HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

11th Report of Session 2012–13

Growth and Infrastructure Bill

Marine Navigation (No. 2) Bill

European Union (Croatian Accession and Irish Protocol) Bill: Government Response

Enterprise and Regulatory Reform Bill Part 6: Government Response

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The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session and has the following terms of reference:

(i) 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;

(ii) To report on documents and draft orders laid before Parliament under or by virtue of:

- (a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,
- (b) section 7(2) or section 15 of the Localism Act 2011, or
- (c) 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; and

(iii) To report on documents and draft orders laid before Parliament under or by virtue of:

- (a) section 85 of the Northern Ireland Act 1998,
- (b) section 17 of the Local Government Act 1999,
- (c) section 9 of the Local Government Act 2000,
- (d) section 98 of the Local Government Act 2003, or
- (e) section 102 of the Local Transport Act 2008.

Membership

The members of the Delegated Powers and Regulatory Reform Committee are:
Baroness Andrews
Lord Blackwell
Rt Hon Lord Butler of Brockwell
Baroness Gardner of Parkes
Lord Haskel
Lord Marks of Henley-on-Thames
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. Interests related to this Report are in Appendix 2.

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

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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 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

Eleventh Report

GROWTH AND INFRASTRUCTURE BILL

1. This Bill deals with a large number of individual topics. There is a memorandum from the Department for Communities and Local Government on the delegated legislative powers in the Bill.[1] There are four items that we wish to draw to the House's attention.

Clause 1 – Planning applications direct to Secretary of State

2. The first item is not mentioned in the memorandum, quite possibly because the power is not seen as legislative in the light of how the Government intend to use it. But because of how the Bill is framed, it could be exercised in a way which amounts in practice to legislating.

3. Paragraphs 13 to 16 of the memorandum address the delegated legislative power at new section 62A(1)(b) of the Town and Country Planning Act 1990. That is a power to prescribe by order subject to negative procedure the descriptions of development for which, under the new section, applications may be made to the Secretary of State rather than the local planning authority. That power seems unexceptional. Paragraph 13 of the memorandum says that "Persons wishing to seek planning permission for such developments will, if their local planning authority is designated as poorly performing, be entitled to apply direct to the Secretary of State." But that is not what the Bill says – there is no limitation to poorly performing authorities.

4. The new arrangements apply to any local planning authority that is "designated by the Secretary of State for the purposes of this section" (section 62A(1)(a)). The Bill specifies no criteria for designation; nor, indeed, does the Bill provide for the criteria to be set out in an instrument subject to a Parliamentary procedure. They must merely be published (section 62A(8)(a) and (b)). Accordingly, though each local planning authority might be designated individually, the power may be used by this or a future Government to designate a significant proportion of local planning authorities, based on criteria which have no relevance to poor performance. Yet there would be no Parliamentary control over the criteria or the designations. **We draw this to the attention of the House.**

Clause 6(4): Repeals

5. Clause 6(1) inserts two new sections into the Town and Country Planning Act 1990. The new sections ensure the modification or discharge of a planning obligation to provide affordable housing if the requirement makes a development not economically viable. The memorandum explains that the new sections are intended to apply only in current economic circumstances, and the implication is that when the economy recovers the new sections will not be required.

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

6. Because of this, the Bill proceeds by enabling an order subject to affirmative procedure to repeal the new sections. The memorandum acknowledges that this is relatively unusual. We do not regard this as inappropriate, but the default position is that the new sections continue in force, which seems counter-intuitive if the intention is that the sections be temporary. An alternative way of providing for the new sections to be of only limited duration (but with the default position the other way round) is to amend the Bill by including a sunset clause, which could be combined with a power to extend the sunset period by order subject to affirmative procedure. **We draw this to the attention of the House.**

Clause 14: Town and village greens

7. Section 15 of the Commons Act 2006 gives certain rights to apply to register land as a town or village green. Clause 14 inserts a new section 15C into the 2006 Act. This says that the right to register in England does not apply on the occurrence of a "trigger event" unless and until there is a "terminating event". There is a table of trigger events and terminating events on pages 46 to 49 of the Bill. These events are all related to development. For instance, the publicising of an application for planning permission is a trigger event and, if it is refused, the expiry of rights to appeal against or challenge the refusal is a terminating event.

