HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

21st Report of Session 2010-12

Legal Aid, Sentencing and Punishment of Offenders Bill

Human Trafficking (Further Provisions and Support for Victims) Bill [HL]

Terrorism Prevention and Investigation Measures Bill: Government response

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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, report on documents and draft orders laid before Parliament under or by virtue of section 7(2) of the Localism Act 2011 or under or by virtue of section 5E(2) of the Fire and Rescue Services Act 2004; 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
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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 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.

Twenty first Report

LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS BILL

Introduction

1. This four part Bill contains a number of delegated powers, explained in a memorandum from the Ministry of Justice[1]. Much of the Bill is about matters related to criminal proceedings and punishment of offenders, but Part 1 covers both civil and criminal legal aid and Part 2 (litigation funding and costs) covers both criminal and civil proceedings, though the provisions about costs in criminal cases are to be found only in Schedules 7 and 8.

2. There are Henry VIII powers at clauses 8(2), 16(3), 18(5), 48 (new section 22ZB(4)), 51(4), 63(7) (new paragraph 11A(1)), 65(3) (new paragraph 12A(1)), 79(10), 80(8), 81(1), 112(3) and 132, paragraph 11 of Schedule 4, paragraph 3 of Schedule 6, paragraph 15 of Schedule 7 (new section 62B(3)) and paragraph 18 of Schedule 7 (new section 135B(3)). These powers are all subject to affirmative procedure, except those at clauses 63(7) and 65(3), which are limited to altering sums to take account of changes in the value of money and are subject to negative procedure.

3. In this Report we draw attention in particular to a number of powers that delegate to the Lord Chancellor the ability to control access to legal aid or make far-ranging alterations to the level of penalties for offences on summary conviction.

Clause 2 – Legal aid arrangements

4. Clause 2(3) enables the Lord Chancellor, by regulations subject to negative procedure, to make provision about the payment of remuneration to those who provide services funded by legal aid. This is not in itself remarkable because, as paragraph 2 of the memorandum explains, similar provision exists at present under the Access to Justice Act 1999. However, that Act imposes on the Lord Chancellor a statutory obligation to consult the General Council of the Bar and the Law Society before making remuneration orders and to have regard to certain specified matters when making remuneration orders. These requirements are not reflected in this Bill.

5. Paragraph 4 of the memorandum says "We will continue to engage the Bar Council and the Law Society whenever it is appropriate and constructive to do so. It is considered that it is unnecessary to impose a statutory requirement to this effect". Paragraph 5 of the memorandum explains that the Lord Chancellor will take into account the matters which he is currently specifically required to take into account, before making the remuneration regulations. **Since the choice of Parliamentary procedure is, at least in part, justified by reference to the precedent, we draw the differences to the attention of the House.**

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

Clause 8 – Civil legal services

6. Clause 8(2) enables the Lord Chancellor, by regulations subject to affirmative procedure, to reduce the services (listed in Schedule 1) that may be provided under civil legal aid. We recognise that there is a precedent for a power of this kind; regulations under section 6(7) of the Access to Justice Act 1999 may amend the list (in Schedule 2 to that Act) of services that may not be provided as part of the Community Legal Service, whether by adding new services or omitting existing ones. The memorandum explains that "it is appropriate for there to be a limited power to amend Schedule 1 to allow it to be kept up to date". In reality, the power is limited only by the inability to add to the list and may legitimately be used to curtail the scope of civil legal aid quite significantly**.** Whether the power should extend to adding to the list is not a matter for this Committee. **The Committee has concerns about clause 8(2), and those concerns were not allayed by the explanation in the memorandum that this was merely an updating provision. However, there is precedent for a power of this type to be delegated and subject to affirmative procedure (whether the power is to add or to remove from the Schedule), and on that basis, we do not find it inherently inappropriate. But we draw it to the attention of the House because it is not limited to routine updating and may legitimately be used to make substantial omissions from Schedule 1.**

Clause 10 – Civil legal aid criteria

7. Clause 10(1)(b) requires the Director of Legal Aid Casework to determine qualification for civil legal aid services against criteria set out in regulations by the Lord Chancellor subject to negative procedure. There is a duty on the Lord Chancellor to consider the extent to which the criteria ought to reflect factors listed in clause 10(3), but there is no requirement to select criteria exclusively from that list. This contrasts with the current system under which criteria are set out in a funding code issued by the Legal Services Commission and subject (so far as the criteria are concerned) to affirmative procedure.

