HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

8th Report of Session 2019–21

Private International Law (Implementation of Agreements) Bill [HL]

Birmingham Commonwealth Games Bill [HL]: Government Response

Pension Schemes Bill [HL]: Government Response

Prisoners (Disclosure of Information About Victims) Bill

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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 (Chair)
Baroness Browning
Lord Goddard of Stockport
Lord Haselhurst
Lord Haskel
Baroness Meacher
Lord Rowlands
Lord Thurlow
Lord Tope

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Publications

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

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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 hldelegatedpowers@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. ative and Regulatory Reform Act 2006 and certain instruments made under other Acts specified in the Committee's terms of reference.

Eighth Report

PRIVATE INTERNATIONAL LAW (IMPLEMENTATION OF AGREEMENTS) BILL [HL]

1. This Bill was introduced in the House of Lords on 27 February 2020. Clause 1, which implements three Hague Conventions on private international law, does not involve delegated powers. Clause 2 allows the Government to implement any other private international law agreement by statutory instrument rather than by Act of Parliament. Clause 2 involves a significant delegated power.

2. Private law is the law which governs relations between individuals or bodies. It includes traffic accidents, product liability, sale and carriage of goods, banking, property, copyright, insurance, professional negligence, divorce, insolvency, defamation, partnership, wills and probate, to name but few. By contrast, public law governs relations between (on the one hand) individuals and bodies and (on the other) the State.

3. English private international law covers all areas of English private law that contain a foreign element. Examples include: (a) a contract made in London between a French person and a German company for the construction of a factory in Saudi Arabia; (b) an English holidaymaker claims compensation for injuries sustained in a road accident in Italy; (c) an English parent seeks child support from a former spouse in a third country; (d) an English journalist, having written an article in an English newspaper, is sued for defamation by a reader in a foreign country. It is to be contrasted with public international law, which concerns the relations between States, including the law of armed conflict, law of the sea, treaties, nationality, asylum, refugees, diplomatic relations and so forth.

4. The Government regularly enter into international agreements in the sphere of private international law.[1] These agreements include matters of considerable public interest, including (a) the law applicable to the celebration and validity of marriages; (b) recognition of foreign divorces and legal separations; (c) civil aspects of international law applicable to child abduction; (d) international recovery of child support; (e) recognition and enforcement of foreign judgments in civil or commercial matters; (f) the law applicable to traffic accidents, product liability, international commercial contracts and succession to the estates of deceased persons in cases involving a foreign element. Such international agreements typically need to be implemented in English domestic law before people in this country can rely on them. This is where clause 2 of the Bill comes in.

5. Traditionally the implementation of private international law agreements entered into by the UK has been done through Acts of Parliament.[2] **Clause 2 allows Ministers to implement international agreements relating**

1 Annex A of the Delegated Powers Memorandum ("the Memorandum") lists more than 40 such international agreements.

2 For example, the Carriage by Air Act 1961 (the Warsaw Convention), the Carriage of Goods by Road Act 1965 (the Geneva Convention), the Carriage of Goods by Sea Act 1971 (the Hague-Visby Rules) and the Contracts (Applicable Law) Act 1990 (giving the force of law to the Rome Convention on the law applicable to contractual obligations).

to private international law by statutory instrument, and therefore without the need for Acts of Parliament.

6. The Ministry of Justice (MoJ) justifies its approach in a Delegated Powers Memorandum ("the Memorandum") accompanying the Bill, but we have not found these justifications convincing.[3]

7. MoJ says, and it is true, that clause 2 contains a clearly defined power[4] to make regulations, enabling the implementation in domestic law of international agreements on private international law.[5] But it is also a wide power. For the first time there will exist a *general* power to implement international agreements on private international law by statutory instrument, thereby obviating the need for an Act of Parliament. This will be so regardless of the nature or importance of the agreement. MoJ has offered no evidence that the practice in the last 100 years (implementation by Act of Parliament) has led to untimeliness or unacceptable inconvenience.

8. MoJ says that private international law is a "vibrant and active"[6] area of international co-operation with regular substantial developments likely, such that the power in clause 2 is needed long into the future. Something similar could be said of such domestic matters as taxation, health, business, enterprise and the criminal law. They are vibrant, active and developing areas, but it does not follow that the law in such areas should be a matter only for statutory instruments rather than for Acts of Parliament.

