



HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

5th Report of Session 2016–17

Wales Bill
House of Lords Bill [HL]
Lobbying (Transparency) Bill [HL]
Register of Arms Brokers Bill [HL]
Renters' Rights 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

The members of the Delegated Powers and Regulatory Reform Committee are:

Baroness Drake	Lord Lisvane
Baroness Fookes (<i>Chairman</i>)	Lord Moynihan
Lord Flight	Lord Thomas of Gresford
Baroness Gould of Potternewton	Lord Thurlow
Lord Jones	Lord Tyler

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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 and the fax number is 020 7219 2571. 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.

Fifth Report

WALES BILL

1. The Wales Bill is aimed “at creating a clearer and stronger settlement in Wales which is durable and long-lasting”.¹ Assuming it proceeds to Royal Assent, it would be the fourth Act of Parliament providing for the devolution of powers to the National Assembly for Wales (“the Assembly”) or to the Welsh Ministers in the last 18 years.²
2. The Bill is intended to provide “a clearer separation of powers between what is devolved and what is reserved, enabling the Assembly to legislate on any subject except those specifically reserved to the UK Parliament”.³ It does this by changing the basis on which the Assembly has legislative competence from a “conferred powers” to a “reserved powers” model, broadly similar to the one that underpins the devolution settlement in Scotland.
3. The Wales Office have provided a memorandum about the delegated powers contained in the Bill,⁴ as well as a supplementary memorandum concerning clause 21.⁵ We wish to draw the following matters to the attention of the House.

Clause 3 and Schedules 1 and 2: legislative competence

4. Under section 108 of the Government of Wales Act 2006 (“the 2006 Act”) as it currently stands, the Assembly has power to make laws (called “Acts of the Assembly”) if they:
 - relate to one or more of the subjects listed in Schedule 7 to the 2006 Act (for example agriculture, education, environment, highways and housing);
 - do not fall within one of the exceptions specified in that Schedule;
 - apply only in relation to Wales;
 - do not breach a restriction referred to in subsection (6) (for example, because the law would be incompatible with the European Convention on Human Rights or with EU law).
5. Clause 3 of the Wales Bill redefines the basis upon which the Assembly has legislative competence. In broad terms, it will confer power on the Assembly to pass Acts relating to Wales on any subject that does not relate to a “reserved” matter unless it breaches a restriction: see the new section 108A and Schedules 7A and 7B.⁶

1 See the Explanatory Notes, para 1.

2 The previous Acts are the Government of Wales Act 1998, the Government of Wales Act 2006 and the Wales Act 2014.

3 See the Explanatory Notes, para 3.

4 Wales Office, *Wales Bill: Delegated Powers Memorandum*: <http://www.parliament.uk/documents/lords-committees/delegated-powers/Wales-Bill-DPM.pdf><http://www.parliament.uk/documents/lords-committees/delegated-powers/Wales-Bill-DPM.pdf> [accessed 25 October 2016]

5 Wales Office, *Wales Bill: Supplementary Delegated Powers Memorandum*: <http://www.parliament.uk/documents/lords-committees/delegated-powers/Wales-Bill-Supplementary-DPM.pdf> [accessed 25 October 2016]

6 Clause 3 replaces section 108 of the 2006 Act with new section 108A. New Schedules 7A and 7B (which are set out in Schedules 1 and 2 to the Bill) replace existing Schedule 7 to the 2006 Act.

