

HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

15th Report of Session 2010-12

Education Bill

Localism Bill – Parts 1 to 3

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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”.

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Rt Hon Lord Butler of Brockwell

Lord Carlile of Berriew QC

Baroness Gardner of Parkes

Lord Haskel

Rt Hon Lord Mayhew of Twysden QC DL

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Contacts for the Delegated Powers and Regulatory Reform Committee

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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.

Fifteenth Report

EDUCATION BILL

Introduction

1. This Bill, in nine Parts, contains material about almost every stage of educational provision, from ‘early years’ (clause 1) to student finance (clauses 72 and 73), and includes in particular provision about exclusions from schools (Part 2), the professional regulation of teachers (Part 3) and schools’ governance and standards (Part 5); and there is extensive further provision about Academies (Part 6). The Department for Education has prepared a memorandum¹ for the Committee to explain the delegated powers conferred or affected by the Bill (most of these are also listed in summary form in the Annex at the end of the memorandum); there is also a supplementary memorandum from the Department concerned specifically with powers conferred in, or in relation to, clauses 4, 8, 62 and 67.

Clause 2 – Power to search pupils

2. Sections 550ZA to 550ZD of the Education Act 1996 provide for the searching of school pupils by school staff for ‘prohibited items’, and the seizure of any such items found during a search. The prohibited items are listed in section 550ZA(3) to include weapons, alcohol, drugs and stolen articles; and there is a residual category comprising any ‘article of a kind specified in regulations’. Clause 2(2) inserts a new category of article in the list in section 550ZA(3), and adds a further residual category comprising any other item identified in the school’s rules. In many cases, such rules will be publicised as required by section 89 of the Education and Inspections Act 2006; but for schools to which that provision does not apply, the rules must be publicised in accordance with negative regulations.
3. We do not consider that either the delegation or the negative procedure is inappropriate in relation to those publicity requirements. But the memorandum does not explain why it is thought appropriate that the list of articles in section 550ZA(3) that may be searched for (which may at present be supplemented only by an amending Act or an instrument subject to Parliamentary control) should in future be capable of being supplemented by the school in question, apparently to include any kind of article whatever. We regard that as a significant change (particularly in view of the powers of seizure in, and the nature of the further powers now to be included in, section 550ZC), and **we draw it to the attention of the House so that the Minister may be invited to amplify in this respect the explanation of clause 2 provided in the memorandum.**

Clause 4 – Exclusion of pupils from schools in England: review

4. Clause 4 inserts a new section 51A into the Education Act 2002 to make provision about the exclusion of pupils from schools in England. Much of the

¹ <http://www.parliament.uk/business/committees/committees-a-z/lords-select/delegated-powers-and-regulatory-reform-committee/bills-considered/>

provision reflects that already contained in section 52 (which will, by virtue of clause 4(3), in future be confined to Wales). But there are some significant differences. New section 51A(3)(c) will oblige the Secretary of State to make regulations, subject to negative procedure, to require that certain persons are to be afforded access to a review panel for a review of a decision not to reinstate a pupil who has been excluded from a school. At present, section 52(3)(c) requires the regulations to provide for a right of appeal to an appeal panel, which may direct that the pupil be reinstated. New section 51A(4)(c) provides that a review panel may quash the decision not to reinstate the pupil, and to direct that it be reconsidered, only where the panel considers that the decision “was flawed when considered in the light of the principles applicable on an application for judicial review”. On its face, this provision would not appear to enable a review panel to quash a decision and direct its reconsideration (with a view to reinstatement) by reason only of its conclusion that the decision was reached on an incorrect appreciation of the relevant facts.

