

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

3rd Report of Session 2016–17

Policing and Crime 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	Lord Lisvane
Baroness Fookes (<i>Chairman</i>)	Lord Moynihan
Lord Flight	Lord Thomas of Gresford
Baroness Gould of Potternewton	Lord Thurlow
Lord Jones	Lord Tyler

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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 certain instruments made under other Acts specified in the Committee's terms of reference.

Third Report

POLICING AND CRIME BILL

1. This Bill was brought from the House of Commons on 14 June and is to have its Second Reading on 18 July. It is a long and wide-ranging Bill, as can be seen from the extent of its Long Title. There is a helpful memorandum from the Home Office to explain the delegated powers in the Bill,¹ a number of which we wish to draw to the attention of the House.

Clause 8 and Schedule 1—transfer of fire and rescue functions

2. Chapter 2 in Part 1 of the Bill is concerned with local fire and rescue functions. In particular:
 - it enables the future exercise of those functions by a police and crime commissioner (“PCC”) as the fire and rescue authority, and their delegation to a chief constable, who may in turn be permitted to delegate them further;
 - where those functions are exercisable by the elected mayor for the area of a combined authority, it similarly enables their delegation to (and further delegation by) a chief constable.

As arrangements are to be agreed for each area on a ‘bespoke’ footing, their implementation in legislation is to be effected by a series of orders, each providing for the changes in a particular area. For the PCC model, the orders will be made under new sections 4A to 4M of the Fire and Rescue Services Act 2004 (“the 2004 Act”), as inserted by Schedule 1 to the Bill. For the elected mayor model, the orders will be made under new sections 107EA to 107EF in Part 6 of the Local Democracy, Economic Development and Construction Act 2009 (“the 2009 Act”) as amended by clause 8.

3. What we found striking, however, is a difference in the level of Parliamentary control that is to apply between the two models. With two exceptions, the orders under sections 4A to 4L of the 2004 Act are subject to negative procedure, which is usual for most subordinate legislation under that Act. (The two exceptions arise where sections 4K and 4L enable the amendment of provisions of Acts, and therefore require affirmative procedure.) However, orders under new sections 107EA to 107EF of the 2009 Act will all require the affirmative procedure (which is the level of scrutiny that almost invariably applies to orders under Part 6 of that Act).
4. The disparity between scrutiny procedures is perhaps best illustrated by comparing new section 107EA(2) and (3) (inserted by clause 8(2)) with new section 4H(1) and (2) (inserted by paragraph 5 of Schedule 1). In each case the new subsections confer very similar powers, to provide for delegation of functions to chief constables, and for onward delegation by them. They also make clear that this allows the delegation of functions wholesale, or subject to exceptions, or confined to specified functions. However, the orders under

¹ Home Office, *Policing and Crime Bill: Delegated Powers Memorandum*: <http://www.parliament.uk/documents/lords-committees/delegated-powers/Policing-and-Crime-Bill-DPM.pdf> [accessed 12 July 2016]

section 107EA will be affirmative, while those under section 4H will be negative.

5. This difference in scrutiny procedure requirements is acknowledged in paragraphs 19 and 20 of the memorandum. Paragraph 19 offers three reasons in support of the negative procedure for orders under the 2004 Act:
 - that the principle of delegation via chief constables is a more clearly established delegation pattern on the face of the Bill in the cases where the PCC is to be the fire and rescue authority than in cases where the fire and rescue functions lie with an elected mayor;
 - that the procedural preconditions (for example, as to consultation) that apply² before orders may be made under sections 4A to 4L of the 2004 Act are more exacting than the preconditions for orders under sections 107EA to 107EF of the 2009 Act; and
 - that the use of the negative procedure in this context is consistent with its use for orders combining fire and rescue authorities under section 2 of the 2004 Act).
6. Conversely, paragraph 20 of the memorandum emphasises, in relation to the orders to be made under the 2009 Act:
 - a lesser level of detail in the 2009 Act;
 - the absence of a statutory duty to consult; and
 - the fact that new sections 107EA to 107EF are being inserted into Part 6 of the 2009 Act, where the scrutiny procedure for delegated powers is almost exclusively affirmative.

