HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

10th Report of Session 2012-13

Enterprise and Regulatory Reform Bill: Part 6

Public Service Pensions Bill

Small Charitable Donations Bill

European Union (Croatian Accession and Irish Protocol) Bill

Prevention of Social Housing Fraud Bill

Disabled Persons' Parking Badges Bill

Scrap Metal Dealers Bill

Draft Legislative Reform (Hallmarking) Order 2013

Enterprise and Regulatory Reform Bill Parts 1 to 5: Government Response

Ordered to be printed 12 December 2012 and published 14 December 2012

Published by the Authority of the House of Lords

London : The Stationery Office Limited
£price

HL Paper 93

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".

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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.

Tenth Report

ENTERPRISE AND REGULATORY REFORM BILL: PART 6

1. We reported on Parts 1 to 5 of this Bill on 14 November (9th Report, HL Paper 64). The memorandum prepared by the Deparment for Business Innovation and Skills (BIS) to explain the delegated powers in the Bill deals with Part 6 from page 39 onwards[1]. When considering Part 6, we have taken particular account of evidence submissions received from UK Music and ENN Advokatbyrå HB ("ENN") which expressly address the appropriateness of certain of the delegations in clauses 66 to 68. These submissions are available on the Committee's website.[2]

Clause 66 – Exceptions to copyright and performance rights

2. Clause 66 inserts new sections 28ZA and 189A into the Copyright, Designs and Patents Act 1988 ("the 1988 Act") to make provision about exceptions to, respectively, copyright and performance rights. Both copyright and performance rights are already subject to exceptions set out in the 1988 Act, in the form of descriptions of acts that may be done in relation to those rights.

3. Subsection (1) of each new section confers a power to amend by affirmative regulations either set of exceptions to provide that any act is or is not an act which may be done in relation to copyright works or performance rights. Each power is a Henry VIII power, in so far as consequential amendments may be made in primary legislation under subsection (3)(b). The powers conferred by subsections (1) and (3) in each new section would by themselves be very significant, as provision made under them could have a considerable impact on private rights. But those powers are constrained by subsection (2), which permits only provision that could be made under section 2(2) of the European Communities Act 1972 ("the EC Act") – save that paragraph 1(1)(d) of Schedule 2 to that Act (which limits the penalties for criminal offences created under section 2(2)) is disapplied, so that there is no limit on the maximum penalty that may be provided for in the regulations.

4. The reason for the powers is explained on page 40 of the memorandum. Sections 107 and 198 of the 1988 Act already create offences in connection with breaches of (respectively) copyright or performance rights, and provide for penalties which exceed those that may be provided for under section 2(2) of the EC Act. Changes made, by regulations under the new powers, to the statutory exceptions may well result in certain conduct becoming a criminal offence under section 107 or 198, and it is the intention that the same maximum penalties should apply to those as to existing offences.

5. Although, in an early report made in the context of a particular Bill, our predecessor committee indicated that it would regard as inappropriate a

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

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

power to increase statutory penalties by subordinate legislation, that approach has not been followed for some time. Indeed, we have, in subsequent Sessions, considered numerous instances where Acts have conferred powers to create offences and provide for penalties. In some cases, where the likely ingredients of the offence, and the maximum penalties that may be prescribed, are sufficiently clear in the Bill itself, we have accepted that even the negative procedure may not be inappropriate for such powers; but otherwise, we have almost invariably recommended that the affirmative procedure should apply. In the light of that, we do not consider either the delegation or the affirmative procedure to be inappropriate in the present case.

Clause 67 – Reduction of transitional protection

6. Clause 67 inserts new subsections into section 170 of the 1988 Act to enable the Secretary of State, by affirmative regulations, to reduce the duration of copyright afforded under Schedule 1 to that Act, to unpublished works and to published anonymous and pseudonymous works. Schedule 1 to the 1988 Act was concerned with providing transitional protection to works made before the commencement of Part 1 of that Act. For instance, under paragraph 12(3) of that Schedule, copyright in existing unpublished but anonymous works continues to subsist until 2039 (50 years after the coming into force of Part 1).

