

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

11th Report of Session 2021–22

National Insurance Contributions 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

[Baroness Andrews](#)

[Lord Blencathra](#) (Chair)

[Baroness Browning](#)

[Lord Goddard of Stockport](#)

[Lord Haselhurst](#)

[Lord Henty](#)

[Lord Janvrin](#)

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Publications

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

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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.

Eleventh Report

NATIONAL INSURANCE CONTRIBUTIONS BILL

1. The Bill contains the following measures relating to national insurance contributions:
 - It makes provision for private sector employers in freeport tax sites¹ to be relieved from paying national insurance contributions in relation to new employments during a period which may extend until 5 April 2031.
 - It makes provision for employers of armed forces veterans to be relieved from paying national insurance contributions for the first 12 months of a veteran's employment on leaving the armed forces.
 - It exempts test and trace support payments from self-employed national insurance contributions.
 - It amends legislation relating to the disclosure of tax avoidance schemes.
2. The Treasury have provided a delegated powers memorandum (“the memorandum”) relating to the powers conferred by the Bill. We draw the attention of the House to the following powers.

Clause 3—Powers to modify the conditions relating to eligibility for relief for employer contributions in freeport tax sites

3. Clause 1 makes provision for the zero-rating of national insurance contributions payable by an employer (other than a public authority) in respect of an employee's earnings. Zero-rating applies where the conditions in clause 2(1) are met. Those conditions limit the relief to new employments which begin in the period from 6 April 2022 to 5 April 2026, and where the employer reasonably expects at least 60% of the earner's employed time to be spent in a single freeport tax site. The earnings to which the relief applies are limited to those paid during the period of 3 years beginning with the first day of the employment (subject to them not being paid after the relevant end date as defined in clause 2(6)).
4. Clause 3 contains three sets of powers which enable the Treasury to amend the conditions in clause 2(1) by regulations. All confer Henry VIII powers since they allow the regulations to amend, repeal or otherwise modify provisions of Part 1 of the Bill.

Clause 3(1)

5. Clause 3(1) allows regulations to amend the date by which a new employment must have begun to qualify for the relief. There is a limit on the date which may be specified using this power; it may be no later than 5 April 2031. Despite being a Henry VIII power, the power conferred by clause 3(1) is subject to the negative resolution procedure.

¹ A freeport tax site is an area designated as such by the Treasury under section 113 of the Finance Act 2021 (mistakenly referred to in clause 13(2) as section 109 of that Act).

6. The Treasury explain the use of the negative procedure by reference to the fact that it can only be used to extend the cases in respect of which the relief applies and not to reduce them.² We are not convinced by this reason. Under the Bill, as it currently has effect, the relief will apply to employments in a freeport tax site which begin during a four-year period from 6 April 2022. The amendment will allow the period to be more than doubled until 5 April 2031. In our view, this would represent a significant change to the effect achieved by the Bill. **Accordingly, we consider that regulations under clause 3(1) should be subject to the affirmative procedure.**

Clause 3(2)

7. Clause 3(2) enables regulations to make provision about circumstances in which a condition in clause 2(1) is to be treated as being met. Regulation 3(5) states that the regulations may make provision by reference to sectors of the economy or to descriptions of employer, earner or employment. Regulations under clause 3(2) are subject to the negative resolution procedure and again the Treasury explain this on the basis that the power can only be used to extend the scope of the relief.
8. The Treasury provide an example of how they envisage the power might be used.³ They suggest that the Government may wish to use the power to modify the requirement that the earner spends 60% of their working time in the freeport so that the requirement does not apply where the earner is disabled, and adjustments have been made to the earner's working arrangements which allow working from home. However, this does not represent the only type of provision which might be made. The power does not contain any limitations on the conditions to which it may be applied, the circumstances in which a condition may be treated as being met, or the purposes for which the power may be used. The power would allow the freeport conditions to operate differently in relation to different sectors of the economy or different types of employment.
9. **Given the width of the power conferred by clause 3(2) and the potential significance of the changes which might be made using it, we consider the power should be subject to the draft affirmative resolution procedure.**

Clause 3(3)

10. Clause 3(3) allows regulations to make any other changes in relation to the conditions in clause 2(1) as the Treasury consider appropriate. This includes adding, removing or altering the conditions. As with regulations under clause 3(2), clause 3(5) provides that the regulations may make provision by reference to sectors of the economy or to descriptions of employer, earner or employment. Regulations under clause 3(3) are subject to the draft affirmative resolution procedure.
11. The powers conferred by clause 3(3) would allow the Treasury to rewrite the conditions which have to be met for an employer to be able to take advantage of the national insurance contributions relief which applies in freeport tax sites. This would include making changes to the period for which the relief

2 HM Treasury, *Delegated Powers Memorandum* (September 2021), para 8: <https://bills.parliament.uk/publications/42812/documents/700> [accessed 24 November 2021].

3 See para 11 of the memorandum.

applies, and making different provision for different sectors of the economy and different kinds of employer or earner.

