House of Lords

Delegated Powers and Regulatory Reform Committee

First Report of Session 2006-07

Northern Ireland
(St Andrews Agreement) Bill

Ordered to be printed 22nd November and published 23rd November 2006

London: The Stationery Office Limited

HL Paper 6
The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session and has 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”.

Membership

The members of the Delegated Powers and Regulatory Reform Committee are:
- Rt Hon. the Lord Brooke of Sutton Mandeville CH PC
- The Lord Dahrendorf KBE (Chairman)
- The Baroness Gardner of Parkes
- Air Marshal the Lord Garden KCB
- The Lord Harrison
- Rt Hon. the Lord McIntosh of Haringey PC
- The Baroness Scott of Needham Market
- The Lord Shaw of Northstead DL
- The Lord Temple-Morris

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.

Publications

The Committee’s reports are published by the Stationery Office by Order of the House. All publications of the Committee are on the internet at www.parliament.uk/parliamentary_committees/dprr.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

If you have any queries regarding the Committee and its work, please contact 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. As a result, the name of the Committee was changed to 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 took on the scrutiny of regulatory reform proposals under the Act. With the passage of the 2001 Act, the Committee’s name was further amended to its present form, the Delegated Powers and Regulatory Reform Committee.
First Report

NORTHERN IRELAND (ST ANDREWS AGREEMENT) BILL

Introduction

1. Although the House has not yet appointed a Delegated Powers Committee this session, our orders of appointment from last session remain in force under Standing Order No. 65 (Sessional Committees). As it is our duty to report on each bill, we have met to consider the Northern Ireland (St Andrews Agreement) Bill which our successor Committee will not have the opportunity to consider because the bill is due to be taken through all of its Lords stages on 22 November.

2. The bill makes provision, in particular, to prepare for restoring devolved government in Northern Ireland in accordance with the St Andrews Agreement of 13 October 2006. It includes provision for the consequences of both compliance and non-compliance with the timetable of that Agreement.

3. The Northern Ireland Office have provided a memorandum on the delegated powers in the bill, printed at the Appendix. There is one issue in the bill to which we wish to draw the attention of the House.

Clause 2—Compliance or non-compliance with St Andrews Agreement timetable

4. Schedule 2 sets out provisions which relate to the restoration of devolved government on 26 March 2007. In particular, it provides for filling Ministerial and other offices by reference to the Transitional Assembly established by clause 1 and Schedule 1.

5. In the absence of any other action under the bill (see paragraph 8 below), the bill requires the Secretary of State on 25 March 2007 to make an order under section 2(2) of the Northern Ireland Act 2000 restoring devolved government with effect from 26th March and Schedule 2 comes into force on 26 March. The order restoring devolved government is subject to no parliamentary procedure (whereas orders under section 2(2) of the 2000 Act are normally subject to affirmative procedure). We accept that it is reasonable for the restoration order to be subject to no parliamentary procedure because the question of policy is here decided by the bill itself: the Secretary of State is obliged to make the order on a particular day, to come into effect on the following day. This accords with earlier legislation: we accepted in relation to section 2 of the Northern Ireland Act 2006 that a restoration order which could be made only in clearly defined circumstances specified in the Act might be subject to no procedure.

6. If a restoration order is made, but it appears to the Secretary of State that one or more of the Ministerial offices has not been filled by the end of 26 March, he must on 27 March revoke the restoration order with effect from 28 March. Again, the order is subject to no parliamentary procedure. We consider this provision acceptable because the Secretary of State is given no real discretion and must make the revoking order on the basis of facts as they are at the end of 26 March.
Non-compliance with St Andrews Agreement timetable

7. Schedule 2 and Schedule 3 do not co-exist and, under the bill, Schedule 2 is the default position (clause 2(2)(b)). Schedule 3 provides for the dissolution of the Northern Ireland Assembly and the postponement of elections to the Assembly. It repeals the provisions of the bill relating to the Transitional Assembly and the restoration of devolved government (sections 1(1) and (2) and (3), Schedules 1, 2 and 4 and Part 2). It comes into force only if an order is made under clause 2(1) (or if an order revoking a restoration order is made – paragraph 6 above).

8. Clause 2(1) enables the Secretary of State at any time after the enactment of the bill and before 25 March 2007 to make an order bringing Schedule 3 into force on the day after that on which the order is made. But the order may be made only if the Secretary of State considers that (were Schedule 2 to come into force) there would be no reasonable prospect that each of the ministerial offices would be filled in accordance with Schedule 2, paragraph 2. The order is subject to no Parliamentary procedure “as it is a commencement order, to be made in … limited circumstances” (paragraph 6 of the memorandum).

9. We do not accept that this power is a commencement order. Commencement orders are generally subject to no parliamentary procedure because the policy which they implement relates only to timing. An order under clause 2(1) is of greater significance: it will represent the Secretary of State’s judgment as to what will happen as well as when it will happen. The effect of the order is that clause 2(2), which provides for the restoration of devolved government, will not apply and that many provisions of the bill will never come into force.

