

HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

1st Report of Session 2012–13

Groceries Code Adjudicator Bill [HL]

Legislative Reform: Draft Legislative Reform (Annual Review of Local Authorities) Order 2012

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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”.

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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 Legislation, 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.

First Report

GROCERIES CODE ADJUDCIATOR BILL [HL]

Introduction

1. This is an unusual Bill, for its purpose is to provide for enforcement of a Code which no Act of Parliament requires to exist, and which may be altered or revoked without any Parliamentary involvement. The Groceries Code is a Code of Practice set out in Schedule 1 to the Groceries (Supply Chain Practices) Market Investigation Order 2009 which was made by the Competition Commission. The Order is not a statutory instrument and is not subject to a Parliamentary procedure. This has informed our consideration of the Bill and, in particular, our acceptance of the negative procedure for some powers in the Bill which in other circumstances might more appropriately have been made subject to affirmative procedure.
2. There are delegated powers to make orders in clauses 9(1), 15(10), 16(1), (2) and (4), 19(5) and 25(1). A memorandum from the Department for Business, Innovation and Skills explains these powers¹; and we shall mention five of them.

Clause 9(1) - Financial Penalties

3. If the Secretary of State considers that the Adjudicator's other powers are inadequate, he may make an order enabling the Adjudicator to impose financial penalties on large retailers for breaking the Groceries Code. This power is explained at paragraphs 12 to 28 of the memorandum. As the Bill itself does not specify a maximum penalty (but leaves this to be stated in the order) we consider the affirmative procedure is appropriate, and that is what the Bill requires.

Clause 15(10) – Information

4. This is a Henry VIII power subject only to negative procedure. But, though the mechanism used is amendment of the Act itself, the legal effect that the order can have is limited and clearly spelt out in the Bill. This power is explained in paragraphs 43 to 51 of the memorandum, and we are satisfied with the reasons given for the negative procedure at paragraph 51.

Clause 16(1) – Transfer of Functions

5. An order under clause 16(1) can transfer all or some of the Adjudicator's functions to another public body (undefined). The power is balanced by the affirmative procedure; and the Adjudicator's functions are specific under the Bill. We are satisfied with this approach.

¹ <http://www.parliament.uk/documents/DPRR/2012-13/Delegated-Powers-Memo-25-05-12.DOC>

Clause 16(2) – Abolition

6. Clause 16(2) enables an order to abolish the Adjudicator; and this in effect reverses the whole purpose of the Bill. The circumstances in which abolition may be effected are set out in clause 16(2)(a) to (d) and described in paragraphs 66 to 70 of the memorandum. Orders under 16(2)(a) and (b) are subject to affirmative procedure, and those under 16(2)(c) and (d) to negative procedure. The orders may all amend or repeal not just the Act itself, but also any other enactment, even where the order is subject only to negative procedure.
7. This provision illustrates the unusual nature of this Bill. If the Competition Commission revoked the Order containing the Groceries Code, the Act would serve no purpose, so it could be repealed. There would be no great point of principle involved in its repeal, for the Act is wholly dependent on the Order. But if the Secretary of State decides that it is no longer necessary to have an adjudicator, even though there is still a Groceries Code, then there is a point of principle at stake and the order is rightly made subject to affirmative procedure. We considered whether this goes far enough and whether the policy and repeal of the Act in these circumstances should be effected by another Bill. But we are satisfied that the affirmative procedure is appropriate given the overall purpose of the Bill. Accordingly, we make no recommendation on clause 16(2).

Clause 16(4) – Changes to the Groceries Order

8. Clause 16(4) contains another Henry VIII power subject to negative procedure only. Since the Bill is entirely dependent on the Competition Commission's Order (see, for example, the definitions in clause 22) it is inevitable that changes to the Order may necessitate changes to the Bill (once enacted). Of course, the changes might mean increasing the scope of the Act considerably, but since its whole purpose is to give teeth to whatever the Order provides, in the circumstances we are satisfied that the negative procedure is sufficient.

DRAFT LEGISLATIVE REFORM (ANNUAL REVIEW OF LOCAL AUTHORITIES) ORDER 2012

Introduction

9. This Legislative Reform Order (LRO) was laid on 10 May, together with an Explanatory Document (ED), by the Department for Education (DfE). It was made under section 1 of the Legislative and Regulatory Reform Act 2006 (the LRA) which allows a Minister of the Crown to make provision by order for removing or reducing any burden resulting directly or indirectly from legislation.
10. Section 138 of the Education and Inspections Act 2006 (“the Act”) requires Her Majesty’s Chief Inspector of Education, Children’s Services and Skills to review annually the overall performance by local authorities in England of functions to which Chapter 4 of Part 8 of the Act applies. As listed in section 135(1) of the Act, these functions include education and social care functions of local authorities towards children. Article 3 of the LRO repeals section 138 of the Act; Article 4 makes consequential amendments as a result of the repeal.