8. The effect of new section 15C is therefore to remove, at least for a limited time, the right conferred by section 15(1) of the 2006 Act. So the trigger and terminating events are highly significant. New section 15C(5) contains a Henry VIII power enabling the Secretary of State, by order subject only to negative procedure, to amend the Schedule of trigger or terminating events, though any new trigger or terminating event must relate to development. Having considered the points drawn to our attention at paragraph 64 of the Department's memorandum, we were not persuaded that a sufficient case had been made for negative procedure. **We recommend that orders under new section 15C(5) should be subject to affirmative procedure.**

Clauses 22 and 23: Special Parliamentary procedure

9. Statutes sometimes provide for orders which authorise the compulsory purchase of certain types of land to be subject to special Parliamentary procedure (see, for example, paragraph 14 below). This can, if there are petitions against the order, lead to Select Committee proceedings, rather as with a private Bill.

10. Clauses 22 and 23 are not mentioned in the memorandum, and it is reasonable for the Department not to regard as legislative orders authorising (and only so far as they authorise) the compulsory purchase of particular bits of land. An explanation of changes made by these clauses in certain cases may be found at paragraphs 205 to 214 of the Explanatory Notes. There is nothing in clauses 22 and 23 that we wish to draw to the attention of the House.

MARINE NAVIGATION (NO. 2) BILL

11. As this private member's Bill has Government support, there is a memorandum from the Department for Transport on the delegated powers in the Bill.[1] There is an issue on clause 6 of the Bill.

Clause 6: Harbour closure orders

12. Clause 6 inserts six new sections into the Harbours Act 1964. New section 17A enables the Secretary of State, by order normally subject to no Parliamentary procedure, to make harbour closure orders. These are orders which relieve a harbour authority of all or some of its statutory functions in respect of a harbour. The order can normally be made only on the application of, or with the consent of, the harbour authority. New section 17D applies to closure orders the procedural provisions already in the 1964 Act for harbour revision orders. These procedures provide an opportunity for the public to object to a proposed order and may involve an inquiry.

13. New section 17F enables a closure order to amend or repeal an enactment of local application and to disapply or modify the application of any other enactment, including a Public General Act. In these circumstances, one might have expected the orders to be subject to some level of Parliamentary control. Paragraph 23 of the memorandum explains that closure orders are considered to be similar to revision orders, for which there is no Parliamentary control either.

14. When the 1964 Act was enacted, revision orders could amend or repeal local enactments. The express power to modify or disapply other enactments was inserted in 1992, before the establishment of this Committee. Revision orders have never been subject to the negative procedure prescribed by the Statutory Instruments Act 1946, but they were originally all subject to special Parliamentary procedure under the Statutory Orders (Special Procedure) Act 1945, which gives either House the opportunity to annul the order if there are petitions against it. Because of changes made in 1981 and 1992 by Act of Parliament, and by regulations in 1999, harbour revision orders in England can still be subject to special Parliamentary procedure, but only if they authorise the compulsory acquisition of, or of rights over, National Trust land (to which the National Trust objects) or commons, open spaces etc., and then only to the extent that they do so. So for practical purposes the memorandum is right to describe these orders generally as being subject to no Parliamentary scrutiny. Accordingly, over the years, the power to override statute has increased, yet the opportunity for involvement of Parliament in the legislative and policy aspects of the orders has evaporated. Those aspects can be considerable, even though the orders are of local application.

15. We doubt that the lack of Parliamentary scrutiny for revision orders is appropriate today. If we accepted the view that consistency should prevail and that closure orders should be treated in the same way as revision orders, we would be endorsing the extension of arrangements that we do not consider satisfactory. The procedure for revision orders is not a matter before us. But that for closure orders is, and the case for a Parliamentary procedure

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

for those orders seems at least as strong as that for revision orders. We accept that a case may be made for consistency (ie. no Parliamentary procedure) but **we consider that in principle all harbour closure orders should be subject to a form of Parliamentary control and that the negative procedure would be sufficient.**

EUROPEAN UNION (CROATIAN ACCESSION AND IRISH PROTOCOL) BILL: GOVERNMENT RESPONSE

16. We considered this Bill in our 10th Report (HL Paper 93). The Government have now responded by way of a letter from The Rt Hon David Lidington MP, Minister for Europe, printed at Appendix 1.

ENTERPRISE AND REGULATORY REFORM BILL PART 6: GOVERNMENT RESPONSE

17. We considered this Bill in our 10th Report (HL Paper 93). The Government have now responded by way of a letter from The Viscount Younger of Leckie, Parliamentary Under Secretary of State for Business, Innovation and Skills printed at Appendix 2.

