

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

9th Report of Session 2012-13

**Arbitration and Mediation Services
(Equality) Bill [HL]**
**Enterprise and Regulatory Reform Bill:
Parts 1 to 5**
**Partnerships (Prosecution) (Scotland)
Bill [HL]**
**Draft Legislative Reform (Constitution
of Veterinary Surgeons Preliminary
Investigation and Disciplinary
Committees) Order 2012**
**Special Report on Strengthened
Statutory Procedures for the Scrutiny
of Delegated Powers: 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 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 2006.

Ninth Report

ARBITRATION AND MEDIATION SERVICES (EQUALITY) BILL [HL]

1. The purposes of this Private Member's Bill, as summarised in paragraph 5 of the Explanatory Notes provided, are "to clarify the application of discrimination law to arbitration, to strengthen the law to support progress on equality in other methods of dispute resolution, and to help ensure that family law and criminal matters are dealt with by the proper authorities".
2. We recommend that any order made under clause 8(2) to bring the Act into force should be made by statutory instrument.

ENTERPRISE AND REGULATORY REFORM BILL: PARTS 1 TO 5

3. This Bill contains a wide variety of provision. A memorandum has been submitted by the Department for Business, Innovation and Skills (“BIS”) about the delegations of legislative power in the Bill.¹
4. The Bill is arranged in six Parts, each of which contains delegated powers. This Report is on Parts 1 to 5. **Part 6 will be the subject of a separate Report.** There is nothing in Parts 1 to 4 (UK Green Investment Bank; employment proceedings; competition regulators; and other competition matters) that we draw to the attention of the House, in terms either of the delegation of legislative power or the level of Parliamentary scrutiny proposed.

Clause 52 (new section 26B) – Heritage partnership agreements

5. Clause 52 inserts a new section 26A into the Planning (Listed Buildings and Conservation Areas) Act 1990 (“the Listed Buildings Act”). This enables listed building consent for alterations or extensions to be given by means of a heritage partnership agreement with a local planning authority. When consent is given in this way, the provisions in the Listed Buildings Act about applications for consent, decisions, appeals, and various other matters do not apply (new section 26A(5)). The provisions disapplied are not all purely procedural in character. For example they include the obligation, imposed on the local planning authority by section 16(2) of the Listed Buildings Act, to have special regard to the desirability of preserving a building or its setting or any features of special architectural or historic interest.
6. New section 26B leaves to regulations, subject to negative procedure, matters such as consultation, publicity, termination by the Secretary of State and the terms which must be included in an agreement. So matters which are at least partly covered by the Listed Buildings Act itself (as well as by regulations) for listed building consent to be granted on an application are to be in subordinate legislation for consent to be contained in an agreement. Indeed the regulations may even re-apply the very provisions of the Act which the new section 26A(5) disapplies – see section 26B(2)(f) and this may, but need not, include section 16(2) (desirability of preserving building, setting and features). But the approach of leaving matters of this sort to subordinate legislation follows that for planning permission under the Town and Country Planning Act 1990 (“TPCA”) and the provisions are likely to be largely, although not exclusively, procedural in character. So, subject to one exception, we do not consider the powers or the level of scrutiny inappropriate.
7. The exception is paragraph (g) in new section 26B(2). This enables the regulations to modify any provision of the Listed Buildings Act as it applies to heritage partnership agreements. The memorandum gives no indication either of why it should be necessary to modify anything outside Chapter 2 of Part 1 of the Listed Buildings Act (which deals with the authorisation of works affecting listed buildings) or why, if it is, the necessary modifications

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

are not in the Bill itself. **We consider new section 26B(2)(g) to be inappropriate.** The same would not necessarily apply to a more targeted provision which specified particular sections or chapters of the Listed Buildings Act, the need for modification of which was convincingly demonstrated.

