Introduction.

1. We thank the Committee for its report on the Deregulation Bill. Our response takes each of the four clauses raised by the Committee in turn.

Clause 16

The Committee commented: Suppliers of Fuels and Fireplaces: The Joint Committee on the Draft Deregulation Bill recommended, on the advice of the House of Lords Delegated Powers and Regulatory Reform Committee, that the clause be removed from the draft bill. We share the view that clause 16 should be omitted.

2. The Delegated Powers and Regulatory Reform Committee initially expressed concern over the move from a legislative to an administrative process. In the Government’s response to the Committee’s Report on the draft Bill, it gave the following reasons for the delegated power in Clause 16: the Government is assured that it can provide legal certainty by the administrative list process; Parliament has not previously debated smoke control statutory instruments due to their technical nature; and the administrative list will reduce delays to business.

a. The Government accepts that there is a need for legal certainty in the context of a criminal offence and its associated defence. In the Delegated Powers Memorandum for the draft Bill the Government set out the steps it intends to take to ensure that legal certainty is maintained in the move from subordinate legislation to administrative lists. The new lists will contain the same level of detail as the schedules to the current smoke control statutory instruments. Any changes will be made in a robust and auditable way with checks being undertaken and approval required at a senior departmental level. The lists will be published on the Defra smoke control webpages. Members of the public without access to the internet will be able to request paper copies of the lists from the department. Any changes to the list will be potentially subject to judicial review.

b. The Government is not aware of the smoke control statutory instruments having been debated in Parliament on any previous occasions. These instruments tend not to be controversial because they are based on expert advice and are highly technical in terms of their content. The Secretary of State’s specification of products under the existing powers is based on specialist advice from technical experts and this element of the process will remain unchanged. The authorised fuel schedules are defined in technical terms covering matters such as the composition of the fuels, the manufacturing process, the shape of the fuels, the weight and sulphur content. Similarly the exempted fireplaces schedules contain highly technical conditions of exemption relating to how individual fireplaces should be used and what fuels they should be used with in order to qualify for exemption. The new lists will contain similar technical content.

c. The Government’s rationale for this measure is that it will reduce the delay between products being recommended for approval and this approval being granted. The Delegated Powers and Regulatory Reform Committee challenged this rationale and indicated that it considered that any delays
faced by businesses were attributable to the Government’s common commencement date policy which means that these statutory instruments are only made every six months. In response to this point, the Government advised that it had considered the merits of producing the smoke control statutory instruments more frequently and concluded that this was not a viable option for achieving its objective. In the Government’s experience it is necessary to allow at least two months for the making and coming into force of the smoke control statutory instruments due to parliamentary processes. Past experience indicates that many additional products will be recommended for specification during this two-month period with the result that the statutory instrument will be out-of-date by the time it comes into force. For example, the exempted fireplaces Order that came into force on 1 October 2014 exempted 192 new fireplaces, which equates to 32 products a month. This large volume of products means that it is impractical to make a statutory instrument for each product that is recommended for specification.

d. The list procedure has been chosen instead because it will substantially reduce delays for business whilst also reducing burdens on the Government. Once a product has been recommended for specification, the Department will be able to prepare a new entry to go on one of the published lists. The Department intends to publish revisions to the lists on a monthly basis. Any new entries will undergo rigorous checking and require senior official approval within the Department but will not need to go through the same formal procedures as a statutory instrument. The Government anticipates that in most cases a product that is recommended for specification will be able to be added to the relevant list on the next occasion that the list is revised. Therefore, in most cases, it will not take longer than a month to complete the process of specifying a product.

3. In the Delegated Powers and Regulatory Reform Committee’s 5th Report they concluded:

...that the Government have made a sufficiently compelling case in favour of the amendment.

4. In their response, the Delegated Powers and Regulatory Reform Committee also requested assurance that adequate steps would be taken to prevent inadvertent offences being committed by persons who had been lawfully using authorised fuels or exempt fireplaces because a particular product has been removed from a list without their knowledge. The Government accepts changes to the administrative lists should not create a situation where consumers and businesses could inadvertently end up in breach of the law. The Government would like to provide assurance that there are inherent safeguards to guard against these risks. The first of these is that the amendment proposed in the clause requires the publication of the lists. The inclusion in the published lists of the dates of any changes to a product’s eligibility ensure transparency of information. Secondly, any decision to approve, amend or withdraw a product’s specification would remain subject to judicial review if it is not taken correctly.

5. The Government accepts that if a specified product were to be removed from a list then additional actions beyond these safeguards would be needed. These would include liaising with industry to investigate the reasons for withdrawing a specification and ensuring that any change is publicised appropriately. Where possible, affected consumers would be notified directly.
6. The Government therefore remains assured as to the merits of this measure which provides benefits to businesses and consumers as well as reducing regulatory burdens. It also remains assured that adequate steps will be implemented to ensure that the risks of moving to an administrative system are effectively mitigated.

Clause 59 and Clause 60

The Committee commented: *It seems illogical that Parliament should be invited to legislate for a review and at the same time for a possible outcome of that review. If it is decided in due course to change the sanctions regime in respect of TV licence violations, the better course would be to introduce a bill at that point, rather than legislating now by means of a Henry VIII clause.*

7. Whilst the Government appreciate the Committee’s concerns about the presence of clause 60 in the Bill, we seek to reassure the Committee by reiterating that the review outlined in clause 59 is intended to be an opportunity for Parliament as well as the public and industry to input to the process. To ensure transparency and to enable Parliamentary input, terms of reference have been published and laid in both Houses of Parliament.