APPENDIX 1: EUROPEAN UNION (CROATIAN ACCESSION AND IRISH PROTOCOL) BILL: GOVERNMENT RESPONSE

I am writing in response to the Committee's 10th Report of Session 2012-13 in which the Committee recommends that all regulations made pursuant to Clause 4 (freedom of movement) of the European Union (Croatian Accession and Irish Protocol) Bill be subject to affirmative procedure.

As drafted, the Bill would require that the initial regulations made pursuant to clause 4 be subject to the affirmative resolution procedure. This would provide Parliament with the opportunity to give or deny approval but not to amend the regulations. Any subsequent regulations would be subject to either the negative or the affirmative resolution procedure.

I consider these arrangements to be proportionate. The initial regulations made pursuant to clause 4 will set out in detail the scheme of restrictions which are to be applied to Croatian nationals. They will, for example, set out the circumstances in which a Croatian national may be authorised to take employment and the penalties which may be applied for any breach of the restrictions, It is clearly appropriate that there should be a presumption that Regulations setting out a broad scheme of controls and penalties should require the positive approval of the House.

Any subsequent Regulations pursuant to clause 4 are, by contrast, likely to have only a limited purpose, The circumstances in which we would expect the regulations to be amended, and taking the equivalent regulations applied to Bulgarian and Romanian nationals as a precedent, are twofold, Firstly, the regulations may be amended to extend the period during which they apply, The initial regulations will provide for their application for an initial period of five years, Under the terms of the Accession Treaty, transitional measures may be extended for a further two years if there is serious labour market disturbance, or the threat of such, The Government would expect to review the labour market situation at that point (and, as with the Bulgarian and Romanian restrictions, may well commission the Migration Advisory Committee to provide advice on the case for extending the restrictions). It is, of course, possible that amending regulations might be made with the purpose of curtailing the period during which the initial regulations are in force, but this is unlikely. The measures applied to the countries which acceded in both 2004 and 2007 have been applied for as long as it is legally possible to do so.

Secondly. it may become necessary to make technical adjustments to the regulations to, for example, adjust the circumstances in which work authorisation may be given to reflect particular labour market circumstances or to bring the regime applied to Croatian nationals into line with the regime applied to third country nationals where subsequent changes to the Immigration Rules applied to the latter would otherwise provide the latter with more generous treatment. In the case of the regulations applied to Bulgarian and Romanian nationals, there have been subsequent amendments to the original regulations. But these have been to address technical issues such as bringing the arrangements for students undertaking employment during vacation, or vocational employment linked to their studies, into line with the treatment extended to third country nationals, and to makes changes to the arrangements for family members of Bulgarian and Romanian workers (which the Accession Treaty required be lifted once the restrictions had been in force after two years).

These were matters concerned with responding, as they arose, to legal issues as to the proper administration of the restrictions, rather than matters pertaining to their general shape and force. It does not seem essential that amendment of the regulations to deal with these types of issue should require the affirmative resolution procedure. The negative procedure would nevertheless allow for the possibility that a Member might pray against any subsequent regulations if their effect was judged to amount to significant policy change.

The Rt Hon David Lidington MP

Minister for Europe

December 2012

APPENDIX 2: ENTERPRISE AND REGULATORY REFORM BILL PART 6: GOVERNMENT RESPONSE

I am grateful for the Delegated Powers and Regulatory Reform Committee's Tenth Report of Session 2012-13, published on 15 November 2012, which considers Part 6 of the Enterprise and Regulatory Reform Bill. We thank the Committee for their helpful observations on these powers.

The Report made recommendations for powers brought about in clause 66 (exceptions to copyright and performance rights), clause 67 (reduction of transitional protection), clause 68 and schedule 21 (copyright, and performers' rights) and clause 74 (equal pay audits). We have carefully considered the Committee's recommendations on these points below.

Clause 67 - power to harmonise the duration of copyright in transitional cases (unpublished works subject to the 2039 provision)

Clause 67 amends the Copyright, Designs and Patents Act 1988 (CDPA) to enable the Secretary of State to reduce the duration of copyright for certain works that were subject to the transitional provisions contained in Schedule 1 to the CDPA. The transitional provisions provide that certain unpublished works, created before 1 August 1989, remain in copyright until 2039 at the earliest. The Committee considered this power to be wide, unclear, and asked for the provision of greater safeguards for private rights.