6. Whether an Act of the Assembly relates to a reserved matter is to be determined “by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances”: see new section 108A(6).
7. New Schedule 7A contains 200 paragraphs setting out a long list of the matters that are reserved to the UK Parliament. The rationale for many of the reservations is self-evident, for example: the constitution, foreign affairs, defence, the armed forces, nationality and immigration. In other cases, the rationale is much less obvious, for example: betting, hunting with dogs, Sunday trading.
8. Several reservations are subject to exceptions. In our view, the dividing line between certain reservations and exceptions is very fine and gives rise to difficult questions. For example:
 - Regulation of the sale and supply of goods and services to consumers is reserved, and so is the safety of, and liability for, services supplied to consumers; but food, food products and food contact materials are excepted.⁷ Does this mean that the Assembly will have power to regulate restaurants but only in relation to the provision of food to customers?
 - Job search and support is reserved but “education, vocational training and careers service” are excepted from the reservation.⁸ Does this mean that the Assembly will have power to legislate as regards the provision of a service to assist persons in choosing a career, but that service could not include helping persons find a job in their chosen career?
9. New Schedule 7B contains nine pages of detailed restrictions on the Assembly’s power to legislate, even in relation to matters that are not reserved. Some are relatively straightforward. So, for example, an Act of the Assembly may not confer functions on a Minister of the Crown without the consent of that Minister.⁹ However other restrictions in Schedule 7B are dauntingly complex, notably paragraph 7 which restricts the Assembly’s power to modify the 2006 Act.
10. It is unclear whether the combined effect of the changes will result in the Assembly gaining legislative competence in new areas, or losing competence in areas where it currently has competence. Neither the Explanatory Notes nor the delegated powers memorandum contain any analysis of the expected scope of the Assembly’s legislative powers under the proposed new provisions in comparison with those under the existing legislation.¹⁰ Much may depend on how the Courts interpret new section 108A(6), which specifies how the question whether a provision of an Act of the Assembly “relates to” a reserved matter is to be determined.
11. There have been several cases under the existing section 108 of the 2006 Act to determine whether proposed Assembly legislation “relates to” a subject expressly devolved to the Assembly. In particular, the Supreme Court was asked to rule in 2014 at the request of the Attorney General as to whether the Agricultural Sector (Wales) Bill was within the Assembly’s competence. The Bill contained provisions about the regulation of farm workers’ wages

7 See paras 70 to 74 of new Schedule 7A.

8 See para 139 of new Schedule 7A.

9 See Schedule 7B, para 8(1).

10 See para 4 above.

in Wales. The issue was whether this related to agriculture, which was specifically devolved, or to employment which was not. The Supreme Court held¹¹ that the Assembly Bill did “relate to” agriculture and thus was within devolved competence, even though it also related to the non-devolved subject of employment.¹²

12. It is not our role to speculate on whether the Courts would adopt a similarly broad interpretation of the “relates to” test in this new “reserved powers” model. However, we are concerned that there may have to be repeated further references to the Supreme Court to determine the limits of the Assembly’s legislative competence under the proposed new settlement.
13. Clause 3 and Schedules 1 and 2 fall within our remit given that they provide for the delegation of legislative power. We do not, however, express a view as to the appropriateness of delegating or devolving particular powers to the Assembly. We regard the devolution of powers to a legislative body such as the Assembly differently from the conferral of powers on the Executive. It is for the House as a whole to accept or reject the new settlement proposed in the Bill. We also anticipate that the Constitution Committee will wish to report on these provisions of the Bill in some depth.
14. **Nonetheless, we draw to the attention of the House:**
 - **the absence of an obvious rationale for the inclusion of certain reservations;**
 - **the difficult questions that may arise about how exceptions from reservations are intended to operate;**
 - **the uncertainty about the application of the “relates to” test under the new “reserved powers” model;**
 - **the lack of any analysis in the Bill’s explanatory material as to whether new section 108A and Schedules 7A and 7B are expected to result in the expansion or the contraction of the Assembly’s legislative competence.**
15. **In light of these points, the House may wish to press the Minister on whether the Bill will fulfil the objectives referred to in the Explanatory Notes of achieving “a clearer separation of powers between what is devolved and what is reserved” and of creating “a clearer and stronger settlement in Wales which is durable and long-lasting”.**
16. **It is also a matter of concern that the failure to spell out more clearly in the Bill the boundaries of the Assembly’s legislative competence could lead to repeated future references to the Supreme Court; and that this could sow the seeds of future discord between the Assembly and Welsh Ministers on the one hand and the UK Parliament and Government on the other.**

11 In Re Agricultural Sector (Wales) Bill [2014] UKSC 43, 1 WLR 2622.

12 The Bill does not reverse the effect of the Supreme Court’s judgment. While employment rights and duties, including the national minimum wage, are specifically reserved, the subject-matter of the Agricultural Sector (Wales) Act 2014 is excepted from the reservation: see para 139 of new Schedule 7A.

