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Delegated Powers and Regulatory Reform
Committee

13th Report of Session 2016–17

Digital Economy Bill: Parts 5–7

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The Delegated Powers and Regulatory Reform Committee

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- (i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;
- (ii) To report on documents and draft orders laid before Parliament under or by virtue of:
 - (a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,
 - (b) section 7(2) or section 19 of the Localism Act 2011, or
 - (c) section 5E(2) of the Fire and Rescue Services Act 2004;

and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and

- (iii) To report on documents and draft orders laid before Parliament under or by virtue of:
 - (a) section 85 of the Northern Ireland Act 1998,
 - (b) section 17 of the Local Government Act 1999,
 - (c) section 9 of the Local Government Act 2000,
 - (d) section 98 of the Local Government Act 2003, or
 - (e) section 102 of the Local Transport Act 2008.

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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.

Thirteenth Report

DIGITAL ECONOMY BILL: PARTS 5–7

1. We reported on Parts 1 to 4 of the Digital Economy Bill in our 11th Report of this Session.¹ This report concerns the delegated powers in Parts 5 to 7 which create new information-sharing gateways and amend the functions of OFCOM and the BBC. The Department for Culture, Media and Sport have submitted a memorandum about the delegations.²

Part 5: Digital Government

Background

2. Information gathered from members of the public about their personal affairs by a public body, for example a government department or a local authority or the police, may be used only for the purpose for which it was originally obtained. It may not be used by that body for another purpose, or disclosed to a third party (even to another public body) without specific legal authority. To do so may constitute a criminal offence and a breach of confidence at common law, and could contravene the Data Protection Act 1998 and/or Article 8 of the European Convention on Human Rights (which protects privacy rights).
3. This explains why current legislation regulating the activities of public bodies sometimes contains “information-sharing gateways”, that is provisions which authorise the use and sharing of information other than for the purpose for which it was originally obtained, although subject to restrictions and conditions. Gateways of this type are to be found in particular in taxation and social security legislation to allow Her Majesty’s Revenue and Customs (HMRC) or the Department for Work and Pensions (DWP) to disclose information to other public authorities. Those departments hold personal information about almost everybody who lives or has lived in the United Kingdom; the gateways allow them to disclose such information in specified circumstances and for specified purposes.³
4. Part 5 contains a suite of new provisions (divided into seven chapters). These would *very* significantly broaden the scope for the sharing of information across government departments, local authorities and other public bodies. There are numerous powers to delegate important matters to regulations or codes of practice. Several broadly similar powers appear in each chapter of Part 5.
5. Although this is not stated expressly in the Explanatory Notes accompanying the Bill or in the delegated powers memorandum, we infer that at least some of the clauses in Part 5 are intended to supersede existing and more specific information-sharing gateways.

1 Delegated Powers and Regulatory Reform Committee. (11th Report, Session 2016–17, [HL Paper 89](#))

2 Department for Culture, Media and Sport, *Digital Economy Bill: Delegated Powers Memorandum*: <http://www.parliament.uk/documents/lords-committees/delegated-powers/Digital-Economy-Bill-DPM.pdf> [accessed 19 January 2017]

3 See, for example, the gateways in Schedule 5 to the Tax Credits Act 2002.

Chapter 1 of Part 5: Public service delivery

Clause 30(2)—Power to define “specified person” for purpose of public service delivery

6. The first new gateway is in clause 30. The rationale for the provision is given in the Explanatory Notes:

“The government believes that the current legal landscape of data sharing for public service delivery is complex and inconsistent across public services and organisations. This may hinder the ability of public authorities to offer citizens timely and appropriate interventions and to respond quickly to a changing social and policy environment.

The Bill provides a single gateway to enable public authorities, specified by regulation, to share personal information for tightly constrained reasons agreed by Parliament, where its purpose is to improve the welfare of the individual in question. To use the gateway, the proposed sharing of information must be for the purpose of one of the specified objectives, which will be set out in regulations”.⁴
7. Clause 30(1) provides that “a specified person may disclose information held by the person in connection with the person’s functions to another specified person for the purposes of a specified objective”.
8. The meaning of the term “specified person”, as used throughout Chapter 1 of Part 5, does not appear on the face of the Bill. Instead, it is to be defined in regulations to be made by “the appropriate national authority”; that is, the relevant devolved administration in relation to information-sharing by public authorities within the legislative competence of the Scottish Parliament, National Assembly for Wales or the Northern Ireland Assembly, or the Secretary of State or Minister for the Cabinet Office in relation to United Kingdom bodies.
9. The affirmative procedure in the UK Parliament will apply to regulations made by the Secretary of State or the Minister for the Cabinet Office. If they are made by Scottish Ministers, Welsh Ministers or a Northern Ireland department, the affirmative procedure in the relevant devolved legislature will apply.
10. Any person or description of person may be prescribed in the regulations as “a specified person” provided that it is a public authority or a person providing services to a public authority.⁵ “Public authority” is defined simply as “a person who exercises functions of a public nature”.⁶
11. “Specified objective” is also to be defined in regulations.⁷ The regulations may provide for any objective to be “a specified objective” so long as it has as its purpose—
 - the improvement or targeting of a public service provided to individuals or households or the facilitation of a benefit (whether or not financial) to individuals or households; and

