HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

11th Report of Session 2014-15

Small Business, Enterprise and Employment Bill: Clauses 1 to 70

Recall of MPs 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 15 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 are:

Baroness Andrews
Baroness Drake
Baroness Farrington of Ribbleton
Baroness Fookes
Countess of Mar
Lord Marks of Henley-on-Thames
Baroness O'Loan
Baroness Thomas of Winchester (Chairman)
Lord Trimble
Viscount Ullswater

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. Interests related to this Report are in the Appendix.

Publications

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

General Information

General information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at http://www.parliament.uk/business/lords/.

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 dprr@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 other acts specified in the Committee's terms of reference.

Eleventh Report

SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT BILL: CLAUSES 1 TO 70

1. The Bill had its second reading on 2 December. It contains a wide range of provisions on matters affecting businesses, in particular small and medium sized businesses. The Bill makes specific provision about tied pubs and the businesses which own them. It also contains provisions about regulatory reform, and makes changes to company law, in particular dealing with the registration of persons having significant control. The Bill makes changes to the law on directors' disqualification and insolvency. It also contains provisions dealing with employment, making provision in particular about the national minimum wage and about zero hours contracts.

2. The Department for Business, Innovations and Skills has provided the Committee with a memorandum on the powers delegated by the Bill. We have so far limited our consideration of the Bill to clauses 1 to 70. We will report separately on the remaining clauses of the Bill.[1]

Clauses 4 to 6 – Provision of Financial Information about small and medium sized businesses

3. Clauses 4 and 5 are enabling provisions which allow the Treasury to make regulations imposing duties on designated banks to provide information about their small and medium sized business customers. They also allow duties to be imposed on those to whom the information must be provided (designated credit reference agencies under clause 4 and designated finance platforms under clause 5) to provide the information to finance providers – ie companies which are in the business of providing loans or other credit. Clauses 4 and 5 both confer a wide measure of discretion on the Treasury in establishing the new duties and how they will operate. In particular, they allow the Treasury to determine in the regulations the kinds of information to which each of the duties applies, the conditions which have to be met to trigger the duty, and the process for designating banks and other bodies for the purposes of clauses 4 and 5 and the conditions which have to be met for a body to be designated.

4. Regulations under clauses 4 and 5 are subject to a first time affirmative procedure, with subsequent regulations subject to the negative procedure. The Department explain this approach on the basis that any subsequent exercises of the power will not involve any significant changes. We are not convinced that the Department has made out its case on this point: it seems to us the scope of the delegations conferred would allow significant changes to be made in the future. **Accordingly, we consider that the powers conferred by clauses 4 and 5 should be subject to the affirmative procedure in respect of all exercises of the powers.**

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[1] http://www.parliament.uk/business/committees/committees-a-z/lords-select/delegated-powers-and-regulatory-reform-committee/bills-considered/

5. There is one aspect of the powers under clauses 4 and 5 for which we think the case for an all-time affirmative procedure is particularly strong. Clause 6 allows regulations under clauses 4 and 5 to make provision enabling the Financial Conduct Authority (FCA) to monitor and enforce compliance with the regulations. In this context, clause 6(3)(a) and (c) expressly allows regulations under clauses 4 and 5 to confer on the FCA powers of entry and search and to provide for the creation of criminal offences and the imposition of financial penalties. **The memorandum refers to section 58 of the Legal Aid, Sentencing and Punishment Act 2012 as a previous example where such powers are conferred. What the memorandum fails to mention, however, is that those powers in the 2012 Act are subject to the affirmative procedure in respect of all exercises of the powers. We consider the same should apply here.**

Clause 7 – Power to amend the figure for annual turnover of a small or medium sized business

6. Clause 7 contains definitions which apply for the purposes of clauses 4 to 6, and subsection (1) defines what constitutes a small or medium sized business for those purposes. There are four elements to the definition, one of which is whether the business has an annual turnover of less than £25 million. Subsection (3) confers a power on the Treasury by regulations to amend the figure for turnover given in subsection (1). Regulations under clause 7(3) are subject to the negative procedure.

7. While we accept the need for this delegation, we are not convinced by the Department's arguments in providing for the power to be subject to the negative procedure. Since this is a Henry VIII power to amend primary legislation, in our view there need to be strong reasons exceptionally to justify a level of Parliamentary scrutiny other than the affirmative procedure. The Department suggest that the negative procedure is appropriate because the figure for annual turnover is only one out of the four elements of the definition, and because the powers are only exercisable after consultation. We are not convinced that the existence of consultation is relevant in determining the level of Parliamentary scrutiny which should be applied. We also consider that the level at which annual turnover is set is likely to play a very important part in determining the number of businesses which fall within the scope of clauses 4 and 5. **Accordingly we consider that regulations under clause 7(3) to amend the figure for annual turnover should be subject to the affirmative procedure.**

Clause 10 – Disclosure of information affecting the export of goods

8. Clause 10(1) enables the Commissioners for HMRC to make regulations authorising officers of HMRC to disclose specified information about the export of goods from the UK. Subsection (3) limits the kind of information which may be prescribed in the regulations. It is limited to the commodity code for exported goods (being a code used in connection with the preparation of statistics), a description of the goods covered by a particular code, the names and addresses of persons who have exported goods covered by a particular code, and the years and months in which a person has exported goods covered by a particular code. Regulations under clause 10(1) are subject to the negative procedure.

