

HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

4th Report of Session 2009-10

Personal Care at Home Bill

Government response and
amendments to clause 17:
Digital Economy Bill [HL]

Government amendments:
Equality Bill

Ordered to be printed 21 January and published 22 January 2010

Published by the Authority of the House of Lords

London : The Stationery Office Limited
£price

The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session with the terms of reference “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; to report on documents and draft orders laid before Parliament under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006; 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”.

Current membership

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

Lord Armstrong of Ilminster GCB CVO
Lord Blackwell
Rt Hon. the Lord Boyd of Duncansby PC QC
Rt Hon. the Lord Butler of Brockwell
Viscount Eccles CBE
Lord Goodhart QC (*Chairman*)
Lord Haskel
Rt Hon. the Lord Mayhew of Twysden QC DL
Lord Razzall CBE
Lord Soley

Registered Interests

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. Declared interests for this Report are in Appendix 4.

Publications

The Committee’s reports are published by the Stationery Office by Order of the House in hard copy and on the internet at www.parliament.uk/parliamentary_committees/dpr.cfm.

General Information

General information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at www.parliament.uk/about_lords/about_lords.cfm.

Contacts for the Delegated Powers and Regulatory Reform Committee

Any query about the Committee or its work should be directed to the Clerk of the Delegated Powers and Regulatory Reform Committee, Delegated 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 dpr@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.

Fourth Report

PERSONAL CARE AT HOME BILL

1. This Bill removes the restriction on the period for which personal care may be provided free of charge to persons living at home. There is nothing in the Bill to which we wish to draw the attention of the House.

DIGITAL ECONOMY BILL — GOVERNMENT RESPONSE AND AMENDMENTS TO CLAUSE 17

2. We reported on this Bill in our 2nd Report (HL Paper 24) and made recommendations on several clauses, including clause 17. This clause introduced a new section 302A into the Copyright, Designs and Patents Act 1988, with an exceptionally broad power enabling the Secretary of State by order subject to affirmative procedure to amend all or any of Parts 1 to 7 of that Act (comprising around 200 sections), “for the purpose of preventing or reducing the infringement of copyright by means of the internet, if it appears to the Secretary of State appropriate to do so having regard to technological developments that have occurred or may occur”. We concluded that no adequate case had been made for this very unusual power, and recommended the removal of the clause from the Bill.
3. The Government have responded to our report on the Bill by way of a letter from Lord Mandelson, Secretary of State for Business, Innovation and Skills, printed at Appendix 1. The letter refers to proposed Government amendments to clause 17, which have now been tabled and appear as amendments 211A and 211B in the marshalled list for Committee stage.
4. The Government argue that clause 17 should not be removed from the Bill, on the ground that “new technologies can bring new challenges to the copyright regime, and we have sometimes had to play catch-up in our responses where we have not had existing mechanisms in place to allow us to respond in a timely fashion”. Instead, they propose to revise their approach. Amendment 211A replaces the original purpose set out in paragraph 2 above and provides that the power to amend the 1988 Act may be exercised if the Secretary of State is “satisfied that (a) the infringement is having a serious adverse effect on businesses or consumers, and (b) making the amendment is a proportionate way to address that effect”. Amendment 211B introduces two new sections (302B and 302C), providing for the rare super-affirmative procedure for orders under new section 302A.
5. As the super-affirmative procedure is very unusual, it is worth explaining briefly how it is intended to operate in this case:
 - a consultation exercise must first be conducted
 - a first-stage draft order is laid before Parliament, together with an explanatory document *inter alia* explaining why the conditions set out in amendment 211A are met, and giving details of the consultation;
 - the Secretary of State must have regard to any representations etc. made by either House or one of its Committees charged with reporting on the draft order, or anyone else, made within 60 days after the first-stage order

is laid; and decide whether to amend the order in the light of those representations;

