HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

8th Report of Session 2014-15

Infrastructure Bill [HL]: Government Amendments: Before Clause 28

Consumer Rights Bill: Government Response

Criminal Justice and Courts Bill: Government Response

Wales Bill: Government Response

Serious Crime Bill [HL]: Government Response: Clauses 10(1) and 30(1)

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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
Baroness Drake
Baroness Farrington of Ribbleton
Baroness Fookes
Countess of Mar
Lord Marks of Henley-on-Thames
Baroness O'Loan
Baroness Thomas of Winchester (Chairman)
Viscount Ullswater

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/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 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 dprr@parliament.uk.

Historical Note

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that "in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion" (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, "be well suited to the revising function of the House". As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and other acts specified in the Committee's terms of reference.

Eighth Report

INFRASTRUCTURE BILL [HL]: GOVERNMENT AMENDMENTS: BEFORE CLAUSE 28

1. We reported on this Bill in our Second Report of the present Session.[1] The Government have now tabled amendments to insert six new clauses into Part 4, before clause 28, to give persons the right to conduct underground activities to exploit petroleum or deep geothermal energy. Four of the new clauses confer delegated powers, explained in a supplementary memorandum from the Government.[2] Although the first two of the new clauses do not delegate legislative powers, they are important for assessing the significance of the clauses which do.

2. The amendments inserting the new clauses will be taken in Grand Committee on Tuesday 14 October. In the absence of a marshalled list of amendments, the new clauses (NC) are identified in this report as follows:

   NC1: Petroleum and geothermal energy: right to use deep-level land

   NC2: Further provision about the right of use

   NC3: Payment scheme

   NC4: Notice scheme

   NC5: Payment and notice schemes: supplementary provision

   NC6: Interpretation

3. NC1 a right to use deep-level land – i.e. land at least 300 metres below surface level – "in any way for the purposes of exploiting petroleum or deep geothermal energy". The new right would mean that such use would no longer require the consent of the owner of the land vertically above the spot where the underground activity is taking place. By virtue of subsection (2) of NC6 "petroleum" has the same meaning as in Part 1 of the Petroleum Act 1998, with the effect that something done underground "for the purposes of exploiting petroleum" would include something done for the purpose of extracting shale gas.

4. NC2 sets out the kinds of things that may be done in exercise of the right, and the particular purposes for which they may be done. Notably, subsection (1)(a) allows "fracturing or otherwise altering deep-level land", so that the process of extracting shale gas by means of hydraulic fracturing (also known as "fracking") is expressly contemplated by the new clause.

5. NC3 enables the Secretary of State by regulations to require energy undertakers to make payments to landowners and others in respect of the exercise of the new right. NC4 enables him to make regulations requiring undertakers to give notice to such persons of the exercise, or proposed exercise, of the new right. Because the Government would prefer undertakers to operate voluntary schemes for payments and notification, both powers are

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1 http://www.publications.parliament.uk/pa/ld201415/ldselect/lddelreg/15/1502.htm

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

described as "reserve powers" in paragraphs 7 and 17 of the memorandum. Regulations under NC3 and NC4 would be affirmative.

6. Both of those powers are amplified in subsections (1)-(4) of NC5. Subsections (5) and (6) of that clause go on to require the Secretary of State to review the powers conferred by each of NC3 and NC4 within five years of its commencement, and to repeal the new clause by regulations if the power has not been exercised within seven years of its commencement and if he is satisfied that there is no convincing case for retaining the power (see subsection (7)). Those repealing regulations would attract the negative procedure. The final delegated power is conferred by subsection (3) of NC6, which enables the definition of "landward area" in subsection (2) to be amended by negative regulations made under section 4 of the Petroleum Act 1998.

7. We do not regard the powers conferred by NC3 and NC4 as inappropriate, in view of the affirmative procedure that is to apply; and, although the power in subsection (3) of NC6 enables the amendment of a definition in the Bill itself, we consider the negative procedure in this case to be acceptable because the power is narrow, being exercisable only in consequence of a change made in the regulations under section 4 of the 1998 Act. But we have concerns about the power in NC5(6) to repeal NC3 and NC4 by regulations.