9. We agree with the Department that the information to which the power under clause 10(1) applies is tightly and clearly defined in subsection (3), and therefore that regulations under that subsection are properly subject to the negative procedure. However, the laudably precise way in which subsection (3) identifies the kinds of information which may be specified in regulations is in contrast to the apparently very wide powers conferred by subsection (4). That subsection allows the Commissioners to make such provision as they think appropriate in connection with the provisions of the regulations authorising disclosure of information. Although paragraph 52 of the memorandum refers to the fact that the regulations "can also cover administrative arrangements", no explanation is given as to why it is necessary for such wide powers to be conferred by subsection (4). **Given the breadth of the powers conferred by clause 10(4) we consider that their exercise should be subject to the affirmative procedure.**

Clause 35 – Home Business Tenancies under Part 2 of the Landlord and Tenant Act 1954

10. Clause 35 amends Part 2 of the Landlord and Tenant Act 1954 ("the 1954 Act") to take home business tenancies outside the scope of that Part. "Home business tenancy" is defined in subsection (2) of new section 43ZA of the 1954 Act (as inserted by clause 35(4)). One of the conditions which must be met under the definition is that the terms of the tenancy permit the carrying on of a home business but not of any other kind of business. "Home business" for these purposes is defined in subsection (4) of section 43ZA to mean a business of a kind which might reasonably be carried on at home. Subsection (6) confers a regulation-making power to prescribe cases in which businesses are, or are not, to be treated as home businesses. The regulations are subject to the negative procedure.

11. The need for this delegation is explained in paragraph 115 of the memorandum. Because of the way in which "home business" is defined, it is expected that it may be necessary from time to time to clarify whether particular cases fall within or do not fall within the definition. It is also stated that new types of business may start to be carried out in dwellings, which may not have been foreseen and where it is desirable for the kind of business not to be treated as a home business for the purposes Part 2 of the 1954 Act.

12. We can readily see there will be cases where it is unclear whether or not the particular case falls within the definition in subsection (4) so that it is necessary to have a regulation-making power to clarify the position. But we are not convinced that the negative procedure provides an appropriate level of Parliamentary scrutiny. The Department states in paragraph 116 of the memorandum that the major parameters for the definition of a home business are set out in the primary legislation and that the power merely allows for its "refinement". It is also suggested that the power cannot be used to widen the scope of the home business tenancy exception. We are not convinced on either of these points. Section 43ZA(6) allows the regulations to prescribe cases which are to be treated as home businesses (and therefore falling within the home business tenancy exception). On its face this would appear to allow the regulations to treat as home businesses those businesses that would not otherwise fall within the definition in section 43ZA(4). Nor is there anything to suggest that the power can only be used as a refining power to deal with cases which fall at the margins. This seems to be acknowledged

by the Department when in paragraph 115 of the memorandum they refer to the power also being used to deal with cases where as a matter of policy a particular business is viewed as being inconsistent with a residential setting. **In our view, this is a significant power in that it allows changes to be made to the kinds of business tenancies which are excluded from scope of Part 2 of the 1954 Act under the home business tenancy exception. For this reason we consider that the exercise of the power should be subject to the affirmative procedure.**

Clause 39 – Regulations about public authority procurement functions

13. Clause 38 enables the Minister for the Cabinet Office or the Secretary of State to make regulations imposing duties on contracting authorities (as defined in subsections (3) and (4)) in respect of the exercise of their functions relating to procurement. Regulations under clause 38 are subject to the negative procedure. The Department explains the reasons for the delegation in paragraph 135 of the memorandum: the flexibility of subordinate legislation is required as it is likely to be necessary to adapt or add to the duties to ensure they remain effective and take account of changing economic circumstances.