4 Paras 30 and 31.

5 See subsections (2) and (3).

6 See subsection 38(1).

7 See clause 30(6)

- the improvement of the well-being of individuals or households, which can include:
 - their physical and mental health and emotional well-being,
 - the contribution made by them to society,
 - their social and economic well-being (see subsections (8) to (10)).
12. We observe that those provisions are drafted in very general terms, and would appear to permit any purpose connected with the provision of a public service to be prescribed as a “specified objective”.
 13. The memorandum explains that the “specified persons” are to be set out in secondary legislation rather than primary legislation “as the list will need to be regularly updated, for example to reflect the transfer of functions between public authorities, and to remove specified persons for non-compliance with the code of practice in accordance with clause 30(5)(b)”, and that it is “not considered appropriate to go back to Parliament to change primary legislation every time such an adjustment is required”.⁸
 14. In considering whether to make regulations designating a public authority or a person providing services to a public authority as a “specified person”, the appropriate national authority must have regard to that person’s systems and procedures for the secure handling of information. In the case of regulations amending or revoking previous regulations so that a person ceases to be a “specified person”, the authority must have regard to whether that person has had regard to the code of practice about disclosure and use of information issued by the relevant Minister under clause 36.
 15. There will also be a duty to consult the Information Commissioner and others before the appropriate national authority makes the regulations (see clause 37(5)).
 16. The Government have published draft regulations to illustrate how they intend to exercise the powers conferred by clause 30 and other provisions of Part 5 of the Bill.⁹ These provide for all of the following to be “specified persons”, and therefore entitled to disclose and receive information from each other for the purposes of Chapter 1 of Part 5:
 - most UK government departments;
 - every principal local authority in England;
 - every police force in England and Wales;
 - every school or academy in England and Wales;
 - every university;
 - a person providing services to any of the “specified persons” listed above.

⁸ Para 125.

⁹ These can be found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/535311/2016-07-05_Digital_Government_Disclosure_of_Information_draft_regs.pdf. [accessed 19 January 2017]

17. Clause 30(2) is wide enough to allow for numerous other public authorities to be specified in the regulations, for example NHS trusts and non-departmental public bodies (of which there are many hundreds).
18. The draft regulations published by the Government specify the objectives for which information can be disclosed and used under clause 30(1) as:
 - identifying persons who face multiple disadvantages and enabling public services to be provided that are tailored to their needs;
 - enabling information to be obtained and used to offer support to persons affected by changes to terrestrial TV broadcast frequencies; and
 - providing assistance to persons living in fuel poverty.
19. Clause 30(6) would also permit many other types of general objectives to be prescribed in the regulations as “specified objectives”. However, even the provisions of the Government’s draft regulations would allow for large scale disclosures of confidential personal information from one “specified person” to another. For example, the DWP would have power to disclose social security information on a bulk basis to all local authorities, and/or the police, and/or schools, with a view to allowing the recipients to match this against data that they already hold to facilitate the identification of individuals facing multiple disadvantages.
20. Clauses 33 and 34 provide that information disclosed under clause 30 may be used by the recipient only for the purpose for which it was disclosed, and may not be disclosed to third parties. However this rule is subject to several exceptions, in particular that information disclosed can be used for the purpose of the prevention or detection of crime or anti-social behaviour, or for the purposes of any type of legal proceedings. So, for example, social security data disclosed by the DWP under the Government’s proposed regulations to a local authority, to enable it to identify individuals who face multiple disadvantages, could also be used by that authority to bring any type of criminal or civil proceedings against other individuals.
21. We consider it inappropriate for Ministers to have the almost untrammelled powers given by clause 30 which would allow them to prescribe:
 - extensive lists of public authorities as “specified persons”, either by name or description; and
 - non-specific purposes for which the information may be disclosed or used, which need only meet the general conditions about improvement of public services in subsections (8) to (10).
22. The effect would be to confer broad discretion on the authorities listed in the regulations as to the circumstances in which it is appropriate to disclose personal information to other listed authorities.
23. We recognise that the affirmative procedure would apply to the regulations; but, as we have observed before, a higher level scrutiny cannot justify the delegation of a power which is inappropriately wide.¹⁰

¹⁰ See, for example: Delegated Powers and Regulatory Reform Committee, (1st Report, Session 2016–17, [HL Paper 13](#)), para 20.

