HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

20th Report of Session 2010–12

# Protection of Freedoms Bill

# Education Bill: Government amendments

# London Olympic Games and Paralympic Games (Amendment) Bill: Government response

Ordered to be printed 26 October and published 27 October

Published by the Authority of the House of Lords

*London* : The Stationery Office Limited
£price

HL Paper 209

### *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)

### *Registered 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 Parliamentary Archives.

### *Publications*

The Committee's reports are published by the Stationery Office by Order of the House in hard copy and on the internet at www.parliament.uk/hldprrcpublications

### *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*

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 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. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006.

# Twentieth Report

## PROTECTION OF FREEDOMS BILL

### INTRODUCTION

1. This Bill contains a variety of measures to provide for the removal, relaxation or qualification of statutory provisions that are considered to impose undue restrictions on individuals. Most of these relate to powers conferred on public authorities (for instance, as respects surveillance and rights of entry); but some (for instance, in relation to the parking of vehicles) are concerned with the conduct of private persons towards others. The Home Office has prepared a memorandum (the memorandum) for the Committee to explain the delegated powers conferred or affected by the Bill[1].

### CLAUSES 39 TO 41—ORDERS ABOUT POWERS OF ENTRY LEGISLATION

2. Clause 39 enables the Secretary of State or the Welsh Ministers to repeal by order any provision of legislation which confers a power to enter land or other premises. Clause 40 enables powers of entry conferred in legislation to be amended by order to provide for safeguards of the kind mentioned in subsection (2). Clause 41 allows provisions of legislation, as they relate to powers of entry, associated powers and any aspects of them, to be rewritten – but only so as to secure that the related safeguards which apply after the changes provide, when 'taken together', a greater level of protection than the safeguards applicable before them. There is an obligation to review existing powers of entry (clause 42), and a requirement for consultation before any of the order-making powers is exercised (clause 43).

3. Clause 44(b), taken with the definitions in clause 46, provides expressly that any of the three categories of order may modify primary legislation (and "modify" is defined as including "amend" or "repeal"). By virtue of clause 44(2) and (4), any such order requires the affirmative procedure unless it does not amend or repeal primary legislation (which would include an Order in Council making 'direct rule' provision for Northern Ireland).

4. Although the powers conferred by clauses 39 to 41 would allow for the modification of large numbers of provisions of primary and subordinate legislation, in view of the limits on each power – particularly in clauses 40(2) and 41(3) – to the making of what might be seen as benign provision, and the affirmative procedure which is to apply where primary legislation is to be revised, we do not find these delegations inappropriate.

### CLAUSE 51—EFFECT OF POWERS OF ENTRY CODE

5. Clauses 47 to 50 provide elaborately for the preparation, scrutiny, issue and publication of a code of practice about the exercise of powers of entry, and

---

[1] www.parliament.uk/hldelegatedpowers-bills

clause 51 provides for the effect of the code, in terms of who must have regard to it, and the consequences of any failure to do so. But subsection provides that 'a relevant person' must have regard to the code; and that expression is defined (subsection (5)) as a person specified or described in a negative order. Until an order is in force, the code can have no practical effect, because there is no one for it to bite on.

6. We are unconvinced that the negative procedure provides an appropriate level of scrutiny for this order. We anticipate that when the first order is made, there may be considerable interest in who are to be the "relevant persons" for this purpose, as well as interest in which persons are not to be included. **We therefore recommend that the first exercise of this power should attract the affirmative procedure (and thereafter the exercise should attract the negative procedure).**

## CLAUSE 58—EMERGENCY POWER WHEN PARLIAMENT IS DISSOLVED

7. Clause 57 amends Schedule 8 to the Terrorism Act 2000 to reduce from 28 days to 14 days the maximum period for which a terrorist suspect may be detained without charge from the time of arrest. As is explained in paragraphs 93 and 94 of the memorandum, it has been concluded that it may in exceptional circumstances be necessary to increase the limit again to 28 days for a limited period. In that event, the government would introduce one of the Detention of Terrorist Suspects (Temporary Extension) Bills – which it has published in draft[2] – for urgent enactment as an emergency measure. But such a bill could not be enacted during dissolution of Parliament or until after the first Queen's Speech of the new Parliament. Clause 58 therefore amends Schedule 8 to confer an order-making power on the Secretary of State to increase temporarily, for a period of three months, the maximum period of pre-trial detention to 28 days.