7. It is unclear from either the Explanatory Notes to the Bill or the memorandum how it is intended that the power should be exercised – for instance, what scale of reduction in the period of protection might be envisaged, and whether different categories of works within the general classes identified in new subsection (2)(a) and (b) might be affected in different ways. But it is clear from new subsection (3) that the existing transitional protection could be brought to an end as soon as the regulations could be made and brought into force.

8. This new power could also have a very significant effect on private rights but, unlike the powers conferred by virtue of clause 66, is subject to no constraint on the face of the Bill. The memorandum offers medieval manuscripts as an example of the kinds of works that might be affected, and the Explanatory Notes mention a belief that unpublished, pseudonymous or anonymous works account for a large proportion of "orphan works". But the broad scope of the power would seem to enable the regulations to reduce substantially, or even remove, the remaining period (which could be up to 25 years) of copyright in respect of works of relatively recent creation – for instance, those made during the 1980s.

9. We consider that BIS has not made a sufficient case in its memorandum for a delegation of legislative power (albeit subject to affirmative resolution) of this potential significance, particularly one that could be used to interfere with existing property rights. **We therefore recommend to the House that, unless the Bill can be amended to constrain the power so as to provide greater safeguards for private rights, clause 67 ought to be removed.**

Clause 68 and Schedule 21 – Copyright, and performers' rights

10. Clause 68 inserts new sections 116A to 116D, and a new Schedule A1 (set out in Part 1 of Schedule 21 to the Bill), into the 1988 Act, to make further

provision about the licensing of copyright and of performers' rights. Almost all of the provision is to be made in regulations under powers conferred in the new sections and new Schedule A1, and in Part 2 of Schedule 21. Many of the provisions are closely modelled on the earlier sections 116A to 116D and Schedule A1 that were to be inserted in the 1988 Act by the Digital Economy Bill in Session 2009-10. As respects those earlier provisions, the Committee suggested amendments to the House, having found that neither the delegation of powers nor the proposed procedure (negative, unless primary legislation was being amended) were acceptable (2nd Report of Session 2009-10, HL Paper 24)). The provisions were subsequently removed from that Bill. We are surprised that the memorandum does not seem to refer either to the earlier provisions or to our earlier Report.

11. The new provisions fall into the same four categories as in the earlier Bill, but are differently arranged. They deal with the following areas:

- regulation of licensing bodies (often referred to as "collecting societies", being bodies that sell licences, collect and distribute royalties, and enforce rights, on behalf of individual copyright owners) – clause 68(2) and new Schedule A1;
- licensing of 'orphan works' (copyright works where the copyright owner cannot be contacted) – see new section 116A;
- extended collective licensing (to enable and regulate schemes whereby copyright licences may be granted in respect of works in which copyright is not owned by, or licensed to, the body granting the licence) – see new section 116B; there is a brief explanation on page 45 of why these powers are thought to be necessary;
- corresponding provision about performers' rights – clause 68(4) and Part 2 of Schedule 21. These are not dealt with explicitly in the memorandum; but new paragraphs 1A to 1D correspond broadly with new sections 116A to 116D.

12. All of these provisions contain significant powers, conferred in circumstances where the new provision about the licensing of works, and about the regulation of the bodies that are to grant licences, is to be almost exclusively in regulations. Anxiety has been expressed in representations to the Committee (UK Music at pages 4 and 5; and ENN at paragraphs 52 to 70) about the breadth of the powers, the purely enabling nature of the provision in the Bill and the absence of express provision for safeguards; and there is also concern about international obligations.

13. Many of the recommendations listed in our 2009-10 Report have now been met by additional requirements in the Bill about the provision that regulations must contain (for instance, "orphan rights" were, under the earlier Bill to be left at large for definition in the regulations and by reference to guidance, but must now be defined in accordance with new section 116A(3)). But, the exercise of all of these powers is still to be subject only to negative procedure, unless the regulations include provision amending an enactment (see new section 116D(5), paragraph 7(5) of new Schedule 1A and paragraph 1D(5) in Part 2 of Schedule 21). **There is a clear case for requiring that at least the first regulations under new sections 116A and 116B, under paragraphs 1 (codes of practice) and 5 (sanctions) of new Schedule 1A, and under new paragraphs 1A and 1B inserted by paragraph 5 of Schedule 21, should require the affirmative procedure.**

That was in substance one of the recommendations we made in Session 2009-10, and we consider that it applies with as much force now as it did then.

