

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

7th Report of Session 2016–17

High Speed Rail (London - West Midlands) 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

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.

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 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.

Seventh Report

HIGH SPEED RAIL (LONDON - WEST MIDLANDS) BILL

1. This hybrid bill makes provision for the works for Phase 1 of the high speed railway line (“HS2”) from London Euston to its junction in Staffordshire with the existing west coast railway line, including a spur into Birmingham. There is a memorandum from the Department for Transport about the delegated powers in the bill.¹
2. The bill contains more than 20 delegations of legislative power, exercisable by means of a variety of forms of subordinate legislation subject to a wide range of procedures. However, nearly all of the powers are closely comparable with powers of the kind conferred in the Crossrail Act 2008, and many are in almost identical terms. This Committee’s predecessor considered the equivalent powers in 2007–08 when it saw the bill for that Act. We are pleased that the observations made by that committee² about powers in that bill, or about their associated procedures, were accepted by the Government and have been given effect where the equivalent power appears in this bill.
3. There is therefore only one power in the bill which we wish to draw to the attention of the House.

Clause 53—Rights of entry for further works

4. Clause 53(1) is to apply in connection with a future bill, or a proposed future bill, to authorise works for a high speed railway line in Great Britain. It enables an authorised person to enter land within 500 metres of the proposed route of the line, for the purpose of surveying the land or facilitating compliance with EU environmental protection legislation. It is clear that the right of entry may involve intrusive activity, because it includes powers to take samples and to bore for the purpose of ascertaining the presence of minerals.
5. Residential land may be entered only if the entry is authorised by a magistrate’s or, in the case of Scotland, a sheriff’s warrant, and other land only with written authorisation from the Secretary of State. All reasonable attempts to obtain consent to enter the land must have been made before a warrant or authorisation is issued.
6. Subsection (10) confers order-making powers on the Secretary of State to change the 500 metres limit, either—
 - by amending subsection (1) to substitute a different distance (subsection (10)(a)), or
 - by modifying its application so that, in a particular class of case, subsection (1) is to have effect as if a different distance were specified in it (subsection (10)(b)).

In the case of an amendment, the affirmative procedure is to apply; for a modification, the negative procedure will apply.

1 Department for Transport, *High Speed Rail (London - West Midlands) Bill: Delegated Powers Memorandum*: [http://www.parliament.uk/documents/lords-committees/delegated-powers/High-Speed-Rail-\(London%e2%80%93West-Midlands\)-Bill-DPM.pdf](http://www.parliament.uk/documents/lords-committees/delegated-powers/High-Speed-Rail-(London%e2%80%93West-Midlands)-Bill-DPM.pdf) [accessed 16 November 2016]

2 Delegated Powers and Regulatory Reform Committee (4th Report, Session 2007–08, [HL Paper 49](#))

7. In the bill as introduced into the House of Commons in November 2013, orders under what is now clause 53³ attracted only the negative procedure, irrespective of whether the order amended or modified subsection (1). As paragraph 123 of the memorandum explains, the Commons Select Committee on the bill recommended⁴ that “power to increase the distance should be subject to the affirmative resolution procedure”. Paragraphs 124 to 126 of the memorandum explain the Government’s response to that recommendation:

“124. The Department took account of the concerns being raised in formulating its response dated June 2015. The Bill was then amended such that subsection (10) makes an order-making provision for amending the distance in relation to two separate categories.

125. The first category is set out in subsection (10)(a) and relates to changing the distance of the right of entry for all cases. It is this category that would potentially have a significant impact on a wide number of land owners and should therefore be subject to the affirmative resolution procedure which was felt to provide Parliament with an appropriate level of scrutiny.

126. The second category set out in subsection (10)(b) applies to amendment of the distance in relation to any class of case. As set out above, this category is expected to be the most likely to give rise to the use of this power. In such a circumstance, a limited number of landowners would be affected, and in a very limited and low-impact way. In cases such as the example given above, access would be needed to survey species in natural habitats rather than entering buildings or carrying out ground investigations work, which may occur within the existing 500 metre limit. As this category of amendment is expected to have a more localised impact, affecting a smaller number of landowners, it was felt for this reason the negative resolution procedure should be retained as providing Parliament with a suitable level of scrutiny.”

