

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

6th Report of Session 2012-13

Electoral Registration and Administration 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)

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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

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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.

Sixth Report

ELECTORAL REGISTRATION AND ADMINISTRATION BILL

Introduction

1. Part 1 of the Bill is about individual electoral registration in Great Britain, and Part 2 is about the administration and conduct of elections. There is a memorandum from the Cabinet Office about the delegated legislative powers in the Bill.¹
2. The powers to make orders under Part 1 are Henry VIII powers and include power to amend future Acts (see clause 10(4) and the definition of “modify” in clause 11). The orders concerned are those enabled by clauses 6(1) and (2) (including pilot orders under clause 8) and 9. They are subject to affirmative procedure.
3. Although there are a large number of delegated powers for so short a Bill, many of them simply build on those powers already in the Representation of the People Act 1983. We comment on three powers in the Bill.

Clause 2 – Verification of entitlement

4. Section 53 of the 1983 Act enables the Secretary of State or the Lord President of the Council to make regulations about the form of the register of electors, the procedure to be followed in preparing the register and generally about any matters incidental to the provisions of the 1983 Act about the registration of electors. Schedule 2 to the 1983 Act specifies matters which, in particular, may be the subject of the regulations. The regulations are subject to affirmative procedure.
5. Paragraph 1(2) of Schedule 2 already enables the regulations to contain provision authorising a registration officer to require persons to give information required for the purpose of registration duties. (This will be amended by the Bill so that the regulations may also require the officer to require the information.) This is expanded by clause 2(2) of the Bill – a new paragraph 1(2A) provides expressly that paragraph 1(2) covers two specific things – first, evidence from a person who has made an application for registration that he or she is the person named in the application and secondly evidence to enable the registration officer to determine whether that person is entitled to be registered.
6. The expanded power enables the regulations to provide for the Secretary of State to specify in a determination (outside the regulations and subject to no Parliamentary procedure) what kind of evidence must be provided. The justification given for this is at paragraph 27 of the memorandum. We accept that the nature of the evidence considered sufficient will change over time, and accept therefore that it is a matter appropriate to the regulations. However, the type of evidence which must be provided goes to the heart of someone’s entitlement to be registered. We consider that the evidence, or the

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

kind of evidence, should always be prescribed in the regulations themselves and never in a determination by the Secretary of State subject to no Parliamentary control. We are unpersuaded by the suggestion in the memorandum that a perceived possible need to change the evidence at short notice justifies a lack of Parliamentary scrutiny. **We consider that the possibility for the Secretary of State to determine the kind of evidence otherwise than in the regulations is inappropriate.**

7. The Committee reaches the same conclusion on the similar provision in new paragraph 3ZA(4)(b) of Schedule 2 to the 1983 Act (paragraphs 33 and 34 of the memorandum), which is about the evidence to be provided initially with an application.

Clause 6 – Annual canvass

8. Section 10(1) of the 1983 Act requires each registration officer in Great Britain to conduct an annual canvass for his or her area to ascertain who is entitled to be, or remain, on the register of electors. This is omitted by paragraph 9(2) of Schedule 4 to the Bill. It is replaced by a new section 9D(1) and (2) of the 1983 Act (clause 4), which similarly requires the registration officer to conduct an annual canvass to ascertain the names and addresses of those entitled to be registered but who are not registered, and those who are registered but are not entitled to be.
9. Clause 6(1) enables an order subject to affirmative procedure to make provision for the purposes of assisting registration officers to ascertain the names and addresses of persons not registered who are entitled to be registered, and persons who are registered but are not entitled to be. The Electoral Commission must be consulted before the order is made. The order may amend any Act other than the Bill, but the new section 9D of the 1983 Act is dealt with specifically at clause 6(2).
10. Clause 6(2) enables an order subject to affirmative procedure to amend or repeal the new section 9D or any other provision relating to a canvass under that section. If an order abolishes the requirement for an annual canvass, a subsequent order may reinstate it (clause 6(3)). A report by the Electoral Commission must be laid with the draft order (clause 7), unless it is an order reinstating the annual canvass.
11. We do not consider that substantial changes to electoral arrangements should be left to delegated legislation. The reason given in paragraph 44 of the memorandum for taking the power to abolish or amend the annual canvass is that “it is intended that in future alternative means of obtaining information will become available ... and, if those alternative means provide a more efficient means of obtaining information, it may be desirable to replace the current canvass requirement entirely, or to retain it in a modified form.” The memorandum correctly points out that the annual canvass was abolished in 2006 for Northern Ireland. This was done by primary, not subordinate, legislation.
12. The focus of Part 1 of the Bill is on individual registration of electors. The annual canvass under clause 4 is an important part to the structure of the new system, and, if it is to be changed, it should be only by primary legislation. **We consider the power at clause 6(2) to be inappropriate.**
13. We do not find clause 6(1) to be inappropriate, but we do not feel there is sufficient justification for an order under clause 6(1) being able to amend,

