



HOUSE OF LORDS

Delegated Powers and Regulatory Reform  
Committee

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4th Report of Session 2021–22

**Advanced Research and  
Invention Agency Bill**

**Telecommunications  
(Security) Bill**

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### *The Delegated Powers and Regulatory Reform Committee*

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

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

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

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

### *Membership*

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](#)

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### *Publications*

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### *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](mailto: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.

# Fourth Report

## ADVANCED RESEARCH AND INVENTION AGENCY BILL

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1. The Advanced Research and Invention Agency Bill was brought from the House of Commons on 8 June. It makes provision in relation to the establishment of the Advanced Research and Invention Agency (“ARIA”). The Department for Business, Energy and Industrial Strategy has furnished the Committee with a Delegated Powers Memorandum (“the Memorandum”).
  2. The defining characteristic of ARIA is that it can devote resources to projects that carry a high risk of failure. Clause 3 says so explicitly:

“In exercising any of its functions under this Act, ARIA may give particular weight to the potential for significant benefits to be achieved or facilitated through scientific research, or the development and exploitation of scientific knowledge, that carries a high risk of failure.”
  3. The Memorandum (paragraph 2) says:

“The policy intention behind the Bill is to create ARIA as a nimble body that can operate at pace and which undertakes ground-breaking research with a high tolerance to the risk of failure.”
  4. In the welcome given to the Bill, tribute has been paid to the tradition of British science and invention. In criticizing aspects of this Bill, we do so without of course criticizing scientific innovation. We draw attention to two delegated powers in the Bill.
- Clause 8: power to dissolve ARIA**
5. Although ARIA is to be created by Act of Parliament, clause 8 allows Ministers to dissolve it by an affirmative statutory instrument. They cannot do so for another ten years and they must consult ARIA before doing so. They do not have to offer any reasons.
  6. **We object to this on principle. If Parliament creates a body, it should be for Parliament to dissolve the body. It should not be for Ministers to dissolve it by statutory instrument, even an affirmative instrument.**
  7. The Government’s justifications for including a power to dissolve ARIA by statutory instrument are inadequate.
  8. The first justification (Memorandum, paragraph 11) is:

“As ARIA will be a statutory corporation, it is necessary to have a delegated power providing a legal mechanism for its dissolution if government policy on the delivery of science funding changes in the future.”
  9. This is incorrect. It is not necessary (legally, politically or practically) for something created by primary legislation to be dissolved by secondary legislation. On the contrary, if Parliament creates ARIA, the right to dissolve it should naturally belong to Parliament. Rather than a statutory instrument

being *necessary* for the dissolution of ARIA, it would be more accurate to say that a statutory instrument might be a more *convenient* way of dissolving ARIA. Necessity and convenience are different things.

10. If anyone suggested that a power to revoke regulations made by the Minister under paragraph 11 of Schedule 1<sup>1</sup> should require a new Act of Parliament, Ministers would rightly object on the principle that—if Ministers can make regulations—they should be able to revoke them. By parity of reasoning, what Parliament has created should be for Parliament alone to abolish.
11. Further justifications (Memorandum, paragraph 12) are:
  - (a) “the binary nature of the question whether ARIA should be dissolved”;
  - (b) ARIA must be consulted before being dissolved;
  - (c) the regulations dissolving ARIA must be affirmative.
12. These justifications are not convincing.
  - Merely because the question whether to dissolve ARIA admits of a yes or no answer does not mean that, once the answer is arrived at, Ministers (rather than Parliament) should dissolve ARIA.
  - Likewise, the fact that Ministers must consult ARIA before dissolving it is not relevant to the question whether Ministers (rather than Parliament) should dissolve ARIA.
  - The fact that the proposed regulations must be affirmative does not justify the initial delegation to Ministers of the power to dissolve ARIA. If Parliament has devoted an Act of Parliament to the creation of ARIA, another Act of Parliament should be needed before it can be dissolved.
  - The fact that ARIA will have a minimum shelf-life of 10 years before it can be dissolved reinforces the argument that Parliament (rather than Ministers) should be the arbiter of its fate. After 10 years, ARIA will have become well established. The case for an Act to be required before ARIA can be dissolved after that length of time is strengthened.
  - The Memorandum (paragraphs 13–14) argues that—without the power for regulations to make consequential amendments (for example) to statutory references to ARIA—primary legislation would be necessary. If ARIA were to be dissolved by secondary legislation, we agree that it would be unsatisfactory that any such consequential amendments should have to await primary legislation. But this assumes that ARIA is to be dissolved by secondary legislation. If the abolition of ARIA were to await future primary legislation, any necessary consequential changes could be included in that legislation.
13. **Accordingly, we take the view that the power in clause 8 for Ministers to dissolve ARIA by statutory instrument is inappropriate and should be removed from the Bill. If ARIA is to be dissolved, it should be done by Parliament in primary legislation rather than by Ministers in secondary legislation.**

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<sup>1</sup> Allowing for regulations to be made that relate to procedures to be adopted for dealing with conflicts of interest of members of ARIA.