8. The memorandum explains that the negative procedure is considered appropriate for regulations under clause 10(1)(g) because it is expected that the regulations will contain less of substance than the current Funding Code, as the scope of legal aid is drawn tightly by the Bill. But we consider the criteria in the regulations are just as important to the scheme under this Bill as the criteria in the Code are to the scheme under current legislation. Nor are we persuaded in any way by the suggestion in paragraph 38 of the memorandum that the Lord Chancellor's political accountability to Parliament may have a bearing on the choice of Parliamentary procedure for these regulations. **We recommend that regulations under clause 10(1)(g) should be subject to affirmative procedure.**

Clause 12 – Advice and assistance for those in custody

9. Clause 12(1) provides that initial advice and initial assistance are to be available to those qualifying individuals held in custody in a police station. The Lord Chancellor may by regulations subject to negative procedure under clause 12(3) set out criteria by which qualification is to be determined and/or require the financial resources eligibility requirements in clause 20 to be applied. (This is different from the current scheme whereby there is no

means test and the advice and assistance funded is such as the Legal Services Commission considers appropriate.)

10. Legal aid under clause 12 (like the civil legal aid under clauses 8 and 9 and criminal legal aid under clause 15 but unlike legal aid under clause 14) is required by the Bill to be provided. We consider that the criteria under clause 12(3) are just as significant in their context as criteria under clause 10(1). We also consider that a decision by the Lord Chancellor to apply the financial resources conditions will have a direct effect on the extent of services under clause 12. **We recommend that regulations under clause 12(3) be subject to affirmative procedure.**

11. "Initial advice" and "initial assistance" for the purposes of clause 12 are defined in clause 12(8). But the Lord Chancellor is enabled by clause 12(9) to make regulations subject to negative procedure providing that advice or assistance prescribed by the regulations is not initial advice or initial assistance. Paragraph 46 of the memorandum explains that the power enables the Lord Chancellor to control the circumstances in which criminal legal aid is provided to those in custody. The negative procedure is justified in the memorandum on the grounds that the regulations would be detailed and technical in nature and that the principle would have been agreed in the Bill. We disagree. Defining the scope of what may be provided is sufficiently important as to require affirmative approval. **We therefore recommend that regulations under clause 12(9) should be subject to affirmative procedure.**

Clause 15(4)(b) – Representation for criminal proceedings

12. Clause 15(3) provides that where someone qualifies for legal aid for representation in criminal proceedings, representation must also be available for the purposes of any related bail proceedings and any preliminary or incidental proceedings.

13. Clause 15(4)(a) enables the Lord Chancellor to make regulations subject to negative procedure which can specify whether proceedings can be regarded as preliminary or incidental. As paragraph 53 of the memorandum explains, this reflects a provision currently in paragraph 2(2) of Schedule 3 to the Access to Justice Act 1999. It may reasonably be described as power to "fine tune".

14. Clause 15(4)(b) enables the Lord Chancellor to make regulations subject to negative procedure which provide for exceptions from the principle in clause 15(3) that the legal aid covers related bail proceedings and preliminary or incidental proceedings. Despite what is said in paragraph 53 of the memorandum, the provisions do not appear to reflect anything in paragraph 2(2) of Schedule 3 to the 1999 Act. **The power in clause 15(4)(b) enables the Lord Chancellor to except from the important proposition in the Bill that qualification for representation in proceedings carries with it qualification for representation in bail and preliminary proceedings. We therefore recommend that the exercise of this power should be subject to affirmative procedure.**

Clause 45 – Recovery of insurance premiums

15. New section 58C(2) of the Courts and Legal Services Act 1990, inserted by clause 45, enables the Lord Chancellor to make regulations subject to

negative procedure permitting costs orders in clinical negligence proceedings to include the cost of premiums on a costs insurance policy. We considered whether these regulations should be subject to the affirmative procedure. But we concluded that the scope of power was similar to that in section 58B of the 1990 Act and that the negative procedure was sufficient.