9. Agreements on private international law are said to be "generally narrowly defined, predictable in scope and content, and widely considered beneficial by Parliament and stakeholders".[7] Even if this were generally the case, it would be no guarantee that such a state of affairs would last indefinitely. It also seems to be an over-generalisation. Taking the Carriage of Goods by Sea 1971, which gives the force of law to the Hague-Visby Rules, the Rules are of considerable importance to those involved in the carriage of goods by sea and their advisers. One wonders how it can be said in the abstract that such rules are narrowly defined. As for all private international law agreements being widely considered beneficial by Parliament, such a proposition would be untestable in future save by threatening to vote down a statutory instrument, which the Lords does only exceptionally and the Commons never.

10. MoJ, having described the area as vibrant and active,[8] says that private international law is a "highly technical and specialised field of law".[9] All areas of law have their technicalities. But private international law involves matters of considerable public interest, including recognition of foreign divorces, international recovery of child support and the law applicable to traffic accidents or product liability in cases involving a foreign element. Indefinitely to exclude private international law agreements from being given the force of law by an Act of Parliament ought not to be based on the technical nature of the subject matter, given the public interest in so many of these agreements. MoJ is "confident that it will be generally clear whether

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3 Private International Law (Implementation of Agreements) Bill [HL]: Delegated Powers Memorandum: https://publications.parliament.uk/pa/bills/lbill/58-01/101/5801101-DPM.pdf
4 Memorandum, para. 7.
5 *Ibid.*, para. 11.
6 *Ibid.*, para. 13.
7 *Ibid.*, para. 14.
8 Memorandum, para. 13.
9 *Ibid.*, para. 14.

agreements fall under the power or not".[10] It may indeed be clear whether they do fall under the power; it does not follow that they should.

11. Without the power in clause 2, primary legislation would be necessary to implement each new international agreement on private international law "which would cause unnecessary delay in stakeholders being able to enjoy the advantages of any agreement".[11] MoJ says that "a swift implementation mechanism … will allow the UK to continue to develop and maintain its PIL [private international law] framework with new and existing international partners".[12] A swift implementation mechanism is also said to facilitate alternative dispute resolution (ADR), 3,000 out of 40,000 disputes resolved in 2018 in this country being international.[13]

12. But MoJ offers no empirical evidence that delay has been caused to stakeholders by late implementation of private international law agreements. Nor does it offer statistics on how many of the 3,000 ADR cases involved agreements that were unimplemented due to lack of Parliamentary time, and which therefore caused inconvenience or hardship to stakeholders. The argument from delay, apart from involving unsubstantiated assertion, might justify dispensing with Acts of Parliament in other areas where governments need to legislate quickly.

13. MoJ mentions[14] that the proposed power in clause 2 is in addition to the rule, under section 20 of the Constitutional Reform and Governance Act 2010 ("the 2010 Act"), that treaties subject to ratification must (with limited exceptions) be laid before Parliament for 21 sitting days before ratification occurs. This does not bear on whether the implementation of the treaty in domestic law should be subject to an Act of Parliament or be achieved by regulations under clause 2. Nor is it necessarily true that the agreement will be properly scrutinised (if at all) by Parliament under section 20 of the 2010 Act, though Parliamentary scrutiny of treaties is in the process of being strengthened.[15]

14. MoJ says that, once agreements have been ratified[16] and are awaiting implementation in domestic law, it is too late for the Government to change them without being in breach of their international obligations. The fact that a Minister negotiating an international agreement does so in the knowledge that it will need to be implemented via an Act of Parliament is likely to have a more potent effect on negotiations than the knowledge that it can be implemented by statutory instrument that will attract considerably less parliamentary scrutiny.

15. **We are of the view that clause 2 represents an inappropriate delegation of power and we recommend that it should be removed from the face of the Bill.**

10 *Ibid.*, para. 14.

11 *Ibid.*, para. 15. See para 18 of the Memorandum for a list of the international agreements which the UK is currently considering joining, which, according to the Memorandum, the Government could implement using the clause 2 power.

12 *Ibid.*, para. 26.

13 *Ibid.*, para. 27.

14 *Ibid.*, para. 32.

