

HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

8th Report of Session 2016–17

**Policing and Crime Bill:
Government Amendments**

**Small Charitable Donations and Childcare
Payments Bill**

**Pension Schemes Bill [HL]:
Government Response**

**International Development (Official
Development Assistance Target)
(Amendment) Bill [HL]**

**Lobbying (Transparency) Bill [HL]:
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>)	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 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.

Eighth Report

POLICING AND CRIME BILL: GOVERNMENT AMENDMENTS

1. We reported on this Bill in our 3rd Report of this Session.¹ The Government have now tabled amendments for Report Stage. Some of them introduce provisions delegating legislative power and the Home Office has submitted a Supplementary Memorandum to accompany them.²
2. There is only one amendment to which we wish to draw the attention of the House. It is particularly unfortunate therefore that this is the one amendment to which no reference is made in the Supplementary Memorandum, contrary to Cabinet Office guidance which states that memoranda should identify *every* provision for delegated legislation within a bill.³

Amendment 181—After Clause 145: Pilot schemes

3. Clauses 144 and 145 of the Bill insert five new sections into the UK Borders Act 2007. These new sections will require an individual who is arrested for an offence—
 - to state his or her nationality if required to do so; and,
 - before being released after arrest, whether or not on bail, to produce a nationality document if required to do so.

An offence is committed if either requirement is not complied with.

4. Amendment 181 inserts a new Clause to enable regulations to provide for pilot schemes, to test out the new provisions inserted by Clauses 144 and 145 “for the purpose of assessing [their] effectiveness”. Regulations made under the new Clause could be used—
 - to activate particular provisions of the new sections,
 - to specify the period of time during which those provisions remain in force,
 - to specify the particular areas to which they apply, and
 - to apply them differently “for different purposes”.
5. We note with some surprise that subsection (1) of the new Clause states that the period of time during which the provisions remain in force may be specified “in or under” regulations made under the Clause. This is a sub-delegation of power, meaning that the period may be specified *either* in the regulations themselves *or* in some other form provided for by the regulations. We would expect to be given a compelling justification for any such power of sub-delegation, why it is needed and how it is intended to be exercised.

1 Delegated Powers and Regulatory Reform Committee, (3rd Report, Session 2016–17, [HL Paper 23](#))
2 Home Office, *Policing and Crime Bill: Supplementary Delegated Powers Memorandum*: [http://www.parliament.uk/documents/lords-committees/delegated-powers/Policing-and-Crime-Bill-Further-SDPM\(2\).pdf](http://www.parliament.uk/documents/lords-committees/delegated-powers/Policing-and-Crime-Bill-Further-SDPM(2).pdf) [accessed 1 December 2016]
3 Cabinet Office, *Guide to Making Legislation* (July 2015), para16.9. See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450239/Guide_to_Making_Legislation.pdf [accessed 1 December 2016]

6. The scope of the power under the new Clause is potentially significant and could seemingly even allow the obligations to state nationality and to produce nationality documents to be targeted on different classes of persons. Furthermore, while we would acknowledge that there is no conceptual novelty about testing provisions locally before rolling them out nationally, we are conscious that ‘piloting’ generally means that powers are being conferred to apply new statutory provisions unevenly and temporarily on an experimental basis. For this reason, we usually expect certain standards to be met in relation to pilot schemes.
7. The last occasion on which we considered a power of this kind concerned a provision about alternative arrangements for determining applications for planning permission, in the Bill which is now the Housing and Planning Act 2016. In our report on that Bill,⁴ we set out those standards by recommending that the Bill itself should:
- set out the intended purpose of the pilot regulations;
 - specify that the affirmative procedure should apply to every exercise of the power;
 - require the Secretary of State to consult interested parties before making the regulations;
 - provide on the face of the Bill for the maximum duration of any pilot regulations;
 - require the Secretary of State to prepare and lay before Parliament a report on the outcome and effectiveness of each pilot scheme.

We were pleased that the Government subsequently amended that Bill to give effect to those recommendations.

8. Although the subject matter of these pilot schemes is different, we consider it significant that the new Clause inserted by Amendment 181 would enable selected provisions of an Act to be turned on and off, in different parts of the country, and possibly targeted on different kinds of people, all in a criminal justice context where compliance is backed by criminal sanctions. We therefore found it surprising that the schemes may run for periods not limited on the face of the Bill, and without any obligation to report to Parliament on the outcome, or indeed any requirement for Parliamentary approval of the regulations.
9. **In the light of that, we recommend that the new Clause should:**
- **specify that the affirmative procedure should apply to every exercise of the power;**
 - **provide on the face of the Bill for the *maximum* duration of any pilot regulations;**
 - **provide for the *actual* duration of any pilot scheme to be specified in regulations; and**

⁴ Delegated Powers and Regulatory Reform Committee, (21st Report, Session 2015–16, [HL Paper 98](#)), paras 44 and 45.

