

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

2nd Report of Session 2015–16

Childcare Bill [HL]
Regulation of Political Opinion Polling Bill
[HL]
Airports Act 1986 (Amendment) Bill [HL]
Cities and Local Government Devolution
Bill [HL]: Government Response
Draft Legislative Reform (Duchy of
Lancaster) Order 2015

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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:
 - (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 19 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 Drake	Lord Lisvane
Baroness Fookes (<i>Chairman</i>)	Countess of Mar
Lord Flight	Lord Moynihan
Baroness Gould of Potternewton	Lord Thomas of Gresford
Lord Jones	Lord Tyler

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

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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 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 hldelegatedpowers@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

CHILDCARE BILL [HL]

1. This Bill, according to its long title, will “make provision about free childcare for young children of working parents and about the publication of information about childcare and related matters by local authorities in England”. Although short, it is almost entirely enabling, in that the Bill itself contains very little substantive provision about either of the topics for which it seeks to provide.
2. During the debate on Second Reading on 16 June, the Bill was referred to more than once as a “skeleton”, and that seems to us to be an accurate description. The significant powers conferred by the Bill are explained in a memorandum prepared by the Department for Education.¹ Despite what is said in paragraph 9 of our guidance to departments (that memoranda should be received no later than the day of introduction in the Lords), it was – regrettably – not submitted in final form until two weeks after the Bill had been introduced.²
3. We wish to draw to the attention of the House the delegations of legislative power by the Bill that have caused us considerable concern, namely those conferred by clause 1 (in connection with the provision of free childcare for working parents).

Clause 1 - Free childcare for working parents

Extent and nature of the delegations in clause 1

4. Subsection (1) imposes a duty on the Secretary of State to secure that childcare is available free of charge for qualifying children of working parents for, or for a period equivalent to, 30 hours in each of 38 weeks in any year. Beyond two interpretation provisions in subsections (3) and (12), no other provision appears on the face of the Bill defining what is to be made available in discharge of that duty. Everything else is left to regulations.³ Even the definition of the key expression “qualifying child of working parents” is dependent on regulations (see subsection (2)).
5. So, in this context, the regulation-making power conferred by subsection (4) is remarkably wide. It is supplemented by subsection (5), which sets out in paragraphs (a) to (k) the kinds of provision which the regulations might include. However, these categories are examples only; they are not exhaustive. Many of them in our view go to the very heart of what is to be delivered, and we have a number of observations to make:

¹ Department for Education, *Delegated Powers Memorandum*:

[<http://www.parliament.uk/documents/DPRR/2015-16/Bills/Childcare/11-Childcare-DP-Memo.pdf>]

² Delegated Powers and Regulatory Reform Committee, *Guidance for Departments on the role and requirements of the Committee*, July 2014, paragraph 9:

[<http://www.parliament.uk/documents/DPRR/2014-15/Guidance%20for%20Departments/Guidance-for-Departments.pdf>]

³ Under subsections (4), (8) and (9), or to regulations under the Childcare Act 2006.

- **Paragraphs (a) to (c)** are concerned with the description of childcare to be made available, the terms on which it is to be available and when and for how long.

We do not accept the memorandum's dismissal (in paragraph 12) of provision under these paragraphs as "procedural", because much of it will form the substance of the new arrangements.

- **Paragraphs (d) and (e)** enable provision to be made about financial matters – not only the important aspect of rates of payment, but also the arrangements for payment.
- **Paragraph (f)** envisages that the regulations might impose obligations or confer functions on any public body.

The memorandum (paragraph 15) explains that the regulations might provide for this to be a local authority; but there is no explanation why the power refers to *any* public body.

- **Paragraph (g)** enables the establishment by regulations of a body corporate.

The memorandum (paragraph 15) explains little about why a new body might be thought necessary or about the nature of its proposed functions.

- **Paragraph (h)** enables the regulations to "reproduce any provision of the Childcare Payments Act 2014 with or without modification".

