The Rt Hon the Baroness Royall of Blaisdon

The Leader of the House of Lords

Baroness Warsi
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House of Lords
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22 January 2010

Dear Colleague

On the 22nd of January the Solicitor General, Vera Baird QC MP, responded to the further report on the Equality Bill by the Delegated Powers and Regulatory Reform Committee.

I attach a copy of the Government's response for your information.

I am placing a copy of this letter and attachment in the House Library.

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Lord Goodhart
Chairman
Delegated Powers and Regulatory Reform Committee
House of Lords
London
SW1A 0PW
Our ref:

22 January 2010

Your ref:

Dear Lord Goodhart

Equality Bill: further report of the Delegated Powers and Regulatory Reform Committee – Government response

Thank you for the Committee's further report on the Bill (Parts 6 to 15), contained in its Third Report of Session 2009-10 (paragraphs 7 to 29).

I attach the Government's response.

Vera Baird

VERA BAIRD QC MP

EQUALITY BILL

GOVERNMENT RESPONSE TO THE THIRD REPORT OF THE DELEGATED POWERS AND REGULATORY REFORM COMMITTEE – EQUALITY BILL PARTS 6 TO 15

1. The Delegated Powers and Regulatory Reform Committee previously reported on the Equality Bill, among others, in its Second Report of Session 2009-10 (paragraphs 33-44). This considered Parts 1 to 5 of the Bill. The Government responded by way of a memorandum which was reproduced in Appendix 2 of the Committee's Third Report.

2. In its Third Report (paragraphs 7-28), the Committee has now reported on the remaining Parts 6 to 15 of the Bill. The Committee's comments and recommendations on particular powers are set out below, together with the Government's response.

Clause 106 – associations

3. The Committee noted that the power in clause 106 [to amend subsection (2)(a) relating to the membership threshold for an association to be caught by the relevant provisions] is described in paragraphs 85 and 86 of the Government's [original] memorandum as being subject to the negative procedure, but that in fact clause 200(2) provides for the affirmative procedure which it considered appropriate for this Henry VIII power.

4. **The Government confirms that the power in clause 106 is to be subject to the affirmative procedure.**

Clause 150 - public authorities

5. The Committee noted that the powers in clause 150 (which enable a Minister of the Crown, Welsh Ministers and Scottish Ministers respectively to amend, by order, relevant Parts of Schedule 19 which sets out the public authorities covered by the public sector equality duty) could, among other things, be used to add judicial and parliamentary bodies to the list of bodies subject to the duty. The Committee doubted that such a power should be capable of use to list the judicial and parliamentary bodies currently excluded from the scope of the duty, and recommended that the power in clause 150 should be limited accordingly. The Committee also recommended that this more limited power should be subject to the affirmative procedure.

6. **The Government will carefully consider the Committee's recommendation in relation to limiting the power so as not to be capable of listing judicial and parliamentary bodies as covered by the public sector equality duty. It will also carefully consider the recommendation that a more limited power should be subject to the affirmative procedure, in particular in cases where a body is added to the list of public authorities. However, the Government considers that there will be certain cases where the negative procedure will be more appropriate, for example where a body changes its name but not its status or functions; or where a body is removed from the Schedule 19 list as a result of its dissolution. In these cases, it would not appear to be an efficient use of parliamentary time to subject such changes to the affirmative procedure.**

Schedule 18 – exceptions to the public authorities

7. The Committee further noted what it calls an equally significant power in Schedule 18, paragraph 5, which enables a Minister by order to add, vary or omit an exception listed in Schedule 18. The Committee noted that the power is subject to the affirmative procedure under clause 200(2), but doubted whether it could be appropriate for an exception relating to judicial functions (paragraph 3 of Schedule 18) or those relating to Parliament, the Scottish Parliament, the National Assembly for Wales and the General Synod (paragraph 4) to be removed or limited by statutory instrument, even one subject to affirmative procedure. In its view, if Parliament ever wished to remove or limit these exceptions, it should do so only through primary legislation. The Committee recommended that the power in paragraph 5 of Schedule 18 should be limited accordingly. It also invited the House to consider very carefully whether it is appropriate that a Minister of the Crown should be enabled to remove or limit any of the other exceptions in Schedule 18 (those exceptions relate to children – paragraph 1 of the Schedule; and to immigration – paragraph 2).