Schedule 5, paragraph 3—power to amend new Schedules 7A and 7B

17. Schedule 5, which is headed “minor and consequential amendments”, contains a long list of amendments to various enactments made in consequence of other provisions contained in the Bill.
18. Paragraph 3 amends section 109 of the 2006 Act. The amendment would allow for new Schedules 7A and 7B to be amended by Order in Council. This is, of course, a Henry VIII power of constitutional significance, but it is not mentioned in the delegated powers memorandum.
19. The House will be interested to note that section 109 (as amended) would reflect section 30 of the Scotland Act 1998, which allows for the list of reserved matters in that Act to be amended by an Order in Council approved in draft by the House of Lords, House of Commons and Scottish Parliament. In fact it was section 30 that was used to confer power on the Scottish Parliament to legislate for the Scottish independence referendum held in September 2014.¹³
20. Changes of considerable constitutional importance could similarly be made under the power in section 109 (as amended). For example, the Assembly could be given legislative competence to hold a Welsh independence referendum, or to create a separate legal jurisdiction for Wales, or to establish a Welsh currency.
21. Despite its significance, we do not consider the section 109 power (as amended) to be inappropriate. As observed above, new Schedules 7A and 7B to the 2006 Act are lengthy and complex. It seems likely that both Schedules will have to be amended regularly to clarify whether the Assembly has legislative competence in a particular context. We accept that it may be desirable for amendments to be made without waiting for further primary legislation to be passed in the UK Parliament.
22. We also recognise that no Order could be made under section 109 (as amended) unless it is first approved in draft under the affirmative procedure in each House of Parliament and in the Assembly.
23. **Nonetheless, we draw this Henry VIII power to the attention of the House, and express our surprise that such an important provision is paraded as a “minor” or “consequential” amendment in a Schedule to the Bill and not mentioned in the delegated powers memorandum.**

Clause 6—power over timing of elections

24. Clause 6 contains important provisions which would allow the date of an Assembly general election to be changed by the exercise of delegated powers. These will reflect similar powers which have already been conferred in relation to the date of a Scottish parliamentary general election.¹⁴
25. Clause 6(3) would prevent the poll for an Assembly general election from being held on the same day as a UK parliamentary general election (other than an early parliamentary general election¹⁵) or a European parliamentary general election.

¹³ See the Scotland Act 1998 (Modification of Schedule 5) Order 2013 (SI 2013/242).

¹⁴ See section 2 of the Scotland Act 1998, as prospectively amended by section 5 of the Scotland Act 2016.

¹⁵ “An early parliamentary general election” is one which takes place under section 2 of the Fixed-term Parliaments Act 2011 because the House of Commons either has resolved by a two-thirds majority of its members that there should be one, or has passed a vote of no confidence in the Government.

26. Where this scenario arises, the Welsh Ministers are given power to specify by order the day on which the poll for the Assembly general election is to be held, subject to the affirmative procedure in the Assembly. There is, however, nothing on the face of the Bill to prevent Welsh Ministers from choosing a day which resulted in delaying the poll—and extending the term of the Assembly—by many months or even into the following year: see section 3(1B) of the 2006 Act, inserted by clause 6(3).
27. This contrasts with the power which allows Her Majesty to make a proclamation under the Welsh Seal, upon the proposal of the Assembly’s Presiding Officer, to require an ordinary Assembly election to be held on a day which is not more than one month earlier, nor more than one month later, than the day on which it would otherwise take place: see section 4(1) to (2A) of the 2006 Act, substituted by clause 6(7).
28. **The House may wish to ask the Minister why no comparable limitation is included in the power to be conferred on Welsh Ministers by clause 6(3).**

