HOUSE OF LORDS

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Infrastructure Bill [HL] (HL Bill 2 of 2014–15)

The Infrastructure Bill makes provision for the Government's proposals to fund, plan, manage and maintain the UK's national infrastructure. It includes a diverse range of measures, including replacement of the Highways Agency with strategic highways companies; provision for the control of invasive non-native species; reform of planning law and provision for nationally significant infrastructure projects; and for a community electricity right. As introduced to the House of Lords, however, the Bill does not include measures which had been widely speculated upon prior to its publication pertaining to hydraulic fracturing or fracking, and to zero carbon homes.

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Table of Contents

1. Introduction

The Infrastructure Bill [HL] 2014–15 was announced as part of the Queen's Speech 2014.[1] The Bill makes provision for the Government's proposals to fund, plan, manage and maintain the UK's national infrastructure. This Note examines the provisions of the Bill, as they are set out below. Where possible it details relevant reports upon, and reactions to, those proposals. The Note then examines issues which are included in the Cabinet Office's briefing on the Bill published for the Queen's Speech,[2] but which are under consultation/not currently provided for in the text of the Bill.

2. Overview of the Bill

As introduced in the House of Lords, the Bill contains five parts:

- **Part 1** and schedules 1 to 3 make provision for the appointment of "strategic highways companies" to manage strategic roads in England in place of the Highways Agency.
- **Part 2** makes provision for the control of invasive non-species through species control agreements and orders, and related matters.
- **Part 3** makes provision about nationally significant infrastructure projects, 'deemed discharge' of planning conditions and about the Homes and Communities Agency (HCA) and other bodies. This part together with schedule 4 also provides for Land Registry to assume responsibility for the registration of local land charges and to have wider powers to provide information and register services to land and other property.
- **Part 4** and schedule 5 make provision for a community electricity right which, if exercised, will give individuals resident in a community, or groups connected with a community, the right to buy a stake in a renewable electricity development in or adjacent to the community.
- **Part 5** contains some general provisions that apply to the Bill as a whole.[3]

3. Part 1: Strategic Highway Companies

The strategic road network (SRN) is a network of motorways and trunk roads consisting of around 4,300 miles or 2.4 percent of England's surfaced road network.[4] Around 30 percent of all road journeys and more than 65 percent of road freight journeys use the SRN.[5] The Department for Transport has also predicted that levels of traffic on the SRN will rise by 46 percent by 2040.[6]

The Highways Agency is the executive agency of the Department for Transport (DfT) responsible for the maintenance, operation and enhancement of the SRN, on behalf of the

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[1] Queen's Speech, HL *Hansard*, 4 June 2014, cols 1–4.
[2] Cabinet Office, Briefing on the Queen's Speech 2014, 4 June 2014.
[3] Summary provided by the Explanatory Notes to the Bill.
[4] House of Commons Transport Select Committee, *Better Roads: Improving England's Strategic Road Network*, 7 May 2014, HC 850 of session 2013–14, p 5.
[5] ibid, p 5.
[6] ibid, p 3.

Secretary of State.[7] In order to perform those functions, the Highways Agency has a total budget of £4.7 billion in 2014–15.[8]

As noted by the House of Commons Transport Select Committee in its recent inquiry on the SRN, in 2011 the DfT published *A Fresh Start for the Strategic Road Network*, a paper written by the incoming non-executive chairman of the Highways Agency, Alan Cook.[9] This examined the road network and the Highways Agency, and highlighted potential efficiencies and better ways of managing the SRN, making the following recommendations:

- The DfT should publish a long-term strategy for motorways and trunk roads.
- The DfT should set out a predominantly outcome-based specification for the road network, detailing firm commitments for the next five years and with a challenging target for financial efficiency.
- The DfT should set out a five-year funding package to accompany the specification for the road network with the support of the Treasury.
- If Ministers decide that new road connections are required, the DfT should examine the business case for building and operating these as private toll roads in the first instance.
- The DfT should remodel the Highways Agency to reflect best practice in successful infrastructure companies and provide greater independence from government.
- The Highways Agency board should devise and lead a change programme in the new organisation.
- The reformed Highways Agency, working with local authorities and Local Enterprise Partnerships (LEPs), should initiate and develop a new generation of route-based strategies.[10]

The Department for Transport subsequently published *Action for Roads* in July 2013,[11] which set out proposals for roads policy to 2021, including (as summarised by the Transport Select Committee's report):

- A £24 billion funding package for maintenance, capacity and expansion of the SRN.
- A Roads Investment Strategy (RIS), to be brought forward by the DfT before the next election, outlining plans and performance criteria for the road network to 2021.

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[7] The equivalent networks in Northern Ireland, Wales and Scotland are the responsibility of the devolved administrations.
[8] Highways Agency, *Business Plan 2013–14*, April 2013, p17; and House of Commons Transport Select Committee, *Better Roads: Improving England's Strategic Road Network*, 7 May 2014, HC 850 of session 2013–14, p 5.
[9] Department for Transport, *A Fresh Start for the Strategic Road Network*, November 2011.
[10] House of Commons Transport Select Committee, *Better Roads: Improving England's Strategic Road Network*, 7 May 2014, HC 850 of session 2013–14, p 9.
[11] Department for Transport, *Action for Roads: A Network for the 21st Century*, July 2013, Cm 8679.

- A proposal to turn the Highways Agency into a government-owned company (GoCo), with a six-year funding settlement from 2015. The company would operate the road network and implement road projects developed by the DfT.[12]

The Government consulted on these measures in late 2013. Its consultation document put forward proposals for:

- The creation of an arms-length Government-owned company and the transfer of powers and duties to allow it to discharge functions currently discharged by the Highways Agency.

