

# HOUSE OF LORDS

## Delegated Powers and Regulatory Reform Committee

---

31st Report of Session 2017–19

### **Ivory Bill**

### **Mental Health Units (Use of Force) Bill**

### **Crime (Overseas Production Orders) Bill [HL]**

### **Mental Capacity (Amendment) Bill [HL]**

### **Non-Domestic Rating (Nursery Grounds) Bill**

### **Assaults on Emergency Workers (Offences) Bill**

### **Health and Social Care (National Data Guardian) Bill**

---

Ordered to be printed 18 July 2018 and published 24 July 2018

---

Published by the Authority of the House of Lords

### *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 who agreed this report are:

[Baroness Andrews](#)

[Lord Blencathra](#) (Chairman)

[Lord Flight](#)

[Lord Jones](#)

[Lord Lisvane](#)

[Lord Moynihan](#)

[Lord Rowlands](#)

[Lord Thomas of Gresford](#)

[Lord Thurlow](#)

[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*

The Committee's reports are published by Order of the House in hard copy and on the internet at [www.parliament.uk/hldprrcpublications](http://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 [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.

# Thirty First Report

## GUIDANCE

---

1. In this Report the Committee makes recommendations in relation to two Bills: the Ivory Bill and Mental Health Units (Use of Force) Bill, a Private Member's Bill. The Bills deal with entirely different subjects. There is however a striking procedural similarity between them. In each case, the Bill contains a delegated power enabling the Secretary of State to issue guidance which is, in effect, mandatory (see paragraphs 7 to 13 and 33 to 36 below).
2. While it is not unusual for a bill to contain a power to issue guidance, such a power is commonly expressed as including a requirement on the person to whom the guidance is addressed "to have regard to" such guidance, which, as we explain in paragraph 8 below, means that that person has an element of choice in whether to follow it.
3. In contrast, in the case of the Ivory Bill and Mental Health Units (Use of Force) Bill, the Secretary of State is given power to issue guidance which specifies legislative requirements or is otherwise determinative of matters which affect a person's legal rights or obligations.
4. The guidance is therefore not properly guidance at all but to all intents and purposes a form of legislation. Since it is not guidance it should not in our view be given that label. This is not simply a matter of form; but it ensures that the relevant provisions are treated consistently with other legislation. **We would be grateful for the Government's views on this practice of camouflaging legislation as guidance and seek an assurance that it will not be continued in the future.**
5. Where a power to issue guidance includes a requirement "to have regard to", it has often been our practice to recommend that the guidance should be subject to some form of parliamentary scrutiny. This is because, although there is an element of choice, a requirement "to have regard to" carries with it an expectation that the guidance will be followed unless there are cogent reasons for not doing so.<sup>1</sup> **Where the provisions to be contained in guidance are to have mandatory effect, the arguments in favour of them being contained in subordinate legislation subject to parliamentary scrutiny are, we believe, so much the stronger.**

---

<sup>1</sup> See for example, Delegated Powers and Regulatory Reform Committee, 1st Report, Session 2017–19, [HL Paper 10](#), para 18 on the Financial Guidance and Claims Bill.

## IVORY BILL

---

6. This Bill, which had its Second Reading on 17 July, would prohibit dealing in ivory in the UK. The Bill contains a number of delegated powers and the Department for Environment, Food and Rural Affairs has provided us with a Delegated Powers Memorandum.<sup>2</sup>

