

HOUSE OF LORDS

Delegated Powers and Regulatory Reform  
Committee

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4th Report of Session 2016–17

**Investigatory Powers Bill:  
Government Response  
Policing and Crime Bill:  
Government Response**

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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 Moynihán
Lord Flight	Lord Thomas of Gresford
Baroness Gould of Potternewton	Lord Thurlow
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](http://www.publications.parliament.uk/pa/ld/ldreg.htm). The Register may also be inspected in the Parliamentary Archives.

### *Publications*

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### *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 [hlddelegatedpowers@parliament.uk](mailto: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 certain instruments made under other Acts specified in the Committee's terms of reference.

# Fourth Report

## **INVESTIGATORY POWERS BILL: GOVERNMENT RESPONSE**

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1. We considered this Bill in our 2nd Report of this Session.<sup>1</sup> The Government have now responded by way of a letter from Rt Hon. Earl Howe, Minister of State for the Ministry of Defence and Deputy Leader of the House of Lords, printed at Appendix 1.

## **POLICING AND CRIME BILL: GOVERNMENT RESPONSE**

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2. We considered this Bill in our 3rd Report of this Session.<sup>2</sup> The Government have now responded by way of a letter from Baroness Williams of Trafford, Minister of State at the Home Office, printed at Appendix 2.

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

2 Delegated Powers and Regulatory Reform Committee, (3rd Report, Session 2016–17, [HL Paper 23](#))

## APPENDIX 1: INVESTIGATORY POWERS BILL: GOVERNMENT RESPONSE

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### Letter from Rt Hon. Earl Howe, Minister of State for the Ministry of Defence and Deputy Leader of the House of Lords, to Baroness Fookes, Chairman to the Delegated Powers and Regulatory Reform Committee

#### *Clause 242(2) and (3)—power to make consequential provision*

I have considered the Committee's view that the powers conferred by clause 242(2) and (3) are inappropriate to the extent that they permit the amendment of enactments passed or made after the current session. The Government will bring forward amendments to the Bill to restrict those powers accordingly.

As to the power "to otherwise modify" an enactment, I agree that there are likely to be relatively few occasions when the powers to otherwise modify primary legislation need to be exercised and, as set out in the Department's memorandum, changes to primary legislation are, wherever possible, made by textual amendment.

However, it remains the Government's position that there are some cases where it is necessary to modify primary legislation, and that it is not possible to specify which kinds of modification of primary legislation should attract the negative procedure and which the affirmative procedure, without creating legal uncertainty.

I note that the Committee does not accept the position set out in the delegated powers memorandum, but the Home Office remains of the view that it is justified, and that the powers in clause 242 are subject to the appropriate level of parliamentary scrutiny.

#### *Schedule 8, paragraph 33—power to make consequential provision in connection with the combination of warrants and authorisations*

As set out in relation to clause 242, the Government will bring forward amendments to the Bill to restrict the powers conferred by paragraph 33, in response to the Committee's comments.

As to the power to amend Schedule 8 itself, I am sorry that the Committee did not consider that the delegated powers memorandum gave sufficient explanation of the need for this power.

The memorandum explains that Schedule 8 sets out the various warrants and authorisations under the Bill, and other legislation including the Intelligence Services Act 1994, Part 2 of the Regulation of Investigatory Powers Act 2000, the Regulation of Investigatory Powers (Scotland) Act 2000 and the Police Act 1997, which may be combined in a single warrant. The ability to combine warrants and authorisations in this way means that the Secretary of State or Scottish Ministers (or other person with power to issue warrants), and the Judicial Commissioner approving the issue of the warrant, have a complete picture of the intrusive techniques involved in a particular operation, and can assess the necessity and proportionality of the warrant accordingly.

The Committee accepted the explanation at paragraph 153 of the memorandum that, while every effort has been made to take account of the implications of these combinations for those other Acts and to include provision in the Bill, the provisions of Schedule 8 are complex and it is possible that further consequential amendments will be needed, including to references to warrants in those enactments, and to provide for unintended consequences of these provisions. The power to amend Schedule 8 itself is also needed for this reason.

In addition, the purpose of Schedule 8 is to set out the rules that apply where warrants provided for elsewhere are combined. The complexity of the combined warrants regime is such that it is much clearer and more accessible if all the rules are in one place-i.e. in Schedule 8. Schedule 8 tracks the language of the other enactments and it may well be necessary to reflect any amendments to those other enactments in the Schedule.

The purpose of including the bespoke power in paragraph 33 of Schedule 8, rather than relying on the powers in clause 242 to make amendments consequential on the Bill as a whole, was so that a power to amend the Schedule itself could be included. That power is, of course, limited to the amendment of Schedule 8 and does not extend to any other part of the Bill.

**5 September 2016**

## APPENDIX 2: POLICING AND CRIME BILL: GOVERNMENT RESPONSE

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### Letter from Baroness Williams of Trafford, Minister of State at the Home Office, to Baroness Fookes, Chairman to the Delegated Powers and Regulatory Reform Committee

I am pleased that the Committee found the Department's memorandum helpful and had no comments to offer on the great majority of the delegated powers in the Bill. I have carefully considered the report and the Committee's recommendations and conclusions which I respond to in turn below.

