HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

17th Report of Session 2015–16

Cities and Local Government Devolution Bill [HL]: Commons Amendments

Education and Adoption Bill: Government Response

Immigration 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 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
Baroness Fookes (*Chairman*)
Lord Flight
Baroness Gould of Potternewton
Lord Jones
Lord Lisvane
Countess of Mar
Lord Moynihan
Lord Thomas of Gresford
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

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

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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.

Seventeenth Report

CITIES AND LOCAL GOVERNMENT DEVOLUTION BILL [HL]: COMMONS AMENDMENTS

1. We reported on this Bill in our 1st Report of the current Session,[1] and then on Government amendments in our 4th Report.[2] The Bill has now completed its passage through the House of Commons and has returned with 87 Commons amendments which are expected to be considered by the House on 12 January 2016. The amendments which are all Government amendments include changes to existing delegated powers and a number of new delegated powers. The Department for Communities and Local Government has provided a supplementary delegated powers memorandum.[3]

Amendment 36 – Power to make provision about local authority structures and boundaries

2. Amendment 36 is one of a number of amendments to clause 16 of the Bill. Clause 16 confers a power on the Secretary of State by regulations to make changes to the governance arrangements, constitution and membership, and the structural and boundary arrangements of local authorities in England.

3. In our report on the Bill we recommended that clause 16 (clause 10 as it then was) should be made subject to similar constraints and protections as apply to the powers to establish combined authorities under Part 6 of the Local Democracy, Economic Development and Construction Act 2009; for example, a duty to consult all those affected and not just the relevant local authorities. In their response the Government relied on the fact that the regulations require the consent of *all* the local authorities concerned to justify the lack of any constraints or protections. The Minister stated in her letter of 29 June to the Chairman of the Committee:[4]

> "However, the context for these regulations will be the implementation of bespoke devolution deals, which have been agreed between Government and the areas. In these circumstances, the need for consent by all councils involved to the clause 10 regulations is sufficient safeguard that the fast tracking will not remove inappropriately any essential constraint or protection."

4. Amendment 36 will insert provisions into clause 16 that have the effect of removing the requirement for the consent of *all* the local authorities concerned in so far as the regulations make provision about structural or boundary changes in relation to a non-unitary district council area. In those circumstances, it will be sufficient if *only one* of the relevant local authorities

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1 1st Report, Session 2015–16, HL Paper 8.

2 4th Report, Session 2015–16, HL Paper 20.

3 http://www.parliament.uk/documents/lords-committees/delegated-powers/Cities_and_LG_Devolution_Bill_Supplementary_Delegated_Powers_Memorandum_Commons_Amendments.pdf

4 3rd Report, Session 2015–16, HL Paper 17, p 6.

consents. These provisions are time limited in that they will expire at the end of March 2019.

5. The Government have previously justified the breadth of the powers and the absence of any wider constraints or protections in clause 16 by reference to the requirement for the consent of *all* the local authorities concerned. Given this and given that Amendment 36 significantly downgrades this requirement in particular circumstances, we were surprised and disappointed to find that the memorandum says nothing to justify Amendment 36. The memorandum also says nothing about why the amended provisions are only to apply for a limited three-year period. This limitation appears to acknowledge that removing the consent of all local authorities is to be regarded as exceptional, but no indication is given as to why the Government consider it appropriate exceptionally to relax the requirement during this period.

6. **We remain of the view that the powers conferred by clause 16 are inappropriate in the absence of the kinds of constraints and protections which apply to combined authorities under Part 6 of the Local Democracy, Economic Development and Construction Act 2009. Amendment 36, which will have the effect of weakening the consent regime under clause 16, serves only to strengthen our view in this regard.**

Amendment 53 – Sub-national transport bodies

7. Amendment 53 inserts a new Part 5A into the Local Transport Act 2008 ("the 2008 Act"). The purpose of the new Part is to enable the establishment of new strategic transport bodies known as a sub-national transport bodies (STB). Each STB will be established by means of regulations. In line with other provisions of this Bill, the regulation-making powers conferred by Part 5A are very wide and include powers to transfer the transport functions of a local authority and those of other public authorities to a STB (see sections 102J and 102K of the 2008 Act).