### Clauses 2, 3, 4, 10 and 11—Guidance

7. There are a number of places in clauses 2, 3, 4, 10 and 11 of the Bill where legal requirements are to be specified through guidance rather than being placed on the face of the Bill or being delegated to subordinate legislation<sup>3</sup>. The guidance issued under these provisions is not subject to Parliamentary scrutiny. Clause 37(4) requires the Secretary of State to publish any guidance issued under clause 2, 3, 4, 10 or 11. But it imposes no requirements as to the form or manner in which publication is to take place, leaving it to the discretion of the Secretary of State.
8. Guidance is normally used in legislation as a way of enabling a public body—normally the Secretary of State—to issue guidance to another public body about how statutory functions conferred on that other body are to be exercised. This is generally linked to a statutory duty imposed on the other public body to have regard to that guidance in exercising those functions. It is fundamental to the nature of guidance (as its name implies) that, although there is a duty on the person to whom it is addressed to consider and have regard to the guidance, it is open to that person to decide not to follow the guidance if the person considers that there are good reasons for not doing so in the circumstances of a particular case. The duty is to have regard to guidance, not to comply with it.
9. The function of guidance in clauses 2, 3, 4, 10 and 11 is very different. It is used as a means of specifying legal requirements which if not complied with have a substantive effect on a person's rights or obligations. So, for example, clause 3 sets out the process for the making and consideration of applications for an exemption certificate in respect of pre-1918 ivory items that are of outstandingly high artistic, cultural or historic value. Subsection (1) specifies the information which *must* be included with an application and includes at subsection (1)(g) “any other information specified in guidance issued by the Secretary of State”. Under subsection (2) the Secretary of State is required to refuse an application if the applicant has failed to comply with the information requirements in subsection (1).
10. The reasons given by the Department in its memorandum for imposing the requirements through guidance vary in each case.<sup>4</sup> The kinds of reasons given are that the power is very limited in scope, it is “technical and detailed”, and that it is important for the Government to be able to react quickly and flexibly to changing circumstances.
11. We are not convinced by the Department's reasons. The fact that the powers are limited in scope and that the required provision may be technical and detailed does not in our view justify using guidance to impose legal

---

2 Department for Environment, Food and Rural Affairs, Ivory Bill [Delegated Powers Memorandum](#)

3 See clauses 2(3), 3(1)(g), 4(7)(b) and (9), 4(8), 10(1)(f) and 11(5).

4 The relevant passages in the [Delegated Powers Memorandum](#) are at paragraphs 10, 19, 29, 32, 41 and 48.

requirements. Nor do we consider that reacting quickly and flexibly to changing circumstances is something that is necessarily easier to achieve through guidance than it would be through legislation subject to the negative procedure, which can be made and come into effect very swiftly. But more fundamentally it seems to us that the Department has failed to explain why it considers it appropriate to use statutory guidance as the means, not for giving guidance, but for specifying legal requirements.

12. In our view this is not just a matter of form but is liable to impact on the accessibility of legislation. All primary and secondary legislation is published in a consistent manner which facilitates access to legislation by members of the public. By providing for legislative requirements to be contained in guidance, the normal procedures relating to publication of legislation will not apply. Although clause 37(4) requires the Secretary of State to publish guidance given under clauses 2, 3, 4, 10 and 11, it is left wholly to the discretion of the Secretary of State as to the form and manner in which publication is to take place.
13. **We consider that the Department has failed to justify the use of guidance in clauses 2, 3, 4, 10 and 11 as a means of specifying legal requirements under the Bill, and that these matters should instead be contained in subordinate legislation made by statutory instrument, with the negative procedure offering an appropriate level of Parliamentary scrutiny in each case.**

**Clause 5(3)—Appeals against the refusal or revocation of an exemption certificate**

14. Clause 5(1) provides that, where an application for an exemption certificate is refused or an existing exemption certificate is revoked, the owner of the item concerned may appeal against the decision. Clause 5(3) provides that the Secretary of State may by regulations make provision about appeals. Regulations under clause 5(3) are subject to the negative procedure.
15. Nothing is said on the face of the Bill as to:
  - who is to be responsible for determining appeals under clause 5,
  - what the possible grounds of appeal might be—for example, whether it is to be limited to an appeal on the grounds of a mistake of law or whether the appeal body is to be able to re-determine all the issues in the case including issues of fact, or
  - what powers the appeal body is to have.

Instead they are all left to be provided for in the regulations.

16. The Department says that the detailed and procedural nature of the provisions for an appeal make it more suitable for subordinate legislation.<sup>5</sup> Subordinate legislation also allows for timely changes to be made to the procedure for appeals in the light of experience.
17. We agree it is reasonable for rules of procedure to be set out in subordinate legislation rather than on the face of the Bill. But this does not in our view explain leaving to subordinate legislation matters such as the identity of the

---

<sup>5</sup> See paragraph 34 of the [Delegated Powers Memorandum](#).

body which is given responsibility for determining appeals, the grounds on which an appeal may be made, and the powers of the appeal body in determining an appeal. These are not procedural matters, nor are they things which are liable to need to be changed in the light of experience over time. Instead they are fundamental to the nature and scope of the appeal rights which are being conferred. In our view, in the absence of a strong and convincing case to the contrary, these are matters which should be set out on the face of the Bill.