- New legislation to underpin the long term funding settlement and new Road Investment Strategy (RIS) processes.

- Power for the Secretary of State to make transfer schemes which would allow assets and liabilities (including land and contractual obligations) to be transferred to a strategic highways company.

- Arrangements for two bodies—a road user watchdog and efficiency monitor—providing independent scrutiny of the company's performance, advising government and being a focal point for road users.[13]

The Government published its response to the consultation on 30 April 2014, and confirmed its intention to bring forward the measures outlined above.[14] Accordingly, part 1 of the Infrastructure Bill would make provision for the appointment of one or more strategic highways companies which would replace the Highways Agency.[15] Such companies will be incorporated under the Companies Act 2006, limited by shares where the sole shareholder is the Secretary of State.[16]

The Bill (clause 3) also specifies that each strategic highways company would be required to have a Road Investment Strategy, stating objectives to be met by the company and the financial resources agreed with the Secretary of State for meeting those objectives. Further provisions in the Bill (clause 5) would enable the Secretary of State to impose a fine where a strategic highways company fails to meet the requirements set out in a Road Investment Strategy (or fails to comply with other directions issued by the Secretary of State).

In addition, the Bill (clause 8) would provide for the Passengers' Council (generally known as Passenger Focus) to carry out activities which protect and promote the interests of road users in relation to roads managed by a strategic highways company. Clause 9 of the Bill would mandate that the Office of Rail Regulation will monitor how a strategic highways company carries out its functions. Clause 10 would allow the Secretary of State to make schemes transferring property, rights and liabilities when a company is appointed, or ceases to be appointed, as a strategic highways company.

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[12] House of Commons Transport Select Committee, *Better Roads: Improving England's Strategic Road Network*, 7 May 2014, HC 850 of session 2013–14, p 9.
[13] Department for Transport, *Transforming the Highways Agency into a Government Owned Company*, October 2013.
[14] Department for Transport, *Government Response to Consultation on Transforming the Highways Agency into a Government Owned Company*, April 2014, Cm 8855.
[15] The Explanatory Notes to the Bill explain, however, that it is the Government's intention to create a single strategic highway company in the first instance.
[16] Explanatory Notes to the Bill, p 3.

Commentary on the Proposals

The House of Commons Transport Select Committee

In the summary of the report into its inquiry into the SRN, published the day before the Government issued its consultation response, the House of Commons Transport Select Committee noted that the network "has suffered from inconsistent funding and changes in Government policy over the past two decades".[17] The Committee said that "road users deserve clarity on how the network can be part of a high quality integrated transport system",[18] and argued that if the traffic forecasts were correct, the Government "will need to increase investment in the road network substantially during the next decade". Such investment would require "new long-term funding streams" the Committee added, which was a challenge that would need to be addressed (though the Committee also noted that consensus would be required to introduce any new funding mechanism such as road-charging).

However, whilst the Committee welcomed the five year funding plan being introduced for the Highways Agency, its report stated that it was "not convinced by the case for establishing [it] as a GoCo".[19] The Committee added:

> [The new body's] remit will not be extended; it will not have new funding streams; and it will still be subject to changes in government policy, while incurring ongoing oversight costs. We are not persuaded that increasing salaries will be a value-for-money way of increasing skills in the company. In that context, we note that the agency's current chief executive has worked in both the private and public sectors. The proposed benefits, including the implementation of the five-year funding plans, seem achievable through better management of the existing Highways Agency.[20]

With regard to oversight, the Committee advocated against an advisory or oversight body which would report to the Secretary of State (as advanced in previous proposals), on the grounds that it would not be sufficient to scrutinise the performance of the proposed Highways Agency 'GoCo' because that agency would not be accountable to it.[21] Similarly, it suggested that the same argument would apply to establishing a panel of experts. Instead, the Committee recommended that the remits of Passenger Focus and the Office of the Rail Regulator respectively be extended to cover the new body, as is the approach adopted in the Bill.

National Audit Office

The National Audit Office published a report on 6 June 2014 entitled, *Maintaining Strategic Infrastructure: Roads*.[22] Though it examined both the strategic road and local road networks, the report found that funding pressures on highways authorities have "encouraged efficiency and innovation", yet "public value will be lost unless funding becomes more predictable".[23] With

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[17] House of Commons Transport Select Committee, *Better Roads: Improving England's Strategic Road Network*, 7 May 2014, HC 850 of session 2013–14, p 3.
[18] ibid, p 3.
[19] ibid.
[20] ibid, p 27.
[21] ibid.
[22] National Audit Office, *Maintaining Strategic Infrastructure: Roads*, 6 June 2014, HC 169 of session 2014–15.
[23] ibid, p 3. The report also notes that the expected reduction in the budget for the Highways Agency will now be seven percent, rather than the 19 percent predicted in the Spending Review 2010, owing to the injection of capital funding which has offset the reduction. Source: ibid, p 3.

that in mind, and speaking directly to the Government's plan for the reform of the Highways Agency, the Comptroller and Auditor General, Amyas Morse, said:

> Stop/start funding makes long-term planning more difficult for highways authorities. The Department for Transport understands the threat posed to road maintenance from the uncertainty of funding, but establishing a new government company to address the problems will not, in itself, be enough. The Department should work with the Treasury and the Department for Communities and Local Government to address the unpredictability of funding for both the strategic and local road networks.[24]

Other Organisations

The Institution of Civil Engineers was among the organisations who welcomed the proposals outlined in the Bill to reform the Highways Agency. Its Director General, Nick Baveystock, said:

> Transforming the Highways Agency into a government owned company will facilitate a welcome shift away from the costly and inefficient stop/start pattern of investment that has plagued the development and operation of our road network.[25]