We accept that the power should be clarified. As a matter of general law, when exercising this power, the Secretary of State would not be able to reduce the period of copyright protection below the period of protection provided for by the Term Directive 2006/116/EC. However, as the Committee has made clear, the scope of the power should be clarified.

The Term Directive specifies different terms for different types of work. For example, an unpublished literary work must have a minimum term of copyright duration of the life of the author plus 70 years or, where the author is not known, 70 years from the date the work was created. The proposed power will only apply to unpublished works which under the transitional provisions currently enjoy a longer term of copyright than this. The only literary works that could have their terms reduced will be those where the known author died before 1969, or in the case of unknown authors, where the work was created before 1969.

We have also agreed that, as the main issue is with unpublished works, the reference to published but anonymous or pseudonymous works may be removed from the scope of the power.

Therefore we will bring forward amendments at Committee stage to

a) clarify that the power to reduce the term of copyright protection is subject to the protections provided by the Term Directive; and

b) remove the references to 'published but anonymous or pseudonymous' works.

Clause 68 and Schedule 21 -orphan works; Extended Collective Licensing; codes of practice for collecting societies

Clause 68 amends the Copyright, Designs and Patents Act to provide for the licensing of orphan works and the authorisation of voluntary extended collective

licensing for specified works or rights. Schedule 21 inserts Schedule A 1 into the Copyright, Designs and Patents Act to enable the Secretary of State to make provision for the regulation of licensing bodies.

The Committee considered that at least the first Regulations under new sections 116A and 1168, under paragraphs 1 (codes of practice) and 5 (sanctions) of new Schedule 1A, and under new paragraphs 1A and 1 B inserted by paragraph 5 of Schedule 21, should require the affirmative procedure.

We accept the Committee's recommendation and will bring forward amendments at Committee stage to give effect to it. These will go further than the minimum recommended so that all Regulations made under these powers -and not just the first Regulations- will require the affirmative procedure.

Schedule 21 -Backstop power for codes of practice for licensing bodies

Schedule 21 provides that, where a licensing body fails to self-regulate effectively, the Secretary of State will have the power to require the body to adopt a suitable code of practice or, failing that, put in place a suitable code for it. The code must comply with the criteria to be specified in regulations.

The Committee considered there to be insufficient Parliamentary oversight of the power to put in place a suitable code for a licensing body. In particular, it opined that approval of a 'default' code should attract a Parliamentary procedure.

While we believe there is sufficient Parliamentary oversight intended in the proposed scheme, and can confirm that there will not be such a thing as a 'default' code, we accept that this could be better reflected in the primary legislation. We will therefore bring forward amendments at Committee stage which requires the following steps:

a) the regulations may provide for a licensing body to adopt a code of practice that complies with criteria specified in the regulations;

b) if the licensing body fails to adopt a code which complies with the criteria specified in the regulations, then the Secretary of State may approve a code for that licensing body;

c) the Secretary of State may only approve a code which complies with the criteria specified in the regulations; and

d) once a code has been approved by the Secretary of State for a licensing body then the code has effect as the code adopted by that licensing body.

Schedule 21. para 7(3)- The role of guidance in codes of practice

Schedule 21, para 7(3) provided the Secretary of State with a power to impose requirements in a code of practice by reference to guidance. The Committee drew attention to this paragraph on the grounds that provisions that must be complied with on pain of penalty ought to be susceptible to some form of Parliamentary control.

This provision was included as it was thought helpful to refer to the Government's minimum standards for collecting societies, which have the status of guidance. However, these minimum standards are relevant for those collecting societies that are self-regulating rather than those few that may fall under the backstop power. After further consideration, we no longer consider it necessary to make reference to guidance.

Clause 74 - Equal pay audits

We are still considering the Committee's recommendations for these powers and will respond separately on these issues shortly.

The Viscount Younger of Leckie

Parliamentary Under Secretary of State for Business, Innovation and Skills

January 2013

APPENDIX 3: MEMBERS AND DECLARATIONS 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 in respect of the following Bill at the meeting on 16 January 2013:

Growth and Infrastructure Bill:

Baroness Andrews as Chairman of English Heritage.

Lord Blackwell as Chairman of Interserve, a construction company.

Attendance:

The meeting on 16 January 2013 was attended by Baroness Andrews, Lord Blackwell, Baroness Gardner of Parkes, Lord Marks of Henley-on-Thames, Lord Mayhew of Twysden, Baroness O'Loan, Lord Soley and Baroness Thomas of Winchester.