- the Secretary of State may decide to proceed with the draft as laid (in which case he lays a statement before Parliament) or he may lay a revised draft order; in either case the order is subject to approval by each House;
 - if a Committee of either House charged with reporting on the orders recommends that the order should not be approved, the order cannot proceed unless a resolution of the relevant House overturns the recommendation.
6. We begin our consideration of the Government's amendments by stating that the insertion of a super-affirmative procedure cannot bring a misconceived delegated power within the bounds of acceptability. Orders under new section 302A would remain pieces of delegated legislation. There would be less opportunity for Parliamentary scrutiny than is afforded by the use of a Bill; in the case of secondary legislation there is no established means of reconciling any differences of view between the two Houses; and the Government (not Parliament) would retain the sole ability to make amendments to an order.
 7. On the other hand we note that the Government's new test in amendment 211A, though no longer limited to technological developments, does seem to represent a more focused test for use of the proposed power compared with what was originally in clause 17 (not least because of the removal of the prospective element authorising action to be taken in respect of technological developments that "are likely to occur"). And the new proposed scrutiny procedure does at least provide additional requirements for consultation, and Parliamentary consideration.
 8. The changes made by the amendments appear, overall, to represent an improvement on what was originally in the Bill. It must now be for the House to decide whether or not these changes render the clause acceptable.
 9. If the House was minded to agree to the revised scheme, it would first have to satisfy itself that the super-affirmative procedure would provide real opportunities for additional scrutiny: for example, considering which Committee (whether new or existing) should scrutinise the draft orders. And if the House does determine that the revised power is now acceptable it must be considered entirely exceptional, justified only by unusual circumstances in this particular case, and be understood to set no precedent. The super-affirmative procedure is not an adequate substitute for Parliament's established procedures for dealing with matters of complexity and importance, through primary legislation.

EQUALITY BILL — GOVERNMENT AMENDMENT

10. We considered this Bill in our 2nd (Parts 1 to 5) and 3rd (Parts 6 to 15) reports. The Government have now invited us to consider an amendment they have tabled for Committee stage, which appears as amendment 108KA on the marshalled list. The Government Equalities Office has provided a supplementary memorandum, printed at Appendix 2, explaining that the purpose of the amendment is to allow provision to be made by regulations

subject to affirmative resolution, requiring publication by political parties of information on the diversity of their candidates. The Committee does not wish to draw the amendment to the attention of the House.

11. In addition, the Committee has received from the Government Equalities Office information on the delegated power in clause 195 (relating to age), which was omitted by mistake from their original delegated powers memorandum sent to us and printed in our 2nd report. This additional information is printed in Appendix 3 to this report.

APPENDIX 1: DIGITAL ECONOMY BILL [HL] — GOVERNMENT RESPONSE

Letter to the Chairman from the Rt Hon Lord Mandelson, Secretary of State, Department for Business, Innovation and Skills

1. I am writing in response to the Committee's Second Report of Session 2009-10 published on 17 December which addresses the Digital Economy Bill.

Online infringement of copyright

Paragraph 11 of the Report: clauses 6 to 8: Code procedure

2. The Committee recommends that the negative procedure should apply when a code produced by industry is approved by OFCOM, just as it does when a code is made by OFCOM.

3. At the moment a code produced by industry has to be approved by OFCOM. Prior to giving approval the Secretary of State needs to give his consent. The Bill provides that OFCOM has to give notice of its approval or withdrawal of approval in relation to the code and the notice has to be published in a manner that OFCOM considers appropriate to bring it to the attention of those likely to be affected. Any notice along with the approved code or any approved modifications have to be laid before Parliament.

4. We have considered the views of the Committee and can see the logic in its argument that an approved industry code should be subject to the same level of parliamentary scrutiny as a code made by OFCOM itself. The Government would therefore like to bring forward an amendment so that when the code is in a form that is satisfactory to both OFCOM and the Secretary of State OFCOM must approve the code by an order. Modifications would also have to be approved by order. If OFCOM wish to withdraw their approval for the approved code they would revoke the order. An order would be subject to the negative parliamentary procedure and section 403 of the Communications Act 2003 would apply to the power of OFCOM to make an order. This would mean that OFCOM would have to consult for at least a month before making the order as it has to if it makes the code itself under clause 7.

Paragraph 13 of the Report: clause 11: Obligations to limit internet access

5. The Committee recommends that orders under the new section 124H of the Communications Act 2003 (Obligations to limit internet access) be subject to the affirmative procedure. An order under this section would be made by the Secretary of State and would impose a technical obligation on internet service providers to take technical measures against particular subscribers. At the moment such orders are subject to the negative procedure. The Government accepts the recommendation that the level of scrutiny which the affirmative procedure would bring would be appropriate and intends to bring forward an amendment to achieve this.

6. The Committee also recommends that the Bill itself should impose limits on the subscribers who may be subject to technical measures under the order. It was the intention of the Department that technical measures should only be taken against those subscribers who have infringed owners' copyright by means of an internet access service and agree that this should be made clear of the face of the Bill. The

Government would therefore like to accept the Committee's recommendation and bring forward an amendment to achieve this.

