



HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

20th Report of Session 2021–22

Building Safety Bill
Judicial Review and
Courts Bill
Office for Demographic
Change Bill [HL]

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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 Browning](#)
[Lord Cunningham of Felling](#)
[Lord Goddard of Stockport](#)
[Lord Haselhurst](#)
[Lord Hendy](#)

[Lord Janvrin](#)
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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.

Twentieth Report

FOREWORD

1. This report sets out the Committee's observations in relation to a private member's Bill. It has long been, and remains, the Committee's approach to apply the same exacting standards of scrutiny to all bills, whether a government bill or a private member's bill. We acknowledge however that those members of the House who sponsor private members' bills, unlike ministers, do not have the support of departmental officials and Parliamentary Counsel in the preparation of their bills. Our comments on private members' bills are framed in the light of that understanding.

BUILDING SAFETY BILL

2. The Building Safety Bill was brought from the House of Commons on 20 January. The Bill, which legislates for a reformed building safety regime, has been through pre-legislative scrutiny.
3. We have been given a detailed and helpful delegated powers memorandum (“the Memorandum”) from the Department for Levelling Up, Housing and Communities (“DLUHC”). DLUHC is also to be commended for supplying us with illustrative secondary legislation for a number of important delegated powers. We very rarely see this from Government. **Other Departments may wish to take note of DLUHC’s approach, which undoubtedly represents best practice.**

Clause 12: power to abolish committees

4. Clause 12 of the Bill gives Ministers a Henry VIII power to repeal clauses 9 to 11, which if exercised would remove the legal underpinning for three committees described by DLUHC in the Memorandum¹ as essential in the coming years to ensure the delivery of the Independent Review’s recommendations on industry competence. These committees are a building advisory committee, a committee on industry competence and a residents’ panel.
5. DLUHC says that the importance of these committees to the delivery of the reforms recommended by the Independent Review means that the role of the committees should be made clear in legislation (hence clauses 9 to 11). DLUHC uses the word “essential” to describe the importance of the committees, though clause 12 allows Ministers to make substantial changes to the committees or even abolish them altogether by statutory instrument.
6. If these committees are essential to ensure the delivery of the Independent Review’s recommendations, they should not be capable of being abolished by statutory instrument—even an affirmative one. **We therefore take the view that clause 12 contains an inappropriately wide delegation of power in so far as it allows Ministers to repeal clauses 9 to 11.**

Clause 46: higher-risk building work and public bodies

7. Clause 46 contains a widely drafted power for Ministers to amend sections 5 and 54 of, and Schedule 4 to, the Building Act 1984 by affirmative instrument, in connection with the Government’s policy of preventing public bodies from being able to supervise their own building work for higher-risk buildings.
8. DLUHC admits that more work needs to be done to engage with the sector before creating a new regime in relation to bodies using public bodies notices and it is not therefore possible to include detailed provisions in the primary legislation.² DLUHC does, however, envisage “significant changes” to the above-mentioned provisions of the Building Act 1984.³
9. Under-developed policy should not be a justification for widely-drafted delegated powers. DLUHC is able to envisage significant changes to the

1 DLUHC, [Delegated Powers Memorandum](#), para 38.

2 *Ibid.*, para 323.

3 *Ibid.*, para 325.

above-mentioned legislative provisions. **The House may wish to seek further information from the Minister concerning the Government's current intentions in relation to the exercise of the delegated power in clause 46. We accordingly draw the attention of the House to the width of the delegated power in clause 46.**

Schedule 11, paragraph 10(1): construction products

10. Schedule 11 creates a power for the Secretary of State to make regulations in relation to the marketing and supply of construction products placed on the United Kingdom market. As part of this, regulations under paragraph 10(1) of Schedule 11 will define the list of safety-critical products—any failure of which risks causing death or serious injury to any person.
11. The first regulations made under paragraph 10(1) of Schedule 11 will be subject to the affirmative procedure; subsequent regulations will only be subject to the negative procedure.
12. DLUHC's justification is as follows:

