



HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

59th Report of Session 2017–19

Northern Ireland (Executive Formation) Bill

Ordered to be printed 16 July 2019 and published 16 July 2019

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)

[Baroness Browning](#)

[Lord Goddard of Stockport](#)

[Lord Haselhurst](#)

[Lord Haskel](#)

[Baroness Meacher](#)

[Lord Rowlands](#)

[Lord Thurlow](#)

[Lord Tope](#)

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

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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.

Fifty Ninth Report

NORTHERN IRELAND (EXECUTIVE FORMATION) BILL

1. This Bill, as originally introduced into the House of Commons, was solely concerned with extending the period for the formation of the Northern Ireland Executive to 21 October 2019. A delegated powers memorandum in relation to this version of the Bill was provided by the Northern Ireland Office. The Bill was substantially amended during its passage through the Commons. The amendments included two clauses, clause 8 (on same sex marriage) and clause 9 (on abortion), which contain delegated powers. The amendments were not tabled by the Government and no supplementary delegated powers memorandum has been provided in respect of them.
2. The Bill is passing through the two Houses very quickly indeed. It was introduced into the House of Lords on 9 July, received its second reading on 10 July, committee stage took place yesterday, on 15 July, and remaining stages are scheduled for tomorrow, 17 July. It is the practice of the Committee to report on bills introduced into the House of Lords after second reading and before committee stage. Because of the speed at which the Bill is proceeding, however, this has not been possible on this occasion.
3. For the same reason, this report concerns the Bill as introduced into the Lords. We are aware that it is anticipated that the Bill will be amended on report. In a letter to the Chairman dated 12 July from the Minister, Lord Duncan of Springbank, Parliamentary Under Secretary of State at the Northern Ireland Office, we were told that clauses 8 and 9 “as drafted do not function properly” and that the Government were therefore “discussing with members of both Houses” on how to proceed and “to ensure the changes agreed by the Commons can be delivered”. The exigencies of the legislative timetable will prevent the Committee from reporting further on the Bill. Given the Government’s intention that clauses 8 and 9 should be amended, our final recommendation (in paragraph 11 below) is necessarily anticipatory.

Clauses 8 and 9 – Same sex marriage and abortion in Northern Ireland

4. These clauses contain the following delegated powers:
 - Clause 8(1) requires the Secretary of State to make regulations to change the law relating to marriage in Northern Ireland to provide that marriage between same sex couples is lawful.
 - Clause 9 is concerned with abortion in Northern Ireland. It requires the Secretary of State to make regulations which give effect to recommendations made by the Committee on the Elimination of Discrimination against Women (CEDAW) in their Report of the inquiry concerning the UK under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. In its report CEDAW made numerous recommendations following its conclusion that the UK had infringed provisions of the Protocol. The recommendations require making changes to the law on abortion in Northern Ireland, and other changes affecting the sexual

and reproductive health rights and services for women in Northern Ireland.

5. As we have said (see paragraph 3), the Minister acknowledges that, as drafted, clauses 8 and 9 do not function properly. We agree with this conclusion. In the case of clause 8, there is a failure to set out clearly the full range of powers conferred by the clause. The clause as drafted simply confers a power to provide for marriage between same sex couples to be lawful. It does not expressly confer any other powers. This means that the clause either has to be construed very narrowly with the risk that it would fail to deliver an effective and workable system; or it has to be construed as conferring broad unspecified powers. So, for example, one would expect it to be necessary to have a power to modify the way in which Northern Ireland marriage legislation applies to marriages of same sex couples. This would allow provisions to be included which protect the ability of persons to act in accordance with their religious beliefs in not having to conduct marriages of same sex couples. But the clause as drafted says nothing about whether and (if so) to what extent such powers exist.
6. In the case of clause 9, there is a similar failure to set out the full range of powers that are being conferred. For example, it must be implied that clause 9 confers a power to amend primary legislation (at least to the extent that the CEDAW recommendations require the repeal of sections 58 and 59 of the Offences against the Person Act 1861). But it is not clear whether the powers conferred by the clause are to be taken generally to include a power to amend primary legislation or whether the powers allow, for example, the making of supplemental, consequential and transitional provision. Furthermore, although the CEDAW recommendations are limited to Northern Ireland, the recommendations about changing the law would need to be considered in the context of England and Wales also because some of the affected legislation extends to England and Wales as well as Northern Ireland.
7. However, the question of the appropriateness of the powers is not limited to the technical effectiveness and workability of the provisions. In the case of both clauses 8 and 9, we consider that the politically sensitive nature of the powers, and their wide-ranging scope, mean that, in the ordinary course of events, the provisions should be contained in primary and not subordinate legislation. We accept that the clauses have been drafted to deal with a wholly exceptional circumstance, namely the absence of executive government in Northern Ireland; and that the House has approved the principle of conferring these powers when agreeing to the clauses standing part of the Bill. Nevertheless, given this fundamental issue of principle, we consider that the clauses should contain as much detail as possible on the face of the primary legislation so as to narrow as far as possible the scope of the powers being conferred.
8. Both clauses provide for the negative procedure to apply to any regulations made under them. Given the very wide-ranging nature of the powers, including the power to amend primary legislation, and the politically sensitive nature of the provisions, we firmly believe that the negative procedure does not offer an appropriate level of Parliamentary scrutiny and that the affirmative procedure should apply instead.
9. One reason why the negative procedure may have been chosen is because of the requirement that both sets of regulations must be in force by

