

HOUSE OF LORDS

Delegated Powers and Regulatory Reform

14th Report of Session 2012–13

Welfare Benefits Up-rating Bill
Succession to the Crown Bill
Enterprise and Regulatory Reform Bill:
Government Amendments
Antarctic Bill
Presumption of Death Bill
Mobile Homes Bill

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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
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

General Information

General information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at www.parliament.uk/about_lords/about_lords.cfm

Contacts for the Delegated Powers and Regulatory Reform Committee

Any query about the Committee or its work should be directed to the Clerk of the Delegated 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 200

Fourteenth Report

WELFARE BENEFITS UP-RATING BILL

1. This Bill requires the Secretary of State or (where appropriate) the Treasury to up-rate various welfare benefits by 1% by order in respect of the tax years 2014-15 and 2015-16. The Department for Work and Pensions (“DWP”) has prepared a memorandum, explaining the delegated powers in the Bill.¹ In fact, the entire substance of each of clauses 1 and 2 is to impose a duty to make an order; and clause 3(4) confers powers to make commencement orders. None of the order-making powers is subject to a Parliamentary procedure.
2. Clause 1 requires the Secretary of State (or, in the case of child benefit, the Treasury) to make an order that up-rates the sums listed in paragraph 1 of the Schedule by 1%. Clause 2 imposes the equivalent duty on the Treasury in relation to the up-rating of various amounts listed in paragraph 2 of the Schedule in connection with working tax credit and child tax credit. In each case, the duty is disapplied where, on a review of the general level of prices in the UK, it is found that prices have not increased or have increased by less than 1% (clauses 1(5) and 2(4)). In the case of clause 1, the order must give effect to the increases within the period specified in subsection (2).
3. We considered whether it was appropriate that orders prescribing rates of welfare benefits should be subject to no Parliamentary control, but we observe that this Bill leaves the Secretary of State and the Treasury with very little discretion about what the orders may provide for. Apart from the operation of the rounding power, and the dates on which increases are to take effect under clause 1, there seems to be no flexibility allowed by either clause in the provision that may be made. In view of that, we have concluded that there is little control that the House could usefully exercise in relation to either category of order, and so we do not find inappropriate the absence of a Parliamentary procedure for orders under the Bill.

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

SUCCESSION TO THE CROWN BILL

4. There is nothing in this Bill which we wish to draw to the attention of the House.

ENTERPRISE AND REGULATORY REFORM BILL: GOVERNMENT AMENDMENTS

5. We reported on this bill on 14 November 2012 and 12 December 2012 (9th and 10th Reports, HL Papers 64 and 93) in the present session. The Department for Business, Innovation and Skills (“BIS”) subsequently prepared an Addendum (dated 8th January 2013) to its earlier memorandum, to explain delegated powers in three New Clauses moved by the Government, and inserted in the Bill, at the Grand Committee’s final sitting on 31 January.² But the Addendum did not reach our office until the afternoon of 31 January itself; and the Department has since acknowledged that the Addendum should have been, but was not, submitted earlier. The first two of the three New Clauses, which now appear as Clauses 75 to 77 in the Bill as amended in Grand Committee, contain delegated powers.
6. The first New Clause (now clause 75) enables a duty to be imposed by regulations on certain suppliers of goods or services to provide “customer data” to customers (or third parties on their behalf) who request it. Subsection (2)(a) to (c) limit the scope of the power to suppliers of gas and electricity, mobile phone services and financial services by way of current account or credit card facilities. But paragraph (d) enables it to be extended to businesses providing goods or services of other descriptions, specified in the regulations. “Customer data” is defined in subsection (3). The regulations may also provide for the form in which data are to be provided, for charges to be made for the provision of the data, and for conditions to be satisfied before they are provided (subsections (4)-(6)). All powers under clause 75 attract the negative procedure, save for that conferred by subsection (2)(d) (to extend the meaning of “regulated person”), which is affirmative. We do not regard either these delegations, or the associated arrangements for Parliamentary control, as inappropriate.
7. The second New Clause (now clause 76) consists entirely of enabling powers. Regulations may provide for enforcement of the obligation under clause 75 by an “enforcer” identified by the regulations: that may be the Information Commissioner, but need not be. The enforcement provision may (but need not) include provision for an application to a court or tribunal, and for the issue and enforcement of compliance notices. The regulations may also confer powers of investigation on the enforcer, including powers of entry, search and seizure. Provision can also be made for co-ordinating enforcement functions between different enforcers, where the regulations provide for more than one. We were surprised (particularly in view of the power to include intrusive enforcement provision in the regulations) to see that they are to be subject only to the negative procedure.
8. Very little is said on page 3 of the Addendum in support of the general nature of these powers, or to explain why it is thought that more provision could not appear in the Bill. While explaining that the regulations could not impose criminal or financial penalties, nothing is said about the nature of the sanctions being contemplated, apart from an intention to follow “existing enforcement models”. The reference to Part 8 of the Enterprise Act 2002 did not seem to us to be a particularly useful model to rely on, because a good