“The decision as to how the new safety-critical regime will operate will be of critical importance to the effective regulation of construction products placed on the UK market. It is important, therefore, that when the scheme is designed initially that this should be subject to full debate to ensure that it is fit for purpose. It is envisaged that further use of this power is likely to be limited to addressing technical and administrative matters.”⁴
13. The question is whether the affirmative procedure should be confined to the initial design of the regime as set out in the first regulations made under the power or whether the affirmative procedure should also extend to subsequent amendments to the regulations. DLUHC says that any subsequent use of the power is likely to be limited to addressing technical and administrative matters.⁵ But there is no such limitation set out on the face of the Bill.
14. **Given the importance of the subject-matter of these regulations, which DLUHC says will be of critical importance to the effective regulation of construction products placed on the UK market, we recommend that all regulations made under paragraph 10(1) of Schedule 11 should be subject to the affirmative procedure.**

⁴ *Ibid.*, para 842.

⁵ *Ibid.*, para 842.

JUDICIAL REVIEW AND COURTS BILL

15. This Bill was passed by the House of Commons on 25 January. It was introduced in the House of Lords on 26 January and had its second reading on 7 February.
16. The Bill includes measures relating to—
 - judicial review;
 - practice and procedure in criminal courts, non-criminal courts and tribunals; and
 - coroners.
17. It contains 20 delegated powers.
18. The Ministry of Justice has provided a Delegated Powers Memorandum (“the Memorandum”).⁶
19. We draw the following delegated powers to the attention of the House.

Clause 13—power to amend the general limit on magistrates’ court’s power to impose custodial sentence

20. Clause 13 increases, from 6 months to 12 months, the maximum term of imprisonment that can be imposed by a magistrates’ court for an offence.⁷
21. However, it gives the Secretary of State a Henry VIII power to reduce the maximum back to 6 months—or to raise it again to 12 months—by negative procedure regulations.⁸
22. According to the Memorandum—

“The Government believes it is necessary to take this power in order to ensure flexibility in the future, should significant unsustainable pressures arise as a direct result of extending magistrates’ courts sentencing powers, such as a significant increase in the prison population, or a change to the election rate⁹ increasing the pressure on the Crown Court. It is also thought appropriate to take a power to increase the limit back to 12 months again, to allow the benefits of this policy to be maintained if solutions can be found to address those pressures.”¹⁰
23. In our recent report, *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*, we said the following about Henry VIII powers—

“Henry VIII powers are controversial, and for good reason. Every such power, and its scope, must always be fully justified. We will always

6 Ministry of Justice, [Delegated Powers Memorandum](#), dated January 2021.

7 It does this by inserting a new subsection (1A) into section 224 of the Sentencing Code (see clause 13(1)(b)).

8 See new paragraph 14A(3) of Schedule 23 to the Sentencing Act 2020, inserted by clause 13(2).

9 This is referring to a defendant’s right to elect to be tried in the Crown Court instead of in the magistrates’ court.

10 See para 31 of the Memorandum.

deprecate the use of Henry VIII powers where they appear to have been included in a bill “just in case”.¹¹

24. We are concerned that it appears from the explanation given in the Memorandum that the Henry VIII power in clause 13 may have been included in the Bill “just in case”.
25. Added to that, we consider that the exercise of this particular Henry VIII power could prove to be particularly controversial. The issue of what the maximum term of imprisonment that is available to a magistrates’ court should be is one on which there are differing and strongly held views.
26. Even if the appropriateness of the delegation of power were accepted, we consider that the Memorandum fails to provide adequate justification for the regulations being subject only to the negative procedure. We have often repeated our view that there should be a presumption that the affirmative procedure should apply to instruments made under Henry VIII powers.
27. The Memorandum gives the following justification¹² for the negative procedure applying—
 - “Parliament will have approved the principle of the ability to increase and reduce the limit by including the power within the Bill”; and
 - “changes to the policy may need to be implemented quickly”.
28. We find these reasons unconvincing—
 - approval of the principle that the limit ought to be capable of being increased or decreased by regulations is one thing; the level of parliamentary scrutiny to which such regulations should be subject is an entirely separate matter;
 - the Memorandum does not explain why it might be necessary to increase or decrease the limit so quickly that there would be insufficient time for affirmative procedure scrutiny; and
 - in any event, as we stated in our *Democracy Denied?* report—

