HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

4th Report of Session 2006-07

Bailiffs (Licensing) Bill [HL]
Corruption Bill [HL]
Energy Efficiency and Microgeneration Bill [HL]
Government Spending (Website) Bill [HL]
Palliative Care Bill [HL]
Piped Music etc. (Hospitals) Bill [HL]
Victims of Overseas Terrorism Bill [HL]

Government amendments:

Tribunals, Courts and Enforcement Bill [HL]

Government response:

Mental Health Bill [HL]

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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 level of parliamentary scrutiny; to report on documents and draft orders laid before Parliament under the Regulatory Reform Act 2001; and to perform, in respect of such documents and orders and subordinate provisions orders laid under that Act, the functions performed in respect of other instruments by the Joint Committee on Statutory Instruments”.

Current membership

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

- The Lord Acton
- The Lord Armstrong of Ilminster GCB CVO
- The Lord Brett
- The Viscount Eccles CBE
- The Baroness Fritchie DBE
- The Baroness Gardner of Parkes
- The Lord Goodhart QC (Chairman)
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Contacts for the Delegated Powers and Regulatory Reform Committee

Any query about the Committee or its work should be directed to the Clerk of 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 dprr@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. Following the passage of the Deregulation and Contracting Out Act 1994, the Committee was given the additional role of scrutinising deregulation proposals under that Act and the Committee became the Select Committee on Delegated Powers and Deregulation. In April 2001, the Regulatory Reform Act 2001 expanded the order-making power to include regulatory reform and the Committee, renamed the Delegated Powers and Regulatory Reform Committee, took on the scrutiny of regulatory reform proposals under that Act. The Committee will scrutinise regulatory reform orders under the successor to the 2001 Act, the Legislative and Regulatory Reform Act 2006.
Fourth Report

BAILIFFS (LICENSING) BILL [HL]

1. This private member’s bill introduces licensing arrangements for bailiffs. The bill may in part be modelled on the Gangmasters (Licensing) Act 2004. The bill for the 2004 Act was a Commons private member’s bill introduced in response to a widespread feeling that urgent legislation was required following the death of 23 cockle pickers in Morecambe Bay. That bill was brought to the Lords on 24 May 2004 and, due to shortage of time in the Commons, may not have been enacted if it had been amended in the Lords. This may have affected our predecessor Committee and we do not feel constrained by the precedent. There are delegated powers in this bill to make orders, rules or regulations at clauses 1(2)(g) and (5), 9, 12 and 22. The bill is close to being a skeleton bill in that the constitution of the licensing authority (“the Authority”), the criteria for the grant of a licence, the limits on fines, the nature of appeals and other matters are all delegated. Some, at least, of these matters should be on the face of the bill and we wish in particular to comment on the powers at clauses 1(5), 9 and 12.

Bailiffs Licensing Authority — clause 1(5)

2. The bill does not itself provide for the constitution of the Authority established by clause 1. Instead, this is left to regulations by the Secretary of State subject to affirmative procedure. In itself this is not unprecedented but we draw this to the attention of the House because, if the bill itself does not detail the constitution of the Authority, it is difficult for Parliament to decide whether it is appropriate to delegate to it the rule making and other powers proposed later in the bill.

Authority rules — clause 9

3. Clause 9 delegates to the Authority, rather than the Secretary of State, the power to make rules in connection with the licensing of persons acting as bailiffs and the accreditation of agents. The rules are to be comprised in a statutory instrument subject to negative procedure (clause 21(4) and (6)). It is unusual, but not unprecedented, for a power to make rules subject to a parliamentary procedure to be conferred on someone other than a Minister. In this instance, the Secretary of State may direct the Authority as to how it carries out its functions, and could be presumed to answer in Parliament for rules made or to be made by the Authority.

4. Although the mechanism of delegation may not be inappropriate, we have reservations about the breadth of the power in the light of the uncertainty surrounding the constitution of the Authority. We recommend that the first rules under clause 9, which can be expected to be the most significant exercise of the power, should be subject to the affirmative
procedure. In reaching this conclusion, we have considered, in particular, four aspects of the rules: subsections (2)(d), (h) and (o) and (4)(c).

