



HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

24th Report of Session 2021–22

Animals (Penalty Notices) Bill

Subsidy Control Bill: Government Response and Correspondence

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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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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.

Twenty Fourth Report

ANIMALS (PENALTY NOTICES) BILL

1. This private member's bill, which had its second reading on 18 March, allows fixed penalty notices to be issued for certain offences relating to animals. The Department for Environment, Food and Rural Affairs has provided a delegated powers memorandum ("the memorandum").¹ There is one power which we wish to draw to the attention of the House.

Clause 4—Use of guidance to specify matters to be taken into account

Subsection (3)

2. Clause 4 is concerned with specifying the matters which an enforcement authority or a constable are required to take into account when deciding whether to issue a fixed penalty notice and in deciding on the amount of the penalty. These matters are in part set out on the face of the Bill, with the relevant matters being listed in subsection (2). But there is also power in subsection (3) to specify additional matters which must be taken into account. The mechanism used for allowing the Secretary of State to specify these additional matters is guidance.
3. No explanation is given in the memorandum for this mixed approach, using both primary legislation and guidance to specify the matters to be taken into account. In our view, it is inconsistent and accordingly inappropriate for guidance to be used to specify additional matters, if primary legislation is the mechanism used to specify the matters which at the time of enactment it is decided should be taken into account. The reason for requiring specified matters to be taken into account is to affect how enforcement authorities and constables exercise what is otherwise an unfettered discretion to decide the types of cases in which to use fixed penalty notices, and to determine the amount of the penalty within the parameters set by clause 3(3). The intention as indicated in the memorandum² is to ensure consistency across the different enforcement bodies. And given this background we consider that the matters which an enforcement authority or constable are required to take into account should be specified in legislation (rather than guidance), with regulations being used as the means for providing for the additional matters. In our view, those regulations should be subject to parliamentary scrutiny with the negative resolution procedure offering a sufficient level of parliamentary scrutiny.

Subsection (4)

4. Subsection (4) of clause 4 imposes a duty on the Secretary of State to lay the guidance before Parliament, but beyond that there is no provision for parliamentary scrutiny. We have expressed the view in the past that guidance should be subject to parliamentary scrutiny where the guidance is aimed at public authorities who are under a legal duty to have regard to that guidance in exercising statutory functions, particularly where the guidance is likely to have a significant impact on how those functions are exercised.

1 Department of Environment, Food and Rural Affairs, [Delegated Powers Memorandum](#), dated 31 January 2022.

2 See paras 24–26 of the memorandum.

5. This is clearly such a case, since the Department states that the purpose of the guidance is to ensure consistency in the use of penalty notices, and to free enforcement authorities from having to develop their own procedures or policies. We note that the guidance will also perform the important role of determining how the matters listed both in clause 4(2) and guidance should be taken into account.
6. **Accordingly, we recommend:**
 - **that clause 4 should provide for any additional matters which are to be taken into account to be set out in regulations (subject to the negative resolution procedure), rather than in guidance; and**
 - **that, in any event, guidance issued by the Secretary of State under the clause should be subject to parliamentary scrutiny, with the draft negative procedure offering a sufficient level of scrutiny.**

SUBSIDY CONTROL BILL: GOVERNMENT RESPONSE AND CORRESPONDENCE

7. We considered this Bill in our 17th Report of this Session.³ The Government have responded by way of a letter from Lord Callanan, Minister for Business, Energy and Corporate Responsibility at the Department for Business, Energy and Industrial Strategy. In January we wrote to the Rt Hon. Jacob Rees Mogg MP, then Lord President and Leader of the House of Commons, about the Subsidy Control Bill. The response is printed at Appendix 1 and the correspondence at Appendix 2.

3 [17th Report](#), Session 2021–22 (HL Paper 140).