24. **We therefore recommend that:**
- **the authorities or descriptions of authorities who are to be “specified persons” should be listed on the face of the Bill; and**
 - **Ministers should not have power to add *any* public authority, or description of authority, but only those authorities engaged in the provision of the types of public service specified in the Bill. Only in these circumstances would we regard as appropriate a Henry VIII power allowing Ministers to amend the list in the Bill, recommended above, by affirmative procedure regulations.**
25. **It also follows that Ministers should not have power to specify very generalised objectives under clause 30(6), such as those in the draft regulations published by the Government. They should instead be required to specify closely delineated objectives which can be properly scrutinised by Parliament. We recommend accordingly.**
26. We are also deeply concerned about the power to prescribe as a “specified person” a person “providing services to a public authority” (see clause 30(3)(b)). This is not explained or justified in the memorandum. The draft regulations published by the Government indicate that they intend to prescribe a person providing services to any of a long list of public authorities. This means that *any* person with whom one of those authorities chooses to contract for the provision of services connected with the “specified objective” would then become entitled to disclose and receive information under this gateway for the purpose of that objective. This applies whether the service provider concerned is in the public sector *or is a charity or a commercial organisation*.
27. **We recommend that clause 30(3)(b) should be removed from the Bill, unless the Government can explain to the satisfaction of the House why it is needed and what safeguards are in place to prevent its misuse.**
- Clause 31(4)—Disclosure of information to gas and electricity suppliers*
28. Clause 31(1) enables “specified persons” to disclose information to “a licensed gas supplier” or to “a licensed electricity supplier” for the purpose of providing assistance to persons living in fuel poverty. The information will be used by the recipient in connection with one of the statutory support schemes listed in subsection (3). “Specified persons” are those prescribed in regulations made under clause 30(2).
29. This gateway would, for example, permit HMRC or DWP to disclose tax or social security information to gas suppliers so that they can identify persons on low incomes and offer them discounts on fuel bills or assistance with insulating their homes.
30. Clause 31(4) is a Henry VIII power that would enable “the appropriate national authority”¹¹ by affirmative procedure regulations to amend subsection (1) or (3):
- so as to add or remove a person, or description of persons, to whom a “specified person” may disclose information; or
 - to amend the list of statutory support schemes for relieving fuel poverty in connection with which the information has to be shared.

11 “Appropriate national authority” is defined in clause 38.

31. We consider that the power is appropriate to the extent that it would allow particular gas or electricity suppliers to be removed from the description of persons to whom information could be supplied where, for example, it was found that they had failed to comply with the code of practice issued under clause 36.
32. As regards the power to add new persons or descriptions of persons in subsection (1), the memorandum explains that it is needed so as to enable “the list to be kept up-to-date with the persons that are required to deliver fuel poverty support or to administer, monitor and enforce the scheme”.¹² **We recommend that the power, which is drafted in a very broad terms, should be amended so as to reflect the narrow policy intention set out in the memorandum.**
33. The power to amend subsection (3) is also an open-ended one. It is justified in the memorandum on the basis that it would “enable the fuel poverty schemes to be updated should the statutory framework for the existing schemes change, or new frameworks for support schemes be created”.¹³ **We consider that this power too should be amended in order to reflect that narrow policy intention.**

Clause 36—Code of practice

34. Clause 36 requires “the relevant Minister”, which means either the Secretary of State or the Minister for the Cabinet Office, to issue a code of practice about the disclosure of information and the use of information disclosed under clauses 30, 31 and 32.
35. We do not accept the point made in the memorandum¹⁴ that the code may only “possibly” be legislative in nature. In our view, there is no doubt that it *is* legislative because persons to whom the code applies must have regard to it.¹⁵
36. The Minister must consult the Information Commissioner, the devolved administrations and others before making issuing or reissuing the code.¹⁶ He or she is also required to lay the code before the UK Parliament and the three devolved legislatures after it is issued. However, *no* Parliamentary procedure is associated with the code. The reason for this is given in the memorandum as follows:

“It is not considered necessary for the code to be subject to specific Parliamentary scrutiny because it contains guidance that will support those using the power, rather than binding legal obligations. There will also be expert external scrutiny as the code is subject to statutory consultation requirements ... when issued or reissued. Further, there is a requirement set out on the face of the Bill ensuring that the code of practice (and any reissue) must be consistent with the [Commissioner’s] code of practice on data sharing.”¹⁷