14. Given this explanation, we accept that the delegation is appropriate. But we are not convinced that the negative procedure provides an appropriate level of Parliamentary scrutiny. The powers conferred by clause 38 are very broad: there are no limits on the kinds of duties relating to the exercise of procurement functions which can be imposed. Subsection (5) provides examples of the kinds of duties which may be imposed under clause 38, but that is a non-exhaustive list and does not derogate in any way from the generality of the power. It also seems to us that the way in which the powers are exercised is likely to have a significant impact, since it is liable to affect a wide-range of public procurement which is currently unregulated because it falls below the financial thresholds governed by EU law. The Department states in paragraph 137 of the memorandum that the negative procedure is appropriate because the regulations are likely to be needed "to make changes to technical details and/ or to respond to new economic circumstances when speed may be of the essence". We are not convinced by these reasons, and certainly we do not consider them sufficient to justify the negative procedure when placed against the breadth of the powers which are being conferred and their potential significance. **Accordingly we consider that regulations under clause 38 should be subject to the affirmative procedure.**

Clause 42 – Market rent only option for large pub-owning businesses

15. Part 4 of the Bill introduces a statutory Pubs Code for England and Wales which will make provision about the practices and procedures to be followed by pub-owning businesses in their dealings with their tied pub tenants. Clause 41 makes provision for the establishment of the Pubs Code which is to be set out in regulations made by the Secretary of State. Regulations under clause 41 are subject to the affirmative procedure. Clause 42 requires the Pubs Code to include a Market Rent Only Option which is to be provided by large pub-owning businesses in respect of their tenants. A Market Rent Only Option means the right of the tenant to be offered a tenancy at a market rent rather than being made subject to a tie (ie a contractual obligation to sell alcohol supplied by the landlord). As explained

at paragraph 140 of the memorandum, clause 42 was inserted in the Bill at Report stage in the House of Commons as a non-Government amendment.

16. Subsection (11) of clause 42 contains a delegated power. It provides for the implementation of the measures in that clause by regulations amending the Pubs Code. It also enables regulations to be made to change the kind of agreements between pub-owning businesses and their tenants which are to be subject to the Market Rent Only Option. In both cases, clause 42(11) provides for the regulations to be subject to the negative procedure. The Department makes the point in paragraph 140 of the memorandum that clause 42(11), in providing for the negative procedure for regulations amending the Pubs Code, is inconsistent with clause 70(1) which requires the regulations containing the Pubs Code to be subject to the affirmative procedure. **We agree with the Government that regulations under clause 42 should be subject to the affirmative procedure in line with the Parliamentary procedure which applies generally to regulations containing the Pubs Code.**

Clause 70(3) – Dehybridising provision

17. Clause 70(3) provides that, if a draft of an instrument containing regulations under clause 68 would otherwise be treated as a hybrid instrument, it is to proceed as if it were not such an instrument. Clause 68 allows for exceptions from the Pubs Code. It is stated in paragraph 181 of the Department's memorandum that regulations under clause 68 are likely to make different provision in relation to franchises, and that this has the potential to trigger the hybrid instruments procedure because of the affirmative procedure applying to the regulations.

18. It is usual for the Committee to draw a provision of the kind made by clause 70(3) to the attention of the House so that it can satisfy itself that any interests that would normally be afforded protection by the hybrid instruments procedure are afforded appropriate protection by some other means – for example, by consultation while the policy underlying the draft is still at a formative stage. In this case there is no requirement on the face of the Bill for consultation or any other means for protecting private interests. The Department states in paragraph 181 of the memorandum that in this case the Government is satisfied that the private interests of franchises will be sufficiently protected because they will not inadvertently fall within the provisions of the Pubs Code. We have found it difficult to make any assessment of this on the basis of the limited information provided by the Department in its memorandum. **Accordingly, as well as drawing the de-hybridising provision to the attention of the House, we also draw attention to the fact that the Bill does not include any express requirement for consultation, or any other means for protecting interests which would otherwise be protected by the hybrid instruments procedure.**

RECALL OF MPs BILL

19. This Bill is to have its Second Reading on 17 December. It introduces a "power of recall" to enable electors in a parliamentary constituency to force a by-election where their sitting Member of Parliament has been found to have engaged in certain kinds of wrongdoing, and where 10% or more of the electors sign a petition for the MP to lose his or her seat and for a by-election to be held. In connection with the delegations of legislative powers in the Bill, the Cabinet Office has submitted a memorandum, which also contains at paragraphs 5 and 6 a summary of the main provisions of the Bill.[2] There are two provisions which we wish to draw to the attention of the House.

Clause 21(3) & (4) – Power to make provision by amendment of Acts

20. Clause 21(3) enables regulations made under powers conferred elsewhere in the Bill to "make consequential, supplementary, incidental, transitional or saving provision"; and this power, when exercised in the context of clause 18, includes (by virtue of subsection (4)) the power to amend "legislation", which is defined in clause 22(1) to include an Act of Parliament. But it is the final three words of subsection (4) ("including this Act") that lead us to raise this provision. On their face, those words could permit the infiltration of quite substantial and significant additional provision into the Bill.

