

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

2nd Report of Session 2014-15

**Infrastructure Bill [HL]
Serious Crime Bill [HL]
Armed Forces (Service
Complaints and Financial
Assistance) Bill [HL]**

Ordered to be printed 25 June and published 27 June 2014

Published by the Authority of the House of Lords

London : The Stationery Office Limited
£price

The Delegated Powers and Regulatory Reform Committee

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
Lord Bourne of Aberystwyth
Baroness Drake
Baroness Farrington of Ribbleton
Baroness Fookes
Countess of Mar
Lord Marks of Henley-on-Thames
Baroness O’Loan
Viscount Ullswater
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 the Appendix.

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/hldprcpublications.

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 <http://www.parliament.uk/business/lords/>.

Contacts for the Delegated Powers and Regulatory Reform Committee

Any query about the Committee or its work should be directed to the Clerk of 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 and other acts specified in the Committee’s terms of reference

Second Report

INFRASTRUCTURE BILL [HL]

1. This Bill had its Second Reading on Wednesday 18 June. It confers powers to make delegated legislation in connection with the establishment of strategic highways companies to be responsible for the road network (Part 1); in a number of areas concerned with the planning system and land ownership (Part 3); and in connection with a statutory scheme for community shared ownership of renewable electricity generation facilities (Part 4). Five Government departments are concerned in the various areas of policy to be enacted by the Bill, and they have together prepared a memorandum for the Committee, explaining the delegations of legislative power and the associated scrutiny procedures.¹ There are only two aspects of the Bill that we wish to refer to below.

Clause 14 (and clauses 13 and 28) – Powers to “modify” Acts

2. In connection with provision made by or under Part 1 of the Bill, clause 14 confers power on the Secretary of State to make (by regulations) consequential, supplementary, incidental, transitional, transitory or saving provision. By virtue of subsection (2), the power is a Henry VIII power, in that it may be exercised so as to amend, repeal *or otherwise modify* an Act. It is not clear to us (and paragraph 46 of the memorandum does not explain) what, apart from a textual amendment, is contemplated by the words “otherwise modify”. Are they, for instance, intended to mean that provisions of an Act may be applied with modifications? Or is it envisaged that such provisions might be “glossed” in subordinate legislation, so that they are to have a different effect? Non-textual modifications of primary legislation are capable of making changes which are no less significant than textual amendments. Moreover, the regulations are, by virtue of clause 29(2)-(4), to be subject to the negative procedure unless they amend or repeal an Act (but not, apparently, if they “otherwise modify” one). The memorandum does not explain the reason for that discrepancy. Finally, the power extends to the amendment, repeal or ‘other modification’ of Acts “whenever passed or made”, and so would enable the amendment etc. of Acts passed in future Parliaments. (The power does not explicitly extend to the Act that will emerge from this Bill, and we assume for present purposes that the Government do not intend it to do so.) Again, the memorandum is silent about the perceived need for a power to amend or modify future Acts. Powers in identical terms to those in clause 14(2) are conferred by clause 13(5) (to which the affirmative procedure applies in all respects) and clause 28, and in the Serious Crime Bill which we deal with in paragraphs 12 and 13 below; and the powers are similarly unexplained in those cases too.
3. We are surprised that none of those important features of such significant delegations of legislative power (which paragraphs 46 and 109 of the memorandum dismiss as “standard provision”) or of the arrangements for

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

their control by Parliament has been expressly explained and supported in the relevant memorandum. On several past occasions, we have indicated that we expect that to be done for powers in Bills enabling the amendment of future Acts. Only last Session, we questioned the purpose and effect of powers to “modify” Acts: see our 12th Report in Session 2013-14 in relation to the Transparency of Lobbying, Non-party Campaigning and Trade Union Administration Bill, and our 27th Report concerning the Commons’ amendments to the Care Bill. In the first of those instances, the Bill was amended to extend the requirement for the affirmative procedure to instruments which “modify” primary legislation; and in the latter case, amendments were made to make clear that the power to “otherwise modify” an Act was intended to mean “apply with modifications” (and to apply the affirmative procedure to that power).

4. **We draw these powers, and the deficiencies in the explanations for them, to the attention of the House. We recommend that, unless the reason for their inclusion and their intended purpose can be fully explained to the satisfaction of the House, the words “otherwise modify” and “(whenever passed or made)” should be omitted from clauses 13(5), 14(2) and 28(2); and that, if the words “otherwise modify” are retained in clause 14 or 28, the same words should be inserted in clause 29(2)(c) so that regulations made under that clause in reliance on them will require the affirmative procedure.**