8. New paragraph 38(2)( a) and (b) set out the nature of the provision which the order ("a temporary extension order") is to contain: as well as increasing the maximum period to 28 days, the order must also further modify Schedule 8 as required in subsections (3) and (4) (pages 42-43). The effect of the modifications is that any application to extend a detention period beyond 14 days would require the consent of the Director of Public Prosecutions (in Scotland, the Lord Advocate) and must be made to a High Court judge. The order could come into force on being made, but would cease to have effect 20 days after parliamentary sittings recommenced, unless within that time it had been approved by both Houses. There is also provision for the Secretary of State to revoke it by further order (sub-paragraph (6)). In that event, or if the order ceases to have effect or expires after three months, any suspect who has been held for longer than 14 days must be released (sub-paragraphs (7) and (8)).

9. The order may only be made if the Secretary of State is satisfied that it is necessary by reason of urgency (sub-paragraph (1)(b)), and the preamble to the instrument can be expected to bear a statement to that effect. The case of anyone detained for more than 14 days by virtue of the order must be

---

[2] http://www.homeoffice.gov.uk/publications/counter-terrorism/draft-detention-terrorist-bills

reviewed, and a report on the outcome of the review made to the Secretary of State (clause 58 (3)).

10. We considered a very similar power in our last Report in clause 26 of the Terrorism Prevention and Investigation Measures Bill.[3] On that occasion, we accepted that recourse to subordinate legislation, even to confer power to restrict personal liberty, was not inherently inappropriate where, quite exceptionally, an urgent need to take action arises during a period when no Parliament exists to enact the emergency legislation which the government has prepared and published in draft for the purpose. In the light of that conclusion, the more limited nature of the order proposed under clause 58, the opportunity for early giving or withholding of parliamentary approval, and the qualifications and safeguards described above, we reach a similar conclusion in relation to clause 58 that it is in the nature of an exceptional measure to meet exceptional circumstances, and on that basis, it is not inherently inappropriate.

11. However, two points of detail arise in relation to clause 58. First, clause 58(2) amends the Terrorism Act 2000 to provide for the parliamentary procedure for orders under new paragraph 38. They must be made by statutory instrument (section 123(1) of the 2000 Act), and they require an affirmative resolution to keep them in force after the 20-day period has elapsed (new section 123(6A)). But there appears to be no provision requiring the orders to be laid before Parliament. There is express provision in the Terrorism Prevention and Investigation Measures Bill for the equivalent order under that Bill to be laid as soon as practicable after being made – that is, once Parliament has re-assembled.) **We therefore recommend that similar provision should be made in this Bill, so that an order under new paragraph 38 must be laid before Parliament as soon as practicable after being made.**

12. Second, the requirement for affirmative approval in new section 123(6A) applies to "an order under paragraph 38" but is not confined to a temporary extension order; so the requirement would seem to apply equally to an order under new paragraph 38(6) revoking a temporary extension order. The memorandum says nothing specifically about a revocation order under paragraph 38(6), or indeed about the procedure under which such an order should be made. We recognise that the circumstances under which the Secretary of State would make a revocation order under paragraph 38(6) would be exceptional. **We draw this to the attention of the House to give the Minister the opportunity to explain why the affirmative procedure is necessary for an order under new paragraph 38(6) revoking a temporary extension order.**

## SCHEDULE 4, PARAGRAPH 16—RECOVERY OF UNPAID PARKING CHARGES

13. Schedule 4 forms part of Chapter 2 of Part 3 of the Bill (see clauses 54 to 56) which contains provision for further regulating the immobilisation of vehicles, particularly vehicles parked on private land. Clause 54 makes it an offence to immobilise, move or restrict the movement of a vehicle without

---

[3] 19th Report of 2010-12: *Terrorism Prevention and Investigation Measures Bill* (HL Paper 202)

lawful authority. Clause 55 extends the powers of vehicle removal that may be conferred on police and others (by negative regulations under section 99 of the Road Traffic Regulation Act 1984) so that they may also remove vehicles from private land in circumstances specified in section 99. Schedule 4 provides for the recovery of unpaid parking charges from the keeper or hirer of a vehicle parked on "relevant land".