8. If the Review in clause 59 finds a case for amending the current system, it is in the interests of the licence fee-payers, citizens and the courts to ensure this could happen as soon as possible, if required. The Government is clear that if the existing regime needs changes – and is making no presumptions until this review has completed – it will be to everyone’s benefit to be able to make changes as soon as possible.

9. The enabling powers in clause 60 will therefore enable the implementation of the findings early in the new Parliament, should any further changes be required, and should this be the course of action that the Government at that time decides to take. We make no presumption at this stage as to the outcomes of the Review, nor of specific actions that the next Government will decide to take.

10. The Government acknowledges the Committee’s views on the delegated power in clause 60, however would add that there will be the opportunity for Parliament to apply further scrutiny to any proposed changes, as new regulations – again, if these are brought forward – will be subject to the affirmative resolution procedure.

The Committee also commented: *Clause 59 requires the Secretary of State to review whether the current (criminal) sanctions for failure to possess a TV licence (under the Communications Act 2003) are appropriate. Clause 60 provides that the Secretary of State may make regulations creating alternatives to the current TV licensing offences. This is a Henry VIII power which is intended to be used, if necessary, following the review. One option in clause 60 is to replace TV licensing offences with civil monetary penalties. The other option is to amend the Regulatory Enforcement and Sanctions Act 2008 so that civil monetary penalties can be imposed as an alternative to criminal prosecution (with the offences remaining in place and prosecutions being brought by the BBC as desired). In 2007 we reported on the Regulatory Enforcement and Sanctions Bill, drawing the attention of the House to “the extent to which it is constitutionally appropriate for regulatory authorities—rather than the ordinary courts—to make determinations as to whether a*
person has committed a criminal offence and to impose unlimited financial penalties.

11. Any criminal offence will continue to be dealt with by the criminal courts. Clause 60(3)(b) requires there to be an appeal mechanism, as does the Regulatory Enforcement and Sanctions Act 2008 (RESA). Further, clause 60(2) also provides for limits for any penalties. The Regulations, should they be brought forward pending the findings of the review being led by David Perry QC, will set out further detail, which in our view is an entirely appropriate use for secondary legislation. Again, we reiterate that this detail will be subject to further Parliamentary scrutiny through the affirmative resolution procedure.

Clause 78 and Schedule 19

The Committee commented: Clause 78 and Schedule 19 repeal various duties on local authorities and other public bodies to engage in consultation “on the basis that [they] should be trusted to engage with local people without a duty being imposed on them to do so.” This may be concerning from a constitutional perspective: both this committee and the courts have recognised the importance of consultation as a means of safeguarding the responsiveness of public decision-making. The Joint Committee on the Draft Deregulation Bill stated that Parliament will wish to be “assured that the Government have taken full account of the possible consequences” of repealing such duties. **Given the constitutional importance of consultation, we agree with the joint committee’s view.**

12. Clause 78 has three parts:
   e. subsection one and two repeal the statutory duty to involve local representatives that is placed on local authorities; this provides local authorities with the discretion to decide when and how to engage with local people; and
   f. Subsection three gives effect to schedule 19 which repeals a number of duties to consult on specific issues and placed on local authorities and other public bodies.

13. Individual departments considered each of these repeals listed in schedule 19 on their own merit. Further detail can be found in the explanatory notes to the Bill. However, should the Committee be concerned about any particular measure, the Government would be very happy to provide more detailed information.

Clause 83

The Committee commented: Clause 83 provides that “a person exercising a regulatory function to which this section applies must, in the exercise of the function, have regard to the desirability of promoting economic growth.” In particular, such a person should ensure that regulatory action is taken only when needed and that any action taken is proportionate. Clause 84 provides that the regulatory functions to which clause 83 applies are to be specified by order. **It would be preferable for these functions to be specified in the bill, rather than in future subordinate legislation.** Additionally, the clause 83 duty may have the effect in some cases of inhibiting a regulator’s independence of action: this concern has been raised by the Joint Committee on Human Rights in respect of the Equality and Human Rights Commission, for example. The Joint Committee on the Draft Deregulation Bill also had
concerns about this matter, recommending: “an economic growth duty on regulators is welcome provided that safeguards are in place to ensure that the growth duty does not take precedence over regulation and that the overriding and principal objective of regulators remains the protection of the public interest.” The House may consider that clause 83 should be amended accordingly.

14. The Committee suggests that it would be preferable for the functions under the duty to have regard to economic growth to be listed on the face of the Bill rather than in secondary legislation. However, the Government believes that the ability to exercise this power in secondary legislation allows flexibility to add or remove functions where a new regulator or new regulatory functions are created. This secondary legislation is subject to the affirmative procedure to enable thorough Parliamentary Scrutiny.

15. The Government is undertaking a consultation on specific exemptions and will revert to the Committee when the outcome of that consultation is known.

16. The Committee makes specific reference to the EHRC. The Government agrees that the EHRC should be exempt from the growth duty in order to mitigate the risk of threatening EHRC’s independence.