Schedules 7 and 8 – Costs in criminal cases

16. Schedules 7 and 8 (introduced by clause 59) contain some important powers about costs in criminal cases, many of them, rightly in our view, made subject to the affirmative procedure. These are well explained in the memorandum, with the exception of the power in new section 16A(9) of the Prosecution of Offences Act 1985, inserted by paragraph 3 of Schedule 7. This power enables the Lord Chancellor to set a maximum amount for legal costs awarded as part of costs to be paid out of central funds in a court other than the Supreme Court. It is not clear from the memorandum why the negative, rather than the affirmative, procedure has been chosen for this power. **As the negative procedure is not fully justified in the memorandum, the House may wish to seek a clear explanation from the Minister.**

17. We note the explanation at paragraph 191 of the memorandum for the negative procedure for regulations under new section 25(1A) of the 1985 Act (inserted by paragraph 6 of Schedule 7). These regulations set out a calculation for amounts payable out of central funds even where the calculation results in a figure which the court considers insufficient compensation. The point of principle (insufficient compensation) is contained in the Bill itself (and can be removed by amendment if Parliament so wishes), and the regulations then set out the detail. **We do not disagree with this, but we draw it to the attention of the House.**

Clause 79(2) – Removal of fines limit

18. Clause 79(1) deals with existing criminal offences. It provides that where those offences are currently punishable on summary conviction by a fine or maximum fine of £5,000 or more (including level 5 on the standard scale), they will instead be punishable on summary conviction by a fine of any amount (that is, there will be no statutory limit at all on the amount of the fine that may be imposed). This provision, though applying both to offences created by statute and to offences created by subordinate legislation, does not affect the future exercise of powers to make subordinate legislation and so is not of direct concern to the Committee.

19. But clause 79(2) does have an effect on the future exercise of existing powers to make delegated legislation. It affects any existing power to create an offence punishable on summary conviction by a fine or maximum fine of £5,000 or more "however expressed" (and so covers level 5 on the standard scale and anything above that). Such a power is automatically converted by clause 79(2) into a power to create an offence punishable on summary conviction by a fine of any amount.

20. When considering the appropriate level of Parliamentary scrutiny for the exercise of a power to create a criminal offence we take into account not just whether a maximum penalty for committing the offence is specified in the enabling power but also the amount of that maximum. For instance, in our

2008 Report on the Health and Social Care Bill[2] we recommended that regulations creating a new offence with a maximum fine of more than level 4 should be subject to affirmative procedure, whereas negative procedure would be sufficient where the penalty was level 4 or less. The Bill was amended to meet that recommendation. **It is almost inevitable that clause 79(2) will have the effect that the future exercise of some of the powers affected will be subject to a level of scrutiny which is inappropriately low. We draw this to the attention of the House.**

21. We also wish to draw to the attention of the House the effect of clause 79(2) on the power conferred by section 2(2) of the European Communities Act 1972. Paragraph 1 of Schedule 2 to that Act provides that the power does not include power to create any new criminal offence punishable on summary conviction with a fine of more than level 5 on the standard scale. So at present the regulations may provide for offences carrying a maximum penalty of £5,000 and that limit is to be removed by the Bill. Under the 1972 Act, the Minister making the instrument has the choice of subjecting the subordinate legislation to negative or affirmative procedure. **The House may wish to seek an explanation from the Minister as to whether the level of penalty provided for in future instruments will have a bearing on the relevant Minster's choice of Parliamentary procedure.**

22. We have serious reservations about the approach proposed in clause 79, which was inserted at Report Stage in the Commons and which is given very little explanation in the memorandum. The effect of the clause will be an extraordinary enlargement of existing delegated powers which allow the creation of new offences, with implications for the appropriate level of parliamentary control of the exercise of such powers. In particular, there is no indication from the minimalist explanation of clause 79(2) in paragraph 232 of the memorandum that any consideration has been given to the effect of clause 79(2) on the appropriate level of Parliamentary scrutiny. **Accordingly, we are not persuaded that the approach in clause 79(2) is appropriate at all.**

Clause 79(5) – Disapplication of removal of limit

23. Clause 79(5) enables the Secretary of State, by regulations subject to affirmative procedure, to disapply clause 79(1) or (2), with or without specifying an alternative increase. If the House accepts clause 79(1) and (2) (which is the major point of principle) then there would seem little choice but to accept this power as well for those offences which could not be identified in the Bill itself. The blanket application of clause 79(1) and (2) will inevitably produce an inappropriate result somewhere, which will need to be rectified.