12. The Treasury provide two reasons for taking the powers:
- The conditions in clause 2(1) have been set against the background of current economic considerations. If circumstances were to change, the Government may wish to amend the conditions to reduce the amount of relief that employers qualify for or the number of employers who qualify for the relief.
 - Following its departure from the EU, the UK has international subsidy control obligations under the UK-EU Trade and Co-operation Agreement and the Northern Ireland Protocol. The Department for Business, Energy and Industrial Strategy is currently designing the domestic subsidy control regime that will apply in the UK which will need to be compliant with these international obligations. It may be necessary to alter the conditions in clause 2 to ensure that the relief is compatible with this future subsidy regime.

The Treasury also refer in the memorandum⁴ to the fact that similar powers have been included in other legislation.

13. We accept there may be circumstances in which it is appropriate to make changes to the conditions in clause 2(1), such as to ensure compliance with the UK's international subsidy control obligations. However, as drafted, the powers may be exercised for any purpose and are not limited to the purposes mentioned in the Treasury's memorandum. It follows in our view that the Treasury have failed fully to justify such significant Henry VIII powers, and this is so despite the precedents referred to by the Treasury.
14. **Accordingly, we consider that:**
- **as currently drafted, the powers conferred by clause 3(3) are inappropriate;**
 - **the powers should be limited so that they may be exercised only for purposes specified on the face of the Bill (such as ensuring compliance with UK's international obligations with respect to subsidy control).**

Clause 6—Zero-rated contributions for armed forces veterans

15. Clause 6 makes provision for the zero rating of national insurance contributions payable by an employer where the veteran conditions in clause 7 are met. Those conditions are:
- the relevant earner has served as a member of the regular armed forces;
 - the employment is employment in a civilian capacity;
 - the earnings are paid during the period of one year beginning with the first day on which the person is employed in a civilian capacity on leaving the armed forces.

4 See para 19 of the memorandum.

16. A limit is imposed by clause 6(4) on the tax years to which the relief applies. The relief will not apply to any tax year after the year 2023–24. Clause 6(6) confers a power on the Treasury by regulations to amend clause 6(4) to add one or more consecutive tax years following on immediately from the tax years for the time being specified in that subsection. Although the power conferred by clause 6(6) is a Henry VIII power, it is subject to the negative resolution procedure.
17. The Treasury state that the negative resolution procedure is appropriate because the power is limited to adding to the number of tax years for which the scheme may operate.⁵ We accept that the exercise of this power is unlikely to be controversial. **However, since there are no limits on the number of years which may be added, or how often the power to add years may be exercised, we consider that the power is still a significant one and that accordingly the affirmative procedure is more appropriate.**

Clause 10—Designation of self-isolation support schemes

18. Clause 10(1) exempts payments made under a self-isolation support scheme from being taken into account in calculating the amount of profits in respect of which Class 4 national insurance contributions are payable. Clause 10(2) lists the self-isolation support schemes to which the clause applies, with different schemes applying for each of England, Wales and Scotland. Clause 10(2)(d) confers a power on the Treasury to designate further schemes which are to be covered by the exemption in clause 10. A scheme may only be designated under this power, if it corresponds or is similar to the schemes already specified on the face of the Bill. The power to designate additional schemes is not required to be made by statutory instrument and accordingly is not subject to any parliamentary scrutiny.
19. We were disappointed that no information is provided in the memorandum explaining why this power is needed or the circumstances in which the Treasury expect it to be used. Nevertheless, the memorandum does explain why the Treasury consider it appropriate for the power not to be subject to parliamentary scrutiny and not to require the making of a statutory instrument. The Treasury rely on the fact that the powers are limited so that the only schemes which can be designated are those which correspond to, or are similar to, the schemes listed on the face of the Bill.
20. We find this reason unconvincing. In our view, the Government should not be able to change the effect of legislation—in this case changing the schemes to which the exemption in clause 10(1) applies—without enacting further legislation. As we have previously noted,⁶ all primary and secondary legislation is published in a consistent manner which facilitates access to legislation by members of the public. This contrasts with the position under clause 10 which is silent as to the form in which a designation is to be made and how designations are to be published, leaving both matters wholly to the discretion of the Treasury.
21. Also, we do not agree with the Treasury’s reasons for excluding parliamentary scrutiny. The fact that a designated scheme may be “similar” to one of the schemes specified on the face of the Bill, suggests that its provisions will not necessarily be identical to those of the other schemes. That being so, we

⁵ See para 26 of the memorandum.

⁶ See [31st Report](#), Session 2017–19 (HL Paper 177), para 12, on the Ivory Bill.

consider that the designation of a scheme should be subject to parliamentary scrutiny.

22. **Accordingly, we recommend that a designation under clause 10(2)(d) should be contained in regulations made by statutory instrument; and that the regulations should be subject to parliamentary scrutiny with the negative resolution procedure offering an appropriate level of scrutiny.**

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 17 November 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 Rowlands and Lord Tope.