12 Para 147.

13 Para 155.

14 Para 161.

15 See subsection (3).

16 See subsection (5).

17 Para 165.

37. We regard this as a *wholly* unconvincing reason for excluding Parliamentary scrutiny. Indeed, as noted above, it is simply incorrect, in view of the express duty to “have regard to” the code, to suggest that it will not contain binding legal obligations. The code will play an important role in determining when it is appropriate for “specified persons” to disclose information under the new gateways, and how any information disclosed may be used. They will be expected to comply with the code unless there are cogent reasons for them not to do so. Moreover, compliance or otherwise with the code will also influence decisions as to whether organisations should continue to be “specified persons” for the purposes of regulations under clause 30(2).
38. **We recommend that the first code made under clause 36 should have to be laid before Parliament in draft, and not brought into force until it has been approved under the affirmative procedure. However, we would regard a draft negative Parliamentary procedure¹⁸ as adequate for any revisions of the code.**
39. **More generally, we consider that Parliament should always be afforded the opportunity to scrutinise “quasi-legislation” in the form of statutory codes or guidance of this nature unless very good reasons exist why it is unnecessary or inappropriate to do so, which must be fully set out in the delegated powers memorandum.**

Clause 37(2) and (3)—Power to make consequential provision

40. Clause 37(2)(b) includes a standard provision allowing for regulations made under Chapter 1 of Part 3 to contain “consequential, supplementary, transitional or transitory provision or savings”. We do not regard this as objectionable, particularly as the affirmative procedure will apply.
41. However, subsection (3) then adds that regulations made under subsection (2)(b) can include provision which amends or repeals Chapter 1 itself and/or any other enactment passed before or in the same session as the Bill. The justification for this Henry VIII power is given in the memorandum as follows:
- “Every effort has been made to identify any necessary amendments to or repeal of other enactments needed as a result of these clauses. However, because the specific persons who may disclose information under the power and the specific objectives for which the power will be used are to be defined in secondary legislation, it is possible that further minor consequential, supplementary, transitional or transitory amendments may be required to give effect to those provisions in regulations. This delegated power is included to ensure that steps can still be taken should anything unexpected arise or if it becomes necessary to make changes to primary legislation to facilitate implementation of the provisions.”¹⁹*
42. This does not explain why the Government need power to amend Chapter 1 itself, let alone unspecified provisions of other primary legislation. We have emphasised in recent reports that Henry VIII powers should not be inserted in Bills as a matter of routine, and any that are included should be fully explained and justified.²⁰ This one appears to have been taken just in case it may prove useful.

18 Under the draft negative procedure, the Minister would be required to make a statutory instrument to bring the code into force; but he or she could not do so until after the expiry of a specified period (e.g. 40 sitting days) during which time neither House had resolved that the code should not be issued.

19 Para 171. (Emphasis added.)

20 See: Delegated Powers and Regulatory Reform Committee, (10th Report, Session 2016–17, [HL Paper 86](#)), para 39..

43. We are also puzzled by the assertion in the memorandum that “every effort has been made to identify necessary consequential amendments”, given that Part 5 contains no consequential amendments to current legislation, in particular repeals of existing gateways in various Acts of Parliament which, we assume, the new ones created by this Bill are intended to replace.²¹
44. **We therefore recommend that clause 37(3) should be removed from the Bill, unless the Government can provide a convincing justification as to why the Henry VIII power in clause 37(3) is necessary.**

Clause 37(12)—Dehybridisation provision

45. Clause 37(12) provides that regulations made under clause 30(2) or 31(4)(a), which may otherwise be treated as hybrid for the purposes of the standing orders of either House of Parliament, are to proceed as if they were not hybrid.
46. As mentioned above, section 30(2) enables the meaning of “specified person” to be set out in regulations. Section 31(4)(a) allows for regulations to be made adding or removing persons who may receive information for the purpose of reducing fuel poverty. The memorandum explains that this “dehybridisation” is included because:
- “if regulations made under clause 30(2) were used to, for example, add or remove a specific local authority from the list of specified persons the regulations would be likely to be hybrid as it would be treating that local authority differently than others in the same class (other local authorities)”.²²
47. The memorandum goes on to say that the Government are satisfied that the private interests of, for example, local authorities will be sufficiently protected because of the safeguards provided for in Chapter 1 of Part 5, including a requirement for statutory consultation.
48. It is likely that regulations which make provision of the type described in the memorandum probably would be treated as a hybrid instrument in the House of Lords. If so, persons with sufficient standing who wished to object could lodge petitions with the House which would then be considered by a select committee, before which the petitioners could appear or be represented.
49. Clause 37(12) ensures that such an instrument would not be treated as hybrid. **In accordance with our usual practice, we draw this provision to the attention of the House so that it can decide whether any further safeguards are needed to protect the legitimate interests of persons who may be affected if the power were exercised in the way referred to in the memorandum.**

21 See, for example, section 142 of the Pensions Act 2008 which enables the Secretary of State by regulations to provide for the disclosure of social security information to gas or electricity suppliers to enable them to provide assistance to persons in receipt of state pension credit.