8. As a result, the Government brought forward amendments to the bill to require the affirmative procedure for amending orders under subsection (10)(a) and to retain the negative procedure for modifying orders under subsection (10)(b).
9. Paragraph 125 confirms that an *amending* order under subsection (10)(a) would change the specified distance for *all cases*, and the Government regard the affirmative procedure as appropriate for such an amendment. Paragraph 126 explains that an order under subsection (10)(b) is likely to be made for *piecemeal modification*, and it goes on to describe the circumstances in which it is envisaged that the need for localised modification might occur. The Government regard the negative procedure as an appropriate level of Parliamentary control for such modifications.

3 Clause 53 was originally, in the bill as introduced into the House of Commons, clause 51.

4 House of Commons Select Committee on the High Speed Rail (London – West Midlands) Bill (First Special Report, Session 2014–15, [HC 338](#))

10. We are inclined to agree that requiring an affirmative debate in each House for one or more geographically limited extensions of the 500 metres limit seems disproportionate. However, while the memorandum in our view makes a reasonably compelling case for a power to *modify* the limit to meet local circumstances, it does not begin to explain why a power to *amend* the limit for all cases is needed at all. Indeed, paragraph 121 of the memorandum explains the *rationale* for the order-making powers wholly in terms of a piecemeal response to meet particular circumstances, and no reason is advanced anywhere in support of the delegation of power to amend the distance for all cases.
11. **We therefore conclude that the Government have not made their case for the power of amendment for all cases under subsection (10)(a). Unless the Minister can satisfy the House that a power of this kind is necessary, and as to the circumstances in which it is likely to be used, we recommend that paragraph (a) be omitted from clause 53(10).**

De-hybridisation provision

12. A hybrid instrument is one which is subject to the affirmative resolution procedure and which affects specific private or local interests in a manner different from the private or local interests of other persons or bodies of the same class. In this House, such instruments are subject to the hybrid instruments procedure which provides those affected by such an instrument with an opportunity to petition against it. The purpose of a “de-hybridisation” provision is to remove the requirement to use the hybrid instruments procedure.
13. Because, by its very nature, a de-hybridisation provision removes a protection afforded to those affected by an instrument, it is our usual practice to draw such provision to the attention of the House, so that it may satisfy itself that private rights normally protected by the hybrid instruments procedure will be protected by some other means under the bill.
14. Subsection (12) is a de-hybridisation provision. It provides that a draft order under subsection (10)(a) is not to proceed as a hybrid instrument, should it be regarded as one. Paragraph 127 of the memorandum explains that this is to ensure that no one may petition against the draft order in this House. It goes on to say that the Department “would ensure that there was full discussion with all relevant land and property owners and would take reasonable steps to ensure that any risk of detriment was minimised or reduced”. Given that an amending order under subsection (10)(a) would change the specified distance for all cases (as paragraph 125 acknowledges), the “full discussion” and the taking of “all reasonable steps” seems to us to amount to a formidable exercise for the Government.
15. **In this case, the House may wish to consider whether the alternative measures for protecting private interests described in paragraph 127 are likely to be practicable. In any event, we doubt whether there is a risk that an amending order under subsection (10)(a) could be hybrid, given that it must apply equally to all cases to which the power extends, there being no power for the order to differentiate between classes of case. We accordingly draw clause 53(12) 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 9 November 2016 Members declared the following interests:

High Speed Rail (London - West Midlands) Bill

Lord Thurlow

Non-executive chairman of a committee within a property investment fund which has received notice that a property will be compulsorily purchased by HS2.

Attendance

The meeting on the 9 November 2016 was attended by Baroness Drake, Baroness Fookes, Baroness Gould of Potternewton, Lord Jones, Lord Lisvane, Lord Moynihan, Lord Thomas of Gresford, Lord Thurlow and Lord Tyler.