



HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

36th Report of Session 2017–19

**Northern Ireland (Executive
Formation and Exercise of
Functions) Bill**

Ivory Bill: Government Response

**Children Act 1989 (Amendment)
(Female Genital Mutilation) Bill**
[HL]

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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 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](#)

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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.

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 Sixth Report

NORTHERN IRELAND (EXECUTIVE FORMATION AND EXERCISE OF FUNCTIONS) BILL

1. This Bill is expected to go through second reading and remaining stages in the House of Commons on Wednesday 24 October and through all stages in the Lords on Tuesday 30 October. We are publishing this report before the Bill is introduced into the House of Lords because of this time constraint.
2. The Bill amends the provisions which govern the time within which an Executive must be appointed following the Assembly election which took place on 2 March 2017. It also makes provision enabling senior departmental officers to exercise functions of a Northern Ireland department and for conferring powers on the Secretary of State and other Ministers of the Crown to exercise appointment functions for Northern Ireland offices. The context of the provisions made by the Bill is the continuing absence of a Northern Ireland Executive, and therefore the absence of Northern Ireland Ministers to exercise, and to oversee the exercise of, the relevant functions.
3. The Northern Ireland Office has provided a Delegated Powers Memorandum.¹ There is one matter we wish to draw to the attention of the House.

Clause 4—Appointment functions of NI ministers which may be exercised by UK ministers

4. Clause 4 is concerned with allowing UK ministers in certain circumstances to exercise the appointment functions of a Northern Ireland minister. Clause 4(2) lists the offices to which this transfer of appointment functions applies. The list is relatively a short one. According to the Department the offices which have been chosen are those where there is an urgent need for the functions to be exercisable to ensure good governance and public confidence in the institutions in Northern Ireland. Given the devolution settlement, the Department has sought not to list an office unless there is a pressing need to do so.
5. Clause 4(3) confers a regulation-making power on the Secretary of State to add entries to the list in clause 4(2). According to the Department, this power is required to deal with the situation where there is an urgent need for appointment functions to be exercised in relation to a particular office which is not currently listed in clause 4(2).
6. Regulations under clause 4(3) are subject to the negative resolution procedure despite the fact that they involve the amendment of primary legislation and therefore are Henry VIII powers. The Department's reasons for requiring the negative resolution procedure are set out in paragraphs 55 and 56 of the memorandum:
 - The negative resolution procedure is proposed because it may be necessary to add to the offices listed in clause 4(2) at short notice especially in the event of a pressing vacancy or other function that needs

¹ Northern Ireland Office, Northern Ireland (Executive Formation and Exercise of Functions) Bill Delegated Powers Memorandum

exercising in relation to a public office. The Department recognises that an alternative would have been to require the regulations to be subject to the approval of both Houses after they are made (“made affirmative procedure”). However, they suggest that the possibility of non-approval could lead to uncertainty for any affected public bodies and in particular any office holders appointed under the regulations.

- The Department also relies on the limited nature of the power. It can only be used to add further offices to the list in clause 4(2). It cannot be used to amend the appointment functions which are exercisable in relation to a particular office.

7. We are not convinced by the Department’s reasons:

- The main reason given for using the negative resolution procedure is that the powers may need to be exercised urgently. But, as the Department recognises, it is possible for urgency to be met using a made affirmative procedure as well as the negative procedure. The Department contends that requiring the affirmative procedure might give rise to an unacceptable level of uncertainty. But we are not convinced by this argument. It is of course only very rarely that an affirmative instrument is not approved by both Houses. Also, the negative resolution procedure arguably carries with it a similar uncertainty because of the possibility that the instrument may be prayed against.
- Nor do we consider it right to characterise this as a narrow or limited power. There are no limits on the kinds of offices which may be included in the list in clause 4(2). It is capable of applying to any office in respect of which appointment functions are exercisable by Northern Ireland ministers. Also, there are no limits on the circumstances in which an office may be included in the list. In our view the exercise of appointment functions in relation to some Northern Ireland offices is likely to be politically sensitive; and this also suggests a high level of scrutiny is appropriate.

8. **Accordingly, we take the view that the power to add new offices to the list in clause 4(2) should be subject to the affirmative resolution procedure.**

IVORY BILL: GOVERNMENT RESPONSE

9. We considered this Bill in our 31st Report of this Session.² The Government have now responded by way of a letter from Lord Gardiner of Kimble, Parliamentary Under Secretary of State for Rural Affairs and Biosecurity at the Department for Environment, Food and Rural Affairs, printed at Appendix 1.

CHILDREN ACT 1989 (AMENDMENT) (FEMALE GENITAL MUTILATION) BILL [HL]

10. This Bill contains no delegated powers.

APPENDIX 1: IVORY BILL: GOVERNMENT RESPONSE

Letter from Lord Gardiner of Kimble, Parliamentary Under Secretary of State for Rural Affairs and Biosecurity at the Department for Environment, Food and Rural Affairs, to the Rt Hon. Lord Blencathra, Chairman of the Delegated Powers and Regulatory Reform Committee

The Government is grateful for the report from the Delegated Powers and Regulatory Reform Committee on the Ivory Bill.