8. We note that, in the response published by the Government on 25 September 2014 to representations made in the consultation exercise they conducted over the summer, it was said that "If the Secretary of State is not satisfied with this scheme [i.e. a voluntary payments scheme] then he may introduce regulations to set up a statutory payments mechanism."][3]; and there was no suggestion there that the power might be repealed. However, even though the Secretary of State would clearly not be in a position to introduce regulations in the way proposed once NC3 was repealed, we do not regard the delegation in subsection (6) of NC5 as necessarily inappropriate, in view of the requirement in subsection (7)(b) for him first to be satisfied that there is no convincing reason for retaining the power. But there remains an issue about whether the negative procedure would afford an adequate level of Parliamentary control over such a repeal.

9. In paragraph 21 of their supplementary memorandum, the Government acknowledge that a power to repeal provision in an Act would usually require the affirmative procedure, but they go on to explain that the negative procedure is considered appropriate in this case because the power is a "limited" one and the conditions for exercising it are on the face of the Bill. We consider that reasoning to be somewhat at variance with the Government's approach to a not dissimilar power in clause 46 of the Criminal Justice and Courts Bill, also currently before the House, which introduces a new Part 2A into the Prosecution of Offences Act 1985 to require the recovery of criminal courts' costs from those convicted of offences. Clause 47 requires the Lord Chancellor to review the operation of the new Part 2A after three years, and if he considers it appropriate to do so he must repeal the new Part by regulations. Those regulations will require affirmative approval because (in the Government's own words in their

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[3] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/358521/Government_Response_FINAL.pdf (*see paragraph 4.30*)

memorandum on that Bill) "… of the scope of the power. It will be important to ensure that each House of Parliament is able to consider whether it agrees with the conclusion that the provisions should be repealed."[4]

10. NC3 and NC4 appear to us to afford the Secretary of State powers to introduce statutory safeguards for protecting the interests of landowners and others affected by the exercise of the new right conferred by NC1, should voluntary schemes for the time being operated by energy undertakers be found to be unsatisfactory for the purpose. It is clear to us that the availability of statutory safeguards was a matter of considerable concern to a large proportion of respondents to the Government's consultation exercise, and we have concluded that, if either of the powers is to be repealed, the regulations proposed for the purpose should be approved by Parliament in draft. That will enable the Government to explain fully, and each House to test, the reasons why "the Secretary of State is satisfied that there is no convincing case for retaining the power" (as required by subsection (7)(b) of NC5). **We accordingly recommend that regulations to be made under NC5(6) to repeal NC3 or NC4 should require the draft affirmative procedure.**

4 http://www.parliament.uk/documents/DPRR/2014-15/Bills/Criminal-Courts-and-Justice-Bill/16-Criminal-Justice-and-Courts-Bill-Delegated-Powers-Memorandum.pdf (*see paragraph 86*)

CONSUMER RIGHTS BILL: GOVERNMENT RESPONSE

11. We considered this Bill in our 3rd Report (HL Paper 23). The Government have now responded by way of a letter from Jo Swinson MP, Parliamentary Under Secretary of State for Employment Relations and Consumer Affairs, printed at Appendix 1.

CRIMINAL JUSTICE AND COURTS BILL: GOVERNMENT RESPONSE

12. We considered this Bill in our 3rd Report (HL Paper 23). The Government have now responded by way of a letter from Lord Faulks, Minister of State for Justice, printed at Appendix 2.

WALES BILL: GOVERNMENT RESPONSE

13. We considered this Bill in our 6th Report (HL Paper 36). The Government have now responded by way of a letter from Rt Hon. Stephen Crabb MP, Secretary of State for Wales, printed at Appendix 3.

SERIOUS CRIME BILL: GOVERNMENT RESPONSE CLAUSES 10(1) AND 30(1)

14. We considered this Bill in our 2nd Report (HL Paper 15). The Government responded to the Committee's recommendations on Clause 67 by way of a letter from Lord Taylor of Holbeach CBE, Parliamentary Under Secretary of State for Criminal Information, printed in our 3rd Report (HL Paper 23). The Government have now responded to the Committee's recommendations on Clauses 10(1) and 30(1) by way of a letter from Lord Bates, Parliamentary Under Secretary of State for Criminal information, printed at Appendix 4.

