Delegated Powers and Regulatory Reform Committee – Written evidence

Thank you for inviting the Delegated Powers and Regulatory Reform Committee to comment on the delegated powers in the draft Deregulation Bill. We welcome the opportunity. We considered the draft Bill at our meeting yesterday and I have pleasure in attaching a memorandum setting out the Committee’s views.

We hope the attached memorandum will be useful as part of your scrutiny of the draft Bill; and we look forward to reading the Joint Committee’s Report. We will, of course, look carefully at the delegated powers contained in any subsequent Bill introduced to the House of Lords.

Baroness Thomas of Winchester
Chairman
28 October 2013

Memorandum from the House of Lords Select Committee on Delegated Powers and Regulatory Reform to the Joint Committee on the Draft Deregulation Bill

1. We were invited by the joint committee to consider the provisions in the Draft Deregulation Bill that delegate legislative power. The Cabinet Office has provided a memorandum about the delegated powers in the Draft Bill. Having considered the Draft Bill, we have particular concerns about the delegated powers in the following provisions.

   **CLAUSE 7 – AUTHORISED FUELS AND EXEMPT FIREPLACES**

2. Under section 20 of the Clean Air Act 1993 (which creates offences in relation to certain smoke emissions) it is a defence to prove that the emission was caused by an “authorised fuel”, defined in subsection (6) as a fuel declared by the Secretary of State in negative regulations to be an authorised fuel. Also, no offence is committed where unauthorised fuel is burnt on a fireplace that is one of a class of fireplaces exempted (conditionally or unconditionally) from section 20 by a negative order under section 21.

3. The new subsection (5B) inserted in section 20 by clause 7(2) would define “authorised fuel”, in relation to England, as a fuel included in a list kept (and published) by the Secretary of State. The new subsection (1A) inserted in section 21 by clause 7(3) would similarly enable the Secretary of State to exempt classes of fireplace from section 20 (with or without conditions) by list. The effect of inclusion in either list would also be to preclude the commission of an offence under section 23 (acquiring or selling fuel) in respect of that fuel or its use in such a fireplace.

4. Both of these changes would remove the specification of authorised fuels and exempt fireplaces from the sphere of subordinate legislation laid before Parliament (and
accordingly subject to Parliamentary control) into the realms of administrative lists. In the context of the ingredients of a criminal offence and of its associated defence, we regard that as a wholly unsatisfactory proposal.

5. We found the explanations advanced in paragraphs 75-77 of the memorandum very surprising. Apparently, manufacturers find it burdensome that fuels and fireplaces can be authorised or exempted in statutory instruments only once every six months. This is because it is Government policy where possible to limit to twice a year (“the common commencement dates”) the occasions on which subordinate legislation affecting business may come into force. Accordingly, the Government now prefer to dispense with subordinate legislation for the purpose, and to use lists instead.

6. Seemingly, having fashioned its own internal fetter on its powers to make regulations and orders, the Government are now presenting this self-erected obstacle as a ‘burden’ on business, to be relieved, not by modifying their own self-denying ordinance to allow instruments to be made more frequently in this case, but by denying Parliament control over the ingredients of a criminal offence (and defence). We therefore conclude that these delegations of legislative power to documents that elude Parliamentary control are inappropriate.

CLAUSE 28 – MODEL CLAUSES IN PETROLEUM LICENCES

7. Section 3 of the Petroleum Act 1998 enables the Secretary of State to grant licences to persons to bore for, and to get, petroleum in certain circumstances. Section 4 requires him to make negative regulations prescribing a number of matters connected with applications for, and the grant of, licences, including (subsection (1)(e)) model clauses to be incorporated in any such licence.

8. Clause 28(2) would remove the requirement in section 4(1)(e) regarding model clauses and insert instead new subsections (2A) to (2C) which, in effect, afford the Secretary of State the choice of prescribing the model clauses either by negative regulations or in a published document. The most significant feature of the proposal from our perspective would be that the model clauses would not be subject to Parliamentary control. In paragraphs 235-238 of the memorandum, the Government explain that the model clauses themselves are generally not controversial; that amendments made otherwise than by statutory instrument can be effected more quickly and cheaply; that the exercise of consolidating published model clauses will be cheaper and more straightforward; and that regulations will still be used where changes are significant or controversial.

9. While those are undoubtedly relevant factors, we were especially influenced in our assessment of clause 28 by three considerations.

10. It is not unusual for changes to either specific or standard conditions of energy licences to require a Parliamentary procedure: the present Energy Bill provides for several instances where modifications of licence conditions in gas and electricity supply licences are to attract the draft negative procedure.

- It seems apparent from new subsection (2C) that a document may amend regulations, and *vice versa*, although the reference to subsection (2A) suggests
that only future regulations might be amendable by document. On its face, the notion of a mixture of regulations and documents affecting the same model clauses does not seem particularly user-friendly.