5. In paragraph 4 of its supplementary memorandum, the Department explains that new section 51A will allow for an independent rehearing of the facts by a review panel, but then appears, in effect, to go on to say that (even where the panel considers that the decision maker got its facts wrong) the panel will only be able to quash the decision “if it considers the decision is flawed in the light of the principles of judicial review”. The Joint Committee on Human Rights in paragraphs 1.26 to 1.43 of its Thirteenth Report in the current Session (HL Paper 154) concluded that this provision is incompatible with the requirement of Article 6 of the European Convention on Human Rights. While, in the light of the existing powers in section 52 of the 2002 Act, we do not suggest that the delegation of legislative power is in this case inappropriately wide, or that the negative procedure is an inappropriate level of Parliamentary scrutiny, **we nevertheless draw to the attention of the House that new section 51A(3)(c) would require a delegated legislative power to be exercised in a way that the Joint Committee on Human Rights has concluded is incompatible with the Convention rights.**

Clause 8 – Functions of Secretary of State in relation to teachers

6. On the abolition, by clause 7, of the General Teaching Council for England (“GTCE”), the Council’s functions as respects the conduct of teachers become, by virtue of clause 8, the responsibility of the Secretary of State. That clause inserts new sections 141A to 141E, and a new Schedule 11A, into the Education Act 2002. New section 141B enables the Secretary of State to investigate certain allegations about a teacher’s conduct and, where he finds “that there is a case to answer”, to decide whether to make an order prohibiting the teacher from carrying out teaching work. New Schedule 11A confers powers to make regulations, subject to negative procedure, about the procedure to be followed by the Secretary of State when reaching such a decision. Many of those powers reflect existing powers conferred by Schedule 2 to the Teaching and Higher Education Act 1998; but some are new. In particular, paragraph 2(3) enables the regulations to make provision for the Secretary of State to make an interim prohibition order, pending his final decision about whether a prohibition order should be made.
7. In paragraph 9 of its supplementary memorandum, the Department explains that it is intended that “the regulations will provide for an interim order to be made only in the most serious of cases where it is necessary to do so in the

public interest” and that “a teacher subject to an interim order may ask for it to be set aside after six months”. We regard these intended constraints as significant safeguards in the exercise of a power which would enable a teacher to be prohibited from teaching, in circumstances where it has been found only “that there is a case to answer”. This is particularly so if some time is likely to elapse before a decision can be reached under new section 141B. We are aware that similar safeguards apply where interim orders are made in relation to registered medical practitioners and dental practitioners, but in each of those cases the safeguards appear in the primary legislation itself. We consider that the power in paragraph 2(3) of new Schedule 11A should be subject to equivalent constraints on the face of the Bill, a safeguard that seems the more important where the power of prohibition is to be exercisable, not by an independent professional regulatory body, but by a Government minister.

8. **We accordingly recommend that the Bill be amended so as to secure provision to the effect that an interim order may only be made where it is considered necessary in the public interest, and that the order must be reviewed periodically on the application of the teacher concerned.**

Clause 62 – Academies Admissions Policies

9. Part 3 of the School Standards and Framework Act 1998 sets out a procedure whereby a maintained school’s arrangements for the admission of pupils are determined annually by the admission authority (the education authority or the governing body). The process includes provision for objections to the arrangements by parents and ‘appropriate persons’ to be referred to a statutory adjudicator who decides whether the objection should be upheld. There is a list of persons set out in section 88F(3) who are ‘appropriate persons’ for this purpose, that may be supplemented by negative regulations. Clause 62 amends Part 3 of the 1998 Act to give the adjudicator the function of determining objections in relation to the admission arrangements of Academies, but for that purpose the ‘appropriate persons’ are to be identified wholly (rather than merely residually) in negative regulations in section 88H(6)(b).
10. In paragraph 20 of its supplementary memorandum, the Department explains that the list in section 88F(3) “does not readily translate to Academies”, and that the approach of not setting out a list on the face of the Act is considered to be justified “owing to the different nature of the educational institutions in question”. But the Department does not explain the nature of those differences which have apparently not made it feasible to devise a list for Academies which is the equivalent of that set out in section 88F(3). **We accordingly draw the power conferred in new section 88H(6)(b) to the attention of the House, so that it may seek from the Minister the explanation not provided in either memorandum from the Department.**

LOCALISM BILL – PARTS 1 TO 3

Introduction

11. This is a very substantial 8-Part Bill containing numerous delegated powers, described in a memorandum² for the Committee from the Department for Communities and Local Government. This report covers Part 1 to 3 of the Bill. The remaining Parts will be the subject of a further report.
12. Part 1 of the Bill is about Local Government, Part 2 about EU Fines and Part 3 about Non-Domestic Rates etc.