We note that the Childcare Payments Act 2014 ("the 2014 Act") is some 47 pages long and is supplemented by some 17 pages of regulations that required affirmative approval from each House. The memorandum (paragraph 16) explains only that this would enable regulations to make for childcare arrangements under the Bill a scheme similar to that in the 2014 Act. But it does not explain how the many delegations of legislative power conferred by that Act would be reflected in the regulations, or what level of Parliamentary control would be required in the event of sub-delegation of legislative powers.

- **Paragraphs (i) and (j)** envisage that the regulations might include provision for the production of information and documents by "a person"; and **paragraph (k)** shows that such provision might be coercive in character.

There is nothing on the face of the Bill or in the memorandum (paragraph 17) identifying the categories of person from whom the information etc. might be required. This contrasts with section 99(1) of the Childcare Act 2006 ("the 2006 Act"), which enables information to be required only from specified classes of person. There is also no safeguard in clause 1 against the publication of identifying details, of the kind found in section 99(7) of the 2006 Act.

Furthermore, we do not understand the analogy drawn in the memorandum (at paragraph 20) between the power in paragraph (k) to create criminal offences and the power conferred by section 85A of the 2006 Act, as the latter appears to us to be concerned with childcare premises rather than the provision of information.

6. The remarkable imbalance between the provision that appears in the Bill itself and what is to be left to regulations, and the scarcity of explanation in the memorandum, has led us to question whether members will be in a position to contribute meaningfully to debates at Committee Stage and Report Stage. Successive speakers at Second Reading expressed considerable disquiet about the absence of any information that might give them a working idea of the nature and shape of the proposed scheme, and about the effect of delegation to subordinate legislation. A number of speakers hoped that drafts of regulations would be made available to inform subsequent debates, but we could find no response to this from the Minister. He did, however, explicitly acknowledge the importance of the “detail” that is to go in the regulations.⁴

Government's approach to delegation in the Bill

7. Unable to understand why the Bill has been presented in a skeleton form only, we turned to the memorandum. Paragraph 5 summarises the Government's approach to the delegation of legislative power in the Bill. It begins with the premise that “the legislative framework must be clearly presented on the face of the Bill with secondary legislation used to provide the detail”, and goes on to say that the provision in the Bill “must support effective implementation and contain sufficient flexibility”. It explains that “operational, administrative and technical details are not normally set out in primary legislation” as “too much detail on the face of the Bill risks obscuring the principal duties and powers from Parliamentary scrutiny”. Finally, the Government express the wish “to consult on matters of detail” and to “consult widely ... before finalising a delivery model”.
8. In our view, the Government's stated approach to delegation is flawed. While the Bill may contain a *legislative* framework, it contains virtually nothing of substance beyond the vague “mission statement” in clause 1(1). It is quite inaccurate to describe the nature of the provision authorised by clause 1(4) (particularly in view of the possible ingredients envisaged by subsection (5)) as “operational, administrative and technical detail”.
9. We do not accept the Government's attempt to dignify their approach to delegation by referring to a need to consult. We of course acknowledge the need for consultation as a precursor to the formation of policy; but this should in our view have followed the well-established sequence of a Green Paper setting out proposals, followed by a White Paper containing the Government's legislative intentions, and finally the presentation of a Bill.
10. We note that the Minister said that “the introduction of the Bill, with a strong duty on the Secretary of State, sends a clear message to parents and providers about the Government's commitment”.⁵ That is not, in our judgment, a proper use of legislation: the purpose of an Act is to change the law, not to “send a message” – a point made repeatedly in the last Parliament on the bill that became the Social Action, Responsibility and Heroism Act 2015.

⁴ HL Deb, 16 June 2015, col. 1130 [Lords Chamber].

