

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

16th Report of Session 2010-12

**Localism Bill:
Parts 4 to 8
& Government Amendments**

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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 Lord Butler of Brockwell
Lord Carlile of Berriew QC
Baroness Gardner of Parkes
Lord Haskel
Rt Hon 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.

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.

Sixteenth Report

LOCALSIM BILL – PARTS 4 TO 8

Introduction

1. The Committee reported on Parts 1 to 3 of the Localism Bill in its previous report¹. This Report covers the remaining Parts of this Bill about Community Empowerment (Part 4), Planning (Part 5), Housing (Part 6), London (Part 7) and general provisions (Part 8). These Parts of the Bill, like the earlier Parts, contain a very large number of delegated powers which are described in a memorandum for the Committee from the Department for Communities and Local Government².

Clause 54 – Local referendums

2. Clause 54(2) enables the Secretary of State to make provision by regulations for the conduct of referendums under Chapter 1 of Part 4, which is about petitions and various other triggers for a referendum. The regulations are subject to negative procedure.
3. In paragraph 31 of our previous Report³, we recommended that, in line with precedent, regulations under new section 9MG of the Local Government Act 2000, which make provision for the conduct of referendums on arrangements for governance, should be subject to affirmative procedure.
4. Referendums under Chapter 1 of Part 4 differ significantly from those under the 2000 Act, since under clause 55 the obligation on the local authority holding it is only to consider what steps (if any) it proposes to take to give effect to the result. So the referendum is advisory only. This accounts for the specific limitations on the power to make regulations, set out in clause 54(6) (for example, the regulations may not include provision about the referendum question or create criminal offences). On this basis, we consider the negative procedure is appropriate.

Schedule 5 – Referendums on council tax increases

5. Schedule 5 inserts a new Chapter 4ZA into Part 1 of the Local Government Finance Act 1992. Included in the new Chapter are provisions requiring authorities to hold a referendum if the basic amounts of council tax for a year are excessive. The result of the referendum in each case has a direct effect on the calculations used to determine the amount of tax (new sections 52ZH and 52ZO). The outcome is therefore highly significant for an authority's council tax payers.
6. New section 52ZQ enables the Secretary of State to make provision by regulations for the conduct of the referendums. The regulations are subject to negative procedure only. The power is not materially different from that in

¹ 15th Report 2010-12: *Localism Bill – Parts 1 to 3* (HL Paper 163)

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

³ *op cit*

new section 9MG to the Local Government Act 2000, which we have already recommended should be subject to affirmative procedure (paragraph 31 of our previous Report)⁴. There is one respect in which the power in section 52ZQ is narrower: when the regulations apply or incorporate a provision of another enactment that creates an offence, the modifications which may be made do not include increasing the penalty (subsection (5) on page 274, line 28 of the Bill). **As the regulation-making power under new section 52ZQ is not materially different from that in section 9MG, in line with our previous recommendation we recommend that regulations made under new section 52ZQ should also be subject to the affirmative procedure.**

Clause 68 – Duty to consider expression of interest

7. Clause 68 imposes on a “relevant authority” a duty to consider certain expressions of interest in providing or assisting in providing an authority’s service. This can lead to the authority being required to carry out a procurement exercise (clause 70). The obligation applies to county councils in England, district councils (in England) and London borough councils. But the Secretary of State may by regulations extend the obligation to any person or body “carrying on functions of a public nature”. These regulations are subject only to negative procedure.
8. In support of the negative procedure, paragraph 211 of the memorandum points to a power in section 20 of the Local Democracy, Economic Development and Construction Act 2009 (relating to petitions). That is a power to provide for the petition provisions of the 2009 Act to be extended to one or more of a list of bodies specified or specifically described in the Act. As the memorandum acknowledges, we considered in Session 2008-09 that the impact on smaller bodies of an order could be considerable and doubted that the negative procedure was sufficient in those cases. As a result, the Bill which became the 2009 Act was amended so that orders applying the petitions provisions to the smaller bodies (parish and community councils) are subject to affirmative procedure. The power in clause 68(2)(d) of this Bill is more open-ended than the power in the 2009 Act, since there is no specific list in the Bill from which the Secretary of State may select and an order may cover any organisation of any size which carries out functions of a public nature. **The operation of the regulation-making power in clause 68(2)(d) could shape the scope of Part 4 of the Bill. The Committee therefore recommends that regulations made under clause 68(2)(d) should be subject to the affirmative procedure.**
9. Similarly, we consider that the exercise of the power in clause 68(5)(e) to specify any “other person or body” as a “relevant body” for submitting a valid expression of interest may, even though not a Henry VIII power, shape the scope of Chapter 3 of Part 4 at least as much as the powers in clause 68(9) which are rightly subject to the affirmative procedure. **We recommend that regulations under clause 68(5)(e) should also be subject to the affirmative procedure.**

