

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

4th Report of Session 2022–23

**Product Security and
Telecommunications Infrastructure Bill**

Clean Air (Human Rights) Bill [HL]

**Universal Credit (Removal of Two
Child Limit) Bill [HL]**

Front-loaded Child Benefit Bill [HL]

**Local Authority (Housing Allocation)
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

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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 hldelgatedpowers@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.

Fourth Report

PRODUCT SECURITY AND TELECOMMUNICATIONS INFRASTRUCTURE BILL

1. This Bill, which had its second reading on 6 June 2022, deals with two matters:
 - It enables legislation to specify requirements which are to apply for the purpose of protecting and enhancing the security of consumer internet-connectable products,¹ and it establishes a regulatory regime to underpin the imposition of those requirements.
 - It makes changes to the legislation governing telecommunications infrastructure, in particular the electronic communications code contained in Schedule 3A to the Communications Act 2003.
2. The Bill contains a relatively large number of delegated powers and the Department for Digital, Culture, Media and Sport has provided a delegated powers memorandum (“the memorandum”).² We draw the following provisions to the attention of the House. Some of the points we make arise from a difference between what is said in the memorandum and what appears on the face of the Bill. Our final point concerns a power which is not explained in the memorandum.

Clause 3—Power to deem compliance with security requirements

3. Part 1 of the Bill is concerned with the security of internet-connectable products which are made available to consumers in the UK. The core provision is clause 1 which allows the Secretary of State to make regulations specifying the requirements which are to apply for the purpose of protecting or enhancing the security of internet-connectable products made available to consumers in the UK. The security requirements can be applied to the manufacturers of such products and also to importers and distributors (referred to collectively in the Bill as “relevant persons”).
4. Clause 3 allows the Secretary of State to make regulations providing that a relevant person is to be treated as complying with a security standard if specified conditions are met. No limits are imposed on the circumstances in which this power will be capable of being used. Subsection (2) provides that the specified conditions may include “among other things” compliance with specified standards. But this does not limit the circumstances in which the power may be exercised.
5. The explanation for the power is given in paragraphs 20 to 22 of the memorandum. The point is made that improving the security of connectable products is a critical global issue, and therefore it is likely that other countries and international standards bodies will introduce standards that are similar to or align with the security requirements imposed under the Bill. The purpose of the power is to allow products which meet these alternative

1 References in this Report to internet-connectable products also include network-connectable products: see clause 4 of the Bill.

2 DCMS, [Delegated Powers Memorandum](#), 26 May 2022.

standards to be excepted from the regime under the Bill, provided that those standards achieve equivalent security outcomes and do not weaken the regime established by the Bill. The powers will also facilitate mutual recognition agreements and therefore help the UK to avoid placing an undue burden on industry by restricting the free flow of international trade.

6. While we consider that this provides a reasonable explanation for the power contained in clause 3, it does not explain why it is considered necessary or appropriate for the power to be at large and not limited so that it can only be used where a product is subject to an alternative security regime imposed outside the UK. **Accordingly, the House may wish to ask the Minister to explain whether the failure to limit the powers in this way is inadvertent; and, if not, why (whether by reference to technological change or otherwise) it is considered necessary to draw the powers more widely than indicated in the memorandum.**
7. Regulations under clause 3 are subject to the negative resolution procedure. That is based in part on the fact that the regulations will not reduce the effect of the legal framework.³ But that assumes that other international standards will apply instead. **Accordingly, we consider that the affirmative resolution procedure is more appropriate if the width of the regulation-making power is to be retained.**

Clause 9—Power to except manufacturers from the duty to provide a statement of compliance

8. Clause 9 requires manufacturers to provide a statement of compliance when a product which is subject to security requirements is made available in the UK. Subsection (7) of clause 9 confers a power by regulations to provide that a manufacturer is to be treated as complying with this requirement if specified conditions are met.
9. The explanation in the memorandum⁴ links this power to the power in clause 3 to treat a relevant person as complying with a security requirement:

“Where the government has recognised another standard as being equivalent to compliance with a security requirement using the provisions of clause 3(1), it may be appropriate under certain conditions, for instance where the government has entered into a mutual recognition arrangement with another regime, for the duty to ensure that a product is accompanied by a statement of compliance to be waived for relevant persons in relation to products that meet that standard.”

