HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

10th Report of Session 2021–22

Northern Ireland (Ministers, Elections and Petitions of Concern) Bill

Education (Environment and Sustainable Citizenship) Bill [HL]

Status of Workers Bill [HL]

Wellbeing of Future Generations Bill [HL]

Education (Assemblies) Bill [HL]

Advanced Research and Invention Agency Bill: Government Response

Armed Forces 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.

Membership

Baroness Andrews
Lord Blencathra (Chair)
Baroness Browning
Lord Goddard of Stockport
Lord Haselhurst
Lord Hendy
Lord Janvrin
Baroness Meacher
Lord Rowlands
Lord Tope

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Publications

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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. 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.

Tenth Report

NORTHERN IRELAND (MINISTERS, ELECTIONS AND PETITIONS OF CONCERN) BILL

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

EDUCATION (ENVIRONMENT AND SUSTAINABLE CITIZENSHIP) BILL [HL]

2. This Bill makes provision in the national curriculum regarding sustainable citizenship and protection of the environment.

3. Under clause 1(4) of the Bill, the Secretary of State must give guidance to maintained schools about the provision of sustainable citizenship education for all registered pupils who are provided with secondary education. The guidance must be given with a view to ensuring that the pupils learn about the impact of human behaviour on the natural environment, and the impact of the natural environment on human wellbeing, and that the pupils have opportunities to develop skills to protect and restore the natural environment, and skills to measure the impact of their actions on the natural environment. The governing body of a maintained secondary school must have regard to guidance under clause 1(4).

4. Although a duty to have regard to statutory guidance does not imply a duty to follow it in any or all respects, we have in recent years observed that a person or body required by statute to have regard to guidance will normally be expected to follow it and will in practice normally do so unless there are cogent reasons for not doing so. And yet this guidance is subject to no parliamentary scrutiny at all.

5. We consider that guidance should be subject to parliamentary scrutiny where a legal duty is placed on persons or bodies (in this case, school governing bodies) to have regard to the guidance and where the guidance is liable to have a significant impact on how statutory functions are exercised. **Accordingly, the guidance under clause 1(4) should be subject to parliamentary scrutiny. We consider that the negative procedure would afford an adequate level of scrutiny.**

STATUS OF WORKERS BILL [HL]

6. This Bill makes provision for the creation of a single status for workers by amending the meaning of "employee", "worker", "employer" and related expressions in the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"), the Employment Rights Act 1996 ("the 1996 Act") and other legislation.

7. The Bill contains identical amendments to the 1992 Act and the 1996 Act allowing the Secretary of State by regulations to designate as "workers" other persons engaged in work, and to designate as "employers" other entities

engaged in the provision of work, after consultation with organisations which appear to the Secretary of State to represent such persons and entities.

8. **However, the power conferred by clause 1(4) (which substitutes a new section 295(6) of the 1992 Act) does not provide for the regulations to be made by statutory instrument or to be subject to any parliamentary procedure**. This may have been a drafting oversight.

9. The only general provision in the 1992 Act relating to the making of regulations is section 293, which provides:

> "(1) The Secretary of State may by regulations prescribe anything authorised or required to be prescribed for the purposes of this Act.
>
> (2) The regulations may contain such incidental, supplementary or transitional provisions as appear to the Secretary of State to be necessary or expedient.
>
> (3) Regulations under this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament."

10. The purpose of section 293 is to ensure that where the Act provides for something to be "prescribed", it is construed as a reference to the thing being prescribed by regulations made by statutory instrument (with the negative procedure applying). There are various provisions of the 1992 Act that refer to things being prescribed, without saying anything further about how the prescribing is to take place: hence the need for section 293. However that provision does not assist here because new section 295(6) does not use the term prescribed but refers to the Secretary of State making regulations. Where that happens elsewhere in the 1992 Act, there is specific provision for the regulations to be made by statutory instrument subject to a parliamentary procedure.