18. **Accordingly, we consider that the Department has failed to justify the scope of the regulation-making powers conferred by clause 5, and therefore that the delegation of powers is inappropriate. In our view, the identity of the body responsible for determining appeals, the grounds of appeal, and the powers of the appeal body should all be specified on the face of the Bill.**

### Clause 9—Acquisitions by qualifying museums

19. Clause 9 provides that dealing in an ivory item is exempt from the prohibition if the dealing involves a qualifying museum.
20. “Qualifying museum” is defined in subsection (3) and includes a museum in the United Kingdom, the Channel Islands or the Isle of Man which is shown as being accredited in a list published by or on behalf of:
- Arts Council England,
  - The Welsh Government,
  - Museums Galleries Scotland, or
  - Northern Ireland Museum Council.

A qualifying museum also includes a museum other than one in the United Kingdom or the Channel Islands etc. if that museum is a member of the International Council of Museums.

21. Subsection (4) of clause 9 allows the Secretary of State to make regulations amending subsection (3). Despite this being a Henry VIII power the regulations are subject to the negative procedure. The reason why the Department considers the negative procedure to be appropriate is because of the very limited scope of the power.<sup>6</sup> It may be exercised only to make an amendment that is consequential on:
- a change in the name of one of the bodies mentioned in subsection (3), or
  - a transfer of functions involving such a body.
22. Although we would expect Henry VIII powers normally to be subject to the affirmative procedure, as we have made clear in the past,<sup>7</sup> we accept there will be cases in which the negative procedure provides an adequate level of Parliamentary scrutiny because of the narrow scope of the powers conferred. We agree with the Department that this is such a case.

---

<sup>6</sup> See paragraph 38 of the [Delegated Powers Memorandum](#).

<sup>7</sup> See paragraph 35 of the Committee’s [Guidance for Departments](#), July 2014.

**Schedule 1—Civil sanctions**

23. Clause 12 makes it an offence to breach the prohibition on dealing in ivory. Schedule 1 to the Bill creates an alternative system of civil sanctions for breaches of the prohibition.
24. Schedule 1 contains detailed provision about the civil sanctions regime for breaches of the prohibition on dealing in ivory. They include various enforcement provisions:
- a power to require the payment of a civil penalty, with a maximum limit of £250,000;
  - a power for the Secretary of State to serve a stop notice on a person suspected of committing an offence under clause 12. The notice prohibits the person from carrying out activities specified in the notice, with it being an offence to fail to comply with the notice;
  - provision allowing a person who is suspected of committing an offence under clause 12 to enter into an enforcement undertaking under which they commit to take specified actions;
  - a power for the Secretary of State to recover enforcement costs.

The Schedule also contains procedural provisions governing the exercise of the enforcement powers and provisions enabling appeals to be made.

25. Paragraph 14 of Schedule 1 confers a power on the Secretary of State to make regulations (known as “supplementary regulations”) which make provision supplementing that made by the Schedule. Regulations under paragraph 14 of Schedule 1 are subject to the negative procedure.
26. **We do not draw paragraph 14 to the attention of the House because the delegation of powers appears to be appropriate. However, we were disappointed that the Delegated Powers Memorandum failed to provide any explanation for taking the power.** The section of the Delegated Powers Memorandum which purports to set out the reasons for taking the power (see paragraphs 60 and 61) does no more than explain the effect of paragraph 15 of Schedule 1 which requires the Secretary to consult before making regulations.

*Paragraph 21 of Schedule 1—Guidance as to enforcement*

27. Paragraph 21 of Schedule 1 requires the Secretary of State to prepare and publish guidance about the sanctions which may be imposed on a person who commits an offence under clause 12, and about the action which the Secretary of State may take and the circumstances in which the Secretary of State is likely to take any such action.
28. Paragraph 21 sets out in some detail the matters which must be included in the guidance. To a large extent the matters which must be included in the guidance are descriptions of the provisions in the Schedule. However, the powers are wide enough to cover guidance on how and in what circumstances the discretions conferred on the Secretary of State under those provisions should be exercised. For example, the guidance might reasonably be expected to set out:

- the circumstances in which action will be taken to impose a civil sanction rather than to prosecute for an offence under clause 12,
  - the circumstances in which a particular kind of sanction will be imposed,
  - the amount that is likely to be imposed as a civil penalty, and
  - if the level of the penalty will vary according to the circumstances, an explanation of that fact and the factors which are likely to cause cases to be treated differently, and the levels of the penalties which will be imposed in particular cases.
29. The Secretary of State is required to publish the guidance and any revisions to the guidance, but there is no requirement for Parliamentary scrutiny.
30. **Schedule 1 confers significant powers on the Secretary of State which are liable to have very important consequences for those who may be affected by their exercise. It seems to us that the guidance is likely to be very influential in determining how in practice those powers will be exercised. In the circumstances, we consider that the guidance should be subject to Parliamentary scrutiny, with the draft affirmative procedure affording an appropriate level of scrutiny.**

## MENTAL HEALTH UNITS (USE OF FORCE) BILL

31. This Private Member's Bill was brought from the House of Commons on 9 July, together with a Delegated Powers Memorandum from the Department of Health and Social Care.<sup>8</sup> The Bill's purpose is to increase the oversight and management of the use of force in mental health units.
32. The Bill contains five regulation-making powers. Of those, we wish to draw the attention of the House to the power contained in clause 6(3).

