HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

9th Report of Session 2014-15

Deregulation Bill: Government Amendments

Social Action, Responsibility and Heroism Bill

Mutuals' Redeemable and Deferred Shares Bill [HL]

House of Lords (Expulsion and Suspension) Bill [HL]

Special Report: Quality of Delegated Powers Memoranda: Government Response

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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.

Ninth Report

DEREGULATION BILL: GOVERNMENT AMENDMENTS

1. We reported on this Bill in our Fifth Report of the present Session.[1] The Government have now tabled amendments (Nos 38 and 39 in the Second Marshalled List dated 25 October 2014) to insert two new Clauses after clause 34, amending the Local Government, Planning and Land Act 1980 to reduce Parliamentary control over order-making powers to designate land as urban development areas ("UDAs") under section 134, and to establish urban development corporations ("UDCs") under section 135.

2. The Department for Communities and Local Government and the Cabinet Office have prepared a memorandum explaining the nature and purpose of these changes.[2] It is a matter for serious regret that, although these amendments were tabled on 23 October, the memorandum was not in fact submitted to the committee until late yesterday, 27 October. We again remind the Government of our expectation that "a supplementary memorandum must be provided when … any government amendment is tabled which introduces a significant new delegated power or significantly amends an existing one" (see paragraph 10 of our Revised Guidance to Government Departments, as set out in Appendix 4 to our *Special Report: Quality of Delegated Powers Memoranda*).[3]

Orders under sections 134 and 135: the current scrutiny arrangements

3. At present, an order under section 134 or 135 must be made by statutory instrument and must be laid before Parliament, but it has no effect until approved by resolution of each House (so the order requires what has become known as a "made affirmative" procedure). To date, more than 20 orders have been made under each section, to designate land as UDAs and to establish UDCs for them, and the orders have in this House been regarded as hybrid instruments. This is because such orders require an affirmative procedure, and the Chairman of Committees has, in relation to each of them, reported his opinion that, apart from the provisions of the Act authorising them to be made, they make provision that would require to be enacted by a private or hybrid bill.[4]

4. Where the hybrid instruments procedure applies to an order, those whose property interests are directly and specially affected by the order may petition against it; and the Hybrid Instruments Committee then determines whether the matters complained of in any petition ought to be considered by a select committee. Many of the orders made under sections 134 and 135 have given rise to petitions, and, in most of those cases, the Hybrid Instruments Committee has reported that the petitions ought to be considered by a select

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[1] 5th Report, Session 2014-15 (HL Paper 29).

[2] http://www.parliament.uk/documents/DPRR/2014-15/Bills/Deregulation-Bill/56-Supplementary-memo-to-revised-DP-Memo-for-Lords.pdf

[3] 7th Report, Session 2014–15 (HL Paper 39).

[4] Private Business Standing Orders, SO 216.

committee. The last order under sections 134 and 135 to be declared hybrid was the West Northamptonshire Development Corporation (Area and Constitution) Order 2004. Several petitions were deposited in relation to the order, and a select committee heard evidence and submissions on behalf of petitioners and the Government and then reported to the House recommending that the order be allowed to proceed, subject to the Government giving undertakings in connection with the constitution of the new UDC.

Effect of the proposed Government amendments

5. The two new Clauses would amend sections 134 and 135 by imposing on the Secretary of State a duty to consult the four categories of persons listed in paragraphs (a) to (d) in each new subsection (1A), an obligation which could be satisfied by consultation which had taken place before the new Clauses came into force (see subsection (5) of each new Clause). Each section would also be amended so that an order that designated a UDA or established a UDC would in future be subject only to the negative procedure (other orders under section 134(1) and 135(1) would continue to require the "made affirmative" procedure). But the less obvious consequence of reducing the level of Parliamentary control from affirmative to negative procedure is that an order under section 134 or 135 would no longer be liable to be regarded as a hybrid instrument in this House.

6. In their memorandum, the Government explain that the affirmative procedure, and particularly the hybrid instrument procedure, leads to uncertainty about when an order under sections 134 and 135 might be approved, and to delay, because it is thought that the procedure can "take too long" (paragraph 15). It is said that this in turn can "erode business confidence" and "act as an impediment to regeneration" (paragraph 18). Local interests "like certainty and ... expect that government will be able to tell them from the outset exactly when the urban development area and corporation will be established and what the ... corporation's proposals ... will be" (paragraph 19). The Government make the further point that developers' behavioural reactions to delay and uncertainty may give rise to applications for development consent being expedited or deferred inappropriately, in a way that is disruptive to the business of existing planning authorities, and of the UDC once planning functions have been conferred on it by a negative resolution order under section 149 of the 1980 Act (paragraphs 22-25).