11. The problem may have arisen because the words used in clause 1(4) to insert new section 295(6) of the 1992 Act are identical to those used in the amendment made by clause 2(2), which substitutes new section 230(6) of the 1996 Act. In the latter case, the reference to the making of regulations by the Secretary of State works because section 236 of the 1996 Act contains the expected general provision about regulation-making powers and the applicable parliamentary procedure:

> "(1) Any power conferred by any provision of this Act to make any order (other than an Order in Council) or regulations is exercisable by statutory instrument.
>
> (2) A statutory instrument made under any power conferred by this Act to make an Order in Council or other order or regulations … is subject to annulment in pursuance of a resolution of either House of Parliament."

12. **In our view the power to make regulations conferred by clause 1(4) (in so far as it substitutes a new section 295(6) of the 1992 Act) is deficient in not providing for the regulations to be made by statutory instrument or to be subject to any parliamentary procedure. In our view, the regulations should be made by statutory instrument, with the negative procedure being appropriate.**

WELLBEING OF FUTURE GENERATIONS BILL [HL]

13. This Bill makes provision for requiring public bodies to act in pursuit of the United Kingdom's environmental, social, economic and cultural wellbeing by meeting wellbeing objectives, publishing future generations impact assessments, accounting for preventative spending, and through public services contracts. It establishes a Commissioner for Future Generations for the United Kingdom; and it establishes a Joint Parliamentary Committee on Future Generations.

14. Clause 42 stipulates that all the regulations made under the Bill are subject to the affirmative procedure, apart from regulations made under clause 41 allowing the Secretary of State to make consequential, incidental, supplemental, transitional and saving provision. Regulations under clause 41 contain a Henry VIII power allowing the Secretary of State to amend or repeal any Act of Parliament, past or future. And yet such regulations will only be made under the negative procedure.

15. Our guidance to government departments says that, in the case of any Henry VIII power to make incidental, consequential or similar provision, the usual presumption applies - that such powers should be subject to the affirmative procedure. Where they are not, the Department's delegated powers memorandum should explain why not. Likewise, where the power extends to the amendment of future Acts, the memorandum should explain why such a power is necessary. We expect a convincing case to be made for a power to use secondary legislation to amend future primary legislation. While it may be reasonable to amend past Acts to ensure they fit with a new Bill, future legislation should be capable of taking account of the Bill's provisions when it comes to be enacted.

16. This being a private member's bill, there is no departmental delegated powers memorandum. **Accordingly, the House may wish to seek an explanation from the sponsor of the Bill:**

    (a) **why the Henry VIII power in clause 41 is subject only to the negative procedure; and**

    (b) **why clause 41 contains a power to amend future primary legislation.**

EDUCATION (ASSEMBLIES) BILL [HL]

17. There is nothing in this Private Members' Bill which we would wish to draw to the attention of the House.

ADVANCED RESEARCH AND INVENTION AGENCY BILL: GOVERNMENT RESPONSE

18. We considered this Bill in our 4th Report of this Session.[1] The Government have now responded by way of a letter from Lord Callanan, Minister for Business, Energy and Corporate Responsibility at the Department for Business, Energy and Industrial Strategy. The response is printed at Appendix 1.

1 4th Report, Session 2021-22 (HL Paper 29).

ARMED FORCES BILL: GOVERNMENT RESPONSE

19. We considered this Bill in our 7th Report of this Session.[2] The Government have now responded by way of a letter from the Rt Hon. Baroness Goldie DL, Minister of State at the Ministry of Defence. The response is printed at Appendix 2.

2 7th Report, Session 2021-22 (HL Paper 71).

APPENDIX 1: ADVANCED RESEARCH AND INVENTION AGENCY BILL: GOVERNMENT RESPONSE

Letter from Lord Callanan, Minister for Business, Energy and Corporate Responsibility at the Department for Business, Energy and Industrial Strategy, to the Rt Hon. Lord Blencathra, Chair of the Delegated Powers and Regulatory Reform Committee

I am writing in response to the Delegated Powers and Regulatory Reform Committee's Fourth Report, on the Advanced Research and Invention Agency (ARIA) Bill.

I would like to thank the Committee for their consideration of the Bill, and their acknowledgement of the UK's history of science and invention on which it seeks to build.

Two of the delegated powers in the Bill were highlighted by the Committee. The Government's response on each of these points is detailed below.