The Home Office suggest that all of these considerations indicate that the orders made under the 2009 Act ought by contrast to be affirmative.

7. We are much less persuaded by the first and the third of those arguments than we are by the second, which we find quite compelling. It is clear to us that the preliminary consultation and other requirements for orders under the 2004 Act are significantly more stringent than those applicable to orders under Part 6 of the 2009 Act. While consistency between the procedures applying to similar powers would usually be desirable, we do not in these particular circumstances regard the difference as inappropriate.

Clause 28—power to include pre-enactment misconduct etc.

8. Section 50 of the Police Act 1996 enables provision to be made by negative regulations about the investigation of allegations relating to the conduct, efficiency or effectiveness of members of police forces, and section 51 enables equivalent regulations to be made about similar allegations against special constables. Clause 28(2) and (3) insert further powers into each of those sections so that the regulations may provide for the investigations to be pursued even where the person concerned left the force, either after the allegation was made, or within a particular period prior to the allegation coming to light. That period is to be specified in the regulations. According to paragraph 142 of the memorandum, the Government intend to amend

² See new Schedules A1 and A2, inserted by paragraph 12 of Schedule 1.

the Bill so that allegations may exceptionally be investigated even where this time limit has expired.

9. Clause 28(7) offers complete protection from investigation for anyone who ceased to be a member of the police force or a special constable before subsections (2) and (3) come into force. There is limited protection for someone who ceases to be a member or a special constable after clause 28 comes into force. Conduct that occurred before subsections (2) and (3) were in force is not protected if it would have led to dismissal, had the person not resigned or retired.
10. We are aware that the new arrangements introduced by clause 28 are controversial, and we note the measure of retrospection afforded by subsection (7). We do not however consider that either of those considerations raises a doubt about the appropriateness of the negative procedure. The degree to which the Bill should provide for retrospection is in our judgment ultimately a matter of policy for the House.

Schedule 8—“police barred list”: effect of inclusion in list

11. Schedule 8 amends the Police Act 1996 to introduce, as a new Part 4A, a regime to secure that anyone who is (or who would, had they not resigned, have been) dismissed as a police officer or police staff member is not subsequently reappointed elsewhere in some policing or other law enforcement capacity. As amended, the 1996 Act will itself set out:
 - the four categories of persons to whom the new rules apply (new section 88A(1));
 - the arrangements for the maintenance of a list (the “police barred list”) of such persons (new section 88B),
 - the effect of being included in it (new sections 88C-88E),
 - when persons must be removed from it (new section 88F), and
 - the arrangements for publishing or disclosing information held in the list (new sections 88G and 88H).

There is also to be a “police advisory list” for recording the names of former officers or staff against whom an allegation has been made but not yet determined, and new sections 88I to 88M make similar provision for that list as for the police barred list, except that there is no prohibition against employing or appointing someone on the advisory list.

12. Schedule 8 contains 16 delegated powers, and all of them attract the negative procedure. In general, we do not find either the delegations or the negative procedure to be inappropriate, because the new sections themselves set out much of the detail of the new “barring” and “advisory” arrangements, and most of the delegated powers are not concerned with matters of substance.
13. Paragraph 162 of the memorandum explains the choice of the negative procedure by reference to “the procedural nature of these regulation-making powers”. While we agree with that description for the most part, there is one power in new Part 4A which is certainly not merely procedural in character. New section 88C(3) requires that a person included in the barred

list must not be employed or appointed by various persons or bodies listed in subsection (5) as follows:

- a chief officer of police;
- a local policing body;
- the chief inspector of constabulary;
- the Independent Police Complaints Commission; or
- a person with functions of a public nature relating to policing or law enforcement who is specified in regulations made by the Secretary of State.

It is clear to us that the exercise of that power affects the “reach” not only of the barred list but also the advisory list (see new section 88K(3)(e)).