14. There are two related points about new Schedule A1:

- Paragraph 1 enables regulations to require a licensing body to adopt a code of practice that complies with the regulations, failing which the regulations may treat the body as having adopted a code approved by the Secretary of State. Given that it appears from paragraph 5(1)(b) that a failure to comply with a code may expose a body to sanctions under the regulations, **we consider that the approval of the 'default' code (see paragraph 1(2)) should attract a Parliamentary procedure. Otherwise, requirements of the code, to be enforced by penalties, could be imposed or revised without any form of Parliamentary scrutiny.**
- Paragraph 7 enables the regulations to "impose requirements by reference to guidance issued from time to time by any person", and a failure to comply with such a requirement could seemingly expose a body to a sanction under paragraph 5(1)(c). It is clear from paragraph 7 that it is envisaged that the guidance might be revised at any time, with the result that the requirements imposed by virtue of the regulations would change without any amendment of the regulations themselves. Leaving aside the undesirability of putting in "guidance" provision that is in effect to be regarded as mandatory in character, the objection to paragraph 7 is the same as for the default code of practice, namely that provisions that must be complied with on pain of penalty ought to be susceptible to some form of Parliamentary control. **We draw paragraph 7 to the attention of the House on this ground.**

Clause 74 – Equal pay audits

15. Clause 74 inserts new section 139A into the Equality Act 2010 to make provision about "equal pay audits", defined in subsection (3) as an audit designed to identify action to be taken to avoid "equal pay breaches" (these are in turn defined in subsection (2) as a breach of an equality clause or a contravention in relation to pay of specified provisions of the 2010 Act). Apart from those definitions, new section 139A leaves the remainder of the provision about equal pay audits to regulations under that section, which are to be subject to affirmative procedure.

16. The regulations may require an employment tribunal to order a respondent (who will usually be an employer) to carry out an audit where it finds there has been an equal pay breach (subsection (1)), but the Bill sets out circumstances in which the regulations must require the tribunal not to order an audit (subsection (5)). The means by which an order for an audit is to be enforced is left entirely to the regulations (subsection (6)), although they may not make non-compliance an offence. It is unclear from the memorandum whether the Government envisages that whatever means of enforcement is provided for should be operated by the tribunal, or whether some other mechanism is contemplated.

17. Section 78 of the 2010 Act (gender pay gap information) is mentioned in the memorandum as a partial precedent for the new powers. Although we regarded that provision as a significant power when we considered the

Equality Bill, we did not find it inappropriate, in view of the affirmative procedure (2nd Report of Session 2009-10, HL Paper 24). We regard new section 139A as acceptable in principle for the same reason.

18. Subsection (7) requires the first regulations under section 139A to exempt a "start-up" or "micro-business" from the tribunal's power to order an equal pay audit, but those expressions are to be defined in the regulations themselves. It seems most unusual for the extent of a duty to make provision in regulations to be (in effect) self-limiting by reference to the regulations themselves. It would be more appropriate for "start-up" and "micro-business" to be defined in section 139A itself. The intended effect of the final eight words of subsection (7) is also unclear.

19. Finally, in view of the part to be played by employment tribunals in the execution of whatever provision is made under new section 139A, it is surprising that there is no express requirement for the regulations to be made in concurrence with, or even after consultation with, (for instance) the Lord Chancellor.

20. We draw to the attention of the House-

- **the lack of clarity in either subsection (6) or the memorandum about the intended means of enforcement (paragraph 16);**
- **the unsatisfactory nature of the duty imposed by subsection (7) (paragraph 18);**
- **the absence of any requirement for concurrence or consultation (paragraph 19).**

PUBLIC SERVICE PENSIONS BILL

21. This Bill enables regulations to establish schemes for pensions and other benefits for civil servants, the judiciary, local government workers, teachers, health service workers, fire and rescue workers, members of police forces and the armed forces. Clause 1(3) says that these terms are defined in Schedule 1. But that it is true only up to a point. For example, paragraphs 3, 4 and 5 of Schedule 1 effectively leave it to the regulations themselves to define significant elements of what is meant by "local government workers", "teachers" and "health service workers". And no effective meaning is given to "the judiciary" at all, since everything depends on orders subject to the negative procedure.

