HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

8th Report of Session 2012-13

Defamation Bill

Government Responses:

Justice and Security Bill [HL]
Electoral Registration and Administration Bill
Financial Services Bill

Civil Aviation 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 5.

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.

Eighth Report

DEFAMATION BILL

Introduction

1. This Bill contains delegated powers only at clauses 5, 10(7) and 17. The latter two are respectively, a re-enactment of an existing power and a power to make commencement orders. There is a memorandum from the Ministry of Justice on the powers in the Bill.[1]

Clause 5 – Website operators

2. Clause 5(2) provides a defence for the operator of a website against whom an action in defamation is brought in respect of a statement posted on the website, if the operator is shown not to have posted the statement. Clause 5(3) specifies circumstances in which the defence is defeated. One of the things which a claimant must show to defeat the defence is that the operator failed to respond to the notice of complaint "in accordance with any provision contained in regulations" by the Secretary of State (clause 5(3)(c)).

3. Clause 5(5) enables regulations to do four things:

   (a) to provide for action which must be taken by an operator in response to a notice of complaint;

   (b) to specify a time limit for taking the action;

   (c) to give the court discretion to waive the time limit;

   (d) to "make any other provision for the purposes of this section."

4. All of the regulations under clause 5 are subject to the negative procedure. Paragraph 6 of the Ministry's memorandum indicates that its choice of the negative procedure is based partly on the anticipated contents of the regulations being procedural in character. While this seems true for regulations relying solely on clause 5(3) and (5)(b) and (c), it does not appear so for regulations which rely on clause 5(5)(a) or (d). Paragraph 5 of the memorandum indicates ("Clause 5(5) provides that regulations *under clause 5(3)(c)* may make provision...") that the regulations mentioned in clause 5(5) are the same regulations as those mentioned in clause 5(3)(c), so that the intention is that non-compliance by the operator with the regulations mentioned in clause 5(5) will defeat the defence. So regulations under clause 5(5)(a) or, especially, (d) may prescribe substantive elements going to the heart of whether or not the new statutory defence is defeated. In those circumstances, **we recommend that any regulations containing provision relying on clause 5(5)(a) or (d) should be subject to affirmative procedure.**

5. The negative procedure for regulations under clause 5(6)(d) specifying the information to be contained in a notice of complaint is unexceptionable.

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

JUSTICE AND SECURITY BILL [HL]: GOVERNMENT RESPONSE

6. We considered this Bill in our 5th Report (HL Paper 30). The Government have now responded by way of a letter from Rt. Hon. Kenneth Clarke QC MP, Minister without Portfolio, printed at Appendix 1.

ELECTORAL REGISTRATION AND ADMINISTRATION BILL: GOVERNMENT RESPONSE

7. We considered this Bill in our 5th Report (HL Paper 30). The Government have now responded by way of a letter from Cholë Smith MP, Minister for Political and Constitutional Reform, printed at Appendix 2.

FINANCIAL SERVICES BILL: GOVERNMENT RESPONSE

8. We considered this Bill in our 6th Report (HL Paper 39). The Government have now responded by way of a letter from Rt. Hon. Greg Clark MP, Financial Secretary to the Treasury, printed at Appendix 3.

CIVIL AVIATION BILL: GOVERNMENT RESPONSE

9. We considered this Bill in our 4th Report (HL Paper 21), and we published a letter from Theresa Villers MP, Minister of State for Transport, in our 7th Report (HL Paper 45). We have received a further response from Rt. Hon. Simon Burns MP, Minister of State, printed at Appendix 4.

APPENDIX 1: JUSTICE AND SECURITY BILL [HL]: GOVERNMENT RESPONSE

I would like to thank you for the Committee's helpful report on the Justice and Security Bill, and apologise for the delay in responding to you formally.

The Committee raised two points in relation to the Bill, and I would like to deal with each in turn.

In relation to the power in the Bill to make rules in relation to the closed material procedures (CMPs) introduced by the Bill, the Committee noted the absence of an explicit duty to consult relevant rule-making bodies before the Lord Chancellor makes the first sets of rules in relation to England and Wales or Northern Ireland. While the Committee noted that this was consistent with equivalent provision in other recent Acts of Parliament creating CMPs, the Committee concluded that the lack of such a duty to consult was a significant omission in this case.