7. The Committee has also commented that if the power to make an order under the new section 124H is only to be exercisable after an assessment has been prepared under the new section 124G the Bill should be amended to make this clear. It is not the intention that such an assessment should be a precondition for the exercise of the power. The Secretary of State needs to be able to make an order in the light of other considerations should the situation demand it. He needs to be able to take a broad view of the desirability of imposing a technical obligation. For example, the economic situation at the time might be something the Secretary of State might want to factor into the decision, or an assessment of potential unintended consequences of some measures on other policy areas.

Paragraph 15 of the Report: clauses 12 and 13: "the technical obligations code"

8. The Committee has commented that the provision for indemnities in the Bill does not limit the indemnity in amount or set out the circumstances in which the indemnity may apply. Clause 13 of the Bill provides in the inserted section 124J(4)(b) that the technical obligations code may make provision requiring a copyright owner to indemnify an internet service provider for any loss or damage resulting from the owner's infringement or error in relation to the code or the copyright infringement provisions.

9. This is intended to cover the situation where a subscriber has suffered loss or damage as a result of an infringement of, or error in relation to, the code or the provisions in the Bill by a copyright owner. In those circumstances the internet service provider may be unaware of the copyright owner's error or infringement but the subscriber may have a right to take civil action against the internet service provider. Section 124J(4)(b) therefore allows for the internet service provider to be indemnified by the copyright owner for any amount that the internet service provider might have to pay to the subscriber. It is true that there is no limit placed on this indemnification in the Bill, but since it will only apply to losses caused as a result of the copyright owners breach or error the Department considers that the absence of a limit is appropriate. There is equally no limit on the amount of damages that a subscriber might claim from an internet service provider in the circumstances and it would not be reasonable to expect the internet service provider to be ultimately liable for the copyright owner's breach or error.

Paragraph 17 of the Report: clause 15: Sharing of costs

10. The Committee recommends that either the split of costs between internet service providers and copyright owners should appear on the face of the Bill or orders under clause 15 in the inserted section 124L of the Communications Act 2003 should be subject to the affirmative procedure. The Department will be making available a preliminary draft statutory instrument for the Committee stage which will specify what the proposed split should be between internet service providers and copyright owners in relation to certain costs. The intention is to go out to consultation on the costs issue and so the position may change in the light of responses to the consultation. The Department believes that it is not therefore appropriate to put this detail on the face of the Bill. The Government has decided to accept the second option in the recommendation and intends to bring forward an amendment providing for any order in the inserted section 124L to be subject to the affirmative procedure.

Paragraph 19 of the Report: clause 17: Power to amend copyright provisions

11. We have learnt from experience that new technologies can bring new challenges to the copyright regime, and we have sometimes had to play catch-up in our responses where we have not had existing mechanisms in place to allow us to respond in a timely fashion.

12. It is for this reason that the power in clause 17 is required. Not to allow sweeping or arbitrary changes to copyright law, but to allow a nimble and flexible response to be made to any emerging threats to our valuable creative industries. It is recognised of course, that a power such as this needs to be targeted, and subject to suitable safeguards. As such, you will see that the clause and power are already narrowly drawn, and may only be used for the specific purpose of addressing online infringement. The power may not be used for more general changes, such as rewriting what does, or does not, constitute copyright infringement.

13. In response to concerns raised by the committee however, the government has decided to make certain amendments to clause 17, in order to further clarify the way in which it will function, and the safeguards that will apply to its use.

14. This package of amendments will make it clear, through the language of the clause, that the power is not a sweeping one, but rather a targeted power that may only be used for a specific purpose (to tackle online infringement of copyright) and only in a way that is appropriate and proportionate.

15. The amendments will also introduce a threshold that must be reached before action is taken. The Secretary of State will only be able to act under clause 17 for the purpose of preventing or reducing online infringement of copyright if he is satisfied that the infringement is having substantial adverse effects on business or consumers in the UK and he will be required to set out why he is so satisfied in the explanatory document that he must lay in parliament with any draft order under the super-affirmative procedure referred to below. This threshold will effectively create a test that should be satisfied before the power could be used. While it is problematic to assign numerical values to infringing behaviour (for reasons of detection and interpretation) it is reasonable to require consumer behaviour to be such that it comprises a significant and damaging form of online copyright infringement, is identifiable as such and is addressable by targeted amendments to the CDPA, before the power is used.

16. In addition to the amendments detailed above, it is also intended that the power will include a “super-affirmative” resolution before any use. While this procedure can take different forms, it is clear that an enhanced process such as this will ensure that any use of the power is subject to sufficient parliamentary scrutiny.