8. **The Government will carefully consider the Committee's recommendation to limit the power in paragraph 5 of Schedule 18 so that it cannot be used to remove or vary the exceptions in paragraphs 3 (judicial functions) and 4 (both Houses of Parliament, the Scottish Parliament, the National Assembly for Wales, the General Synod of the Church of England, and the security services). It notes the Committee's invitation to the House in relation to the other exceptions.**

Clause 195 – age

9. The Government is grateful to the Committee for pointing out the inadvertent omission of text on the power in clause 195 in its original memorandum and has since provided the relevant material to the Committee. For convenience, this is also set out in the Annex to this response.

10. The Committee noted that this is a very significant power enabling a Minister to amend the Bill by affirmative order so as to provide that specified conduct relating to age does not contravene the Bill when enacted. Furthermore, the Committee noted that the orders may make further provision to be set out in guidance or documents specified in guidance. The Committee considered that this provision for sub-delegation would require strong justification, as it was a mechanism capable of being used to bypass the affirmative procedure and therefore removing parliamentary scrutiny over the extent and nature of the exception, but that no justification had been offered. The Committee therefore recommended that the provisions for such sub-delegation in clause 195(3) and (6) be removed from the Bill.

11. **The Government is happy to take this opportunity to justify the provisions in clause 195(3) and (6). The intention is that this guidance-making power will be used to set out the details of how the requirements established in the order itself (which will be subject to the affirmative procedure) are to be met. It is not intended to use guidance to set out the substantive requirements, which will be inserted by the order into the Act (as it will then be).**

12. **An example of a similar guidance-making power can be found at paragraph 22(3) (b) of Schedule 3 to the Bill. This provision requires data to be "*compiled, published (whether in full or in summary form) and regularly updated in accordance with guidance issued by the Treasury*". In this example, which carries forward the effect of existing provisions in the Sex Discrimination Act 1975, the actual requirement (that data be compiled, published and updated) is set out on the face of the Bill, but the detail about how the data are to be compiled, published and updated is to be set out in Treasury guidance.**

13. **This guidance-making provision is particularly important in the case of financial services, where any age-based exceptions are likely to be complex and where considerable detail will be needed in order to provide sufficient certainty to service providers such as insurance companies. For example, in relation to the emerging policy proposals set out in the consultation paper *Equality Bill: Making it work - ending age discrimination in services and public functions*, it is currently envisaged that guidance would be needed to give full effect to the proposals relating to transparency (data publication), and signposting and referrals by one insurance company to another.**

14. **In the absence of such guidance-making powers, all the details on implementation would need to be set out on the face of the Act (as the order will operate to amend the Act). The result would be excessively cumbersome, and inconsistent with the way the rest of the Bill is drafted. It would also be much more difficult to make minor necessary changes to the detail, as might be needed (for example) to reflect developments in the financial services sector. Without guidance, a fresh affirmative resolution instrument would be required every time such a change were proposed. This could result in unnecessary delays to changes that could benefit customers.**

15. **The financial services exceptions are those on which most work has been carried out so far. However, it is apparent that in respect of other exceptions canvassed in the Government's consultation paper there will also need to be detailed guidance; for instance, in relation to the Government's proposal to ensure retention of common beneficial concessions while not also permitting "concessions" that are harmfully discriminatory.**

16. **For these reasons, the Government is minded to retain clause 195 (3) and (6).**

Clause 196 – harmonisation

17. The Committee described this power as an "exceptionally significant" Henry VIII power. The power enables the Government to extend, in the interests of continued harmonisation, the substance of a provision implementing European law to areas of domestic law not affected by the European requirement. The Committee noted that the Government had been unable to produce a firm precedent for the power, which could be used very widely – potentially beyond the stated purpose. It considered whether there were exceptional circumstances with the Bill that would justify the power but concluded there were not. Therefore it considered the powers conferred by clause 196 to be inappropriate.

