

# HOUSE OF LORDS

## Delegated Powers and Regulatory Reform Committee

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### First Report of Session 2010–11

**Academies Bill [HL]**

Private Members Bills:

**Contaminated Blood (Support for Infected and Bereaved  
Persons) Bill [HL]**

**Defamation Bill [HL]**

**Dog Control Bill [HL]**

**House of Lords Reform Bill [HL]**

**Marine Navigation Aids Bill [HL]**

**Re-Export Controls 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 degree of parliamentary scrutiny; to report on documents and draft orders laid before Parliament under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006; and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments”.

### *Current membership*

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

Baroness Andrews

Lord Blackwell

Rt Hon the Lord Butler of Brockwell

Lord Carlile of Berriew QC

Baroness Gardner of Parkes

Lord Haskel

Rt Hon. the Lord Mayhew of Twysden QC DL

Baroness O’Loan

Lord Soley

Baroness Thomas of Winchester (*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 [dpr@parliament.uk](mailto:dpr@parliament.uk).

### *Historical Note*

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that “in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion” (Session 1991–92, HL Paper 35–I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, “be well suited to the revising function of the House”. As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006.

# First Report

## ACADEMIES BILL [HL]

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### Introduction

1. This Bill contains a number of powers which either are legislative or might possibly be said to be legislative. They are described in a memorandum for the Committee from the Department for Education, printed at Appendix 2. The Committee would like to draw to the attention of the House one issue only, namely the provision in clause 4.

### Clause 4 – Academy Orders

2. The Bill provides for a procedure for conversion of maintained schools into Academies. Under the Bill the Secretary of State enters into Academy arrangements under clause 1. In connection with those arrangements, a governing body of a maintained school may apply to the Secretary of State for an Academy order. The Secretary of State may make an order either on an application or if the school is eligible for intervention under Part 4 of the Education and Inspections Act 2006 (schools causing concern). The legal effects of the order are mentioned in clause 5 of the Bill – principally, the local authority must cease to maintain the school when it opens as an Academy; other consequences of the order include that the provisions in the Bill about transfer of school surpluses and property are engaged.
3. The Academy orders will not be statutory instruments and are not to be subject to a Parliamentary procedure. This seems to us to be reasonable. Each order affects only one school, and there is provision for those affected to be provided with copies (clause 4(4)). We agree with paragraph 1 of the memorandum that these orders are not really legislative in character and we see no reason why Parliament would wish to have control over them.

## CONTAMINATED BLOOD (SUPPORT FOR INFECTED AND BEREAVED PERSONS) BILL [HL]

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4. This is a private Member's Bill introduced by Lord Morris of Manchester. It is very similar to a Bill on which the Committee reported in the last Parliament.<sup>1</sup>
5. Clause 6(3) now makes the powers in clauses 2(5) and 4 subject to the affirmative procedure, which appears to meet adequately the points made by the Committee in paragraphs 2 and 4 of its Report. There is nothing in this Bill which we wish to draw to the attention of the House.

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<sup>1</sup> 2nd Report, Session 2009-10, HL Paper 24.

### DEFAMATION BILL [HL]

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6. This is a private Member's Bill introduced by Lord Lester of Herne Hill.
7. There are delegated legislative powers at clauses 15(4) (rules of court to prescribe procedure for applications for trial by jury) and 21(2) (commencement orders) and paragraphs 17 and 19 of Schedule 1. There is nothing in this Bill which we wish to draw to the attention of the House.

### DOG CONTROL BILL [HL]

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8. This is a private Member's Bill introduced by Lord Redesdale.
9. There are delegated legislative powers to make orders at clauses 4(7) and (10), 6(4) and 13(6). All the orders are subject to affirmative procedure.
10. Clause 4(8) sets out information that a dog control notice must include (which may be added to by local authorities), but the form (as opposed to the content) of the notice is left to an order. **We recommend that the negative procedure would be sufficient for these orders.**
11. Clause 6(2) obliges a local authority to record and update "such information as Ministers may require" in relation to any dog control notice. This appears intended to be a general requirement on all local authorities, or local authorities of a particular type (rather than a requirement imposed on an individual local authority). **If so, we recommend that the requirement should be imposed by a statutory instrument subject to negative procedure, and we consider the same procedure would be sufficient for orders under clause 6(4) about the use of information.**
12. Clause 13(5) (under which all orders are subject to affirmative procedure) is not disapplied for commencement orders under clause 13(6). The Committee considers that, in the usual way, the commencement orders need not be subject to a Parliamentary procedure. The powers conferred under the Bill should also, in the usual way, be conferred either on a Minister of the Crown or the Secretary of State, rather than "Ministers".

