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The Baroness Fookes DBE
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Delegated Powers and Regulatory Reform Committee
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6th April 2016

I am grateful for the work of the Delegated Powers and Regulatory Reform Committee in considering and reporting on the Northern Ireland (Stormont Agreement and Implementation Plan) Bill in its 24th Report of Session 2015–16, published on 18 March (HL118).

The Committee drew the attention of the House to two delegated powers in the Bill. I would like to take this opportunity to respond to the points raised by the Committee and offer further information before the Bill has its Second Reading in the House of Lords, in order to assist the House with its consideration of the relevant provisions.

Clause 2(5)

In relation to clause 2(5) – the duty on the Secretary of State to issue guidance to the Independent Reporting Commission (“the Commission”) – the Committee requested further explanation, in order that the House may consider whether the guidance should be subject to Parliamentary scrutiny before it takes effect.

The subject matter of the guidance to be issued by the Secretary of State to the Commission is constrained by the provisions of the Bill and there are a number of relevant precedents of statutory guidance which do not attract any Parliamentary procedure.

The guidance to be issued does not relate to the delivery of the Commission’s functions in a broad sense – indeed, this would not be appropriate, given that the Commission is an international body, independent in the exercise of its functions - but rather to exercise of its functions in relation to information, the disclosure of which might prejudice the national security interests of the United Kingdom, or put at risk the life or safety of any person.

In order to fulfil its broad objective of promoting progress towards ending paramilitary activity connected with Northern Ireland, the Commission is likely to seek information from a broad range of sources. Engagement with stakeholders is also one of the Commission's express functions, as set out in the November 2015 agreement, 'A Fresh Start: the Stormont Agreement and Implementation Plan' ("the Fresh Start Agreement"). It is likely therefore that the Commission will receive information which, if it became public, could pose a risk to the safety of individuals, for instance. For this reason, the Bill places the Commission under duties not to do anything which might prejudice legal proceedings, the prevention, detection and investigation of crime, national security in the UK or Ireland, or put at risk the life or safety of any person (clause 2(3)).

The guidance to be issued by the Secretary of State will therefore relate to information that it receives in the exercise of its functions (as defined in clause 1(1)¹) which has the potential to put at risk the life or safety of any person, or prejudice UK national security (a subset of the duties in clause 2(3)).

Parliament is therefore asked to agree the key functions of the Commission and the duties at clause 2(3) - those at clause 2(3)(a) and (b) are relevant in this context - which set the context for the guidance to be issued under clause 2(5). The guidance will then deal with how the Commission may operate within these duties with respect to the types of information referred to above. It is likely to cover operational matters about how the Commission receives, holds and discloses information, e.g. the premises at which any sensitive material can be viewed and the storage of any such material.

In its report, the Committee noted that no specific precedents for such provision were offered in the Government's delegated powers memorandum. We would therefore now like to draw the Committee's attention to several examples of provisions in relation to guidance issued by the Secretary of State to which persons must have regard.

The Policing and Crime Act 2009 (section 47), Infrastructure Act 2015 (section 13), Health and Social Care Act 2012 (section 63) and Natural Environment and Rural Communities Act 2006 (section 15) all contain duties or powers to issue guidance to which the recipient "must have regard". In addition, the Sexual Offences Act 2003 includes a number of guidance-making powers and duties, including one at section 136P to which the recipient "must have regard".

Some of these provisions are more wide-ranging, or operational in nature than others (for instance the Health and Social Care Act provides a guidance-making power which is construed relatively broadly, relating to objectives and exercise of functions), and some require prior consultation with expert stakeholders (e.g. in the example given above of section 15 of the Natural Environment and Rural Communities Act 2006), or specify that the guidance (as issued or published) must be laid before Parliament. However, none attract a requirement for prior Parliamentary scrutiny.