Our assessment of the Government's explanation

7. We do not find the arguments advanced in the memorandum in support of the proposal to downgrade the level of Parliamentary control over certain orders under sections 134 and 135 to be at all persuasive. We note that, when those sections were enacted to confer these significant order-making powers on the Secretary of State, it was recognised in the course of the proceedings in each House that orders designating UDAs and establishing UDCs were likely to be found hybrid in this House, with the result that the petitioning process would be available to ensure that those whose interests were directly affected by the orders could have their objections properly examined and determined by a select committee of this House. In the light of what is said in the Government's memorandum, and

in particular in paragraph 20 regarding the current proposals for a UDA and UDC at Ebbsfleet in Kent, we consider that the retention of the hybrid instrument procedure in this context is no less necessary today for the purpose of properly safeguarding such interests than it was when sections 134 and 135 were first enacted. It appears to us that the "problems caused by the affirmative procedure" alluded to in the memorandum in paragraphs 15 to 27 may well arise, not (as the Government perceive) from the nature and duration of the process of Parliamentary control, but from a need better to manage local expectations and to ensure that the prior requirement for Parliamentary scrutiny and approval is properly understood locally from the outset.

8. The present proposals do not appear to flow from any general review of infrastructure or other statutory planning procedures in connection with the designation of UDAs and the establishment of UDCs. Had that been the case, we might have expected to have seen provisions of this kind in the draft Deregulation Bill published last Session. Instead, it appears to us that the new Clauses have been tabled because the Government have realised that, if an order to give effect to the Ebbsfleet proposals were subject to the usual degree of Parliamentary control - a "made affirmative" procedure and the hybrid instrument procedure - there may now be insufficient time for the order to be brought into force before the end of the present Parliament. We regard the presence of subsection (5) in each new Clause as a particularly significant feature, which tends to confirm our conclusion that the principal purpose of these changes is to enable an order to be expedited to deliver the Government's proposals for Ebbsfleet, which were the subject of a consultation exercise between August and October this year.

9. If the proposed new Clauses were to be inserted in the Bill in their present form, their effect in relation to the Ebbsfleet proposals would be to remove the need for express Parliamentary approval promised in the consultation document.[5] They would also introduce a statutory requirement for consultation that is to be deemed to have been satisfied by a consultation process that has already taken place. Public law requires that, where there is such a duty to consult, a consultation exercise must be undertaken while the policy is still at a formative stage, so that responses to consultation may be evaluated with a genuinely open mind. We are concerned that, in view of the advanced stage at which the policy in respect of the Ebbsfleet proposals appears already to have reached, the objections of those whose interests may be adversely affected by the proposals are unlikely to receive the same degree of objective analysis from consultation as they would under the hybrid instruments procedure. It has, of course, been the expectation hitherto that that procedure would be available for any order to give effect to the Ebbsfleet proposals in the same way as for any previous order under sections 134 and 135.

10. In paragraphs 31-33 of their memorandum, the Government explain why they consider the negative procedure to be a more appropriate level of Parliamentary control for orders of this kind. They describe it as "more certain and more speedy" with the advantage that "the Government would

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5 First paragraph of Chapter 3 of Government's consultation paper:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/342421/20140807-Formatted-Condoc-Final.pdf

be able to inform stakeholders exactly when the [UDA] and the [UDC] would be established"; they would also be able to confer planning functions on the UDC by making another negative procedure order under section 149 at the same time. In paragraph 33, the Government explain that the new statutory duty to consult would "provide sufficient safeguard and guarantee of engagement with" interested persons, in the light of the relaxation of Parliamentary control. It is clear to us from paragraphs 31-33 that the Government appear to regard the negative procedure as affording no effective mechanism for Parliamentary control whatever: their explanation proceeds on the footing that certainty would be achieved, presumably because of an expectation that there would be no Parliamentary intervention; and we regard it as very significant that there is no mention of even the possibility that either House might resolve that an order should be annulled.

11. **We have concluded that the amendment made by subsection (3) of each new Clause (to insert new subsection (3C) into section 134, and new subsection (2A) into section 135) is inappropriate in so far as it substitutes the negative procedure for orders that designate a UDA or establish a UDC. We accordingly recommend that subsection (3) (and subsection (4), which is merely consequential on subsection (3)) be removed from each new Clause before it is inserted in the Bill.**

12. **We make no recommendation about subsection (5) of each new Clause, but draw to the attention of the House that its effect will be to validate retrospectively the previous consultation exercise that is said by the Government to afford an opportunity for the protection of private interests.**

SOCIAL ACTION, RESPONSIBILITY AND HEROISM BILL

13. There is nothing in this Bill which we wish to draw to the attention of the House.

MUTUALS' REDEEMABLE AND DEFERRED SHARES BILL [HL]

14. This Private Member's Bill had its Second Reading on 24 October. The Bill is largely enabling in character, in that clause 1 confers powers to make regulations, and clauses 2 to 4 have the effect of amplifying those powers. The powers are conferred on the Secretary of State, though clause 3(5) implies that one aspect of them might be intended to be exercisable by the Treasury. Clause 5 makes substantive provision about voting rights, on the assumption that regulations under clause 1 are in force; and clause 6 is an interpretation provision.