22. The Bill is essentially an enabling Bill. Much of the detail is to be left to subordinate legislation and there is a memorandum from HM Treasury on the delegated powers in the Bill.[3]

The current position

23. Pensions for the groups of public servants covered by the Bill are not all dealt with in the same way under existing legislation.

    (a) Civil servants are provided for by a scheme under section 1 of the Superannuation Act 1972. The principal civil service pension scheme and amendments to it must be laid before Parliament, but there is no Parliamentary procedure. Section 1 of the 1972 Act also covers a list of public bodies and offices specified in Schedule 1 to that Act and the list may be altered by an order subject to negative procedure.

    (b) Local government workers, teachers and health service workers are provided for by regulations under, respectively, sections 7, 9 and 10 of the 1972 Act. The regulations are in each case subject to negative procedure.

    (c) Fire and rescue workers are provided for by schemes under section 34 of the Fire and Rescue Services Act 2004 which are bought into force by order by the Secretary of State subject to negative procedure.

    (d) Members of police forces are provided for by regulations under the Police Pensions Act 1976 which are subject to negative procedure.

    (e) The armed forces are provided for by schemes in orders by the Secretary of State under the Armed Forces (Pensions and Compensation) Act 2004, which are normally subject to negative procedure.

    (f) Judicial pensions are dealt with differently. In particular, for England, Wales and Northern Ireland, the Judicial Pensions and Retirement Act 1993 sets out arrangements in primary legislation, leaving just some of the details to be filled in by regulations and orders subject to negative procedure.

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

24. Accordingly, the principle that most public sector pensions may largely be left to delegated legislation is well-established. The elements which may be so left include significant matters such as the type of scheme (defined benefits or defined contributions, for example). But even so, some aspects of the schemes which under the Bill would be left to subordinate legislation are currently in the primary legislation, for example, appeal procedures for civil servants.

Scheme regulations under the Bill

25. The regulations establishing schemes under the Bill are subject to negative procedure, except where they amend primary legislation or contain retrospective provision appearing to the person making them to have significant adverse effects, in which case they are subject to affirmative procedure. Much of clauses 3 to 18 deals with particular matters for which the regulations may or must provide, and all this is explained in the memorandum. We wish to draw to the attention of the House the arrangements for judicial pensions and two aspects of clause 3.

Judicial pensions

26. Paragraph 28 of the memorandum explains that the judicial pension schemes are largely set out in primary legislation. For instance, the Judicial Pensions and Retirement Act 1993 sets out the arrangements in considerable detail. The judicial offices covered are specified in Schedule 1 to that Act and there is a power to add to the list (but not to reduce it) by order subject to negative procedure. Though some of the minor details are left to subordinate legislation, the elements of the scheme are spelt out in considerable detail in the Act itself. The only exception of significance is that the amount, if any, of contributions, including voluntary additional contributions, is left to subordinate legislation. The judicial office holder's entitlement to a pension is given by Act of Parliament.

27. All this will be changed under the Bill. Under Clause 16, no benefits are to be provided under the scheme in the 1993 Act in respect of service after 5 April 2015, or indeed under any of the other schemes listed in paragraphs 3 to 15 of Schedule 5 to the Bill. Instead, provided that orders are made under paragraph 2 of Schedule 1 to the Bill, those falling within the scope of the orders may be provided for by scheme regulations. Paragraph 28 of the memorandum indicates the present government's intention that judges be brought within the scope of the civil service pension scheme.