22 Para 132.

Chapter 2 of Part 5: Civil registration

Clause 39—Code of practice about disclosure of information by civil registration officials

50. Clause 39 inserts new sections 19AA to 19AC into the Registration Service Act 1953. These provisions would allow “civil registration officials”, which include, among others, the Registrar General, and registrars of births, deaths and marriages,²³ to disclose information to “specified public authorities” to enable the recipients of the information to exercise one or more of their functions. The term “specified public authority” includes government departments, the Welsh Government and local authorities.²⁴
51. New section 19AC confers a power on the Registrar General to issue a code of practice about the disclosure of information under new section 19AA, after consultation with the Secretary of State and the Information Commissioner. A civil registration official is to “have regard to” the code and so it will be legislative in character.²⁵
52. There is to be *no* Parliamentary procedure associated with the code. The Registrar General is required to lay it before Parliament only after the code has been issued or re-issued. The memorandum gives the same, unpersuasive justification for the absence of Parliamentary scrutiny as was given for the code under clause 36.²⁶ **As before, therefore, we recommend that:**
- **the first code made under new section 19AC should have to be laid before Parliament in draft, and not brought into force until it has been approved under the affirmative procedure; and**
 - **the draft negative Parliamentary procedure should apply to any revisions of the code.**

Chapter 3 of Part 5: Debt owed to the public sector

Clause 41(4)—Power to make regulations specifying persons who may disclose information to reduce debt in the public sector

53. Clause 41(1) provides a gateway for a “specified person” to disclose information to another “specified person” for the purpose of taking action in connection with debt owed to a “specified person” or to the Crown.
54. As is the case with clause 30, “specified person” is not defined on the face of the Bill. Instead it means a person specified, or of a description specified, in regulations made by the “appropriate national authority”.²⁷ The affirmative procedure will apply, either in the UK Parliament or in the relevant devolved legislature.
55. Any “public authority”, which is defined in very broad terms,²⁸ can be specified in the regulations, as can any person providing services to a public authority.²⁹ The draft Regulations published in connection with the Bill list as “specified persons” for the purposes of this gateway: several key

23 New section 19AA(6).

24 New section 19AB(1).

25 New section 19AC(3).

26 Para 187.

27 See subsection (4).

28 See clause 48(1).

29 See subsection (5).

Government Departments, all principal local authorities in England, the Student Loans Company, as well as a person providing services to any of those bodies. It would of course be open to future Ministers to add many other types of public authorities to that list.

56. The justification for the clause 41(4) power given in the memorandum is very similar to that provided for clause 30(2). It emphasises that the list of specified persons “will need to be regularly updated, for example to reflect the transfer of functions and responsibilities between public authorities”.³⁰
57. We have found it difficult to assess the appropriateness of the delegated powers contained in clause 41 and other provisions of Chapter 3 of Part 5. The Explanatory Notes and delegated powers memorandum give little or no detail as to the type of information which could be disclosed under the clause 41 gateway, and as to how that information can or should be used. We assume that the Government plan to leave all this important detail to the code of practice issued under clause 45, which is not subject to any Parliamentary scrutiny.
58. However, we observe that the gateway in clause 41(1) is drafted in very wide terms. It is not just about one authority obtaining information from another authority about specific individuals who owe money to the first authority; it would also appear to allow for the public authorities specified in the regulations, and their service providers, to engage in the sharing of bulk data, for example income tax records about persons living in a particular area, to help the recipient authorities identify debtors.
59. **We, therefore, recommend that:**
- **the public authorities should be listed on the face of the Bill, as we do not consider it appropriate for Ministers to have the power to decide by delegated legislation which authorities should be entitled to disclose or receive information under this potentially far-reaching and broadly-drafted gateway;**
 - **Ministers should not have power to add *any* public authority, or description of authority, but only those authorities which they can show, by reference to particular criteria specified in the Bill, have difficulty in recovering debt. Only in these circumstances would we regard as appropriate a Henry VIII power allowing Ministers to amend the list in the Bill, recommended above, by affirmative procedure regulations; and**
 - **the power to prescribe a person who provides services to a public authority as a “specified person” should be removed from the Bill, unless the Government can provide a convincing explanation for its inclusion which, we note, is entirely absent from the memorandum.**

Clause 45—Code of practice

60. Clause 45 requires the Secretary of State or Minister for the Cabinet Office, after consultation with the Information Commissioner and others, to issue a code of practice about the disclosure of information under clause 41 and the use of information that is disclosed. “Specified persons” will be required to have regard to the code.