APPENDIX 1: CONSUMER RIGHTS BILL: GOVERNMENT RESPONSE

I am grateful for the Delegated Powers and Regulatory Reform Committee's Third Report of Session 2014-15, published on 11 July 2014, which considers the Consumer Rights Bill.

The Report made recommendations that the powers conferred by clause 85(1)(a), clause 87, paragraph 8(2) of Schedule 3, and new section 47C(7) inserted into the Competition Act 1998 by paragraph 6 of Schedule 8 should be subject to the affirmative procedure.

(1) Clause 85(1) allows the Secretary of State to make regulations to impose functions on a local authority regarding the enforcement of the duty on letting agents in clause 81 to publicise details of relevant fees, and for civil penalties to be imposed. The Committee recommended that this power be subject to the affirmative procedure.

However, having reflected further on the matter and taking into account the point made by the Committee, we have decided to include the detail about enforcement on the face of the Bill, rather than by subsequent regulation.

To ensure that these details are fully future-proofed, I propose to include a new power in the Bill that will enable the provisions to be amended, and this will be subject to the affirmative procedure.

(2) The power in clause 87 allows the Secretary of State to make consequential changes, including those that modify an enactment. I believe that enabling consequential modifications is important to fully future-proof the Bill, so we must retain that provision. However, I agree with the Committee that such consequential changes certainly are no less significant than textual amendments to primary legislation. I am therefore happy to accept the Committee's recommendation that this power be subject to the affirmative procedure where used to modify primary legislation.

(3) The power conferred by paragraph 8(2) (and further detailed in paragraph 8(5)) of Schedule 3 allows the Secretary of State to amend the list of bodies which regulate unfair terms and make consequential amendments (and transitional provisions). This provision is needed because we cannot anticipate what future changes may be needed to the list of regulators, if and when the regulatory landscape changes. I agree with the Committee that this sort of change is substantive, not procedural or administrative, and I am therefore happy to accept the recommendation that the power be subject to the affirmative procedure.

(4) Section 47C inserted into the Competition Act 1998 by paragraph 6 of Schedule 8 provides for damages in successful collective action proceedings that are not claimed within a certain period are paid to a charity prescribed by the Lord Chancellor. The Access to Justice Foundation is currently the only such prescribed charity. Again, the approach we have taken here is to ensure that the policy is future proofed against any change in the prescribed charity. Therefore section 47C(7) allows for the Secretary of State to amend the body prescribed in section 47C(5). Since the power is likely to be used only very rarely, I am content to accept the Committee's recommendation that the power

> be subject to the affirmative procedure. The relevant references to section 47C within the Bill will be amended to reflect this (and to update a cross-referencing error). I am also content to go further by limiting the power so that only a charity can be prescribed in section 47C(5).

The Government has today laid amendments, for consideration in Grand Committee in the House of Lords, which make these changes to the Bill.

Paragraph 12 of Schedule 8 introduces Section 49C into the Competition Act 1998, permitting the Secretary of State to make regulations relating to the CMA's redress power. The Committee sought further explanation about use of the negative procedure.

We have specified the negative procedure for this in the Bill because the regulations concern purely procedural matters. The regulations will state the minimum components that must be included in a scheme before it may be considered for approval. However, as the exact nature of individual schemes will vary, the regulations will not contain criteria as to how they should be assessed. The approach taken here is similar to the approach taken in other parts of Schedule 8: to create a framework which allows the relevant bodies to make assessments on a case-by-case basis. There is no intention for the Regulations to detail the underlying policy, or to prescribe how an assessment should be undertaken.

I am placing a copy of this letter in the Libraries of both Houses.

Jo Swinson MP

Parliamentary Under Secretary of State for Employment Relations and Consumer Affairs

6 October 2014

APPENDIX 2: CRIMINAL JUSTICE AND COURTS BILL: GOVERNMENT RESPONSE

I am grateful to the Delegated Powers and Regulatory Reform Committee for their report on the Criminal Justice and Courts Bill (3rd Report of Session 2014-15), which was published on 11 July 2014.