² <http://www.parliament.uk/business/committees/committees-a-z/lords-select/delegated-powers-and-regulatory-reform-committee/bills-considered/>

deal of the enforcement provision is set out in Part 8 itself. Part 5 of the Data Protection Act 1998 (which we assume to be the other Act to which BIS meant to refer) does make provision about enforcement; but, again, a good deal of the provision appears on the face of the Act, and an entire Schedule is devoted to rights of entry and inspection.

9. We are not persuaded by the case which BIS seeks to make in the Addendum in support of the delegation of power in clause 76. **We therefore recommend that the Bill be amended at Report stage either to include much more provision about enforcement in the Bill itself, or to require the affirmative procedure to apply whenever the powers under this clause are exercised.**

ANTARCTIC BILL

10. There is nothing in this Bill which we wish to draw to the attention of the House.

PRESUMPTION OF DEATH BILL

11. This Private Member's Bill provides, for England and Wales, a new procedure whereby a declaration may be obtained from the High Court that a missing person is to be deemed to have died, and introduces new arrangements for the Registrar General then to enter the missing person's death in a new Register of Presumed Deaths. The Ministry of Justice ("MoJ") has prepared a memorandum explaining the delegated powers in the Bill.³
12. The Bill contains a number of powers, many of which are procedural in character and none of which (with one exception) seem to us to be inappropriate. Regulations made by the Registrar General in connection with entries in the new Register (under paragraphs 1 and 2 of Schedule 1) must be approved by the Secretary of State but are not subject to a Parliamentary procedure: this is quite usual; but regulations made by the Secretary of State about fees for registration under paragraph 6 are subject to negative procedure, as we would expect.

Clause 17 – Power to amend qualifying period for declaration

13. Clause 1 enables an application to be made to the High Court for a declaration that a missing person is presumed to be dead, where the person has not been known to be alive for a period of at least seven years; and clause 2 requires the court to make the declaration if satisfied that this is so. In that event, the court must also include a finding that the person is presumed to have died at the end of the period of seven years following the day on which he or she was last known to be alive (see clause 2(4)).
14. Clause 17(a) and (b) enable the Secretary of State to amend that period in clauses 1 and 2 by affirmative regulations, to substitute some longer or shorter period. Seven years has long been settled at common law, and also appears in some statutory provisions, as the period after which a missing person might be presumed dead for the purposes of court proceedings or of (for instance) dissolution of marriage. That period is shared by many common law jurisdictions; but views differ about whether the period should be longer or shorter (some States in the U.S.A. use a five-year period, others seven; and Italy uses a twenty-year period). But the period has a long-standing significance when determining the rights of those personally affected by the disappearance of someone (who may be a close relative).
15. In the final paragraph on page 5 of the memorandum, MoJ explains that the power has been taken because "there may come a time when it is considered that seven years is no longer an appropriate yardstick ..."; and it is implicit that any conclusion as to the "right" period will be that of Ministers. Any regulations under clause 17(a) or (b) would require the affirmative procedure, and so must be debated in both Houses; and the Minister at Second Reading⁴ confirmed that the Government have no present plans to exercise the powers. But, because any new period would be substituted by

³ <http://www.parliament.uk/business/committees/committees-a-z/lords-select/delegated-powers-and-regulatory-reform-committee/bills-considered/>

⁴ Official Report, Vol. 742, col. 1795.

statutory instrument, Parliament would then only have the choice of accepting or rejecting it, but would have no opportunity to amend it.

16. **We draw the powers conferred by clauses 17 (a) and (b) to the attention of the House so that it may consider whether, if the Government should propose to change the seven-year period, the House would expect to have the opportunity to amend the chosen period, rather than merely to accept or reject it. In that event our recommendation would be that paragraphs (a) and (b) of clause 17 should be omitted from the Bill.**

MOBILE HOMES BILL

17. There is nothing in this Bill which we wish to draw to the attention of the House.

APPENDIX: 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.

No interests were declared at the meeting on 13 February.

Attendance:

The meeting on the 13 February was attended by Baroness Andrews, Lord Marks of Henley-on-Thames, Lord Mayhew of Twysden, Lord Soley and Baroness Thomas of Winchester.