28. The judicial office holder is not given any entitlement to a pension by the Bill itself – everything depends on whether, and how, the powers to make subordinate legislation are exercised. The potential significance of this change is not addressed in the memorandum. A reason why an Act of Parliament currently specifies both the fact of entitlement and the details of the calculations for judicial pensions may be the special position of the judiciary in our constitution. The underlying theme of the Bill seems to be that their pensions should not be subject to any higher level of Parliamentary involvement, nor to any lower level of control by the executive, than the pensions of those whose work is essentially executive or operational. **The House may want to consider whether this is appropriate.**

Clause 3 (scheme regulations)

29. There are two aspects of clause 3 which concern us – power to amend Acts and retrospection.

Power to amend Acts

30. Clause 3(3)(b) enables scheme regulations to "make provision by amending any legislation (whenever passed or made)". Neither the Explanatory Notes nor the memorandum state whether, in the government's view, this extends to amending the Bill itself once it is enacted. It probably does not (contrast "(including this Act)" in the more limited power in clause 15(4)). But it seems certainly arguable that it does.

31. The Bill as drafted enables the regulations to amend any Act whatsoever (provided always that the amendment is for the purpose of the schemes). Paragraph 25 of the Explanatory Notes says that clause 3(3)(b) "may be necessary where legislation is inconsistent with or requires modification as a consequence of scheme regulations." But if a future Act is inconsistent in its policy with regulations, one would expect its prevalence not to be amendable by subordinate legislation merely because of the inconsistency of its policy with subordinate legislation. In the absence of a very good reason, the future Act should continue to trump the earlier subordinate legislation. On the other hand, a power enabling the regulations to amend existing Acts purely consequentially would be unobjectionable.

32. Section 6 of the Superannuation Act 1972 enables an order subject to negative procedure to "repeal or amend any provision in an Act of Parliament ... where it appears to [the Minister] that provision is inconsistent with, or has become unnecessary or requires modification in consequence of" the civil service scheme. But that power is not expressed to apply to future Acts and it appears never to have been exercised. We were certainly not convinced of the need or justification for the more extensive power now being sought. **We recommend that the House seeks the amendment of clause 3(3)(b) so that it is limited-**

- **so far as it confers power to amend primary legislation, to amendments of Acts passed before the end of this session (not including the Bill itself); and**
- **to making only consequential provision or provision that is necessary to ensure consistency.**

33. For any amendment to primary legislation, the affirmative procedure should apply and the Bill already provides for this (clause 21(1)(a)).

Retrospective provision

34. Clause 3(3)(c) enables scheme regulations to make retrospective provision. Though the exercise of this power so as to interfere with accrued rights is significantly limited in practice by the Human Rights Act 1998, it is undoubtedly the case that the Government intends that members of a scheme **can** be significantly adversely affected by the power. This is because the Bill acknowledges the possibility by providing in such cases for a different consultation procedure (clause 20), involving consultation "with a view to reaching agreement" with those affected or their representatives (clause 20), and by providing in such cases for the affirmative procedure (clause

21(1)(b)). The question whether the legislation would have significant adverse effects is left to the judgment of those making the regulations.

35. Whether the regulations should be capable of imposing adverse effects retrospectively is ultimately a matter of policy for the House, but Parliament does not often confer powers of this sort and the fullest justification is needed. The explanation given to us was this: "Because of the complex interaction of pensions with the rest of the statute book, it is considered essential to include powers to amend legislation and to make retrospective provision in order to ensure that pension schemes continue to operate as intended for all members" (paragraph 29 of the memorandum).

36. Paragraph 26 of the Explanatory Notes says that powers to make retrospective provision "are common in public service pension legislation". That is true, but the full story is alluded to at paragraph 31 of the memorandum. The statutory provisions for civil servants, local government employees, teachers, health service workers, members of the police forces and the armed forces all contain a provision which to some extent or another limits the power to make adverse changes retrospectively without agreement. A provision of this sort is common and indeed the statutory provisions for pensions for MPs and Ministers also contain an express provision to protect accrued rights.

37. **We draw to the attention of the House that the unrestricted nature of the power now being sought to make retrospective provision is not well supported by precedent, and the case made for it to us was less than wholly convincing.** If the House is persuaded of the need for so wide a power to make retrospective provision, then it is certainly appropriate that (as the Bill provides) the exercise of the power must be subject to affirmative procedure where there are significant adverse effects.