5. Subsection (2)(d) enables the regulations to prescribe the requirements to be met before a licence or accreditation is granted. **We draw to the attention of the House that the bill itself fixes no criteria for either of these.**

6. Subsection (2)(h) enables the Authority's rules to require the payment of fees. This is unexceptionable and the usual implication is that the level of fee set by delegated legislation will not exceed the cost of providing the service. Here, however, subsection (4)(c) requires the Authority to set fees with the objective of making a “modest financial surplus over the longer term”. Under clause 20(2) the Authority must (unless the Secretary of State directs otherwise) pay to the Secretary of State all sums received by it in the course of carrying out its functions; and under clause 20(3) those sums must be paid into the Consolidated Fund. It is inappropriate for rules by the Authority which set fees at a level designed to produce a surplus to be subject to negative procedure only. We have already recommended that the first exercise of this power should be subject to the affirmative procedure (paragraph 4): the first exercise can be expected to establish the level of surplus as a benchmark for subsequent variation and we consider that such subsequent variations may be made under the negative procedure.

7. Subsection (2)(o) enables the rules to require bailiffs and agents to pay compensation to injured parties and fines to the Authority for breaches of the rules. In addition to our recommendation at paragraph 4, we consider that the bill should set a maximum level of fine that rules under subsection (2)(o) may authorise and indicate how the compensation authorised by the rules is to be calculated. Subsequent variation of the maximum level of fine may appropriately be made by the negative procedure.

Clause 12 – Appeals

8. Clause 12 requires the Secretary of State, by regulations subject to negative procedure, to make provision for an appeal against decisions of the Authority specified in subsection (1)(a) to (d). Though the appealable decisions are in the Bill, the grounds for appealing are not. The regulations will specify who is to hear the appeals and the procedure to be followed. **We would prefer the bill to specify more about the nature of appeals and consider that the first exercise of this power should be subject to the affirmative procedure.**

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We assume that “fines” means civil penalties, as a breach of the rules does not in itself constitute an offence under the bill.
CORRUPTION BILL [HL]

9. This private member’s bill contains one delegated power: an appointed day power at clause 19(3). The bill does not otherwise delegate legislative power and there is nothing in the bill which we wish to draw to the attention of the House.

ENERGY EFFICIENCY AND MICROGENERATION BILL [HL]

10. Clause 1 of this private member’s bill affects the power, subject to negative procedure, conferred on the Secretary of State by section 163 of the Housing Act 2004 to make regulations about the contents of home information packs (HIPs). The bill requires the regulations to require HIPs to include information about energy rating and enables the regulations to determine the criteria for energy rating for this purpose. The bill does not otherwise delegate legislative power and there is nothing in the bill which we wish to draw to the attention of the House.

GOVERNMENT SPENDING (WEBSITE) BILL [HL]

11. This private member’s bill makes provision for a website to enable public access to information about government expenditure. The bill contains delegated powers at clauses 1, 2(1), 4 and 6(2) but there is nothing in any of these delegations which we wish to draw to the attention of the House.

PALLIATIVE CARE BILL [HL]

12. This private member’s bill makes provision for palliative care for those suffering from terminal illness, in particular by imposing a duty on the Secretary of State and the National Assembly for Wales. There are delegated powers in clauses 3, 4 and 5, none of which is inappropriate. We note that, when the Government of Wales Act 2006 comes into force, the powers in respect of Wales would be transferred to the Welsh Ministers in accordance with Schedule 11 to that Act. There is nothing in the bill which we wish to draw to the attention of the House.

PIPED MUSIC ETC. (HOSPITALS) BILL [HL]

13. This bill does not delegate legislative power.
14. This private member’s bill makes provision for advice and assistance to victims of terrorism. There are delegated powers at clauses 1(2) and 4. Provision around the latter power reflects existing provision for criminal injuries compensation. Neither delegation is inappropriate and there is nothing in the bill which we wish to draw to the attention of the House.