The Committee is right to note that such a requirement does not exist in other statutory contexts where CMPs have been created. We chose the "made affirmative procedure" to enable rules to be made swiftly if need be – the same consideration as applies in the other contexts where this approach has been taken.

However, there is a requirement on the face of the Bill for the Lord Chancellor to consult, as applicable, the Lord Chief Justice of England and Wales and the Lord Chief Justice of Northern Ireland. In addition, the Government endeavours to consult the relevant rule-making authorities as a matter of practice, unless to do so would inhibit the ability to respond quickly to a specific need. This was the approach taken in relation to Rules for Terrorism Prevention and Investigation Measures (TPIMs), for example.

As this Bill applies to cases currently before the High Court, Court of Appeal or Court of Session at the point of commencement the Government is keen to have Rules in place and bring the proposals into force as quickly as possible after Royal Assent. A statutory requirement to consult the rule-making authorities would delay making CMPs available for such cases.

On balance, therefore, we would prefer to omit a statutory requirement to consult, but will continue to consult if practicable the normal rule-making authorities on an informal basis.

The Committee also expressed concern about the scope of the power in clause 11(2) of the Bill to amend the definition of "civil proceedings", while also being reluctant to recommend in terms that the delegation of powers is inappropriate. The Committee was concerned in particular that this power might be used to extend CMPs to inquests.

In response to the public consultation on the Justice and Security Green Paper I made clear that the Government did not intend to use this Bill to enable the extension of CMPs to inquests, either by extending CMPs directly or enabling their extension in the future using the order-making power in the Bill. The Government's view is that the power in clause 11(2) would not enable the extension of CMPs to inquests in England and Wales or Northern Ireland in any event because inquests are not a type of civil proceedings. They are a form of inquisitorial proceedings.

However, we are also aware that in Scotland, Fatal Accident Inquiries (FAIs) are considered by some to be a type of quasi-civil proceedings. This means that on one

view CMPs could be extended to FAIs as the Bill stands at the moment (though the Government has no intention to do so), even if they could not be used to extend CMPs to inquests.

We recognise that there is therefore some doubt and concern about the scope of the power in the Bill, and agree that this is unhelpful. We will explore whether it would be possible to put beyond doubt on the face of the Bill the Government's position that this power will not be used to extend CMPs to either inquests or FAIs.

Rt. Hon. Kenneth Clarke QC, MP.

October 2012

APPENDIX 2: ELECTORAL REGISTRATION AND ADMINISTRATION BILL: GOVERNMENT RESPONSE

I am grateful to the Delegated Powers and Regulatory Reform Committee for their report on the Electoral Registration and Administration (ERA) Bill. The Committee made four recommendations relating to two Clauses and one Schedule in the Bill, which I will address in turn:

Clause 2: verification of entitlement

The Government understands the Committee's concern over the powers to allow the Secretary of State to determine the kind of evidence to be provided without Parliamentary scrutiny. We also consider that some flexibility is needed around 'alternative' forms of evidence (used when primary sources may be unavailable or when further evidence is required by a registration officer), particularly to cater for the possibility that an item on the prescribed list of acceptable evidence is found to be prone to fraud.

The Government will introduce amendments to the ERA Bill to require all forms of evidence to be prescribed in regulations, subject to Parliamentary scrutiny under the affirmative procedure, while also making provision that items may be removed from the list under regulations subject to the negative procedure. We consider that this addresses the Committee's concerns over Parliamentary scrutiny of the prescribed forms of evidence, without compromising the Government's flexibility to respond rapidly in exceptional cases that may threaten the integrity of the new registration system.