**Clause 10: power to make consequential provision**

14. Schedule 3 contains a small number of standard consequential amendments. Clause 10 contains a Henry VIII power for Ministers to make regulations amending or repealing any Act of Parliament that they consider appropriate, including all Acts ever passed until the end of the current parliamentary session.
15. This is a short Bill mostly made up of standard clauses. The context of the Bill could not be simpler. The Agency is brand new. We expected the Department to have done more in the way of legislating for consequential amendments than the exiguous matter found in Schedule 3. The Government have offered two reasons (Memorandum, paragraph 18) to justify the wide-ranging power in clause 10.
16. The first reason is that clause 10 “enables provision to be made applying to ARIA legislation that applies to bodies that are similar in nature to it”. However, we consider that Schedule 3 could have gone further in the way of bespoke provision, rather than being limited to some standard amendments to legislation concerning public records, Ombudsman jurisdiction, House of Commons disqualification and so forth.
17. The second reason concerns the consequential provision that might be needed if ARIA were dissolved by regulations under clause 8. However, if clause 8 were to be removed from the Bill, as we have recommended, this second reason would no longer apply.
18. **In the absence of a convincing explanation why clause 10 should contain such a wide-ranging Henry VIII power, we take the view that clause 10 is inappropriately wide. Any identifiable need for consequential provision should be added to Schedule 3.**

## **TELECOMMUNICATIONS (SECURITY) BILL**

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19. This 29-clause Bill was passed by the House of Commons on 25 May. It was introduced in the House of Lords on 26 May and has its Second Reading on 29 June.
20. The purpose of the Bill, according to the Explanatory Notes, is “to introduce a new security framework for the UK telecommunications sector to ensure that public telecommunications providers operate secure and resilient networks and services and manage their supply chains appropriately”.<sup>2</sup> The Bill amends the Communications Act 2003, which provides the current regulatory framework for telecommunications security.
21. The Bill contains eleven delegated powers. The Department for Digital, Culture, Media and Sport has provided a Delegated Powers Memorandum (“the Memorandum”).<sup>3</sup>
22. We draw one power to the attention of the House.

### **Clause 3: new section 105E (power to issue codes of practice about security measures etc.)**

23. Clause 3 gives the Secretary of State the power to issue, revise and withdraw codes of practice. The purpose of the codes is to give guidance on the measures to be taken by providers of public electronic communications networks and public electronic communications services<sup>4</sup> (referred to below as “providers”) in the performance of their duties under the Bill to protect those networks and services against security compromises. The duties in question are—
  - to take measures to identify and reduce the risks of security compromises occurring and to prepare for the occurrence of security compromises;<sup>5</sup>
  - to take such measures as may be specified in regulations for any of those purposes;<sup>6</sup>
  - to take measures to prevent, remedy or mitigate adverse effects arising from a security compromise that has occurred;<sup>7</sup> and
  - to take such measures as may be specified in regulations to prevent, remedy or mitigate adverse effects arising from a security compromise that has occurred.<sup>8</sup>

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2 See para 1 of the Explanatory Notes to the Bill.

3 Department for Digital, Culture, Media and Sport, [Delegated Powers Memorandum](#), 26 May 2021.

4 Annex A of the Explanatory Notes to the Bill explains what public electronic communications networks and services are. “Electronic communications network” is defined in section 32 of the Communications Act 2003. It means a “transmission system” and associated apparatus, software, data and other resources for the conveyance of signals (for example, a satellite or cable TV network or a mobile phone network). “Electronic communications service” is also defined in section 32. It means a service for conveying signals by means of an electronic communications network (for example, a mobile phone contract or an internet connection).

5 This duty is imposed by new section 105A of the Communications Act 2003, inserted by clause 1 of the Bill.

6 See new section 105B of the Communications Act 2003, inserted by clause 1 of the Bill.

7 This duty is imposed by new section 105C of the Communications Act 2003, inserted by clause 2 of the Bill.

8 See new section 105D of the Communications Act 2003, inserted by clause 2 of the Bill.

24. Before issuing or revising a code of practice, the Secretary of State must—
- publish a draft of the code or the revisions to the code; and
  - consult about the draft with OFCOM,<sup>9</sup> providers to whom the draft would apply, and such other persons as the Secretary of State considers appropriate.<sup>10</sup>
25. A code of practice must be published and laid before Parliament but is subject to no Parliamentary scrutiny procedure.
26. The Department gives the following reasons for the absence of Parliamentary scrutiny<sup>11</sup>—
- “a code of practice is to give guidance about the measures to be taken by providers ... the contents of a code of practice are therefore not legislative in character”;
  - the codes will be “highly technical”;
  - the “need to revise any codes relatively frequently to respond to changes in technology and evolving security threats”; and
  - “it would ... be difficult to legislate for the detail of the measures that providers should take”.