Overview of the proposal

11. The Chief Inspector is required under section 138 of the Act to undertake, in each financial year, a review of the performance of each top-tier local authority in England in relation to certain children’s services functions and related activities. After conducting the review, the Chief Inspector must award each local authority a performance rating; he or she fulfils this duty through Ofsted’s annual rating process, known as its annual children’s services assessment (“CS assessment”).
12. The ED states that the CS assessment is “a remnant of a more centralised local government performance management framework which is not consistent with the current Government’s direction of travel: away from central regulation and bureaucracy, in favour of localism and local democratic accountability”. The CS assessment formed part of the previous Government’s Comprehensive Area Assessment (CAA), introduced in April 2009, which sought to assess how well communities were being served by their local public services, including councils, police, health, and fire and rescue services. The CAA process was led by the Audit Commission, which drew together separate assessments from other inspectorates including Ofsted.
13. The ED states that the CAA was abolished by the current Government in May 2010; and that on 9 December 2010, the Parliamentary Under-Secretary of State for Children and Families announced the intention to repeal the requirement on Ofsted to conduct an annual assessment of local authority children’s services, stating that Government would “seek to repeal this legislation at the earliest opportunity”.
14. DfE states that removing the requirement to undertake annual CS assessments would eliminate an unnecessary regulatory burden on both Ofsted and local authorities, and that the repeal would bring a cost saving to the public purse of between £1.3m and £1.7m per annum. However, the Department adds that the repeal would not affect Ofsted’s other inspection

activity, and that Ofsted is putting in place new, universal, child-focused inspection regimes for local authority services for the protection of children and local authority fostering, adoption and looked after children's services between May 2012 and early to mid 2013. DfE states that Ofsted has a separate duty to make an annual report to the Secretary of State under section 121 of the Education and Inspections Act 2006. Such annual reports must also be laid before Parliament.

Extent

15. The Chief Inspector's functions under Chapter 4 of Part 8 of the Act of inspecting and reviewing performance of local authorities apply only to local authorities in England. The repeal of section 138 of the Act accordingly would not have any impact outside England. DfE states that the Government are satisfied that there are no implications for the devolved administrations resulting from the repeal.

Role of the Committee

16. The Committee's role is described in its first Report on an LRO:
- “When considering an LRO, our role is not to consider in depth the policy in the draft order, but to consider whether it is ‘appropriate’ to be made under the 2006 Act; if so, whether it meets the tests in the 2006 Act; and to consider the matters considered for other instruments by the Joint Committee on Statutory Instruments.” (1st Report, Session 2007-08, paragraph 39)

Tests in the Legislative and Regulatory Reform Act 2006 (LRRRA): assessment of the proposal

17. The relevant tests in the LRRRA are that:
- the proposal removes a burden (section 1).
 - various pre-conditions have been met (section 3):
 - a. the policy objective intended to be secured by the provision could not be satisfactorily secured by non-legislative means;
 - b. the effect of the provision is proportionate to the policy objective;
 - c. the provision, taken as a whole, strikes a fair balance between the public interest and the interests of any person adversely affected by it;
 - d. the provision does not remove any necessary protection;
 - e. the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise;
 - f. the provision is not of constitutional significance.
 - there has been proper consultation on the proposal (section 13)

Section 1 test – removal of a burden

18. The LRO would remove a burden from Ofsted as it would remove the financial costs arising from the carrying out of the Chief Inspector's functions

under section 138, by freeing up resources within the inspectorate to be used for other inspection activity. DfE comments that this would help Ofsted meet the 30% reduction to their budget put in place through the spending review. Section 1(4) of the LRA prohibits the making of an LRO “in relation to any burden which affects only a Minister of the Crown or government department, unless it affects the Minister or department in the exercise of a regulatory function”. It is not clear that the function of the Chief Inspector under section 138 is a regulatory function within the meaning of the LRA², nor is there anything in the ED to suggest that DfE considers it to be such. Since Ofsted is a non-Ministerial department, the issue therefore arises of whether the LRO removes any burden from any other bodies.

19. DfE has said that the LRO would also remove a financial cost from the local authorities who are subject to reviews under section 138. The extent of these cost savings is unclear. Paragraph 2.7 of the ED says: “there are also likely to be some small cost savings in local authorities which will no longer have to verify that they agree with Ofsted’s annual assessment and enter into an appeals process, if necessary”. While DfE officials have stated that it is not possible to quantify the savings to local authorities, they have pointed to comments made by consultees representative of local government: the Association of Directors of Children’s Services said that “the burden on local authorities is probably unquantifiable but is not insignificant”; the Local Government Association said that the proposals would reduce burdens “in line with the Government’s drive to reduce inspection burdens on local authorities”; and the Society of Local Authority Chief Executives made a similar point. Although these comments are the only evidence presented that the LRO meets the statutory test of removing a burden, on balance, we are satisfied that the test in section 1 is met.