However, other campaigning groups have been critical of the proposed reforms. The Campaign for Better Transport's Campaign Director, James MacColl, voiced concerns over a perceived lack of accountability of any new body:

> The Government's Infrastructure Bill risks creating a bloated and inflexible version of the Highways Agency [which will be] less accountable for how [it] acts. While drivers will get a formal voice, local communities and other interests like conservation will have no way to get their concerns heard. This is a big omission and needs to be urgently addressed.[26]

Similarly, the Public and Commercial Services Union issued a press release arguing that it was "sceptical" that the 'GoCo' plan would address the challenges faced by the strategic road network, could lead to road tolls and was "priming the agency for privatisation".[27]

4. Part 2: Invasive Non-Native Species

Part 2 of the Infrastructure Bill seeks to resolve perceived problems in extant legislation to enable the UK Government and the Welsh Government to more effectively address the problem of invasive non-native species (INNS).[28] The Explanatory Notes to the Bill state that INNS have a negative economic impact on the UK of £1.8 billion per year, £1 billion of which comprises the costs to the agriculture and horticulture sectors. The Explanatory Notes also highlight the importance of early intervention in tackling INNS:

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[24] National Audit Office, Press Release, 'Maintaining Strategic Infrastructure: Roads', 6 June 2014.
[25] Highways Magazine, 'Highways Agency Reforms Included in Infrastructure Bill', 4 June 2014.
[26] Campaign for Better Transport, 'Government Plans for Highways Agency Bloated and Inflexible', 6 June 2014.
[27] Public and Commercial Services Union, 'Ditch Plan to Parcel off Highways Agency, Invest Properly in Our Roads', 6 June 2014.
[28] The provisions of part 2 apply to England and Wales only.

> [I]t is estimated that the early eradication of the invasive aquatic plant water primrose would cost £73,000 compared to £242 million if the plant became fully established as it has in France and Belgium.[29]

The Royal Horticultural Society (RHS) website on INNS states that:

> There are 1,402 non-native plants established in the wild in Great Britain, of which 108 (8 percent) are stated to have a negative impact.[30]

However, the RHS also argues that "after habitat destruction, invasive non-native species are the most serious threat to global biodiversity".[31] This is echoed by Natural England, who argue that:

> Invasive non-native species have an impact on biodiversity by displacing or preying upon native species, by destroying habitats, or by introducing new diseases or parasites. The most direct implications are the threats of predation on, and competition with, native species. For example, water voles have declined as a direct result of predation from non-native mink.[32]

The non-native species secretariat (NNSS) has responsibility for helping to coordinate the approach to invasive non-native species in Great Britain. The website of the NNSS explains existing legislative provision for addressing the issue of INNS in England and Wales.[33]

The European Union is also considering the issue of INNS, and a *Regulation on the Prevention and Management of the Introduction and Spread of Invasive Alien Species* is currently being negotiated.[34] Again, background information on the regulation can be found on the NNSS website.[35]

Background

The Department for Environment, Food and Rural Affairs (DEFRA) proposed that the issue of wildlife law should be the subject of the Law Commission's eleventh programme of law reform, which commenced in July 2011.[36] At the request of DEFRA and the Welsh Government, the Law Commission published the section on invasive non-native species ahead of the main report, on 11 February 2014.[37] The Law Commission's report forms the basis of proposals in part 2 of the Bill. The wider programme remains ongoing, and the Law Commission expects to publish its full report in the autumn of 2014.[38]

DEFRA and the Welsh Government do not currently have powers to compel landowners to address the issue of INNS on their property.[39] In instances where INNS are a potential

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[29] Explanatory Notes to the Bill, p 11.
[30] Royal Horticultural Society, 'Invasive Non-native Species', accessed 11 June 2014.
[31] ibid.
[32] Natural England, 'Non-native Species', accessed 11 June 2014.
[33] Non-native species secretariat (NNSS), 'England and Wales', accessed 11 June 2014.
[34] European Parliament, 'Procedure File: Regulation on the Prevention and Management of the Introduction and Spread of Invasive Alien Species', accessed 12 June 2014.
[35] NNSS, 'EU IAS Regulation', accessed 11 June 2014.
[36] Law Commission, 'Wildlife', accessed 9 June 2014.
[37] Law Commission, *Wildlife Law: Control of Invasive Non-native Species*, 11 February 2014, HC 1039 of session 2013–14.
[38] ibid, p 1.
[39] Explanatory Notes to the Bill, p 11.

concern, they also lack powers of entry to undertake action themselves, or powers of entry to enable surveillance. DEFRA and the Welsh Government rely instead on voluntary agreements being reached with landowners. As the Explanatory Notes to the Bill state, however, this is not possible in around 5 percent of cases.[40]

Provisions of Part 2

In order to make addressing the issue of INNS easier, the Bill seeks to introduce Species Control Agreements (SCAs) and Species Control Orders (SCOs). SCAs would formalise the process by which DEFRA and the Welsh Government seek to reach voluntary agreements with landowners over addressing INNS on their property. In cases where an SCA cannot be reached an SCO could be made which would compel the landowner to comply; provision is also made for the making of SCOs without first trying to negotiate an SCA where urgent action is deemed necessary. The Bill sets out what must be included in an SCA and an SCO, what may be included, and the circumstances in which an appeal can be made.