APPENDIX 1: SUBSIDY CONTROL BILL: GOVERNMENT RESPONSE

Letter from Lord Callanan, Minister for Business, Energy and Corporate Responsibility at the Department for Business, Energy and Industrial Strategy, to the Rt Hon. the Lord McLoughlin CH, Chair of the Delegated Powers and Regulatory Reform

I am writing in response to the Delegated Powers and Regulatory Reform Committee's Seventeenth Report of Session 2021–2022 on the Subsidy Control Bill (the Bill).

May I extend my congratulations to you for taking the chair of the Committee. I am thankful to current and previous members for their work scrutinising provisions in primary legislation.

As noted in the Lord President of the Council's letter of 27 January, officials and I have carefully considered the Committee's Report and contributions from Peers throughout the Bill's passage through the House to date. I have today tabled a number of Government amendments which I trust address the concerns raised by your Report.

Clause 47: financial stability directions

I note that the Committee has raised several concerns on the drafting of Clause 47, in particular to subsection 47(7). These concerns were strongly echoed by Peers at Second Reading and Committee stages of the Bill. I appreciate the Committee's approach in reviewing this clause and I have listened carefully to the views expressed. Therefore, in response to these concerns I am tabling two amendments:

- An amendment to make explicit the need to publish a direction once doing so would no longer undermine the reason it was given so that 47(7) clearly provides only for a temporary delay of publication, not permanent secrecy. I recognise the concern that clause 47(7) could potentially allow for no parliamentary scrutiny to apply to a Ministerial direction which disapplies a legislative provision and note the consequent suggestion from the Committee to remove clause 47(7) from the Bill entirely. It was never the Government's intention that Clause 47(7) provide for permanently secret laws, and this amendment is designed to address any unintended ambiguity.
- A second amendment to provide that a financial stability direction is to be laid before Parliament. I fully agree with the Committee regarding the importance of Parliamentary scrutiny. This proposed amendment would require the Treasury to lay a copy of the direction in Parliament to the same timeframe of its publication, ensuring that there is appropriate visibility to Parliamentarians of any directions made.

I have also taken on board the comments made by colleagues regarding other methods for Parliamentary scrutiny in cases where it is not possible to allow for publication immediately. In response to this concern, I would like to confirm the Government's intention to commit from the dispatch box at Report stage for the Treasury to confidentially notify chairs of relevant Committees of the use of a direction. My Treasury colleagues will be writing to the Chairs of the relevant Committees to make them aware of this commitment.

I am confident these amendments address fully and directly the concerns raised by the report and Peers at Second Reading and Committee and would like to

briefly state the Government's position on the necessity of clause 47(7). The flexibility to delay publication of a financial stability direction is important where that publication would prematurely disclose the existence of a subsidy, and as such potentially further damage confidence in the recipient enterprise, cause a run on that recipient, and damage wider market confidence. As I noted at Committee, it may be possible to interpret clause 47(6) as allowing for a delay in publication. However, the Government's view is that it is much more appropriate to provide, as we have in clause 47(7), for an explicit process for delay in publication, clearly setting out a specific and limited condition for such a delay.

Finally, regarding the Committee's concerns that the reason for having no Parliamentary procedure is to prevent non-approval of the direction by Parliament, I would like to emphasise this is not the Government's intention, as I indicated during Committee on 2 February 2022⁴. It is important when ensuring the effectiveness of any intervention that the perception by stakeholders (including financial markets and the recipient enterprise) that support could be withdrawn is minimised. If there is concern that support could be withdrawn there is a material risk that a recipient enterprise will reject the support offered, or the market will not be reassured by such support. That is why similar powers to act without Parliamentary approval where it would normally be required are provided for in the Special Resolution Regime, reflecting the importance of legal certainty for the success of emergency interventions. In any event, and as the Delegated Powers Memorandum in relation to this provision made clear, legal certainty was one of several factors considered in relation to a Parliamentary procedure for this measure and was not the sole deciding factor for choosing the process in clause 47.

Clause 10: streamlined subsidy schemes

Clause 10 provides that Ministers may establish streamlined subsidy schemes to facilitate the granting of subsidies.

The Report recommends that this power to establish streamlined subsidy schemes in Clause 10 should be exercised by regulations, and that the negative procedure would be appropriate. The rationale is that since Parliament will be interested in such schemes, it would be only right to use a formal Parliamentary procedure.