- The subject matter of some of the model clauses presently in force under Statutory Instrument 1999 No. 160, does not strike us as being necessarily free from controversy. We have in mind in particular clauses governing ‘the abandonment and plugging of wells’, and about ‘working obligations’ as they relate to such matters as seismic surveys.

11. We therefore remain unpersuaded by paragraphs 227-238 of the memorandum that the changes proposed to the legislative power delegated in section 3 of the 1998 Act are appropriate.

**CLAUSE 43 – GANGMASTERS: ENFORCEMENT OFFICERS’ FUNCTIONS**

12. Section 15 of the Gangmasters (Licensing) Act 2004 enables the Secretary of State to appoint “enforcement officers”, with the functions set out in subsection (1)(a) and (b) (to enforce the provision prohibiting unlicensed activity and to take action where it appears that an offence under the Act has been committed). Alternatively, or in addition, he may make arrangements with an authority listed in subsection (3) for officers of that authority to be enforcement officers. Clause 43(2) inserts a new subsection (3A) (and clause 43(3) inserts a similar sub-paragraph in the equivalent Northern Ireland provisions).

13. The new subsection enables the Secretary of State to provide that enforcement officers are not to exercise such functions in relation to the institution or conduct of criminal proceedings as may be specified. The memorandum does not mention this provision. Although paragraph 184 of the Explanatory Notes does not make this clear, it seems to us to be implicit that the power is intended to be exercisable generally, and there is nothing in the new subsection (3A) that would appear to preclude this. If that is the case, the power is legislative in character because it can curtail the statutory functions of enforcement officers conferred by section 15(1)(b) of the 2004 Act.

14. New subsection (3A) does not specify how the Secretary of State is to “provide” for the curtailment of officers’ functions, nor how or where the functions in question are to be specified. **We therefore consider that the new powers inserted by subsections (2) and (3) of clause 43 (if intended to be general in scope) should be exercisable by statutory instrument subject to negative procedure.** We also do not think it satisfactory that power should be conferred on the Secretary of State enabling him to remove these statutory functions from enforcement officers without requiring him, rather than merely enabling him, to transfer them elsewhere.

**CLAUSE 48 – AMBULATORY REFERENCES**
15. Clause 48 inserts a new section 306A into the Merchant Shipping Act 1995, enabling subordinate legislation made under that Act to include “ambulatory provision” (see subsections (2) and (4)). This would permit (say) regulations made to implement an international instrument (for instance, a maritime convention) to provide that references in the regulations to the convention are to be construed as references to it as for the time being in force.

16. Such an approach is not novel in principle, because (as is mentioned in paragraph 308 of the memorandum) an equivalent power has already been enacted in relation to EU instruments in the European Communities Act 1972 (by an amendment made by the Legislative and Regulatory Reform Act 2006). On that occasion, we did not regard the power to make ambulatory provision as inappropriate, but nevertheless drew its significance to the attention of the House.

17. One aspect of the power proposed here is, however, novel, in that subsection (5) enables subordinate legislation that makes ambulatory provision to authorise the Secretary of State to give directions about whether, when and how any particular change to the international instrument is to apply. The power to authorise directions is then elaborated considerably by subsections (6) to (8). Where (for instance) a direction disapplies a particular change in a convention, it may also disapply provisions in the regulations and make alternative provision (see subsection (6)). The directions are not to be given by statutory instrument, and hence no Parliamentary scrutiny procedure would apply to them. But there can be no doubt that the provision made in the directions would be an exercise of legislative power.

18. According to paragraph 311 of the memorandum, this power is needed to enable the Secretary of State to react to changes in international instruments without incurring the delay associated with making provision by statutory instrument. Explanations of this kind are not infrequently offered to us by the Government as a justification for enabling provision to be made without Parliamentary control, and our practice is to approach such reasoning with some scepticism and to require a fairly compelling case to be made before being ready to regard the power as not inappropriate. In the present instance, we have not found the reasons advanced in paragraphs 311-314 particularly persuasive; in particular, we remain unconvinced that the fact that a change to an international instrument may itself have been reported to Parliament (see paragraph 313) necessarily justifies a denial of Parliamentary control over the amendments to be made to domestic law in response to the international change. Accordingly, we regard the powers in new section 306A(5)-(8) to give directions as an inappropriate delegation of legislative power.

CLAUSE 49 – DATES DESCRIBED IN LEGISLATION

19. Clause 49 makes a free-standing provision that is to be of general application. We saw a similar power, exercisable only in a specific context, earlier this Session when we considered the Offender Rehabilitation Bill. The purpose of the proposed power is well explained in paragraph 207 of the Notes by reference to an example in paragraph 208. The power here differs from that in the earlier Bill, in that subsection (1) includes (in paragraph (b)) a power to amend “the date on which any other event occurs”. The purpose of that additional power is not explained in the Notes or in the
Memorandum: it could be intended to be an event connected with commencement, but it need not be.