This would bring England and Wales in line with a similar system already in place in Scotland. As explained by the Law Commission's *Wildlife Law: Control of Invasive Non-native Species* report, the Wildlife and Natural Environment (Scotland) Act 2011 made a number of amendments to the provisions on invasive non-native species in the Wildlife and Countryside Act 1981 in Scotland, including the introduction of SCAs and SCOs.[41]

The Wildlife and Countryside Act 1981 provides the principal legislative basis for addressing INNS in England and Wales. Clause 16 of the Infrastructure Bill would insert a new subsection into that Act setting out new powers for addressing problem INNS in England and Wales. These would include:

- Establishing Species Control Agreements and Species Control Orders including what they must contain, mechanisms for land owners to appeal, powers of enforcement and the creation of new offences in regard to SCOs.
- Defining new powers of entry in relation to SCAs and SCOs.
- Allowing for compensation to be paid to owners of premises in respect of financial loss resulting from an SCO or SCA, or from the powers of entry under schedule 9A.
- Placing an obligation on the Secretary of State to issue a code of practice in relation to SCAs and SCOs in England. A similar obligation is placed on Welsh Ministers for Wales.

Definitions in the New Schedule 9A

The new schedule 9A defines the terms 'species', 'invasive' and 'non-native' as follows:

- 'Species' is defined as "any kind of animal or plant".

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[40] ibid.
[41] Law Commission, *Wildlife Law: Control of Invasive Non-native Species*, 11 February 2014, HC 1039 of session 2013–14, p 10.

- An 'invasive' species is one which "if uncontrolled […] would be likely to have a significant impact on: a) biodiversity, b) other environmental interests, or c) social or economic interests".

- A 'non-native' species is one which is "a) listed in part 1 or 2 of schedule 9 [of the Wildlife and Countryside Act 1981], or b) in the case of a species of animal, it is not ordinarily resident in, or a regular visitor to, Great Britain in a wild state".

Who Can Make SCAs and SCOs?

The Bill states that 'environmental authorities' may make SCAs and SCOs. In England, this includes the Secretary of State, the Environment Agency, Natural England and the Forestry Commission. In Wales, this includes Welsh Ministers and the Natural Resources Body for Wales.

Commentary on the Proposals

On 16 April 2014, the House of Commons Environmental Audit Select Committee published its report on INNS, *Invasive Non-native Species*.[42] In that report the Committee urged the Government to implement SCOs and SCAs:

> There is a clear need for the Scottish system of species control agreements and species control orders to be replicated in England and Wales, to ensure effective rapid response plans to eradicate invasive species before they can become established. They could also help avoid wasted effort and expenditure on large-scale control or eradication programmes, which might otherwise fail if access to all affected land could not be secured. The Government should implement the Law Commission's recommendations to tighten the invasive species legislation for England and Wales, which should be a priority for the Government's legislative agenda.[43]

5. Part 3: Planning and Land

The Infrastructure Bill seeks to introduce a number of changes to the system which governs major infrastructure projects, to the Land Registry and to the process by which land can be transferred to the Home and Communities Agency (HCA).

The provisions in part 3 of the Bill include:

- Making changes to the Planning Act 2008 to improve the procedures under which major infrastructure projects are assessed; including changes to the number of person required on the panel of an examining authority, and amending the Secretary of State's powers to make changes to Development Consent Orders once made.

- Introducing a 'deemed discharge' power to enable the Secretary of State to make an order which would have the effect of "discharging the applicant from the requirement of

[42] House of Commons Environmental Audit Select Committee, *Invasive Non-native Species*, 16 April 2014, HC 913 of session 2013–14.
[43] ibid, p 3. The Committee's full list of recommendations can be found in pp 27–28 of the report.

gaining consent, approval or agreement from the local planning authority" under specific circumstances.

- Providing powers to the Secretary of State to transfer the property, rights and liabilities of a public body to the HCA. In addition, provision would be made to allow purchasers of land previously owned by the HCA, Greater London Authority and the Mayoral Development Corporation to develop that land without being affected by easements and other rights and restrictions.

- Making provision to transfer responsibility for local land charges from local authorities to the Chief Land Registrar (CLR). Additionally, the CLR would be made responsible for the establishment and maintenance of a fully electronic register of land charges. The CLR's powers would be extended to enable to the Land Registry to provide information and register services relating to land and other property. The responsibility for appointing the consumer affairs member of the Rule Committee would be transferred from the Lord Chancellor to the Secretary of State. [44]

Background

In 2013, the Government launched a review of the Planning Act 2008. This Act established the governance procedure for applications for infrastructure projects of national significance. The review involved discussions with around 40 'partners' including:

> […] developers currently building or intending to build new infrastructure; local authorities who have dealt with applications in their areas; statutory consultees who are required to advise on any application; other organisations with an interest in nationally significant infrastructure; and representatives from local community groups.[45]

The review made several recommendations for making the regime under the 2008 Act more effective, including reforms to the number of people required on the panel of an 'examining authority', and powers to enable changes to Development Consent Orders after consent has been given. The Government used these to form the basis of a consultation which ran from 4 December 2013 until 24 January 2014.

The Government published its response to the consultation on 25 April 2014. Annex 1 of the that response contains a table summarising improvement measures the Government intends to make and the action required to implement them.[46] As the introduction to the document states, it believes such reform will encourage growth and investment:

> Delivering economic growth is a priority for this Government. Improving the efficiency and speed of the planning process, particularly for infrastructure delivery, is a crucial part of creating the right conditions for sustainable growth. This Government is committed to securing investment in new nationally significant infrastructure as part of its efforts to rebuild the economy and create new jobs.

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[44] Explanatory Notes to the Bill, p 19.
[45] Department for Communities and Local Government, *Government Response to the Consultation on the Review of the Nationally Significant Infrastructure Planning Regime*, 25 April 2014, p 4.
[46] ibid, pp 19–22.