Clause 21—power in relation to transferred Ministerial functions

29. Section 58 of the 2006 Act allows for functions conferred on UK Ministers to be transferred by Order in Council to the Welsh Ministers.
30. Clause 21 would allow an Order in Council to make in relation to “a previously transferred function”—
- provision “increasing or reducing (*whether geographically or otherwise*¹⁶) the extent of the previous transfer”; or
 - provision “to the effect that the function is exercisable—
 - concurrently or jointly with a Minister of the Crown, or
 - only with the agreement of, or after consultation with, a Minister of the Crown.”¹⁷
31. The term “previously transferred function” is defined (in broad terms) as a function exercised by Welsh Ministers by virtue of a previous Order in Council made under section 58 or new Schedule 3A.¹⁸
32. The exercise of the new power would be subject to the affirmative procedure in both Houses of Parliament and to the approval of Welsh Ministers (as with the existing powers in section 58.)
33. Paragraph 61 of the memorandum explains clause 21 in the following terms:
- “To provide greater scope for consolidation/restatement or modification of the transfer of functions, clause 21 further expands the kinds of provision that can be made by a [transfer of functions order] under section 58 of the [2006 Act]. That clause allows “previously transferred functions” (defined in new section 58(2B)) to be increased or reduced, or to be made concurrent, joint or subject to the agreement of, or consultation with, Welsh Ministers.”

16 Emphasis added.

17 See new section 58(2A) of the 2006 Act, inserted by clause 21.

18 New Schedule 3A is inserted by Schedule 4 to the Bill.

34. As the meaning of this paragraph was unclear, the Wales Office were asked for a supplementary memorandum to explain (i) why the existing provisions of section 58 are considered inadequate, and (ii) the inclusion in new subsection (2A) of a power to increase or reduce “geographically or otherwise” the extent of a previous transfer.

35. These are the key paragraphs in the supplementary memorandum:

“Clause 21 ... enables modification of functions previously conferred on Welsh Ministers to be transferred back to Ministers of the Crown, and to redefine functions already transferred so that they apply to different geographical areas than they do currently.

These modifications provide for the possibility of the functions of Welsh Ministers and/or Ministers of the Crown in relation to water to be modified in future. UKG¹⁹ is currently considering the outcomes of the Joint Government Review Programme on water established under the St David’s Day Agreement. The programme was established to examine the implications of aligning the legislative competence for water with the England-Wales border (the boundary is currently aligned to water catchment areas).

Subject to Parliament, if a decision is taken in future to align the legislative competence boundary with the national border, both Welsh Ministers and UK Ministers functions would need to be modified, including on a geographical basis. Clause 21 enables the modifications to be made through section 58 Orders, with Welsh Ministers’ consent ...”²⁰

36. As drafted, however, clause 21 would allow for *any* previously transferred executive function to be increased or reduced “whether geographically or otherwise”, not just a function in relation to water. For example, the new power might be exercised to allow for:

- planning powers already transferred to Welsh Ministers to be extended as regards the development of land just within in England but which might affect Wales; or
- Welsh Ministers’ powers regarding hospitals in Wales used mainly by patients who live in England to be transferred to UK Ministers.

37. **In our view, neither the original nor the supplementary memorandum explains adequately why the new power is needed apart from in relation to the specific issue of water catchment area boundaries. We consider that the power as drafted is inappropriately wide, and recommend that it be redrawn so that it reflects the narrow policy intention referred to in the supplementary memorandum.**

Clause 53—power to make consequential provision

Power to “otherwise modify” primary legislation

38. Clause 53(2) allows the Secretary of State by regulations to make consequential provision. Under subsection (3) this includes a power to amend, repeal or

¹⁹ We assume that this is a reference to the UK Government.

²⁰ Wales Office, *Wales Bill: Supplementary Delegated Powers Memorandum*: <http://www.parliament.uk/documents/lords-committees/delegated-powers/Wales-Bill-Supplementary-DPM.pdf> [accessed 25 October 2016]

otherwise modify an enactment contained in primary legislation. Subsections (6) and (7) deal with the procedures for Parliamentary scrutiny. Regulations under clause 53(2) are subject to the affirmative procedure if they amend or repeal any provision of primary legislation; but only the negative procedure applies if they “otherwise modify” primary legislation.