Clause 52 (new section 26C) – Listed building consent orders

8. New section 26C of the Listed Buildings Act, inserted by clause 52, enables the Secretary of State to give listed building consent for alterations or extensions by order subject to negative procedure, without the need for an application to the local planning authority. This reflects the position for planning permission under TCPA and for scheduled monument consent under the Ancient Monuments and Archaeological Areas Act 1979. Provided that the Secretary of State has special regard to the matters in new section 26F (desirability of preserving building, setting and features), the consent granted by order can be by reference to descriptions of works or of buildings which are as wide or as narrow as the Secretary of State wishes. We accept that this is a matter appropriate to delegated legislation. **However, given that listed buildings are, by their nature, of special architectural or historic interest, and given the number of buildings potentially affected, we recommend that orders by the Secretary of State under section 26C should be subject to the affirmative procedure.**

Clause 61 – Civil liability for breach of health and safety duties

9. Clause 61 was introduced at Report stage in the House of Commons.
10. Section 47 of the Health and Safety at Work etc. Act 1974 provides that breach of a duty imposed by health and safety regulations shall, so far as it causes damage, be actionable. But there is power for the Secretary of State to make exceptions from this by regulations subject to negative procedure.
11. Clause 61 provides that, instead, breach of a duty imposed by a statutory instrument containing health and safety regulations (whether alone or with other provisions) shall not be actionable. This applies, therefore, to an instrument under “mixed” powers, such as where the powers in section 2 of the European Communities Act 1972 are used in combination with powers under the 1974 Act. None of the duties (under whichever of the enabling enactments imposed) will be actionable. This in effect reverses the position as it is under section 47 at present, but is wider in scope, since it affects the entirety of an instrument made under “mixed” powers. But similarly, the Secretary of State is given power to make exceptions from the general rule by regulations subject to negative procedure. Since this procedure reflects that for making exceptions from the general rule under the current section 47, we do not consider it inappropriate. The significant change of policy is in the Bill itself.
12. New section 47(2A) provides that breach of a duty imposed by any of a list of statutory provisions specified in Schedule 1 to the 1974 Act shall not be actionable. But again the Secretary of State is given power to make exceptions, including by modifying any of the relevant enactments. Under section 82(1)(c) of the 1974 Act, the power to modify extends to making textual amendments and this is therefore a Henry VIII power. But its

purpose and the list of enactments are clearly defined and the negative procedure is, in these circumstances, not inappropriate.

13. New section 47(2B) enables regulations subject to affirmative procedure to “make provision about the extent to which breach of a duty imposed by other health and safety legislation is actionable.” “Other health and safety legislation” is defined in new section 47(2C) as including “any provision of an enactment which *relates to any matter relevant to* any of the general purposes of” Part 1 of the 1974 Act (other than provisions of Part 1 itself, health and safety regulations or the enactments listed in Schedule 1 to the 1974 Act). The general purposes of Part 1 go far further than simply securing the health, safety and welfare of persons at work. They include:
 - protecting those not at work against risks to health and safety arising in connection with activities of those at work;
 - controlling and keeping dangerous substances, and generally preventing the unlawful acquisition, possession and use of such substances.
14. There is no discernable policy in new section 47(2B) other than a wish to change the existing position under a very widely-drawn description of statutes, including (it seems to us) those relating to defective premises and occupier’s liability, whatever that existing position may be. The memorandum states only that “this flexibility is desirable so that the government can extend this policy [that is, of excluding civil liability] in due course should it wish to do so”. **We consider this delegation is potentially so far-reaching in its effect as to be inappropriate despite the affirmative procedure, and we recommend removal of new section 47(2B) from the Bill.**

PARTNERSHIPS (PROSECUTION) (SCOTLAND) BILL [HL]

15. This Bill gives effect to recommendations from the Scottish Law Commission and will, in particular, enable a dissolved partnership to be prosecuted in Scotland notwithstanding its dissolution.
16. The Bill contains only one delegated power, in clause 6(6), to enable the Secretary of State to make, by order, any further amendments of legislation that appear to be necessary or expedient in consequence of the resulting Act. The power is explained in the brief memorandum prepared by the Scotland Office.² It is to be exercisable subject to the negative procedure, unless the order amends either an Act of Parliament or an Act of the Scottish Parliament, in which case the affirmative procedure will apply.
17. There is nothing in the Bill to which we draw the attention of the House.