10. If this power was proposed in a usual programme bill, we would expect that Parliament would wish to exercise some degree of control over its exercise. We accept however that the circumstances here are unique and we make no recommendation. The bill prescribes that the order must come into effect the day after it is made and this creates procedural difficulties for parliamentary control. If the House agrees with the political necessity of such a short interval between the minister making the order and it coming into force, then there may well be no practical alternative to the provision in the bill.
Memorandum by the Northern Ireland Office

1. This Memorandum describes the purpose and content of the Northern Ireland (St Andrews Agreement) Bill; identifies the provisions of the Bill which confer powers to make delegated legislation; and explains in each case why the power has been taken and the nature of, and reason for, the procedure selected.

Background and purpose of the Bill

2. At the beginning of 2006, the British and Irish Governments made clear their commitment to achieving restoration during 2006 and embarked on new all party talks in February 2006 with the aim of agreeing a way forward. On 6th April 2006 the Prime Minister and Taoiseach published a joint statement setting out the Governments’ strategy for achieving devolution by the end of 2006. This strategy was incorporated into what became the Northern Ireland Act 2006, which provided for Assembly members to be brought together to participate in a process to select a Northern Ireland Executive by 24th November 2006. Further political talks were held between the British and Irish governments and the Northern Ireland political parties at St Andrews between 11th to 13th October 2006. This culminated in the St Andrews Agreement, published on 13th October, which sets out a framework for the restoration of devolved government in Northern Ireland. This Bill gives effect to those parts of the St Andrews Agreement requiring primary legislation.

3. If the process is successful, an Assembly election will be held on in March 2007, followed by full restoration of devolved government on 26th March 2007. In this scenario, the Bill also provides for the repeal of the Northern Ireland Act 2000, and, on restoration, amendments to the Northern Ireland Act 1998 arising from the St Andrews Agreement to take effect.

4. If, however, attempts to form an Executive fail before 25th March, the Secretary of State will make an order dissolving the Assembly, and the Assembly election will be postponed indefinitely. If an Executive is not formed following restoration of the Assembly, dissolution, and postponement of the next election will similarly occur.

5. The Government has considered carefully the need for the powers to make subordinate legislation conferred by the Bill, and believes that the proposals in the Bill are justified in the light of the delicate political situation in Northern Ireland, the need for speed and flexibility in responding to the outcome of negotiations in such a situation, and the fact that the overall aim of the powers in the Bill remains the restoration of a democratic functioning legislature as soon as circumstances allow.

Clause 2: compliance or non-compliance with St Andrews Agreement timetable

Powers conferred on: Secretary of State

Power exercised by: order (commencement, restoration, and suspension)

Parliamentary procedure: none

6. Clause 2 deals with the consequences of success in meeting the St Andrews Agreement framework, or, alternatively, failure to do so. Under subsection (1), if at any time before 25th March 2007 the Secretary of State considers that there is no reasonable prospect of an Executive being formed successfully, he may make an order bringing Schedule 3 into force on the day following the day on which the order is made. Subsection (6) provides for the order to be made by statutory instrument. The effect of bringing Schedule 3 into force is dissolution of the Northern Ireland Assembly, and postponement
of the next Assembly election. The order under subsection (1) of clause 2 is not subject to Parliamentary procedure, as it is a commencement order, to be made in the limited circumstances set out above.

7. Clause 2(2) deals with the contrasting situation where the Secretary of State does not make an order under subsection (1). In this case, he must make a restoration order on 25 March 2007, and, under clause 2(2)(b), Schedule 2 will come into force on 26 March 2007. The power to make a restoration order is conferred by section 2(2) of the Northern Ireland Act 2000 (“the 2000 Act”), which enables the Secretary of State to provide that section 1 of that Act is to cease to have effect on a specified date. (Section 1 provides for the suspension of the Northern Ireland Assembly). Normally a restoration order would be subject to the affirmative resolution procedure. However, in the light of the fact that the circumstances in which the order is to be made are set out in the Bill, and in view of the particular requirements of the St Andrews Agreement timetable, subsection (7) of clause 2 omits that requirement in this case. Section 7(2) of the 2000 Act already enables a restoration order to make consequential, supplemental or transitional provision. Paragraph 4 of Schedule 2 amplifies this by stating that this may include provision to treat things done under the Bill as having been done under the 1998 Act, and things done by or in relation to the Transitional Assembly as having been done by or in relation to the Northern Ireland Assembly. This could be used to avoid the need for the signing of the roll and community designation to be repeated following restoration, if it had already been done shortly before in the Transitional Assembly.

8. Clause 2(3) and (4) deal with the case in which a restoration order is made, but by the end of 26 March 2007 it appears to the Secretary of State that one or more of the Ministerial offices is not filled. In this case, subsection (4) requires him to make an order on 27th March revoking the restoration order, thereby suspending the Northern Ireland Assembly again, to come into force on 28th March. Like the restoration order under subsection (2), the revocation order is similarly made under the 2000 Act, and, for the same reasons, the usual requirement for the affirmative resolution procedure has been lifted.