### HOUSE OF LORDS REFORM BILL [HL]

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13. This is a private Member's Bill introduced by Lord Steel of Aikwood.
14. The Bill confers two order-making duties on a Minister of the Crown – one in clause 5(5) to set out criteria (for recommending conferment of a peerage) which are proposed by the Appointments Commission under clause 5(3); and the other in clause 6(2) to set out guidelines issued by the Commission as to how it will interpret and apply the criteria provided for in clause 5.

15. The Committee has twice before considered a Bill in similar terms<sup>2</sup> and on both occasions recommended the affirmative procedure for approval of the criteria in clause 5(3). **The Committee makes the same recommendation on this occasion also.**

#### MARINE NAVIGATION AIDS BILL [HL]

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16. This is a private Member's Bill introduced by Lord Berkeley.
17. There are two delegated legislative powers in the Bill. One is a straightforward power to make commencement orders (clause 14(2)). The other is the power in new section 214(3) and (4) of the Merchant Shipping Act 1995 (inserted by clause 12 of the Bill). It enables the Secretary of State, by order subject to negative procedure, to make arrangements for pensions for those whose salaries are or were paid out of the General Lighthouse Fund to be paid differently. This is a Henry VIII power because in two respects the order, even though subject only to negative procedure, may amend Acts of Parliament. First, it may amend the list in Schedule 1 to the Superannuation Act 1972 of the kinds of employment relevant for the purposes of section 1 of that Act (superannuation schemes for civil servants, etc.). Secondly, it may make consequential amendment of the 1995 Act. But these are the types of changes which orders or regulations under the 1972 Act may effect, subject only to negative procedure, in similar circumstances; so the Committee feels that in this instance a higher level of Parliamentary control is not required.

#### RE-EXPORT CONTROLS BILL [HL]

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18. This is a private Member's Bill introduced by Lord Alton of Liverpool.
19. Clause 1(2) inserts a new section 1A (re-export controls) into the Export Control Act 2002. Section 1A(1) imposes a duty on the Secretary of State to make provision for or in connection with the imposition of re-export controls and section 1A(1) enables the Secretary of State to make provision in connection with any re-export controls imposed by a directly applicable Community obligation. These powers reflect those already in the 2002 Act for export controls, including the Parliamentary procedure (negative, except in the case of certain temporary orders when the affirmative procedure applies). There is nothing in the Bill which we wish to draw to the attention of the House.

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<sup>2</sup> First Report, Session 2007-08, HL Paper 11; First Report, Session 2008-09, HL Paper 12.

## **APPENDIX 1: ATTENDANCE AND DECLARATION OF INTERESTS**

Committee Members' registered interests may be examined in the online Register of Lords' Interests at [www.publications.parliament.uk/pa/ld/ldreg.htm](http://www.publications.parliament.uk/pa/ld/ldreg.htm). The Register may also be inspected in the House of Lords Record Office and is available for purchase from The Stationery Office.

For the meeting on 16 June 2010 no interests were declared.

### **Attendance:**

The meeting was attended by Baroness Andrews, Lord Blackwell, Lord Butler of Brockwell, Baroness Gardner of Parkes, Lord Haskel, Lord Mayhew of Twysden, Lord Soley and Baroness Thomas of Winchester

## APPENDIX 2: ACADEMIES BILL

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### Memorandum from the Department for Education

#### Introduction

1. This Memorandum sets out the provisions in the Academies Bill which confer powers on the Secretary of State to make delegated legislation. The section 'Provisions for Delegated Legislation' explains in each case the purpose of the power; the reason why delegated legislation is appropriate; and the nature and reason for the Parliamentary procedure that apply. These delegated powers are listed at annex A. The Memorandum also considers some other administrative provisions contained in the Bill.