I am writing to explain the Ministry of Justice's response to the recommendations made in the report. I have used the clause numbers in the version of the Criminal Justice and Courts Bill as amended in Lords Committee on 30th July 2014. For ease of reference, and in brackets the clause numbers used by the Committee, these are:

- Young offenders: clauses 32 – 34 and schedules 5 and 6 (clauses 29 – 31 and schedules 5 and 6)
- Provision and use of financial information: clauses 71 and 72 (clauses 65 and 66)
- Interveners and costs: clause 73 (clause 67)
- Capping of costs: clauses 74 and 75, (clauses 68 and 69) environmental cases: clause 76 (clause 70)

When quoting the Committee, I have used the earlier clause numbers in place at the time the Committee was writing its report.

As the Committee may be aware, further Government amendments relating to rules against inducements to make personal injury claims were added to the Bill during Lords Committee. To assist the Committee in their analysis of these new provisions, I have provided further information in relation to clause 50 (rules against inducements to make personal injury claims), clause 51 (effect of rules against inducements), clause 52 (inducements: interpretation) and clause 53 (inducements: regulations).

On 1 August 2014, the Government tabled an amendment to insert a new clause after clause 54, entitled "Appeals from the Court of Protection". In anticipation of consideration of this clause at Report stage, I have also provided further information on this new clause to assist the Committee in their analysis.[5]

I am placing a copy of this letter in the Library of both Houses and copying this letter to Lord Beecham and Lord Marks of Henley-on-Thames.

Lord Faulks

Minister of State for Justice

1 September 2014

5 http://www.parliament.uk/documents/DPRR/2014-15/Bills/Criminal-Justice-and-Courts-Bill/Government-Response-Criminal-Justice-and-Courts-Bill.pdf

APPENDIX 3: WALES BILL: GOVERNMENT RESPONSE

I am grateful to the Delegated Powers and Regulatory Reform Committee for its consideration of the Wales Bill and the Delegated Powers Memorandum that accompanied it and am writing to confirm the Government's position in relation to the comments made on clause 12.

The Committee expressed particular concern over the use of an Order in Council to set the question and other matters relating to the referendum. Whilst there is legislative precedent for including referendum questions on the face of Bills in all instances when this has been done the timing of the referendum has been clear at the point of legislating.

The Government wants to put the timing of any referendum on income tax devolution in the hands of the National Assembly for Wales, as the Silk Commission recommended, and therefore including the question in subordinate legislation is more appropriate. This approach will also allow for consultation on the question and other matters relating to the referendum to take place in the political context current to the vote itself.

The alternative would be to set a question now, potentially several years in advance of any referendum in order to include it in the Bill. The approach the Government has taken offers the maximum flexibility while also being one that has been used successfully for the last Wales-only constitutional referendum, and of course still giving Parliament the final say in approving any question. The Government believes that this approach is the right one for the referendum provided for in this Bill and we hope that the Committee and the House can be similarly satisfied with our reasoning.

Rt. Hon. Stephen Crabb MP

Secretary of State for Wales

25 September 2014

APPENDIX 4: SERIOUS CRIME BILL: GOVERNMENT RESPONSE CLAUSES 10(1) AND 30(1)

Further to Lord Taylor's letter of 2 July, I am writing in response to the Delegated Powers and Regulatory Reform Committee's conclusion in respect of the order-making power in clauses 10(1) and 30(1) of the Bill (Second Report of session 2014/15).

Clause 10(1) (and the parallel Northern Ireland provision in what is now clause 32(1)) includes an order-making power which would enable the Secretary of State to amend new subsection (2A) of section 35 of the Proceeds of Crime Act 2002 (POCA), which makes provision for default sentences where a defendant fails to pay the amount due under a confiscation order. Such default sentences are to be determined by the court in accordance with the four tier sliding scale set out in the table in new subsection (2A). The order-making power may be used to provide for minimum default sentences, to vary any minimum sentences so introduced, to vary the maximum sentences and to modify the tiers, for example by introducing additional tiers.

In its report, the Committee commented that the Department's memorandum contained no specific reasons for including the power to make provision for minimum terms and that the introduction of minimum sentences would constitute a significant derogation from the powers of the court to exercise its own discretion in deciding the appropriate sentence in a particular case. In view of this, the Committee concluded that the question of whether or not, or how, the legislation should provide for minimum terms is not something which should be delegated to subordinate legislation.