¹ Clause 1(1) defines the Commission's functions as those in paragraph 5.1 of Section A of 'A Fresh Start: the Stormont Agreement and Implementation Plan,' which is available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/479116/A_Fresh_Start_-_The_Stormont_Agreement_and_Implementation_Plan_-_Final_Version_20_Nov_2015_for_PDF.pdf

There is also an example which relates specifically to the issue of disclosure of information in the Northern Ireland context. Provision has recently been approved by the Northern Ireland Assembly in the Justice (No. 2) Bill (clause 38), in respect of the Prison Ombudsman. This clause provides that the Secretary of State may issue guidance to the Prison Ombudsman in relation to any matter connected with national security (including some specified matters listed in prisons legislation) and that the Ombudsman must have regard to any such guidance. There is no provision in that Bill for the Northern Ireland Assembly to scrutinise the guidance prior to its issue. While the Secretary of State is not obliged to issue any guidance under this provision, draft guidance has already been produced and was issued to the Prison Ombudsman, pending passage of the Bill.

As outlined above, the Government considers that the duty to issue guidance in clause 2(5) of the Northern Ireland (Stormont Agreement and Implementation Plan) Bill is about an important, but limited, aspect of the Commission's functions and that the guidance is constrained by provisions on the face of the Bill. Moreover, it is our intention to consult with expert stakeholders, including the Police Service of Northern Ireland and security services in compiling the guidance. Clause 2(8) also requires the Government to publish the guidance and we have further committed to placing a copy in the library of each House.

In light of this, the Government continues to consider that it is appropriate for the guidance itself not to be subject to further Parliamentary scrutiny.

Clause 4(2) and (3)

In relation to clause 4(2) and (3) of the Bill, the Committee draws attention first to the multiple agreements which will form the basis for the Independent Reporting Commission. To clarify, the UK Government and Irish Government committed to establishing a new Commission to report on progress towards ending paramilitary activity as part of the multi-party Fresh Start Agreement.

As the Committee notes, this document outlines some key aspects of the new Commission, including its functions (to which clause 1(1) refers). It also makes clear that the Commission is intended to be an "international body". To confer on it international status, the UK Government and Irish Government will therefore establish the Commission through a bi-lateral international agreement, or treaty. This international agreement, referred to in the Bill as the "agreement relating to paramilitary activity", will define the parameters of the regulation making power in clause 4(2) and (3).

Discussions on the international agreement are at an advanced stage. However, the Government will not be in a position to finalise it until a new Government is formed in Ireland. Once finalised, it will be laid before Parliament for scrutiny under the provisions of the Constitutional Reform and Governance Act 2010.

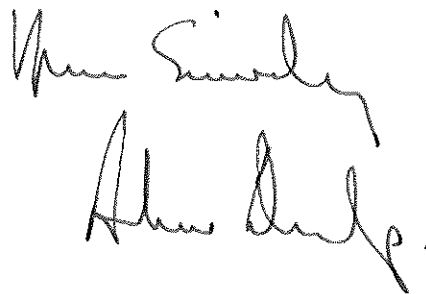
The Committee suggests that the power in clause 4(2) and (3) for the Secretary of State to make regulations to give full effect to the international agreement could be expected to be concerned only with the structure and operation of the Commission, while noting that it could be exercised more broadly. It therefore invites the House to seek further assurances about the character of the provision intended to be made under it.

I thank the Committee for their comments. It is the case that this power is intended to be used to provide further detail on the operations, structure and governance arrangements of the Commission, as these are finalised in discussion with the Irish Government. It may therefore be used to make provision about such matters of detail as majority decision-making on the contents of reports, arrangements for their publication, audit and accounts.

Making provision in secondary legislation will also provide the necessary flexibility to react to any further circumstances which may arise in the course of finalising the treaty and establishing the Commission. Parliament will have the opportunity to give its approval to any regulations made under this power, which, in view of its breadth, is subject to the affirmative procedure.

I thank the Committee again for their comments on the Bill.

I am placing a copy of this letter in the libraries of both Houses.

A handwritten signature in black ink, appearing to read 'Alan Duff', written in a cursive style.

**LORD DUNLOP
LORDS SPOKESPERSON ON NORTHERN IRELAND**