HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

21st Report of Session 2021–22

Draft Legislative Reform (Renewal of National Radio Multilex Licences) Order 2022

Elections Bill

Down Syndrome Bill

Cultural Objects (Protection from Seizure) Bill

Motor Vehicles (Compulsory Insurance) Bill

Building Safety Bill: Government Response

Commercial Rent (Coronavirus) Bill: 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.

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Lord Cunningham of Felling
Lord Goddard of Stockport
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Lord Janvrin
Lord McLoughlin (Chair)
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Lord Tope

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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 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.

Twenty First Report

DRAFT LEGISLATIVE REFORM (RENEWAL OF NATIONAL RADIO MULTIPLEX LICENCES) ORDER 2022

1. This draft Legislative Reform Order (LRO) has been laid before Parliament by the Department for Digital, Culture, Media and Sport (DCMS), together with an Explanatory Document (ED). The draft Order is proposed to be made under section 1 of the Legislative and Regulatory Reform Act 2006 ("the 2006 Act") which allows a minister to amend primary legislation by order to remove or reduce a burden, such as a financial cost or administrative inconvenience.

2. According to DCMS, the purpose of the draft Order is to amend section 58 of the Broadcasting Act 1996 to allow Ofcom to renew the two national commercial digital radio multiplex licences[1] (which are due to expire in 2023 and 2028 respectively) until 31 December 2035, without an open competition.

Background

3. DCMS says that the two commercial national multiplexes are an essential means of distributing national commercial radio stations and programming across the UK, and that they have encouraged an increase in national commercial radio stations and enabled competition with the BBC.

4. The Department explains that the policy objective of the draft Order is to "provide clarity and long-term certainty to the commercial radio sector", and that this "will provide commercial radio with stability at a time of uncertainty in the industry and national broadcasters with the confidence to continue to invest in their digital services and support the further development of digital radio".

5. Under the current legislation, Ofcom has no power to renew these licences. Without legislative change, Ofcom would need to re-advertise the licences through an open competition.

Proposed changes

6. The main proposal in the draft Order is to give Ofcom the power to renew the two national commercial radio multiplex licences without an open competition. The proposal is to extend both licences to the same expiry date of 31 December 2035, equivalent to a 12-year extension of the first licence and a seven-year extension of the second licence.

Tests in the 2006 Act

7. The Committee considered whether the proposals meet the statutory tests set out in the 2006 Act. It appears that the draft Order would remove or reduce a burden by generating cost and administrative savings for both current licence holders and Ofcom, as a competitive re-advertisement of the

1 A radio multiplex (network) is the platform on which digital radio services/stations are broadcast. It consists of several stations bundled together to be transmitted digitally on a single frequency in a given licensed geographic area, in this case across the UK.

national licences would be avoided. With regard to the balance of interests of businesses that may wish to enter the market, current licence holders who would benefit from renewal of their current licences and listeners, the Department says that the costs of a competitive process would lead to licence holders having to divert investment away from developing digital radio content and services. The ED also demonstrates that there appears to be limited interest in a competitive process: only one respondent to the consultation expressed an interest in bidding for a national licence, and past licence competitions were met with limited interest. In addition, DCMS says that the barriers to entry to the market are high, and that commercial digital radio is recovering from the financial pressures of the pandemic, when advertising revenues dropped sharply, and from competition through online services. During public consultation, six out of ten respondents supported the proposal to extend the licences without open competition.

Parliamentary Procedure

8. DCMS has proposed that the LRO be subject to the affirmative resolution procedure.

Conclusion

9. **In the light of the information provided by the Department, we are satisfied that the Order meets the tests set out in the 2006 Act and is not otherwise inappropriate for the Legislative Reform Order procedure; and also that the affirmative resolution procedure proposed by the Government is appropriate.**

ELECTIONS BILL

10. The Bill, which had its second reading on 23 February, contains a range of provisions affecting the holding of elections. They include:

- a requirement for voters to show an approved form of photographic identification before collecting their ballot paper to vote in a UK parliamentary election in Great Britain;
- new rules for voting and candidacy eligibility of European Union citizens voting and standing in local elections;
- amendments to the provisions governing Parliamentary accountability of the Electoral Commission;
- amendments to the provisions governing political finance and expenditure in elections, including amendments to the rules on third-party spending.

