

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

14th Report of Session 2014-15

Counter-Terrorism and Security Bill

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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)
Lord Trimble
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/hldprcrpublications.

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 hlddelegatedpowers@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.

Fourteenth Report

COUNTER-TERRORISM AND SECURITY BILL

1. This Bill, which had its Second Reading on 13 January, is in seven Parts and contains a range of measures. Part 1 includes provisions which would allow temporary restrictions to be imposed on travel. Part 2 amends the Terrorism Prevention and Investigation Measures Act 2011, amongst other things, to allow the Secretary of State to require a person to reside in a particular location in the UK and to restrict their travel outside their area of residence. Part 3 amends the Data Retention and Investigatory Powers Act 2014 to require the retention of data provisions under that Act also to apply to certain internet data. Part 4 of the Bill contains provisions relating to border and transport security. Part 5 addresses the risk of persons being drawn into terrorism and in particular imposes a duty on specified public authorities to have due regard, in exercising their functions, to the need to prevent people from being drawn into terrorism. Part 6 makes amendments to the Terrorism Act 2000 and Part 7 contains miscellaneous and general provisions.
2. The Home Office has provided the Committee with a memorandum in relation to the delegated powers conferred by the Bill.¹ There are two provisions which we wish to draw to the attention of the House.

Clause 18 – Authority to Carry Schemes

3. Clause 18(1) enables the Secretary of State to make one or more schemes requiring a carrier to seek authority from the Secretary of State to carry persons on aircraft, ships or trains which are travelling to or from the United Kingdom. These are known as authority-to-carry schemes. Under clause 18(2) a scheme must set out the classes of carrier to which it applies, the classes of passengers or crew in respect of whom authority to carry must be sought, and the classes of passengers or crew in respect of whom authority to carry may be refused under the scheme. Clause 18, together with clause 19, which allows civil penalties to be imposed in respect of breaches of an authority to carry scheme, re-enact with modifications section 124 of the Nationality, Immigration and Asylum Act 2002.
4. We consider that clause 18 constitutes a significant delegation of powers to the Secretary of State, since authority-to-carry schemes will have the effect of regulating the persons who may lawfully be transported by a carrier to and from the UK. A scheme will also be able to impose requirements on carriers about the provision of information about passengers and crew (see clause 18(5)). In other contexts, such as under the provisions to be inserted by paragraphs 1(4) and 7 of Schedule 2 to the Bill, regulations which impose requirements about the provision of information about those travelling to or from the UK are subject to the affirmative procedure.
5. The powers conferred by clause 18 are not subject to any Parliamentary scrutiny. This is consistent with the position under section 124 of the

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

Nationality, Immigration and Asylum Act 2002. However, despite this precedent, we consider that such a significant delegation of powers ought to be subject to Parliamentary scrutiny by means of the affirmative procedure unless there are compelling reasons why in this particular case that is not appropriate. The Home Office state in paragraph 21 of the memorandum that authority-to-carry schemes are not subject to any Parliamentary scrutiny because “there will be provision on the face of the Bill providing guidance as to the circumstances in which a class of passenger may be specified for the purpose of the scheme”. The only provision which refers to the circumstances in which a person may be specified for the purposes of a scheme is clause 18(3). That limits the circumstances in which authority to carry may be refused so that it may be refused only if it is necessary “in the public interest”. But we do not regard this limitation on the powers conferred by clause 18 as amounting to “guidance” and nor do we believe that it is sufficient to justify the absence of Parliamentary scrutiny.

6. The Home Office also rely on the indirect Parliamentary scrutiny of authority-to-carry schemes provided by clause 19, which enables regulations to be made for imposing civil penalties for breaching the requirements of a scheme. Regulations under clause 19 are subject to the draft affirmative procedure and are subject to the requirement that a draft of the regulations may not be laid before Parliament unless the authority-to-carry scheme to which they relate has been laid before Parliament. But, in our view, any Parliamentary scrutiny offered by clause 19 is necessarily incomplete because it would not require scrutiny for any revisions made to a scheme after the regulations under clause 19 had been made.
7. **We recommend that the House ask the Minister for a further and better explanation as to why it is appropriate for the powers conferred by clause 18 to be exercised without Parliamentary scrutiny. We consider that, in the absence of a more compelling explanation, the powers conferred by clause 18 should be exercisable by statutory instrument subject to the affirmative procedure.**

Clause 38 – Powers to “otherwise modify” primary legislation

8. Clause 38(1) allows the Secretary of State to make consequential provision by regulations. Under subsection (2), the power may be exercised by “amending, repealing, revoking or otherwise modifying” a provision made by or under primary legislation (Henry VIII powers). Clause 38(4) and (5) provides for regulations to be subject to the negative procedure except where they amend, repeal or revoke a provision of primary legislation, in which case the affirmative procedure applies.
9. We have expressed concern in the past about equivalent provisions in other Bills which allow regulations to make consequential amendments by amending, repeal, revoking or *otherwise modifying* a provision of primary legislation, but only require the affirmative procedure where the regulations amend, repeal or revoke a provision of primary legislation. A non-textual modification of primary legislation is capable of making changes which are no less significant than textual amendments. Accordingly, it seems to us that in principle the same level of Parliamentary scrutiny should apply. In the past the Government's response to these concerns has generally been to amend the provision to make the “otherwise modifying” power also subject to the affirmative procedure where it modifies a provision of primary legislation.

More recently, in relation to the Small Business, Enterprise and Employment Bill the Government have sought to justify powers to otherwise modify primary legislation being subject to the negative procedure, but in doing so they rely on the flexible scrutiny provisions in that Bill which would allow the affirmative procedure to be used in particular cases.² There are no equivalent flexible scrutiny provisions in this Bill.

10. Given this background we were disappointed that the Home Office's memorandum failed to give any explanation as to why in this case the negative procedure is considered appropriate for regulations which modify primary legislation otherwise than by making direct textual amendments. **We consider that clause 38 should be amended to provide for the affirmative procedure to apply where regulations "otherwise modify" a provision of primary legislation.**

² See DPRRC, 13th Report, Session 2014-15, HL Paper 90, paras 18 to 23.

APPENDIX: 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 14 January 2014 Members declared no interests.

Attendance:

The meeting on the 14 January 2015 was attended by Baroness Andrews, Baroness Drake, Baroness Farrington of Ribbleton, Baroness Fookes, Countess of Mar, Baroness O'Loan, Baroness Thomas of Winchester and Lord Trimble.