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From the Parliamentary
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Dear Baroness Randerson

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Additional Provisions in the Second House

During the debate on Second Reading of the High Speed Rail (London – West Midlands) Bill (“the HS2 Bill”) on 14 April, there was some discussion of the powers of the Select Committee to make changes to the Bill, and its powers in relation to the Select Committee in the House of Commons. This is of course a matter for Parliament and I set out at the end of this section the advice I have received from the Clerks of the Legislation Office of the House of Lords.

Hybrid bills are “public bills which are considered to affect specific private or local interests, in a manner different from private or local interests of other persons or bodies of the same category, so as to attract the provisions of the standing orders relating to private business”, and, as a result, “such bills are subject in both Houses to certain proceedings additional to the normal stages in the passing of public bills” (*Erskine May*, 24th ed, p 652). The process for a hybrid bill in Parliament, therefore, has elements of both the public bill and private bill procedures. The Select Committee stage is part of the private bill procedure.

Either House, whether in Select committee or at some later stage, may make amendments to the public elements of the Bill. Any such amendment passed in the House of Lords would, in accordance with usual bill procedure, require the Bill to return to the House of Commons for Commons Consideration of Lords Amendments.

The Select Committee in either House may also require the Promoter to make other sorts of changes such as, in the case of the HS2 Bill, changes to the way in which the scheme is built or to the underlying policies that have been put in place that are not set out in the Bill. As I set out in my remarks in the House, these may include, for example, how we plan to control noise and dust during construction, or matters of compensation or property acquisition. The Select Committee in the House of Commons made recommendations that included:

- Changing the vertical alignment of the railway near Lichfield (para 51 of the Select Committee's Report)
- Extending noise barrier protection at Radstone (para 83), Mixbury (para 86) and Wendover (paras 131ff)

- Providing for a road bypass at Chipping Warden (para79)
- Extending the Chilterns tunnel northward at South Heath (para 127)
- Directing the acquisition of a business (para 58).

This non-exhaustive list illustrates the wide scope of that Committee's power to require changes that address issues raised by petitioners, and the Committee in the Lords will be able to make similar recommendations. This also explains why the House of Lords petitioning kit says:

"individuals, businesses and organisations specially and directly affected by a hybrid bill are given the opportunity to 'petition' either or both Houses of Parliament to seek to mitigate the effects of the bill on themselves, their business or their property"

as quoted by Lord Stevenson during the debate.

Another class of possible changes includes those amendments which, if the bill were a private bill, would require a petition for Additional Provision. These are changes that go beyond the scope of the existing Bill powers, for example by requiring the compulsory acquisition of rights over additional land, permanently or temporarily, or that produce a significant environmental impact beyond what is set out in the Environmental Statement. By affecting private or local interests not previously affected, they have the effect of re-hybridising the Bill.

It is important to understand, however, that not every change to the railway or its mitigation is an Additional Provision. The powers in the Bill are reasonably broad and, therefore, changes can be recommended that do not require an Additional Provision. For example each of the Scheduled Works (the main works for the railway set out in Schedule 1 of the Bill) has Limits of Deviation that are set out in the Bill plans. The Select Committee may recommend that the works are constructed in a specific position within those limits without requiring an Additional Provision.

Similarly the Bill grants powers for ancillary works, such as mitigation works, to be constructed anywhere within the Limits of Land to be Acquired and Used (LLAU), which are again set out on the Bill Plans. The Select Committee may recommend, for example, that replacement habitat is provided in a different location within the LLAU and, as long as this fits within the environmental envelope set out in the Environmental Statement, would not require an Additional Provision.

Five sets of Additional Provisions were brought forward by the Promoter while the HS2 Bill was being considered by the Select Committee in the House of Commons. These included significant changes sought by the Committee, including a 2.6 km extension to the tunnel under the Chilterns.

The convention is that the Select Committee in the first House on a hybrid Bill is allowed to make an amendment that would require an Additional Provision whereas the normal process is that the Select Committee in the Second House is not. This is because Erskine May states that the procedure in a Select Committee on a hybrid Bill "broadly follows the procedure of an opposed private bill". Standing Orders in both Houses are clear that petitions for additional provisions are not allowed in the second House (Lords Standing Order 166A(3), Commons Standing Order 73(2)). It is important to note that this is not an issue of the relative powers of the Commons and the Lords but the appropriate powers for the first and second House considering a hybrid Bill.

The principle underlying this practice is that the second House (whether this is the House of Lords or the House of Commons) should not make amendments affecting private interests which affected persons have not had an opportunity to petition against in the first House. To do so would put such a petitioner at a disadvantage relative to other petitioners that are able to petition both Houses to protect their private interests.

This has been the common understanding on hybrid Bills as can be seen in the excerpt below from the First Special Report of the House of Lords Select Committee on the Crossrail Bill (session 2007-08):

"On a Private Bill, it is not possible to introduce a Petition for Additional Provision in respect of a Bill in the Second House, as this is expressly forbidden by Private Bill Standing Order 73. Procedure in a Select Committee on a hybrid bill "broadly follows the procedure on an opposed private bill"[citing Erskine May]. We therefore concluded that we had no power to make an amendment which would have amounted to an Additional Provision, unless we were specifically instructed to do so by the House. We received no such instruction.