8. By virtue of section 102T of the 2008 Act, regulations under Part 5A are generally subject to the affirmative procedure. In certain circumstances, however, only the negative procedure is required. These include regulations under sections 102J and 102M transferring a local authority or public authority function to a STB, where the regulations provide for that function to be exercisable by the STB "for a limited period of time". There is nothing in Part 5A of the 2008 Act which clarifies what is meant by "a limited period of time", and the memorandum offers nothing to help us, simply asserting that "the transfer of a function on a temporary basis for a project or time limited period … will not have a significant effect on the way a local authority or a public authority will function" (paragraph 62). "A limited period of time" could in fact be a matter of weeks, months or years. In any event, we do not accept that the impact of regulations which transfer transport functions for a limited period of time (however short) is necessarily going to be any less significant than where the regulations have effect indefinitely.

9. **Accordingly, we do not consider that placing a limit on the period for which regulations under section 102J or 102K have effect justifies a reduction in the level of Parliamentary scrutiny. In our view, the regulations should still be subject to the affirmative procedure in these circumstances.**

EDUCATION AND ADOPTION BILL: GOVERNMENT RESPONSE

10. We considered this Bill in our 10th Report of this Session.[5] The Government have now responded by way of a letter from Lord Nash, Parliamentary Under Secretary of State for Schools at the Department for Education, printed at Appendix 1.

IMMIGRATION BILL

11. This Bill is to have its Second Reading on 22 December 2015. It seeks to improve the security and operation of the immigration system by:

- introducing measures against illegal working,
- enhancing enforcement of labour market rules,
- denying illegal migrants access to services including housing and banking, and
- amplifying immigration officers' powers.

12. We have been disappointed by the quality of the memorandum submitted by the Home Office to explain the delegated powers in the Bill.[6] We have found that in several instances it does not fully explain the intended purpose and likely use of the powers being conferred. Furthermore, it does not deal with all of the powers conferred by the Bill, as we would expect it to do;[7] and in one respect it is seriously misleading.

Clauses 10, 11, 16 and 43 – Power to apply provisions outside England, or outside England and Wales

13. Clause 10(1) gives effect to Schedule 1, which amends the Licensing Act 2003 to prohibit illegal working in businesses conducting certain licensable activities. Schedule 1 itself applies only in relation to England and Wales, but clause 10(2) and (3) confers power to enable similar changes to be given effect in Northern Ireland and Scotland by affirmative regulations. This includes power to amend primary legislation and to confer functions on any person other than Scottish or Northern Ireland ministers, or a Northern Ireland department.

14. Similar powers are conferred in relation to the application outside England (or outside England and Wales) of other provision in the Bill:

- under clause 11, provision in Schedule 2 about private hire vehicles may be given similar effect in Scotland and Northern Ireland;
- under clause 16, provision in clauses 13 to 15 about residential tenancies may be applied or given similar effect in Wales, Scotland and Northern Ireland;

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5 10th Report, Session 2015–16, HL Paper 45.

6 http://www.parliament.uk/documents/lords-committees/delegated-powers/Immigration_Bill_Delegated_Powers_Memorandum.pdf

7 7th Report, Session 2014–15, HL Paper 39.

- under clause 43, provision about local authorities' responsibilities in relation to children may be applied or given similar effect in Wales, Scotland and Northern Ireland.

15. In the case of each of the four powers, the Home Office explains in the memorandum that there is a precedent for the extension of provision outside England by affirmative regulations under section 53 of the Immigration Act 2014. In the light of that, we are content with the powers conferred by clauses 10 and 11, particularly as the affirmative procedure is to apply.

16. We note however that clauses 16(3)(a) and 43(3)(a) include power to amend the Bill itself:

    - when applying provision in it outside England by regulations under subsection (1), and

    - when making similar provision outside England under subsection (2).

    Clause 43(3)(b) is, moreover, exceptional in that it enables the sub-delegation of legislative power to "any person".

17. We always look closely at powers which enable unspecific amendments to be made in the very Act that confers them, and we expect the Government always to justify powers of that kind in express terms. We were therefore surprised to find no reference at all on page 11 or page 25 of the memorandum to the fact that clauses 16 and 43 include power to amend the Bill. While we acknowledge that it might be expedient to have power to amend provisions of the Bill in connection with their application outside England under subsection (1), we do not understand why the same facility is to be available when making *similar* provision outside England under a separate power under subsection (2).