18. **The Government notes the Committee's view and is considering what further safeguards in relation to the power would be appropriate in order to assuage concerns.**

Clause 199 – exercise of subordinate legislation powers

19. The Committee noted that clause 199 contains the standard provisions on savings, transitionals and consequentials, but that clause 199(7) contains a more novel provision enabling provision consequential on commencement of a Bill provision to be dealt with in a separate order with no Parliamentary control apparently attached to it. The Committee recommended that the negative procedure should apply to such additional orders.

20. **The Government will carefully consider the Committee's recommendation.**

Other matters

21. The Committee noted that many provisions in the Bill, including several of the delegated powers, are repeated from existing legislation. It noted that in some cases, if these had been new delegated powers the Committee might have questioned them. However, in recognition of the fact that the Equality Bill pulled together a number of existing strands of equality legislation, the Committee simply drew them to the attention of the House.

Clause 182

22. The Committee noted that under clause 181(1) the Secretary of State can authorise, by order, the use of rail vehicles that do not meet the requirements of rail vehicle accessibility regulations; and that "surprisingly", under clause 182, the choice of parliamentary procedure for such orders (affirmative or negative) is left to the Government (repeating the existing position under the Disability Discrimination Act 1995). It considered that it would not normally consider it appropriate for the executive to be left to select the appropriate level of parliamentary scrutiny for a statutory instrument.

23. **The Government agrees that, typically, the level of parliamentary scrutiny is indeed set in primary legislation. However, from time to time, Parliament accepts that a measure of discretion for the executive is reasonable.**

24. **The power to introduce technical standards for rail vehicle accessibility was provided in section 46 of the Disability Discrimination Act ("DDA") 1995. That Act granted to the executive the power, by order, to allow exemptions (section 47) and selected the negative resolution procedure as the appropriate level of parliamentary scrutiny for all orders.**

25. **Ten years later, the Government sought parliamentary approval to make various amendments in the DDA 2005. During its passage, peers expressed concerns about the level of parliamentary scrutiny provided under section 47 for certain exemption orders. Whilst provision was therefore also made for the use of the affirmative resolution procedure, Parliament accepted that the appropriate level of scrutiny may vary widely depending on the nature of the exemption being sought, which could potentially range from all rail vehicles operated on a specific network to authorisation for minor non-conformities such as the installation of a door control button 5mm below the prescribed height range.**

26. **For these reasons, it was agreed that the Secretary of State should retain discretion as to which parliamentary procedure should be adopted on a case-by-case basis in recognition of the differing circumstances which may apply. The amendments made to the DDA 1995 (new sections 67(5A) and 67A) therefore provided that either procedure could be used, but that the exercise of discretion was subject to section 67A. This empowered the Secretary of State to make regulations setting out the basis on which such a decision would be made. It also required that, before deciding which procedure to use, the Secretary of State must first consult the Disabled Persons Transport Advisory Committee ("DPTAC", established under the Transport Act 1985 to provide the Secretary of State with advice on the public passenger transport needs of disabled people).**

27. **The Rail Vehicle Accessibility Exemption Orders (Parliamentary Procedures) Regulations 2008 [S.I. 2008/2975] were made under section 67A following public consultation and approval by Parliament under the draft affirmative resolution procedure. The Department for Transport has published a "decision tree" to assist understanding which is available on its web site (at www.dft.gov.uk/adobepdf/165234/decisiontree.pdf).**

28. **A number of exemption orders have subsequently been considered under these procedures and, in all cases to date, the draft affirmative resolution procedure has been adopted.**

