HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

2nd Report of Session 2012–13

Crime and Courts Bill [HL]

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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".

Membership

The members of the Delegated Powers and Regulatory Reform Committee are:
Baroness Andrews
Lord Blackwell
Rt Hon Lord Butler of Brockwell
Lord Carlile of Berriew QC
Baroness Gardner of Parkes
Lord Haskel
Rt Hon Lord Mayhew of Twysden QC DL
Baroness O'Loan
Lord Soley
Baroness Thomas of Winchester (Chairman)

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Contacts for the Delegated Powers and Regulatory Reform Committee

Any query about the Committee or its work should be directed to the Clerk of the Delegated 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.

SECOND REPORT

CRIME AND COURTS BILL [HL]

Introduction

1. This Bill covers a number of different topics. Though there are only 31 clauses, there are 16 Schedules. Some very important material is in the Schedules. For example, clause 18 introduces Schedule 12, so that all the significant provisions about judicial appointments are to be found on pages 167 to 201 of the Bill.

2. There is a memorandum from the Department for Justice on the delegated powers in the Bill[1]. There are Henry VIII powers at clauses 2 and 29; Schedule 3, paragraph 30; and Schedule 5, paragraphs 27 and 28. For the most part the powers seem to be appropriately delegated and subject to an appropriate level of Parliamentary scrutiny, but there are eight provisions that we wish to mention in this Report.

Clause 2 – National Crime Agency functions

3. Clause 1 establishes the National Crime Agency (NCA), and confers on it functions which include a crime-reduction function and a criminal intelligence function. But, in addition, clause 2 enables the Secretary of State by order to make provision about NCA counter-terrorism functions (which can include conferring any such functions). In particular, paragraph 9 of the memorandum explains that a forthcoming review might conclude that counter-terrorism policing functions should be conferred on the NCA.

4. The idea of adding to a statutory body's functions by subordinate legislation subject to a Parliamentary procedure is well established. Although "NCA counter-terrorism functions" is not defined, it is reasonably clear what sort of functions are being described. No doubt in view of the significance of the subject-matter clause 2(5) applies what is described as a "super-affirmative" procedure set out in Schedule 16. This procedure is clearly based on the procedure in section 11 of the Public Bodies Act 2011, which is described in the Explanatory Notes to the Act as an "enhanced affirmative"[2] procedure and not a "super-affirmative" procedure (as found in Part 1 of the Legislative and Regulatory Reform Act 2006). Drawing on an existing statutory procedure is preferable to creating a new procedure although the enhanced affirmative procedure in this Bill differs from that in the Public Bodies Act in that there are no "statutory tests" in the Bill. This difference can be explained by the provision in clause 2 which, by sufficiently circumscribing the scope of the power, obviates the necessity for statutory tests.

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

[2] Explanatory Notes to the Public Bodies Act 2011, paragraph 36

Schedule 10, paragraph 1 – Family court legal advisers

5. Paragraph 1 of Schedule 10 inserts new sections 31B to 31Q into the Matrimonial and Family Proceedings Act 1984. These are about the new family court, which has as its judges all levels of judiciary currently able to deal with family proceedings in the High Court, county courts and magistrates' courts. New section 31O enables a person to sit as a legal adviser to a family court only if he or she is a Justice's clerk. These advisers will be needed because not all the judges of the family court will be legally qualified (they include lay justices).

6. New section 31O(4) enables the Lord Chancellor, with the agreement of the Lord Chief Justice, and after consulting the Family Procedure Rules Committee, to make rules enabling functions of the family court, or of a judge of the family court, to be carried out by a legal adviser, and for functions of a legal adviser to be carried out by an assistant legal adviser. The rules are subject to negative procedure only.

7. This power is similar to that in section 28 of the Courts Act 2003 in relation to delegation to Justices' clerks. But that power is limited to delegating things which can be done by a single Justice of the Peace. **Paragraph 106 of the memorandum explains that the power in the Bill may be used quite widely and we therefore recommend that at least the first rules made under new section 310(4) should be subject to affirmative procedure.**

Schedule 12, paragraph 5 – Supreme Court judges

8. Part 3 of the Constitutional Reform Act 2005 deals with the Supreme Court (the replacement for the House of Lords acting in a judicial capacity). In particular sections 25 to 31 deal with the appointment of its judges. If there is a vacancy for the President, the Deputy President or a judge of the court, the Lord Chancellor must convene a selection commission to select a person to be recommended for appointment. Schedule 8 to the 2005 Act specifies who must be a member of the commission (with special rules where the President's or Deputy President's place is unfilled), who is disqualified and who chairs the commission. Sections 28 to 31 set out in some detail what happens after a commission has made a selection, including provisions about the circumstances in which, and grounds on which, the Lord Chancellor may reject a selection or require its reconsideration.