11. The Department for Levelling Up, Housing and Communities has provided a delegated powers memorandum explaining the delegated powers in the Bill ("the memorandum").[2] We draw the following powers to the attention of the House.

Clause 25—Power to amend list of recognised third parties

12. Part 4 of the Bill amends Part 6 of the Political Parties, Elections and Referendums Act 2000 ("PPERA") to impose further controls on the extent to which third parties may incur expenditure in promoting registered political parties or candidates at elections. The amendments include the insertion of a new section 89A which restricts the categories of third parties who can lawfully incur such expenditure beyond a maximum of £700. The permitted categories of third parties are those listed in section 88(2) of PPERA, as well as unincorporated associations with the requisite UK connection.[3]

13. Clause 25 inserts a new subsection (9) into section 88 of PPERA. It is a Henry VIII power since it will allow the Secretary of State by order to amend the list of third parties in section 88(2) by adding, removing or varying an entry in the list.

14. In the memorandum,[4] the Department states that the list in section 88(2) is intended to constitute a comprehensive list of categories of third party. However, the Department says that it is aware that preventing other categories of third party from being able to campaign has the potential to impinge on freedom of expression (Article 10 of the ECHR) and the right to enjoy a free election (Article 3 of the First Protocol to that Convention). Accordingly, the Department states that it is important, if a legitimate category of third party emerges, that it can be added quickly to the list of categories to ensure these restrictions on campaigning remain proportionate and no more extensive than is necessary to meet their aim of preventing campaigning by those with no genuine stake in the UK.

2 Department for Levelling Up, Housing and Communities, *Delegated Powers Memorandum*, 20 January 2022.

3 Section 89A(7) defines what is meant by an unincorporated association that has the requisite UK connection. It is an unincorporated association all of whose members are registered in a UK parliamentary register as overseas electors.

4 See para 190 of the memorandum.

15. While we consider this explanation may justify having a power to add new categories to the list of third parties in section 88(2), it does not explain why it is necessary or appropriate to have the power to remove entries from the list or to vary entries in the list. **Accordingly, the House may wish to ask the Minister to explain why the power conferred by clause 25 has been drafted to allow entries in the list in section 88(2) of PPERA to be removed or varied. We consider that, in the absence of a convincing explanation, the powers to remove and vary entries in the list are inappropriate.**

Schedule 1, paragraph 2—Power to determine applications for electoral identity documents

16. Paragraph 2 of Schedule 1 inserts two new sections into the Representation of the People Act 1983 ("RPA") (sections 13BD and 13BE). Both sections provide for new kinds of electoral identity documents. The identity document under section 13BD is for persons on a register of parliamentary or local government electors, with section 13BE applying to those with an anonymous entry on such a register. The new provisions are linked to other provisions in the Bill which will have the effect of requiring a person to produce identification before they can receive a ballot paper at a polling station for UK parliamentary elections in Great Britain.

17. Under both new sections, a person has to apply to the registration officer for the relevant electoral identity document. The registration officer is then under a duty to determine the application "in accordance with regulations".

18. In explaining why the determination of a person's application for an electoral identity document is to be dealt with in regulations, the Department refers to other statutory provisions where similar regulation making powers are conferred.[5] However, there is a significant difference in those cases. In each case, it is the primary legislation, rather than regulations, which sets out the circumstances in which the registration officer is under a duty to grant the application. So, taking as an example section 13C of the RPA (which relates to electoral identity cards in Northern Ireland), the regulation making powers conferred by that section are limited to the requirements for making an application, including who may make an application and the form in which an application is to be made. The powers do not include setting out the circumstances in which the registration officer is required to issue an identity card to the applicant. That is instead set out on the face of the primary legislation which requires the registration officer to issue an identity card if satisfied that that the information provided by the applicant is correct.

19. This contrasts with the position under new sections 13BD and 13BE, which simply provide for the application to be determined by the registration officer "in accordance with regulations". This leaves it open to the regulations to determine the conditions which must be met before an applicant is entitled to receive an electoral identity document. It also allows for the possibility of the registration officer being given a discretion in deciding whether or not to issue an electoral identity document to a person.

