

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

18th Report of Session 2015–16

**Immigration Bill:
Government
Amendments**

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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	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

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 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.

Eighteenth Report

IMMIGRATION BILL: GOVERNMENT AMENDMENTS

1. We reported on this Bill in our 17th Report of the current Session.¹ On 12 January the Government tabled a substantial number of amendments — 54 pages' worth! Many of these are likely to be taken on 18 January, the first day of Committee Stage. We therefore met urgently to consider the amendments, so that we might report before then.
2. Amendments referred to below are numbered in accordance with the Marshalled List published on 14 January 2016. The Home Office have submitted a supplementary memorandum to explain the further delegations of legislative power introduced by the amendments, and have subsequently provided a further supplementary memorandum in connection with Amendment No.54.²
3. We wish to draw three of the amendments to the attention of the House.

Amendment No.41 – Application of police powers to Gangmasters and Labour Abuse Authority

4. This new clause inserts a new section 114B into the Police and Criminal Evidence Act 1984 (“PACE”). It enables the Secretary of State to apply, by negative regulations, any provision of PACE which relates to investigations of offences conducted by police officers to investigations of “labour market offences”³ conducted by “labour abuse prevention officers”.
5. “Labour abuse prevention officers” are defined in subsection (3) of the new clause as officers of the Gangmasters and Labour Abuse Authority (“GLAA”) who are acting for the purposes of four Acts:
 - the Employment Agencies Act 1973,
 - the National Minimum Wage Act 1998,
 - the Gangmasters (Licensing) Act 2004, and
 - the Modern Slavery Act 2015.

(See paragraphs (a) to (d) of subsection (4)).

6. Paragraph (e) is a general provision which enables the Secretary of State to prescribe, by regulations, “any other purpose”. Such regulations will require only negative procedure unless they amend primary legislation in which case the affirmative procedure applies.

¹ 17th Report, Session 2015–16, [HL Paper 73](#), paras 11 to 32.

² <http://www.parliament.uk/documents/lords-committees/delegated-powers/ImmigrationBillSuppDelegatedPowersMemo.pdf>

³ Defined in clause 3(4) of the Bill as supplemented by Amendment Nos. 27 and 29.

7. As is explained in paragraphs 11 and 12 of the supplementary memorandum, powers to apply PACE provisions to officers of bodies other than the police are not novel. Equivalent powers are already conferred in relation to the Armed Forces, Her Majesty's Revenue and Customs and certain officers of the Secretary of State (see sections 113, 114 and 114A of PACE), and are similarly exercisable by negative procedure regulations. Given this, both the delegation in new section 114B(1) and its associated negative procedure seem to us to be appropriate.
8. We do not take the same view, however, in relation to the general power in subsection (4)(e) to enlarge the purposes for which the PACE powers may be applied. The GLAA, by virtue of these amendments, is acquiring significant new functions, about which it is wholly untested. It does not have the experience of the other bodies and officers to whom powers under PACE may be applied under sections 113, 114 and 114A. We consider that, in those circumstances, the House might expect the PACE powers to be applied only for purposes specified on the face of the Bill, and that a higher level of scrutiny ought to apply to any subsequent addition of further purposes by statutory instrument.
9. While we are prepared to accept the case for flexibility made in paragraph 15 of the supplementary memorandum in support of the power conferred by new section 114B(4)(e), we are not persuaded by what is said in paragraph 16 in favour of the negative procedure. **We accordingly recommend that regulations made under new section 114B(4)(e) should require the affirmative procedure on any exercise of that power.**

Amendment No.54 – Code of practice for enforcing authorities

10. This new clause requires the Secretary of State to issue a code of practice giving “guidance” to enforcing authorities, including the GLAA,⁴ about the exercise of their functions under the ten new clauses introduced by Amendment Nos.43 to 52. They are significant functions, the exercise of which could result in a person being made subject to a “labour market enforcement order” (see the new clause introduced by Amendment No.49), backed by criminal sanctions in the event of non-compliance. The code of practice must be laid before Parliament and published, but is subject to no scrutiny procedure.
11. In paragraph 4 of their further supplementary memorandum, the Home Office explain the absence of a Parliamentary procedure by pointing out that the subject matter of the code is confined to guidance only, and they refer in support to a similar absence in relation to guidance given under section 33 of the Modern Slavery Act 2015 (“the 2015 Act”) which, they imply, is comparable.

⁴ An “enforcing authority” is defined in subsection (5) of the new clause introduced by Amendment No.43 in terms that include the GLAA.

12. The Home Office appear however to have overlooked the significance of subsection (4) of the new clause, which requires an enforcing authority to “have regard” to the guidance when exercising its functions — a duty which does *not* feature in section 33 of the 2015 Act. A body that is required by statute to “have regard” to a code is normally, as a matter of public law, expected to follow the guidance in it, unless in particular circumstances it has cogent reasons for not doing so.
13. **In view of that, we have concluded that the code should be subject to Parliamentary control. We consider that the negative procedure would afford an adequate level of scrutiny. That could either take the form of a draft negative procedure applied to the code itself, or a statutory instrument which brings the code into force being subject to the negative procedure. We recommend accordingly.**

Amendment No.77 – Rules made by the GLAA

14. Section 8 of the Gangmasters (Licensing) Act 2004 (“the 2004 Act”) enables the GLAA to make rules dealing with a number of matters, such as the conditions to be satisfied before a licence may be granted, the charging of fees, and the various procedural matters concerned with licences. At present, the rules must be made by statutory instrument and are subject to the negative procedure (see section 25(4) and (6)(b) of the 2004 Act) . In future, however, Parliamentary control over the GLAA’s rules is to be removed, because paragraph 21 of the new Schedule introduced by Amendment No.77 amends section 25 of the 2004 Act to repeal subsections (4) and (6)(b).
15. In paragraph 53 of the supplementary memorandum, the Home Office seek to justify this change by explaining that the GLAA’s rules will in future require the consent of the Secretary of State, “who is answerable to Parliament”. We do not find this in the least persuasive. In our view, general answerability (which applies in the case of every Minister in respect of almost every ministerial function) can never be regarded as a satisfactory substitute for specific control over the exercise of a delegated power to legislate.
16. We are also wholly unpersuaded by the Home Office’s suggestion that there is a similar power in section 7 of the Private Security Industry Act 2001 (“the 2001 Act”) that is exercisable without Parliamentary control. On the briefest comparison of the power to publish licensing criteria under section 7 of the 2001 Act with the rule-making power in section 8 of the 2004 Act, it is clear to us that like is not being compared with like.
17. We also notice that the obligation to make rules by statutory instrument subject to the negative procedure is to be expressly preserved where the GLAA make rules about licences in Northern Ireland (see paragraph 22 of the new Schedule): that incongruity is not even mentioned, far less explained or justified, in the supplementary memorandum.
18. **For all of those reasons we consider that the removal of Parliamentary control over rules made by the GLAA is inappropriate. We therefore recommend that paragraph 21 of the new Schedule be not included in the Bill.**

APPENDIX 1: 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 2016 Members declared no interests.

Attendance:

The meeting on the 14 January 2016 was attended by Lord Flight, Baroness Fookes, Baroness Gould of Potternewton, Lord Jones, Lord Lisvane, Lord Thomas of Gresford and Lord Tyler.