SMALL CHARITABLE DONATIONS BILL

38. This Bill is certified by the Speaker of the House of Commons as a Money Bill. HMRC have prepared a memorandum for the Committee on the delegated powers in the Bill.[4]

39. There are delegated powers to make orders or regulations at clauses 5(8), 7(3), 8(5), 11(2), 14(1), (2), (4) and (6) and 21(6). Of these, those at clauses 5(8), 7(3) and 14(1), (2), (4) and (6) are Henry VIII powers. All instruments are subject to affirmative procedure in the House of Commons only, except for those made under the power to make transitional provision at clause 21 (6), which are subject to no Parliamentary procedure.

Clause 11 (management of top-up payments)

40. The power in clause 11 is potentially wide-ranging and explained at paragraphs 18 to 22 of the memorandum. It is significant in that the regulations may apply provisions of other enactments about powers of entry, civil penalties and creating criminal offences (subject to the limitations in subsections (5) and (6)) and those other enactments are not specifically identified. But it is plain that the payments under the Bill will be administered alongside the tax system and, in particular, that of claiming tax relief (paragraph 20 of the memorandum). It seems likely that, as mentioned in paragraph 21 of the memorandum, the powers in clause 11 will be used to reflect what is already on the statute book for analogous areas.

41. There is nothing in the Bill which the Committee wishes to draw to the attention of the House.

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

EUROPEAN UNION (CROATIAN ACCESSION AND IRISH PROTOCOL) BILL

42. This Bill deals, in particular, with the entitlement of Croatian workers to work and reside in the UK. The only delegated power in the Bill is at clause 4 and it is explained in the memorandum for the Committee from the Foreign and Commonwealth Office.[5]

Clause 4 (freedom of movement)

43. As explained in paragraphs 7 to 10 of the memorandum, existing EU member states may, notwithstanding the EU's normal rules about free movement, regulate the labour market by restricting access by Croatian nationals for a transitional period. Under clause 4, this is all to be done by regulations. The regulations are subject to the affirmative procedure on the first exercise of the power, thereafter to affirmative or negative procedure at the option of the Secretary of State.

44. The power is based on that in the European Union (Accessions) Act 2006 (Bulgaria and Romania). But it is wider in that:

- the range of criminal offences that may be created is wider (clause 4(3)(c) and (e));
- a fixed penalty notice system may be applied to offences created under clause 4(3)(c) (clause 4(3)(f)), though there is a cap on the penalty (clause 4(7)(a));
- a civil penalty system may be applied to certain contraventions of the regulations (clause 4(3)(g)) – though there is a cap on the penalty (clause 4(8)(a)) and provision for objection and appeal must be included in the regulations (clause 4(8)(b));
- the regulations may apply powers of arrest, search and entry in the Immigration Act 1971 (clause 4(3)(h)).

45. This last in particular seems especially significant. No justification is given in the memorandum for the extent of subsection (3)(h).

46. There is an issue with Parliamentary procedure. Unlike with the 2006 Act, under which any exercise of the power was subject to an affirmative procedure, any regulations under the Bill after the first regulations need not be subject to affirmative procedure. Instead, the Secretary of State is given the choice of affirmative or negative procedure, as with regulations under section 2(2) of the European Communities Act 1972. That Act is a wholly exceptional case. Given that the transitional period can last up to seven years (paragraph 8 of the memorandum), subsequent regulations may well reflect significant policy decisions. There is no sufficient reason to depart from the precedents of 2006 and 2003 (10 new member states) that the transitional regulations about movement of workers should always be subject to an affirmative procedure and indeed there is every reason not to do so. **We recommend that in all cases the regulations be subject to affirmative procedure.**

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

PREVENTION OF SOCIAL HOUSING FRAUD BILL

47. This is a Private Member's Bill with Government support, so there are Explanatory Notes and a Delegated Powers Memorandum from the sponsoring Department, the Department for Communities and Local Government.[6]

48. The only significant powers are in clauses 7 and 8, about powers to require information and the associated creation of offences (the penalty for which is capped by clause 8(2)(b) and (3)(b)). These are subject to affirmative procedure – at Westminster when the regulations are by the Secretary of State and at the National Assembly for Wales when they are by the Welsh Ministers. Since it seems fairly clear what the regulations are to contain (final sentence of paragraphs 2 and 7 of the memorandum) it may be surprising that the provisions are not in the primary legislation, as they are for social security. But the Committee finds the delegations acceptable in view of the affirmative procedure.