21 October 2019. It is unlikely to be practical to make the regulations within such a timescale, if a draft affirmative procedure were to apply. However, a feasible alternative would be to provide for the made affirmative procedure to apply instead. Under such a procedure the regulations could be made and come into force without prior approval by both Houses, but with a requirement for them to be approved within a specified period after making or laying.

10. Neither clause requires the Secretary of State to consult bodies and interests in Northern Ireland before making the regulations. Given that both sets of regulations relate to devolved matters, we consider it is important that the Secretary of State seeks the views of bodies and interests in Northern Ireland who are liable to be affected by the regulations. We would normally expect this to be the subject of a duty imposed by each of the clauses. However, we accept that imposing such a duty would be incompatible with the timescale for making the regulations if they are to come into force by 21 October 2019. Nevertheless, we consider that the Secretary of State should use best endeavours to obtain the views of those affected before making regulations under clauses 8 and 9.
11. **Accordingly, we make the following recommendations in respect of clauses 8 and 9:**
 - **We agree with the Government that the clauses do not function properly as drafted, and therefore we recommend that both clauses should be revised.**
 - **The powers conferred are very wide ranging. They also deal with politically sensitive matters which in our view should in principle be dealt with in primary rather than secondary legislation. We acknowledge that the clauses have been drafted to deal with a wholly exceptional circumstance, namely the absence of executive government in Northern Ireland; and that the House has approved the principle of conferring these powers. Nevertheless, we recommend that the clauses contain as much detail as possible on the face of the primary legislation in order to narrow as far as possible the scope of the powers conferred.**
 - **We recommend that both clauses should be subject to the affirmative and not the negative procedure. The use of the made affirmative procedure would ensure that the procedure does not undermine the requirement for the regulations to be in force by 21 October 2019.**
 - **While accepting that it would be inappropriate to impose a duty on the Secretary of State to consult before making regulations under clause 8 or 9, we recommend that the Secretary of State uses best endeavours to obtain the views of those in Northern Ireland affected by the legislation before making the regulations.**

Proposed amendments

12. Although no information is given in the Minister's letter about the nature of the provisions which will replace the current clauses 8 and 9, the letter makes it clear that the new provisions will also involve the delegation of powers and

that those powers will be subject to the negative rather than the affirmative procedure. The letter states:

“Both [of the existing regulation making powers] are subject to the negative procedure in Parliament. The Government accept that this would not ordinarily be the most appropriate procedure for such a wide power capable of amending primary legislation. But the proposal that the powers should be subject to the negative procedure was the clear will of the House of Commons, and reflects the strength of feelings by MPs on the issues of same sex marriage and abortion and that the majority believe these to be universal rights that should be available to people throughout the UK. The Government has no plans to bring forward amendments in respect of the procedure.”

13. We find the Minister’s reason for retaining the negative procedure, namely that it was “the clear will of the House of Commons”, wholly unconvincing. The House of Lords, in scrutinising legislation, is a “revising” chamber. As the Royal Commission on Reform of the House of Lords stated in 2000, the role of the Lords is “to require the Government and the House of Commons to reconsider proposed legislation and take account of any cogent objections to it”.¹ And it is the role of this Committee to assist the Lords in its legislative scrutiny function by offering advice on the delegation of power in bills in accordance with the terms of reference that have been given to the Committee by the House. To do anything other than to discharge this function unconstrained by the decision of the House of Commons would, we believe, amount to a dereliction of our duty.
14. **It is our strong view that the support given by the House of Commons to the original amendments should not determine the level of Parliamentary scrutiny given to the new provisions proposed by the Government. Instead those provisions should be judged on their own merits.**
15. **We anticipate that amendments will be tabled to replace the provision in clauses 8 and 9. If they confer wide-ranging Henry VIII powers in relation to politically sensitive matters such as the provisions affecting same sex marriage and abortion, then the Committee remains of the view, expressed earlier in this report, that the affirmative rather than the negative procedure should apply.**

¹ Cabinet Office, *A House for the Future: Royal Commission on the reform of the House of Lords* (20 January 2000): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/266067/chap4.pdf, para 4.7 [accessed 16 July 2019]

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 the 16 July 2019, Members declared no interests.

Attendance

The meeting on the 16 July 2019 was attended by Baroness Andrews, Lord Blencathra, Baroness Browning, Lord Goddard of Stockport, Lord Haselhurst, Lord Haskel, Baroness Meacher and Lord Tope.