Clauses 26 and 27, Schedule 5 – Community electricity right

5. Clause 26 (supplemented by clause 27) is entirely enabling in character, and confers extensive powers for purposes connected with giving individuals resident in a community, and groups connected with a community, rights to buy a stake in a nearby renewable electricity generation facility. The intention is that the powers should be available to the Government in case the “voluntary approach” described in paragraph 78 of the memorandum should fail. Subsection (1) enables regulations to provide for the basic “right to buy”; regulations under subsection (2) will be concerned with provision about the operator of the facility; subsection (3) confers power to require the provision of information in connection with the matters listed in paragraphs (a) to (e); and subsection (4) enables regulations to be made about enforcement. Subsection (5) enables regulations to make associated modifications to generation licence conditions and exemptions. All regulations made under clause 26 will be affirmative, except those under subsection (5)(b) regarding licence exemptions, which are set out in instruments that themselves require only negative procedure.
6. Although only enabling in character, we do not regard clause 26 as by any means a skeleton provision. In addition to clause 27, it is supplemented by Schedule 5, which considerably amplifies the nature of the provision that must, and the provision that may, be made under clause 26(1)-(3). For instance, if “right to buy” regulations are made under subsection (1), Part 1 of the Schedule requires that they specify what kinds of facility are to qualify, how the facility and its promoters (and the relevant communities, individuals and groups who may exercise the right) are to be identified, as well as what kinds of stakes may be bought in what kind of facility. Similarly, Parts 2 and 3 of Schedule 5 contain additional provision about the contents of regulations made under, respectively, subsections (2) and (3) of clause 26. The Schedule contains nothing for subsection (4), but we are accustomed to

seeing in Bills fairly general powers about enforcement, exercisable by affirmative regulations, particularly where (as here) they include power to provide, in cases of contravention, for financial penalties that are unlimited on the face of the Bill.

7. We accordingly do not find the delegations in clause 26, or the arrangements for Parliamentary scrutiny of the exercise of the powers, to be inappropriate. But we are conscious that, even with the amplified outline of the regulatory framework that Schedule 5 affords, the House will not begin to get a clear idea of the real shape and content of what would be a novel statutory regime until the Government provide details of the provision that would appear in instruments made under clause 26. **We therefore express the hope that the Government will make available to the House, preferably before Report Stage, as much as possible of the provision that would be included in the regulations.**

SERIOUS CRIME BILL [HL]

8. The Bill had its Second Reading on 16 June. It is in six Parts and covers a range of matters. Part 1 makes provision about the recovery of property derived from the proceeds of crime, making amendments to the Proceeds of Crime Act 2002. Part 2 makes amendments to the Computer Misuse Act 1990. Part 3 provides for a new offence of participating in the activities of an organised crime group and amends the provisions in respect of serious crime prevention orders and gang injunctions. Part 4 provides for the seizure and forfeiture of substances used as drug-cutting agents. Part 5 amends the criminal law in relation to the offences of child cruelty and female genital mutilation, and provides for a new offence of possession of “paedophile manuals”. Part 6 provides for or extends extraterritorial jurisdiction in respect of certain offences under the Terrorism Act 2006 and confers Parliamentary approval for two EU decisions. The Home Office have prepared a memorandum for the Committee explaining the delegated powers in the Bill.²

Clauses 10 and 30 – Power to amend default sentences

9. Chapter 1 of Part 1 of the Bill amends provisions of the Proceeds of Crime Act 2002 (“the 2002 Act”) which deal with confiscation orders. Clause 10 of the Bill amends section 35 of the Proceeds of Crime Act 2002 to specify the maximum terms which may be imposed by the Crown Court under section 139(2) of the Powers of Criminal Courts (Sentencing) Act 2000 in respect of a confiscation order. The maximum term, which varies according to the amount recoverable under the order, is set out in a table contained in new subsection (2A) of section 35. Broadly, the effect of the amendments is to increase the maximum term where the amount payable under the confiscation order is more than £500,000. New subsection (2C) of section 35 contains an order making power which will allow the Secretary of State to amend the table in subsection (2A). It also allows the Secretary of State to make provision for minimum terms of imprisonment or detention which are to apply for the purposes of section 139(2) of the 2000 Act.
10. The explanation for the powers conferred by clause 10 are contained in paragraphs 3 to 12 of the department’s memorandum. We were disappointed that this explanation contained no specific reasons for including the power to make provision for minimum terms, particularly as it is a feature which is absent from the current legislative framework and there is, as far as we are aware, no comparable precedents in other legislation; certainly none was referred to in the memorandum. In our view, requiring the imposition of a minimum term constitutes a significant derogation from the powers of a court to exercise its own discretion in deciding the appropriate sentence in a particular case. For this reason, we do not believe the question of whether or not, or how, the legislation should provide for minimum terms is something which should be delegated to subordinate legislation. **Accordingly we consider that the delegation of powers by clause 10, in so far as it relates to the delegation of the power under section 35(2C)(a) of the 2002 Act to make provision for minimum terms, is inappropriate.**