The Government has considered very carefully the Committee's conclusion in this regard, but has respectfully concluded that the power to amend new section 35(2A), including to provide for minimum sentences, is an appropriate one.

We believe that the tiered structure of the existing default sentencing framework in section 139(4) of the Powers of Criminal Courts (Sentencing) Act 2000, and that in the replacement section 35(2A) of POCA, clearly points the court to setting the default sentence in any given case within the appropriate tier or band relevant to that case. So, for example, under the present scheme if the confiscation order was for a sum exceeding £1 million the appropriate default sentence would be between five and 10 years, with 10 years being the statutory maximum for that tier and five years being the statutory maximum for the preceding tier.

This approach is supported by case law. For example, in *Szrajber* (1994) 15 Cr App R (S) 821, Latham J said:

> "The use of the words "the maximum period" [in the statute] makes it quite plain that it was intended that these should indeed be maximum periods, in other words that the court when imposing a period of imprisonment in default was to have a discretion below that maximum period. Normally the court is likely to determine that the appropriate period in default will fall between the maximum for the band immediately below that which was being considered, and the band itself. In the present case the sum in question is the band of £250,000 to £1 million for which the appropriate maximum is five years' imprisonment. The band next below it, which is £100,000 to £250,000 has a maximum of three years, so one would normally expect that

> the sentence would be between three and five years and would of course be determined in the exercise of the court's discretion by reference to the amount which was in fact in question in the particular case."

And in *Smith* [2009] EWCA Crim 344. Thomas LJ said:

> "It is clear from [the] authorities that the court has a discretion up to the maximum period in the band. It would, taking as an example the band we are concerned with, namely the band of between £250,000 and £1 million, at a sentence between the maximum amount and the top of the previous band, namely three years. In fixing the precise length of the sentence, the court has to consider all the circumstances and is not bound to follow an arithmetical approach."

The evidence we have is that the courts are not uniformly applying the provisions of the 2000 Act in this way. Whilst for confiscation orders over £1 million, the default sentence set is between five and 10 years in some 93% of cases, this means that in some 7% of cases the default sentence is set at less than five years, in one case at just 18 months.

As we indicated in our original memorandum, we will want to review the impact on offender behaviour of increasing the maximum default sentences for higher value orders (over £500,000) and of ending automatic early release where the default sentence served is in respect of the non payment of a confiscation order over £10 million. If these changes have the desired effect of improving compliance rates, then the Government will want to consider further strengthening the default sentencing framework. We consider it prudent to afford maximum flexibility in the delegated powers to make further changes to the framework, including – given the data referred to above – by conferring the ability to introduce minimum sentences. In approving the delegated power in new section 35(2A) in its current form, the House will, in effect, be endorsing the principle that minimum terms may be provided for within the sentencing framework.

In the event that the power was exercised to introduce minimum terms, there would still be significant latitude for the courts to determine the appropriate sentence in any given case. The intention would be to set the minimum term for any given tier at the same level as the maximum term for the preceding tier. So, for example, the minimum default sentence for orders over £1 million would be set at seven years. Accordingly, the court would have the discretion to set the default sentence where the confiscation order was for an amount exceeding £1 million between seven and 14 years.

It is also worth noting that by restructuring the sentencing framework so as to replace the current 12 tiers with just four tiers, a greater element of implied discretion is introduced into the scheme. For example, for a £3,000 confiscation order, the expectation is that the default sentence would be set between 45 days and three months. Under the new scheme, the expected sentencing range would be from nil to six months.

For these reasons, we would invite the House to endorse the order-making powers in clauses 10(1) and 32(1) in their current form. At the request of the Scottish Government, I have today tabled for Report stage an amendment to clause 16 which will replicate for Scotland the provisions in clause 10(1) and (2) of the Bill, including the delegated power contained therein (see new section 118(2A) and (2B) of POCA).

I am copying this letter to Baroness Smith of Basildon, Lord Rosser, Baroness Hamwee and Lord Laming. I am also placing a copy in the library of the House.

Lord Bates

Parliamentary Under Secretary of State for Criminal information

7 October 2014