the substantive changes to the law envisaged by this Bill are to be made through delegated powers rather than the Bill itself, and (b) these are Henry VIII powers.**

Clauses 1 and 2 (power to provide for individuals to be treated as having UK qualifications)

9. Clause 1 gives Ministers power to make regulations which provide for individuals with overseas qualifications or experience who wish to practise a “regulated profession” in the UK to be treated as if they have the required UK qualifications or experience. “Regulated profession” means any of the 160 or so professions that are regulated by law in the UK.
10. It is a Henry VIII power, as it includes power to amend primary legislation and retained direct principal EU legislation.⁷
11. The power can be used to make provision about a wide range of matters relating to applications to practise a profession, including “detail on the approach to be taken in assessing ... qualifications”,⁸ requirements for regulators to have regard to guidance when determining applications to practise, the information to be included in such applications, fees to be paid and appeals.
12. However, it is subject to two important conditions. The first condition is that an individual can only be treated as if they have a relevant UK qualification or experience if a regulator of the profession in question is satisfied that—
- there is equivalence between the overseas qualifications or experience and the relevant UK qualification or experience, with the former demonstrating “substantially the same knowledge and skills, to substantially the same standard”, as are demonstrated by the latter; or
 - where the overseas qualifications or experience do not demonstrate this, any deficiency has been made up by the individual obtaining further qualifications or experience.
13. The second condition is that the power is exercisable only if it is “necessary to make the regulations for the purpose of enabling the demand for the services of the profession in the UK ... to be met *without unreasonable delays or charges*”.⁹
14. The Memorandum states that the power is “heavily constrained”¹⁰ by this second condition. However, we consider the condition to be somewhat vague: opinions could vary considerably on what might be considered “necessary”

7 Retained direct EU legislation is a type of retained EU law. It is converted by the European Union (Withdrawal) Act 2018 (“EUWA 2018”) from EU-made law of the kind which applies automatically in Member States (including EU Regulations and Decisions). It is neither primary nor secondary legislation. It is a new category of domestic legislation created by the EUWA 2018. That Act distinguishes between “retained direct principal EU legislation” and “retained direct minor EU legislation”. The former (which includes legislation converted from EU Regulations) has a status under the EUWA 2018 which is similar to primary legislation.

8 See para 22 of the Explanatory Notes.

9 See clause 2(2) of the Bill.

10 At para 26.

or an “unreasonable delay” in relation to the demand for the services of a particular profession at a particular time.

15. We are therefore disappointed to see that neither the Memorandum nor the Explanatory Notes say anything about—
 - what sort of “delays” or “charges” the Government might consider to be “unreasonable” for these purposes;
 - whether the Government consider that any such delays or charges currently exist;
 - what is meant by “enabling the demand for the services of the profession ... to be met” and what criteria would be used to measure “demand” for these purposes; or
 - why this condition applies only to the first set of regulations made in relation to a profession and not to subsequent amending regulations.¹¹
16. The Memorandum provides two justifications for the delegation of power. The first is that the use of the power “is to be demand-led” and “demand will naturally change over time and so it is not possible to achieve the policy through provisions on the face of the Bill that apply to a fixed set of professions”.¹² This appears to be a reference to the second condition mentioned above, the point being that the power provides a means of addressing problems in particular professions as and when they may arise.
17. However, that does not explain why all of the changes within the scope of the power—across so many professions and including changes to primary legislation—should be a matter for secondary rather than primary legislation.
18. Dentistry is one profession the regulation of which is provided for in primary legislation. The Dentists Act 1984 includes provision about recognition of overseas qualifications.¹³ Holders of overseas qualifications who wish to qualify for registration as dentists in the UK must not only have a “recognised overseas diploma” but the starting point is that they must sit an examination for the purpose of satisfying the regulator that they have the requisite knowledge and skill — and they must also satisfy the regulator as to their identity, good character, good health and knowledge of English.
19. It appears that clause 1 could allow such requirements—and other comparable requirements in primary legislation relating to other professions—to be watered down by statutory instrument if Ministers considered this to be necessary to enable demand for the services of the profession in question to be met without “unreasonable delays”.
20. Where the power is used to amend primary legislation or retained direct principal EU legislation, it is subject to the affirmative procedure but, as we have said before: “the affirmative procedure 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”.¹⁴ The

11 This is the effect of clause 2(3)(a).

12 See para 20 of the Memorandum.

13 See section 16 of that Act.

14 [34th Report](#), Session 2017–19 (HL Paper 194), para 6 (on the Agriculture Bill).

exercise of the power is otherwise subject to the negative procedure, even where it is used to amend secondary legislation made under the affirmative procedure.

21. The second justification given for the delegation relates to the existing legislative provision covering a wide range of different professions and regulators: “the professions that are in scope of this power have pre-existing legislative frameworks governing how each is regulated. It is not feasible to provide, on the face of the Bill, for an approach that would interface with each of these various frameworks and their different approaches to the recognition of professional qualifications, or to address them individually”.¹⁵
22. We readily accept the case for profession-specific provision but, again, the Government have not explained why all such provision should be a matter for secondary legislation, regardless of profession and whether or not primary legislation is to be amended.
23. We are surprised and disappointed that neither the Memorandum nor the Explanatory Notes—
 - give any examples of circumstances in which the power might be exercised and changes that could be made in such circumstances; or
 - explain why Ministers will have no duty to consult before making regulations.
24. We consider that this scarcity of explanation—
 - makes it difficult to understand how significant the changes that could be made in exercise of this power could be, particularly given the proliferation of existing legislative schemes that could be amended; and
 - gives rise to uncertainty as to whether there may be aspects of the law relating to recognition of overseas qualifications that the Bill would allow to be provided for in regulations (albeit subject to the affirmative procedure) but which should instead be subjected to the much greater Parliamentary scrutiny afforded to primary legislation.
25. **The House may therefore wish to press the Minister to provide—**
 - **a much fuller explanation about the provision that could be made in regulations under clause 1; and**
 - **full justification for all such provision – including that which amends primary legislation – being made by statutory instrument instead of by primary legislation with its attendant scrutiny.**

Clause 3 (implementation of international recognition agreements)

26. Clause 3 gives Ministers a broad power to make regulations which “make such provision as [they] consider appropriate for the purpose of, or in connection with, implementing any international recognition agreement¹⁶ to which the UK is a party”.