20. The circumstances in which a person is entitled to be issued with an electoral identity document is of particular significance in the case of persons who have an anonymous entry on the register. In those cases, the electoral identity

5 See para 16 of the memorandum.

document issued under section 13BE is the only document that the person may use to establish their identity and so be entitled to receive a ballot paper.

21. Nothing is said in the memorandum to explain why the Bill does not set out on its face the circumstances in which an applicant is to be entitled to be issued with an electoral identity document. **Accordingly, the House may wish to seek an explanation from the Minister as to why the powers in this case do not, unlike the precedents referred to in the memorandum, specify the circumstances in which an applicant will be entitled to be issued with the relevant electoral identity document. We consider that, in the absence of a convincing explanation, the powers are inappropriate in leaving it to regulations to determine the circumstances in which electoral identity documents are to be issued.**

Schedule 8, paragraph 1(11)—Power to add new EU countries in respect of voting and candidacy rights of EU citizens

22. Part 1 of Schedule 8 deals with the rights of EU citizens to vote in local elections. It will replace the existing rights of EU citizens to vote and to stand in such elections with rights instead conferred on two categories of EU citizen: those with retained rights to remain in the UK following the UK's withdrawal from the EU, and those other EU citizens who fall to be treated as "qualifying EU citizens". For these purposes, "qualifying EU citizen" means an EU citizen who has the right to remain in the UK and is a citizen of an EU country listed in new Schedule 6A to RPA. Schedule 6A is inserted by paragraph 1(12) of Schedule 8 to the Bill.

23. Paragraph 1(11) imposes a duty on the Secretary of State to make regulations to add a new country to the list in Schedule 6A where:

- the country was an EU member State before the UK left the EU;
- the UK and the country concerned intend to become parties to a treaty providing for reciprocal rights to vote and stand as a candidate; and
- the requirements relating to ratification of the treaty under section 20 of the Constitutional Reform and Governance Act 2010 ("the CRAG Act") have been met.

24. The regulation making power (which appears in a new section 203A(2) of the RPA) is subject to the negative resolution procedure, despite it being a Henry VIII power to amend primary legislation. The justification given in the memorandum for the negative procedure is that the relevant treaty will have already undergone a process of parliamentary scrutiny under the CRAG Act under which the approval of both Houses is required[6]. It is stated that a further affirmative process is not considered necessary.

25. The problem with this explanation is that it misdescribes the process under section 20 of the CRAG Act. Section 20 does not require the approval of both Houses for the ratification of a treaty. Instead, a procedure akin to the negative resolution procedure for statutory instruments applies. Also, where either House resolves against the ratification of the treaty, that does not necessarily prevent the Government from ratifying it.

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6 See para 159 of the memorandum.

26. **In the circumstances, we take the view that the power to add countries to the list in Schedule 6A should be subject to the affirmative resolution procedure, particularly as this is a Henry VIII power which affects the franchise and rights to stand as a candidate in local elections.**

DOWN SYNDROME BILL

27. There is nothing in this private member's Bill which we would wish to draw to the attention of the House.

CULTURAL OBJECTS (PROTECTION FROM SEIZURE) BILL

28. There is nothing in this private member's Bill which we would wish to draw to the attention of the House.

MOTOR VEHICLES (COMPULSORY INSURANCE) BILL

29. This private member's Bill contains no delegated powers.

BUILDING SAFETY BILL: GOVERNMENT RESPONSE

30. We considered the Government amendments to this Bill in our 20th Report of this Session.[7] The Government have now responded by way of a letter from Lord Greenhalgh, Minister of State for Building Safety and Fire at the Department for Levelling Up, Housing and Communities. The response is printed at Appendix 1.

COMMERCIAL RENT (CORONAVIRUS) BILL: GOVERNMENT RESPONSE

31. We considered the Government amendments to this Bill in our 19th Report of this Session.[8] The Government have now responded by way of a letter from Letter from Lord Grimstone of Boscobel, Kt, Minister for Investment at the Department for International Trade and the Department for Business, Energy and Industrial Strategy. The response is printed at Appendix 2.