17. It is hoped that these amendments to clarify the purpose and safeguards surrounding the power will reassure the committee that not only is the delegated power in this case justified, but that all possible steps have been taken to ensure that it is used only in an appropriate and proportionate manner.

Clause 7: Initial obligations code by OFCOM in the absence of an approved code

18. The Department would like to take the opportunity of drawing to the attention of the Committee an amendment to clause 7 which has been put down in the name of Lord Mandelson as follows-

Page 9, leave out lines 12 to 14 and insert—

“(2) OFCOM may but need not make a code under subsection (1) for a time before the end of—

(a) the period of six months beginning with the day on which sections 124A and 124B come into force, or

(b) such longer period as the Secretary of State may specify by notice to OFCOM.

(2A) The Secretary of State may give notice under subsection (2) (b) only if it appears to the Secretary of State that it is not practicable for OFCOM to make a code with effect from the end of the period mentioned in subsection (2) (a) or any longer period for the time being specified under subsection (2) (b).”

19. The new section 124D in clause 7 as drafted has the effect of requiring OFCOM to have either approved, or made by order, a code covering the initial obligations within 6 months of new sections 124A and 124B coming into force. Those sections are introduced by clauses 4 and 5 of the Bill and come into force 2 months after Royal Assent. This means that OFCOM will have to approve or make an initial code no later than 8 months after the Bill receives Royal Assent. The deadline was put into the Bill because the Government believes that it is important that the initial obligations on online copyright infringement should take effect as soon as possible. However, it is no doubt a challenging timescale for the development, consultation on and approval of a code. This is particularly so because a code under the new sections 124C or 124D would require notification to the European Commission under the Technical Standards Directive. This will require at the least that the code be notified in a near final form to the European Commission 3 months before it can be formally approved, or made by order, by OFCOM.

20. Since the Bill was published it has been brought to the Government’s attention that the standstill period under the Technical Standards Directive could, under certain circumstances, be as long as 12 months. This is not something over which either OFCOM or the UK Government have any control. Failure to comply properly with the Technical Standards Directive in the making of the code would mean that the code itself, and therefore the relevant obligations in the Bill, could not be enforced.

21. The amendment therefore provides a power for the Secretary of State to extend that deadline should it appear to him that it is not practicable for OFCOM to make a code that takes effect within the existing deadline.

Independent radio services

Report paragraph 22: clause 36: Renewal of radio multiplex licences

22. The Committee considers that it is impossible from the Bill to determine whether the policy is for licences to be renewable and, if so, for what period and on what grounds. The Committee draws attention to the “skeletal nature of the power in clause 36, to enable the House to examine it further and determine whether it is justifiable in this context”.

23. The Department notes that the Committee does not recommend removal or amendment of this provision. The Government intends to further explain the rationale for the clause during the Committee stage of the Bill.

24. It is the Government's aim to work with broadcasters and multiplex operators to agree how to build out the Digital Audio Broadcasting (DAB) infrastructure to meet FM coverage levels, one of the criterium that needs to be met in setting a date for digital switchover for radio. This is unlikely to be an easy task, or indeed to be resolved quickly. Among other things, it will require agreement about the current levels of FM coverage, the plan for building out DAB and the level of investment required. The Government hopes to have a comprehensive plan by the end of 2010.

25. The Government believes that a key component of this planning will be the ability to alter the terms of multiplex licence renewals. The existing section 58 of the Broadcasting Act 1996 allows OFCOM to renew radio multiplex licences granted prior to 30 September 2006 for periods of 12 or 8 years (depending on when the licence was granted). However, the Government recognises the need to reduce, as much as possible, the impact of infrastructure build-out on digital stations.

26. One way this can be achieved is to allow multiplex operators to spread the cost of any new investment over a longer licence period. This is why the Government has proposed new powers in section 58A to amend the provisions about the renewal of multiplex licences. The reason that the power is not more specific is because it will not be clear exactly how it will be most appropriately applied until the plan for the build-out of DAB is developed.

27. Exercise of the power will, in any event, be subject to parliamentary scrutiny due to the fact that any regulations will require resolutions of both Houses before being made.

Copyright and performers' property rights: licensing and penalties

Paragraphs 31 and 32 of the Report: clause 42 and schedule 2: Extension and regulation of licensing of copyright and performers' rights

28. We note your conclusion that the powers in relation to orphan works and orphan rights, extended licensing schemes, the regulation of copyright licensing and the Henry VIII power in the new section 116D and paragraph 1D of Schedule 2A to the Copyright, Designs and Patents Act 1988 are not justified by the explanations given in the memorandum, and your recommendations in paragraphs 31 and 32 to address these deficiencies.