⁵ *Ibid.*

Conclusion on the appropriateness of the power conferred by clause 1(4)

11. **We have accordingly concluded that the power conferred by clause 1(4) is inappropriately wide. Without greater detail in the Bill itself, together with a much fuller explanation about the nature of the provision likely to be contained in the regulations under clause 1, the House will have insufficient information about the design of the new childcare provision for a properly informed debate. We therefore recommend that the Bill be amended to remedy this deficiency.**

Levels of Parliamentary scrutiny

12. Given our views on the scope of the delegations, we are surprised that the negative procedure is considered appropriate for any of the powers under clause 1.⁶ In paragraph 6 of the memorandum, the Government set out their approach to levels of Parliamentary scrutiny: “The general reliance on the negative resolution procedure reflects our view ... that the relevant matters are of administrative or procedural detail”. As should be clear from what we have said above, that description is in our view misleading. We also found several of the explanations supporting the negative procedure for specific powers to be cursory and insubstantial. While it may be the case that related powers in sections 7 and 7A of the 2006 Act attract the negative procedure, in contrast to this Bill, the 2006 Act was not a purely enabling Act. This Bill is almost entirely enabling, and we have concluded that only an affirmative procedure is appropriate for this extent of delegation. We considered whether there were some powers for which it might be sufficient to require affirmative control only on their first exercise, but we took the view that we did not have enough information to enable us to make that judgment.

Preliminary conclusion on the levels of scrutiny

13. **We accordingly recommend, at this stage and without prejudice to our main conclusion and recommendation in paragraph 11 above, that the draft affirmative procedure should apply on the exercise of all powers conferred by clause 1. Should amendments be tabled by the Government to give effect to our main recommendation above, we would then look again (in the light of additional information in a supplementary memorandum) at the level of scrutiny that should apply for the remaining powers.**

⁶ Clause 2(4) reserves the affirmative procedure for regulations that amend or repeal a provision in an Act.

REGULATION OF POLITICAL OPINION POLLING BILL [HL]

14. This Private Member's Bill is to provide for the regulation of "political opinion polling" (defined in clause 1(8)) by a new regulator, the Political Opinion Polling Regulation Authority. The Bill is largely enabling, as almost all of the detailed provision is to be in regulations made by the Secretary of State or in rules published by the Authority. Delegations of legislative power in the Bill fall into two broad categories.

Clauses 1 and 2 - Regulations about the Authority, and penalties

15. Clause 1(1) obliges the Secretary of State to establish the Authority by regulations within one year of enactment, and subsection (3) requires those regulations to make provision about the Authority's constitution, particularly in accordance with paragraphs (a) to (c). They must also specify the amount of a penalty for the purposes of clause 2. The regulations attract a draft affirmative procedure (subsection (7)). Three matters occurred to us:
- Because subsection (1) in effect requires the Secretary of State to have the regulations in force (rather than merely to lay a draft of the first such regulations before Parliament) within one year, that duty could be breached if draft regulations were not approved by both Houses in sufficient time.
 - The powers conferred for setting up the Authority seem very specific (and therefore narrow) when compared with other statutory powers for establishing public bodies by subordinate legislation, especially given the absence of a general power to make consequential, supplementary or incidental provision.
 - The nature of the power conferred by clause 2 is insufficiently precise, in that it is unclear whether the intention is that a criminal offence may be created, or whether the penalty envisaged is a civil penalty.
16. **We draw these matters to the attention of the House so that it may consider whether the Bill should be amended to clarify and, if thought appropriate, amplify the powers to make regulations under clauses 1 and 2.**

Clause 1(5) – Regulations containing rules about polling and polls

17. Under clause 1(2) it is for the Authority to make "rules for political opinion polling" dealing, in particular, with the matters set out in paragraphs (a) to (c); and the rules must be published and kept under review (subsection (4)). Any amendments must also be published (along with explanatory notes – although we were unsure why the same requirement does not apparently apply to the publication of the initial rules).
18. Subsection (5) requires the Secretary of State to lay before Parliament "a statutory instrument containing the rules or amendments to the rules", which would be subject to a negative procedure by way of annulment. That appears to us to be a very unusual requirement, in that subsection (5) seems to envisage the statutory instrument purely as a vehicle for getting the rules before Parliament; but a statutory instrument should itself have some effect. It would be more usual if (for instance) the rules required the approval of, or

were to come into force on a date specified by, the Secretary of State by regulations made by statutory instrument.