7 20th Report, Session 2021–22 (HL Paper 158).
8 19th Report, Session 2021–22 (HL Paper 155).

APPENDIX 1: BUILDING SAFETY BILL: GOVERNMENT RESPONSE

Letter from Lord Greenhalgh, Minister of State for Building Safety and Fire at the Department for Levelling Up, Housing and Communities, to the Rt Hon. the Lord McLoughlin CH, Chair of the Delegated Powers and Regulatory Reform Committee

I am very pleased that Committee found the Delegated Powers Memorandum submitted on introduction of the Building Safety Bill helpful and have probed the justification for some of our measures. I have provided comments on the issues raised in your Report.

Clause 12–Committees–powers to amend or repeal

Clause 12 includes an ability to repeal provision for three statutory Committees of the Building Safety Regulator by regulations. The Committee raises specifically how it can be that the three Committees of the Building Safety Regulator in the Building Safety Bill can be both sufficiently important to be included on the face of the Bill, and also subject to a delegated power that enables their repeal.

This reflects that the Government believes that these three Committees are the right ones for the near future. However, this Bill is intended to provide a structure for long-term improvements to the building regulatory system. It is appropriate that we reflect this and provide sufficient flexibility for the Building Safety Regulator to be able to adapt its Committee structure to changing circumstances, with strong Ministerial and Parliamentary oversight through the requirement for the affirmative procedure.

The Government has relied on the expert advice and experience of the Health and Safety Executive (HSE), as the future Building Safety Regulator, when developing clause 12. HSE has over forty-years' experience delivering regulation at an appropriate distance from Government. HSE's advice has consistently been that this delegated power is needed to enable the Committee structure to adapt and improve over time. Since 1974, HSE has witnessed major changes in both the profile of British industry and its own governance. This in turn has meant changes to HSE's 'industry' and 'subject' advisory committees reflecting industrial, technical, legal, and administrative developments. The committees on which the Health and Safety Executive can now call represent a rich mix of advisory and stakeholderled bodies. HSE could not have predicted in 1974 the exact right committee structure for the decades after.

It may assist to take a practical example. Whilst the Government considers the committee on industry competence to be essential in the coming years, the long-term objective of the policy (and indeed Dame Judith Hackitt's Independent Review) is that the built environment industry will mature to the point where it shows leadership and can take on greater responsibility for its own standards-setting and competence oversight. Therefore, as industry matures, the role of the Committee on Industry Competence may need to change. And, indeed, the eventual repeal of the Committee could be an indication of success. Whatever the long-term future of Committee on Industry Competence, the Building Safety Regulator would continue to have responsibilities for facilitating the improvement of industry competence, including under clause 6.

I do acknowledge that any use of clause 12 to repeal a statutory committee would be an important and sensitive use of this delegated power, which Parliament is right to probe carefully. The Government only intends to bring forward regulations

to repeal a statutory committee of the regulator as part of changes that would improve the regulatory system.

I will be reflecting further about how the Government can provide greater assurance to the Committee and Parliament about that intention.

Clause 46–Higher-risk building work: public bodies

The public bodies provisions in the Building Act 1984 are very little used in practice. There are two sets of similar but not identical provisions in the Act, one of which has never been used (section 54) and the other only once (section 5). These provisions allow: for a specific public body, approved by Government, to supervise its own building work but with the requirement that the body must notify the local authority using a public bodies notice (s54–which has never been used); and for a specific public body, approved by Government, to supervise its own building work without the need to notify the local authority via a public bodies notice (s5–again rarely used).

We do not propose any significant use of these provisions in future. We do want to ensure a consistent approach to higher-risk buildings being within the Building Safety Regulator's responsibilities, including for building control. Therefore the power in clause 46 of the Bill allows the Government to make secondary legislation that excludes public bodies from making use of sections 5 or 54, subject to possible exceptions. Any exceptions we might make to this rule would be narrowly defined. Defining this group of exceptions–or the absence of any exceptions–does require further work and consultation across Government. Any future secondary legislation would be subject to the affirmative resolution process.

I will be reflecting further about how the Government can provide greater assurance to the Committee and Parliament about that intention.