2. The Bill seeks to reform the law relating to Academies and maintained schools and will enable all maintained schools, including primary and special schools, to apply to become Academies. This will give them the freedoms and flexibilities to continue to drive up standards and deliver a first class education system. It also seeks to introduce further, more flexible options for funding new, and existing Academies. It also makes provision relating to the land held by maintained schools and by Academies and makes provision for Academies to have interests in the land on which they are situated. It provides for Academies to be deemed to be charities.

#### Background

Academies are independent schools, which are funded directly by the Government rather than through local authorities. They have greater freedoms than local authority maintained schools over the curriculum, pay and conditions of staff and the length of the school day and year in order to enable them to promote innovation and provide an excellent education for their pupils in the way they consider to be most appropriate. 203 academies have opened so far.

#### Territorial coverage

3. The Bill extends to England and Wales only.

#### Rationale and overview of delegated powers

4. The Bill contains only three delegated powers of any substance. The first is a power to make regulations to provide for resolution of any dispute between an Academy school and a local authority about the amount of any financial surplus to be transferred to the Academy from the local authority. The surplus represents any unspent budget of the predecessor maintained school remaining at the point of conversion.

5. The second is an ability to make regulations containing incidental, consequential, transitional and supplemental provisions concerning land transfers to or for the benefit of, Academies, where the provisions are consequential on Schedule 1 of the Bill or give it full effect. This is discussed in more detail below.

6. The third is the power in clause 15 to bring certain of the Bill's provisions into force by order.

7. The Bill also contains a number of powers to make administrative orders, directions and schemes, and these are also discussed in the section on delegated

legislation for convenience, notwithstanding that they are not strictly delegated powers. The delegated power in Schedule 1 relates directly to some of them.

8. In seeking these limited, specific provisions for secondary legislation in this Bill the Department has also taken into account the considerations both that the substantive policy provision must be clearly presented on the face of the Bill and that operational, administrative and technical details are not normally set out in primary legislation. Too much detail on the face of the Bill risks obscuring the headline duties and powers from Parliamentary scrutiny.

### Parliamentary procedure

9. The power to make regulations concerning the resolution of disputes in clause 6 will be subject to the negative resolution procedure by virtue of section 569 of the Education Act 1996. Clause 13(3) provides that clause 6 is to be read as being part of the 1996 Act. Section 569 of the 1996 Act provides for the default position to be that the negative resolution procedure applies.

10. The power to make regulations connected with land transfers in paragraph 11 of Schedule 1, is also subject to the negative resolution procedure, by virtue of section 569 of the Education Act 1996.

11. As is normal for commencement orders in relation to education legislation, no Parliamentary scrutiny is proposed for commencement orders under the Bill, on the basis that they are largely administrative.

## PROVISIONS FOR DELEGATED LEGISLATION

### Clause 4 – Academy Orders

12. Clause 4 provides for the Secretary of State to make orders (known as Academy orders) in two circumstances: when the governing body of a maintained school applies to the Secretary of State to convert to an Academy school (clause 4(1)(a)) or when a school is eligible for intervention<sup>3</sup> (clause 4(1)(b)) and the Secretary of State wishes it to convert to an Academy school. In neither case is an order of the Secretary of State delegated legislation in the strict sense of the word, but the order has a number of effects in relation to individual schools which are significant.

13. The principal effect of an Academy order is to require the local authority to cease to maintain the school on and after the ‘conversion date’ (which is the date on which the new Academy school opens). It can also have other effects, however, in particular deeming various regulatory provisions to be met at the point of conversion. Local authorities must also determine whether the school has any surplus from its delegated budget for the current or earlier funding periods, and if so must pay that surplus to the Academy in accordance with regulations under clause 6 discussed below.

14. The nature of these orders is largely administrative and technical and contains a level of detail not suitable for parliamentary scrutiny. As the provisions of clause 4 are to be read as one with the provisions of the Education Act 1996 however (by virtue of clause 13(3)), it is necessary to dis-apply the presumption which would otherwise apply by virtue of that Act<sup>4</sup>, that orders are to be made by statutory

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<sup>3</sup> This phrase is defined in s.59 Education and Inspections Act 2006.

<sup>4</sup> By virtue of section 568(1) and (3).

instrument (and therefore subject to negative resolution procedure). The underlying assumption of the 1996 Act, of course, is that orders are likely to be a form of delegated legislation. This is why clause 4(6) is necessary.