14. The powers conferred by clauses 1 to 4 are Henry VIII powers enabling three specified Acts and other unspecified "legislation governing a mutual insurer" to be amended to create new classes of redeemable and deferred shares by which mutuals could raise additional funds; to confer consequential rights on mutual society members; and to restrict voting rights of members holding only redeemable or deferred shares from participation in decisions to transfer, merge or dissolve the mutual. (We are aware in the light of speeches at Second Reading that the Bill is likely to be amended to remove provision about redeemable shares.) The regulations under clause 1 must be made by statutory instrument and require the affirmative procedure (see clause 1(3)). We do not regard either the delegation or the procedure as inappropriate.

15. We notice that the definition of a "society" in clause 6 includes a delegated power enabling the Treasury to specify descriptions of co-operative or mutual undertakings established or operating outside the United Kingdom. Because the power is exercisable by order, it is not caught by the procedural requirements specified in clause 1(3) in relation to regulations under the Bill. **We recommend that the Bill should be amended to require that an order under clause 6 should be made by statutory instrument and be subject to Parliamentary scrutiny (we would regard the negative procedure as sufficient in this instance).**

16. We also note that the final two definitions in clause 6 have the effect that regulations under clause 1 may amend not only "the 1965 Act" and "the 1982 Act" but also any future Acts which amend or replace either of them. **We draw this to the attention of the House so that it may satisfy itself that this power to amend as yet unenacted primary legislation is necessary and proportionate to the purpose of introducing the new categories of shares.**

HOUSE OF LORDS (EXPULSION AND SUSPENSION) BILL [HL]

15. There is nothing in this Bill which we wish to draw to the attention of the House.

SPECIAL REPORT: QUALITY OF DELEGATED POWERS MEMORANDA: GOVERNMENT RESPONSE

16. The Committee published their Special Report: Quality of Delegated Powers Memoranda [HL Paper 39] on the 31 July 2014. The Government have now responded to the Committee's recommendations by way of a letter from Jonathan Jones, Treasury Solicitor and HM Procurator General and Richard Heaton CB, Permanent Secretary and First Parliamentary Counsel printed at Appendix 1.

APPENDIX 1: SPECIAL REPORT: QUALITY OF DELEGATED POWERS MEMORANDA: GOVERNMENT RESPONSE

We welcome the above report from the Delegated Powers and Regulatory Reform Committee (HL Paper 39) and we were both grateful for the opportunity to give evidence to the Committee.

This letter sets out the Government's response to the report.

We acknowledge the Committee's concerns about the quality of delegated powers memoranda. We agree that quality has been variable. We welcome the examples of poor practice set out in Appendix 3 of the report, together with the revised guidance set out in Appendix 4. In addition, as you are aware, the Cabinet Office has recently revised its guidance on this topic. This material provides a good basis for improving standards in the preparation of memoranda across departments and their legal teams. Accordingly we are taking the following steps:

- The Committee's report, its revised guidance and the revised Cabinet Office guidance have been drawn to the attention of all departmental legal teams and all members of Parliamentary Counsel.
- We have taken the opportunity to stress to all lawyers involved in Bill work the importance we and the Committee attach to high standards in the drafting of delegated powers memoranda.
- We have nominated a senior lawyer to monitor all reports of the Committee and draw the attention of counsel and departmental legal teams to any common issues arising from those reports, including instances of good or bad drafting of memoranda. We will use the existing GLS Primary Legislation Group as a vehicle for disseminating this material around departments.
- In their weekly reports to the Treasury Solicitor, heads of departmental legal teams have been asked specifically to report on any comments (whether critical or complimentary) made by the Committee on their delegated powers memoranda. Where appropriate, such reports will be followed up with the legal team concerned, or shared with other legal teams in order to embed best practice.
- The issue of the quality of delegated powers memoranda will be specifically covered in the Bill training given to lawyers in the Government Legal Service. This will include reference to the guidance from the Committee and the Cabinet Office referred to above.
- Parliamentary Counsel will continue to support departmental legal teams in the preparation of memoranda as appropriate. In particular, in the case of Bills starting in the Commons, they will support departments in making any changes which are needed to memoranda when Bills move to the Lords, in the light of any amendments made in the Commons: the objective is to ensure that the Committee sees the best possible product.
- If the Committee is able to share examples of what it considers to be good memoranda, the Cabinet Office will look at all memoranda produced by Whitehall departments to help ensure that the Committee's concerns are addressed.

We hope that these measures will help address the Committee's concerns and improve standards in the preparation of memoranda.

We also reiterate our willingness to engage informally with the Committee's staff and our invitation to them to raise with us at an early stage any concerns they may have with a particular Bill or memorandum.

Jonathan Jones

Treasury Solicitor and HM Procurator General

Treasury Solicitor's Department

Richard Heaton CB

Permanent Secretary and First Parliamentary Counsel

Cabinet Office

13 October 2014

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.

For the business taken at the meeting on 28 October 2014 Members declared no interests.

Attendance:

The meeting on the 28 October 2014 was attended by Baroness Drake, Baroness Farrington of Ribbleton, Countess of Mar, Lord Marks of Henley-on-Thames, Baroness Thomas of Winchester and Viscount Ullswater.