15 House of Lords Procedure Committee 1st Report, Session 2019-21 (HL Paper 29).

16 And, therefore, binding on the UK Government.

BIRMINGHAM COMMONWEALTH GAMES BILL [HL]:GOVERNMENT RESPONSE

16. We considered this Bill in our 5th Report of this Session.[17] The Government have now responded by way of a letter from Baroness Barran, Parliamentary Under Secretary of State for Civil Society at the Department for Digital, Culture, Media and Sport. The response is printed at Appendix 1.

PENSION SCHEMES BILL [HL]: GOVERNMENT RESPONSE

17. We considered this Bill in our 4th[18] and 7th[19] Reports of this Session. The Committee has received a partial response to its 4th Report from Baroness Stedman-Scott, Secretary of State for Work and Pensions at the Department for Work and Pensions. The response is printed at Appendix 2.

PRISONERS (DISCLOSURE OF INFORMATION ABOUT VICTIMS) BILL

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

17 5th Report, Session 2019-21 (HL Paper 24).
18 4th Report, Session 2019-21 (HL Paper 17).
19 Report on Government Amendments to the Bill: 7th Report, Session 2019–21 (HL Paper 28).

APPENDIX 1: BIRMINGHAM COMMONWEALTH GAMES BILL [HL]:GOVERNMENT RESPONSE

Letter from Baroness Barran, Parliamentary Under Secretary of State for Civil Society at the Department for Digital, Culture, Media and Sport, to the Rt Hon. Lord Blencathra, Chair of the Delegated Powers and Regulatory Reform Committee

I am writing to respond to the 5th report of the Delegated Powers and Regulatory Reform Committee that considered the Birmingham Commonwealth Games Bill and which was published on 13 February 2020.

I am grateful to the Committee for their report on the delegated powers memorandum produced to support the Bill. I am sorry that it was not possible to get this response to you ahead of Lords Report stage of the Bill.

Clauses 13 and 16: Advertising and trading regulations - Games locations, time periods and vicinity

I have carefully considered the DPRRC's recommendations for certain regulation making powers to be subject to the affirmative procedure unless the Secretary of State certifies that by reason of urgency the negative procedure should apply instead.

Whilst I am grateful for the Committee's acknowledgement of the differences between the powers in the Bill and the precedents of the London Olympics and Paralympics, the Government does not agree with the Committee's recommendation that regulations concerning advertising and trading made under clauses 13 and 16 should be subject to the affirmative procedure.

However, I want to reassure the Committee that regulations brought forward by the Government will ensure that any restrictions are proportionate, and only in place when and where absolutely necessary.

That is why the Bill specifies that the restrictions will be in place for a maximum of 38 days, and it will potentially be much less in many cases, for example where Games locations are only in operation for a few days.

Further, the Government has made clear, as set out at Report stage of the Bill in the previous session, that the intention is, in most cases, for a **vicinity** to only "*extend a few hundred metres beyond a Games location*". (Official Report, Volume 799, Column 790)

Finally, the Bill requires that the Government consults specific persons before making regulations setting out exceptions to the advertising or trading offences (in addition to those exceptions on the face of the Bill), a commitment I reiterated during Committee stage on the Bill on 25 February. Engagement with key stakeholders on potential exceptions is already underway in advance of a consultation taking place, likely later on this year.

I hope that the Committee is reassured that an appropriate approach to delegated powers will be taken by the Government.

Clause 25: Power to direct a local authority or combined authority to produce a Transport Plan

I am grateful to the Committee for acknowledging why it is appropriate to provide for a local authority or combined authority to be the person responsible for a Games transport plan and why it is not feasible at this stage to specify which authority that should be.

However, the Government does not agree that it is proportionate to require that the designation of the authority be made in regulations subject to the negative resolution procedure. Instead, the Government will reiterate its commitment to provide Parliament with a written Ministerial statement when a local authority or combined authority is directed under clause 25.

I have set out our reasoning below and I hope the Committee will be reassured that Parliament will be appropriately sighted on the exercise of this discretion.

Clause 25 of the Bill provides that a local authority or combined authority is to prepare a local transport plan of the kind described in subsection (2), and clause 26 provides that a traffic authority for a road may implement that plan via powers in section 14 of the Road Traffic Regulation Act 1984. Subsections (4) and (5) require consultation to ensure that views of stakeholders are taken into account in the preparation of a local transport plan.