39. We have in a series of reports expressed concern about Henry VIII powers such as this which allow regulations to make consequential amendments by amending, repealing or otherwise modifying a provision of primary legislation, but require the affirmative procedure only where the regulations amend or repeal a provision of primary legislation.
40. The “otherwise modify” issue is not addressed at all in the delegated powers memorandum, even though it was raised in our very recent reports about the Bus Services Bill²¹ and the Investigatory Powers Bill.²²
41. **Despite the Government’s negative response to those and earlier reports, we remain firmly of the view that:**
 - **a Bill should not as a matter of routine confer a Henry VIII power such as that in clause 53;**
 - **where a Henry VIII power is included in a Bill, it must be fully explained and justified in the delegated powers memorandum;²³**
 - **the affirmative procedure should apply to the exercise of a power to authorise any interference with the meaning of an Act—even if it is dressed up as a power to “otherwise modify”—save in very exceptional circumstances which again must be convincingly justified in the memorandum.**

Consequential amendments to Measures or Acts of the Assembly

42. The type of primary legislation that can be amended or modified by regulations in exercise of the power conferred on the Secretary of State by clause 53(2) is defined as:
 - an Act of Parliament; and
 - a Measure or an Act of the Assembly: see subsection (8).
43. Regulations which amend or repeal “primary legislation” as so defined are subject to the affirmative procedure in both Houses of the UK Parliament. However, there is no requirement in clause 53 for the Secretary of State to consult or seek the approval of the Assembly or Welsh Ministers before making regulations which amend a Measure or Act of the Assembly. We note with disappointment that *no* explanation is given in the memorandum.
44. **We draw this to the attention of the House.**

21 Delegated Powers and Regulatory Reform Committee (1st Report, Session 2016–17, [HL Paper 13](#)), paras 27 to 31.

22 Delegated Powers and Regulatory Reform Committee (2nd Report, Session 2016–17, [HL Paper 21](#)), paras 17 to 20.

23 See our Special Report on the *Quality of Delegated Powers Memorandum* (7th Report, Session 2014–15, [HL Paper 39](#)), Appendix 4, para 35.

HOUSE OF LORDS BILL [HL]

45. There is nothing in this bill which we would wish to draw to the attention of the House.

LOBBYING (TRANSPARENCY) BILL [HL]

46. This Private Member's bill had its Second Reading on 9 September 2016. Its purpose is to repeal and replace the whole of the provision in Part 1 of the Transparency of Lobbying, Non-party Campaigning and Trade Union Administration Act 2014 about the regulation of lobbying.
47. Clause 1 provides for a registrar who is, among other things, to establish and maintain a Register of Lobbyists. The expression "lobbyists" is defined in clauses 2 and 3; and clauses 4 and 5 make provision about their registration. A person who engages in lobbying activity without being registered commits a criminal offence, by virtue of clause 9.
48. Clause 7 provides for the registrar to prepare and publish, and from time to time revise, a Code of Conduct with which registered lobbyists must comply, or risk being suspended or removed from the register under clause 8(3). Potential ingredients for the Code are set out in clause 7(4). Subsection (3) requires the Code, and any revision of it, to be laid before both Houses in draft and to be approved by each House before it may come into force. We consider that affirmative procedure to be an appropriate level of scrutiny, because the contents of the Code will be important, and compliance with it is to be mandatory.
49. We are, however, concerned that the proposed commencement arrangements for the Code might cause uncertainty in practice, because it is to come into force as soon as the second House approves it under clause 7(3). In view of the significance of the Code, we consider that those to whom it is to apply should have notice of its provisions and that there should be certainty as to the date from which it is to apply. It therefore seems to us to be inappropriate that the activation of important new obligations should depend on the timetabling of a Parliamentary debate.
50. Timing difficulties of that kind can be overcome, for statutory codes where affirmative approval is required, by providing for the code, or revisions of it, to be laid before Parliament in draft and to come into force on a day specified by the Secretary of State in an order made by statutory instrument. Generally, it is the order, rather than the code itself, that requires affirmative approval in draft before it may be made. Such an approach was adopted for the commencement of the code of practice, and revisions of it, issued under section 195S of the Proceeds of Crime Act 2002.
51. **We recommend that clause 7(3) be amended to make similar provision in relation to the coming into force of the Code of Conduct under the bill.**