PART 1 OF THE BILL

Clause 5(1): amendment of statutory provisions

13. As creatures of statute, local authorities may, generally speaking, do only what they are authorised to do by or under statute. Clause 1 of the Bill enables them to do anything that an individual may do, regardless of whether or not it benefits the authority, its area or its residents. This is subject to specific restrictions in clause 3 on charging and in clause 4 on doing things for a commercial purpose. Clause 2 prescribes certain boundaries, including the preservation of existing restrictions, at least for the time being (see paragraph 10 of the memorandum).
14. Clause 5(1) provides that if the Secretary of State thinks that a statutory provision (whenever passed or made) prevents or restricts local authorities from exercising the general power, he may by order amend, repeal, revoke or disapply that provision, though this may well not be intended to cover clauses 2 to 4 of the Bill itself. There are substantive restrictions in clause 6 which reflect those for Legislative Reform Orders (LRO's) under the Legislative and Regulatory Reform Act 2006. These are the conditions relating to:
 - proportionality;
 - fair balance;
 - necessary protection;
 - continuation of reasonable expectations to exercise rights or freedoms;
 - lack of constitutional significance.

The order may not delegate or transfer any function of legislating (clause 6(3)).

15. There is a requirement for consultation with local authorities etc. before an order is made (subsection (7)). Clause 7 provides that the procedure for the orders is the same as that for legislative reform orders (LROs).
16. The power given to the Secretary of State is very broad, as is acknowledged in the memorandum. Were it not for the precedent mentioned in paragraph 25 of the memorandum and the substantive and procedural safeguards in clauses 6 and 7 of the Bill, we might have found it unacceptable. But we are

² <http://www.parliament.uk/business/committees/committees-a-z/lords-select/delegated-powers-and-regulatory-reform-committee/bills-considered/>

persuaded that it is not inappropriate and accept the analogy with orders under the 2006 Act. The House will wish in due course to consider the procedural implementation of clause 7.

Clause 5(2): overlap

17. Clause 5(2) deals with the situation where the new general power overlaps another, existing, power. The Secretary of State is enabled to amend, repeal or disapply any statutory provision, for the purpose of removing or reducing the overlap. Where this power is exercised in the same instrument as the power in clause 5(1), the procedures applicable to orders under clause 5(1) apply. But where the power is exercised separately, the order is, despite being the exercise of a Henry VIII power, subject only to negative procedure. We are not persuaded by the case made at Paragraph 22 of the memorandum that our normal presumption that Henry VIII powers shall be subject to affirmative procedure should be displaced, especially as the parallel power to amend Acts in relation to fire and rescue authorities (new section 5C of the Fire and Rescue Services Act 2004 on page 8 of the Bill) is subject to the affirmative procedure. **We recommend that orders under clause 5(2) which amend Acts should, where not combined with orders under clause 5(1), be subject to affirmative procedure.**