Clause 8: power to dissolve ARIA

Clause 8 allows the Secretary of State to dissolve ARIA by an affirmative statutory instrument. The power is only exercisable after 10 years and the Secretary of State must have consulted ARIA and any other persons the Secretary of State considers appropriate.

The Committee raised an objection to this delegation of power on principle, stating that since ARIA is to be created by an Act of Parliament, it should be for Parliament alone to dissolve it.

I have carefully considered the Committee's view on clause 8. This question of principle has arisen previously, and I would like to reiterate the Government's existing view that whilst such powers must be well justified, considering the body and narrowness of the power in question, they are not always constitutionally unacceptable. With this in mind, I believe there is both a clear policy rationale and precedent for the specific power in clause 8.

Firstly, ARIA will fund high-risk, high-reward research, an approach which has been supported in both houses of Parliament. Recognising this specialised and unique remit, the Commons Science and Technology Committee's report, A new UK research funding agency, stated that 'the Government must accept that these projects will take a long time, potentially 10-15 years, to 'bear fruit''. It is the Government's view that to ensure ARIA has the opportunity to succeed, a commitment to its long-term security must be provided by the Bill. Clause 8 only confers the power to dissolve ARIA ten years after the Bill has been granted Royal Assent, to give confidence both to ARIA and to stakeholders across the R&D community.

Secondly, under powers set out in the Public Bodies Act 2011, several bodies established by primary legislation have been dissolved using secondary legislation. The super-affirmative procedure was used in the context of widespread public body reform and broad powers in the Act.

Under these powers, Ministers could abolish certain public bodies, merge them, and change their functions or governance. The intended use of these powers was not clear at the time of the Bill's passage, and so it was appropriate that their use

should be subject to a higher level of parliamentary scrutiny. However, Clause 8 of the ARIA Bill provides a much narrower power for the Secretary of State to dissolve ARIA, not to change any of its functions or governance. I therefore feel that the affirmative procedure remains proportionate and appropriate for this power.

For these reasons, I am not able to accept the Committee's recommendation in this instance and hope the Committee is able to understand the reasons for this approach.

Clause 10: power to make consequential provision

Clause 10 contains a power to amend primary legislation in consequence of any provision of the ARIA Bill, or regulations dissolving ARIA made under clause 8.

The power was included in the Bill for two reasons, set out in the Department's Memorandum. Firstly, to apply to ARIA legislation that applies to similar bodies. For example, in consequence of the creation of ARIA by clause 1 of the Bill as a body which does not take the form of a public authority as defined by the Freedom of Information Act 2000, provision could be made for the application to ARIA of provisions that apply to such bodies. Secondly, to enable clause 1 and references to ARIA in other legislation to be repealed if ARIA were dissolved by regulations made under clause 8, to tidy the statute book.

The Committee took the view that clause 10 is inappropriately wide and any consequential provision should be added to Schedule 3.

I have reflected on this section of the Committee's report. As a result of the recommendation, and drawing on preparatory work for the regulations that would have been made under clause 10, I intend to omit clause 10 from the Bill and narrow the power to make consequential provision. I will therefore table amendments at Committee stage to:

(i) apply to ARIA relevant obligations that would normally apply to 'public authorities' through bespoke provision in Schedule 3; and, in line with the Government's position on retaining clause 8,

(ii) restrict the power to make consequential provision so that it can only be used in consequence of regulations made under clause 8. This entails giving notice of my intention to oppose the motion that clause 10 – containing the existing power – stand part of the Bill, and tabling an amendment to introduce a narrower power to make consequential amendments in clause 8.

The power to make consequential provision in clause 10 is time limited to amendments of Acts made no later than the end of the current session. It could not be used to change references to ARIA in future Acts, or future secondary legislation. Clause 8(4)(e) provides a mechanism to deal with these references, but only by allowing them to be treated as references to another person.

Since I intend to confine the consequential amendment power to clause 8, and at least ten years' worth of legislation will have been passed or made before it could be exercised, I believe there is a strong rationale for widening it to cover amendments of any legislation passed or made before the regulations are made.