As per my thoughts on Clause 47, this Government is committed to working with Parliament both to implement the new subsidy control regime and during its ongoing operation. In this vein, illustrative regulations under Clause 11 and illustrative guidance were published on 25 January 2022, along with a policy statement on streamlined subsidy schemes and two illustrative examples of streamlined subsidy schemes.

As this Bill has progressed through the House, I have noted the strength of feeling on the appropriateness of the current drafting of Clause 10, particularly regarding the extent to which Parliamentary scrutiny could be afforded to the making and amending of streamlined subsidy schemes. However, I remain of the view that the economic and analytic nature of these schemes mean that the power to make them should not be exercised by regulations. Consequently, I have tabled amendments to these provisions to provide that streamlined subsidy schemes be subject to the negative resolution procedure, allowing them to be annulled by Parliament within 40 days of their being made.

4 Volume 818 col 229GC: debated on Wednesday 2 February 2022. Available at: <https://hansard.parliament.uk/lords/2022-02-02/debates/B009335E-2F8A-462D-9AAE-F1D3BD53CF8F/SubsidyControlBill#contribution-E00A11CA-7A05-4BEA-AB47-BF61DB9177E3>

Clause 11(1): Subsidies and schemes of interest or particular interest

Clause 11 provides for certain definitions, namely “subsidy, or subsidy scheme, of interest” and “subsidy, or subsidy scheme, of particular interest” to be defined by affirmative regulations.

The Report states that the Committee considers these powers to be inappropriate as drafted, suggesting instead that it would prefer to see these key terms on the face of the Bill, with Henry VIII powers taken to amend them in the future through affirmative procedure regulations.

I hope it will assuage the Committee’s concerns that, as mentioned, illustrative regulations and guidance published on 25 January have been provided to support Parliamentary scrutiny of these provisions in the Bill.

However, I do not agree that these definitions should be added to the Bill as suggested in the Report. Indeed, I am personally very keen that we engage on elements of the Bill rather than simply present them to Parliament and external stakeholders alike as a ‘fait accompli’. The Government will undertake a public consultation before making the first set of regulations under clause 11.

Clause 16(4) and (6): designation of marketable risk countries

Clause 16 prohibits subsidies contingent upon export performance; however, certain export credit insurance, guarantees or insurance programmes are permitted in relation to risks that are not marketable. This clause provides a list of marketable risk countries that the Secretary of State can amend by direction only when the specified conditions are met.

The Committee’s Report recommends that the power to amend the list be exercised by regulations subject to a parliamentary procedure. The Committee considers that the exercise of this power has legislative effect, so consequently should be put to Parliament for scrutiny but this may be an exceptional case where the negative procedure suffices.

In response to this particular recommendation, I trust the Committee will be reassured to hear that I have tabled amendments to the Bill which will provide that regulations subject to the negative procedure must be used to designate a marketable risk country, rather than a direction.

Clause 25(4)—meaning of deposit taker; Clause 26(4)—meaning of insurance company; and, Clause 27(3)—meaning of insurer

The final comments of the Committee in the Report relate to Clauses 25 to 27. These clauses contain powers to revise certain definitions for deposit takers, insurance companies and insurers via the affirmative procedure.

The Committee takes the view that the Government has not identified with sufficient precision the circumstances where these powers would be necessary. The Report suggests that, if changes are needed in the future, they could be made by primary legislation. Consequently, the Report recommends that the powers to amend these definitions be removed from the Bill.

In response to the Committee’s concerns and those of Peers during Committee, I have tabled amendments to the Bill which will remove the powers and related procedure to make regulations to alter the meaning of deposit taker, insurance company, and insurer from the respective clauses.

In addition, I would like to bring to the attention of the Committee that as a consequence of the Government amendments tabled a number of provisions with delegated powers will change (should the amendments be accepted by the House). To summarise these changes, I have provided an annex to the Delegated Powers Memorandum for the House's consideration. I have included this annex in this letter for the Committee.