The Government notes that the Committee made recommendations to:

- replace powers to specify certain matters through guidance with powers to specify them in statutory instruments made under the negative procedure;
- include details on the identity of the appeal body for exemption certificates for pre-1918 items of outstanding artistic value and importance, the grounds for appeal and the powers of the appeal body on the face of the Bill; and
- make the civil penalty guidance under Schedule 1 subject to Parliamentary scrutiny under the affirmative procedure.

Clause 2(3)(c)—guidance on other matters to be taken into account when assessing pre-1918 items of outstanding artistic etc. value and importance

This provision allows the Secretary of State to issue statutory guidance on “other matters” that must be taken into account when assessing whether an ivory item meets the criteria for the exemption titled “pre-1918 items of outstanding artistic etc. value and importance” and should therefore receive an exemption certificate to enable the owner to deal in the item. These other matters would be in addition to the rarity of the item and the extent to which the item is an important item of its type, which are set out on the face of the Bill in clause 2(3). Defra will be working with the Department for Digital, Culture, Media and Sport to establish these other matters, which will draw on existing criteria used by the Government to assess works of art for pre-eminence and national significance.

The Government notes the Committee’s concern that it is open to a person to decide not to follow guidance if that person considers that there are good reasons for not doing so in the circumstances of a particular case. The statutory guidance made under this clause would be addressed to everyone, including the public and prescribed institutions (museums, etc.) rather than a single public body. Nevertheless, we have decided to accept the Committee’s recommendation with regard to the above clause to provide greater certainty for the institutions and applicants alike. We therefore intend to amend clause 2(3)(c) so that other matters are prescribed in regulations made under the negative procedure.

Clauses 3(1)(g) and 10(1)(f)—guidance on information that must be included in applications for exemption certificates and self-registration

These provisions provide the Secretary of State with powers to set out in guidance additional information that must be included in applications for exemption certificates for “pre-1918 items of outstanding artistic etc. value and importance”, and applications to register exempt ivory items. The intention was to provide some flexibility to require additional information that is not already listed in clauses 3(1) and 10(1).

Ongoing work on the application processes has revealed that the criteria listed under clauses 3(1) and 10(1) provides all the information we are likely to need to

issue exemption certificates and accept registration requests. It is therefore unlikely that we will be issuing statutory guidance setting out additional information needs. Given this, we think it is reasonable for any additional information needs that may be needed in the future to be subject to Parliamentary scrutiny—particularly if such further information will increase costs and burdens on applicants. The Government is therefore pleased to accept the Committee’s recommendation to specify additional information requirements in regulations made under the negative procedure.

Clauses 4(8) and 11 (5)—guidance on the manner and form in which applications must be made

These provisions, like those above, provide the Secretary of State with powers to set out in guidance the manner and form in which applications must be made. The intention was to use this power if the Government wanted to restrict the way applications could be made (for example, if we wished to allow online applications only).

The Government has decided to allow maximum flexibility with regards to how applications may be made, and will therefore be removing these powers from the Bill. Applicants will be able to apply online, or they can download forms to be completed in hard copy for postal submission. Applicants will also be able to telephone or email requests for copies of forms to be sent to them by post. This is to reflect the diversity of persons that may wish to submit applications which may range from private individuals without internet access to well-equipped auction businesses.

Clause 5(3)—appeals

This provision allows the Secretary of State to set out in regulations an appeals regime for when an applicant is refused an exemption certificate for a pre-1918 item of outstanding artistic value and importance or when a certificate is revoked. The Committee has recommended that we set out more details on the face of the Bill rather than leaving matters to be prescribed in regulations.

The Government is now in a position to announce that appeals under clause 5 will be handled by the First Tier Tribunal. We therefore intend to amend the Bill at Report in the House of Lords to reflect this. We partially accept the Committee’s recommendation in other respects by inserting some of the grounds on which an appeal may be made on the face of the Bill. These grounds will be that the decision was made on the basis of an error in fact or law or that the decision was unreasonable. We also intend to include the powers of the Tribunal when accepting or rejecting an appeal (for example, order the Secretary of State to issue the exemption certificate). However, we intend to retain the power to prescribe additional grounds and to set fees for when a person applies for an appeal. This is consistent with powers to make appeal regulations relating to appeals against the imposition of civil sanctions as provided in Schedule 1 of the Bill (for example paragraph 2(6)).

Paragraph 21 of Schedule 1—guidance as to enforcement

This provision requires the Secretary of State to issue guidance on how he will exercise his enforcement powers under the Bill. The guidance provision in Schedule 1 is broadly based on those in sections 63 and 64 of the Regulatory Enforcement and Sanctions Act 2008. The guidance under that Act is not subject to a Parliamentary scrutiny and we note that similar guidance to be made under

section 59 of the recent Space Industry Act 2018 (which applies the above 2008 Act) will also not be subject to any Parliamentary procedure.

The Government is grateful to the Committee for its consideration of this duty, but we do not think that the civil sanctions regime supporting the ivory ban should be treated differently to those for other regulatory regimes. This guidance will only provide information on how the Secretary of State will exercise his powers to impose civil sanctions and is not directly addressed to a specific public body or sector. As with other civil sanction regimes, the Secretary of State will be under a duty under paragraph 21 (7) of Schedule 1 of the Bill to consult before publishing or revising this guidance.

Again, I would like to thank the Committee for its work in considering the Bill and I hope this information proves helpful.

17 October 2018

APPENDIX 2: MEMBERS 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.