⁴ *ibid*

Clause 70(8) – Grounds for rejection

10. Clause 70 requires an authority to accept or reject an expression of interest made in accordance with clauses 68 and 69. But there are no criteria for acceptance or rejection in the Bill itself. Instead, subsection (8) provides that the expression of interest may be rejected only on a ground specified in regulations made by the Secretary of State. The regulations are subject to the negative procedure.
11. The reason given in the memorandum (paragraph 222) for this power being taken is “because at the time when the primary legislation is introduced, the consultation exercise which we intend to undertake which will consider what these grounds should be has not been ... completed”. As the Bill was introduced in the House of Commons on 13 December 2010, over 6 months ago, we do not consider that this justification carries weight.
12. Furthermore, the reason given in the memorandum (paragraph 223) for the negative procedure is that “no significant issues of principle arise in what will be part of a detailed technical process”. **Provisions determining whether the authority must or need not carry out a procurement exercise are central to the operation of Chapter 3, and we recommend that regulations made under clause 70(8) should be subject to the affirmative procedure.**

Clause 75 and 82 – Land of community value

13. Clause 82 imposes a moratorium on an owner disposing of land in a local authority’s list of assets of community value. (There is no provision in the Bill awarding compensation to the owner, but clause 85 enables the Secretary of State/Welsh Ministers to make provision for compensation by regulations.) The key concepts of “owner”, “relevant disposal” and “local authority” are all defined in the Bill, though in each case a Henry VIII power, subject to affirmative procedure, is taken to change the definition (see clauses 83(7), 91(2) and 92(6)). But nothing in the Bill defines what land may be included in a local authority’s list. Clause 74(1) requires an authority to maintain a list of land that is land of community value; and clause 74(2) provides that the list is to be known as the list of assets of community value. But clause 75(1) says simply that whether or not a building or land is land of community value is to be determined in accordance with regulations made by the Secretary of State (for England) or the Welsh Ministers (for Wales). Clause 75(2) to (4) enlarges on matters which the regulations may contain. The regulations are subject to negative procedure.
14. This power to make regulations under clause 75 is a potentially significant power allowing the Secretary of State to make regulations concerning the property rights of individuals by determining what is land of community value. **We recommend that regulations under clause 75 should be subject to the affirmative procedure.** If this recommendation is accepted, regulations under clause 75 might, in certain cases, be subject to the House’s hybrid instruments procedure.
15. The length of time during which an owner may or may not dispose of land on an authority’s list of assets of community value is determined under the Bill by regulations under clause 82(6). Those regulations determine the length of an “interim moratorium period”, a “full moratorium period” and a “protected period” and are subject to negative procedure. The length of

these periods is critical for those affected and the Committee is not convinced by paragraphs 235 and 251 of the memorandum of the adequacy of the negative procedure, if the consultation process which will form the basis of the policy is to run during the progress of the Bill. **We recommend that the first exercise of the power to specify each of the three periods should be subject to the affirmative procedure.**