> Ensuring that the nationally significant infrastructure planning regime is operating as effectively and efficiently as possible is therefore an important priority and is one of the strands of wider reforms we have made to the planning system.[47]

Accordingly, the Infrastructure Bill would make provision to implement these measures. The Infrastructure Bill would extend the power of the Land Registry to allow it to provide information and consultancy services relating not only to land registration, but also to land and other property. The Bill would also transfer responsibility for local land charges from local authorities to the Chief Land Registrar (CLR). Both of these measures were the subject of a consultation which ran from 16 January 2014 until 9 March 2014.[48] The consultation document *Land Registry: Wider Powers and Local Land Charges* sets out the Government's reasons for wanting to introduce these measures, stating that:

> These proposals support the Government's digital by default agenda as the register will be held electronically, and will standardise fees, format and turnaround times for searches of that register. A digital Local Land Charges (LLC) service will be the first step to improving the UK's rating for registering property within the World Bank Report—ease of *Doing Business 2014*.[49] The UK is currently ranked 68 in the world for registering property and part of the ranking is affected by the different sources for property searches for the consumer.[50]

At the time of writing, the Government had not published its response to the consultation.

Commentary on the Proposals

Cath Ranson, President of the Royal Town Planning Institute (RTPI), welcomed some of the measures in the Bill, stating:

> We particularly welcome changes to the NSIPs regime (Nationally Significant Infrastructure Projects) where the Infrastructure Bill has simplified the process for making changes to Development Consent Orders.[51]

However, she added:

> We are concerned that placing the whole onus of discharging planning conditions quickly on local authorities risks misunderstanding the role of (often governmental) bodies in the process. All parties to this process need to be expeditious.
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> The RTPI is concerned that whilst economic growth is a valuable objective, further "flexibilities" around use of buildings could lead to unintended consequences such as housing in the wrong places.[52]

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[47] ibid, p 4.
[48] Land Registry, '*Land Registry: Wider Powers and Local Land Charges*', 16 January 2014.
[49] World Bank, *Doing Business 2014*, 29 October 2013
[50] ibid, p 17. Further details of the Government's reasoning can be found in the consultation document pp 17–8.
[51] Royal Town Planning Institute, 'A New Infrastructure Bill and Plans to Build More Homes are Announced in the Queen's Speech', 4 June 2014.
[52] ibid.

The Law Society broadly supported the Government's proposals for reforming the local land charges register, however it voiced concern over whether the current proposals will be effective. In its response to the Government's consultation, it stated that:

> We agree that it is desirable to reduce the time taken in the conveyancing process and for there to be greater consistency and reduced expense. We have some doubts, however, that the proposals in this paper will necessarily achieve this aim at least in the short to medium term.[53]

The Law Society also expressed concern about a second consultation that was running at the time of its response:

> The Department of Business, Innovation and Skills is simultaneously consulting on the introduction of a Land Registry service delivery company, possibly as a first step towards privatisation. Clearly, our view as to the role of Land Registry as a direct distribution channel of local land charges (LLC) data, or as a high level repository of LLC information, and any subsequent developments in relation to the provision of CON 29 searches by Land Registry will be impacted by the outcome of the BIS consultation. Our views on the proposals to seek wider powers and responsibility for the LLC register will also be affected by the outcome of that consultation. Given that there is a certain symbiosis between the two consultations, it is very difficult to provide a definitive answer to one without knowing the outcome of the other, and to respond in any meaningful manner to the "wider powers" questions here.[54]

The Government consultation referred to by the Law Society was seeking views on establishing a new company to take on service delivery functions from HM Land Registry. The consultation ran from 23 January 2014 to 20 March 2014.[55] At the time of writing, the Government had not published its response.

6. Part 4: Energy—The Community Electricity Right

In January 2014, the Government published a *Community Energy Strategy*, which set out how it intends to help communities produce, reduce, manage and purchase energy.[56] In his statement to Parliament on the strategy, the Secretary of State for Energy and Climate Change, Edward Davey, said:

> Community energy covers many different types of community getting involved in different ways to help meet the UK's energy challenges. [...] The strategy recognises the enabling role that partners such as commercial developers and local authorities can play, and seeks to encourage partnerships to increase the reach and scale of community energy. It announces our expectation that by 2015 it should be the norm for interested communities to be offered some level of ownership of new, commercially-developed onshore renewables projects.[57]

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[53] Law Society, *Land Registry: Wider Powers and Local Land Charges: Law Society Response*, March 2014, paragraph 4.
[54] ibid, paragraph 5.
[55] Department of Business, Innovation and Skills, 'Land Registry: New Service Delivery Company', 23 January 2014.
[56] Department of Energy and Climate Change, *Community Energy Strategy*, January 2014.
[57] HC *Hansard*, 27 January 2014, col 19–20WS.

As noted in the Explanatory Notes to the Infrastructure Bill, the Government has established a Shared Ownership Taskforce to "facilitate a substantial increase in the shared ownership of new, commercial onshore renewables developments".[58] Clauses 26 and 27 (and schedule 5) of the Bill would mandate for a 'community electricity right'—"an alternative to the voluntary approach to increasing shared ownership, if this approach fails to deliver".[59]

As provided for by the Bill, the community electricity right would confer a power on the Secretary of State to make regulations giving individuals and/or community groups the right to purchase a stake in a renewable electricity generation facility in their local area (including onshore and offshore facilities). The Bill would also enable the Secretary of State to make regulations about the ownership of qualifying facilities, the supply of information and the enforcement regime. Through such regulations, the Secretary of State would be able to determine which kinds of facilities the community electricity right would apply to; the members of the community who would be eligible to exercise the right to buy; and the kinds of stake that may be bought through the right to buy.[60]

Schedule 5 of the Bill specifies that the power to take a stake in renewable energy projects would apply to new commercial renewable electricity schemes above a minimum threshold of 5MW installed capacity, and expansions of existing sites above this 5MW threshold.[61] This includes solar, hydro and onshore wind technologies. Schedule 5 would also make provision with regard to the nature of the stakes that may be offered through the community electricity right regulations, which may include shares, any other interest in a body other than a company, a royal instrument or a loan. In addition, Schedule 5 details what kind of stake can be offered; how it should be valued/priced; and the total value of the offer to a community:

> **Paragraph 8** provides that the regulations must give the designated promoter or facility operator a choice of at least two different kinds of stake that may be offered. It is then for the promoter or facility operator to make a decision on the kind(s) of stake offered to the community. The promoter or facility operator must consult (eg with the community) and take the results of this consultation into account before choosing the kind(s) of stake that they will offer.
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> **Paragraph 9** requires the Secretary of State to make further provision about setting the price of the stakes in a qualifying facility. It includes reference to 'a measure of fair value' when setting the price of the stake offered to communities; this means that the price of the stake should not be offered at a discounted price to the community.
>
> **Paragraph 10** makes further provision about the total value of the offer to communities. Paragraphs 10(2) and (3) specify that the minimum size of stake that must be offered by developers is to be set in secondary legislation, but that this must not be greater than 5 percent of total capital costs of the development of the facility. Paragraph 10(5) allows the Secretary of State to make further provision about the calculation of the total capital costs. The minimum size of stake prescribed in secondary legislation may vary depending on the technology or size of the development up to this 5 percent cap. It is intended that very large developments will not be required to offer a stake which it would be unrealistic to offer the community.[62]

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[58] Explanatory Notes to the Bill, p 27.
[59] ibid, p 27.
[60] ibid.
[61] ibid, p 29.
[62] Explanatory Notes to the Bill, pp 30–1.

Opposition Reaction

In her speech on the humble address (prior to the publication of the Bill), the Shadow Secretary of State for Energy and Climate Change, Caroline Flint, contended that the plan for a community electricity right appeared similar to proposals advocated in Labour's 2012 energy manifesto, *The Power Book*.[63] Should that indeed be the case, she said that her party would indeed welcome the move.[64]

7. Measures Currently Not Included in the Bill/Under Consultation

7.1 Fracking: Changes to Trespass Laws

It was widely speculated that the Infrastructure Bill would include measures pertaining to hydraulic fracturing, or 'fracking'.[65] In particular, it was anticipated that the Bill would include provisions which would alter the existing laws governing trespass to reportedly enable fracking companies to gain easier access to shale gas deposits under residential properties (particularly when drilling horizontally at depth).[66] As part of the Queen's Speech 2014, Her Majesty announced:

> The [Infrastructure] Bill will enhance the UK's energy independence and security by opening up access to shale and geothermal sites and maximising North Sea resources.[67]

However, on 23 May 2014, the Energy Minister, Michael Fallon, announced that the Government would be undertaking a twelve week consultation on the subject of underground drilling access for the purpose of extracting gas, oil or geothermal energy.[68] That consultation will close on 15 August 2014, and the briefing notes published by the Cabinet Office indicated that the any final proposals would be subject to such consultation.[69]

This was reiterated by the Secretary of State for Energy and Climate Change, Edward Davey, who said during his speech on the debate on the humble address:

> In order to ensure that the UK can benefit even more from its home-grown energy, we will introduce a final set of measures, subject to consultation, so that Britain can be more secure and reduce our reliance on imports and on coal. The measures are to support the development of the shale gas and geothermal industries. Although both industries are still in their infancy, they are both concerned that the existing legal

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[63] Local Government Information Unit, *The Power Book*, 2012.
[64] HC *Hansard*, 5 June 2014, col 142.
[65] Hydraulic fracturing, or fracking, is a technique used to stimulate production of oil and gas. Once a well has been drilled into the earth a high pressure water mixture is injected into the rock, designed to create small cracks within (and thus fracture) the formation. The gas is then released and able to flow out to the head of the well. Source: *BBC News*, 'What is Fracking and Why is it Controversial?', 27 June 2013; and American Geological Society, 'Hydraulic Fracturing Defined', accessed 11 June 2014.
[66] *Guardian*, 'Government Confirms Plan to Let Fracking Firms Drill Under Homes', 4 June 2014; and *Daily Telegraph*, 'Queen's Speech: IoD Calls for Trespass Laws to be Scrapped for Fracking', 3 June 2014.
[67] Queen's Speech, HL *Hansard*, 4 June 2014, cols 1–4.
[68] Written Ministerial Statement by Michael Fallon, Minister of State, Department of Energy and Climate Change, 'Shale Gas and Geothermal Energy (Underground Access)', HC *Hansard*, 5 June 2014, cols 10–11WS; and Department of Energy and Climate Change, *Underground Drilling Access: Consultation on Proposal for Underground Access for the Extraction of Gas, Oil or Geothermal Energy*, 23 May 2014.
[69] Cabinet Office, *Briefing on the Queen's Speech 2014*, 4 June 2014, p 26.

> situation could delay or even stop their ability to drill horizontally deep underground to recover gas or heat. Ironically, given the urgency of climate change and unlike the situation for dirty coal—a landowner or property owner high above a coal seam cannot object and delay work—for cleaner gas and clean heat, landowners and property owners can object.[70]

Mr Davey added:

> To assist the shale gas and geothermal industries, we are consulting on how to address those access issues. [...] We want feedback and input, because that will help us to refine our proposals, to develop alternative ones or even to convince us that the existing system is fit for purpose. We will listen during the consultation and, subject to its outcome, we will introduce proposals when parliamentary time allows.[71]

Existing Access Regime and Consultation Proposals

As detailed in the House of Commons Library Standard Note on the issue,[72] under the existing access regime, drilling license holders do not have automatic access rights to drill under landowners' property. Permission must be sought from the landowner before they can do so. If such permission is refused, then the license holders are able to apply through the Secretary of State and the courts to gain access.[73] However, the Government believes that this approach is too time consuming, and, in the words of Michael Fallon:

> [D]oes not strike the right balance between the legitimate interests and concerns of landowners, and the benefits to the community and nation at large of permitting development, where that development is otherwise acceptable in planning and environmental terms.[74]

Accordingly, the consultation document proposes changes to the current system which would:

- Grant underground access rights to companies extracting petroleum resources—including shale gas and oil—and for geothermal energy in land at least 300 metres below the surface.
- Provide for a voluntary community payment of £20,000 for each unique horizontal well that extends by more than 200 metres laterally. Alongside this will be powers to make such payments compulsory if companies fail to volunteer.
- Provide for a public notification system, under which the company would set out drilling proposals along with details of the voluntary payment.[75]

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[70] HC *Hansard*, 5 June 2014, cols 139–42.
[71] ibid, cols 139–42.
[72] House of Commons Library Standard Note, Shale Gas and Fracking, 5 June 2014, SNSC6073, p 12.
[73] If the courts do grant access rights, then the landowner is entitled to compensation. The 2011 case of *Bocardo SA v Star Energy Ltd* [2010] UKSC 35 established what the level of compensation should be. Source: House of Commons Library Standard Note, Shale Gas and Fracking, 5 June 2014, SNSC6073, p 12.
[74] Written Ministerial Statement by Michael Fallon, Minister of State, Department of Energy and Climate Change, 'Shale Gas and Geothermal Energy (Underground Access)', HC *Hansard*, 5 June 2014, cols 10–11WS.
[75] House of Commons Library Standard Note, Shale Gas and Fracking, 5 June 2014, SNSC6073, pp 11–12.

Commentary on the Proposals

Opposition Reaction

In her speech on the humble address, the Shadow Secretary of State for Energy and Climate Change, Caroline Flint, said that Labour would support the Government's reform of underground access rights.[76] Such reform, she said, would put shale gas on the same footing as other industries such as coal, water and sewage. Ms Flint added, however, that her party would continue to press for further safeguarding measures, specifically:

> We will continue to push for the environmental framework to be strengthened, and for assurances that the responsibility for clean-up costs and liability for any untoward consequences rests fairly and squarely with the industry, not with taxpayers or homeowners.[77]

Other Organisations

A number of environmental groups have been critical of the Government's intention to reform the trespass laws. Friends of the Earth and Greenpeace have launched a joint petition to campaign against the plans. Commenting on behalf of Greenpeace, Simon Clydesdale said:

> [The Prime Minister] wants to rob people of their right to stop fracking firms drilling under their homes [despite the fact that] Fracking won't deliver energy on a meaningful scale for years, if ever, by which time we'll need to have moved away from dirty fossil fuels and towards high-tech clean power if we're to head off dangerous climate change.[78]

However, Marcus Pepperell, spokesman for Shale Gas Europe, argued that the reform was necessary, stating that:

> We are only able to consider shale gas as a commercially viable energy source because of important advances in modern technology [including] horizontal drilling. Shale gas drilling will be deep underground and far less intrusive than many other energy sources. Utility facilities are far closer to the surface and their facilities can be much larger.[79]

The Institute of Directors and the British Chambers of Commerce also said they would support moves that altered the trespass laws to assist shale exploration.[80]

7.2 Zero Carbon Homes

Though not currently included in the Bill, the Cabinet Office briefing on the Infrastructure Bill also stated that the Government would be seeking to bringing forward further measures on

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[76] HC *Hansard*, 5 June 2014, col 142.
[77] ibid, col 142.
[78] Greenpeace, 'Greenpeace Turns PM's Home into Drilling Site as Frackers' Bill is Announced', 4 June 2014.
[79] *Guardian*, 'Queen's Speech: Fracking to Get Boost from Trespass Law Changes', 4 June 2014.
[80] *Daily Telegraph*, 'Queen's Speech: IoD Calls for Trespass Laws to be Scrapped for Fracking', 3 June 2014.

'zero carbon homes'.[81] Specifically, as part of the Queen's Speech 2014, Her Majesty announced:

> [Forthcoming] legislation will allow for the creation of an allowable solutions scheme to enable all new homes to be built to a zero carbon standard.[82]

Current Plans and Recent Developments

The previous Government's 2006 consultation document, *Building a Greener Future,* set out the original plans for a move towards zero carbon in new housing. As noted in the House of Commons Library Standard Note, *Zero Carbon Homes*, those proposals envisaged change being delivered through the three main 'policy levers' available: the planning system, the Code for Sustainable Homes and the Building Regulations.[83] Those proposals were subsequently adopted by the Coalition Government, though with significant amendments. This included the introduction of the concept of 'allowable solutions' to widen the possibility of what off-site carbon reductions can be considered.[84]

In his 2013 Budget speech, the Chancellor of the Exchequer, George Osborne, committed to delivering zero carbon homes from 2016.[85] On 30 July 2013, a written statement from the Parliamentary Under-Secretary of State for Communities and Local Government, Baroness Hanham, announced the Government's plans to amend part L of the Building Regulations (Conservation of fuel and power), and to alter energy efficiency requirements in the Building Regulations for England.[86] Baroness Hanham stated that the plans were designed to "strike a balance between the Government's ongoing commitments to improving energy efficiency requirements and ensure that the overall effect of regulation upon consumers and businesses does not stifle growth".[87]

On 6 August 2013, the Government launched both a Housing Standards review consultation, and a consultation specifically on zero carbon homes—*Next Steps to Zero Carbon Homes: Allowable Solutions*.[88] The latter consultation set out a number of potential framework proposals to deliver a viable allowable solutions programme.

New Proposals

Following this consultation process, the Cabinet Office briefing on the Infrastructure Bill states:

- The Government is committed to implementing a zero carbon standard for new homes from 2016. But it is not always technically feasible or cost effective for house builders to mitigate all emissions on-site.