30 Para 210.

61. The code will have to be laid before Parliament, but only after it is issued or re-issued. There is *no* Parliamentary procedure even though, as we observe above, it is likely to be of central importance to the operation of clause 41 gateway. The justification given in the memorandum³¹ is almost identical to that provided for the code under clause 37. **As before, we recommend that:**
- **the first code made under clause 45 should have to be laid before Parliament in draft, and not brought into force until it has been approved under the affirmative procedure; and**
 - **the draft negative Parliamentary procedure should apply to any revisions to the code.**

Clause 46(5)—Power to amend or repeal Chapter 3 of Part 5 following review

62. Clause 46(1) requires “the relevant Minister”, which means either the Secretary of State or the Minister for the Cabinet Office,³² to review the operation of Chapter 3 of Part 5 after it has been in force for three years for the purpose of determining whether it should be amended or repealed.
63. Once the review is completed, the Minister must publish a report on its outcome, and lay that report before Parliament and the devolved legislatures.³³
64. If, as a result of that review, the Minister decides that the Chapter should be amended or repealed, subsection (5) confers a Henry VIII power on him or her to take either of these steps by affirmative procedure regulations.
65. Regarding the power to *repeal* the whole Chapter, the memorandum explains:
- “If the outcome of the review is that the powers should be repealed then this should be capable of happening quickly, rather than the powers continuing to be in place until a suitable legislative vehicle is found to make the necessary amendments to the primary legislation.”³⁴

66. As to the power to *amend* the Chapter, the memorandum says:

“The delegated power to amend the Chapter is considered appropriate for secondary legislation *given that it could not be used to extend the powers*. Any such amendments to the Chapter would be limited by the framework of the Chapter which will have already been approved by Parliament.

This power allows the relevant Minister the power to amend the Chapter if it is considered to be working well *but in need of slight modifications to improve its effectiveness*. Such modifications would be as a result of any gaps identified in the use of the power during the review process. *The intention of the power to amend is not to broaden the powers in the Chapter but rather to improve on its operation in light of the use of the power during the three years since commencement.*”³⁵

31 Para 209.

32 See clause 48(1).

33 See subsection (4).

34 Para 214.

35 Paras 216 and 217. (Emphasis added.)

67. Despite these assurances that the power would be used only for “slight modifications”, there is in fact nothing to prevent a Minister from using the power to make extensive amendments to the Chapter, for example by removing the safeguards contained in clauses 42(1) and 43(1).
68. We see no objection to the power to repeal Chapter 3 of Part 5. However, we do have serious concerns about the power to amend it. **We recommend, therefore, that:**
- **the power should be narrowed to reflect the policy intention referred to in the memorandum so that it could be used only to improve the operation of Chapter 3; and**
 - **the Minister should not be able to broaden the information-sharing powers conferred by Chapter 3 or to remove any necessary safeguards.**

Clause 47(2) and (3)—Power to make consequential provision

69. Clause 47(2)(b) includes a provision allowing for regulations made under Chapter 3 of Part 5 to contain “consequential, supplementary, transitional or transitory provision or savings”. Subsection (3) then adds that regulations made under subsection (2)(b) can include provision which amends or repeals any provision of Chapter 3 itself and/or any other enactment passed before or in the same session as the Bill. As with clause 37(3), which is discussed above, this Henry VIII power is not properly explained or justified in the memorandum.³⁶ **We consider that this provision is inappropriate in the absence of a convincing explanation as to why it is needed.**

Clause 47(9)—Dehybridisation provision

70. Clause 47(9) provides that regulations made under clause 41(4), which may otherwise be treated as hybrid for the purposes of the standing orders of either House of Parliament, are to proceed as if they were not hybrid. The justification given in the memorandum³⁷ is very similar to that provided for clause 37(12), discussed above. **We also draw this provision to the attention of the House, in accordance with the Committee’s normal practice.**

Chapter 4 of Part 5: Fraud against the public sector

Clause 49(5)—Power to make regulations specifying persons who may disclose information to combat fraud in the public sector

71. Clause 49(1) provides a gateway for a “specified person” to disclose information to another “specified person” for the purpose of taking action in connection with fraud against a public authority.
72. As is the case with clauses 30 and 41, “specified person” is not defined on the face of the Bill. Instead it means a person specified, or of a description specified, in regulations made by the “appropriate national authority”: see subsection (5). The affirmative procedure will apply, either in the UK Parliament or in the relevant devolved legislature.

³⁶ Para 225.

³⁷ Para 204.