19. In the light of the power being conferred by subsection (2)(c), it is in our view certainly appropriate that Parliament should have some form of control over the rules. We have concluded that a draft negative procedure would be more appropriate for the regulations containing them, so as to avoid the possibility of the rules coming into force and then ceasing to have effect should the instrument be annulled.
20. **We draw these further matters to the attention of the House so that it may consider whether subsection (5) should be amended to provide that the regulations are to have some effect and for a draft negative procedure to apply to them.**

AIRPORTS ACT 1986 (AMENDMENT) BILL [HL]

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

CITIES AND LOCAL GOVERNMENT DEVOLUTION BILL [HL]: GOVERNMENT RESPONSE

22. We considered this Bill in our 1st Report (HL Paper 8). The Government have now provided a preliminary response by way of a letter from Baroness Williams of Trafford, Parliamentary Under Secretary of State, Department for Communities and Local Government, printed at Appendix 1.

DRAFT LEGISLATIVE REFORM (DUCHY OF LANCASTER) ORDER 2015

23. This draft Legislative Reform Order (LRO) was laid on 1 June 2015 by the Cabinet Office, together with an Explanatory Document (ED). It replaces a draft Order with the same title, laid on 24 March, which had to be withdrawn owing to a defect in the Order and a policy change. The ED was also amended to deal with some points left out of the first version. Given this history, it was with some disappointment that we found that the printed version of the ED laid before Parliament with the current LRO omitted a table on cash flow, as a result of which it was necessary for the Cabinet Office to submit supplementary evidence (see Appendix 2).⁷ **The Committee has commented in the past about the quality of the explanatory material accompanying an LRO.⁸ It is with regret that we note that errors continue to occur.**

Background

24. The Order is proposed under section 1 of the Legislative and Regulatory Reform Act 2006 (“the 2006 Act”) which allows a Minister to make provision by order for removing or reducing any burden resulting directly or indirectly from legislation.
25. It would amend the Duchy of Lancaster Act 1817 so as to extend the Duchy’s ability to spend money from capital on the preparations required for developing a site or large capital project. Currently legislation limits the Duchy’s capital expenditure to physical improvements to existing property or buying new land. That restriction means that development costs for projects (for example, in applying for planning permission) have to be taken from the Duchy’s income account, which imposes a constraint, since the routine workings of the Duchy are also paid for from that account. The instrument is also intended to make clear that preparation costs can be paid for from the capital account even if the proposed improvement or development does not ultimately take place.

Costs/benefits

26. A full impact assessment has not been prepared because there will be no impact outside the Duchy of Lancaster. Pages 5 and 6 of the ED, however, illustrate the cash flow problem currently caused to the Duchy in having planning costs taken out of income and not reimbursed until the property is sold, often years later.

Tests in the 2006 Act

27. We agree with the Minister that the current restrictions are “an obstacle to efficiency, productivity or profitability” as defined in section 1(3) of the 2006 Act. The changes proposed by the LRO appear proportionate because their effect is simply to put the Duchy on a more equal footing with other land

⁷ The electronic version on Legislation.gov.uk was complete.

⁸ See for example, 15th Report, Session 2014-15, HL Paper 101, on the Draft Legislative Reform (Community Governance Reviews) Order 2014 and 1st Report, Session 2015-16, HL Paper 8, on the Draft Legislative Reform (Combined Authorities and Economic Prosperity Boards)(England) Order 2015.

owners, with no additional commercial advantage. We are also satisfied that, in relation to the proposed changes identified in the ED, the Department has shown that they meet the tests set out in the 2006 Act.

Parliamentary procedure

28. The draft Order is subject to the negative resolution procedure. This is justified in paragraph 3.5 of the ED on the grounds that the Order would affect only the Duchy which has itself requested the changes proposed in the LRO.