Clause 5(3) and (4): prevention of activities and conditions on general power

18. Clause 5(3) enables the Secretary of State by order to make provision preventing local authorities from doing specified things under the general power. The consultation requirement of clause 5(7) (paragraph 5 above) applies, except in the case of an order amending an earlier order so as to apply it to more authorities or reduce its application to fewer authorities. Where the consultation requirement does not apply, the order is subject to negative procedure; in all other cases it is subject to affirmative procedure. This distinction reflects that currently in section 105(6A) of the 2000 Act for orders under section 3(3) of that Act, and is therefore precedented.
19. But the power under clause 1 is considerably wider than that currently in the 2000 Act, so orders under clause 5 may be correspondingly more significant; and as the Committee pointed out in relation to the Bill enacting what is now section 105(6A) of the 2000 Act, an order extending the prohibition from a few select authorities to a wider group, or to all, (e.g. following a piloting exercise) may be at least as significant as the order which it amends. Yet there is in such cases both the absence of a requirement to consult and a lesser degree of Parliamentary control. **We do not consider that this is justified. We recommend that orders under clause 5(3) amending earlier orders so as to extend the earlier order to other authorities should be subject to the affirmative procedure. This applies equally to orders under clause 5(4).**

Clause 8(2): parish councils

20. Clause 8(2) enables the Secretary of State, by order subject to negative procedure, to prescribe conditions which must be met for a parish council to be a “local authority” for the purposes of Chapter 1 of Part 1. It is therefore, in effect, a power to define which parish councils have the general power conferred by clause 1(1). This reflects an existing provision in section 1(2) of

the 2000 Act which may be used to define those parish councils which have the more modest powers in section 2 of that Act. **In view of the more significant powers under Chapter 1 of Part 1 of the Bill we consider the affirmative procedure more appropriate for orders under clause 8(2).**

Clause 9: fire and rescue authorities

21. New section 5C of the Fire and Rescue Services Act 2004, inserted by clause 9 of the Bill (at page 8), gives the Secretary of State and Welsh Ministers broadly equivalent powers over, respectively, English and Welsh fire and rescue authorities to those which the Secretary of State is given by clause 5 over English local authorities. **Our conclusion on clauses 5(3) and 5(4) (paragraph 19 above) applies equally to orders under the new section 5C(3) and (4), inserted by clause 9 of the Bill.**

Clause 11 and schedule 2: governance arrangements for English local authorities - generally

22. Clause 11 and Part 1 of Schedule 2 insert a new Part 1A into the Local Government Act 2000. The new Part contains over 70 sections and a large number of delegated powers, described at paragraphs 46 to 99 of the memorandum. (There are also delegated legislative powers at new sections 9C(5) and 9G of the 2000 Act – pages 190 and 207 of the Bill.) Many of these powers either replicate, or are consistent with, provisions already in Part 2 of the 2000 Act (which Schedule 3 to the Bill confines to Wales). But there are three provisions that we wish to draw to the attention of the House.

New section 9HF: transfer of functions to elected mayors

23. A mayor and cabinet executive of a local authority consists of an elected mayor and two or more councillors appointed by the elected mayor. New section 9HF of the 2000 Act contains a power to which there is no equivalent now in the 2000 Act. It enables the Secretary of State, by order subject to affirmative procedure, to:
- enable or require a local authority operating a mayor and cabinet executive to confer a “local public service function” of any person or body on its elected mayor;
 - transfer a local public service function from any person or body to the elected mayor.
24. The power extends to disapplying or amending enactments (section 9HF(3)).
25. “Local public service function” in relation to a local authority is defined as meaning a function of a public nature in so far as it relates to the provision of a public service either in the local authority’s area or to the inhabitants of the area. “Public service” is defined as a service provided to the public or a section of the public that:
- is provided in the exercise of functions of a public nature or under statutory authority, or
 - is wholly or partly funded by grants, subsidies or other financial assistance from central or local government funds.