14. The regime for the recovery of the unpaid charges is almost entirely contained in the Schedule itself, supplemented only by three delegated powers in paragraphs 10 to 13. These enable negative regulations to make provision about the evidence which is to accompany a notice given to the keeper of the vehicle about the unpaid charge (paragraph 10(1)); about notices that must be displayed on land where parking charges may be incurred (paragraph 12(2)); and about the statements to be made by a hire company, where the vehicle involved is a hired vehicle (paragraph 13(4)).

15. However, paragraph 16 of the Schedule confers a Henry VIII power on the Secretary of State or the Welsh Ministers to amend by affirmative order the definition of "relevant land" (sub-paragraph (1)(a)); and to add to, remove or amend any of the conditions to which the right to recover unpaid parking charges is made subject (sub-paragraph (1)(b)). Although that definition is fundamental to the scope of the Schedule because "relevant land" appears in paragraph 1(1)(a), the land is already defined (in paragraph 3) in wide and exclusive terms, because the exceptions from it are specified in some detail in paragraph 3(1)(a) to (c). It therefore seems to us unlikely that the power would be exercisable so as to broaden significantly the categories of land to which the Schedule applies. In view of the affirmative procedure, we do not think this power is inappropriate.

16. But the second limb of this power is potentially much wider in its scope, and paragraphs 90 and 91 of the memorandum provide very little by way of explanation as to its purpose (beyond a desire for flexibility) or the way in which it might be exercised. The first part of the second sentence in paragraph 91 ("... the core elements of the scheme are set out in primary legislation, and will not generally (*sic*) be subject to amendment under these provisions...") also seems open to question. The power to amend "the conditions" specified in the Schedule would enable paragraphs 5 to 12 to be substituted by order, and the additional power in paragraph 16(3) would permit the incidental modification of other paragraphs too. While paragraph 1 and most of paragraph 4 could not be amended in this way, if the powers in paragraph 16 were exercised to their full extent, some nine of the Schedule's 11 pages could be rewritten using this power.

17. The memorandum explains the purpose of this power is "to give room to amend the keeper liability regime should that prove necessary in the light of experience. The ban on wheel clamping and towing will inevitably cause significant changes in the methods of enforcement of parking on private land. In an area which will continue to be governed substantially by the common law, however, it is hard to predict precisely how landowners, and their agents for parking purposes, will respond to the changes. They may well develop techniques for enforcing parking which are not immediately envisaged and to which it may, or may not, be appropriate to extend the right to enforce parking charges against a vehicle's keeper in future" (paragraph 90).

18. **We recognise that this is a complex and potentially rapidly changing area, and the need for flexibility. However, we are concerned that the**

**extent of the power in paragraph 16 is very wide and may therefore be inappropriate, despite the affirmative procedure. In the absence of a full explanation in the memorandum, we do not consider the Government have made the case for so wide a power, and we draw this to the attention of the House.**

## EDUCATION BILL—GOVERNMENT AMENDMENTS

19. We considered this Bill in our 15th Report[4], and the Government have now invited us to consider amendments tabled for Report Stage. The amendments are explained in a supplementary memorandum prepared for the Committee by the Department for Education and the Department for Business, Innovation and Skills.[5]

### Amendment 89ZZD—New clause: direct payments

20. This new clause amends Part 9 of the Education Act 1996 to insert three new sections 532A to 532C in Chapter 2. So that the Department may test a system of making direct payments for specified special educational provision, new section 5332A enables a local authority to make such payments in accordance with a pilot scheme made under new section 532B. The pilot scheme is to be made by the Secretary of State in an order made by statutory instrument, and is to have a maximum initial duration of two years, which may be extended to a maximum of four years, from the enactment of the new sections. The scheme must specify which local authorities are to participate in it, and must include provision about the ten matters (for instance, the descriptions of persons to or in respect of whom direct payments may be made) specified in new section 532B9(3). The scheme may also include provision to the effect that goods and services purchased by means of a direct payment are to be treated as goods and services provided or arranged by the local authority under a specified statutory duty: new section 532B(9) lists the four provisions of the 1996 Act that may be specified for this purpose.