14. The Home Office say in paragraph 152 of the memorandum that the power might be used to specify bodies such as the National Crime Agency, the Serious Fraud Office and Border Force. However, it could also be used to specify a range of other bodies, including bodies whose functions may only be partly concerned with law enforcement.³ We simply do not accept that the power in new section 88C(5)(e) can properly be described as “procedural”. The employment prospects of a person included in the police barred list or the police advisory list could be fundamentally affected by the exercise of the power.
15. **We therefore recommend that any exercise of the power conferred by new section 88(5)(e) should require the affirmative procedure.**

Clause 29(6)—power to make corresponding or similar provision

16. Clause 29(6) enables the Secretary of State to make in regulations corresponding or similar provision about a barred list and an advisory list for policing and “quasi-policing”⁴ bodies such as the British Transport Police and the National Crime Agency. The regulations would be subject to negative procedure (see subsection (7)). We do not regard that level of scrutiny as inappropriate, given that the regulations under subsection (6) have little scope for significant divergence from the provision made in the new Part 4A inserted by Schedule 8.
17. However, as we have mentioned in our paragraph 12 above, Part 4A makes some 16 delegations of legislative power. It is unclear to us from clause 29, and not explained in the memorandum, how it is intended that the regulations under subsection (6) will, when making provision that “corresponds or is similar” to new Part 4A, deal with the powers conferred by that Part. Will they repeat those powers, thereby sub-delegating provision to a tier of legislation below the subsection (6) regulations themselves; and, if so, what will be the arrangements for the Parliamentary scrutiny of the sub-delegated regulations? Or will the regulations under subsection (6) themselves incorporate the provision actually made in the various sets of regulations to be made under Part 4A? It occurs to us that the latter approach might not be straightforward, because the power conferred by subsection (6)(a) seems to

³ See new section 88D.

⁴ See paragraph 163 of the memorandum.

be confined to imitating the provision made by Part 4A, but not by *or under* Part 4A.

18. **We draw clause 29(6) to the attention of the House, so that it may invite the Minister to explain how the Government intend to provide in their regulations for the material that is delegated to regulations under new Part 4A.**

Clause 30—constitution of police appeals tribunal

19. A police officer against whom a determination of misconduct or gross misconduct has been made has a right of appeal against that determination to a police appeals tribunal.⁵ At present, the Police Act 1996⁶ specifies the three categories of persons who are to be members of the tribunal. The provision varies, depending on whether or not the appellant is or is not a “senior officer”. The Act also designates which of the members is to chair the tribunal. Clause 30(2) and (4) amend the 1996 Act to provide that those matters will in future be dealt with in rules that attract only the negative procedure.
20. Paragraph 168 of the memorandum justifies this change on the ground of “flexibility”. However, we do not understand why the explanation given in support of that objective in the remainder of paragraph 168 is thought to justify this delegation. We do not follow why the intention of having a smaller number of tribunals sitting in fewer places should be affected by, or should influence, the overall character of the membership of each tribunal. If, for instance, it has been decided that a ‘lay’ member should replace the ‘retired officer’ member of a tribunal, as paragraph 167 of the memorandum suggests, that change could be given effect by amending Schedule 6 to the 1996 Act, as could the decision to have a legally qualified chairman.
21. **We have not been persuaded by the arguments in the memorandum regarding the ‘downgrading’ of provision from primary legislation to subordinate legislation subject to negative procedure. We therefore consider that the delegations in clause 30(2) and (4) are inappropriate.**

Clause 46—power to make regulations about police ranks

22. Clause 46 inserts new section 50A into the Police Act 1996, enabling the Secretary of State by regulations to specify ranks in police forces, below the rank of chief officer, but to include the rank of constable. The power is a Henry VIII power because the existing intervening ranks are specified in Acts, which would need to be amended in consequence (see new section 50A(3) and (4)). The regulations will require the draft affirmative procedure, as we would expect (new section 50B(1)).
23. New section 50B(4) provides two alternative routes leading to the laying of draft regulations, one of which is that the College of Policing generates the draft. In that event, under subsection (2)(a) the Secretary of State ‘must’ lay the draft before Parliament in the terms prepared by the College, and make the regulations in those terms. But it appears to us that this apparent duty imposed on the Secretary of State is undermined by subsection (3), which in effect seems to afford her complete discretion whether or not to lay the College’s draft. Paragraphs (a) and (b) of subsection (3) provide explicit