The substance of the policy is therefore set out on the face of the Bill; the only discretion left to be exercised by the Secretary of State is in deciding *which* local authority or combined authority is best placed to prepare a transport plan. While the Government agrees that Parliament should be kept informed of which authority is to prepare a local transport plan, it does not agree that the limited discretion in clause 25 is of a kind that should be subject to the negative resolution procedure.

You will also note that the only other substantive function conferred on the designated authority – the concurrent powers in clause 27 – may only be exercised following the specification of local traffic authorities in regulations of the Secretary of State, which are subject to the negative resolution procedure.

A copy of this letter will also be placed into the library of both Houses, and a copy will also be sent to all Peers that spoke in the debate on the Commonwealth Games Bill at Second Reading.

28 February 2020

APPENDIX 2: PENSION SCHEMES BILL [HL]: GOVERNMENT RESPONSE

Letter from Baroness Stedman-Scott, Secretary of State for Work and Pensions at the Department for Work and Pensions, to the Rt Hon. Lord Blencathra, Chair of the Delegated Powers and Regulatory Reform Committee

Introduction

The Delegated Powers and Regulatory Reform Committee of the House of Lords ("the Committee") published its report on the Pension Schemes Bill 2020 on 11th February. The Select Committee on the Constitution published its report on the constitutional aspects of the Bill on 13th February.

The two Committees may find it helpful to read the Government's responses to each of their reports together. The Government thanks the Committees for their reports.

This partial response to this Committee's report addresses the issues where further explanation was requested. The Government is continuing to consider the other issues raised by the report and will respond on those issues separately. This response applies to the equivalent provisions in the Bill, as applicable in Northern Ireland.

Clause 6(2): amendment of definition of "money purchase benefits"

The Committee considers that there is insufficient justification for such a wide and significant power and that the power as it stands is inappropriate. The Committee considers that the power should be restricted so that it can be exercised only in the circumstances identified in the Delegated Powers Memorandum, that is, where doing so is considered necessary as a consequence of a change that is being made generally to the definition of money purchase benefits (§10).

The Government notes that whilst collective money purchase benefits are a subset of money purchase benefits, they are still a new type of pension benefits in the UK. Accordingly, it is not inconceivable that a judicial decision could affect the definition of collective money purchase benefits independently of the definition of money purchase benefits more broadly. The prospect of judicial re-characterisation of schemes purporting to provide collective money purchase benefits has been of particular concern to those with whom we consulted before drafting the legislation. To restrict the power to situations where it may be used only when the definition of money purchase benefits, generally, is being amended could frustrate the Government's ability to put right quickly any unforeseen consequences arising from a judicial decision.

As rightly pointed out in the Committee's report, this is a wide power. This is because it is inevitably difficult to foresee the circumstances in which its use might be necessary, for example, the precise reasoning of a court decision which interprets a particular scheme's rules under the new provisions. The power in clause 2(1), to which the Committee refers, has a different purpose to the power in clause 6(2) and may not be appropriate to achieve the necessary end, for example, in circumstances where a scheme authorised and functioning as a collective money purchase scheme is characterised by the courts as a defined benefit scheme following hostile litigation. The scope of the power in clause 2(1) is only to deal with schemes whose benefits might technically fall within the definition of "qualifying benefits" but which the Government considers are outside the spirit of Part 1. It would not address the situation where the very nature of what "qualifying benefits" means is changed through a judicial decision.

The Government appreciates the Committee's concern that the power could be exercised for wider policy reasons, and not simply as a means of responding to unexpected court judgments. The regulation making power at section 32 of the Pensions Act 2011 was introduced in response to the Supreme Court decision of Houldsworth v Bridge Trustees Ltd[20]. Since the enactment, the power in section 32 has not been exercised and the lack of exercise is in line with the Government's intention not to use the power unless it needs to use it as a reactive tool. That does not, however, render the power unnecessary. Clause 6(2) remains a crucial safeguard for schemes looking to offer collective money purchase benefits against unforeseen consequences arising from judicial decisions. Without such a provision, schemes would have little comfort that there is an expedient way to put right any such consequences. Finally, the Government notes that the exercise of this power is subject to the affirmative resolution procedure, which enables close Parliamentary scrutiny of any proposed regulations under this power.