**“We therefore recommend that any exercise of the power conferred by new section 88C(5)(e) [of the Police Act 1996] should require the affirmative procedure.” [Paragraph 15]**

The Government accepts the recommendation and has tabled an amendment for Committee stage to provide that the power conferred by new section 88C(5) (e) of the Police Act 1996 (the 1996 Act) will be subject to the affirmative procedure.

**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. [Paragraph 18]**

I am grateful to the Committee for drawing our attention to an apparent gap in the regulation-making power in clause 29(6) of the Bill, which enables provision to be made which corresponds or is similar to that made by the new Part 4A of the 1996 Act (the police barred and advisory lists) and which relates to a person who is or has been employed or appointed by a quasi-policing body. As the Committee points out, certain aspects of the operation of the police barred and advisory lists will be determined by regulations made under the new Part 4A of the 1996 Act and it will most likely be necessary, when exercising the power in clause 29(6), also to make provision corresponding or similar to that contained in such regulations. Accordingly, the Government has tabled a technical amendment to clause 29(6) so that the Secretary of State may, by regulations, make provision that corresponds or is similar to that made by *or under* Part 4A of the 1996 Act.

**“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.” [Paragraph 21]**

The Committee expressed concern about the provisions in clause 30(2) and (4) which enable the composition of Police Appeals Tribunals (PATs) to be determined by rules, rather than, as now, being set out on the face of the 1996 Act. As explained in paragraphs 167 and 168 of our memorandum, the delegated rule-making powers in clause 30 were intended to confer greater flexibility on police forces as to how PATs are both composed and constituted.

With regards to our planned changes to the composition of PATs, it remains the Government's intention to further strengthen the independence of PATs by replacing the current panel member who must be a 'retired police officer' (hearing appeals by non-senior officers) with a 'lay' member. No other changes to PAT panel membership are intended, and the Government accepts that the composition of PATs should continue to be set out in primary legislation. The Government has therefore tabled an amendment which would substitute the existing clause 30 of the Bill with a revised version. Under the revised clause, the composition of PATs will continue to be specified in Schedule 6 to the 1996 Act, subject to the change described above (i.e. the replacement of a retired police officer with a lay person where the appeal is by a non-senior officer).

The revised clause, however, retains the rule-making power which will enable the Secretary of State to: (i) specify "the relevant person" who appoints members of PATs in individual cases; and (ii) make provision allowing that person to delegate his or her power. This rule-making power would, for example, allow the Secretary of State to specify that local policing bodies are to appoint members of PATs in individual cases and that local policing bodies may delegate that power to another local policing body, such as a neighbouring Police and Crime Commissioner. This would allow forces and local policing bodies to collaborate on the administration of hearings or even enable future PATs to be centrally managed by another body such as the College of Policing. This approach will reduce bureaucracy and potentially enable savings across forces. By virtue of section 63 the 1996 Act, the Secretary of State will have to consult with the Police Advisory Board for England and Wales about any proposed rules, and is required to take into account any representations it makes. We therefore remain satisfied that the negative procedure affords an appropriate level of parliamentary scrutiny for such a rule-making power.

**"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." [Paragraph 24]**

The power to decline to make regulations about police ranks on the grounds that "it would for some other reason be wrong to do so" mirrors the provision in section 50(2ZB)(c) of the 1996 Act and should be read as covering similar kinds of things to those covered by section 50(2ZB)(a) and (b). As set out in the explanatory note to the Anti-social Behaviour, Crime and Policing Act 2014 (section 123 of which inserted new subsections (2ZA) and (2ZB) into section 50 of the 1996 Act), this could be used to cover a case where it would not be unlawful to make the regulations in the terms proposed by the College but it would be undesirable to do so because, for example, the regulation as drafted was not sufficiently clear, was flawed, or would not achieve the policy intention the College intended to achieve. In such circumstances the Home Secretary could ask that the College prepare a fresh draft so as not to lay flawed regulations before Parliament.

**"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." [Paragraph 27]**

We accept this recommendation, and undertake to be bound by the views of the Home Affairs Select Committee on Home Affairs in this matter.

**“We welcome that change of approach and we draw it to the attention of the House.” [Paragraph 29]**

Regrettably, the sentence in paragraph 315 of our memorandum about non-textual modifications not being within the scope of the power was included in error; I apologise for this mistake. The Government’s view is that, in a context such as this where the Bill expressly states that a power to make consequential provision includes a power to amend primary legislation, there is a clear implication that the power to make consequential provision also includes the power to modify primary legislation in other ways (because if there is power to make amendments there is power to do something falling short of amendments). In practice, so far as the applicable parliamentary procedure is concerned, every textual amendment of primary legislation and every other modification of primary legislation that is equivalent to a textual amendment will be included in an instrument that is subject to the affirmative procedure.

**7 September 2016**