Clause 80(2) and (4) – Increase of fines

24. Clause 80 is about offences carrying a maximum penalty on summary conviction of specified amounts less than £5,000, and about powers to create such offences by subordinate legislation. As explained in the memorandum, it is not about offences framed by reference to levels on the standard scale,

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[2] Delegated Powers and Regulatory Reform Committee, 6th Report of Session 2007-08, HL Paper 76, http://www.publications.parliament.uk/pa/ld200708/ldselect/lddelreg/49/4902.htm

even if those levels are currently under £5,000 (that is 1 to 4). Those offences are dealt with in clause 81 (paragraphs 29 to 33 below).

25. Clause 80(2) deals with existing offences, whether contained in primary or in subordinate legislation. The Secretary of State may, by regulations subject to affirmative procedure, increase the maximum penalty, but subsection (5) imposes a cap on the increase of £5,000 (or, if it is greater by the time at which the power in clause 80(2) is exercised, level 4 on the standard scale).

26. One drawback with proceeding in this way is that a draft order under clause 80(2) may cover a range of offences, subject matter and policy choices and will, of course, be unamendable – the House has the choice of approving it or not as a whole. Paragraph 243 of the memorandum does not provide sufficient justification for a power of this breadth, despite the affirmative procedure. There is no explanation of the penalties which are considered inadequate and why the Bill itself cannot contain a Schedule of increases of those penalties. The suggestion that the power is needed to keep in step with increases in levels 1 to 4 on the standard scale presupposes that clause 81 of the Bill is itself appropriate (as to which see paragraphs 29 to 33 below). The cap of level 4 is not a significant limitation because there is no indication of what level 4 will be under clause 81.

27. Clause 80(4) deals with existing powers to make regulations, and so with offences to be created in future under those existing powers. The Secretary of State may, by regulations subject to affirmative procedure, enlarge the power so that it may be exercised to create an offence carrying a maximum fine of a higher specified amount (but subject to the same cap of £5,000 or, if higher, level 4, as regulations under clause 80(2)). The justification put forward for this power is the same as that for clause 80(2) and seems no more convincing in this context either.

28. **We consider the powers in clause 80(2) and (4) to be insufficiently justified and to be inappropriate.**

Clause 81 – Standard scale

29. Section 37(2) of the Criminal Justice Act 1982 sets out a standard scale of fines or maximum fines for offences triable summarily in a magistrates' court. Most summary offences in primary and subordinate legislation are now framed by reference to this scale. There are five levels, currently: level 1 - £250; level 2 - £500; level 3 - £1,000; level 4 - £2,500 and level 5 - £5,000. These amounts were fixed by the Criminal Justice Act 1991. Section 143 of the Magistrates Courts Act 1980 enables the Secretary of State to alter the amounts by order subject to negative procedure, but only to take account of changes in the value of money.

30. As noted above, clause 79(1) itself converts level 5 into an unlimited amount for existing offences, and clause 79(2) itself enlarges existing powers so that subordinate legislation which currently cannot create offences carrying a maximum penalty greater than level 5 can in future create offences carrying a maximum penalty of a fine of any amount. So, despite the very serious reservations about effect of clause 79(2) to which we have drawn attention, the principle of the Bill is clear – for £5,000 fine read fine of any amount everywhere.

31. Clause 81 deals with levels 1 to 4 differently. There is no indication at all in the Bill itself what figures are to be substituted for levels 1 to 4. Instead, the

Secretary of State is empowered to substitute higher sums by order subject to affirmative procedure. There is no limit to the increases that may be made, but clause 81(2) requires the ratio between the levels to remain the same (that is, 2.5; 5; 10; 25). The memorandum does not suggest there is any precedent for so wide-ranging and open-ended a power to raise penalties.

32. **There is no explanation of why the Bill itself cannot effect the increases now thought necessary and given the sheer scale of the offences affected this power is inappropriate, despite the affirmative procedure.**

33. If the increases were (as in 1991) specified in the primary legislation, then a power along the lines of that in clause 80 (paragraphs 24 to 28 above) could be appropriately limited by reference to the specific amount specified in clause 81 as level 4, and an application only to those offences which it was not possible to identify in the Bill itself.

