

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

1st Report of Session 2013–14

Care Bill [HL]
Offender Rehabilitation Bill [HL]
Mesothelioma Bill [HL]

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The Committee is appointed by the House of Lords each session and has the following terms of reference:

(i) 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;

(ii) To report on documents and draft orders laid before Parliament under or by virtue of:

(a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,

(b) section 7(2) or section 15 of the Localism Act 2011, or

(c) 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; and

(iii) To report on documents and draft orders laid before Parliament under or by virtue of:

(a) section 85 of the Northern Ireland Act 1998,

(b) section 17 of the Local Government Act 1999,

(c) section 9 of the Local Government Act 2000,

(d) section 98 of the Local Government Act 2003, or

(e) section 102 of the Local Transport Act 2008.

Membership

The members of the Delegated Powers and Regulatory Reform Committee are:

Baroness Andrews

Baroness Gardner of Parkes

Baroness Fookes

Lord Haskel

Countess of Mar

Lord Marks of Henley-on-Thames

Rt Hon. Lord Mayhew of Twysden QC DL

Baroness O'Loan

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 Appendix 2.

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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

First Report

CARE BILL [HL]

1. This Bill begins its Committee Stage on 4 June. Its substantive provision falls into three parts: Part 1 is concerned with the provision and funding of adult social care and support by local authorities; Part 2 makes provision about the regulation of care standards in the NHS and elsewhere, and confers further powers and imposes additional duties on ‘Monitor’ and the Care Quality Commission for that purpose; Part 3 establishes Health Education England and the Health Research Authority, and makes provision about their respective functions. The Department of Health has prepared a memorandum for the Committee explaining the delegated powers in the Bill.¹ Although extensive, we have found that, in a number of instances (of which a few are mentioned below) the memorandum could have explained more fully or more accurately why a delegation is thought to be necessary, or why a particular level of parliamentary scrutiny is being proposed.

Clause 22 – Exception for health services

2. This clause is concerned with the boundary between NHS services and social care services. Subsection (1) prevents a local authority exercising its powers to meet needs under clauses 18 to 20 in relation to a service or facility that is required to be provided under the National Health Service Act 2006, subject to two exceptions in paragraphs (a) and (b). Subsection (2) confers power enabling regulations to provide that specified types of services whose provision is prohibited, or is excepted from prohibition, by subsection (1) are or are not to be provided, or do or do not fall within either of the exceptions in subsection (1)(a) or (b). The regulations are subject to negative procedure. Paragraphs 61 and 62 of the memorandum explain the background to subsection (2), but in paragraph 67 it is said that the regulations under subsection (2) “are essentially procedural and technical ... to regulate the boundary between social care and health care established by the main prohibition in subsection (1)”, and on that footing the negative procedure is thought appropriate.
3. We do not consider that regulations under subsection (2) can fairly be described as “procedural”, because they deal with the services that can or cannot be provided notwithstanding subsection (1). While regulations under subsection (2)(a) would have the effect of relieving the prohibition in subsection (1) for specified types of services, provision under subsection (2)(b) would have the effect of tightening that prohibition, to rule out cases that would even be regarded as excepted from it under subsection (1) where “the service or facility in question would be of a nature that the local authority could be expected to provide”. It appeared to us that the department has, in paragraph 67 of its memorandum mistaken the character of the power in subsection (2)(b), which could conceivably be exercised in a way that could give rise to a gap in provision between NHS services and

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

social care. **We therefore recommend that this power should require the affirmative procedure.**

Clause 49 – “Business failure”

4. Clause 47 makes provision about the responsibility of a local authority to meet needs for care and support where a registered care provider becomes unable to do so because of “business failure”. That expression is not defined in the Bill, but its interpretation is to be provided for in regulations under clause 49(10). For each of clauses 47 to 49, the interpretation of “business failure” (and of being unable to do something because of business failure) is a critical provision, and we find it surprising that its definition should have been left entirely to regulations. We do not find the Department’s reasons (in paragraph 144 of its memorandum) for this wholesale delegation in the least persuasive, and **the House may wish to seek further reasons from the Minister why the definition cannot appear in the Bill. In any event we recommend that the power, if it is retained should attract the affirmative procedure, at least on its first exercise.**