18. We also examine with particular care powers that enable an instrument to delegate legislative power, and we again found the memorandum to be unhelpful in relation to clause 43. Paragraphs 124 to 130 do not even mention that subsection (3)(b) confers a power of sub-delegation, and so there has been no explanation why the sub-delegated powers might be exercised by "*any* person" (who may not, apparently, be Welsh, Scottish or Northern Ireland Ministers or a Northern Ireland department). Moreover, nothing is said about the level of Parliamentary scrutiny that is to apply on the exercise of the sub-delegated powers. In short, there has been no explanation from the Government about why these exceptional powers are thought necessary, or in what way, by whom and subject to what Parliamentary control they might be exercised. Although section 53 of the Immigration Act 2014 is cited as a "comparable" precedent, it does not contain a power of sub-delegation.

19. **In the light of those deficiencies, we recommend that the powers conferred–**

    - **by clauses 16(3)(a) and 43(3)(a) to amend provision in the Bill by regulations under (respectively) clauses 16(2) and 43(2), and**

    - **by clause 43(3)(b) in so far as the functions that may be conferred include the power to make regulations,**

are inappropriate, unless the Minister can satisfy the House about why they are necessary and how they would be exercised. In any event, where legislative power is to be sub-delegated, it ought to be clear on the face of the Bill who is to exercise the sub-delegated power and what arrangements are to be made for its Parliamentary control.

Schedule 8, Paragraph 9 – Support for failed asylum-seekers

20. Paragraph 9 of Schedule 8 inserts new section 95A into the Immigration and Asylum Act 1999 ("the 1999 Act") to supersede provision currently made for the support of "failed asylum-seekers". The new section relies on wide regulation-making powers in subsections (1), (3)-(6), (9) and (10), wider even than in the provision that the new section is to replace (in section 4 of the 1999 Act). We were therefore surprised to see that these regulations, which would set out the arrangements for assisting those who are otherwise destitute, would require only the negative procedure.

21. The Home Office explains this proposed level of scrutiny in paragraphs 89 to 91 of the memorandum, asserting that the negative procedure is the same level as that "of the previous power to support failed asylum-seekers (section 4 of the 1999 Act) which will be repealed by this Bill". We also note the final sentence of paragraph 89 of the memorandum: "It is appropriate that regulations concerning the support of failed asylum-seekers should be subject to the same scrutiny procedures as [the] comparable regulations". While we would not dissent from the latter statement, we believe that the Home Office is mistaken about the former, because regulations under section 4(5) of the 1999 Act require the *affirmative* procedure (see section 166(5)(za) of that Act).

22. In any event, given that the purpose of the regulations is to provide for relief from destitution, we consider that the House will wish to scrutinise very carefully the nature of the assistance to be provided and the terms on which it is to be made available. **We accordingly recommend that the affirmative procedure should apply for regulations under new section 95A.**

Schedule 9, Paragraphs 9 and 13 – Further support for destitute persons

23. Paragraph 9 of Schedule 9 also introduces new provision about destitute persons, by inserting new paragraphs 10A and 10B into Schedule 3 to the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), to deal with support for (respectively) families and adult migrant care leavers who fall into categories of persons to which the new section 95A of the 1999 Act does not apply. Both of paragraphs 10A and 10B are entirely enabling in character, in that they make no provision that can have practical effect unless regulations are made under them. But the regulations are again subject only to the negative procedure.

24. Once again, the Home Office seeks to justify that level of scrutiny (this time in paragraph 102 of the memorandum) by repeating their statement that existing provision for failed asylum-seekers is made in negative procedure regulations under section 4 of the 1999 Act. As we have already noted, that statement is incorrect, because regulations under section 4(5) must be affirmative. **We therefore recommend that the affirmative procedure should also apply to regulations under new paragraphs 10A and 10B.**

25. At present, paragraph 15 of Schedule 3 to the 2002 Act confers a power to make specific kinds of amendments to or about paragraph 1 by affirmative order. Paragraph 13 of Schedule 9 to the Bill very considerably amplifies that Henry VIII power to enable an order to confer power (in new sub-paragraph (d)) to provide by regulations for the support of a further class of persons who are excluded from other forms of support. New sub-paragraphs (e) and (f) enable an order to apply paragraph 1A of Schedule 3 to Wales and to make comparable provision for Scotland and Northern Ireland. (Paragraph 1A is inserted by paragraph 3 of Schedule 9 to the Bill and renders asylum-seekers and others ineligible for certain forms of assistance under the Children Act 1989.)