However, this limitation on the circumstances in which the power will be used is not reflected in clause 9(7) itself, which simply confers a power to treat the manufacturer as complying with the duty to provide the statement of compliance “if specified conditions are met”, without any indication of or limit on what those conditions might be.

10. **Accordingly, the House may wish to ask the Minister to explain whether the failure to limit the power as described in the memorandum is inadvertent; and, if not, why it is considered necessary to draw the power more widely than indicated in the memorandum.**

³ See paragraph 23 of the memorandum.

⁴ See paragraph 52.

11. Regulations under clause 9(7) are subject to the negative resolution procedure. **We consider the affirmative resolution procedure is more appropriate if there are to be no limits on the circumstances in which the duty under clause 9 to provide a statement of compliance may be waived.**

Clauses 11, 18, 19, 24 and 25—Duty to notify customers of a compliance failure

12. Clause 11 requires a manufacturer to take action where it becomes aware of a compliance failure. This includes notifying the persons listed in clause 11(4). Those persons are the enforcement authority, other manufacturers of the product, importers and distributors, and:

“in a case where specified conditions are met, any customer in the United Kingdom to whom the manufacturer supplied the product.”

The reference in the provision quoted above to “specified conditions” is to conditions specified in regulations subject to the negative resolution procedure.

13. The explanation for this regulation-making power is contained in paragraph 55 of the memorandum:

“Where the nature of a compliance failure in relation to consumer connectable products supplied to customers exposes those customers to risk, it is important that they are informed and can respond accordingly. The Government will use this power to set out practical conditions, the effect of which will be that customers will need to be notified of compliance failures where that failure has exposed the customer to significant risk. These conditions will be defined in regulations, and will be based on an assessment of the additional risk of cyber-attack presented by different kinds of compliance failure, for instance, in relation to specific security requirements.”

14. However, despite the stated intention to use the power to ensure that customers are informed where they are put at risk as a result of the compliance failure, there is no duty on the Secretary of State on the face of the legislation to act in that way. Instead, the provision simply gives the Secretary of State an unfettered discretion to determine the circumstances in which customers should be notified.
15. **We fully agree that it is important that customers are notified where they are put at risk as a result of a compliance failure. We are surprised therefore that the power is drafted in a way that gives the Secretary of State a discretion to decide whether or not to make regulations requiring notification in those circumstances. In our view, the legislation should be framed so that the Secretary of State is under a duty to make regulations requiring manufacturers to notify customers in circumstances where a failure to notify is liable to place the customers at a significant risk, and we recommend accordingly.**
16. The same issue arises with the powers in clause 18(4), 19(6), 24(4) and 25(7).⁵ Each of those clauses is also concerned with notification of compliance

⁵ In each of these cases, when explaining the power the memorandum includes a paragraph which is framed in identical terms to paragraph 55. See paragraphs 68, 71, 74 and 77 of the memorandum.

failures with the notification of customers only being required where conditions specified in regulations are met. **We therefore make the same recommendation with respect to those powers as we do in paragraph 15 above in relation to the powers conferred by clause 11(4).**

Clause 27—Power to delegate enforcement functions

17. Chapter 3 of Part 1 (clauses 26 to 52) makes provision for the enforcement of the duties imposed on manufacturers, importers and distributors in relation to the security requirements which apply to internet-connectable products. The enforcement functions conferred by Chapter 3 include:

- the power to give a compliance notice requiring a person who is failing to comply with a relevant duty to comply with that duty within a specified period;
- the power to give a stop notice to prevent a continuing breach of a relevant duty;
- the power to give a recall notice to manufacturers for the purpose of securing the return of products;
- the power to impose monetary penalties⁶ for a failure to comply with a relevant duty;
- the power to apply to the court for the forfeiture of products where there is a compliance failure;
- the power to require a person to provide information and the power to enter premises.

The functions are conferred on the Secretary of State.

18. Clause 27 provides that the Secretary of State may enter into an agreement with any person authorising the person to exercise any enforcement function of the Secretary of State. Clause 27(6) provides that, where a person is authorised under clause 27 to exercise an enforcement function, any reference in Chapter 3 to the Secretary of State in connection with that function is to be read as a reference to that person.
19. The memorandum makes no reference to the power to delegate the exercise of enforcement functions conferred by clause 27. We assume this is because the Department do not view it as a legislative power on the basis that in some sense the Secretary of State remains the owner of the function where a delegation occurs. In this regard, clause 27(3) provides that an agreement under clause 27 may be cancelled by the Secretary of State at any time, and that the existence of such an agreement does not prevent the Secretary of State from performing a function to which the agreement relates.
20. In the Explanatory Notes for the Bill, the delegation power contained in clause 27 is described as “a routine power that replicates other legislation such as section 125 of the Environmental Protection Act 1990”.⁷

⁶ The maximum penalty is the greater of £10 million and 4% of the person’s qualifying worldwide revenue for the person’s most recent complete accounting period.