15. Academy orders are to be served on those who will be directly affected by them, in any event, by virtue of clause 4(4) and any refusal to make such an order must be accompanied by a statement of the reasons for that refusal (subsection (5)). The orders may also include transitional and other consequential provisions (clause 4(7)).

#### **Clause 6: Transfer of school surpluses**

16. Clause 6 applies to any school which is successful in its application to become an Academy under clause 4. It provides for the transfer to the Academy proprietor of any funds made available by the local authority to the governing body of the school which remain unspent immediately before it becomes an Academy. Clause 6(4) and (5) provide for the Secretary of State to prescribe in regulations the procedures to be followed for the determination and payment of such surpluses, including timings, and for the review of any determination upon the application of the Academy proprietor. As noted above, these regulations will be subject to the negative resolution procedure. As these are procedural matters, it is considered appropriate both to delegate them rather than lengthen the Bill and to apply the negative resolution procedure.

#### **Clause 7: Transfer of other property**

17. Clause 7 permits the Secretary of State to make a scheme (referred to in the Bill as a 'property transfer scheme') in relation to an Academy, which can have effect to transfer to the Academy any property (other than an interest in land or a surplus held by the local authority) held by the predecessor school, which can include contractual rights and liabilities of the predecessor school. This may be necessary, of course, to enable the school to continue to utilise its property and continue with any contractual arrangements that it may already have in place and not wish to disturb, for example a cleaning contract which might otherwise be affected by the transfer of the running of the school from one legal entity to the proprietor of the independent school (the Academy company).

18. Again, the nature of the transfers in question are matters of private law and detailed, and not suitable for Parliamentary scrutiny.

#### **Clause 15: Commencement**

19. Clause 15 provides for the Secretary of State to commence clauses 1 to 10 (and Schedules 1 and 2) by order. As is usual for commencement orders in education legislation, any such order is not subject to any parliamentary procedure. These orders may (by virtue of clause 15(3)(b)) make provision for incidental, consequential, supplemental, transitional or transitory provisions, but such provisions would only be for the purpose of giving effect to the main provisions of the Bill and given the content of the Bill are likely to consist mainly of dealing with transitional arrangements and the timing of commencement.

#### **Schedule 1: Academies: Land**

20. This Schedule re-enacts, in part, Schedule 35A to the Education Act 1996 (which provides for schemes in relation to local authority land for the purposes of Academies and former Academies) and elements of Schedule 22 to the School

Standards and Framework Act 1998 (which provides for the disposal of land on the discontinuance of various types of maintained school).

21. The provisions of both Schedule 22 to the 1998 Act and of Schedule 1 to this Bill are quite complex and for the sake of clarity, therefore, are discussed only in outline in this memorandum.

22. The provisions of Schedule 1 are intended to deal with three distinct situations: the creation of new Academy schools on local authority land on the closure of a predecessor school<sup>5</sup>; the creation of new Academy schools by virtue of an Academy order being made in respect of a maintained school; and the disposal of land which has been used by an Academy school but which is no longer, or is about to cease to be, used for the purposes of an Academy.

23. As the land on which maintained schools are situated can be held in a number of ways by different bodies, the Schedule needs to make provision for a wide variety of different circumstances.

24. Paragraph 1 provides for a transfer scheme to be applied to land to transfer an interest in it to an Academy company, when the land or an interest in it is held by the local authority or has been transferred back to the local authority from a converting or replaced maintained school. Paragraph 2 provides for the Secretary of State to make a scheme in relation to land to transfer local authority land, in either freehold or leasehold form, to an Academy company for the purposes of running a new Academy where a competition notice for a new school has been published by the local authority. Paragraph 3 imposes general requirements in relation to all such transfer schemes and confines them to transfers for the purposes of running an Academy. Paragraphs 4 and 5 of Schedule 1 provide a power for the Secretary of State to direct that publicly funded land held by a school's governing body, foundation body or trustees be transferred to the local authority or directly to the Academy, subject to payment of compensation in relation to any private element of the publicly funded land, if appropriate. In this context 'publicly funded' broadly means that the land was previously either held by a local authority, was obtained by money provided by a local authority or has been enhanced by an investment of public money. Paragraphs 6 and 7 provide for the situation where land ceases to be held for the purpose of an Academy, and provides for the land to be returned to the local authority or to the person from whom the land was transferred. .