The new power in the amendment I will table to clause 8 has this effect, as a more coherent replacement to both the existing power in clause 10 and clause 8(4)(e).

I recognise the Committee rightly scrutinises such powers to amend future legislation very closely. In this instance I believe there is a very clear case for its inclusion, because of the ten years that must elapse before it could be exercised, and high likelihood that ARIA is referenced in legislation passed or made in that intervening time. Without it, references to ARIA will simply be left in future primary legislation if the power to dissolve ARIA is exercised.

Further details of this revised power are provided in the supplementary memorandum, which I hope is useful to the Committee.

10 November 2021

APPENDIX 2: ARMED FORCES BILL

Letter from the Rt Hon. Baroness Goldie DL, Minister of State at the Ministry of Defence, to the Rt Hon. Lord Blencathra, Chair of the Delegated Powers and Regulatory Reform Committee

Thank you for the Delegated Powers and Regulatory Reform Committee's 7th Report of this session on the Armed Forces Bill, which was published on 18 October.

The Committee has drawn attention to two clauses in the Bill; clause 8 which relates to the Armed Forces Covenant and clause 10 that would provide a power to restrict grounds of appeal in connection with service complaints.

I am considering carefully the Committee's view, that in respect to clause 8, the power to define "relevant family member" should be exercised through the making of regulations and subject to the affirmative resolution procedure, and the guidance to be issued under section 343AE should be made subject to the draft affirmative resolution procedure.

Turning to clause 10, the Committee considers the power, which would allow service complaints regulations to restrict the grounds on which an appeal to the Defence Council may be made, to be broad and without limitations. The Committee suggests that it is already known what restrictions on grounds of appeal will be provided for in service complaints regulations, and that this could be set out on the face of the primary legislation. I have considered these matters carefully and there are very good reasons for retaining the flexibility of the option to set out the detailed restrictions on grounds of appeal in secondary legislation and not on the face of the Bill.

Defence as an organisation is going through a significant period of transformation and the nature of Service and Defence as a concept is developing. A broad power is therefore needed so that the detailed grounds of appeal can be appropriately amended by secondary legislation and not con The current legislative framework provides for broad regulation-making powers in primary legislation, with a limited level of detail on precisely how the system should operate. It was agreed by Parliament during the passage of the Armed Forces (Service Complaints and Financial Assistance) Bill in 2014/15 that the detailed provisions with respect to the procedure for making and considering service complaints should be left to secondary legislation, and this is the approach that the Department has continued to adopt with these amendments.

While Part 14A of the Armed Forces Act 2006 contains some mandatory requirements for service complaints regulations, we believe that the specific grounds for appeal should not be one of these requirements. This is consistent with existing powers such as the power to set out the details surrounding which complaints are excluded from the system (section 340D(4)), the admissibility of complaints (section 340B(5)(c)) and requirements relating to independent decision-making (section 340E(1)). Putting specific grounds of appeal into the primary legislation would therefore be out of sync with the current legislative framework, and significantly limit our options if the Department decided to review the system again in the future.

Although we are aligning our processes closer to public sector grievance systems, such processes are not set out in law for the Civil Service and are only contained in

policy. It is therefore not the case that we could adopt existing grounds of appeal from other legislation and bring them over to the service complaints system. We believe setting out the grounds for appeal in secondary legislation will give us sufficient flexibility to work through the practicalities of bringing the current regulations into closer alignment with MOD's civilian grievances system.

I hope the reasons we have provided make it clear as to why we have not accepted the recommendation relating to clause 10.

Given the timescale for the Bill, I propose to update the House at Report. In the meantime, I am taking this opportunity to enclose a supplementary delegated powers memorandum to explain the additional power, which appears in a government amendment tabled at Grand Committee, to insert a new clause on the framework for establishment of a tri-service serious crime unit, a development which has been welcomed across the House. strict us in the future.

12 November 2021

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.

For the business taken at the meeting on 17 November 2021 Members declared no interests.

Attendance

The meeting was attended by Baroness Andrews, Lord Blencathra, Baroness Browning, Lord Janvrin, Lord Goddard of Stockport, Lord Haselhurst, Lord Rowlands and Lord Tope.