“When drafting a delegated powers memorandum, departments should ensure that where the negative procedure is chosen on the ground that there is insufficient time for an affirmative, the memorandum explains why the “made affirmative” procedure is not applied. The threshold between the negative and the affirmative procedure depends on the substance of the instrument and should not be determined by political expediency.”¹³

The Memorandum makes no mention of the made affirmative procedure.
29. **We consider that the Government has failed to justify the inclusion of the Henry VIII power in clause 13 and, even were the appropriateness of that delegation of power to be accepted, it has failed to justify making the exercise of that power subject only to the negative procedure.**

¹¹ See [12th Report](#), Session 2021-22 (HL Paper 106), para 83.

¹² See para 32 of the Memorandum.

¹³ See footnote 11 above, para 117.

Clause 25—process for making Online Procedure Rules

30. The Bill provides for the making of Online Procedure Rules that authorise or require parties to civil, family or tribunal proceedings to participate in those proceedings online (using electronic means to initiate and conduct the proceedings (including participation in hearings))¹⁴ and otherwise govern the practice and procedure to be followed in such proceedings.
31. The Rules are to be made by a new committee called the Online Procedure Rule Committee.¹⁵ Rules made by that committee must be submitted to the Lord Chancellor for approval and, if approved, are to be contained in a statutory instrument subject to the negative procedure.¹⁶
32. According to the Memorandum, the provision made in the Bill for Online Procedure Rules (including the level of parliamentary scrutiny to apply to such rules) is comparable to provision in existing legislation governing the making of rules of procedure in civil, family and tribunal proceedings. The Memorandum states that—

“except in one very specific and sensitive circumstance (closed material procedures) court rules have not been subject to an affirmative procedure since 1873, and the Government sees no justification to provide for a different level of scrutiny to that which generally applies to the other rules of court”.¹⁷
33. **However, we are surprised that the Memorandum fails to acknowledge the scale and significance of the transformation that Online Procedure Rules could bring to the way in which justice is delivered in our courts and tribunals.**
34. The Rules could make fundamental changes to our justice system that give rise to significant issues of policy - including by requiring civil, family and tribunal proceedings to be conducted online. The issues that arise relate not only to the impact of such changes on participants in proceedings but also to the impact of such changes on the openness of justice. The principle of open justice is that proceedings in our courts and tribunals should be conducted in a transparent manner. One way that this important principle is upheld is by allowing the public to see and hear court and tribunal hearings in real time. We consider it to be vital that the exercise of a power which is capable of having an effect on this is carefully scrutinised and debated.
35. **Given the significance of the changes that Online Procedure Rules could bring to the way in which justice is delivered in courts and tribunals, we consider that such Rules merit the fuller scrutiny afforded to affirmative procedure regulations.**

Clauses 27(2) and 43(4)—powers to make amendments

36. Clauses 27 and 43 both give the Lord Chancellor power to make regulations that amend, repeal or revoke legislation—
 - clause 27 confers power to do so “in consequence of, or in order to facilitate the making of, Online Procedure Rules”; and

¹⁴ See clause 19.

¹⁵ See clause 22.

¹⁶ See clause 25(6)(b) and (7).

¹⁷ See para 53 of the Memorandum.