Clauses 102 to 104 – Neighbourhood planning charges

16. Clauses 102 to 104 provide a comprehensive power for the Secretary of State to provide for the imposition of charges to meet expenses of local planning authorities in connection with neighbourhood planning functions.
17. Paragraphs 379 to 390 of the memorandum explain the powers. They are indeed wide, but in view of the affirmative procedure (Commons only) provided, we feel that they are acceptable. But there is no explanation of why there is no Parliamentary procedure in the House of Lords, when regulations under section 303 of the Town and Country Planning Act 1990, which provide for fees or charges to local planning authorities in respect of any of their functions, are subject to the affirmative procedure in both Houses.
18. We draw the absence of any procedure in the House of Lords to the attention of the House. **Except in so far as the House considers that provision in clauses 102 to 104 of the bill relate to matters over which the Commons claim financial privilege, we recommend that the powers in clauses 102 to 104 should be subject to the affirmative procedure in both Houses.**

Schedule 10 – Referendums

19. New section 61E of the Town and Country Planning Act 1990, inserted by paragraph 2 of Schedule 9 to the Bill, requires a local planning authority to make a neighbourhood development order (as to which see paragraphs 300 and 301 of the memorandum) if more than half of those voting in a referendum were in favour.
20. Paragraph 15 of Schedule 4B to the 1990 Act, inserted by Schedule 10 to the Bill, enables the Secretary of State to make regulations about the referendums. The power is not readily distinguishable from that in new section 52ZQ of the Local Government Finance Act 1992 and its exercise is similarly subject only to negative procedure. **In line with our other recommendations (in paragraph 6 above and paragraph 31 of our previous Report), we recommend that regulations made under new section 52ZQ should also be subject to the affirmative procedure.**

Clause 174 – Mayoral development corporations, establishment

21. Chapter 2 of Part 7 provides that the Mayor of London may, following a specified consultation process, designate any area of land in Greater London as a Mayoral development area. If the Secretary of State receives a notification that an area has been designated, he must by order establish a Mayoral development corporation for the area. Under clauses 178 and 190 the Mayor may decide that the corporation is to have functions relating to town and country planning and certain non-domestic rating functions; and the order must give effect to that decision. The order is subject to the negative procedure.

22. This procedure is different from that by which urban development corporations are established under Part 16 of the Local Government, Planning and Land Act 1980 and by which urban development areas may be established under Part 1 of the Housing and Regeneration Act 2008. In each of those cases the orders leading to transfer of planning functions from the usual local planning authority (in London, the borough council) are subject to affirmative, not negative, procedure. Orders establishing urban development areas and corporations have on occasions in the past proved controversial.
23. But this Bill gives the very considerable power to the Mayor, and it would be unusual for his actions to be the subject of Parliamentary control. The role of the Secretary of State is limited, as he has no discretion as to whether or not to make an order or as to its main content. Accordingly, the Committee agrees that the negative procedure provided for the establishment orders is appropriate.

LOCALISM BILL — GOVERNMENT AMENDMENTS

24. Since our previous Report on Parts 1 to 3 of the Bill⁵, the Government have invited us to consider further amendments to be moved in Committee of the Whole House, printed in the Fourth Marshalled List sheet (HL Bill 71—IV). The Department of Communities and Local Government have provided an explanation of the delegated powers contained in these new amendments which is available on the Committee's website⁶. There is only one amendment to which we wish to draw the attention of the House.

Government Amendment 153AF

25. Government amendment 153AF is about the additional referendum for which other Government amendments provide. It inserts new paragraph 14A of Schedule 4B to the Town and Country Planning Act 1990. New paragraph 14A(3) provides that those entitled to vote in the referendum are the non-domestic ratepayers and those meeting other conditions to be prescribed in regulations. But new paragraph 14A(5) enables the regulations subject only to negative procedure to exclude a person's entitlement to vote. We do not consider negative procedure an adequate level of control for regulations removing an entitlement to vote given by the Bill. **We recommend that regulations under new paragraph 14A(5) should be subject to affirmative procedure.**

⁵ *ibid*

⁶ <http://www.parliament.uk/business/committees/committees-a-z/lords-select/delegated-powers-and-regulatory-reform-committee/bills-considered/>

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 29 June Lord Soley declared an interest as a homeowner on an unadopted road.

Attendance:

The meeting on 15 June was attended by Lord Butler of Brockwell, Lord Carlile of Berriew, Baroness Gardner of Parkes, Lord Haskel, Baroness O'Loan, Lord Soley and Baroness Thomas of Winchester.