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[81] Cabinet Office, *Briefing on the Queen's Speech 2014*, 4 June 2014, pp 25–6.
[82] Queen's Speech, HL *Hansard*, 4 June 2014, cols 1–4.
[83] House of Commons Library, *Zero Carbon Homes*, 18 November 2013, SNSC06678.
[84] Department of Communities and Local Government, *Next Steps to Zero Carbon Homes: Allowable Solutions—Impact Assessment*, August 2013.
[85] HM Treasury, *Budget 2013*, 20 March 2013, HC 1033 of session 2012–13, pp 39–40.
[86] HL *Hansard*, 30 July 2013, col WS165.
[87] ibid, col WS165.
[88] Department for Communities and Local Government, *Next Steps to Zero Carbon Homes: Allowable Solutions*, August 2013; and Housing Standards Review, August 2013.

- The Government would set a minimum energy performance standard through the building regulations. The remainder of the zero carbon target can be met through cost effective off-site carbon abatement measures—known as 'allowable solutions'. These provide an optional, cost-effective and flexible means for house builders to meet the zero carbon homes standard, as an alternative to increased on-site energy efficiency measures or renewable energy (such as solar panels). Small sites, which are most commonly developed by small scale house builders, will be exempt. The definition of a small site will be consulted on shortly, and set out in regulation.

- The Zero Carbon Home standard will be set at Level 5 of the Code for Sustainable Homes, but the legislation will allow developers to build to Level 4 as long as they offset through the allowable solutions scheme to achieve Code 5.

- Energy efficiency requirements for homes are set in the Building Regulations 2010 and are made under powers in the Building Act 1984. But there are insufficient powers in the Building Act to introduce off-site allowable solutions, so the Government will now bring forward enabling powers for this.[89]

Commentary on the Proposals

The Environmental Audit Select Committee

The House of Commons Environmental Audit Select Committee conducted an inquiry into the Code for Suitable Homes and Housing Standards review in early 2014. Reporting in November 2013, and speaking directly to the Government's plans to 'wind down' the Code for Sustainable Homes (CSH) and the implications for zero carbon homes, the Committee said:

> Local choice in favour of practical, sustainable local solutions will be radically curtailed and replaced with a lowest-common-denominator national standard [as a result of the changes, and in addition] the proposed replacement for CSH standards on energy and carbon emissions, the 2016 zero carbon homes standard, has been significantly diluted.[90]

The Committee also noted that "unlike Building Regulations", the CSH incentivises developers and designers to think about sustainability from the outset and throughout the development process.[91] Speaking specifically to the "watering down" of the zero carbon homes standard, the Committee argued that it had occurred to such an extent that the "proposed standards in Building Regulations now fall some way short of the higher levels of the CSH". The Committee added that there was "no guarantee that further dilution will not occur in the run-up to the implementation of zero carbon homes in 2016".[92]

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[89] Cabinet Office, *Briefing on the Queen's Speech 2014*, 4 June 2014, pp 25–6.
[90] House of Commons Environmental Audit Select Committee, *The Code for Suitable Homes and Housing Standards Review*, 20 November 2013, HC 192 of session 2013–14, p 5.
[91] ibid, p 19.
[92] ibid, p 21.

Opposition Reaction

In her speech on the humble address, the Shadow Secretary of State for Energy and Climate Change, Caroline Flint, was critical of what she perceived to be a weakening of the zero carbon homes process begun under the previous Government:

> When in government, Labour set a target that every new home built in Britain would have to be built to, or as near as possible to, a zero-carbon standard by 2016. [However, the current Government is] exempting developments of up to 50 homes [and] watering down the standards for larger developers. [...] Whatever the short-term benefits, in the long term there is a real risk that these decisions will leave consumers stuck with homes that are not meeting the high standards of energy efficiency. Given the scale of the challenge we already face, that is a problem we could well afford to do without.[93]

Other Organisations

A number of campaign groups have alleged that the Government's plans represent a weakening of its commitment to the delivery of zero carbon homes by 2016. Nina Skorupska, Chief Executive of the Renewable Energy Association, said:

> [This is] one of the worst row-backs on green policy of the whole coalition government. First emissions from TVs and kettles were excluded [from the zero carbon home target], then DCLG started dismantling existing new build energy efficiency policies, and now they are focusing on offsets and hefty exemptions. Our energy bills, our climate and the domestic renewable energy supply chain will all lose out as a result.[94]

Paul King, Chief Executive of the UK Green Building Council, added:

> It is deeply worrying to hear suggestions that 'small sites' could be exempt from the zero carbon standard. This decision could cause confusion and lead to perverse outcomes, for example the slowing down of housing supply as developers phase the delivery of 'small sites' to avoid regulations.[95]

Leonie Greene, of the Solar Trade Association, also alleged that the changes would save developers only a small percentage of the building's cost, but meant the homeowners' energy bills would be significantly higher.[96]

In contrast, the Federation of Master Builders declared its support for the Government's plans. A spokesman said that the zero carbon proposals as they currently stand could "deluge smaller housebuilders in a tsunami of costs that hinder their ability to build".[97] Similarly, the National Federation of Builders said that without reform the plans could "threaten SME-led growth in the housebuilding sector".[98]

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[93] HC *Hansard*, 5 June 2014, col 145.
[94] *Guardian*, 'Queen's Speech: Fracking to Get Boost from Trespass Law Changes',4 June 2014.
[95] ibid.
[96] ibid.
[97] *Construction News*, 'What Does the Infrastructure Bill Mean for Construction?', 11 June 2014.
[98] *The Construction Index*, 'Zero Carbon Homes Compromise Gets Mixed Industry Response', 5 June 2014.