26. We carefully examined paragraphs 92 to 102 of the memorandum to discover the reason for this very significant amplification of an existing Henry VIII power, particularly in view of its provision for sub-delegation of legislative power and for extra-territorial extension. It was with surprise and concern that we found that the memorandum is entirely silent about these additional powers conferred by paragraph 13 of Schedule 9.

27. **In the light of that, we recommend that the powers conferred by paragraph 13 are inappropriate, unless the Minister can satisfy the House about why they are necessary and how they would be exercised. In particular, if the provision inserting new sub-paragraph (d) in paragraph 15 of Schedule 3 to the 2002 Act is to survive, it ought to be made clear on the face of the Bill who is to exercise the sub-delegated power and what arrangements are to be made for its Parliamentary control.**

Schedule 10, Paragraph 1 – Power to prescribe maximum penalty

28. Schedule 10 introduces penalties in connection with the operation of aircraft, with a view to enforcing measures to reduce unlawful entry into the United Kingdom. Paragraph 1 inserts a new Part 1A into Schedule 2 to the Immigration Act 1971, and paragraph 28 enables the Secretary of State to impose financial penalties on owners and agents of aircraft where they fail to take reasonable steps to secure that passengers are not embarked or disembarked outside designated control areas at airports. Sub-paragraph (6) provides for the penalty to be of such amount as the Secretary of State considers appropriate; but "the penalty must not exceed the prescribed maximum". In this context, "prescribed" means "specified in regulations"; but the regulations are subject only to negative procedure.

29. This Committee almost invariably recommends that instruments which specify a fine or other penalty, or a maximum fine or penalty, that is not itself subject to an upper limit set out in the enabling Act should require the affirmative procedure. We did so most recently in our 1st Report of Session 2012–13 in connection with the Groceries Code Adjudicator Bill,[8] and our 7th Report of Session 2013–14 in connection with the Littering from Vehicles Bill.[9]

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[8] 1st Report, Session 2012–13, HL Paper 10.

[9] 7th Report, Session 2013–14, HL Paper: 49.

30. This has been the long-standing approach of the Committee. In paragraph 137 of the memorandum, the Home Office seeks to justify the negative procedure by relying on an existing power in subsection (2A) of section 32 of the Immigration Act 1999. That subsection was inserted by Schedule 8 to the 2002 Act. At the time, the Committee observed, in relation to another power conferred by the same Schedule:

> "Where a bill contains a power to increase penalties which is not limited to changes consequent on changes in the value of money, the Committee would normally suggest that affirmative procedure would be appropriate."[10]

31. Since that time, the Committee has been firm in its view that only the affirmative procedure is appropriate for powers to specify maximum amounts of penalties in secondary legislation (and without limitation on the face of the Bill).

32. We consider that the approach of the Committee in this respect ought by now to be well understood by departments. The reference to "changing circumstances" in paragraph 135 of the memorandum does not seem to us to signify an intention that, once fixed, the maximum amount of a penalty would be increased only to reflect changes in the value of money. **We accordingly recommend that the affirmative procedure should apply to the power conferred by new paragraph 28(6) (inserted by paragraph 1 of Schedule 10) whenever it is exercised.**

[10] 24th Report, Session 2001–02, HL Paper 138, para 10.

APPENDIX 1: EDUCATION AND ADOPTION BILL: GOVERNMENT RESPONSE

From Lord Nash, Parliamentary Under Secretary of State for Schools at the Department for Education, to Baroness Fookes, Chairman to the Delegated Powers and Regulatory Reform Committee

I am grateful to the Delegated Powers and Regulatory Reform Committee for their report on the Education and Adoption Bill (10th Report of Session 2015–2016). Following the publication of this report and the conclusion of Committee stage of the Bill earlier this week, I wanted to explain how I intend to respond to reflections of both the Delegated Powers and Regulatory Reform Committee and other Peers on clause 1 on coasting schools and clause 13 on adoption.

Clause 1:

Clause 1 of the Bill introduces a power for the Secretary of State to define a "coasting" school in regulations. I appreciate that there has been concern about how the Government intends to define coasting and the level of detail that should be on the face of primary legislation or in regulations. As the Committee acknowledges in its report, the Government published illustrative regulations on 30th June setting out the detail of how we propose to define coasting. We also launched a consultation seeking views on how coasting should be defined on 21st October: that consultation is due to close on 18th December.

Following your recommendations and the debate in both Houses, I intend to make several amendments to the Bill before Report stage in the Lords.