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

DISABLED PERSONS' PARKING BADGES BILL

49. This is a Private Member's Bill with Government support, so there are Explanatory Notes and a Delegated Powers Memorandum from the sponsoring Department, the Department for Transport.[7] But this does not fully explain the power in clause 1 to specify a form of badge.

50. Section 21(1) of the Chronically Sick and Disabled Persons Act 1970 says that "there shall be a badge of a prescribed form to be issued by local authorities for motor vehicles driven by, or used for the carriage of, disabled persons." The prescribing of the form is done by regulations subject to negative procedure and made by the Secretary of State (England and Wales) or Scottish Ministers (Scotland). So the form is currently a matter of public record.

51. There is no requirement on the Secretary of State to prescribe the form in any particular level of detail, but if he wishes all local authorities to conform to detailed requirements he must set out that detail in regulations. This is what the current regulations do.

52. Clause 1(2) and (3) changes the position for England and Wales. Under the Bill, the method by which the Secretary of State imposes the form of badge is to be by simply specifying it, without any particular formality and subject to no Parliamentary procedure. But the nature of the act of specifying the form is no less, and no more, legislative than it was before. So the issue is whether it is acceptable for there to be no Parliamentary procedure where previously the negative procedure applied.

53. Paragraph 14 of the Explanatory Notes says that the current arrangement has the effect of requiring the disclosure of certain high-security features of the badge which ought not to be a matter of public record, and that this compromises the security of the scheme. Paragraph 8 of the memorandum says that clause 1 has the effect of helping to prevent forgery. We do not see any overwhelming reason why Parliament would need to maintain control over the form of the badge. In our view an increase in security can in this context be an appropriate reason for the House to relinquish control.

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

SCRAP METAL DEALERS BILL

54. This is a Private Member's Bill with Government support, so there are Explanatory Notes and a Delegated Powers Memorandum from the sponsoring Department, the Home Office.[8]

55. We consider that the memorandum makes a good case for all of the powers in the Bill, and for their level of Parliamentary control, especially in relation to the two Henry VIII powers subject to negative procedure only (paragraphs 14 and 17 of the memorandum).

56. The most significant power is at clause 21(8) – to change the definition of "scrap metal" by order subject to affirmative procedure. This could, for example, be used to bring precious metals within the scope of the licensing regime, and we would have expected it to be far more fully justified than by paragraph 22 of the memorandum. But we do not consider it inappropriate and its importance is sufficiently acknowledged by the application of the affirmative procedure.

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

DRAFT LEGISLATIVE REFORM (HALLMARKING) ORDER 2013

57. This draft Legislative Reform Order (LRO) was laid on 26 November 2012 by the Department for Business, Innovation and Skills (BIS), together with an Explanatory Document (ED), summary of consultation responses and impact assessment.[9] It is proposed to be made under section 1 of the Legislative and Regulatory Reform Act 2006 ("the 2006 Act").

58. The main purpose of the draft LRO is to remove the geographical limitation on the hallmarking activities of the UK Assay Offices imposed by section 2(1) of the Hallmarking Act 1973 ("the 1973 Act") which includes in the definition of approved hallmarks "marks struck by an assay office in the United Kingdom". The draft LRO proposes to insert a new subsection (aa) in section 2(1) of the 1973 Act which would extend the definition of approved hallmarks to include "marks struck outside the United Kingdom by an assay office under this Act".

59. The draft LRO would make two further changes to the 1973 Act: changes to section 3(3) would remove the requirement that registered manufacturers' or sponsors' marks should include the initial letters of the name or names of the manufacturer or sponsor; and changes to section 5(5) would permit the coating of hallmarked articles of silver, gold or platinum articles with platinum without having first to obtain the written consent of an assay office

60. As required by the 2006 Act, the Department has consulted on the proposal. The consultation exercise was carried out between January and April 2012. Eight responses were received. BIS states that it took account of respondents' views, and that no responses necessitated changes to the draft. Further information is given in paragraphs 19 to 21, and Annexes A and B, of the Explanatory Document.