Clauses 11 – 17: use of the first-time affirmative procedure

The Committee notes that the scope of the powers remain the same on the first and subsequent exercises, and therefore that there is nothing in principle to prevent the changes made by subsequent exercises of the power from being as significant as the provision made by the first exercise (§14). The Select Committee on the Constitution makes similar observations in §19 and §20 of their report.

Clauses 11-17 relate to the authorisation criteria for collective money purchase schemes. As set out in its Delegated Powers Memorandum, the Government considers that there should be an opportunity for Parliament to have a full debate on the first use of these powers relating to the authorisation criteria, as these will set the framework for authorising schemes which has not previously existed and so will be entirely new. Subsequent use of these powers will be to amend the framework put in place by the first exercise of the power. The Government's view is that it is therefore appropriate that subsequent use of the powers follow the negative resolution procedure. This will provide the flexibility needed to respond to changes as new schemes and the wider market develop. The Government notes that this follows the approach that was taken for equivalent powers in the Pension Schemes Act 2017 relating to the authorisation criteria for Master Trusts.

The Government notes, moreover, that the future use of these powers will remain subject to Parliamentary scrutiny, including by the Joint Committee on Statutory Instruments and the Secondary Legislation Scrutiny Committee. The Government does not take the view that the application of the negative resolution procedure to future exercises of the power is license to use the powers inappropriately.

Clause 28: power to designate significant events

The Committee recommends that the House seeks further explanation from the Minister as to why it is not feasible to set out on the face of the Bill the events that are to constitute significant events for the purposes of clause 28, even if this were coupled with a power to make changes in the future to the list of events (§23).

Where a significant event has occurred, clause 28 imposes a duty on persons listed to report the event to the Pensions Regulator. Unlike triggering events, which are

20 [2011] UKSC 42

set out in clause 31, significant events are not key risk events for the scheme. Hence whilst they warrant notification to the Regulator, their occurrence may not give rise to withdrawal of a scheme's authorisation. Collective money purchase benefits schemes are a new type of pension scheme. The Government wishes to consult with industry further prior to setting out what events will constitute significant events. The list of significant events is unlikely to be subject to frequent change, however, the Government does consider that there should be flexibility so that the list can be amended and updated to reflect future developments.

The Government does not therefore consider that there are key significant events which should be listed as significant events in primary legislation and therefore effectively "fixed", even if coupled with a power to make changes in future. In taking this approach the Government is mindful that a similar approach was taken in the Pension Schemes Act 2017 in relation to significant events for the purposes of Master Trusts.

Paragraph 2 of Schedule 10: amendments to Part 3 of the Pensions Act 2004

The Committee considers that the Government has failed to explain why there is a need for a power to impose conditions on who may be the chair of trustees of a defined benefit scheme, and that in the absence of an explanation the delegation of the power is inappropriate. If the power is to be retained the Committee suggest that the applicable procedure should be affirmative (§34 and §36).

The proposal to require defined benefit schemes to appoint a chair of trustees was included in the March 2018 White Paper *Protecting Defined Benefit Pension Schemes*. It was informed by the experience of the requirement for defined contribution schemes to appoint a chair of trustees, as set out in the Occupational Pension Schemes (Charges and Governance) Regulations 2015. Those regulations make provision regarding who can be chair of trustees of defined contribution schemes, for example where a trustee is a professional trustee body or a company. The Bill inserts a requirement for defined benefit schemes to appoint a chair in new section 221B(7) of the Pensions Act 2004. The power in new section 221B(6)(b) to make provision regarding who can be appointed chair will enable provision to be made in regulations for defined benefit schemes to deal with similar cases to those which have been provided for in regulations for defined contribution schemes. The regulations will be subject to the consultation requirements in section 317 of the Pensions Act 2004. The Government wants to ensure that these provisions are workable and effective, and therefore want to consult with the industry and other interested parties before finalising the detail. The Government also wants to retain the flexibility to refine the requirements in the future in the light of experience and changing economic context. The Government therefore thinks that it is appropriate for the detail of these requirements to be in secondary legislation and that the negative resolution procedure provides appropriate Parliamentary scrutiny.

Clause 25 (transfer rights), clause 47 (power to extend the definition of qualifying schemes) and clause 124 (conditions before pension rights can be transferred)

The Government will respond separately, as soon as possible, to the Committee's recommendations in relation to these provisions.

4 March 2020

APPENDIX 3: 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.