- clause 43 confers power to do so by way of “consequential or supplementary provision in relation to the abolition of local justice areas”.¹⁸
37. The powers may be used to make changes to both subordinate and primary legislation, including future Acts of Parliament.¹⁹
 38. Our guidance to government departments²⁰ states that, where a Henry VIII power to make incidental, consequential or similar provision extends to the amendment of future Acts, “the memorandum should explain clearly why it is thought such a power is necessary”.²¹ We are entitled to expect a convincing case to be made for a power to use secondary legislation to amend future primary legislation. We consider that, while it may be reasonable for there to be a need to amend past enactments to ensure that they fit with a Bill, the same does not necessarily apply to future legislation which should be capable of taking account of a Bill’s provisions when enacted.
 39. In relation to both powers, the Memorandum states that there are various precedents for similar provision²² but it fails to explain clearly why the powers are required in this Bill.
 40. Further, the Memorandum does not explain why the power in clause 27 allows amendments to be made to future primary legislation not only “in consequence of” but also “in order to facilitate the making of” Online Procedure Rules. What “in order to facilitate the making of” is intended to mean is not clear—and the Memorandum does not assist—but it is clearly intended to add to the breadth of the power. Although existing legislation²³ relating to practice and procedure in criminal courts and family proceedings contains such a power, existing legislation relating to practice and procedure in civil courts does not.²⁴
 41. **We consider that, unless the Government can make a convincing case for the powers conferred by clauses 27(2) and 43(4) extending to the amendment of future primary legislation, those powers are inappropriate to the extent that they permit this.**

Clause 27(1)—power to make amendments in order to facilitate the making of Online Procedure Rules

42. A separate point arises in relation to the parliamentary procedure that applies where the power in clause 27 is used to make amendments “in order to facilitate the making of” Online Procedure Rules. The power is subject to the affirmative procedure where it is used to amend primary legislation but is otherwise subject to the negative procedure.
43. Again, although this is consistent with existing provision relating to practice and procedure in criminal courts and family proceedings, it is not consistent

18 Clause 43 makes provision for the abolition of local justice areas.

19 See clauses 27(2) and 43(4).

20 DPRRC [Guidance for Departments](#) on the role and requirements of the Committee, dated November 2021.

21 See para 11 (first bullet) of the guidance.

22 See paras 44, 66 and 77 of the Memorandum.

23 See sections 73 and 80 of the Courts Act 2003.

24 See section 4(2) of the Civil Procedure Act 1997, which contains a power to amend enactments “in order to facilitate the making of Civil Procedure Rules” but only enactments passed or made before the power came into force.

with existing provision relating to practice and procedure in civil courts. Although the latter provision does include a power to make amendments “in order to facilitate the making of Civil Procedure Rules”,²⁵ that power is subject to the affirmative procedure in all cases.²⁶ The Memorandum does not address this.

44. **This means that, in relation to civil cases, amendments made to facilitate the making of Online Procedure Rules will be subject to less rigorous parliamentary scrutiny than amendments made to facilitate the making of Civil Procedure Rules. We recommend to the House that the Minister is asked to justify this.**

25 Which power may only be used to amend enactments passed or made before the power came into force (see para 25 above).

26 See section 4(2) and (5) of the Civil Procedure Act 1997.

OFFICE FOR DEMOGRAPHIC CHANGE BILL [HL]

45. This private member's Bill, introduced by Lord Hodgson of Astley Abbotts on 14 June 2021, establishes the Office for Demographic Change with the duty of collecting evidence about, and analysing the impact of, population change and considering future changes in the population of the United Kingdom and the consequences of such changes.
46. Clause 1(1) states: "There is to be a body corporate called the Office for Demographic Change." But clause 1(6) states: "The Secretary of State may, by regulations made by statutory instrument, provide for the establishment of the Office for Demographic Change."
47. **Clause 1(6) appears to confer on the Secretary of State a power to provide for the establishment of a body that is already established by clause 1(1) (once clause 1(1) is brought into force).**
48. Clause 1(6) was perhaps intended to confer a constitution on the body, dealing with such matters as the body's status, its membership, committees, quorum and matters such as account, audit, fees, charges. When bodies are created by statute, these and similar matters are typically (and for Government bills, invariably) set out expressly on the face of the legislation, usually in a schedule to the Bill.
49. **We have previously commented on the desirability of having the constitution of a statutory body set out in detail on the face of the Bill so that it is clear for all to see, rather than being consigned to secondary legislation. We remain of this view.**

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 9 February 2022 Members declared no interests.

Attendance

The meeting was attended by Baroness Browning, Lord Janvrin, Lord Goddard of Stockport, Lord Haselhurst, Lord Hendy, Lord McLoughlin, Baroness Meacher, Lord Rooker and Lord Tope.