



HOUSE OF LORDS

Select Committee on the Constitution

20th Report of Session 2010–12

Protection of Freedoms Bill

Report

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To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

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Committee Staff

The current staff of the Committee are Emily Baldock (Clerk) and Nicola Barker (Committee Assistant).

Contact Details

All correspondence should be addressed to the Clerk of the Select Committee on the Constitution, Committee Office, House of Lords, London, SW1A 0PW.

The telephone number for general enquiries is 020 7219 1228/5960

The Committee's email address is: constitution@parliament.uk

Protection of Freedoms Bill

1. The Constitution Committee is appointed “to examine the constitutional implications of all public Bills coming before the House; and to keep under review the operation of the constitution”. In carrying out the former function, we endeavour to identify questions of principle that arise from proposed legislation and which affect a principal part of the constitution.
2. This report draws to the attention of the House one aspect of the Protection of Freedoms Bill. We may in due course additionally report on further aspects of the Bill.
3. Chapter 1 of Part 3 of the Bill on “Protection of property from disproportionate enforcement action” makes provision for changes to the law on powers of entry. While we welcome the prospect of a thoroughgoing reform of powers of entry to homes and premises, we are concerned that the Bill may provide the executive with an overly broad Henry VIII clause which permits the rewriting of primary legislation by ministerial order.
4. As the subject of classic common law authority on liberty and the rule of law, powers of entry have a very special place in British constitutional history. Reflected and reinforced today by Article 8 of the European Convention on Human Rights (right to respect for home and private life), *Entick v Carrington* (1765)¹ still stands for the constitutional principle of the inviolability of home or premises other than with the owner’s consent or through the proper exercise of a clearly defined legal power.
5. Conversely, and associated in particular with the rise of the regulatory state,² successive governments have secured from Parliament an extraordinary array of specific powers of entry for officials from central and local government, the police, inspectorates and agencies and other bodies. Building on research begun under the previous Government,³ a mapping exercise led by the Home Office has discovered that there are currently over 1,200 separate powers of entry contained under primary and secondary legislation.⁴ Further, with the development happening in typically ad hoc and piecemeal fashion, the powers and their safeguards and their supporting sanctions vary considerably. In particular, some entry powers but not others require warrants and/or specifically allow for the use of force.⁵
6. In addition to the constitutional imperative of the accountability of public bodies and officials,⁶ we have a longstanding interest in the accessibility to citizens of the statute book. In the words of a previous report, “clarity and transparency in the law are elemental to the core constitutional principle of the rule of law.”⁷ **A chief purpose of the relevant provisions of Part 3 is**

¹ 19 St Tr 1029.

² Constitution Committee, 6th Report (2003–04): *The Regulatory State: Ensuring its Accountability* (HL Paper 68).

³ Archived at:

<http://webarchive.nationalarchives.gov.uk/20080910134953/http://police.homeoffice.gov.uk/operational-policing/powers-pace-codes/powers-of-entry-review/>

⁴ Home Office, Primary Legislation: Powers of Entry and Secondary Legislation: Powers of Entry (February 2011), available at: <http://www.homeoffice.gov.uk/publications/about-us/legislation/powers-entry/>

⁵ See further, R. Stone, *The Law of Entry, Search and Seizure* (Oxford University Press, 4th edn 2005).

⁶ See, for example, Constitution Committee, 6th Report (2003–04), *op. cit.*

⁷ Constitution Committee, 20th Report (2008–09): *The Proposed National Assembly for Wales (Legislative Competence) (Environment) Order* (HL Paper 159), para 8.

clearly to simplify a veritable jungle of law. From the standpoint of constitutional principle, such reform is long overdue.

7. Clause 39 of the Bill grants ministers an order-making power to repeal any power of entry which the minister considers unnecessary or inappropriate. Schedule 2 begins the process of reform by repealing a number of entry powers. The subsequent clauses of chapter 1 then flesh out the practical arrangements; as well as order-making powers to add safeguards to powers of entry, there are requirements on ministers to review existing powers of entry, for the use of affirmative resolution procedure, and for consultation and codes of practice. In particular, clause 41 provides:
- 41 Rewriting powers of entry
- (1) The appropriate national authority may by order rewrite, with or without modifications—
- (a) powers of entry, associated powers or any aspects of any such powers or
- (b) enactments relating to, or connected with, any such powers or aspects.
- (2) The power under subsection (1) to rewrite a power of entry or associated power includes, in particular, the power to remove an aspect of such a power without replacing it.
- (3) But no order under this section may alter the effect of—
- (a) a power of entry,
- (b) any associated power connected with it, or
- (c) any safeguard relating to, but not forming part of, the power of entry or associated power,
- unless, on and after the changes made by the order, the safeguards in relation to the power of entry and associated powers connected with it, taken together, provide a greater level of protection than any safeguards applicable immediately before the changes.
8. The restriction in clause 41(3) obviously is important. Nonetheless, as currently drafted in terms of safeguards, it would not prevent the creation by ministers of more extensive powers of entry. As such, clause 41 amounts to a very considerable Henry VIII clause to rewrite the statute book other than through the ordinary processes of primary legislation.⁸
9. We have consistently raised concerns about the evident tendency of the executive to resort to wide-ranging Henry VIII clauses at the expense of Parliament in general and of the House of Lords as a revising chamber in particular.⁹ In our view, the current drafting of clause 41 gives rise to more concern when read in the twin contexts of our constitutional history and strong common law tradition, and of a Bill titled Protection of Freedoms.
10. We note the statement in the Home Office explanatory memorandum to the Delegated Powers and Regulatory Reform Committee that “it is envisaged that [the clause 41 power] will primarily be used to consolidate different

⁸ The Joint Committee on Human Rights has also made this point: 18th Report (2010–12): *Legislative Scrutiny: Protection of Freedoms Bill* (HL Paper 195), para 115. The Delegated Powers and Regulatory Reform Committee has expressed a different view: 20th Report (2010–12): *Protection of Freedoms Bill, etc* (HL Paper 209), para 4.

⁹ Not least in this Parliament in relation to the Public Bodies Bill: Constitution Committee, 6th Report (2010–11): *Legislative Scrutiny: Public Bodies Bill* (HL Paper 51).

powers of entry”.¹⁰ However, as we have consistently observed,¹¹ executive assurances about the use of legislative powers are no firm basis on which to legislate. Particularly with powers of entry to homes and premises, benign intentions in the future ought not to be assumed.

11. **The restriction in clause 41(3) in terms of safeguards is welcome. But it cannot obscure the fact that clause 41 includes a wide-ranging Henry VIII power to rewrite primary legislation by ministerial order. We are concerned that, as currently drafted, clause 41 does not strike an appropriate constitutional balance between the executive and Parliament.**

¹⁰ Home Office, Protection of Freedoms Bill. Delegated Powers—Memorandum by the Home Office, paragraph 58 (October 2011).

¹¹ See, most recently, Constitution Committee, 19th Report (2010–2012): *Terrorism Prevention and Investigation Measures Bill* (HL Paper 198), paras 15–17.