21. By virtue of amendments made by subsection (2) of the new clause, an order under new section 532(1) must be laid in draft and approved by both Houses before it may be made; but this does not apply to the first such order. In the light of the explanation in paragraph 43 of the memorandum, we are satisfied that the delegation of the scheme to subordinate legislation is not inappropriate. We also consider the affirmative procedure is an appropriate level of parliamentary control, as it accords with the procedure usually adopted for pilot schemes in the area of social security (for instance, under section 29 of the Jobseekers Act 1995), where schemes about benefits frequently have characteristics similar to those of the scheme proposed under new section 532B. But we are concerned that the first order, which will introduce the new scheme, is to require only the negative procedure.

22. In paragraph 46 and 47 of the memorandum, the Department points out the powers conferred by new section 532B are similar to those conferred in relation to a pilot scheme for purposes of the national health service, and that regulations which provide for that scheme attract only the negative procedure. We note that, in that case, the first and any subsequent exercise of the power was considered to be suitable for the negative procedure. But we are influenced here by the subject matter of the proposed scheme, dealing

---

[4] 15th Report 2010-12: *Education Bill* (HL Paper 163)

[5] The memorandum is available via the Committee's web pages: http://www.parliament.uk/business/committees/committees-a-z/lords-select/delegated-powers-and-regulatory-reform-committee/bills-considered/

with novel arrangements for special educational services. Even though the Department has made available to the House an 'indicative draft' of the first scheme to be made under new section 532B, we do not consider that producing an indicative draft of the first scheme at Report Stage of the Bill (in the second House) affords a sufficient opportunity for the level of scrutiny which a novel scheme of this kind merits. **We accordingly recommend that an order under new section 532B should require the affirmative procedure on any occasions when the power conferred by that section is exercised.**

## LONDON OLYMPIC GAMES AND PARALYMPIC GAMES (AMENDMENT) BILL—GOVERNMENT RESPONSE

23. We considered this Bill in our 19th Report (HL Paper 202). The Government have now responded by way of a letter, printed at Appendix 2, from Baroness Garden of Frognal.

## APPENDIX 1: MEMBERS 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.

The following interest was declared at the meeting on the 26 October:

Protection of Freedoms Bill: Lord Soley declared an interest as living on an unowned road.

Attendance:

The meeting on 26 October was attended by Baroness Andrews, Baroness Gardner of Parkes, Lord Haskel, Lord Mayhew of Twysden, Baroness O'Loan, Lord Soley and Baroness Thomas of Winchester.

## APPENDIX 2: LONDON OLYMPIC GAMES AND PARALYMPIC GAMES (AMENDMENT) BILL—GOVERNMENT RESPONSE

I am writing in response to the Delegated Powers and Regulatory Reform Committee's report on the London Olympic Games and Paralympic Games (Amendment) Bill, published on Friday 14th October.

In its report the Committee called for further assurance that the provision allowing subsequent advertising and trading regulations to be made via the negative resolution procedure (clause 2(1) and (2) of the Bill) would be exercised only when there was an urgent need to do so.

As this was always the intention behind this provision, the Government is content to provide the additional assurance the Committee seeks and so will, before Committee on 25 October, table a minor and technical amendment to confirm that regulations would only be made via the negative resolution procedure where the Minister thinks that is necessary by reason of urgency. The effect of this amendment would be that the preamble to any regulations that are made pursuant to the negative resolution procedure would state, in terms, that the Minister is of the view that it is necessary by reason of urgency to use that procedure.

Baroness Garden of Frognal
17th October 2011