61. 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.

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

ENTERPRISE AND REGULATORY REFORM BILL PARTS 1 TO 5: GOVERNMENT RESPONSE

62. We considered this Bill in our 9th Report (HL Paper 64). The Government have now responded by way of a letter from Lord Marland, Parliamentary Secretary for Business, Innovation and Skills, printed at Appendix 1.

APPENDIX 1: ENTERPRISE AND REGULATORY REFORM BILL: PARTS 1 TO 5: GOVERNMENT RESPONSE

I am grateful for the Delegated Powers and Regulatory Reform Committee's Ninth Report of Session 2012-13, published on 15 November 2012, which considers Parts 1 to 5 of the Enterprise and Regulatory Reform Bill.

I note that the Committee considered that most of the powers included in parts 1 to 5 were an acceptable use of delegated legislation.

The Report made recommendations for the powers included in clause 52 (heritage partnership agreements and listed building consent orders) and clause 61 (civil liability for breach of health and safety duties). We have carefully considered the Committee's recommendations on these points below.

Clause 52 (new section 26B) - heritage partnership agreements

New section 26B(2)(g) enables the Secretary of State, by regulations, to modify any provision of the Planning (Listed Building and Conservation Areas) Act 1990 ("P(LBCA)A 1990") as it applies to heritage partnership agreements. The Committee considered this power to be inappropriately wide. We accept the Committee's conclusion and will bring forward an amendment at Committee stage to narrow the provision so that it specifies particular sections or chapters of the P(LBCA)A 1990.

Clause 52 (new section 26C) - listed building consent orders

New section 26C enables the Secretary of State to make a listed building consent order, granting listed building consent in respect of works to listed buildings as specified in the order. The Committee considered that this power should be subject to the affirmative procedure. We accept the Committee's recommendation and will bring forward an amendment at Committee stage to give effect to it.

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

This clause inserts new section 47(2B) of the Health and Safety at Work etc Act 1974, which enables the Secretary of State to make regulations which make changes to the extent to which "other health and safety legislation" is actionable. "Other health and safety legislation" is defined as "any provision of any enactment which relates to any matter relevant to any of the general purposes" of Part 1 of the 1974 Act. The Committee considered that this power was potentially so far-reaching in its effect as to be inappropriate, despite the affirmative procedure, and recommended its removal. On further consideration, and taking into account of the fact that the government has no plans to extend the policy at present, we accept the Committee's recommendation and will bring forward an amendment at Committee stage to give effect to it.

I believe that we will therefore be addressing all of the Report's recommendations.

I note that you will be reporting separately on Part 6 of the Bill, which I look forward to.

Lord Marland of Odstock

Parliamentary Secretary for Business, Innovation and Skills
December 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 12 December:

Enterprise and Regulatory Reform Bill: Part 6:

Lord Blackwell as a Non-executive Board Member at OFCOM, Lord Haskel as the Honorary President of the Knowledge Transfer Network and Lord Soley as Chairman and Co-Director, Good Governance Foundation CIC.

Public Service Pensions Bill:

Baroness Andrews, Lord Butler of Brockwell, Baroness Gardner of Parkes, Lord Mayhew of Twysden and Lord Soley as in receipt of a public service pension.

Small Charitable Donations Bill:

Lord Butler of Brockwell, Baroness Gardner of Parkes, Lord Haskel, Lord Marks of Henley-on-Thames, Lord Soley and Baroness Thomas of Winchester as involved in charitable activities.

Disabled Persons' Parking Badges Bill:

(Lord Soley took the chair for the discussion of this Bill)

Baroness Thomas of Winchester as the sponsor of the Bill and owner of a blue badge, and Baroness Gardner of Parkes as owner of a blue badge.

Scrap Metal Dealers Bill

Lord Haskel as the Honorary President of the Knowledge Transfer Network.

Draft Legislative Reform (Hallmarking) Order 2013:

Baroness Gardner of Parkes whose daughter is a Liveryman of the Goldsmiths' Company.

Attendance:

The meeting on the 12 December 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, Lord Soley and Baroness Thomas of Winchester.