25. It is against that background that the power to make regulations in paragraph 11 of the Schedule is set. The regulations may make what may broadly be called transitional or additional practical arrangements to give effect to the powers to make schemes and give directions in relation to land contained in the preceding paragraphs, or which are a necessary consequence of them. In essence, the regulations are likely to be required to supplement the Schedule to ensure that it works as intended.

26. The regulations will also enable the Secretary of State to appoint an agent to ascertain the rights and liabilities attaching to land in particular cases and to obtain documents from local authorities for that purpose. They may also require the local authority to take all necessary steps to ensure that necessary transfers of land or interests, or the granting of leases, are formally completed.

27. The purpose of the regulation-making powers is essentially practical and administrative and designed to ensure that all transfers directed by the Secretary of

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<sup>5</sup> Or on the creation of a wholly new school.

State or schemes made are both accurately undertaken with all necessary information and subsequently perfected by the execution of necessary documentation. The regulation-making power contained in paragraph 11 of Schedule 1 replicates, with amendments, the provisions of paragraph 11 of Schedule 35A of the Education Act 1996. The power in that latter Schedule was subject to negative resolution procedure, and so it is entirely right that this re-enacted and extended power is also subject to this procedure given the detailed, and administrative nature of the provision to be made by it. It is also right that whilst Academy orders themselves are likely to be of no interest to Parliament, the general processes followed by the Secretary of State in resolving practical issues around land transfers may well be, and this justifies a level of Parliamentary scrutiny.

### Schedule 2: Academies: Amendments

28. Paragraph 3 of the schedule amends section 349(1) of the Education Act 1996 to permit the Secretary of State to amend by order the trust deeds of any non-maintained special school to enable them to meet the requirements of any Academy arrangements (whether these are contained in a contract or a grant). This represents a small widening of the existing power which permits amendment of the trust deeds of such schools to allow them to comply with the requirements of approval under section 342 of the same Act. By virtue of section 568(2) of that Act, such orders under the existing section 349 are not made by statutory instrument and are therefore not subject to any parliamentary process. It is entirely right that this expanded power also continue not to be subject to any parliamentary scrutiny since the effects it has are private ones with no public impact, and are administrative and technical in nature.

29. Paragraph 9 of Schedule 2 amends section 82(1) of the School Standards and Framework Act 1998, in a limited way, to permit the Secretary of State to amend the trust deeds of maintained schools by order, as a result of an Academy order. Again, this is not strictly an expansion of a delegated power and this is reflected in the fact that the existing power to make orders under section 82 is also not by way of statutory instrument or subject to any parliamentary scrutiny<sup>6</sup>. It is right that this expanded power also continue not to be subject to any parliamentary scrutiny for the same reasons as given above in relation to the power in section 349 of the Education Act 1996.

Department for Education

May 2010

### Annex A

#### Delegated Powers in the Academies Bill

Clause	title	procedure	New or restatement
ACADEMY ORDERS etc			
6	Power to make provision for resolving disputes between Academies and local authorities about budget surpluses	Negative	New

<sup>6</sup> See section 138(2)(a) of that Act.

Clause	title	procedure	New or restatement
15	Commencement provisions	None	-
Paragraph 11, Schedule 1	Power to appoint person to ascertain rights and liabilities over land, require provision of documents, to execute directions and transfers on the Secretary of State's behalf and require local authorities to execute documents	Negative	Re-statement in part
Paragraph 3, Schedule 2	Power to amend non-maintained special school trust deeds by order to reflect Academy arrangements	None	Expansion of existing power
Paragraph 14, Schedule 2	Power to amend maintained school trust deeds by order to reflect the operation of the Bill	None	Expansion of existing power

### **Relevant publications**

The Bill implements long-standing policy, set out in the Conservative party Manifesto, on expanding the Academy sector to include outstanding schools and give them greater freedoms.

There has been no consultation on the provisions of this Bill, although the plans have been welcomed by expanding schools.

An Impact Assessment has been completed for the provisions in the Bill and is available via the Bill Manager.