In particular, I recognise that there has been some concern that clause 1 currently states that regulations to define coasting "may" be made, implying that a Government could theoretically not set out any further definition of coasting. The Government's intention is that detailed regulations will always be made and so to ensure there is no doubt about this I will therefore bring forward an amendment to state that regulations "must" be made.

Our intention has also always been that it should be transparent to a school whether they are coasting or not by looking at whether they meet the definition set out in regulations. With this in mind, we appreciate that it may be unintentionally misleading to suggest that the Secretary of State will notify a school when she "considers" it to be coasting and we will therefore amend the Bill to be clear that a school will be notified when "it is coasting" as per the definition set out in regulations.

Another amendment that we intend to bring forward is to allow the Secretary of State, through regulations, to disapply the coasting definition to certain types of schools. During previous debates, concern has been expressed that the proposed coasting definition could, for instance, apply to maintained nursery schools by virtue of the fact that the Bill applies to all types of maintained schools. Given the age range of these schools, we have been clear in our consultation that we do not intend to apply a coasting definition to these schools. We are also currently consulting on whether and how the coasting definition could apply to other types of schools, such as special schools or alternative provision. Having this power to disapply ensures that we can be clear to different settings when the definition will and will not apply to them.

Finally, having heard the views of both Houses, I have decided to amend the Bill to subject the coasting regulations to the affirmative procedure when they are first laid. As I have been clear, we do not intend to identify coasting schools until the end of 2016. Whilst I have already produced illustrative regulations and we are publicly consulting on our proposed definition, I appreciate the need to reassure both Houses that a debate will take place when we lay final regulations for the first time.

I continue to hold the view that, after this point, to require there to be a debate every time the regulations are amended–even when we have been clear that we anticipate minor and technical amendments will be needed at least twice a year–would appear an unnecessary demand of Parliamentary time. As Peers themselves have raised during Committee, the negative procedure still allows members of either House to call for a debate where they deem this to be necessary.

I appreciate that your Committee would like to see more detail in primary legislation on the criteria that will determine whether a school is coasting. At this point, the consultation on the proposed coasting definition continues to run and will close on 18th December. I am concerned that to place any criteria on the face of primary legislation at this stage could pre-empt the Government's consideration of and response to this consultation. I can reassure the Committee, however, that we will continue to consider whether it is appropriate to amend primary legislation following the conclusion of the consultation.

Clause 13:

In relation to the adoption clause, I would like to reassure you that these powers remain a backstop measure in our wider plan to regionalise adoption services. As I have set out previously, we are working with the sector to deliver regional adoption agencies that build on existing relationships and ways of partnership working and are created organically. We are providing £4.5m of funding this year to support early adopters of the programme. We are delighted by the response we have had already had from the sector. 140 of 152 local authorities applied to the programme and we have announced 19 projects so far covering over 100 local authorities. We therefore envisage that the vast majority of local authorities will make this move voluntarily.

This will mean that use of these powers will be rare. I recognise the comparison you have drawn with Section 3A of the 2002 Act, but do not think the stated intended use of these new powers is directly comparable. These powers would be used to direct only those local authorities that fail to engage appropriately voluntarily. As set out above, we expect this to be very few. It is therefore highly unlikely that we would ever need to use these powers to direct *all* local authorities, which was a possibility with the previous powers.

Where the powers are used, I would like to reassure you that this would only happen after extensive discussions with the agencies involved. As we have been clear, the Secretary of State would write to any local authority and/or other adoption agency seeking their views and requesting supporting evidence. This would ensure that all agencies would have the opportunity to move towards regionalisation voluntarily before the powers were used. The National Adoption Leadership Board–which includes representatives of local authorities and voluntary agencies–will also have an important role to play in shaping decisions and overseeing the development of the system. We therefore maintain our position that no Parliamentary procedure is required.

Finally, in relation to subsection (6), this is to help 'future-proof' the clause. At this time, we believe that the functions included in the clause are the relevant ones, but recognise that we may need to respond to changing services and circumstances in the future. This will allow us to respond to any intelligence we receive from the sector about the powers and ensure the powers cover the appropriate functions. We recognise that this power is broad and that is why we considered that it should be subject to the affirmative procedure.

23 November 2015

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 16 December 2015 Members declared no interests.

Attendance:

The meeting on the 16 December 2015 was attended by Baroness Drake, Lord Flight, Baroness Fookes, Baroness Gould of Potternewton, Lord Jones, Lord Lisvane, Lord Moynihan, Lord Thomas of Gresford and Lord Tyler.