Clause 6: annual canvass

The Government has no current plans to abolish the annual canvass. This power is included in the Bill to allow provision to be made in future for consistency with Northern Ireland and to help us build a modern electoral registration system, potentially using methods other than a traditional household canvass. We would only look to take the step of abolishing the annual canvass (whether in whole or in part) if there were another, more effective way, in which registration officers could find the names and addresses of people who are eligible to be registered but who are not currently registered to vote and to keep track of the electors when they move house, for example data matching and data mining. In this situation, the role of the annual canvass in the upkeep of the electoral register would be less significant than under the initial system set out in the ERA Bill. It would only be when the annual canvass is less pivotal that it might be amended or abolished, as was the case in Northern Ireland; this diminished significance would then make it reasonable to use secondary legislation to make this change.

I can also assure you that there are sufficient safeguards in place governing the use of this power. The Bill includes a power to reinstate the annual canvass if needed. Clause 7 of the Bill sets out the roles of the Electoral Commission and Parliament in approving any amendment to or abolition of the Annual Canvass. If this step were to be taken, the Government would have to notify the Electoral Commission, and within three months of that notification, the Commission would be required to report to the Minister on any proposed change to the annual canvass. This report must be laid before Parliament with the draft order amending or abolishing the canvass.

Regarding the Committee's third recommendation, it is likely that, if the step described above were to be taken, Clause 6 would be used to make an order

amending the 1983 Act to put in place an alternative to the canvass using the power at clause 6(1), and at the same time modifying or abolishing the canvass under clause 6(2). This means that the powers at clause 6(1) and (2) both need to include a power to amend other legislation.

For these reasons and with these safeguards, we believe that the powers provided by this Clause are reasonable and will allow the Government to keep the registration system up-to-date if other methods of identifying eligible electors are developed. Currently, the Government does not intend to introduce an amendment to remove the power to abolish or amend the annual canvass.

S*chedule 2, paragraph 2: information sharing*

As the Bill stands, there is no stated restriction on categories of persons that can be required to provide information. There are no restrictions because we believe that the operation of Individual Electoral Registration will be most effective with the flexibility to use information from sources as-yet unknown. We have ensured the provision of information may be authorised or required only for restricted purposes to do with electoral registration. Indeed, it will be an offence for this information to be shared for any other purpose.

The Committee's recommendation that the Bill prescribe the categories of persons who may be authorised or required to provide information runs counter to the desired flexibility in the Bill. Specifying such categories on the face of the Bill would require an exact line to be drawn between acceptable and unacceptable data-sources prior to implementation. This could, for example, lead to the exclusion of types of source that are not yet in existence, or whose value has not yet been established; these could then only be included through amendments to the primary legislation.

On the specific question of the implications for professionals' duty of confidentiality, it is important to note that the power relates to both authorisation and requirement to provide information and only for the purposes of registration. In terms of authorisation, this leaves room for professionals to maintain confidentiality.

The Government feels that the categories of persons should not be prescribed in primary legislation in this regard. However, the Government does not intend to introduce an amendment to restrict the categories of persons that may be authorised or required to provide information, but will listen carefully to the views of the House on this issue during Parliamentary debate.

I have placed a copy of this letter in the libraries of both Houses.

Cholë Smith MP

Minister for Political and Constitutional Reform

October 2012

APPENDIX 3: FINANCIAL SERVICES BILL: GOVERNMENT RESPONSE

I am writing in response to the Delegated Powers and Regulatory Reform Committee's 4th Report of session 2012-2013.

The Committee provided a considered and helpful analysis of the delegated powers in the Financial Services Bill, and I would like to thank the members of the Committee for their constructive scrutiny.

The Committee's overall assessment is that "This substantial Bill contains numerous delegated legislative powers, explained in a full and helpful memorandum from H.M. Treasury (the Treasury). But many of them are well founded in precedent, and there is little which needs drawing to the attention of the House." The Committee also responded to calls for the application of the 'super-affirmative' procedure for Parliamentary scrutiny of the Financial Policy Committee's macro-prudential tools, stating that the standard affirmative procedure (as provided for in the Bill) would be sufficient.