26. Accordingly, this is a remarkably wide power. It would appear to cover many activities carried out in the voluntary sector and other public services (e.g. the NHS, policing, and those relating to the environment), including those carried on by other elected authorities (such as another council in a non-unitary area).
27. There are no criteria in the Bill by reference to which the power may be exercised and no restrictions on the local public service functions that may be transferred. Though new section 9HG (page 214 of the Bill) requires the Secretary of State to consider a proposal about the exercise of the powers which is made by an elected mayor within one year of his election, a proposal is not a necessary pre-condition of making an order, nor does the Bill set out the criteria to be applied. We do not consider that paragraphs 63 to 67 of the memorandum provide justification for a power of this extent. **Despite the affirmative procedure, we consider new section 9HF as an inappropriate delegation of legislative power.**
28. An order under section 9HF may transfer not just functions, but also property, rights and liabilities (including those relating to employment contracts) from the person or body whose functions are being removed.
29. The House's hybrid instruments procedure is disapplied from any order under section 9HF. That procedure is based on the principle that an individual or body sufficiently affected by the proposed instrument shall have the opportunity to petition Parliament. **Given the lack of any statutory requirement to consult before making an order under section 9HF, the Committee is concerned that the disapplication of the hybrid instruments procedure – and thereby the opportunity to petition Parliament – leaves inadequate means to ensure private or local interests are taken into account when the power is exercised. We draw this to the attention of the House.**

New section 9MG: referendums

30. New section 9M of the 2000 Act specifies cases in which a change in a local authority's governance arrangements is subject to a referendum. New sections 9MC, 9MD and 9ME enable the Secretary of State to provide for other circumstances in which a referendum may take place on whether or not an authority should have a particular type of governance arrangements. In each case the referendum has an effect on the governance arrangements.
31. New section 9MG(2) enables the Secretary of State to make provision by regulations, subject to negative procedure, for the conduct of the referendums. Section 9MG(4) enables the regulations to apply or incorporate, with or without modifications, any provision of any enactment relating to elections or referendums, including provisions about the referendum question and limitations on expenses and creating criminal offences. Apart from the level of Parliamentary control, all of this is reasonably well precedented. Paragraph 95 of the memorandum points to the precedent of section 45 of the 2000 Act itself. But regulations under section 45 are subject to the affirmative, not the negative, procedure. Regulations about the conduct of elections and referendums the results of which have a significant legal effect are invariably subject to affirmative procedure. **We recommend that regulations under section 9MG should be subject to affirmative procedure.**

New section 9N: mayor and cabinet executive

32. New section 9N provides for the Secretary of State by order to require a specified local authority to operate a mayor and cabinet executive. This is a very significant power which has no equivalent in the 2000 Act. These orders are rightly subject to affirmative procedure. **We draw to the attention of the House disapplication of the hybrid instruments procedure by paragraph 77 of Schedule 3 to the Bill, so that the House may satisfy itself that there will be suitable alternative procedures in place.**

PART 2 OF THE BILL**Clause 36(3): local or public authority**

33. Part 2 enables a Minister, through a procedure described in the Bill, to require local or public authorities to make payments in respect of certain penalties imposed on the UK government by the European Court of Justice, if the Minister considers that acts of the authority caused or contributed to the infraction of EU law for which the penalty was imposed. This is described at paragraph 119 of the memorandum.
34. Clause 36 defines a “local or public authority” as the authorities listed in clause 36(2) or a person or body designated under clause 36(3). Clause 36(3) enables the Secretary of State by order subject to negative procedure to designate any person or body “exercising public functions in England” as a public authority. This is in effect a power to extend the scope of Part 3 beyond the local authorities listed in clause 36(2). It is also of some considerable width because a person exercising any public function in England may be designated even though not all of its functions are public functions. **We do not consider that the negative procedure is sufficient in these circumstances, and we recommend that orders under clause 36(3) should be subject to affirmative procedure.**

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. The Register may also be inspected in the House of Lords Record Office and is available for purchase from The Stationery Office.

At the meeting on 15 June Lord Mayhew declared an interest as President, West Kent College of Further Education (Education Bill).

Attendance:

The meeting on 15 June was attended by Baroness Andrews, Lord Butler of Brockwell, Baroness Gardner of Parkes, Lord Haskel, Lord Mayhew of Twysden, and Baroness Thomas of Winchester.