20. We welcome the general power now proposed in clause 49(1)(a), as we did the specific version in the Offender Rehabilitation Bill, as a useful mechanism for rendering references in Acts to their commencement dates more accessible to users. However, we consider that the intended purpose of the additional power conferred by subsection (1)(b) requires some further explanation by the Cabinet Office.

CLAUSE 51 – LEGISLATION NO LONGER OF ‘PRACTICAL USE’

21. Clause 51 enables a Minister to provide by order for legislation (including provisions of Acts) to cease to apply “if the Minister considers that it is no longer of practical use”. An order could make any of the provision described in subsection (2).

22. The procedure for an order under clause 51 is a “strengthened procedure” that does not fit happily into any of the existing categories we examined in our Special Report (Strengthened statutory procedures for the scrutiny of delegated powers – HL Paper 19) last Session. There must be consultation (clause 54), following which the Minister must lay a draft of the order along with an explanatory document (clause 55); but the order can only be made if neither House (or its designated committee) resolves (or recommends), within 40 days of laying, that the order may not be made in terms of the draft (clause 56). So the Parliamentary procedure that is to apply is merely a draft negative procedure, enhanced to the limited extent described above.

23. The test (“no longer of practical use”) that is to apply to the operation of this broad Henry VIII power seems to us to be startlingly wide and vague. Paragraph 323 of the memorandum explains the three categories of circumstances thought “likely” to lead to a conclusion that provisions are no longer of practical use: essentially these appear to us to be where provisions are thought to be spent, or superseded, or redundant. But the “no practical use” test is wider than that, and there is no express provision in clause 51 confining its scope to those three categories, or in any other way whatever.

24. Paragraph 323 of the memorandum also explains that the new power would supplement not only the existing arrangements operated by the Law Commission for the repeal of redundant legislation, but also the powers in Part 1 of the Legislative and Regulatory Reform Act 2006 (that enable primary legislation to be repealed or amended by order for the purpose of removing burdens). Although paragraph 325 explains why it is thought that the Law Commission’s arrangements might require supplementation, nothing is said about the 2006 Act (which enables Parliament to require instead an affirmative or super-affirmative procedure for orders). As respects the final sentence of that paragraph, it is unclear why the power in clause 51 is thought necessary where amendments to subordinate legislation are in issue, given that the relevant Minister could generally amend or revoke existing subordinate legislation simply by making a further instrument in exercise of the same powers as before.

25. For Parliament, the principal disadvantage of the proposed power is that, like most delegated legislative powers, either House ultimately has no choice but to take or leave the draft instrument as a whole. If, for instance, Schedule 16 to the Bill had
instead been packaged as a draft order under clause 51, the fate of the entire collection
of provisions listed in that Schedule would need to be determined by a vote on a
single motion – or, in the case of a committee, by a single recommendation. Even
under the Legislative and Regulatory Reform Act 2006, the subject matter(s) of a
draft order can usually be expected to have some generic integrity. We are also aware
that the Government have yet to respond fully to the question raised in our Special
Report of last Session about re-affirmation of undertakings given by the previous
administration (that they would not seek to use orders under the 2006 Act to make
highly controversial changes; nor would they pursue a proposal in the face of
opposition from the relevant committee).

26. Finally, it is unclear to us what is to happen where a House resolves, or its committee
recommends, that a draft order should not be made. There is no explicit provision (as
in the 2006 Act) for the Minister to come back with a revised draft order. Nor is there
any express provision for representations by either House or its committee (beyond
the fatal resolution or recommendation that the draft order should not be made), and
therefore no requirement that the Minister must consider such representations etc and
set out the Government’s response to them before laying a further order.

27. We are therefore strongly of the view that the power proposed in clause 51 is
inappropriate. We found the explanations advanced in the memorandum as to
its perceived necessity to be wholly unconvincing; and we do not regard the
procedural arrangements in clauses 54-56 as in any sense mitigating the
unacceptability of the power.

CLAUSES 58-61 – GUIDANCE ABOUT REGULATORY FUNCTIONS

28. Clause 58(1) imposes on a person exercising regulatory functions to which the section
applies a duty (amplified in subsection (2)) to have regard, in the exercise of the
functions, to the desirability of promoting economic growth. Clause 59 enables a
Minister to specify by affirmative order the regulatory functions to which clause 58
applies. Clause 60 enables the Minister from time to time to issue guidance as to the
performance of the duty under clause 58; and a person who has a duty under that
clause must have regard to the guidance. The guidance must be laid in draft and
approved by both Houses before it may be issued; and it comes into force on a date
specified by order under subsection (9).