### Clause 6(3)—recording the use of force

33. Clause 6 requires the responsible person for each mental health unit to keep records of any use of force by staff save where the use of force is "negligible". Clause 6(3) states that whether the use of force is negligible is to be determined in accordance with guidance published by the Secretary of State. Although described as guidance, it is not the responsible person who decides what amounts to negligible force, having had regard to guidance issued by the Secretary of State.<sup>9</sup> Rather, it is the Secretary of State's guidance itself which will determine what is meant by the use of negligible force. The guidance will therefore add an important gloss to the meaning of the Act. It is, however, not subject to any parliamentary procedure.
34. The Delegated Powers Memorandum (paragraph 8) justifies the lack of any parliamentary procedure on the grounds that:
- the Secretary of State must consult on the guidance before publishing it;
  - the guidance will be published;
  - the guidance will contain matters of a practical and detailed nature;
  - the position is consistent with sections 23 and 24 of the Health and Social Care Act 2008, under which there is no parliamentary procedure in relation to guidance issued by the Care Quality Commission ("the CQC").
35. **We do not find any of these reasons sufficient to justify the absence of a parliamentary procedure for the guidance.**
- (a) Consultation is an elementary requirement when testing the merits of new policy. It is an addition to, not a substitute for, parliamentary consideration. This is particularly so given the sensitive nature of the subject-matter of this Bill.
- (b) Naturally the Secretary of State must publish the guidance. The guidance could not do its job if it remained unpublished. But mere publication of guidance is not a reason for denying Parliament a role in scrutinising it.
- (c) The guidance may indeed contain detailed and practical matters. But the point about clause 6(3) is that the effect of the guidance is

---

8 Department of Health and Social Care, Mental Health Units (Use of Force) Bill [Delegated Powers Memorandum](#)

9 Clause 6(4) makes this clear by applying clause 11(3) to (6) but, crucially, not clause 11(2) to guidance published under clause 6.

to determine whether the use of force is negligible. It is not a case of the mental health unit making the determination having regard to the guidance. The determinative nature of the guidance will affect the legal obligations of responsible persons in mental health units. Because the guidance affects legal obligations we would normally expect it to be contained in legislation, whether primary or subordinate.

(d) The Department mentions sections 23 and 24 of the Health and Social Care Act 2008, under which there is no parliamentary procedure in relation to guidance issued by the CQC. But section 25 of the 2008 Act makes clear that the guidance is merely to be “taken into account” in certain contexts. Its purpose is not, as with clause 6(3), to determine an important matter of law.

36. Under clause 6(3), the Secretary of State’s guidance will determine whether the use of force is negligible and thus affect the legal obligations of responsible persons in mental health units. The subject-matter of the guidance will be sensitive, and demands parliamentary scrutiny. **In our view such matter should be contained in subordinate legislation made by statutory instrument, with the negative procedure offering an appropriate level of parliamentary scrutiny.**

#### **CRIME (OVERSEAS PRODUCTION ORDERS) BILL [HL]**

---

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

#### **MENTAL CAPACITY (AMENDMENT) BILL [HL]**

---

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

#### **NON-DOMESTIC RATING (NURSERY GROUNDS) BILL**

---

39. This Bill contains no delegated powers.

#### **ASSAULTS ON EMERGENCY WORKERS (OFFENCES) BILL**

---

40. This Bill contains no delegated powers.

#### **HEALTH AND SOCIAL CARE (NATIONAL DATA GUARDIAN) BILL**

---

41. There is nothing in this Bill which we would wish to draw 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 <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 18 July 2018, Members declared no interests.

### **Attendance**

The meeting on the 18 July 2018 was attended by Baroness Andrews, Lord Flight Lord Jones, Lord Lisvane, Lord Moynihan, Lord Rowlands, Lord Thomas of Gresford, Lord Thurlow and Lord Tyler.