Clause 11 – committee to review functioning of Assembly and Executive Committee

*Power conferred on: Secretary of State*

*Power exercisable by: order made by statutory instrument*

*Parliamentary procedure: negative resolution*

9. Clause 11 provides for standing orders to ensure that a new Assembly committee is established to examine the functioning of the Assembly and Executive Committee. One of its tasks will be to consider whether or not the changes to the way that the First and deputy First Ministers are appointed introduced by the Bill should be retained after the 2011 Assembly election. If the Committee determines that the changes made by the Bill should be reversed, then it is required to make a recommendation to the Secretary of State to this effect, and under clause 11(2) the Secretary of State will be under a duty to make an order amending the Northern Ireland Act 1998 to secure that it has effect as if those changes had not been made. The relevant amendments are defined as “the executive selection amendments” in subsection (3), so that the effect of the order is already clearly defined in advance. For this reason, the negative resolution procedure is thought to be appropriate, notwithstanding the fact that the order will amend primary legislation. An order under this provision may include supplementary, incidental, consequential, transitional or saving provision (see subsection (4)).
Clauses 23 and 24 – power to make consequential provision etc

Power conferred on: the Secretary of State

Power exercised by: order made by Statutory Instrument

Parliamentary procedure: affirmative (with urgency procedure) or negative resolution, depending on the contents of the instrument

10. Clause 23 enables the Secretary of State to make an order making supplementary, incidental, or consequential provision, and transitional and savings provisions. This power is intended to be used to make any changes that may be needed in consequence of the coming into force of Schedules 2 or 3, and any transitional or saving provision that may be required as a result of the repeal of the 2000 Act under Schedule 4. Some transitional provision to cover the consequences of that repeal is made in the Bill itself, in paragraph 2 of Schedule 4, but the nature of the legislation has meant that it has not been possible to make full transitional provision, and more is likely to be needed. For example, it is likely to be necessary to make the kind of provision found at paragraphs 4 and 10 of the Schedule to the Northern Ireland Act 2000, which deal with matters such as the validity of executive functions. Clause 23(2)(b) enables the order to amend another enactment, which includes paragraph 2 of Schedule 4 to this Bill. This is aimed at the possible need to adjust those provisions in the light of the further transitional or saving provision made in a subsequent order.

11. The Parliamentary procedure to be followed depends on the content of the order. If the order amends or repeals any provision of an Act or Northern Ireland legislation, it may not be made unless a draft has been laid before and approved by each House of Parliament under clause 24(1) and (3). Provision is made for an urgency procedure if the Secretary of State considers that expedient: clause 24(4) and (5). In such a case the order must be laid after being made, and will cease to have effect if not approved by a resolution of each House before the end of the period of 40 days starting on the date on which the order is made. If the order does not amend or repeal primary legislation (including Northern Ireland legislation), the negative resolution procedure applies. This combination of procedures seems to the Department to strike an appropriate balance between the need to secure a quick and smooth transition to devolved government and the need to respect Parliamentary involvement where legislation is to be amended.

Schedule 3 – non-compliance with St Andrews Agreement Timetable

Power conferred on: Secretary of State

Power exercised by: order

Parliamentary procedure: draft affirmative (each House, with urgency procedure).

Other relevant provisions: section 31 and section 96(2) to (2D) of the Northern Ireland Act 1998.

12. Schedule 3 deals with the consequences of failure to select an Executive and confers on the Secretary of State power to postpone the next Northern Ireland Assembly election (paragraph 2).

13. Paragraph 2(1) of Schedule 3 amends the 1998 Act so as to substitute section 31(2) with new subsections (2) to (2D). The substituted material provides that the next election to the Assembly will not take place until a date the Secretary of State specifies by order. New section 31(2) and (2A) provides for the making of that order, and enables the Secretary of State to fix a date after the date on which the election would, in the normal course of events, take place. New section 31(2B) enables the order to make modifications (including amendments or repeals) to any enactment or subordinate legislation for the purposes of the order – this may be necessary to cater for the procedural steps required in
connection with the holding of elections, for example to avoid a clash with the canvass. To be consistent with the existing structures and procedures provided in section 31 of the 1998 Act, the substituted provisions attract the Parliamentary procedure set out in section 96(2) of that Act, namely, the affirmative resolution procedure, with the possibility of an urgency procedure. (The urgency procedure provisions in section 96(2A)-(2D) were inserted by the Northern Ireland (Elections and Periods of Suspension) Act 2003).

14. Paragraph 2 of Schedule 3 thus ensures that the structures of the 1998 Act (and subsequent Acts) remain in place, ready to be activated at the right moment. And it gives the Secretary of State a power to respond to political developments favourable to devolution by calling for an election to the Assembly when he judges the time to be right. The Department submits that in the circumstances it is appropriate to adopt the existing Parliamentary procedures provided for the making of subordinate legislation, since the new provisions are consistent with the framework provided by the 1998 Act.

Northern Ireland Office

16 November 2006