The Department adds that the requirement for consultation on any code “will contribute to ensuring codes are drafted to a high standard and therefore are appropriate to have the statutory effects [that are provided for in the Bill]”.<sup>12</sup>

27. In our view, the Department’s reasons are unconvincing—
- the fact that codes of practice would be produced after consultation with interested parties cannot be a reason for denying Parliament any scrutiny role; and
  - the Department appears not to have recognised the significance of the statutory effects of the codes of practice.
28. Although a failure by a provider to act in accordance with a code of practice “does not of itself make the provider liable to legal proceedings before a court or tribunal”,<sup>13</sup> the Bill provides for codes of practice to have two important effects.
29. First, OFCOM must take into account a provision of a code of practice if it is relevant to the determination of any question arising in connection with the carrying out of its functions under the Bill of (a) ensuring that providers comply with their duties under the Bill, (b) assessing whether providers have complied with those duties, and (c) enforcing those duties.<sup>14</sup> Indeed, where OFCOM suspects a provider of failing to act in accordance with a code, it can require the provider to give a statement that either confirms or denies

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9 OFCOM is the independent regulator for communications services in the UK.

10 See new section 105F, inserted by clause 3 of the Bill.

11 See paras 35–40 of the Memorandum.

12 See para 39 of the Memorandum.

13 See new section 105H(1), inserted by clause 3 of the Bill.

14 See new section 105H(3) and (4), inserted by clause 3 of the Bill.

the failure, with a supporting explanation.<sup>15</sup> The Memorandum explains that, “where Ofcom has concerns that a provider is not complying with its duties under [the Bill] ... , Ofcom’s exercise of [this] power ... might be used in determining whether to open an investigation”.<sup>16</sup>

30. We consider that the codes are liable to be highly influential when OFCOM determines whether there has been a failure by a provider to comply with its duties and, where there has been such a failure, when it considers enforcement action (with the options available including the imposition of significant financial penalties and the suspension or restriction of the entitlement to provide an electronic communications network or service).
31. It is also a measure of the significance of the codes of practice that OFCOM must report annually to the Secretary of State about the extent to which providers have acted in accordance with them.<sup>17</sup>
32. The second important effect of codes of practice is that a court or tribunal must take into account a provision of a code of practice if it is relevant to the determination of any question arising in legal proceedings before it.<sup>18</sup> This includes legal proceedings brought under the Bill by a person who sustains loss or damage as a result of a breach by a provider of its duties under the Bill.<sup>19</sup>
33. Where legislation requires that regard must be had to statutory guidance, in practice this means that those to whom the guidance applies will normally be expected to follow it unless there are cogent reasons for not doing so. We have often recommended that guidance of this kind which is designed to have a transformative effect on behaviour should be subject to a Parliamentary procedure.<sup>20</sup>
34. The Bill provides for codes of practice to play a significant role—both in relation to the exercise of OFCOM’s regulatory functions and in legal proceedings - in supplementing the important duties to take security measures that the Bill imposes on providers. This is acknowledged in the Memorandum, which refers to the importance of codes of practice setting out “clear expectations” as to “the measures that providers should take”<sup>21</sup> to comply with their duties under the Bill.
35. In our recent report on the Education (Guidance about Costs of School Uniforms) Bill,<sup>22</sup> we were unconvinced by the Government’s reasons for statutory guidance to state-funded schools in England about the “costs aspects of school uniform policies” being subject to no Parliamentary procedure. The Government argued<sup>23</sup> then that the guidance was “not equivalent to a Code of Practice” and was instead “a very limited document covering one aspect of school uniform which will sit alongside and complement the non-

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15 See new section 105I, inserted by clause 3 of the Bill. Failure to provide a statement may result in a significant financial penalty - see new section 105T(2) and (3), inserted by clause 7 of the Bill.

16 See para 34 of the Memorandum.

17 See new section 105Z(4)(b), inserted by clause 11 of the Bill.

18 See new section 105H(2), inserted by clause 3 of the Bill.

19 See clause 8 of the Bill (civil liability for contravention of security duties).

20 For example, the Committee’s [18th Report](#), Session 2015–16, para 13; [20th Report](#), Session 2015–16, paras 10–11; [21st Report](#), Session 2015–16, para 27; [22nd Report](#), Session 2015–16, para 19; [1st Report](#), Session 2016–17, para 38.

21 See para 38 of the Memorandum.

22 See the Committee’s [37th Report](#), Session 2019–21, para 7.

23 See para 17 of the Delegated Powers Memorandum for that Bill.

statutory guidance”. Yet the Government now argue in relation to this Bill that codes of practice that will be far from “limited”, that will supplement important duties in primary legislation and that will have the significant statutory effects described above also merit no Parliamentary scrutiny.

36. **In our view, it is unacceptable for codes of practice that will have the significant statutory effects provided for in this Bill to be subject to no Parliamentary scrutiny procedure. We consider that the negative procedure would afford an appropriate level of scrutiny.**

## APPENDIX 1: MEMBERS' INTERESTS

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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 23 June 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.