¹⁵ See paragraph 21 of the Memorandum.

¹⁶ An international recognition agreement means an agreement relating to the recognition in the UK of overseas qualifications or experience for the purpose of determining whether a person is entitled to practice a profession in the UK (see clause 3(4)).

27. This is a Henry VIII power as it includes power to amend primary legislation and retained direct principal EU legislation. It is not subject to any conditions of the kind contained in clauses 1 and 2.¹⁷
28. Implementation of such agreements in UK domestic law could raise matters of considerable public interest (for example, were such agreements to give preference to professional qualifications issued in particular countries—perhaps linked to trade deals).
29. However, the Memorandum says nothing at all about—
- the sort of changes that could be made to UK domestic law in exercise of the power; or
 - the scale of the change that it is anticipated will be made under the power, including how many of the 160 or so professions that could be affected are likely to be affected and how many international recognition agreements it is anticipated will be entered into.
30. The first justification given for the delegation is that, “since the power will be available in relation to international agreements concluded in the future, and the terms of those agreements are not known, it is not possible to deliver the necessary changes on the face of the Bill”.¹⁸ That makes sense but it does not explain why, in all cases, “the necessary changes” should in due course be made by Ministerial regulations rather than by Act of Parliament.
31. The second justification given is that, “the professions in scope of the Bill all have pre-existing legislative frameworks governing how each is regulated” and “it is not possible to provide an overarching approach to the implementation of international agreements that covers the varying legislative backgrounds of the professions on the face of the Bill”.¹⁹ It is not entirely clear what the Government mean by this.
32. As the Constitution Committee noted in its report on the Private International Law (Implementation of Agreements) Bill,²⁰ it is “a long-standing convention of the constitution ... that outside the exceptional case of making provision for EU law, international legal agreements that make changes to UK law are given domestic force by an Act of Parliament”. Both we²¹ and the Constitution Committee considered that clause 2 of that Bill, which allowed Ministers to implement a category of international agreements by way of statutory instrument, represented an inappropriate delegation of power.
33. We consider that clause 3 would represent a further departure from constitutional convention by allowing Ministers to implement a further category of international law agreements by statutory instrument instead of by primary legislation with its attendant scrutiny. Yet the Memorandum says nothing about this.
34. **We consider that clause 3 represents an inappropriate delegation of power and should be removed from the Bill.**

17 See paras 12 and 13 above.

18 At para 30 of the Memorandum.

19 At para 31 of the Memorandum.

20 Constitution Committee, [5th Report](#), Session 2019–21 (HL Paper 55).

21 [8th Report](#), Session 2019–21 (HL Paper 40).

Clause 4 (authorisation to enter into regulator recognition agreements)

35. Clause 4 gives Ministers power to make regulations for the purpose of, or in connection with, authorising a UK regulator of a regulated profession to enter into “regulator recognition agreements” with overseas regulators, under which UK qualifications or experience are recognised overseas and overseas qualifications or experience are recognised in the UK.
36. This is a Henry VIII power. According to the Memorandum, it is nonetheless “a narrow power”²² and it “cannot be used to change regulators’ abilities to recognise overseas qualifications or to determine who can practise in the UK”.²³ However, the Memorandum fails to explain this or to say what effect regulations under clause 4 could have. As no examples are given of provision that could be included in a “regulator recognition agreement”, it is difficult to understand how significant the effect of regulations under clause 4 could be.
37. **The House may therefore wish to press the Minister to provide a much fuller explanation about the nature of the provision that could be contained in a “regulator recognition agreement” authorised by regulations under clause 4.**

Clauses 5(2) (power to modify legislation in consequence of the revocation of the European Union (Recognition of Professional Qualifications) Regulations 2015), 6(1) (power to modify retained EU law on the recognition of overseas qualifications or experience) and 10(4) (power to make provision in connection with the duty of UK regulators under clause 10(2) to provide information to overseas regulators)

38. In addition to the three Henry VIII powers to which the attention of the House is drawn in paragraphs 1 to 37 of this Report, there is a further Henry VIII power in each of clauses 5(2), 6(1) and 10(4). We mention them here solely to indicate that, in each case, we consider that the Memorandum provides a satisfactory explanation for the delegation of power and the procedure chosen. Although the power in clause 10(4) is subject only to the negative procedure, we do not consider this to be inappropriate given that it is very narrowly drawn—being exercisable only in relation to the duty under clause 10(2) of the Bill to provide information to an overseas regulator — and is concerned with matters of technical detail in relation to the operation of that duty.

²² At para 41.

²³ At para 40.

DORMANT ASSETS BILL [HL]

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

SKILLS AND POST-16 EDUCATION BILL [HL]

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

APPENDIX 1: MEMBERS' INTERESTS

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

For the business taken at the meeting on 26 May 2021 Members declared no interests.

Attendance

The meeting was attended by Baroness Andrews, Lord Blencathra, Baroness Browning, Lord Janvrin, Lord Goddard of Stockport, Lord Haselhurst, Lord Hendy, Baroness Meacher, Lord Rowlands and Lord Tope.