I hope this letter provides further clarity on the Government's intentions in providing for these powers in the Bill and sufficiently explains the changes I have proposed.

15 March 2022

APPENDIX 2: SUBSIDY CONTROL BILL: CORRESPONDENCE

Letter from the Rt Hon. Lord Blencathra, then Chair of the Delegated Powers and Regulatory Reform Committee to the Rt Hon. Jacob Rees-Mogg MP, then Lord President of the Council and Leader of the House of Commons

Today, the Delegated Powers and Regulatory Reform Committee published its report on the Subsidy Control Bill. (The link to the report is provided below.) It is the practice of the Committee, when reporting on bills, to take clauses in numerical order. On this occasion, we took the exceptional approach of commenting on clause 47 before all other clauses. This was because the provision in clause 47 is, in our view, an egregious example of an inappropriate delegation of power, involving fundamental issues of government accountability and parliamentary scrutiny.

As we set out in our report, one of the cases when the Bill's subsidy control requirements are disapplied is where the Treasury gives a financial stability direction under clause 47(1). The direction involves no parliamentary procedure and does not have to be laid before Parliament after being made. Clause 46(6) states the general rule that the direction must be published in whatever manner the Treasury considers appropriate. But there is a power in clause 47(7) disapplying the general rule where the Treasury considers that publication of the direction would undermine the purpose for which it is given. In effect, clause 47(7) means that there are circumstances in which the Treasury can keep financial stability directions secret from Parliament and the public. We conclude that clause 47(7) should be removed from the face of the Bill.

When you gave evidence to the Committee early last year, you told us that the Parliamentary Business and Legislation (PBL) Committee works closely with departments from the outset of the process of bill development. You also told us that the DPRRC had a pre-emptive impact on bill development in that the PBL Committee, when considering proposed bills, kept in mind the sorts of issues on which the DPRRC would be likely to comment.

It is therefore regrettable that despite these assurances, provision in the Subsidy Control Bill, for which no precedent was given in the Delegated Powers Memorandum, is so contrary to the principles of parliamentary democracy—parliamentary sovereignty, the rule of law and the accountability of the executive to Parliament—which lie at the heart of the Committee's recent report, *Democracy Denied?*, and the Committee's revised guidance to departments.

I know that you have a deep understanding of, and respect for, robust parliamentary scrutiny. I also realise that this provision, and its implications, are deeply embedded in what is a substantial piece of legislation consisting of 92 clauses and three Schedules and that it may not therefore have been a focus of attention by the PBL Committee. Nonetheless, I know that you will understand that the DPRRC cannot compromise the high standards which have been the hallmark of its work since its inception in 1992.

I am shortly to end my term as Chair of the DPRRC, after an eventful but rewarding four years. I am sorry that my final letter to you in my capacity as Chair has been prompted by this issue. May I add however how much I have appreciated, during my time as Chair of the DPRRC, the support that you have given to the Committee.

17 January 2022

Letter from Jacob Rees-Mogg MP to Lord Blencathra

Thank you for your letter drawing my attention to your concerns on the Subsidy Control Bill. Though it is sad to see you leave the post, I wish you well with whatever you take on next and congratulations to your successor, who I have copied this letter to as well.

I have considered your points carefully and have asked my officials to engage with the Department for Business, Energy and Industrial Strategy. I know the Department is working to ensure that their response to your report is as comprehensive as it can be, given the concerns you have expressed.

I know from discussions with the Department that officials are considering the detail of your report and need a few weeks longer than usual to formulate a response which takes into account the Committee's concerns. As the Bill moves to Committee stage in the Lords, Lord Callanan will continue to consider views from peers on the clauses that the report notes are of interest to the House. The Department will respond to the report in full in time for consideration and engagement ahead of the Report Stage of the Bill.

I am copying Lord Callanan, who can discuss the details of this with you, however, it is my hope that you will allow the Government this extra time to make our response as comprehensive as it should be.

27 January 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 23 March 2022 Members declared no interests.

Attendance

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