- **require the Secretary of State to prepare and lay before Parliament a report on the outcome and effectiveness of each pilot scheme.**

SMALL CHARITABLE DONATIONS AND CHILDCARE PAYMENTS BILL

10. There is nothing in this Money Bill to which we wish to draw the attention of the House.

PENSION SCHEMES BILL [HL]: GOVERNMENT RESPONSE

11. We considered this Bill in our 6th Report of this Session.⁵ The Government have now responded by way of a letter from Rt Hon. Lord Freud, Minister of State for Welfare Reform at the Department for Work and Pensions, printed at Appendix 1.

INTERNATIONAL DEVELOPMENT (OFFICIAL DEVELOPMENT ASSISTANCE TARGET) (AMENDMENT) BILL [HL]

12. There is nothing in this bill which we would wish to draw to the attention of the House.

LOBBYING (TRANSPARENCY) BILL [HL]: AMENDMENTS

13. The purpose of this Private Member's Bill is to repeal and replace the whole of the provision about the regulation of lobbying in Part 1 of the Transparency of Lobbying, Non-party Campaigning and Trade Union Administration Act 2014. We reported on this Bill in our 5th Report of this Session, when we recommended changes to the arrangements for bringing into force a Code of Conduct, and any revisions to it, that the Bill then provided for.⁶
14. At Committee Stage, Lord Lansley tabled many amendments, one of which has removed the provision for a Code of Conduct from the Bill; so our earlier recommendation has effectively been dealt with. However, there are two other features of the Committee Stage amendments to which we wish to draw the attention of the House.

Clauses 13–19: provision about civil penalties

15. Seven new Clauses have been inserted into the Bill to make provision about a *civil* penalty regime. The Bill already contained provision, now in Clause 12, making it a *criminal* offence to engage in lobbying activity without being registered and without filing quarterly reports. Lord Lansley's amendments have amplified the offence to include the provision of incomplete or inaccurate information.
16. Clause 13(1) enables the registrar to impose a civil penalty on a person whose conduct amounts to a criminal offence under Clause 12. Though if civil, as opposed to criminal, proceedings are pursued, then the fact that a person has exercised "all due diligence" does not operate even though, as a result of Clause 12(3), it would be a defence to criminal proceedings.

⁵ Delegated Powers and Regulatory Reform Committee, (6th Report, Session 2016–17, [HL Paper 64](#))

⁶ Delegated Powers and Regulatory Reform Committee, (5th Report, Session 2016–17, [HL Paper 54](#))

17. The maximum amount of the penalty is £7,500, specified on the face of the Bill in Clause 15(3). However, Clause 15(4) enables a different maximum amount to be substituted by regulations, and the amount that may be substituted is not itself subject to any limit in the Bill. In these circumstances, we would always expect such regulations to be subject to the affirmative procedure, rather than the negative procedure currently provided for under the Bill. **We accordingly recommend that the affirmative procedure should apply to regulations under Clause 15(4).**

Clause 23: supplementary and incidental provision

18. Clause 23(2) enables regulations made under the Bill to make consequential, supplementary, incidental or transitional provision, *including provision amending or modifying provisions of the Bill itself*. Although this is a Henry VIII power, it is subject only to the negative procedure except where a provision of Clause 22 or 23 is being amended or modified, in which case the affirmative procedure applies (see Clause 23(5)(b)).
19. Powers to make supplementary or incidental provision are potentially wide-reaching in scope, and those conferred by subsection (2) could enable significant provisions of the Bill (apart from Clauses 22 and 23) to be amended by negative regulations. If this had been a Government bill, we would have expected the accompanying delegated powers memorandum to include a very compelling justification for a power of this nature. None was provided to the House at Committee Stage. **We therefore recommend that the power conferred by Clause 23(2) is inappropriate in so far as it enables amendments to be made to the Bill itself. The words “including provision amending or modifying the provisions of this Act” should therefore be deleted from Clause 23(2).**

APPENDIX 1: PENSION SCHEMES BILL [HL]: GOVERNMENT RESPONSE

Letter from Rt Hon. Lord Freud, Minister of State for Welfare Reform at the Department for Work and Pensions, to Baroness Fookes, Chairman of the Delegated Powers and Regulatory Reform Committee

I am grateful to the Committee for its careful consideration of the merits of the Pension Schemes Bill and I would like to take this opportunity to respond on the three areas to which the Committee drew attention in order to help the House with its deliberations on these points.

Clauses 7, 8 and 11—Authorisation criteria

The powers referred to in clauses 7, 8 and 11 allow the Secretary of State to make Regulations that will set out the matters that the Pensions Regulator can take into account when making its assessment of whether a Master Trust pension scheme meets the relevant authorisation criteria and are all subject to a negative resolution procedure. Having considered the original memorandum submitted to the Committee on 19th October you asked for further information on why the made affirmative procedure was not appropriate for these powers and for further examples of the circumstances in which the Government envisages the powers might be used. Our response to your queries was provided in a supplementary memorandum on 4th November.

I note that the Committee have concluded that the negative procedure may offer an appropriate level of Parliamentary scrutiny for these powers, but suggested that the House takes the extra information provided in that supplementary memorandum into account. I welcome this and also note that we have received amendments from the opposition to the Bill at Committee stage that will allow that debate to take place. I will give further consideration following that debate to whether negative procedure is appropriate in relation to all of these powers.

