



HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

9th Report of Session 2021–22

Assisted Dying Bill [HL]

Telecommunications (Security) Bill: Second Government Response

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The Delegated Powers and Regulatory Reform Committee

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

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

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

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

Membership

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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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.

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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 hlddelegatedpowers@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.

Ninth Report

ASSISTED DYING BILL [HL]

1. The Assisted Dying Bill, a private members' bill sponsored by Baroness Meacher, was introduced in the House of Lords on 26 May 2021. This Bill contains a legal framework enabling adults who are terminally ill to be provided at their request with specified assistance to end their own life. Because this is not a Government Bill, we do not have a delegated powers memorandum against which to judge the Bill's delegated powers.
2. Our report is concerned solely with the question of delegated powers. We draw the attention of the House to the delegated powers in clauses 4, 7 and 13(4).

Clause 4

3. Under clause 4(7), the Secretary of State may by regulations specify:
 - (a) the medicines which may be prescribed to end a person's life;
 - (b) the form and manner in which such prescriptions are to be issued; and
 - (c) the manner and conditions under which such medicines are to be dispensed, stored, transported, used and destroyed.
4. The practical operation of the Bill is a matter of considerable public interest. The matters that are, in due course, to be dealt with in regulations under clause 4 are central to the practical operation of the Bill. Matters of far less public interest are regularly made the subject of affirmative regulations or even dealt with in detail on the face of legislation. However, clause 11(2) states that all regulations under the Bill are subject only to the negative procedure.
5. There is likely to be legitimate public interest in how medicines can be lawfully dispensed, stored, transported, used and destroyed. There is also likely to be particular interest in people knowing from the outset precisely what medicines will be available for lawful use. For example, if someone were to change their mind after ingesting the medicine, they would want to know whether the process was reversible. And that would depend on the nature of the medicine originally administered.
6. In due course, the medicines (and the methods of dispensing, storing, transporting, using and destroying them) that can be lawfully prescribed are likely to require amendment. We understand the argument that to do so by regulations is less cumbersome than requiring a new Act of Parliament on each occasion, for example, a new medicine needs to be added or subtracted. A similar argument applies to the question of dispensing, storing, transporting, using and destroying such medicines. But this is not an argument for making these matters wholly a matter for regulations from the outset.
7. **In the interests of clarity and transparency on such important issues of public policy, the matters that are in due course to be dealt with under clause 4(7) by negative regulations should in our view be spelled**

out in detail on the face of the Bill from the outset.¹ Accordingly, the Bill should contain a definitive list of medicines, and details of the manner and conditions under which such medicines are to be dispensed, stored, transported, used and destroyed. The power to amend such matters should be a matter for regulations subject to the affirmative procedure.

Clause 7

8. Clause 7 inserts a new section 39B into the Births and Deaths Registration Act 1953 (“the 1953 Act”) allowing the Secretary of State to make regulations providing for any provision of the 1953 Act relating to the registration of deaths to apply in respect of deaths arising from the provision of assistance in accordance with the Assisted Dying Bill with such modifications as may be prescribed in respect of:
 - (a) the information which is to be provided concerning such deaths;
 - (b) the form and manner in which the cause of such deaths is to be certified; and
 - (c) the form and manner in which such deaths are to be registered.
9. Clause 7 confers a Henry VIII power for Ministers to amend the 1953 Act in important respects, without the need for the agreement of Parliament (that is to say, without regulations being required to be made under the affirmative procedure). **In the absence of a delegated powers memorandum, the House may wish to be given an explanation why modifications to the 1953 Act should be the subject of regulation-making powers rather than being expressly included on the face of the Bill.** For example, clause 7 entails that any regulations must provide for the cause of death to be recorded as “assisted death”. It may lack transparency if the Registrar does not also have to register the underlying terminal illness that led to the assisted dying.
10. Even assuming that the House is, in due course, satisfied that the amendments under the Henry VIII power in clause 7 can properly be a subject for regulations, the Committee would normally expect any such power for Ministers to amend an Act of Parliament to be exercisable by the affirmative procedure. In other words, both Houses would have to approve the amendments either (a) before they could be made (that is, in draft), (b) before they could come into force, or (c) before they could remain in force beyond a certain period (for example, 28 or 40 days).
11. **In the case of the power in clause 7, the affirmative procedure does not apply.** What is not clear, however, is what procedure does in fact apply to the regulations to be made under section 39B of the 1953 Act, as inserted into the 1953 Act by clause 7(2) of the Bill. It appears that the Bill may have inadvertently resulted in no parliamentary procedure being applicable to regulations made pursuant to the amendments in clause 7. It is true that clause 11(2) applies the negative procedure to statutory instruments containing “regulations under *this* Act”. The problem is that clause 7 operates to insert a new regulation-making provision into *another* Act, that is, the 1953 Act. The 1953 Act already comes with its own provision (section 39A)

¹ The face of the Bill includes a Schedule to the Bill. Schedules are as fully a part of the Bill as other operative provisions.

relating to the parliamentary procedure governing regulations made under that Act. If regulations under section 39B are to be governed by the negative procedure, the Bill would need to contain an amendment to existing section 39A(5) of the 1953 Act adding a reference to section 39B. The Bill does not currently contain such a provision.