Clause 50 – Market oversight

5. Clause 52 of the Bill provides for the Care Quality Commission (“CQC”) to assess the financial sustainability of a care provider’s business, and to take certain steps where it finds that there is a significant risk to that sustainability. Clause 50(1) enables regulations to specify criteria by reference to which it is determined whether clause 52 applies to a care provider, and subsection (4) enables regulations to provide that clause 52 does not apply, or applies only to a specified extent, to a specified description of care provider. Subsection (6) enables the regulations under subsection (4) to include cases where the Secretary of State is satisfied that the care provider is subject to some other regulatory regime comparable with that in clause 52, but the provision made by virtue of subsection (6) is inclusive not exhaustive.
6. It appears to us that regulations under clause 50 are in the nature of “gatekeeping” provision for the purposes of clause 52, and in view of the significance of provisions which would enable the CQC to take pre-emptive action where a care provider is at risk of financial instability, we do not consider that the negative procedure affords an adequate level of scrutiny. Paragraphs 149, 152 and 155 of the memorandum do not explain why it is thought that the negative procedure is appropriate. **We recommend that regulations under clause 50(1) and (4) should require the affirmative procedure on the first exercise of the powers.**

Clause 59 – Child’s carer’s needs for support

7. Clause 59(1) enables a local authority to meet a need for support on the part of a child’s carer, and subsection (2) enables regulations to make provision for this, possibly by applying Part 1 of the Bill with modifications. This power too is described in paragraph 180 of the memorandum as enabling provision in the nature of “procedural and related matter”. But in our judgement the power plainly goes well beyond that, and enables a tailor-made regime to be established for cases falling within clause 59(1). Nothing is said in the memorandum to persuade us that the negative procedure is appropriate for so general a power as that conferred by clause 59(2). **We therefore recommend that it should require the affirmative procedure**

on first exercise, when the purpose-built regime for a child's carers is first established in regulations.

Clause 97(7) – Main functions of Health Research Authority

8. Clause 97(1) sets out the main functions of the Health Research Authority (“the HRA”) which is to be established by clause 96. Clause 97(7) enables the Secretary of State to amend those main functions by negative order “in consequence of ... functions being given to ... or taken away from, the HRA”. It is not clear from subsection (7) how functions might be added or removed except under clause 97. According to paragraph 373 of the memorandum, it is envisaged that the need might arise to amend the HRA's functions in a statutory instrument implementing obligations imposed by an EU Directive. But if that were the case, the appropriate amendment could be made to the main functions in clause 97(1) by exercising powers conferred by section 2(2) of the European Communities Act 1972.
9. It seems to us unsatisfactory that a Henry VIII power should be conferred to amend the principal functions of a statutory body in circumstances where the need for the power, and the circumstances in which it might be exercised, are unclear. **We therefore draw this point to the attention of the House so that it might invite the Minister to amplify his department's explanation why the power is believed to be necessary.**

OFFENDER REHABILITATION BILL [HL]

10. This Bill is to begin its Committee Stage on 5 June. It makes a number of changes to the release arrangements set out in the Criminal Justice Act 2003 for offenders serving custodial sentences of less than 12 months and those serving sentences of between 12 months and two years, and provides in particular for adult offenders serving custodial sentences to be supervised on release for a period of at least 12 months. The Ministry of Justice has prepared a memorandum for the Committee to explain the delegated powers in the Bill.¹