29. In structural terms, these provisions very closely reflect those of Part 2 of the
Legislative and Regulatory Reform Act 2006, save that the duty imposed on
regulators by section 21 of that Act is in much more general terms, and the nature of
that duty is explained in a code of practice rather than in guidance as here. But the
requirements under the 2006 Act for Parliamentary control are closely comparable: an
affirmative resolution is required for the code of practice and for the order which
specifies the regulatory functions to which the duty relates. The order which brings
the code into force is, like the order that is to bring the guidance into force, subject to
no procedure – but that does not seem to us inappropriate because the guidance will
itself have received affirmative approval.

30. There is, however, one aspect of these proposals that we do not regard as satisfactory.
Clause 60(2) enables the inclusion of “guidance as to ... the meaning of ‘economic
growth’ ....”. Given the fundamental importance of that expression to the discharge of the duty under clause 58, it seems to us surprising that its definition should be left to guidance (even guidance that requires an affirmative resolution). In our experience, guidance is generally worded with much less care and precision than a statutory instrument, and is quite unsuitable for conveying the meaning of a key expression forming the basis of a statutory duty. **To that limited extent, we consider the delegation arrangements in clauses 58-61 to be inappropriate.**

**SCHEDULE 1 – APPRENTICESHIPS**

31. Schedule 1 inserts a new Chapter A1 into Part 1 of the Apprenticeships, Skills, Children and Learning Act 2009 to make provision about apprenticeships in England. Several of the provisions of existing Chapter 1 (including delegated powers), which at present applies to England and Wales but will in future be confined to Wales only, are reflected in the new Chapter A1.

32. Section A1(2) in effect defines an “approved English apprenticeship” in terms of either an “approved English apprenticeship agreement” or an “alternative English apprenticeship”. Whereas the former is substantially described in subsection (3) (though the description may be supplemented by regulations), the description of the latter is left to regulations under subsection (4), as amplified by subsection (5). All regulations under subsections (2), (3)(c) and (4) are subject to negative procedure, which, in the first two respects, is in line with broadly equivalent provisions in the existing Chapter 1. But the existing equivalent of the power conferred by subsection (4) requires affirmative procedure.

33. Paragraph 34 of the memorandum explains why it is now thought that the power should be negative. We find that explanation persuasive, and do not therefore regard the negative procedure as inappropriate. That conclusion is consistent with the view we took of the equivalent provision when we considered the Bill that became the 2009 Act.

34. New section A4(1) enables the Secretary of State to delegate any of his functions under new Chapter A1 to a person designated by him. Subsection (2) precludes the delegation of any power to make regulations, but provides that “subsection (1) ... does include work done in preparing regulations”. We are unsure what effect those words are intended to have, and we have not found any explanation of them either in the Notes (which mention the power of delegation only in passing in paragraph 237) or in the memorandum. There is clearly a distinction to be drawn between “delegation” (as envisaged by section A4(1)) where the function in effect becomes the function of someone else, and “contracting out”, where the services required to enable a person to exercise his functions may be bought in from outside. But we do not readily understand how in practice the function of preparing regulations might be divorced from the function of making them, and we consider that new section A4(2) accordingly requires further explanation.

**SCHEDULE 8, Part 6: ACCESS BY DISABLED PERSONS TO RAIL VEHICLES**
35. Section 182 of the Equality Act 2010 enables the Secretary of State to make regulations (“rail vehicle accessibility regulations”) for securing that it is possible for disabled persons to, among other things, get on to and off rail vehicles safely and without undue difficulty. Section 183 enables an “exemption order” to be made authorising the use of a rail vehicle that does not comply with the regulations under section 182. Orders under section 183 are statutory instruments and are affirmative unless they fall within a description of such orders for which the negative procedure is authorised by regulations under section 184.

36. Part 6 of Schedule 8 seeks to make the same change as respects Parliamentary scrutiny as was proposed in 2004-05 in the Bill that became the Disability Discrimination Act 2005, so that exemption orders would no longer be statutory instruments. Paragraphs 219-222 of the memorandum set out the benefits that the Government believe would result from the change, in terms of cost, speed, Parliamentary time, and consistency with parallel provision under EU law. The proposal is, moreover, supported by the Disabled Persons Transport Advisory Committee (“DPTAC”), which must be consulted before an exemption order is made. We have examined those explanations with some care, but we do not consider that the position has changed greatly since our predecessor committee considered the matter in 2004-05. **We remain of the view that these orders should continue to be made by statutory instrument, but should attract the negative procedure.** We do not believe that it is now necessary to retain the present complex arrangements (described at the end of our previous paragraph) for determining whether some other form of Parliamentary procedure should apply.

23 October 2013