9. Paragraph 7 of Schedule 12 to the Bill omits many of these detailed provisions, both about the selection commissions and about the process of selection. The purpose of the Bill is that much of the detail relating to these matters that is currently in the 2005 Act will instead be contained in regulations subject to the affirmative procedure. The reason given at paragraph 165 of the memorandum for this change is the need for flexibility. New section 27A is inserted into the 2005 Act by paragraph 5 of Schedule 12 and contains the power to make the regulations. There is a duty on the Lord Chancellor to make provision about membership of selection commissions and the selection process "by regulations made with the agreement of the senior judge of the Supreme Court". (Though the memorandum does not say what will happen if the Lord Chancellor and the senior judge cannot agree, we presume the provision in the Bill will not be commenced until there is agreement.) New section 27A(2) sets out an illustrative list of things for which the regulations may in particular provide. There is a consultation requirement at new section 27A(3).

10. If the Bill is enacted, the position as respects a selection commission will broadly be this. Primary legislation will specify:

    - the circumstances in which the Lord Chancellor must convene a selection commission;
    - the minimum number of members (five) and that it must be an odd number;
    - the category of person that a commission must and may not include (new section 27(1B) to (1D) on page 168-9 of the Bill).

11. If the Bill is enacted, the position as respects the selection process will broadly be this. Primary legislation will still specify:

    - that selection must be on merit;
    - that the qualification in section 25 of the 2005 Act as to holding judicial office, etc must apply;
    - that the commission must ensure that between them the judges will have knowledge and experience of the law of each part of the UK.

12. In addition, new section 27A(1)(c) will require the regulations to ensure that at some point in the process a selection will have to be accepted by or on behalf of the Prime Minister or Lord Chancellor. But how that point will be reached, including the circumstances in which, and the grounds on which, an earlier selection may be rejected, will be for the regulations. (Because the bill itself provides that the Lord Chancellor may be a member of a commission for selecting a President of the Court, new section 27A(2)(d) does not enable the regulations to provide for rejection by the Lord Chancellor when he himself has been a member of the Commission.)

13. The House will wish to consider carefully a combination of provisions which between them remove some provisions currently in an Act into regulations. Before 2005 there was little said in primary legislation about the selection process for any judicial office at all. In 2005, both the Supreme Court and the system for appointing its judges were new. This might partly account for the level of detail currently in the primary legislation. This Committee has often recognised that Parliament sometimes requires a higher level of control over something new than over something which is longer established. **We do not consider it inappropriate in principle for the primary legislation to specify the key points of principle, leaving the remainder to be dealt with by regulations subject to affirmative procedure. It is for the House as a whole to decide whether, as a matter of policy, the reasons given by the Government justify the change.**

Schedule 12, paragraphs 15 to 25 – Judicial Appointments Commission

14. Part 4 of the 2005 Act deals with judicial appointments (other than appointments to the Supreme Court). The Judicial Appointments Commission, or a panel of the Commission, is given the function of selecting a person to be appointed or to be recommended for a judicial appointment, if requested to do so by the Lord Chancellor. (But see paragraphs 19 to 25 below for changes to be made by this Bill.)

15. Part 1 of Schedule 12 to the 2005 Act sets out detailed provisions about the Commissioners. These include provisions about the numbers of members

overall, the number of judicial, lay and other members, conditions for selection as members, composition of selection panels of the Commission, what a panel must consider and maximum term of office. There is a power to amend some of the numbers by order subject to affirmative procedure.

16. The Bill proposes that these provisions be replaced by powers to make regulations subject to affirmative procedure which will cover this ground instead. These items will be in the primary legislation:

- those not holding judicial office must outnumber those that do;
- the chairman must be a lay member;
- membership must include holders of judicial office, practising or employed lawyers and lay members (but what is a "lay member" or "holder of a judicial office" will be defined in the regulations);
- a Commissioner must be appointed for a fixed period;
- provision for removal, including the grounds;
- power for the Lord Chancellor to pay salaries etc. and issue codes of conduct.

17. Subject to this, among the things left to regulations will be:

- numbers, maximum numbers or minimum numbers of commissioners or category of commissioner;
- eligibility for appointment;
- method of selection of people to be recommended for appointment;
- periods of appointment;
- cessation of membership if a member is no longer eligible for appointment.

18. We consider that the framework in the primary legislation (para 16 above) gives a sufficient indication of the composition and tenure of office of the membership to prevent the powers taken being inappropriately wide.