⁷ There is a notable difference between section 125 and clause 27 in that the delegation of enforcement powers in the former case is limited to delegation by the Secretary of State to any public authority (and not any person as in this case).

21. Despite the Department's approach and what it says in the Explanatory Notes, we consider that giving the Secretary of State the power to delegate enforcement functions as proposed in this case is in substance the delegation of a legislative power. Thus, it allows the Secretary of State to determine who is to have the legal authority to exercise functions under the Bill, where the exercise of those functions can include having the sole responsibility to decide how, against whom and in what circumstances enforcement powers under the Bill are exercised. There is nothing on the face of the Bill which requires the Secretary of State to have any involvement in or oversight of the exercise of the functions once a person has been authorised by an agreement under clause 27.
22. The enforcement functions which may be delegated by an agreement under clause 27 are very significant, and how they are exercised will no doubt have an important impact on the effectiveness of the regulatory regime. Also, there are no limitations on the persons to whom the functions may be delegated. As things stand, there is no requirement for parliamentary scrutiny of the delegation by the Secretary of State of the power to exercise enforcement functions under clause 27, and there are no limitations on the persons to whom the functions may be delegated. There is not even any requirement on the Secretary of State to publish information about delegations made under clause 27.
23. **Accordingly, we strongly take the view that the determination of who is to exercise enforcement functions under Chapter 3 of Part 1 should be subject to parliamentary scrutiny, and therefore that the power to delegate functions under clause 27 should be done by way of regulations rather than by agreement. Given the significance of the functions and the width of the power (which extends to conferring the functions on private as well as public bodies), we consider the regulations should be subject to the affirmative resolution procedure.**

PRIVATE MEMBERS' BILLS: INTRODUCTORY NOTE

24. 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.

CLEAN AIR (HUMAN RIGHTS) BILL [HL]

25. The Clean Air (Human Rights) Bill was introduced in the House of Lords on 19 May 2022 by Baroness Jones of Moulsecoomb. The Bill would, among other things, establish the right to breathe clean air; require the Secretary of State to achieve and maintain clean air in England and Wales; establish the Citizens' Commission for Clean Air, and require the Secretary of State to apply environmental principles in carrying out duties under the Bill and other clean air legislation.

Clause 2

26. The Secretary of State has a statutory duty under clause 1(2) to achieve and maintain clear air in England and Wales. Clean air is defined in clause 1(4) to mean air that does not contain banned pollutants or pollutants, concentrations or emissions above the limits or levels of exposure (which may be zero) which are set out in:
- Schedule 1 (pollutants relating to local and atmospheric pollution);
 - Schedule 2 (indoor air pollutants);
 - Schedule 3 (pollutants causing primarily environmental harm); and
 - Schedule 4 (pollutants causing climate change).
27. Under clause 2(1), the Environment Agency (EA) must on an annual basis review the pollutants and the limits set out in Schedules 1 to 3. Following that review, the EA must advise the Secretary of State as to whether additional pollutants should be added to Schedules 1, 2 and 3 or whether the pollutant limits in those Schedules should be lowered in order to protect life, health or the environment.
28. Under clause 2(5), the Secretary of State must, in accordance with the EA's advice and the precautionary principle, amend Schedules 1 to 3—by regulations made by a negative statutory instrument—to include additional pollutants (and their limit values, which may be zero) and to lower any limits. Under clause 2(6), the Secretary of State must also amend the pollutants and the limits set out in Schedules 1 to 3 to reflect revised guidance and good practice statements from the World Health Organization, the International Organization for Standardization and the United Nations Economic Commission for Europe.
29. Clause 2(11) states that the Secretary of State must, in accordance with advice received from the Committee on Climate Change (CCC) and the

precautionary principle, amend the limits in Schedule 4 by regulations made by negative statutory instrument. Interestingly, there is no duty on the Secretary of State in clause 2(11) to add pollutants to Schedule 4, even though the CCC may have advised this under clause 2(10).