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

**DRAFT LEGISLATIVE REFORM (CONSTITUTION OF
VETERINARY SURGEONS PRELIMINARY INVESTIGATION AND
DISCIPLINARY COMMITTEES) ORDER 2012**

18. This draft Legislative Reform Order (“the draft Order”) was laid on 5 November 2012 by the Department for Environment, Food and Rural Affairs (Defra), together with an Explanatory Document and an Impact Assessment.³ It is to be made under sections 1 and 2 of the Legislative and Regulatory Reform Act 2006 (“the 2006 Act”).
19. The purpose of the draft Order is to amend provisions in the Veterinary Surgeons Act 1966 that relate to the constitution of the committees of the Royal College of Veterinary Surgeons (RCVS) that deal with disciplinary proceedings: the Preliminary Investigation Committee (PIC) and the Disciplinary Committee (DC). The changes proposed concern the composition and size of these committees.
20. As required by the 2006 Act the Department has consulted on the proposal. The consultation exercise ran for 12 weeks from 16 January to 10 April 2012; 32 responses were received from a variety of stakeholders; and the overall response was positive, with the majority of respondents in favour of all components of the proposal. Further information is given in Chapter 5 of the Explanatory Document.
21. **The Committee is satisfied that the Order meets the tests set out in the 2006 Act and is not otherwise inappropriate for the Legislative Reform Order procedure. The Committee is also content with the Department’s proposal that the affirmative procedure should apply.**

³ <http://www.parliament.uk/business/committees/committees-a-z/lords-select/delegated-powers-and-regulatory-reform-committee/lros/alphabetical-list-of-lros/>

**SPECIAL REPORT: STATUTORY PROCEDURES FOR THE
SCRUTINY OF DELEGATED POWERS – GOVERNMENT
RESPONSE**

22. Our Special Report on “Statutory Procedures for the Scrutiny of Delegated Powers” was published in July (3rd Report, HL Paper 19). The Government have now responded by way of a letter from the Rt. Hon. Lord Strathclyde, Leader of the House of Lords, printed at Appendix 1.

APPENDIX 1: SPECIAL REPORT: STATUTORY PROCEDURES FOR THE SCRUTINY OF DELEGATED POWERS – GOVERNMENT RESPONSE

Thank you for your letter drawing attention to the Special Report of the Delegated Powers and Regulatory Reform Committee.

The Committee recommended that, when proposing a strengthened scrutiny procedure in any future bill, the Government should normally use an existing model and should explain the basis for the decision. Should it be considered necessary to create another variation, the reasons should be set out clearly. On behalf of the Government I accept this recommendation and agree that wherever possible an existing model will be used. Of course, there may be cases where an existing model is not viewed as appropriate and, in this event, the Government undertakes to explain the reasons for preferring to create a new procedure in the explanatory notes to the bill and the delegated powers memorandum.

The Report also invited the Government to either set out the case for not requiring supporting documents to be laid with draft orders under section of the Localism Act 2011, or to give an undertaking to lay supporting documents when laying any draft order under that section. The Government undertakes to produce material setting out the detail of, and rationale for, any proposed order under section 19 of the Localism Act 2011 and to provide relevant background to support the necessary consultation and subsequent parliamentary process.

The Report also advised that it would be helpful for the Government to make clear whether it intends to confirm the undertaking given by the previous Government in respect of draft orders laid under section 14 of the Legislative and Regulatory Reform Act 2006; and whether it intends to give the same undertakings in respect of draft orders laid under section 5E of the Fire and Rescue Services Act 2004 and sections 7 and 11 of the Localism Act. Further consideration is being given to this point and I will write to provide a full response in due course.

Finally the Special Report recommended that I put proposals to the Procedure Committee as to how the House will scrutinise draft orders under:

1. Section 85 of the Northern Ireland Act 1998
2. Section 17 of the Local Government Act 1999
3. Section 9 of the Local Government Act 2000
4. Section 98 of the Local Government Act 2003
5. Section 102 of the Local Transport Act 2008
6. Section 19 of the Localism Act 2011.

I will put forward proposals to the Lords Procedure Committee recommending that orders made under section 19 of the Localism Act 2011, and the other aforementioned five orders, be scrutinised by the Delegated Powers and Regulatory Reform Committee. I understand that this would be acceptable to both yourself and the Chairman of the Secondary Legislation Scrutiny Committee.

Rt. Hon. Lord Strathclyde

Leader of the House

November 2012

APPENDIX 2: 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.

The following interests were declared in respect of the following Bill at the meeting on 14 November:

Enterprise and Regulatory Reform Bill: Parts 1 to 5:

Baroness Andrews as Chairman of English Heritage and for living in a listed building, Baroness Gardner of Parkes and Lord Marks of Henley-on-Thames for living in listed buildings.

Attendance:

The meeting on the 14 November was attended by Baroness Andrews, 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.