15. We reported on this bill in our 2nd Report (HL Paper 19) and printed the Government’s response in our 3rd Report (HL Paper 10). We have now been invited to consider Government amendments to be moved on Report: amendments to clause 126 printed on sheet HL Bill 22(b). The Department for Constitutional Affairs has provided a supplementary memorandum, printed at Appendix 1, and there is nothing in the amendment to which we wish to draw the attention of the House.

16. We reported on this bill in our 2nd Report (HL Paper 10) and the Government have now responded by way of a letter to the Chairman from Lord Warner, Minister of State at the Department of Health, printed at Appendix 2.
Supplementary memorandum by the Department for Constitutional Affairs

1. This memorandum is supplementary to the memorandum provided to the Committee in November 2006, and identifies a provision for delegated legislation to be introduced by Government amendment to Part 6 of the Bill. The aim of the memorandum is to explain the purpose of the delegated power taken; describe why the matter is to be left to delegated legislation, and explain the procedure selected for this power and why it has been chosen.

2. Part 6 of the Tribunals, Courts and Enforcement Bill provides immunity against seizure to objects lent to this country from overseas. The immunity from seizure will apply whether seizure is ordered by the courts in relation to civil proceedings, or by any law enforcement authorities seeking evidence in an investigation, or to confiscate the proceeds of crime. Under the previous law, immunity has only been given to objects which qualify for protection under the State Immunity Act 1978. The absence of a more general immunity for works of art lent to this country to be included in temporary exhibitions has made museums and private owners increasingly reluctant to lend to such exhibitions without a guarantee that their work will be returned. Part VI of the Bill seeks to ensure that this guarantee may be given.

3. The conditions objects must satisfy in order to qualify for protection are set out in clause 126(2) of the Bill. They must:
   • usually be kept outside the United Kingdom;
   • not be owned by someone resident in the United Kingdom and
   • be brought to the United Kingdom for public display in a temporary exhibition at a museum or gallery.

4. As introduced into the House of Lords, Part 6 of the Bill does not contain any delegated powers. However, concerns have been expressed, in particular by the Board of Deputies of British Jews and the Commission for Looted Art in Europe, that the proposed immunity would enable museums and galleries to exhibit stolen or looted art with impunity.

5. Accordingly, we wish to introduce a further safeguard in the form of an additional condition in clause 126(2) which must be met before an object will qualify for protection under Part VI of the Bill. This will make protection conditional upon the borrowing museum or gallery complying with requirements prescribed by regulations made by the Secretary of State for Culture, Media and Sport about the publication of specified information about the object. The Secretary of State will be given an additional power to make regulations requiring a museum or gallery to provide persons with specified information in specified circumstances. This is intended to allow the Secretary of State to require museums to provide information in addition to that published in advance of the exhibition on request.

6. This power will be conferred on the Secretary of State for Culture, Media and Sport, but exercisable only with the consent of the Scottish Ministers, the Welsh Ministers and the Department of Cultural Arts and Leisure in Northern Ireland. It will be exercisable by order made by Statutory Instrument and subject to the negative resolution procedure.

7. This delegated power is necessary to set out the detailed provisions relating to the information to be published, or provided on request. It may, for example, be necessary to make different provision in relation to different classes of objects. We do not consider that
it is appropriate for this level of detail to be set out in primary legislation. In addition, it may be necessary to make different provision if in future it becomes apparent that more information needs to be published to enable potential claimants to identify works which a museum proposes to borrow as being works which may have been lost by a member of his family in the period 1933–1945.

8. The negative resolution procedure is considered appropriate because, once the principle that a museum should publish in advance information about the works it proposes to borrow is set down in primary legislation, the negative resolution procedure is an adequate safeguard for the more detailed description of the information it will be required to give.

17 January 2007

APPENDIX 2: MENTAL HEALTH BILL [HL] – GOVERNMENT RESPONSE

Letter from the Rt Hon. Lord Warner, Minister of State at the Department of Health, to the Chairman

Thank you for sending us the Delegated Powers and Regulatory Reform Committee’s second report on 29 November and in particular for your conclusions on the Mental Health Bill’s Delegated Powers Memorandum.

I am of course arranging for those conclusions to be reflected in the Bill by means of Government amendments which we will bring forward in due course.

20 December 2006