



HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

37th Report of Session 2022–23

Illegal Migration Bill: Government Response

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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.

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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. 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 Seventh Report

ILLEGAL MIGRATION BILL: GOVERNMENT RESPONSE

1. We considered this Bill in our 34th Report of this Session.¹ The Government have responded by way of a letter from Lord Murray of Blidworth, Parliamentary Under Secretary of State for the Home Office. The response is printed at Appendix 1.

¹ Delegated Powers and Regulatory Reform Committee, *34th Report*, (Session 2022-23, HL Paper 198)

APPENDIX 1: ILLEGAL MIGRATION BILL: GOVERNMENT RESPONSE

Letter from Lord Murray of Blidworth, Parliamentary Under Secretary of State for the Home Office, to the Rt Hon. the Lord McLoughlin CH, Chair of the Delegated Powers and Regulatory Reform Committee

Thank you for your report following the Committee's scrutiny of the provisions of the Illegal Migration Bill. The Government has carefully considered the Committee's recommendations and our response is set out below.

Clause 3(7)—Power to make exceptions from the removal duty under clause 2

DPRRC Recommendation:

“we consider that the affirmative resolution procedure offers a more appropriate level of parliamentary scrutiny”.

Government response:

The Government accepts the Committee's recommendation. We have tabled an amendment for Report stage which applies the made affirmative procedure to the regulation-making power in clause 3(7).

Clause 10—Power to specify circumstances in which unaccompanied children may be detained and to place limit on duration of detention for the purposes of removal

DPRRC Recommendation:

“Given the importance and sensitivity of the subject matter, we consider that the affirmative resolution procedure should apply.”

Government response:

The Government accepts the Committee's recommendation. We have tabled amendments for Report stage which applies the made affirmative procedure for the first exercise of the regulation-making powers in clause 10; subsequent exercise of the power would be subject to the draft affirmative procedure.

Clause 14 and Schedule 2, paragraph 10—Seizure of electronic devices and the handling of legally privileged information

DPRRC Recommendation:

“Given the importance of the principle of non-disclosure of legally privileged material, we consider it inappropriate to rely on guidance to ensure that legally privileged material is not used under the powers conferred by Schedule 2. Instead, provision should be made on the face of the Bill prohibiting the use of items subject to legal privilege; and the power to make regulations (to the extent that it is justified- see the following paragraph) should therefore be limited to making exceptions from this principle... Accordingly, we consider the powers conferred by paragraph 10 of Schedule 2 to allow the use of legally privileged material are inappropriate.”

Government response:

The Government has considered the Committee's recommendation carefully. The Government would like to reiterate that there is no intention that under these

powers legally privileged information will be used. As set out in the Delegated Powers Memorandum, the Home Office will be issuing guidance to immigration officers that, unless relevant provision is made under paragraph 10 of Schedule 2, items subject to legal professional privilege must not be seized. Likewise, the intention of the regulation-making power at paragraph 10 of Schedule 2 is not to make provision for legally privileged information to be used. It is to make appropriate provision for the seizure of devices, which an immigration officer has reasonable grounds to believe contain privileged information in addition to (non-privileged) relevant information, so that the officer or the Secretary of State can access and use that relevant information. In view of this, the Government is not persuaded of the case for amending the Bill in the manner proposed by the Committee.

Clauses 21(6), 23(6) and 24(6) — Power to issue guidance on compelling circumstances for potential victims of modern slavery remaining in the UK to assist with an investigation etc.

DPRRC Recommendation:

“we consider that guidance under clauses 21(6), 23(6) and 24(6) should be subject to parliamentary scrutiny, with the draft negative procedure offering an appropriate level of scrutiny.”

Government response:

As the Committee will be aware, the Government set out its policy in relation to parliamentary scrutiny of statutory guidance in a letter from the then Leader of the House of Lords, dated 16 October 2018, and reproduced at Appendix 1 of the Committee’s 35th Report of session 2017/19. Amongst other things, the letter contained the following passage:

“.....it is Government policy that guidance should not be used to circumvent the usual way of regulating a matter. If the policy is to create rules that must be followed, the Government accepts that this should be achieved using regulations subject to parliamentary scrutiny and not guidance. The purpose of guidance is to aid policy implementation by supplementing legal rules. This remains the Government’s policy and there is no intention to alter this approach.

There is a vast range of statutory guidance issued each year and it is important that guidance can be updated rapidly to keep pace with events. There is nothing to prevent Parliament from scrutinising guidance at any time. In certain exceptional circumstances it may be appropriate for guidance to be laid before Parliament or be subject to the negative procedure.”

This remains the Government’s policy and it informs the Government’s response to the Committee’s recommendations in relation to the parliamentary scrutiny of statutory guidance. In this instance, as the exception to the public order disqualification is clearly set out on the face of the Bill, we are not persuaded that the accompanying guidance meets the “exceptional circumstances” threshold justifying parliamentary scrutiny in this instance.

Clause 37(9)—Power to amend the definition of “working day” for purposes of calculating various time limits in respect of appeals relating to suspensive claims

DPRRC Recommendation:

“we recommend the Minister is asked to explain why the power extends to “working day” where used in that context [that is, in so far as it relates to actions which are to be taken by the person bringing the appeal]; and that, in the absence of an appropriate justification, the power is inappropriate in enabling changes to be made to the meaning of “working day” in relation to actions to be taken by the person bringing the appeal.”

Government response:

The Government accepts the substance of the Committee’s recommendation and has tabled an amendment for Report stage to remove the power to amend the definition of a “working day” in its entirety.

21 June 2023

APPENDIX 2: MEMBERS' INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at <https://www.parliament.uk/hlregister>. The Register may also be inspected in the Parliamentary Archives.