Clause 7(2) – Power to replace references to dates

11. Clause 7(2)(a) confers power on the Secretary of State to amend by order the two Acts specified in subsection (2) “to replace a reference to a date on which this Act came into force with a reference to the actual date on which it did so”. The amending order is not subject to any Parliamentary procedure.
12. Using as an example the new subsection (1A) inserted into section 243A of the Criminal Justice Act 2003 by clause 1 of the Bill, the new power in clause 7(2)(a) would enable the Secretary of State to replace the reference in section 243A(1A)(b) with the date on which clause 1 actually came into force. As a result, someone looking at an updated version of section 243A (for instance, on the internet) would see the relevant date in subsection (1A)(b) without having to seek out the commencement date for clause 1 of this Bill.
13. The purpose of the power conferred by clause 7(2)(b) (to “insert provision explaining the date”) is rather less clear, and is not explained at all in paragraph 9 of the memorandum. It might, for instance, enable a parenthetical reference to be attached to the substituted date; or it might be envisaging something rather more sophisticated.
14. We welcome the facility introduced by clause 7(2)(a), as we can see some real advantages for users of legislation in the replacement of references to commencement dates. But we remain uncertain about the purpose of subsection (2)(b), and **we invite the House to seek from the Minister some assurances about the way in which the government envisages that the power might be exercised, as there is no explanation about it in the memorandum.**

Schedule 1, Paragraph 1 – Supervision requirements

15. An offender to whom new section 256AA (inserted by clause 2(2) of the Bill) applies must comply with such supervision requirements as the Secretary of State may specify, subject to the constraints imposed by new section 256AB(1) (inserted by paragraph 1 of Schedule 1). That subsection limits the requirements that may be imposed to the ten listed in paragraphs (a) to (j), but the list can be altered and supplemented by affirmative order under subsection (4).
16. The need for a delegated power is explained in paragraph 22 of the memorandum, where it is said that “it is essential that this list can be

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

updated to benefit offenders, without having to wait for a suitable legislative vehicle". Had the power in subsection (4) been limited to removing requirements from the list, that statement would undoubtedly have been correct and complete. But the power also enables new requirements to be added to the list, and other provision to be made, which may not necessarily be regarded as being for the 'benefit' of offenders. **While we do not suggest that the delegation in new section 256AB(4) is inappropriate, we are concerned that the memorandum may give a somewhat misleading impression as to the possible effect of exercising the power, and we draw this to the attention of the House.**

MESOTHELIOMA BILL [HL]

17. This Bill is to begin its Committee Stage on 5 June. It provides for a scheme for making payments to people with diffuse mesothelioma and, after their death, to their surviving dependants, and makes related provision about the recovery of certain social security benefits from such payments, and the recovery of such payments from certain compensation payments. It also affords an opportunity to extend some of its provisions to certain kinds of insurance disputes, mentioned in the final two paragraphs below.
18. The Department for Work and Pensions (“DWP”) has submitted a memorandum to the Committee explaining the delegated powers in the Bill.² There is a summary in paragraph 6 of the memorandum of the powers conferred by the Bill that are to be exercisable by statutory instrument; but there are significant powers which appear to us to be of a legislative character that are not to be exercisable in regulations or orders.

Clauses 1 to 6, and 10 – Provisions of the scheme

19. Clause 1 *enables* (rather than requires) the establishment of the scheme, and its amendment, replacement or abolition by the Secretary of State. Subsection (3) on the other hand *requires* that the scheme be published; but there is no requirement that it must be made by statutory instrument, laid before Parliament or subject to any Parliamentary procedure. Subsection (4) indicates (by “some of the things”) that the Bill is not exhaustive as to the nature of the provision that may, as opposed to must, be included in the scheme.
20. There is a table in paragraph 17 of the memorandum that summarises the provision in the Bill about what may, and what must, go in the scheme. Some of the provision affecting the scheme is set out in the Bill itself – for instance, the eligibility criteria for sufferers, and dependants who survive them is set out in (respectively) clauses 2(1) and 3(1) to (4). Certain aspects of those criteria (for instance, what is meant in clauses 2(1)(d) and 3(1)(c) by a “specified payment”) are reserved to regulations under clauses 2(2) and 3(5); and whether someone is “able” to bring an action for damages, for the purposes of clauses 2(1)(c) and 3(1)(b), is to be determined by reference to regulations under clause 18(3). But having considered the nature of its ingredients as set out in clauses 1 to 6, we concluded that the scheme is comparable in structure and content with one governing a discrete targeted social security benefit.
21. It is unclear from the memorandum why the scheme should not be made by statutory instrument so that it, and any changes to it, can receive Parliamentary scrutiny. The final sentence of paragraph 19 notes that the provisions of the scheme will be complex and subject to periodic change “and in the circumstances are properly a matter to be dealt with by the scheme”. Although it is said in paragraph 21 that the DWP has considered the balance of provision between Bill, regulations and scheme, there is little reasoning given to support the approach that has actually been taken in the