However, the Report did raise some issues around Clause 91 and the transfer of consumer credit regulation functions from the Office of Fair Trading (OFT) under the Consumer Credit Act (CCA) to the new Financial Conduct Authority (FCA) under FSMA as amended by the Financial Services Bill. The Committee was concerned about the powers taken by the Treasury in this Clause:

> ".. .clause 9 1 (2) and (4) enable the Treasury, by order subject to affirmative procedure, in particular:
>
> - to transfer to the FCA functions of the Office of Fair Trading (OFT) under 1974 Act;
> - to apply specified enforcement provisions of the 2000 Act to failure to comply with a requirement of the 1974 Act; and in that connection to disapply criminal offence provisions of the 1974 Act,
> - having regard to the FCA 's operational objectives, to repeal, or exclude the application of, any provision of the 1974 Act. (There are over 200 sections of that Act still in force.)
>
> The power may be used to amend any enactment, including the Bill itself The Treasury candidly acknowledges in its memorandum that this is a significant and rather unusual power. The uses to which the power is intended to be put are fully explained at paragraphs 434 to 437 of the memorandum. In particular, the government aims to ensure that consumers do not have fewer rights and protections as a result of the transfer and that disruption to consumer credit licences holders is minimised. But there is nothing in the Bill which guarantees that position; and in particular nothing preventing a future government from exercising the powers in clause 91 (4) differently from the way the present government intends. Similarly, while the Bill enables the Treasury to ensure that a transfer does not result in both a civil and a criminal penalty regime being applied to the same act or omission, this is not mandatory under the Bill (contrast section 41(b) of the Regulatory Enforcement and Sanctions Act 2008)."

The Government will table two amendments to address these concerns.

The first amendment provides that, when exercising the power in clause 91, the Treasury must have regard to the importance of securing an appropriate degree of protection for consumers and the principle that a burden imposed should be proportionate to its benefits. These new "have regards" on the Treasury's exercise of the power reflect:

- that the primary rationale for the transfer is to strengthen consumer protection, so the requirements in the CCA should only be repealed to the extent that their effect can be replicated in an FCA rule book or they are no longer considered to be appropriate (for example, where the requirement is no longer relevant, or an appropriate degree of protection is delivered in an alternative way under a FSMA-based consumer credit regime); and
- the Government's commitment to ensuring that regulatory burdens on business are proportionate to the benefits.

The second amendment provides that where criminal sanctions under CCA and regulatory sanctions under FSMA will be available to the FCA in relation to the same regulatory breach, the Treasury must make provision that a person may not be convicted if he has been the subject of regulatory sanction under FSMA. This reflects the approach taken in section 41 of the Regulatory Enforcement and Sanctions Act 2008 (the precedent highlighted by the Committee in its Report).

I hope these amendments address the Committee's concerns, and I would like to thank members again for their input.

Rt. Hon. Greg Clark MP

Financial Secretary to the Treasury

October 2012

APPENDIX 4: CIVIL AVIATION BILL: GOVERNMENT RESPONSE

On the 30 August 2012 my predecessor, Theresa Villiers, wrote to you in response to the Committee's Fourth Report of Session 2012-13, which included a recommendation for the Civil Aviation Bill.

This letter stated that an amendment had been tabled. However, due to an administrative error, the letter was sent prematurely and the amendment had not yet been tabled.

We now have a settled draft of the amendment and can confirm that there has been no change in the purpose or effect of the amendment since the letter dated 30 August was sent.

I apologise for any confusion that may have been caused and confirm that we intend to table the amendment in advance of House of Lords' Report

Rt. Hon. Simon Burns MP

Minister of State

October 2012

APPENDIX 5: 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 17 October:

Defamation Bill

Lord Marks of Henley-on-Thames declared an interest as a practising barrister (Queen's Counsel) and Arbitrator (commercial and family) and as a member of the Joint Committee on the Draft Defamation Bill.

The following interests were declared at the meeting of the 20 June, 6 July and the 18 July:

Justice and Security Bill [HL]

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

Financial Services Bill

Lord Butler of Brockwell, as Adviser, TT International plc (investment management)

No interests were declared in respect of the Electoral Registration and Administration Bill and the Civil Aviation Bill.

Attendance:

The meeting on 17 October was attended by Baroness Andrews, Baroness Gardner of Parkes, Lord Haskel, Lord Marks of Henley-on-Thames, Lord Mayhew of Twysden, Baroness O'Loan, and Lord Soley.