73. Any “public authority”, which is defined in very broad terms,³⁸ can be specified in the regulations, as can any person providing services to a public authority.³⁹ The draft Regulations published in connection with the Bill list as “specified persons” for the purposes of this gateway a number of government departments, all principal local authorities in England, the Student Loans Company, as well as a person providing services to any of those bodies. It would be open to Ministers to add many other types of public authorities to that list.
74. The justification for clause 49(5) given in the memorandum⁴⁰ is very similar to that provided for clauses 30(2) and 41(4).
75. For the same reasons as are given above in relation to Chapter 3 of Part 5, we have found it difficult to assess the appropriateness of the delegated powers contained in Chapter 4. In the case of this gateway too, it appears that the Government intend that all detail about what types of information should be disclosed, and in what circumstances, and how it should be used, is to be in the code of practice to be issued by Ministers under clause 53—which is not subject to any Parliamentary scrutiny.
76. We again observe that the gateway in clause 49(1) is drafted in very wide terms; and that it would allow bulk data sharing and matching to enable recipients of the information to detect persons who may be committing fraud against them.
77. **We, therefore, make the same recommendations about this clause as we make in the context of clause 41, namely that:**
- **the public authorities entitled to disclose or receive information under clause 49 should be listed on the face of the Bill;**
 - **Ministers should not have the power to add *any* public authority, or description of authority, but only authorities which they can show, by reference to particular criteria specified in the Bill, are involved in taking action in connection with fraud against a public authority. Only in these circumstances would we regard as appropriate a Henry VIII power allowing Ministers to amend the list in the Bill, recommended above, by affirmative procedure regulations; and**
 - **the power to prescribe a person who provides services to a public authority as a “specified person” should be removed from the Bill, unless the Government can provide a convincing explanation for its inclusion.**

Clause 53—Code of practice

78. Clause 53 requires the Secretary of State or Minister for the Cabinet Office, after consultation with the Information Commissioner and others, to issue a code of practice about the disclosure of information under clause 49 and the use of information that is disclosed. “Specified persons” will be required to have regard to the code.

38 See section 49(11).

39 See subsection (6).

40 Para 233.

79. The code will have to be laid before Parliament, but only after it is issued or re-issued. There is *no* Parliamentary procedure even though, as we observe above, it is likely to be of central importance to the operation of clause 49 gateway. The justification given in the memorandum⁴¹ is almost identical to that provided for the other codes referred to above. **As before, we recommend that:**

- **the first code made under clause 53 should have to be laid before Parliament in draft, and not brought into force until it has been approved under the affirmative procedure; and**
- **the draft negative Parliamentary procedure should apply to any revisions to the code.**

Clause 54(5)—Power to amend or repeal Chapter 4 of Part 5 following review

80. Clause 54(1) requires “the relevant Minister”, which means either the Secretary of State or the Minister for the Cabinet Office, to review the operation of Chapter 4 of Part 5 after it has been in force for three years for the purpose of determining whether it should be amended or repealed. If, as a result of that review, the Minister decides that the Chapter should be amended or repealed, subsection (5) confers a Henry VIII power on him or her to take either of those steps by affirmative procedure regulations.

81. We have the same concerns about clause 54(5) as we have in relation to the power in clause 46(5) to amend Chapter 3 of Part 5. **As before, we recommend that:**

- **the power should be narrowed so that it could be used only to improve the operation of Chapter 4; and**
- **the Minister should not be able to broaden the information-sharing powers conferred by Chapter 4, or to remove any necessary safeguards.**

Clause 55(2) and (3)—Power to make consequential provision

82. Clause 55(2)(b) includes a provision allowing for regulations made under Chapter 4 of Part 5 to contain “consequential, supplementary, transitional or transitory provision or savings”. Subsection (3) then adds that regulations made under subsection (2)(b) can include provision which amends or repeals any provision of Chapter 4 itself and/or any other enactment passed before or in the same session as the Bill. As with clauses 37(3) and 47(3), this Henry VIII power is not properly explained or justified in the memorandum.⁴² **We consider that this provision is inappropriate in the absence of a convincing explanation as to why it is needed.**

Clause 55(9)—Dehybridisation provision

83. Clause 55(9) provides that regulations made under clause 49(5), which may otherwise be treated as hybrid for the purposes of the standing orders of either House of Parliament, are to proceed as if they were not hybrid. The justification given in the memorandum⁴³ is very similar to that provided for clauses 37(12) and 47(9), discussed above. **We also draw this provision to the attention of the House, in accordance with the Committee’s normal practice.**

41 Para 241.

42 Para 250.

43 Para 236.

Chapter 5 of Part 5: Sharing for research purposes

Clause 61—Code of practice

84. Clause 57(1) provides for a gateway which would allow a public authority to disclose information to another person for the purpose of research which is being or is to be carried out. There are six conditions which must be met before “personal information” may be disclosed under this gateway, for example the research concerned has to be accredited by the UK Statistics Authority (also known as the Statistics Board) under clause 62.⁴⁴
85. Clause 57 itself, in contrast to clauses 30, 41 and 49, does not contain powers allowing Ministers to specify in regulations which authorities may disclose information or which persons may receive it.
86. However, clause 61 requires the Statistics Board, after consultation with the Information Commissioner and others, to issue a code of practice about the disclosure of information under clause 57 and the holding or use of information that is disclosed. Public authorities who disclose the information, and accredited researchers who receive it, will be required to “have regard to” the code when processing, holding or using the information.
87. The code will have to be laid before Parliament, but only after it is issued or re-issued. There is *no* Parliamentary procedure. The justification given in the memorandum is almost identical to that provided for the other codes referred to above.⁴⁵ **As before, we recommend that:**
- **the first code made under clause 61 should have to be laid before Parliament in draft, and not brought into force until it has been approved under the affirmative procedure; and**
 - **the draft negative Parliamentary procedure should apply to any revisions of the code.**