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

Bill, beyond the final sentence which again explains that a scheme will allow for greater flexibility.

22. We consider that only a most compelling explanation could justify the establishment of a scheme that is to determine rights to statutory payments, yet is not to be subject to any form of Parliamentary scrutiny. We are, in particular, not persuaded that negative regulations could not accommodate the demands of complexity and flexibility in the same way that they do for most social security benefits, while maintaining an appropriate opportunity for Parliamentary scrutiny. **We therefore recommend that the scheme be made by statutory instrument subject to the negative procedure.**

Clause 15 – Determination of insurance disputes

23. The question whether an employer maintained employers' liability insurance at a particular time is relevant for the purposes of eligibility for a payment under the scheme (clauses 2(1)(c) and 3(1)(b)) and for the purposes of the availability of help with bringing proceedings (clause 10(2)(a)(ii)). If a dispute arises on that question between a "potential insurance claimant" (defined in clause 15(8)) and an insurer, it is to be determined by a Technical Committee ("TC") established under arrangements made by the Secretary of State with "a body" (clause 15(1)). A decision of the TC is binding on the insurer and the potential insurance claimant (see subsection (3)), though either party may if dissatisfied refer the question to arbitration under clause 16. Nothing is said in the memorandum about the nature of the "body" that may be selected to establish the TC, save (in paragraph 52) that the TC is to "operate entirely independently of the scheme". **The House may wish therefore to invite the Minister to justify these provisions.**
24. Although we infer that the "arrangements" envisaged by clause 15(1) may be of a contractual nature, they will seemingly include provision which will affect rights under the scheme, and which is of a kind (see subsection (6)) commonly found in regulations governing decision-making about most social security benefits. It is not made clear in paragraph 52 of the memorandum why DWP is in principle providing for a contractual (as opposed to a regulation-based) decision-making process in this instance.
25. The definition of "potential insurance claimant" in subsection (8) is at present (and unsurprisingly, given the nature of the scheme for which the remainder of the Bill provides) confined to diffuse mesothelioma sufferers and their dependants. But subsection (10) permits that definition to be amended by affirmative regulations so as to give the TC jurisdiction over disputes about employers' liability insurance for diseases or injuries other than diffuse mesothelioma. This could extend the scope of the arrangements under clauses 15 and 16 to insurance matters well beyond the scheme for which the rest of the Bill provides. Little is said in paragraphs 53 to 55 of the memorandum about the likely exercise of the power, apart from explaining that there is no intention to exercise it until it has been established whether the TC affords "a forum for obtaining decisions effectively and on a consistent basis".
26. Paragraph 55 of the memorandum is entirely silent on the nature or extent of any envisaged amplification of the TC's jurisdiction, beyond the explanation that it might deal with insurance disputes about "other work-related conditions or injuries". **We find that, unless subsection (10) can be amended to include more about the nature of the provision that it is**

intended should be made by the regulations, it is an inappropriate delegation and, in these circumstances, we would recommend that subsection (10) should be removed from the Bill.

APPENDIX: MEMBERS AND DECLARATIONS OF INTERESTS

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No interests were declared at the meeting on 22 May.

Attendance:

The meeting on the 22 May was attended by Baroness Gardner of Parkes, Baroness Fookes, Countess of Mar, Lord Marks of Henley-on-Thames, Rt Hon. Lord Mayhew of Twysden, Baroness O'Loan and Baroness Thomas of Winchester.