21. A facility to "supplement" the Bill itself is a very significant one, even when conferred only in conjunction with a particular power – and we note that clause 18 itself confers wide-ranging powers in connection with the petitioning process under clauses 6 to 15. If exercised to its full extent, the power could be used to re-write substantially many of those clauses. Paragraph 27 of the memorandum states that "such powers are common"; but we consider that a power to amend the very Act which confers it is, or should be, quite exceptional. The Government do not explain why it is thought essential to have power to amend the Bill itself, nor why they have not ensured that the provisions about petitions in the Bill itself are complete. We do not in any event consider that the second of the precedents cited in paragraph 27 – section 62 of the Electoral Administration Act 2006 – greatly assists the Government on this particular point. Section 62(3)(a) enables an order under that section to "amend or repeal any enactment (whenever passed)", a formulation that is not generally understood, in the absence of the additional express words at the end of clause 21(4) to enable the amendment of the very Act which has conferred the power.

22. In the absence of any explanation why so significant a power is necessary in the context of clause 18 of the Bill, **we recommend that the power conferred by the final three words of clause 21(4), to amend the Act resulting from this Bill, is an inappropriate delegation and that those words should be removed from clause 21(4).**

Clause 21(7) & (8) – "Rolling-up" of different scrutiny procedures

23. Subsections (7) and (8) of clause 21 provide for an approach to the use of Parliamentary scrutiny procedures that appears to us to be unconventional in

[2] http://www.parliament.uk/business/committees/committees-a-z/lords-select/delegated-powers-and-regulatory-reform-committee/bills-considered/

its extent. Taken together, the two subsections would allow powers that attract the affirmative procedure, powers that attract the negative procedure and powers that are not subject to any form of Parliamentary scrutiny to be exercisable in a single affirmative instrument. We are aware that particular Acts have enabled provision that would otherwise be subject to annulment to be included in an affirmative instrument. But it is rare for an Act to enable provision that is not subject to any form of Parliamentary control to be included in the same instrument as provision that is subject to such control (we are aware only that section 1292(3) of the Companies Act 2006 does so).

24. In terms of its potential consequences for the effective Parliamentary control of subordinate legislation, the proposed provision in subsections (7) and (8) appears to us to have a number of objections. First, if not used sensibly, it could allow an affirmative instrument to comprise provision that is mainly (and possibly almost wholly) not provision made under a power requiring the affirmative procedure. An imbalance of that kind could distract the House from the particular provisions that do require affirmative approval, and it could well prolong debates in the discussion of provisions that do not.

25. Secondly, the practice could potentially neutralise the effect of this Committee's own recommendations, in the sense that it could subvert judgments that the House has taken (on the basis of those recommendations) about the appropriate (if any) level of scrutiny to be accorded to each delegated power in a Bill. In that respect, the practice could be seen to represent a further shifting of the legislative initiative from Parliament to the Executive, because it would leave to Ministers and not to Parliament the decision whether or not particular provision to be made by them should be subjected to a higher (or some) level of Parliamentary scrutiny.

26. Finally, because statutory instruments are not amendable in Parliament (for instance, in a way which might enable certain provisions to be severable from others), with the result that each is presented to either House on what amounts to a "take it or leave it" basis, the practice can only accentuate the difficulty faced by members of the House where only some of the provisions in a substantial instrument are regarded as objectionable. Should the entire instrument be not approved, or be annulled, merely because of those provisions? It would be particularly wrong in principle to subject to that risk provision that the House has accepted should have no Parliamentary control.

27. We do not therefore believe that there should be any systematic extension of the present piecemeal and occasional flexibility whereby 'negative' provision may in appropriate circumstances be included in an affirmative instrument. We would be very concerned if the practices envisaged by subsections (7) and (8) of clause 21 were to become a commonplace feature of the arrangements for making statutory instruments, and for those subsections to be replicated as a matter of course in government Bills. (In this respect, we note that there are identical subsections in clause 154 of the Small Business, Enterprise and Regulatory Reform Bill, to which we shall return in a later report.) We are aware of an initiative on the part of the Government, as part of its well-publicised drive for 'de-regulation', to reduce the numbers of statutory instruments, and we do not know whether subsections (7) and (8) are a feature of that initiative; but we are quite sure that it would be wrong in principle for any reduction in the numbers of instruments to be achieved at

the expense of their effective Parliamentary scrutiny. **We draw these concerns to the attention of the House.**

APPENDIX 1: MEMBERS AND DECLARATIONS OF 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 House of Lords Record Office and is available for purchase from The Stationery Office.

For the business taken at the meeting on 10 December 2014 Members declared no interests.

Attendance:

The meeting on the 10 December 2014 was attended by Baroness Drake, Baroness Farrington of Ribbleton, Baroness Fookes, Countess of Mar, Lord Marks of Henley-on-Thames, Baroness O'Loan, Baroness Thomas of Winchester, Lord Trimble and Viscount Ullswater.