Clause 16—Duty to notify the Pensions Regulator of significant events

In your consideration of powers under clause 16 you draw the House's attention to the power in clause 16(3) you concluded that we had not justified the scope of the power. The Clause places a duty on the Secretary of State to make Regulations to set out the events that constitute a significant event for the purposes of the duty on certain persons to report such an event. You stated that it appeared to you that the Government has not yet decided on the policy relevant to this power. I would like to assure you this is not the case, and provide the following additional information as I believe it will assist the House's consideration of this power.

Part 1 of the Pension Schemes Bill has been introduced to address particular risks that arise in Master Trust pension schemes. Master Trusts have developed, in part in response to the success of the automatic enrolment programme, emerging as a different kind of beast to the traditional structures that have existed in the occupational pensions sphere. There has been a general acknowledgement that further regulation of Master Trusts is both desirable and necessary.

In considering what form the new regulation should take the Government has worked with the industry, the Pensions Regulator and the Financial Conduct Authority to consider how existing regulatory regimes apply and what more is required. The Government concluded that the first aim of this regime should be to avoid disruption to members and employers by seeking to avoid scheme failures; hence the Bill will establish an authorisation and supervisory regime.

As part of the supervisory regime there is a requirement for certain key people to notify the Pensions Regulator of certain key risk events, referred to as triggering events (Clauses 20, 21 and 22). These events have been selected as the potential precursors to a scheme failure or that will lead to the scheme no longer being able to meet the authorisation criteria (whilst not necessitating a failure). The triggering events are listed on the face of the Bill, as are those responsible for reporting them as they are critical nature of this requirement to the effectiveness of the regime.

The significant events which may be prescribed under clause 16 are also essential to the effective operation of the supervisory regime, once it is established. However, they are of a lower order than a triggering event. The Government's intention is that a significant event in a Master Trust scheme should be sufficiently important to merit the attention of the Pensions Regulator, justify the costs to the scheme of providing information and be relevant to the ability of the scheme to meet the authorisation criteria. However a significant event will not necessarily be one which results in the scheme failing to meet the authorisation criteria.

For example, schemes will periodically change trustees. The fitness and propriety of a trustee is linked to the scheme's authorisation, so the Pensions Regulator must be informed and the new trustee will be assessed against the relevant standard. Other significant events might be a change to the continuity strategy, changes to the business plans, a change to the scheme administrator or capital adequacy falling within a certain percentage of the threshold. The Government wishes to hold further consultation with industry prior to making the regulations setting out what constitutes a significant event. While the list of significant events will not be subject to frequent change, it is appropriate for the future for there to be sufficient flexibility for the list to be adjusted to reflect market developments and potentially new Master Trust structures and processes.

The power is akin to an existing power in section 69 of the Pensions Act 2004 which requires the reporting to the Regulator of a notifiable event in relation to certain non- money purchase schemes, with power to prescribe what constitutes a notifiable event in regulations.

I hope that this explanation will assist the House to understand the nature of the power that we propose.

We have received an amendment to the Bill at Committee stage on the procedure for the power in this clause as well as notification of a clause stand part debate which will give opportunity to hear all views on the scope of the power and procedure and I will consider further whether there is anything more that we can do to meet any concerns that are raised.

Clause 39(1)–Power to modify the scope of Part 1 of the Bill

You have also drawn attention to the regulation-making powers in clause 39(1) which you have concluded are inappropriate. These allow for Regulations to (a) apply some or all of the provisions of Part 1 of the Bill to pension schemes that would not fall within the definition of a Master Trust or (b) to disapply some or all to those that do. You raise concerns that there is nothing to limit the use of these powers. You make the separate point that these powers also allow for partial application and disapplication of the authorisation regime in Part 1 of the Bill and the memorandum does not set out the circumstances in which this aspect of the power is intended to be used.

While I recognise your desire that powers should be as constrained as possible, I remain convinced that the powers are required.

It is the Government's intention that the measures in this Bill are limited to addressing the specific risks that arise in Master Trust pension schemes. However, while the term "Master Trusts" is in common use in the industry, in practice it encompasses a range of schemes, which include sub-groups with characteristics that may overlap with schemes that do not carry the same risks. Therefore, the delegated powers here will allow us to capture the right schemes and ensure the legislation does not unnecessarily bite where it would be disproportionate for it to do so.

Parliament will have an opportunity to debate any regulations made using these powers as they will be subject to the affirmative procedure. The need for regulation of Master Trusts is pressing and we have sought in this Bill to ensure that such schemes are captured; however this is a market in which scheme designs have already developed and proliferated in response to Government intervention. Therefore, while I take note of the Committee's concern I continue to believe that the flexibility provided by these powers, along with the appropriate provision for Parliamentary scrutiny, is required to achieve the policy aim and future-proof the legislative provisions.

21 November 2016

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 30 November 2016 Members declared no interests.

Attendance

The meeting on the 30 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.