Schedule 12, paragraph 50(3) – Judicial appointments selection process

19. Sections 67 to 75 of the 2005 Act deal with the selection of the Lord Chief Justice, the Master of the Rolls and other heads of division of the High Court. Under section 69 the Lord Chancellor may make a request to the Judicial Appointments Commission for a person to be selected for a recommendation for appointment. Section 70 requires the Commission to appoint a panel who will determine the selection process to be applied, apply it and make a selection accordingly. Section 71 prescribes in some detail the composition of the panel. Sections 72 to 75 set out in detail the process to be followed between the panel making a selection and the actual recommendation for appointment; in particular they deal with the Lord Chancellor's ability to reject a selection.

20. The Bill repeals sections 71 to 75, but inserts (page 194 of the Bill) some provisions into section 70 about the composition of the panel.

21. The groups of sections in the 2005 Act dealing with the Senior President of Tribunals, ordinary judges of the Court of Appeal, puisne judges of the High

Court and other judicial offices listed in Schedule 14 to the 2005 Act (including circuit judges and district judges) reflect, broadly speaking, the provision in sections 67 to 75 in terms of the type of material contained in the Act itself. Under the Bill, all these other groups of sections are amended in a similar way.

22. The provisions of the sort currently in the 2005 Act that are removed will instead be the subject of regulations under new section 94C of the 2005 Act. These regulations are required to be made by the Lord Chancellor with the agreement of the Lord Chief Justice. The regulations are subject to affirmative procedure.

23. It is apparent from paragraphs 190 and 191 of the memorandum that the reason for the change is similar to that given in respect of the selection of judges of the Supreme Court – the wish for greater flexibility. As with the Supreme Court judges, the regulations will have to secure that at some point in the process the panel's or the Commission's selection will have to be accepted, but again, how that point is reached will be a matter for the regulations.

24. The regulations will make provision about the process to be applied where the Commission is requested to select a person for a recommendation or appointment, including the process to be applied by a selection panel under sections 70, 75B or 79 of the 2005 Act. They will also make further provision about the membership of panels, additional to that to be inserted into the 2005 Act by the Bill (page 194, line 21; page 195, lines 4 and 28).

25. As with the provisions about Supreme Court judges, we do not consider the structure of what is proposed inherently inappropriate, especially given that for so long these matters were not the subject of legislation at all. But we draw to the attention of the House that the change here is particularly significant because it is happening at the same time as the changes relating to the composition and functioning of the Commission (paragraphs 14 to 18 above). As with the powers in relation to Supreme Court judges, the House will wish to satisfy itself of the need for the flexibility sought in this Bill.

Clause 22 – Films etc. of court proceedings

26. Section 41 of the Criminal Justice Act 1925 prevents photographing or sketching in court any judge, juror, witness or party in civil or criminal proceedings. Section 9 of the Contempt of Court Act 1981 prevents the use of tape recorders in court without the leave of the court and playing recordings to the public.

27. Clause 22(1) enables the Lord Chancellor, by order subject to negative procedure made with the concurrence of the Lord Chief Justice, to prescribe visual or sound recordings to which sections 41 of the 1925 Act or section 9 of the 1981 Act, or both, do not apply (whether or not subject to conditions).

28. Paragraph 198 of the memorandum explains the initial use to which this power is intended to be put. This is to permit filming and broadcasting of the judgments and advocates' arguments in the Court of Appeal. It is said that filming or broadcasting of any parties or witnesses will not be permitted. But there is nothing to prevent the power being used in that way at some point in the future.

29. The memorandum suggests that if clause 22 is enacted, Parliament will have approved the principle of filming and broadcasting court proceedings. But that does not mean that it would not wish a high level of scrutiny to apply to an order setting out the extent to which it should be permitted. **So despite the fact that clause 22(3) leaves the court or tribunal with the final say in any particular case, we recommend the affirmative procedure should apply to orders under clause 22.**

Clause 23 – Non-custodial sentencing

30. The memorandum explains that this is not intended to reach the statute book and the Government acknowledge that this is not an appropriate delegation (paragraph 205 of the memorandum). **We note the commitment given that this clause will be removed from the Bill and we will consider any delegated powers proposed in any replacement clause or Bill brought forward. If replacement clauses are not brought forward before proceedings in this House are completed, the House might consider removing clause 23 from the Bill before it is sent to the House of Commons.**

Clause 29 – Consequential amendments

31. Clause 29 enables the Secretary of State or the Lord Chancellor to make consequential provision by order, and this extends to amending Acts. Paragraphs 216 and 217 of the memorandum explain that an order is subject to affirmative procedure if it amends an Act, and otherwise to negative procedure. We agree that this is appropriate but a small amendment to the Bill seems necessary to ensure that this is so for orders made by the Lord Chancellor.

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 29 May.

Attendance:

The meeting on 29 May was attended by Baroness Gardner of Parkes, Lord Haskel, Lord Mayhew of Twysden and Baroness Thomas of Winchester.