Schedule 11–Construction products regulations

On the important matter of the procedure that should be used to make regulations under paragraph 10(1) of Schedule 11 to the Bill, concerning construction products regulations. It is of course right to ensure that regulations receive the proper level of Parliamentary scrutiny.

In putting forward the proposed approach the Government is seeking to strike a difficult balance between the need for Parliament to scrutinise regulations through debate and the proper use of the limited and valuable time of Parliamentarians.

The power in paragraph 10(1) of the Schedule is significantly constrained by paragraph 10(2)–a product can only be put on the list if the Secretary of State considers any failure of the product would risk causing death or serious injury. If the Committee's concern is that the Secretary of State might list unnecessarily, we consider the test in paragraph 10(2) protects against this. Paragraph 10(1) is also limited to including construction products deemed to be safety critical to the list of safety critical products. It does not govern the requirements made on manufacturers, importers and distributors of those products, which are covered in subsequent paragraphs.

On the first occasion of adding construction products to the list, the Government anticipates that there will be a significant number of products being included, which it believes will warrant a discussion in Parliament of its scope. However, on subsequent occasions, the Government expects only one or two construction

products to be added to the safety critical list at a time. Given the small number of products likely to be added, and the safeguard at paragraph 10(3) requiring the Secretary of State to consult with appropriate persons, it is our view that the negative procedure would be more proportionate in this case. If the Committee's concern is that the Secretary of State might remove construction products from the safety critical list without proper scrutiny, I would be happy to address this by amending the Bill to specify that the affirmative procedure must be used where regulations intend to remove construction products from the list.

I hope that by setting out the limitations of powers to make regulations under paragraph 10(1) I have been able to reassure the Committee about the proposed approach. Nevertheless, I will be reflecting further about how the Government can provide greater assurance to the Committee and Parliament.

22 February 2022

APPENDIX 2: COMMERCIAL RENT (CORONAVIRUS) BILL: GOVERNMENT RESPONSE

Letter from Lord Grimstone of Boscobel, Kt, Minister for Investment at the Department for International Trade and the Department for Business, Energy and Industrial Strategy, to the Rt Hon. the Lord McLoughlin CH, Chair of the Delegated Powers and Regulatory Reform Committee

I am writing in response to the Delegated Powers and Regulatory Reform Committee's report published on 3 February 2022, regarding the Commercial Rent (Coronavirus) Bill ("the Bill").

My letter dated 8 February 2022 acknowledged our gratitude for the Committee's consideration of the Bill.

Clause 27 was highlighted by the Committee. This delegated power gives the Secretary of State the power to make regulations that provide for the Bill "to apply again in relation to rent debts under business tenancies affected by closure requirements".

The Committee considered clause 27 to contain an inappropriately broad delegation of power and raised a concern that clause 27(3) would allow regulations to alter the arbitration scheme.

I have carefully considered the Committee's report on clause 27. The Government remains of the view that there is a clear rationale for the purpose and intended use of the power, which is to address any future periods of coronavirus-related mandated business closures.

However, it is not the intention of the government to alter the policy of the Bill through secondary legislation. I have therefore tabled amendments to clause 27, to be moved at Report stage, to address the Committee's concerns about the breadth of the delegation of power in clause 27(7) (previously 27(3)).

These amendments will remove the power to specify provisions which are not to be re-applied, limit the power to make modifications to allow only for modifications necessary for the correct operation of re-applied provisions, and limit the power to make different provision to allow different provision for England and Wales. As such, clause 27, as amended, would continue to allow for targeted modifications, which is important to accommodate new dates of future closure periods, and make adjustments that may be needed to moratorium provisions where they relate to particular periods, to take account of a new time frame. As amended, there would still be power to make different provisions for England and Wales, and to make incidental, supplemental, consequential, saving, or transitional provisions.

As before, exercise of the power in clause 27 will be subject to the affirmative procedure.

I am grateful to the Committee for scrutinising the Bill's powers. I believe that the purpose of the clause 27 power continues to be pertinent. As such, I hope that the Committee agrees that the amended power is now appropriate and proportionate.

I will be placing a copy of this letter in the library of the House of Lords.

1 March 2022

APPENDIX 3: 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 2 March 2022 Members declared no interests.

Attendance

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