Conclusion

29. **We are satisfied that the Order meets the tests set out in the 2006 Act and is appropriate for the Legislative Reform Order procedure. We are also satisfied that the negative resolution procedure proposed by the Government is appropriate.**

APPENDIX 1: CITIES AND LOCAL GOVERNMENT DEVOLUTION BILL [HL]: GOVERNMENT RESPONSE

On Thursday 18 June your Committee published its First Report of Session 2015-16, including its conclusions on the Cities and Local Government Devolution Bill, and I am writing to confirm that we will provide our full response to those conclusions before the end of the Bill's committee stage.

As your Committee recognised, the Bill is an enabling Bill. Its aim is to provide the primary legislative framework needed to deliver the Government's manifesto commitments to devolve powers and budgets to boost local growth in England. Delivering these commitments is centred on Government having conversations with areas - counties, cities, and towns - across the country about the powers and budgets which they want to be devolved to them so that they can more effectively grow their local economies, improve their competitiveness and productivity, and reform local public services. From these conversations Government and each area will agree a bespoke Devolution Deal tailored to the circumstances and ambitions of each area.

This is an unprecedented process, reversing 150 years of centralisation, and urgently needed for the country to respond to the economic opportunities and challenges it faces. The Government is clear that the legislative framework being established by the Bill must have the flexibilities, including where necessary appropriate delegated powers, needed for concluding without delay genuine bespoke Devolution Deals across the country. It is against this background that we will be responding to the specific points that your Committee has raised.

I am copying this to Lord McKenzie and Lord Shipley, and arranging for a copy to be placed in the Library of the House.

Baroness Williams of Trafford
Parliamentary Under Secretary of State
Department for Communities and Local Government
22 June 2015

APPENDIX 2: CABINET OFFICE SUPPLEMENTARY EVIDENCE

I am writing on behalf of the Cabinet Office in connection with the Explanatory Document (ED) which was laid alongside the draft Legislative Reform (Duchy of Lancaster) Order 2015 on 1 June 2015.

Page 6 of the ED should include a table immediately before paragraph 2.13. Most regrettably, the printed version of the ED laid before Parliament on 1 June 2015 did not include this table due to a printing error. I apologise to the Committee for this inadvertent omission. The table is however included in the version of the ED on legislation.gov.uk.

The table is enclosed with this letter and I would be grateful if it could be shared with members ahead of the Committee's scrutiny of the draft Order and ED. The ED (see paragraph 2.12) explains that the current restriction on capital expenditure for development costs leads to a deficit in the Duchy of Lancaster's income account until a development is sold. The ED gives an example of this for 2007/8. The table is intended to illustrate this point and we would hope that its absence does not undermine the ED itself.

Please let me know if I can be of any further assistance. We will take care to check printed versions of documents before they are laid, going forward, to avoid any future recurrence.

Christian Lacey-Brennan
Parliamentary Clerk
Cabinet Office
18 June 2015

Table Omitted from the Explanatory Document to the Draft Legislative Reform (Duchy of Lancaster) Order 2015

Year	Expenditure	Recovery	Net Cost
2004/05	232,000	273,000	(41,000)
2005/06	322,000	194,000	128,000
2006/07	516,000	294,000	222,000
2007/08	871,000	161,000	710,000
2008/09	837,000	223,000	614,000
2009/10	390,000	739,000	(349,000)
2010/11	925,000	435,000	490,000
2011/12	607,000	1,018,000	(411,000)
2012/13	492,000	389,000	103,000
2013/14	350,000	229,000	121,000
			1,587,000

APPENDIX 3: 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 24 June 2015 Members declared no interests.

Attendance:

The meeting on the 24 June 2015 was attended by Baroness Drake, Lord Flight, Baroness Fookes, Baroness Gould of Potternewton, Lord Lisvane, Countess of Mar, Lord Moynihan, Lord Jones, Lord Thomas of Gresford and Lord Tyler.