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

11. The amendments made by clause 10 apply to England and Wales. Equivalent changes are proposed for Northern Ireland in clause 30. **For the same reasons, we consider that the delegation of powers by clause 30, in so far as it relates to the delegation of the power under section 185(2B)(a) of the 2002 Act to make provision for minimum terms, is inappropriate.**

Clause 67 – Power to “modify” Acts

12. Clause 67(2) enables the Secretary of State to make regulations consequential on any provision of the Bill. By virtue of subsection (3) such regulations may include provision “amending, repealing, revoking *or otherwise modifying*” any provision made by or under primary legislation passed before the Bill or in the same Session. Generally, regulations under clause 67(2) are subject to the negative procedure (see clause 67(6)); but where the regulations amend, repeal or revoke any provision of primary legislation they are subject to the affirmative procedure (see clause 67(5)).
13. No explanation is given in the memorandum as to the kind of changes to primary legislation which are envisaged using the “otherwise modifying” powers, or why the affirmative procedure is appropriate for an amendment to primary legislation but not where a provision of primary legislation is modified in some other way, such as by a non-textual modification. As we have said, in paragraph 2 above, about similar provision in the Infrastructure Bill [HL], a non-textual modification of primary legislation is capable of making changes which are no less significant than textual amendments. **In line with our conclusions on the Infrastructure Bill [HL], set out in paragraph 4 above, we recommend that, unless the words “otherwise modifying” can be fully explained to the House’s satisfaction, those words should be removed; or, if they are retained, that the words “otherwise modify” should be inserted in clause 67(5) so that regulations made under clause 67 in reliance on them will require the affirmative procedure.**

ARMED FORCES (SERVICE COMPLAINTS AND FINANCIAL ASSISTANCE) BILL [HL]

14. The Bill had its Second Reading on 23 June. It sets out a new statutory regime for the making and determination of service complaints, including the establishment of a Service Complaints Ombudsman, and it enables the Secretary of State to give financial assistance for activities which are intended to benefit the armed forces community.
15. The Ministry of Defence have prepared a memorandum for the Committee explaining the delegated powers in the Bill.³ Other than the provisions at the end of the Bill dealing with commencement, and allowing the provisions of the Bill to be extended to the Channel Islands etc., the only delegated powers are in clause 2 which inserts new sections 340A to 340O into the Armed Forces Act 2006 (“the 2006 Act”). These new sections contain a number of delegated powers, since they operate primarily by providing for the new system for redress of complaints to be set out in Defence Council regulations. Some regulation-making powers are also conferred on the Secretary of State. This structure substantially reflects the structure of the existing legislation, and many of the delegated powers in the new provisions reflect powers conferred under the old. Generally where this happens the same level of Parliamentary scrutiny applies. There is one significant difference in that under the new sections of the 2006 Act the Defence Council regulations are to be made by statutory instrument and are subject to the negative procedure, whereas under the old provisions they are not made by statutory instrument nor are they subject to any Parliamentary scrutiny.

Clause 2 – Grounds of admissibility for service complaints

16. New section 340B(4) of the 2006 Act requires the regulations to provide for a decision to be taken on the admissibility of a service complaint, with provision for that decision to be reviewed by the Service Complaints Ombudsman. The requirement for a decision on admissibility is a new element to the redress of complaints procedures which does not appear in the existing provisions. Admissibility for these purposes is defined in section 340B(5). There are three elements to the definition: a complaint is inadmissible if it is about a matter excluded from being the subject of a complaint under regulations made under section 340A(4); if the complaint is made outside the time limit set out in the regulations; or if it is inadmissible on any other ground specified in service complaints regulations (see section 340B(5)(c)). The first two are matters which are referred to in the existing legislation. There is, however, nothing in the existing legislation equivalent to the power conferred by section 340B(5)(c) to specify in regulations other grounds on which a service complaint can be held to be inadmissible.
17. Regulations under section 340B are dealt with in paragraphs 17 to 20 of the department’s memorandum. We were again surprised that no explanation was included in the memorandum for what seems to us to be an important delegation of powers under section 340B(5)(c). In our view the powers are potentially very significant in that they allow additional restrictions to be

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

imposed on a person's right to have a complaint dealt with under the new redress procedures. At the same time the powers conferred by section 340B(5)(c) are very wide: they contain no limits on the kinds of matters which might be specified in the regulations as grounds for a service complaint to be inadmissible. **Given the importance of the power and its potential to limit the right to bring a service complaint, and the lack of any restrictions on the matters which may be specified under the regulations, we consider the delegation of powers conferred by section 340B(5)(c) to be inappropriate.**

APPENDIX 1: 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.

Attendance:

The meeting on the 25 June 2014 was attended by Baroness Andrews, Lord Bourne of Aberystwyth, Baroness Drake, Baroness Farrington of Ribbleton, Baroness Fookes, Countess of Mar, Lord Marks of Henley-on-Thames, Baroness O'Loan, Viscount Ullswater and Baroness Thomas of Winchester.