29. In the first bullet point of paragraph 31 you recommend that the Bill should include a definition of when a work is, or ceases to be, an orphan work, perhaps with a power to amend the definition by statutory instrument subject to the affirmative procedure.

30. The Government will bring forward an amendment to introduce a definition of "orphan work" into the Bill to meet these concerns. We anticipate that this definition will provide that a work will be classified as orphan if a diligent search meeting specified criteria has failed either to identify or to trace the owner of the work. The definition will specify what constitutes due diligence. We believe that it will be essential to have powers to amend this definition by secondary legislation subject to the affirmative procedure in order to ensure that the defined term remains consistent with protocols or procedures which are used for the classification of such works.

31. In the second bullet point of paragraph 31 you recommend the removal of the provision enabling orphan works to be defined by reference to guidance published

from time to time “by any person”. We accept this recommendation and the Government will bring forward the necessary amendment. Whilst this power was included to ensure that the definition used remains consistent with procedures commonly used in the EU or internationally, we believe that the introduction of a definition of “orphan work” in the Bill, together with a power to amend that definition by secondary legislation, will enable the Secretary of State to ensure this consistency, although the process for doing so will be more complex. That is, it will be possible for the Secretary of State to make regulations defining an orphan work or orphan right in terms of search procedures that are consistent with any EU or international guidelines, in place of making reference to those guidelines in secondary legislation.

32. Your third recommendation is the removal of the power in new section 116D(2)(c) of the Copyright, Designs and Patents Act 1988 to amend Part 1 of that Act. We consider that this recommendation is informed in part by the observation in paragraph 29 that this power is not confined to consequential purposes. Whilst the power has been more widely drawn, it is intended that new section 116D(2)(c) and its counterpart in Schedule 2A should only be available to make consequential amendments and we propose to add this limitation. The power was initially requested to ensure that regulations made under the sections introduced by the Bill did not conflict with jurisdiction of the Copyright Tribunal to determine the reasonableness of licences and licensing schemes and potentially affect orders made by the Tribunal. We believe that there may be other ways in which regulations made under the new powers in the Bill may cut across existing provisions in the Copyright, Designs and Patents Act and we propose to retain this power to amend Parts 1 and 2 of the Act, but to limit its scope so that it is limited to making consequential amendments. The Government will bring forward an amendment to achieve this.

33. Your fourth recommendation is that the first use of any of the powers introduced by new sections 116A and 116B and their counterparts in Schedule 2A and paragraphs 1 and 3 of Schedule A1 should be subject to the affirmative procedure. We are happy to accept this recommendation and the Government will bring forward the necessary amendment.

34. Your fifth recommendation is for an inclusion of a maximum penalty for the purposes of paragraph 3 of Schedule A1 to the CDPA. The Government will lay an amendment to introduce a maximum penalty of £50,000.

35. You recommend in paragraph 32 that the amendments proposed in paragraph 31 should also be introduced for performers’ property rights and we are happy to accept this recommendation and bring forward the necessary amendment.

36. I hope the Committee is satisfied with the explanations provided and the proposed amendments.

Department for Business, Innovation and Skills

January 2010

APPENDIX 2: EQUALITY BILL — GOVERNMENT AMENDMENT

Supplementary memorandum from the Government Equalities Office

1. This supplementary memorandum is to accompany the tabling of the Government amendment inserting a new clause into the Equality Bill after clause 105, during the course of Lords Committee.
2. This new clause is intended to implement one of the recommendations contained in the Second Interim Report of the Speaker's Conference (on Parliamentary Representation), which was published on 25 November 2009¹, on whose behalf an amendment was tabled at Report stage in the House of Commons² (although not adopted).
3. The purpose of the amendment is to allow provision to be made to require publication by political parties of information on the diversity of their candidates as a means of encouraging broader representation, and increased involvement of all groups in the democratic process.
4. The requirement to publish will need to include detailed provisions dealing with the content of the information to be published, and the form and manner in which it will be published, of the kind that are better left to secondary legislation. Furthermore, an element of flexibility is required to amend the requirements, if necessary and depending upon, for example, the extent of any improvements in the diversity of political representation over time. This might lead either to strengthening or relaxing the initial publication requirements.
5. The new clause contains at subsection (10)(c) a power to extend the publication requirements to types of election additional to those listed in subsection (5). It does so by allowing the amendment of the clause itself. It may be necessary, for example, to include additional elections such as local elections in order to achieve the policy aims described above.
6. Given that this is a significant new power, and includes an element that allows regulations made under it to amend primary legislation, we consider that the affirmative procedure is appropriate for its exercise.