Chapter 7 of Part 5: Statistics

Clause 68—Statement of principles and code of practice issued by the Statistics Board

88. Clause 68 inserts new sections 45B to 45G into the Statistics and Registration Service Act 2007. These provisions confer on the Statistics Board a right to access to information held by a wide range of public authorities and private undertakings.⁴⁶ New sections 45E(5) and 45G provide that the Statistics Board must prepare and publish:
- a statement about the principles to which it will have regard in exercising its functions for accessing data under new sections 45B to 45D and the procedures it will adopt in exercising those functions; and
 - a code of practice containing guidance on the matters to be taken into account by a public authority where that public authority is making changes to its processes for collecting, organising, storing or retrieving information or to its processes for supplying information to the Statistics Board.

44 See clause 57(8).

45 Para 259.

46 Clause 67(3) repeals sections 47 to 49 of the Statistics and Registration Service Act 2007, which confer powers on Ministers to make regulations authorising a public authority to disclose information to the Board.

89. In preparing or revising the statement of principles or the code, the Statistics Board is required to consult Ministers and others. The Board must also lay both types of document before Parliament, but only after they have been finalised. There is *no* Parliamentary procedure. The justification given in the memorandum⁴⁷ is almost identical to that provided for the codes referred to above. **As before, we recommend that:**
- **the first statement or code made under clause 68 should have to be laid before Parliament in draft, and not brought into force until it has been approved under the affirmative procedure; and**
 - **the draft negative Parliamentary procedure should apply to any revisions of the statement or code.**

Part 6: Miscellaneous

Clause 77—Power conferred on the BBC to determine TV licence fee concessions by reference to age

90. Section 365 of the Communications Act 2003 enables the Secretary of State to make provision, by negative procedure regulations, for concessions in relation to the payment of the TV licence fee. Regulations made under that power currently provide for persons aged over 75 to be exempted completely from payment of the fee.⁴⁸
91. Clause 77 transfers from the Secretary of State to the BBC the policy responsibility for, and the function of, conferring age-related concessions for those aged 65 and over.⁴⁹
92. The BBC is to have the power to provide for these concessions by a “determination”, which is to be made after consultation with such persons as the BBC may consider appropriate, and then published in whatever way the BBC considers appropriate.⁵⁰ Parliament is not to scrutinise the determination at all, indeed the document does not even have to be laid before Parliament.
93. The justification given in the memorandum is as follows:
- “As part of the funding agreement between the Government and the BBC, reached in summer 2015, the BBC agreed to cover the full costs of the age related concessions alongside taking on the policy responsibility for setting the age related concession. This measure gives effect to that agreement and secures greater autonomy for the BBC in administering the concession.
- The power to set and administer the age-related concession is being transferred from the Secretary of State to the BBC with appropriate safeguards. This concession will no longer be set out in regulations, however the measure requires that the BBC must consult those it considers appropriate before making, varying or revoking a determination. There is also a requirement that determinations under this power are in writing

47 Para 266.

48 See reg. 4 of the Communications (Television Licensing) Regulations 2004 (S.I. 2004/692, as amended).

49 The Secretary of State’s power to make regulations providing for TV licence concessions for persons aged 65 and over is to be abolished: see clause 77(6).

50 See new section 365A of the Communications Act 2003 to be inserted by clause 77(7).

and are published. The measure also makes it clear that the BBC's determinations are to be in relation to any person aged 65 or higher and may not be in relation to a lower age."⁵¹

94. One consequence of transferring that power to the BBC is that Parliament will have no role in scrutinising changes to age-related concessions for TV licence fees even if, for example, the BBC were to increase the age of entitlement to the concession.⁵² **We draw to this to the attention of the House.**

51 Paras 275 and 276.

52 We note that it is a criminal offence to use a TV without a licence: see section 363 of the Communications Act 2003. If the BBC were to determine that entitlement to the concession should apply only persons aged 76 or over (instead of 75 or over, as at present) persons aged 75 would thus be exposed to prosecution if they did not buy a licence for their TV.

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.

For the business taken at the meeting on 11 January 2017 Members declared no interests.

Attendance

The meeting on the 11 January 2017 was attended by Baroness Drake, Lord Flight, Baroness Fookes, Lord Lisvane, Lord Moynihan, Lord Thomas of Gresford and Lord Thurlow.