Therefore, the Select Committee in the second House for a hybrid Bill can only require an Additional Provision if provided with an explicit instruction from the House giving it the right to do so, as it is only the House that is allowed to override Standing Orders.

During the debate, Lord Stevenson of Balmacara said

"..It is my understanding that there are several precedents which suggest that what he read out was not correct; that previously in two major Bills—the Crossrail Bill and the Channel Tunnel Rail Link Bill—additional provisions were considered by the second House.." (HL Deb, 14 April 2016, vol 770 col 430)

This is not correct. No Additional Provisions were brought forward in the House of Lords, which was the second House in both cases, to either of those two Bills.

Lord Stevenson of Balmacara went on to say:

"..A Select Committee ... will be appointed to consider your petition and any other petitions deposited against the Bill ... They have the power to amend the Bill, but not reject it".

I do not understand how he can arrive at the position he has just articulated, given that and what has been said publicly." (HL Deb, 14 April 2016, vol 770 col 430)

As I explained above, the Committee does indeed have the power to amend the Bill without the need for an instruction. What it cannot do is make a rehybridising amendment that would require the promotion of an Additional Provision.

There is only one precedent that we can find of a Select Committee in the second House being instructed to consider an additional Provision; the Channel Tunnel Bill. However, the instruction to the Lords Select Committee that considered that Bill only gave the Committee the power to consider a very specific Additional Provision. That Additional Provision had already been considered, and rejected, by the Select Committee in the House of Commons. A reduced version of the proposals had been agreed with the petitioners concerned, and it was this reduced version that the Lords Select Committee was instructed to consider. In particular, the instruction referred to the fact that the plans and sections for the Additional Provision had been deposited in the previous year, when the Bill was in the House of Commons. No additional rights over land were required by this Additional Provision, other than those set out in the version brought forward in the Commons (see, HL Deb, 19 February 1987, col 1208). This, therefore, allowed the Lords to conclude that this was compatible with the role of the second House, as petitioners affected by this Additional Provision did have the opportunity to petition and be heard in both Houses.

This very specific instance is the only precedent, as far as is known, of an amendment amounting to an Additional Provision being made by a Select Committee in the second House on a hybrid Bill. With respect to the HS2 Bill, there is no Additional Provision for which plans and sections have already been deposited, that the Lords Committee could be instructed to consider in this way.

I have sought the advice of the Clerks of the Legislation Office on the matter of hybrid bill and Additional Provision in the Second House. Their advice is as follows:

The Select Committee on the Bill does not have power to make an amendment that which would amount to an Additional Provision unless it has an instruction to do so by the House. *The Companion to the Standing*

Orders (2015) (paragraph 9.29) states that, in relation to private bills (and hybrid bills generally follow private bills), instructions may be moved at any time between second reading and committee stage. An instruction motion could therefore be tabled either with the second reading motion or with the appointment motion. In the absence of an instruction, it will be a matter for the Select Committee to decide whether or not to hear argument on matters that could give rise to an amendment amounting to an Additional Provision. If such an instruction were agreed by the House and the Bill were subsequently amended to include an Additional Provision, it would have to return to the House of Commons for Commons Consideration of that amendment. It would be a matter for the House of Commons to decide the procedure that should apply to that new Additional Provision.

If such an instruction was passed, and if the Committee then sought an amendment to the Bill that required an Additional Provision to deliver it, the Bill would have to return to the House of Commons. This would be a highly irregular procedure and an unacceptable delay to a project of national importance that has been planned on the basis of existing practice in Parliament, not on a process whose rules change part-way through.

Appointment of a technical advisor to the Select Committee

Lord Berkeley raised a procedural point about whether the Select Committee should have the power to appoint a technical advisor. I think it is important to acknowledge the distinction between the role of a Select Committee for hybrid Bills and a departmental or topical Select Committee. The latter have broad remits and carry out inquiries usually on their own initiative and, therefore, it is normal and accepted that they would request independent advice and opinions from experts.

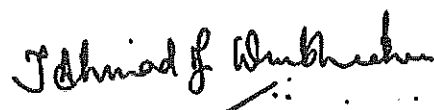
A hybrid Bill Select Committee acts in a quasi-judicial capacity, hearing evidence from both petitioners and promoters to reach a decision based on the information presented. It is the responsibility of both promoters and petitioners to present their evidence, including that of subject expert witnesses where they feel necessary, in a way that is readily understandable to the Committee.

To grant the HS2 Select Committee the power to appoint independent experts for advice would be against convention. It is an important principle that the Committee, like a court, considers the evidence that is presented to it in public in accordance with the rules of the House. An independent advisor would mean that the Select Committee would effectively receive three different sources of evidence on particular points. However, while the promoter and petitioner are able to cross-examine each other there would be no opportunity for either party

to cross examine the independent advice. Instead quasi-court proceedings might be determined by evidence provided in private. This does not feel right or fair to either petitioner or promoter. As in any court the onus is on those appearing before the court to present their evidence as effectively as possible. On this basis I do not think it is necessary or prudent for the Select Committee to be able to appoint a technical advisor.

A copy of this letter will be placed in the libraries of both Houses.

Yours sincerely

A handwritten signature in cursive script, reading "Tariq Ahmad of Wimbledon". The signature is written in dark ink and is positioned centrally below the closing "Yours sincerely".

LORD (TARIQ) AHMAD OF WIMBLEDON