30. Clause 2 contains a Henry VIII power for Ministers to amend Schedules 1 to 4 to the Bill. These Schedules contain the essential components of the Bill's definition of clean air. Yet the Henry VIII power to amend the four Schedules is subject only to the negative procedure. We normally expect a compelling reason why Henry VIII powers should not be subject to the affirmative procedure. **In the absence of such a reason, we recommend that the powers in clause 2(5) and (11) be exercised by the affirmative procedure.**
31. The Secretary of State is legally required—under clause 2(5) and (11)—to act on the advice of the EA and the CCC when amending Schedules 1 to 4. The EA is a non-departmental public body sponsored by the Department for Environment, Food and Rural Affairs. The CCC is the Government's adviser on tackling climate change. If these non-elected bodies give advice to the Government, but the Government are legally obliged to act on the advice (as they are under clause 2(5) and (11)) it is more than advice. It is advice that is legally binding on the Minister, who may have to amend the Act by statutory instrument even if they fundamentally disagree with the advice. Why, with all the resources available to a government department, is the Minister legally obliged to legislate in accordance with advice with which they may fundamentally disagree and without any challenge function of their own? The Minister does not have an independent power under this Bill to amend the Schedules; they are confined to following the advice of other bodies.
32. The duties in clause 2(5) and (11) reflect a mismatch between accountability and responsibility. The person with accountability to Parliament (the Minister) has no option but to do what other bodies (the EA and the CCC) tell them to do. And the bodies (the EA and the CCC) responsible for the content of the statutory instrument are not accountable to Parliament.
33. Under clause 2(6), the Secretary of State must amend the pollutants and the limits set out in Schedules 1 to 3 to reflect revised guidance and good practice statements from foreign bodies (including the World Health Organization). Why should mere guidance or good practice statements from an international body compel the Minister to amend an Act of Parliament without any challenge function on the part of the Minister? It would be unacceptable to give unelected non-Crown bodies and foreign organisations the power to amend Acts of Parliament directly. It is equally unacceptable to allow such bodies to advise or give guidance to the Minister to make the amendments and then impose a statutory duty on the Minister to give effect to the advice or guidance.
34. **In the absence of a satisfactory explanation, we recommend that the duty on the Minister in clause 2(5) and (11) to give legislative effect to the advice be substituted by a power to amend the Schedules under the affirmative procedure, taking account of outside advice but without necessarily being obliged to give legal effect to it.** This means that the Minister will be responsible for the content of the regulations and will be directly accountable to Parliament for the exercise of their discretion.

Clause 3

35. Under clause 3(8), the Citizen’s Commission for Clean Air (CCCA)—a body established under clause 13 by the Secretary of State—must review annually the Secretary of State’s compliance with:
- (a) the limits in Schedules 1 to 4, and
 - (b) the Secretary of State’s duties in clause 3(1) to (7) to make regulations to ensure the accurate and regular assessment of air pollution in England and Wales during the previous calendar year.
36. Following this review, the CCCA must—under clause 3(9)—advise the Secretary of State as to whether any methods of assessment, publication or reporting should be discontinued, amended or improved or whether methods of assessment, publication or reporting should be added with effect from the start of the subsequent calendar year. Under clause 3(10), the Secretary of State must, in accordance with the CCCA’s advice and the precautionary principle, amend assessment, publication or reporting methods through regulations made by statutory instrument.
37. Points made earlier in relation to clause 2 apply to clause 3 too. **In the absence of a satisfactory explanation, we recommend that the duty on the Minister in clause 3(10) to give legislative effect to the advice be substituted by a power to amend the Schedules under the affirmative procedure, taking account of outside advice but without necessarily being obliged to give legal effect to it.** This means that the Minister will be responsible for the content of the regulations and will be directly accountable to Parliament for the exercise of their discretion.

UNIVERSAL CREDIT (REMOVAL OF TWO CHILD LIMIT)**BILL [HL]**

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

FRONT-LOADED CHILD BENEFIT BILL [HL]

39. This private member’s Bill contains no delegated powers.

LOCAL AUTHORITY (HOUSING ALLOCATION) BILL [HL]

40. This private member’s Bill contains no delegated powers.

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 15 June 2022, Members declared no interests.

Attendance

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