HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

5th Report of Session 2012–13

Justice and Security Bill [HL]

Smoke-free Private Vehicles Bill [HL]

Crime and Courts Bill [HL]: 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".

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 the Appendix.

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.

FIFTH REPORT

JUSTICE AND SECURITY BILL [HL]

1. Part 1 of the Bill makes new provision about the Intelligence and Security Committee, and provides for additional functions to be conferred on the Intelligence Services Commissioner; Part 2 is concerned with imposing restrictions on the disclosure of sensitive material in court proceedings. A memorandum explaining the delegations of legislative power, and other delegated powers, in the Bill has been prepared for the Committee jointly by the Cabinet Office, the Home Office and the Ministry of Justice.[1] We comment only on the powers in Part 2.

Clauses 6 to 10 – Rules of court for closed material proceedings

2. Clause 6(1) and (2) introduce arrangements whereby in "relevant civil proceedings" (see subsection (7)) an application may be made to the court by the Secretary of State for a declaration that a "closed material application" (see, again, subsection (7)) may be made in the proceedings. The court must make the declaration where satisfied that a party would, in the course of the proceedings, be required to disclose material to another person and that the disclosure would damage the interests of national security. The main features of the procedure are explained in paragraph 33 of the delegated powers memorandum. In substance it will enable material to be relied on by one party to the proceedings without being disclosed to other parties or their lawyers, who would be excluded from 'closed' parts of the proceedings; and the party would be represented instead by a Special Advocate.

3. Clauses 6(6), 7, 9 and 10(1) and (2) confer powers to make rules of court to govern the procedures to be followed by the court in connection with an application for a declaration under clause 6(1), and any subsequent "closed material application". The provisions about rules in clauses 7 to 10 correspond with the terms of the equivalent powers conferred in Schedule 4 to the Terrorism Prevention and Investigation Measures Act 2011 ("the TPIM Act") and in a number of earlier Acts when provision has been made for a closed material procedure in discrete categories of proceedings. The first rules to be made under Part 2 are to be made by the Lord Chancellor under paragraph 3 of Schedule 3, and are subject to a "made affirmative" procedure[2] (see sub-paragraphs (5) to (7)) – that is, the rules are laid before Parliament after being made, and may come into force; but, in order to remain in force, they require an affirmative resolution from each House within 40 days of being made. Given the earlier precedents, and subject to

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

[2] A made affirmative is a instrument which is made and may even come into force before being laid before Parliament for affirmative approval.

one reservation, we do not consider it inappropriate for the provision about closed material applications to be delegated to rules of court, or for those rules to be made in the first instance by the Lord Chancellor subject to a "made affirmative" procedure. The precise terms in which the relevant powers are to be conferred (for instance, the particular outcomes that the rules must secure, and the powers and obligations of a court where a closed material application is made) of course remain entirely a matter of policy for the House, and we make no comment about them.

4. Our reservation concerns the consultations to be carried out by the Lord Chancellor before making the first rules under Schedule 3. Paragraph 3(2) requires him to consult, as appropriate, the Lord Chief Justice of England and Wales or the Lord Chief Justice of Northern Ireland; but sub-paragraph (3) expressly provides that there is to be no obligation to consult anyone else – not even the rule-making body whose function it would be, but for Schedule 3, to make the rules. Although this obligation is consistent with those imposed in connection with the first exercise of rule-making powers conferred in specific contexts by earlier Acts, we regard the absence of a duty to consult relevant rule-making bodies as a significant omission in the present instance where the rules are to apply to any civil proceedings in any of the High Court, the Court of Appeal or the Court of Session. **We draw that omission to the attention of the House.**

Clause 11 – Definition of "relevant civil proceedings"

5. The arrangements under clauses 6 to 10 for the "closed material procedure" are to apply to any "relevant civil proceedings", which is defined in clause 6(7) to mean any proceedings (apart from criminal proceedings) before the High Court, the Court of Appeal or the Court of Session. But clause 11(2) to (4) confer a wide Henry VIII power enabling the Secretary of State to amend that definition by affirmative order (subsection (2)), so as to add or remove a court or tribunal, and to make supplementary, incidental, consequential, transitional, transitory or saving provision (subsection (3)). Under subsection (4), the order may also amend clauses 6 to 10 for the purpose of making provision about rules to govern the proceedings of any tribunal that may be added to the definition in clause 6(7), and also provision about the composition of a tribunal.

6. The powers are undoubtedly wide. They would, for instance, enable the Secretary of State to specify *any* court or tribunal, although not in so far as it exercises a criminal jurisdiction; and they might, in our view, be exercised so as to specify a coroner's court. We note in this context the remarks made by the Lord Chancellor and Secretary of State for Justice in the Foreword to the Government response to the 24th Report from the Joint Committee on Human Rights Session on the Justice and Security Green Paper (Cm.8365), where he said that "Closed Material Procedures will not be available in inquests and will only be extended to civil cases in the Court of Appeal and High Court, and the equivalent courts in Scotland and Northern Ireland."

That observation describes exactly the definition of "relevant civil proceedings" as it appears in clause 6(7) of the Bill; but it does not mention the possibility of further extending the procedures by order under clause 11(2) to other courts and tribunals, and it does not therefore in terms exclude the possibility of including coroners' courts in the definition at a later date.

7. Once a court or tribunal has been added to clause 6(7) by an order, it seems to use unlikely that it would be removed by a further order. The powers in clause 11(2) to (4) might also be exercised to provide that a tribunal that has been added to clause 6(7) is to be specially constituted, possibly so that its usual member(s) would not adjudicate in the proceedings but some other specified person or class of persons would; and provision might also be made enabling the first rules about the tribunal's closed material procedure to be made by the Lord Chancellor under a "made affirmative" procedure equivalent to that provided for in Schedule 3 (see paragraph 4 above).