29. **Under section 67B of the DDA 1995, the Secretary of State is also required to provide Parliament with an annual report on the making of exemption orders, which must include details of the exercise of discretion under section 67A. Last year the first such annual report was laid before both Houses. This ensures that Parliament is briefed on the use of the Secretary of State's discretion powers and can monitor how they are applied in practice.**

30. **In the ways outlined above, Parliament has already recently considered the question of the appropriate level of scrutiny for exemption orders and is kept informed of the way the Secretary of State's discretion powers are being applied. The Government believes that the current system provides a reasonable and appropriate balance by allowing greater Parliamentary scrutiny where warranted and less scrutiny where the issue is not such as to merit additional Parliamentary time.**

Schedule 21

31. The Committee noted that Schedule 21 makes supplementary provision about reasonable adjustments and that regulations under paragraph 6 may make provision as to circumstances in which a landlord is taken to have acted "reasonably" or "unreasonably" (repeating the existing provision in the Disability Discrimination Act 1995). The Committee considered that there is a case that such regulations ought to be subject to the affirmative procedure (rather than the negative procedure as currently provided).

32. **The Government considers that the power to make regulations under paragraph 6 of Schedule 21 is very limited in scope and context. It is designed to clarify issues around a landlord's consent for the duty holder ('A') to make an alteration. In fact this power, which already exists in the DDA, has not been used to date but the Government would like to retain it in case it does become necessary.**

33. **Schedule 21, paragraph 3 deals with the situation in which A is prepared to make an alteration to comply with his duty to make reasonable adjustments but cannot do so because he occupies the relevant premises under a tenancy and so needs to seek the consent of his landlord. The effect of this paragraph is that the tenancy is to be read as allowing A to make the alteration with the written consent of the landlord, for A to have to seek that consent in writing and for the landlord not to withhold his consent unreasonably and to be able to impose reasonable conditions upon that consent. Paragraph 4 allows the county**

court or sheriff to determine whether a refusal to give consent or a condition imposed was unreasonable.

34. **The regulation-making power is not about A's decision whether or not to comply with the reasonable adjustment duty but is limited to setting out whether the landlord withheld consent, whether such withholding was reasonable or not and whether any condition imposed was reasonable. As such, any regulations would therefore be fairly technical and be limited to the sort of interest the landlord would have as the owner of the property. Since the scope of any regulations would be so limited, the Government believes that the negative resolution procedure is the appropriate one in this case.**

35. **Where the power in paragraph 6(4) amends Schedule 21 itself, the affirmative resolution procedure would be applicable by virtue of clause 200(2).**

Schedule 22

36. The Committee noted that paragraph 5 of Schedule 22 excepts from the provisions of the Bill rules restricting employment by a public body to persons of particular birth, nationality, descent or residence; and that "public bodies" are to be defined by regulations under paragraph 5(3), subject to the negative procedure. The Committee considered that in view of the range of public bodies covered by the power, there is a case for the power to be subject to affirmative procedure.

37. **The Government notes the Committee's observations. The negative procedure for this power maintains the status quo which dates back to the Race Relations Act 1976, in respect of regulations restricting, for example, employment in the service of the Crown, employment by a prescribed public body, or the holding of a public office. The current arrangements have not hitherto been challenged.**

Clause 200 – hybrid procedure

38. The Committee noted that subsection (10) of clause 200 disapplies the hybrid instrument procedure for affirmative instruments under the Bill (powers subject to the affirmative procedure are listed in subsection (5). The Committee drew this to the attention of the House, so that the House can satisfy itself that the disapplication is appropriate for all relevant powers conferred by the Bill.

