

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

12th Report of Session 2016–17

Health Service Medical Supplies (Costs) Bill

Ordered to be printed 11 January 2017 and published 17 January 2017

Published by the Authority of the House of Lords

HL Paper 94

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 Order of the House in hard copy and on the internet at www.parliament.uk/hldprcpublications.

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

Twelfth Report

HEALTH SERVICE MEDICAL SUPPLIES (COSTS) BILL

1. The Bill had its Second Reading on 21 December 2016. It—
 - amends provisions in the National Health Service Act 2006 (“the 2006 Act”) relating to controlling the cost of health service medicines and other medical supplies;
 - inserts new provisions into that Act and the National Health Service (Wales) Act 2006. They—
 - require manufacturers, distributors and suppliers of health service medicines, medical supplies and other related products to provide the Secretary of State and Welsh Ministers with pricing and other information, and
 - provide for the disclosure of that information to other bodies.
2. The Department of Health has provided the Committee with a memorandum about the delegated powers in the Bill.¹ We wish to draw the following matters to the attention of the House.

Clause 6—disclosure of information by the Secretary of State

3. Clause 6 inserts a series of new sections into the 2006 Act which include authorising the Secretary of State to disclose information provided by manufacturers, distributors and suppliers of UK health service products (new section 264B).
4. Subsection (1) of new section 264B lists the bodies to which information may be disclosed. They include health service bodies, government departments, and devolved administrations.
5. Subsection (1) also confers power on the Secretary of State to prescribe in regulations further persons to whom information may be disclosed. There are two powers:
 - a specific power to prescribe bodies which appear to the Secretary of State to represent manufacturers, distributors or suppliers of UK health service products; and
 - a general power to prescribe any other person (“the general power”).
6. Disclosure under new section 264B may involve the disclosure of confidential and commercially sensitive information, although the purposes for which such information may be used are limited by subsections (2) and (3).²

1 Department of Health, *Health Service Medical Supplies (Costs) Bill: Delegated Powers Memorandum*: [http://www.parliament.uk/documents/lords-committees/delegated-powers/Health-Service-Medical-Supplies-\(Costs\)-Bill-DPM.pdf](http://www.parliament.uk/documents/lords-committees/delegated-powers/Health-Service-Medical-Supplies-(Costs)-Bill-DPM.pdf) [accessed 17 January 2017]

2 Where a body to which information may be disclosed is prescribed in regulations, the purposes for which that body may use confidential and commercially sensitive is also to be prescribed in regulations (see section 246B(3)(g)).

7. The general power is justified in the memorandum on the ground that “it may also be necessary for the Secretary of State to specify another person to whom information can be disclosed” (paragraph 30). However the only specific example given is that it may be necessary to use the power to specify other persons who become involved in the payment or re-imburement of health products in the context of regional devolution.³ Nothing is said to explain why provision for that cannot be made on the face of the Bill or why it is necessary to confer the power in a way which imposes no constraints on the kinds of bodies which may be prescribed.
8. **We consider the general power to be inappropriate unless the Minister is able to explain:**
- **why it is not feasible to specify the further bodies to whom information may be disclosed on the face of the Bill, and**
 - **why it is not feasible to limit the kinds of bodies to whom disclosure may be made (as is done with the power to prescribe representative bodies).**

Clause 7—information provisions for Wales and penalties

9. Clause 7 inserts a series of new sections into National Health Service (Wales) Act 2006 (“the NHS Wales Act”). The new sections parallel the provisions inserted into the 2006 Act by clause 6.
10. New section 201A of the NHS Wales Act will enable the Welsh Ministers to make regulations requiring persons who provide primary medical services, or pharmaceutical services, in Wales to record and provide information, including information about health service products which are required for the health service in Wales.
11. New section 201A(5) allows the regulations to make provision for the payment of a penalty if a person contravenes a provision of the regulations. There is no equivalent provision in new section 264A of the 2006 Act, the parallel provision inserted by clause 6. This is because provisions are already contained in that Act which enable regulations to provide for the payment of penalties.⁴
12. There are differences between the two sets of provisions dealing with penalties. Under the 2006 Act, there is a limit on the penalty which may be imposed, with a power by affirmative order to raise the limit. Under new section 201A there is *no* limit on the penalty which may be imposed by the Welsh Ministers under the regulations, and the regulations are subject to the *negative* procedure. No reason is given for this difference.
13. **We consider that the new provision on penalties in the NHS Wales Act should be consistent with that in the 2006 Act. We recommend, therefore, that the maximum penalty which may be imposed under new section 201A should be set out on the face of the Bill with a power to increase that maximum by regulations subject to the affirmative procedure.**

3 We assume that the Government may have in mind combined authorities on whom health service functions may be conferred under the Local Democracy, Economic Development and Construction Act 2009.

4 Section 265 of the 2006 Act confers power to provide for penalties in regulations. That section is applied to section 264A by clause 8(8) of the Bill.

Clause 7—disclosure of information by Welsh Ministers

14. Clause 7 inserts new section 201B into the NHS Wales Act to provide for the disclosure by the Welsh Ministers of information provided to them under new section 201A. The bodies to whom information may be disclosed, which again is capable of including confidential and commercially sensitive information, are not specified on the face of the Bill. Instead section 201B(1) provides for the persons to be prescribed in regulations made by the Welsh Ministers.
15. As with clause 6, nothing is said in the memorandum to explain why it is not feasible to specify the persons to whom information may be disclosed on the face of the Bill, or why it is necessary to draft the power in such broad terms, with no limits on the persons who may be prescribed. The memorandum simply states (paragraph 41):

“It may be necessary for the Welsh Ministers to prescribe persons to whom they wish to share information. The flexibility provided by the regulation making power would allow Welsh Ministers to disclose information to persons who may require the information as necessary.”
16. **We consider the power is inappropriate unless the Minister explains:**
 - **why it is not feasible to specify the further bodies to whom information may be disclosed on the face of the Bill, and**
 - **why it is not feasible to limit the kinds of bodies to whom disclosure may be made.**

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.

For the business taken at the meeting on 11 January 2017 Members declared no interests.

Attendance

The meeting on the 11 January 2017 was attended by Baroness Drake, Lord Flight, Baroness Fookes, Lord Lisvane, Lord Moynihan, Lord Thomas of Gresford and Lord Thurlow.