HUMAN TRAFFICKING (FURTHER PROVISONS AND SUPPORT FOR VICTIMS) [HL]

Introduction

34. This Private Member's Bill makes provision about the "human trafficking offences" listed in the Schedule and about assistance and support to be made available to victims of such offences. Part 4 includes provision about the prevention and monitoring of human trafficking. The Bill contains five delegated powers, all subject to negative procedure (clauses 7(1), 8, 9, 12(2) and 15(2)).

Clauses 7 - 9 – Orders about identifying, compensating and representing victims

35. Clause 7(1) requires the Secretary of State to set out in an order the procedure for identifying a person who "might have been" the victim of a human trafficking offence. Subsection (2) then imposes duties on the Secretary of State about the assistance and support, and in particular for child victims.

36. Clause 8 requires the Secretary of State to make provision by order about applications for compensation for a person who "has been" a victim of human trafficking offences, including provision about assistance for applicants and arrangements to be made where leave to remain is required. There is no indication as to who is to pay compensation or its amount.

37. Clause 9 imposes a duty on the Secretary of State to make arrangements by order for "legal advocates" to represent the best interests of certain children who have been victims of human trafficking offences.

38. Although the orders under clauses 7 and 8 appear to be procedural in character, each clause confers a wide and loosely defined power whose exercise could (depending on what is intended) have significant implications for public expenditure. The "arrangements" envisaged by clause 9 seem more narrowly focused, but may well give rise to a detailed and possibly costly scheme of legal representation. Provision under clauses 8 and 9 will seemingly need to include a mechanism for identifying a person who "has been" a victim from among those identified under clause 7(1) as persons who "might have been" a victim. In view of all of these factors, and the novel character of the subject matter in each case, **the Committee recommends that any exercise of any of these powers should require the affirmative procedure.**

Commencement powers

39. Clause 14(2) applies the negative procedure to the commencement order(s) to be made under clause 15(2). This is unusual, and the House may consider that the commencement order could be made without being subject to any Parliamentary procedure.

TERRORISM PREVENTION AND INVESTIGATION MEASURES BILL: GOVERNMENT RESPONSE

We considered this Bill in our 19th Report (HL Paper 202). The Government have now responded by way of a letter, printed at Appendix 1, from James Brokenshire MP, Parliamentary Under Secretary for Crime and Security.

APPENDIX 1: TERRORISM PREVENTION AND INVESTIGATION MEASURES BILL: GOVERNMENT RESPONSE

Thank you for the Delegated Powers and Regulatory Reform Committee's report of 14 October 2011 on (amongst other Bills) the Terrorism Prevention and Investigation Measures (TPIM) Bill. I am grateful for the Committee's confirmation that in the particular circumstances of the TPIM Bill, it does not consider the order-making power in clause 26 – which allows the Secretary of State to bring the Enhanced TPIM regime temporarily into force while Parliament is dissolved – to be inherently inappropriate.

I am writing to inform the Committee of two minor amendments to clause 26 that the Government has tabled for consideration during Lords Report Stage of the Bill:

The deletion of clause 26(11)(a) of the Bill, which allows for the amendment of any enactment. On further consideration we have concluded that this particular subsection is not required to allow the Government to make the necessary provisions for the ETPIM regime, and that this element of the order-making power can therefore be removed.

An amendment to clause 26 to make clear that the order-making power cannot make provision for matters that are devolved in Scotland (other than those already contained in the TPIM Bill) without the consent of the Scottish Government.

I am copying this letter to Lord Hunt of Kings Heath, and copies will be placed in the House library and on the Home Office website.

James Brokenshire MP

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 interests were declared at the meeting on the 23 November:

Legal Aid, Sentencing and Punishment of Offenders Bill: Lord Mayhew as a retired member of the General Council of the Bar and Baroness O'Loan as a qualified solicitor

Attendance:

The meeting on 23 November was attended by Baroness Andrews, Lord Blackwell, Lord Butler of Brockwell, Baroness Gardner of Parkes, Lord Haskel, Lord Mayhew of Twysden, Baroness O'Loan, Lord Soley and Baroness Thomas of Winchester