Section 3 tests – the preconditions

20. The ED makes it clear that non-legislative means could not be used to achieve the LRO’s objective, since the only way to remove the Chief Inspector’s duty to carry out the annual review and rating of local authority children’s services is to repeal section 138 of the Act.
21. The only effect of the repeal of section 138 of the Act would be to remove the requirement on the Chief Inspector to carry out the annual assessment; other inspection activity would continue, for example under section 136 of the same Act. DfE states that the proposed change is therefore proportionate to the policy objective.
22. DfE states that, while the CS assessment was originally intended to provide the public with an independent judgement of their local council’s performance in respect of children’s services, there is no evidence to suggest that the public engage with the annual ratings; moreover, the assessments are not valued by local authorities themselves. For this reason, DfE considers that the fair balance test is met.
23. The “necessary protection” test is particularly relevant to this LRO. DfE states its view that the proposal will not remove any necessary protection. It explains that wider local authority children’s services inspection will be

² See section 32(1) of the LRA for the definition of “regulatory function”.

unaffected by the repeal of the CS assessment requirement; that Ofsted will continue to inspect and make judgements on the quality of local authority child protection, safeguarding, early intervention and looked after children's services; and that Ofsted will also continue to inspect other services that are covered within the CS assessment process. We note that the inspection function under section 136 of the 2006 Act is a power rather than a duty, as is the case with the review function under section 138.

24. DfE states its view that the proposal would not prevent anyone from exercising an existing right or freedom; and also that the provisions of the draft order are not constitutionally significant.

Consultation

25. DfE has provided information about the consultation exercise (targeted at key stakeholder groups in the local government sector and third sector organisations) which ran for 8 weeks to 18 March 2012. 27 responses were received: 21 responses from local authorities, 3 from local authority representative bodies, 2 from children's charities and 1 from Ofsted
26. DfE states that 26 out of 27 consultation responses directly answered this question of whether they agreed with proposal to repeal section 138 of the Act, and that all 26 respondents did so agree. In the case of all the other questions included in the consultation exercise, a majority of respondents gave positive responses. We noted in particular the response from the NSPCC, which said, among other things, that the NSPCC was "not aware of any evidence to show that the annual assessment process had had any impact on the protection of children . . . it is also not clear that the annual assessment is a meaningful exercise that drives improvement for the majority of local authorities". The NSPCC therefore supported the proposal, provided that general inspection arrangements were "robust and child-focussed".

Legal considerations ("JCSI"-type scrutiny)

27. There is nothing about the drafting of the LRO which we draw to the House's attention.

Appropriateness

28. As explained in paragraphs 13 and 14 above, it is difficult to judge the balance, between Ofsted and local authorities, of the reduction in burdens that would result from the LRO. However, given the clear statements of support from local authority representatives, we agree that the LRO is appropriate.

Parliamentary procedure

29. The 2006 Act allows the Government to propose the negative, affirmative or super-affirmative procedure for each LRO, with either House allowed to upgrade the procedure if it so wishes within 30 days from the date on which the instrument was laid.
30. The instrument is proposed as a negative instrument. We are concerned whether this would provide the appropriate level of Parliamentary scrutiny. We have in the past taken the view that a compelling case must be made for

any Order under the 2006 act to be subject to the negative procedure. Only one LRO has been made where we did not require it be upgraded from the negative procedure. In that case we considered the negative procedure was acceptable because the change to the legislation was “exceptionally modest”.³ In this case, while the proposal is supported by consultees (as is the proposed negative procedure), the proposed change is of some significance, inasmuch as it will remove a substantive duty from the Chief Inspector. By removing the duty annually to review overall performance by local authorities, it leaves only a power on the Chief Inspector to carry out inspections of overall performance. It therefore becomes a matter for the discretion of the Chief Inspector to decide whether and how this inspection function is to be exercised (although the Chief Inspector can be required to carry out an inspection by the Secretary of State). In the circumstances, we recommend the affirmative procedure.

Conclusion

31. On balance, we agree that the Draft Order meets the tests in the 2006 Act, but for the reasons given in this Report we recommend the affirmative procedure.

³ There has been another LRO which the Committee did not recommend to be upgraded (the Legislative Reform (Civil Partnerships) Order 2010) although in that case the order appears never to have been made.

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.

There were no interests declared at the meeting on the 23 May.

Attendance:

The meeting on 23 May was attended by Baroness Gardner of Parkes, Lord Haskel, Lord Mayhew of Twysden, Lord Soley and Baroness Thomas of Winchester.