8. In paragraph 47 of its memorandum, the government explains why these powers are thought necessary – first, because it might subsequently be found that, in proceedings that do not fall within the definition in clause 6(7), a closed material procedure "is needed for the just consideration" of a case where it is thought that sensitive evidence must be protected; and secondly, because the extended provision might be needed urgently.

9. We understand the Government's concern about urgency, should it be found that a need arises for a closed material application to be made in proceedings before a court or tribunal that does not already fall within clause 6(7). But the memorandum does not explain why it is thought that an order which attracts the draft affirmative procedure should offer any speedier means of meeting that perceived need for amending legislation than, for instance, a short Bill fast-tracked through both Houses. The latter approach would at least ensure that control over further extensions of the "closed material procedure" would remain with Parliament, rather than with the Government.

10. Notwithstanding our significant concerns about the wide scope of this power, and the absence of any express constraints in the Bill itself as to the way in which it might be exercised (in particular so as to bring inquests within Part 2), we are reluctant – albeit with considerable misgivings – to recommend in terms that the delegation of powers in clause 11 is inappropriate. **But we nevertheless draw to the attention of the House the scope of the powers conferred so that it may appreciate the unconstrained nature and extent of the provision that might be made under them by this or any future government. The House may wish to consider whether the Bill should be amended to restrict that scope or to include any such safeguards as the House might regard as necessary for ensuring**

Convention rights are observed and for protecting the interests of open justice.

11. The House will also wish to consider, if it finds itself persuaded by the Government's explanations as to the need for urgency, whether the draft affirmative procedure is likely to be the most effective form of scrutiny consistent with that need, or whether a "made affirmative" procedure might be more appropriate. If the House accepts that there is force in the perceived need for urgency, a "super-affirmative procedure"[3] recommended by the Constitution Committee in paragraph 32 of its 3rd Report (HL Paper 18) in relation to the powers conferred by clause 11, would seem to be least likely to meet the need for urgency.

[3] We take this to be a reference to the kind of procedure provided for in section 18 of the Legislative and Regulatory Reform Act 2006 which specifies an initial 60 day scrutiny period.

SMOKE-FREE PRIVATE VEHICLES BILL [HL]

12. This Private Member's Bill inserts a new section 8A into Part 1 of the Health Act 2006 (that Act makes provision for enclosed and substantially enclosed public places and shared workplaces to be "smoke-free"). Subsection (1) requires the driver of a private vehicle to ensure that the smoking of tobacco or any other substance does not take place in the vehicle while a child under the age of 18 is in it. Failure to comply is an offence (subsection (2)), attracting a fine of £60, with the option of attending a "smoke-free driving awareness course" instead (subsections (3) and (4)). We comment on only one power in the Bill.

13. Subsection (6) requires the Secretary of State to "update all relevant regulations regarding the offence" within six months of the Bill's enactment. The purpose and effect of this provision is unclear – though it could, for instance, be intended to require that regulations under section 5 of the 2006 Act (which require certain categories of vehicles to be "smoke-free") must be amended, in so far as they might conflict with the obligation in new section 8A(1). We consider that the power in new section 8A(6) is inappropriate unless the Bill can be amended to clarify the nature of the duty to make regulations.

CRIME AND COURTS BILL [HL]: GOVERNMENT RESPONSE

14. We considered this Bill in our 2nd Report (HL Paper 12). The Government have responded by way of a letter from The Rt Hon Lord McNally, Minister of State for Justice, printed at Appendix 1.

APPENDIX 1: CRIME AND COURTS BILL [HL]: GOVERNMENT RESPONSE

I am writing to let you have details of a third tranche of amendments to the Crime and Courts Bill which I have tabled today. These amendments give effect to recommendations made by the Delegated Powers and Regulatory Reform Committee in their report on the Bill (Second Report of 2012/13).

In their report, the Delegated Powers and Regulatory Reform Committee made two recommendations which the Government has accepted.

The first recommendation related to the provisions in the Bill establishing a single family court. Schedule 10 to the Bill inserts a new section 310 into the Matrimonial and Family Proceedings Act 1984 which enables the Lord Chancellor to make rules enabling the 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 delegated to an assistant legal adviser. The Bill provides that such rules (which must be made with the agreement of the Lord Chief Justice and after consultation with the Family Procedure Rule Committee) are subject to the negative resolution procedure. The Committee argued that as the power may be used quite widely the first exercise of the power should be subject to the affirmative procedure. The amendments to Schedule 10 provide for this.

The second recommendation related to the power to prescribe the circumstances in which the filming and broadcasting of judicial proceedings may be permitted. The Bill provides for this order-making power to be subject to the negative resolution procedure. The Committee recommended that the affirmative procedure should apply. An amendment to clause 28(4) gives effect to this.

The Committee also noted that clause 29 enabled the Secretary of State or Lord Chancellor to make consequential provision by order, but pointed out that where such an order was made by the Lord Chancellor (rather than by the Secretary of State) containing provisions amending primary legislation, clause 28 did not then provide (as intended) for the order to be subject to the affirmative procedure. The other amendments to clause 28 correct this oversight.

The Rt Hon Lord McNally

Minister of State for Justice

June 2012

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 interest was declared at the meeting on the 4 July:

Justice and Security Bill

Lord Butler of Brockwell as a member of the Intelligence and Security Committee

Attendance:

The meeting on 4 July was attended by Lord Blackwell, Lord Butler of Brockwell, Baroness Gardner of Parkes, Lord Haskel, Lord Marks of Henley-on-Thames, Lord Mayhew of Twysden, Baroness O'Loan, Lord Soley and Baroness Thomas of Winchester.