5 Under rules made under section 85 of the Police Act 1996.

6 See paragraphs 1 and 2 of Schedule 6 to that Act.

reasons why she need not lay the draft: on the grounds that it would be unlawful to make the regulations or that it would impair the efficiency of the police to do so. Paragraph (c) allows her an entirely unspecific basis for not laying the draft, on the basis that she considers “it would ... be wrong to do so”.

24. **We draw clause 46(3) to the attention of the House so that it may be aware of the extensive relaxation it provides of the apparent duty imposed by subsection (2)(a) to lay draft regulations.**

Clause 92—Parliamentary control of codes of practice

25. Clauses 86 to 88 confer powers to stop, board, divert, detain, search, arrest and seize, all exercisable in relation to shipping. Clause 92 requires the Secretary of State to prepare and issue a code of practice to be followed by persons exercising those powers; and the code (and any revision of it) must be brought into force by regulations. Where the code itself is being commenced, the regulations require the affirmative procedure (subsection (8)). However, where a revision of the code is involved, the regulations must simply be laid before Parliament without any scrutiny procedure “unless a draft of the instrument has been laid before and approved by each House of Parliament” (subsection (9)). On the face of it, that provision allows the Minister the option between affirmative procedure and no procedure at all! This Committee and its predecessors have tended to deprecate powers that give a Minister a choice between Parliamentary scrutiny procedures.
26. In this case, however, the code of practice can be expected to cover very similar ground to the codes required under section 66 of the Police and Criminal Evidence Act 1984 (“PACE”); and section 67(7A) of PACE affords a similar choice between affirmative procedure and no procedure for instruments that bring revisions to PACE codes into force. Paragraph 227 of the memorandum helpfully explains how subsection (7A) came to be inserted by the Criminal Justice Act 2003. At that time, Ministers undertook to exercise their choice by reference to views expressed by the House of Commons Select Committee on Home Affairs about the particular revisions.
27. **We accordingly draw clause 92(9) to the attention of the House, so that the Minister may be invited to give a comparable undertaking to be bound by the views of the House of Commons Select Committee on Home Affairs.**

Clause 147—power to make consequential amendments, etc.

28. Over the past two Sessions we have frequently found it necessary to criticise powers which enable subordinate legislation to repeal, amend or ‘otherwise modify’ provisions of Acts, but which do not require the affirmative procedure to apply to provisions that do not involve repeal or amendment. We repeated these criticisms in our First Report⁷ of the present Session in relation to the Bus Services Bill, and in our Second Report⁸ on the Investigatory Powers Bill.

⁷ Delegated Powers and Regulatory Reform Committee (1st Report, Session 2016–17, [HL Paper 13](#))

⁸ Delegated Powers and Regulatory Reform Committee (2nd Report, Session 2016–17, [HL Paper 21](#))

29. We notice that, while clause 147(1) and (2) of this Bill confer powers to make consequential provision by regulations, subsection (3)(b) enables the regulations only to “repeal ... or otherwise amend any provision of primary ... legislation ...”, and in either of those instances the regulations would require the affirmative procedure. The second sentence of paragraph 315 of the memorandum appears to us to acknowledge implicitly this Committee’s earlier objections, by stating that: “The regulation-making power does not enable non-textual modifications to be made ...”. **We welcome that change of approach and we draw it to the attention of the House.**

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 6 July 2016 Members declared no interests.

Attendance

The meeting on the 6 July 2016 was attended by Baroness Drake, Lord Flight, Baroness Fookes, Lord Jones, Lord Lisvane, Lord Moynihan, Lord Thomas of Gresford, Lord Thurlow and Lord Tyler.