Government Equalities Office

January 2010

¹ Session 2009-10 HC 63-I.

² NC 34

APPENDIX 3: EQUALITY BILL — CORRECTION TO ORIGINAL MEMORANDUM

Part of Memorandum, printed in our 3rd Report [HL Paper 35], that was omitted by the Government Equalities Office when submitted.

Clause 195 – Age

1. Age is a protected characteristic under clause 5 of the Bill and discrimination is outlawed in the fields of services and public functions (except as regards young persons under the age of 18 (clause 27(1)(a)) and work in Parts 3 and 5 of the Bill). It is unique in that it is possible for direct age discrimination to be justified in the case of treatment that is a proportionate means of meeting a legitimate aim (see cl.13(2)). Clause 195 provides a power for a Minister of the Crown to make an order to amend the Act by making exceptions so that specified conduct relating to age or development of certain policies and arrangements by relation to age do not contravene the Act. The order may amend any part of the Act to which age discrimination applies except Part 5 (which relates to work) and Chapter 2 of Part 6 (which relates to further and higher education). Therefore, this exception-making power relates to fields other than work and further and higher education, such as the provision of goods, facilities and services and the performance of public functions. Under subsection (3), the power to make consequential amendments may apply to an enactment including the Equality Act 2006.

2. Subsection (3) enables the order to provide for a Minister of the Crown or the Treasury to issue guidance in respect of a requirement included in the exception. The actual requirement must be in the order, but matter filling out the detail of that requirement could be in guidance. It provides scope for a formal consultation in respect of the guidance and for consultation undertaken before commencement to qualify as consultation for the purposes of the power. Sub-section (4) enables guidance to be prepared and issued before the power is commenced and for that guidance to qualify as guidance required by the exception order. This is a common provision to facilitate a smooth introduction of new requirements.

3. 178. This power to make exceptions is necessary because the application of the prohibition on age discrimination in non-employment fields is particularly complex and will require the careful delineation of exceptions that enable neutral or beneficial age discrimination, that is not covered by one of the general exceptions in Part 14 of the Bill, to continue. Examples of age-based differential treatment which it is anticipated will be covered by an exception are the reasonable use of age as a factor in financial services and age-based holidays. Detailed work on what these exceptions should be and how they should be framed is under way and emerging policy proposals were set out in the consultation paper *Equality Bill: Making it work ending age discrimination in services and public functions* issued in June 2009. That paper also referred to the possibility of exceptions being required in the Health and Social Care fields. A feedback statement on the responses to the Consultation is being prepared and will be issued shortly.

4. The power to supplement the substantive exceptions with statutory guidance is again necessary because of the difficulty of ensuring that “good” different treatment is permitted while the “bad” must cease. This is particularly the case in relation to the financial services exception and the use of age related factors and the same ability will be necessary if and to the extent that it is decided eventually to use the power in relation to health and social care. The approach proposed here

is similar to Schedule 3 paragraph 22 A as regards gender related factors. That replicates the approach used in the Sex Discrimination Act 1975 to give effect to the requirement in Article 5 of Gender Directive 2004/113/EC (implementing the principle of equal treatment between men and women in the access to and supply of goods and services) that where a Member State, as the UK has done, took up the option to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in assessment of risk based on actuarial and statistical data there had to be in place a system for the collection and publication of accurate data relevant to the use of such actuarial factors³. The guidance power is intended to be used for instance to deal with the detail of how a requirement that data be made public is actually satisfied. Sub-section (5) is intended to allow for methods of meeting a requirement provided for by private sector bodies such as the Association of British Insurers to be recognised as meeting that requirement. It is intended for exceptions to come into effect at the same time as the substantive prohibition in relation to age is commenced.

5. This Henry VIII power is subject to the affirmative procedure because it enables the amendment of primary legislation, is broad in nature and the potential impact of making exceptions in a particular area is likely to be significant.

Government Equalities Office

January 2010

³ See s.45 Sex Discrimination Act 1975 as amended by SI 2008/963

APPENDIX 4: 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 meeting on 21 January 2010, Lord Blackwell declared an interest on the Digital Economy Bill [HL], as a board member of OFCOM.