12. If we are right that regulations under section 39B are not subject to any parliamentary scrutiny at all then, in our view, **this is unacceptable and we recommend that the exercise of the power conferred on ministers to make regulations that amend an Act of Parliament dealing with registration of assisted deaths should be subject to parliamentary scrutiny.**
13. If we are wrong in our analysis set out in paragraph 11 and the negative procedure does apply to regulations under clause 7, we remain dissatisfied. **The Committee has long held the view that a compelling reason is required for Henry VIII powers to be subject to the negative procedure.** It is not apparent what such a compelling reason would consist of in relation to the powers of Ministers to rewrite important provisions of the 1953 Act (in particular sections 15 to 24) relating to the registration of deaths. **We recommend therefore that the affirmative procedure should apply in this instance.**

Clause 13(4)

14. Clause 13(4) states:

“At any time during the period of 12 months beginning on the day 10 years after the provisions in subsection (3) come into force, this Act may be repealed by a resolution of each House of Parliament.”
15. With legislation of this importance, many would expect its repeal to require another Act of Parliament. Even if an Act of Parliament is to be repealed by secondary legislation, we would normally expect (as with most Henry VIII powers) that the repeal be given effect by subordinate legislation contained in a statutory instrument subject to the draft affirmative procedure: in other words, only following a resolution of both Houses.
16. It might be asked: “What is the difference between (a) repealing an Act of Parliament following a resolution of both Houses, as allowed by clause 13(4), and (b) repealing an Act of Parliament pursuant to ministerial regulations made under the draft affirmative procedure, which would in turn require a resolution to be passed in both Houses before the minister could repeal the Act in question?” In both cases, Parliament would have to vote for repeal. The advantage of the clause 13(4) procedure would be that the Act is repealed not by a statutory instrument made by ministers (even if it requires the prior agreement of both Houses) but by the direct application of the law as stated in clause 13(4).
17. The answer to the question in paragraph 16 is as follows:
 - (a) Giving effect to the repeal of an Act simply by means of a resolution lacks transparency because the normal publication requirements applying to the publication of Acts of Parliament, and to the publication of statutory instruments under the Statutory Instruments Act 1946, would not apply to resolutions.

- (b) A power to repeal an Act of Parliament may need to be accompanied by the power to make transitional, supplementary, and savings provisions in connection with the repeal, particularly with a Bill of this significance and complexity. This power is lacking if the repeal is achieved simply by a resolution of both Houses and not by specific legislation.
18. **In our view, Acts of Parliament should only be repealed by other legislation, whether primary or secondary. Accordingly, clause 13(4) is inappropriate and we recommend that it should be removed from the Bill.**

TELECOMMUNICATIONS (SECURITY) BILL: SECOND GOVERNMENT RESPONSE

19. We considered this Bill in our 4th Report of this Session.² The Committee published the first Government response, a letter from Baroness Barran, the then Minister for Civil Society at the Department for Digital, Culture, Media and Sport, in our 5th Report.³ The Government have now provided a further response by way of a letter from Lord Parkinson of Whitley Bay, Minister for Arts at the Department for Culture, Media and Sport. This letter is printed at Appendix 1.

² [4th Report](#), Session 2021-22 (HL Paper 29).

³ [5th Report](#), Session 2021-22 (HL Paper 48).

APPENDIX 1: TELECOMMUNICATIONS (SECURITY) BILL: SECOND GOVERNMENT RESPONSE

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

I am writing in response to the Delegated Powers and Regulatory Reform Committee's Fourth Report, which addressed the Telecommunications (Security) Bill. I would like to thank the Committee for its diligent care in scrutinising the Bill.

My predecessor Baroness Barran previously outlined why the changes recommended by the Committee, which related to the codes of practice, were unnecessary. She and I listened carefully to the arguments put forward during the Committee stage of the Bill regarding the importance of scrutiny of the new regime, especially given the significance of the code of practice. Following further consideration, I am pleased to let you know that we plan to take forward the Committee's recommendation and have tabled a Government amendment for Lords Report Stage which will apply the negative procedure to the issuing of codes of practice.

The codes of practice are technical in nature and are one part of a framework which is tailored to be appropriate and proportionate to the risks it addresses. They will detail practical security measures relating to specific technology. Their intended audience is security professionals working for public telecoms providers. We need the codes to be able to be understood by that audience. They are not intended to be formal pieces of secondary legislation. Therefore, the Office of Parliamentary Counsel has advised that we can amend the Bill in a way that applies the negative procedure to the issuing of codes of practice, without placing the code itself into a statutory instrument. This will provide Parliament with the opportunity to scrutinise any code of practice, ensuring the recommendations of the Committee and the concerns raised during debates in the House of Lords are addressed.

Once again, I would like to thank the Committee for its thoughtful consideration of this Bill. I hope that this amendment will be appreciated by the Committee and that it indicates our willingness to ensure parliamentary scrutiny of the Bill and its powers.

13 October 2021

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 20 October 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, Lord Rowlands and Lord Tope.