repeal or revoke other Acts. **We consider the application of clause 10(4) to orders under clause 6(1) to be inappropriate.**

14. There is also an issue as to whether it would be appropriate for clause 6(2) to remain for the sole purpose of being the subject of a pilot scheme under clause 8. We have considerable reservations about this. Unlike pilot schemes under clause 9, which relate to testing provisions already enshrined in primary legislation, a pilot scheme under clause 8 would be testing something more uncertain. Pilot schemes under clause 8 can only apply for a specified period, and only where the registration office has proposed a pilot for a particular area, and they must be the subject of a report by the Electoral Commission. But there is no limit on the periods, numbers of areas or types of scheme, so the effect of the orders under clause 8 could be very significant.

Schedule 2, paragraph 2 – Information sharing

15. Paragraph 7 of the memorandum explains that one way of verifying entries in the existing registers, so that they might be carried forward into the new registers, is to compare the existing registers with data held by public authorities. A similar method will be used to check the register in the future and verify applications. To enable this to be done, a new paragraph 1A of Schedule 2 to the 1983 Act is inserted by paragraph 2 of Schedule 2 to the Bill. Paragraph 63 of the memorandum explains the intention that the power in the new paragraph be used to provide for information from specified public sector databases and registration officers to be matched with applications or existing entries in the register.
16. The new power enables the regulation to make “provision authorising or requiring a person to disclose information to another person for the purpose of assisting a registration officer in Great Britain” to verify information relating to a person in the register or an applicant, to ascertain names and addresses of those who are not registered but who are entitled to be registered, or to identify those who are registered but who are not entitled to be registered. The conditions subject to which the information may be disclosed or processed is left to the regulations and the regulations may leave the imposition of the requirements to the Secretary of State.
17. So the power is very significant; in particular it is not limited to information held by government departments or registration officers and covers any information held by anyone about, for example, the address of someone who is not registered but may be entitled to be registered. The Electoral Commission and the Information Commissioner must each be consulted before the regulations are made.
18. Under new paragraph 1A(4), a requirement imposed by the regulations overrides any statutory or common law restriction on the disclosure of information. As paragraph 66 of the memorandum describes, this follows section 35(6) of the Political Parties and Elections Act 2009. But section 35 of that Act is limited to requiring information from local or public authorities or those providing services to them or exercising their functions, and it specifically restricts any onward disclosure of the information. This Bill contains power to provide that any person may be authorised or required to provide information, including, for example, professional people who would otherwise be bound by a duty of confidentiality to their client, patient, or customer.

19. We consider the power in new paragraph 1A(1) to be inappropriately wide in enabling regulations to authorise or require any person to disclose information, even if breach of a requirement is not to be an offence. We accept, however, that details of the information to be disclosed, and how it is to be processed etc. are appropriate for the regulations. **We recommend that the Bill itself should prescribe the categories of person who may be authorised or required to provide information by the regulations.**

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.

No interests were declared at the meeting on the 18 July.

Attendance:

The meeting on 18 July was attended by Baroness Andrews, 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.