REGISTER OF ARMS BROKERS BILL [HL]

52. This Private Member's bill had its Second Reading on 10 June 2016. Clause 1 amends the Export Control Act 2002 ("the 2002 Act") to insert a new section 4A requiring provision to be made for the registration of "arms brokers", defined in subsection (2).
53. The Secretary of State is required to make provision by Order in Council for a Register of Arms Brokers. The Order must require that "criminal history" and "tax status" be considered when deciding whether a person should be registered.
54. We consider that the delegation of legislative power in new section 4A gives rise to a number of difficulties:
- It is not clear to us why the chosen form of subordinate legislation is an Order in Council, rather than an order, which is the form of statutory instrument used for the exercise of powers conferred elsewhere in the 2002 Act. In any event, an Order in Council must be made by Her Majesty in Council, not by the Secretary of State.
 - The undefined references to "criminal history" and "tax status" are too vaguely expressed to form a satisfactory basis to enable the obligation to be complied with in the Order in Council.
 - Section 13(4) of the 2002 Act requires the affirmative procedure for instruments made under that Act. It would appear from clause 1(3) that the same procedure is intended for this Order in Council. We agree that the affirmative is the appropriate level of scrutiny. It is therefore unfortunate that this objective is not achieved, because section 13 as it stands applies only on orders, but not to an Order in Council.
 - There are constitutional difficulties inherent in seeking to impose a statutory duty of this kind on Her Majesty. Moreover, conferring an affirmative power in the form of an obligation gives rise to a potential timing difficulty. The requirement to make the Order in Council takes effect immediately on the bill's enactment under clause 2(2). Yet that obligation cannot be complied with until a draft of the Order has been approved by each House and submitted to the Privy Council. Should it not prove possible to secure approval of the draft by both Houses, the breach of the statutory duty would continue indefinitely.
55. **We draw clause 1 of the bill to the attention of the House, and recommend that it be amended to remedy the difficulties and deficiencies described in our previous paragraph.**

RENTERS' RIGHTS BILL [HL]

56. This Private Member's bill had its Second Reading on 10 June 2016. It amends the Landlord and Tenant Act 1985 and the Housing and Planning Act 2016 ("the 2016 Act") to confer further rights on, and safeguards for, tenants of residential properties.
57. Section 122(1) and (3) of the 2016 Act as currently in force state that:
- “(1) The Secretary of State may by regulations impose duties on a private landlord of residential premises in England for the purpose of ensuring that electrical safety standards are met during any period when the premises are occupied under a tenancy.
- ...
- (3) The duties imposed on the landlord may include duties to ensure that a qualified person has checked that the electrical safety standards are met.”
- The regulations must be laid in draft and approved by both Houses before they may be made.
58. Under the current bill, “must” is substituted for “may” in each of those subsections, so that the Secretary of State becomes *obliged* to make regulations which contain a checking requirement of the kind described in subsection (3). The obligation will take effect immediately on the bill's enactment under clause 5(2).
59. The difficulty inherent in a power to make regulations that takes the form of a duty is that, if the regulations require affirmative approval (as these regulations will), the Secretary of State may be placed in breach of his statutory duty should he be unable to secure approval by both Houses for the draft of the regulations.
60. Where a requirement of this kind is being imposed, it is common for the minister's obligation to be confined to *laying a draft* of regulations before both Houses. Such an approach was adopted (for example) for regulations about the carbon budget under section 49 of the Infrastructure Act 2015.
61. **We recommend that the bill be amended so that the obligation to be imposed on the Secretary of State by virtue of clause 3 is an obligation to lay a draft of regulations before each House.**

APPENDIX 1: MEMBERS AND DECLARATIONS OF INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the House of Lords Record Office and is available for purchase from The Stationery Office.

For the business taken at the meeting on 19 October 2016 Members declared the following interests:

Wales Bill

Lord Lisvane

Member of the Steering Committee of the Constitution Reform Group

Attendance

The meeting on the 19 October 2016 was attended by Baroness Drake, Lord Flight, Baroness Fookes, Lord Jones, Lord Lisvane, Lord Thomas of Gresford and Lord Tyler.