39. **The Government notes the Committee's comments. It has examined all powers in the Bill subject to (or which could be subject to) the affirmative procedure in order to satisfy itself that the hybrid procedure would not be applicable. It has identified a few provisions which could be exercised in such a way as to only affect one person – for example some provisions of clause 2 and 150 relating to, respectively, the socio-economic and public sector equality duties. But the Government does not consider the hybrid procedure should apply to the use of the powers in clauses 2 or 150, because they simply enable the adding of specific bodies that are to be subject to those duties.**

ANNEX

SUPPLEMENTARY TEXT ON CLAUSE 195 AS PREVIOUSLY PROVIDED TO THE COMMITTEE

Clause 195 – Age

Age is a protected characteristic under clause 5 of the Bill and discrimination is outlawed in the fields of services and public functions (except as regards young persons under the age of 18 (clause 27(1)(a)) and work in Parts 3 and 5 of the Bill). It is unique in that it is possible for direct age discrimination to be justified in the case of treatment that is a proportionate means of meeting a legitimate aim (see cl.13(2)). Clause 195 provides a power for a Minister of the Crown to make an order to amend the Act by making exceptions so that specified conduct relating to age or development of certain policies and arrangements by relation to age do not contravene the Act. The order may amend any part of the Act to which age discrimination applies except Part 5 (which relates to work) and Chapter 2 of Part 6 (which relates to further and higher education). Therefore, this exception-making power relates to fields other than work and further and higher education, such as the provision of goods, facilities and services and the performance of public functions. Under subsection (3), the power to make consequential amendments may apply to an enactment including the Equality Act 2006.

Subsection (3) enables the order to provide for a Minister of the Crown or the Treasury to issue guidance in respect of a requirement included in the exception. The actual requirement must be in the order, but matter filling out the detail of that requirement could be in guidance. It provides scope for a formal consultation in respect of the guidance and for consultation undertaken before commencement to qualify as consultation for the purposes of the power. Sub-section (4) enables guidance to be prepared and issued before the power is commenced and for that guidance to qualify as guidance required by the exception order. This is a common provision to facilitate a smooth introduction of new requirements.

This power to make exceptions is necessary because the application of the prohibition on age discrimination in non-employment fields is particularly complex and will require the careful delineation of exceptions that enable neutral or beneficial age discrimination, that is not covered by one of the general exceptions in Part 14 of the Bill, to continue. Examples of age-based differential treatment which it is anticipated will be covered by an exception are the reasonable use of age as a factor in financial services and age-based holidays. Detailed work on what these exceptions should be and how they should be framed is under way and emerging policy proposals were set out in the consultation paper ***Equality Bill: Making it work - ending age discrimination in services and public functions*** issued in June 2009. That paper also referred to the possibility of exceptions being required in the Health and Social Care fields. A feedback statement on the responses to the Consultation is being prepared and will be issued shortly.

The power to supplement the substantive exceptions with statutory guidance is again necessary because of the difficulty of ensuring that "good" different treatment is permitted while the "bad" must cease. This is particularly the case in relation to the financial services exception and the use of age related factors and the same ability will be necessary if and to the extent that it is decided eventually to use the power in relation to health and social care. The approach proposed here is similar to Schedule 3 paragraph 22 A as regards gender related factors. That replicates the approach used in the Sex Discrimination Act 1975 to give effect to the requirement in Article 5 of Gender Directive 2004/113/EC (implementing the principle of equal treatment between men and women in the access to and supply of goods and services) that where a

Member State, as the UK has done, took up the option to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in assessment of risk based on actuarial and statistical data there had to be in place a system for the collection and publication of accurate data relevant to the use of such actuarial factors[1]. The guidance power is intended to be used for instance to deal with the detail of how a requirement that data be made public is actually satisfied. Sub-section (5) is intended to allow for methods of meeting a requirement provided for by private sector bodies such as the Association of British Insurers to be recognised as meeting that requirement. It is intended for exceptions to come into effect at the same time as the substantive prohibition in relation to age is commenced.

This Henry VIII power is subject to the affirmative procedure because it enables the amendment of primary legislation, is broad in nature and the potential impact of making exceptions in a particular area is likely to be significant.

[1] See s.45 Sex Discrimination Act 1975 as amended by SI 2008/963