



HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

17th Report of Session 2022–23

Public Order 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

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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 hldelatedpowers@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.

Seventeenth Report

PUBLIC ORDER BILL

1. This Bill was passed by the House of Commons on 18 October. It was introduced in the House of Lords on 19 October and had its second reading on 1 November.
2. The purpose of the Bill, according to the Explanatory Notes, is “to strengthen police powers to tackle dangerous and highly disruptive tactics employed by a minority of protesters”.¹
3. Many of the measures in the Bill were originally included in amendments to the Police, Crime, Sentencing and Courts Bill that were tabled by the Government at Report stage in the House of Lords² but were rejected by the House on 17 January 2022.³ Those amendments included a delegated power that we drew to the attention of the House in our 13th Report of Session 2021–22.⁴ Clause 30 of this Bill contains a power that is virtually identical to that earlier power. In this Report, we draw the attention of the House to the power in clause 30, repeating the concerns we expressed in our earlier Report.
4. The Home Office has provided a Delegated Powers Memorandum (“the Memorandum”).⁵

Clause 30—power to issue guidance on the exercise of police functions in relation to serious disruption prevention orders

5. Part 2 of the Bill creates a new form of order (a serious disruption prevention order (“SDPO”)) that a court can make to impose restrictions on a person either (a) on their conviction for a “protest-related offence”,⁶ or (b) on application by the police.
6. It gives courts a very broad discretion to impose on a person “anything” by way of requirement or prohibition,⁷ including such things as—
 - a requirement to attend a particular place at particular times;
 - prohibitions on being in a particular place between particular times, being with particular persons or participating in particular activities;⁸ and
 - a requirement to submit to electronic monitoring of compliance with such requirements and prohibitions.⁹

1 See para 1 of the [Explanatory Notes](#) to the Bill.

2 See Amendment 10, inserting new sections 342L to 342X into the Sentencing Code.

3 HL Deb, 17 January 2017, [cols 1430–1476](#).

4 [13th Report](#), Session 2021–22 (HL Paper 107). Amendment 10, new section 342V of the Sentencing Code.

5 Home Office, [Delegated Powers Memorandum](#), dated 24 October 2022.

6 Defined in clause 33 as an offence which is directly related to a protest.

7 See clauses 19(6) and 20(5).

8 See clause 21(4).

9 See clauses 21(2)(c) and 23.

A person who is subject to an SDPO must keep the police informed of their home address and any other premises at which they regularly stay.¹⁰

7. Breach of a requirement under an SDPO or provision of false information to the police in purported compliance with an SDPO is an offence punishable by up to six months' imprisonment and/or an unlimited fine.¹¹ An SDPO can last for between one week and two years¹² but can be renewed.¹³

*SDPOs made on conviction*¹⁴

8. A court may impose an SDPO when sentencing a person for a “protest-related offence”¹⁵ if the court—
- is satisfied¹⁶ that the person has in the previous 5 years—
 - been convicted of another protest-related offence;
 - committed a protest-related breach of an injunction for which they were found in contempt of court;
 - caused or contributed to the commission by another person of such an offence or breach; or
 - carried out activities related to a protest that resulted in, or were likely to result in, serious disruption to two or more individuals or to an organisation, or caused or contributed to the carrying out by another person of such activities;
 - is satisfied¹⁷ that the current offence and the conduct mentioned above relate to different protests or took place on different days; and
 - considers it necessary to make the order—
 - to prevent the person from committing a protest-related offence or a protest-related breach of an injunction—or causing or contributing to the commission of such an offence or breach by another person;
 - to prevent the person from carrying out activities related to a protest that result in, or are likely to result in, serious disruption to two or more individuals or to an organisation—or causing or contributing to the carrying out of such activities by another person; or
 - to protect two or more individuals, or an organisation, from the risk of serious disruption arising from a protest-related offence, a protest-related breach of an injunction, or activities related to a protest.

10 See clause 24.

11 See clause 27.

12 See clause 25.

13 See clause 28.

14 See clause 19.

15 The court must be satisfied, on the balance of probabilities, that the offence is a “protest-related offence”.

16 On the balance of probabilities.

17 On the balance of probabilities.

*SDPOs made otherwise than on conviction*¹⁸

9. A magistrates' court may impose an SDPO on a person at any time—on application by the police—if the court—
- is satisfied¹⁹ that the person has, on at least two occasions in the previous 5 years—
 - been convicted of a protest-related offence or been found in contempt of court for a protest-related breach of an injunction— or caused or contributed to the commission by another person of such an offence or breach; or
 - carried out activities related to a protest that resulted in, or were likely to result in, serious disruption to two or more individuals or to an organisation— or caused or contributed to the carrying out by another person of such activities;
 - is satisfied²⁰ that the person's conduct in relation to each such occasion related to a different protest or took place on a different day; and
 - considers it necessary to make the order—
 - to prevent the person from committing a protest-related offence or a protest-related breach of an injunction - or causing or contributing to the commission of such an offence or breach by another person;
 - to prevent the person from carrying out activities related to a protest that result in, or are likely to result in, serious disruption to two or more individuals or to an organisation— or causing or contributing to the carrying out of such activities by another person; or
 - to protect two or more individuals, or an organisation, from the risk of serious disruption arising from a protest-related offence, a protest-related breach of an injunction, or activities related to a protest.
10. As we stated in our 13th Report of Session 2021–22, we consider that the SDPO regime places considerable power in the hands of the police—
- first, any decision of a court as to whether to make an SDPO—and as to the restrictions to be imposed under one—is likely to be heavily influenced by what the police say about whether the conditions for making one are met, the types of restrictions that should be imposed and the period for which restrictions should apply;
 - second, SDPOs can be applied in a broad range of circumstances: they are not limited to the prevention of criminal conduct but can be imposed for such vague, and rather open-ended, purposes as preventing people from “contributing to” the carrying out by others of activities that “are likely to result in” serious disruption to as few as two people; and

18 See clause 20.

19 On the balance of probabilities.

20 On the balance of probabilities.

- third, SDPOs can be imposed even on people who have not been convicted of any offence—it is sufficient for a magistrates’ court to be satisfied that a person has carried out activities related to a protest that resulted in, or were likely to result in, serious disruption to two or more people, or to an organisation (or caused or contributed to the carrying out of such activities by others). SDPOs are therefore a means by which people who have not been convicted of any offence can be made subject to restrictions on liberty backed by criminal penalties. We are surprised that all applications for SDPOs in respect of such people would be determined in the magistrates’ court,²¹ where it is unclear how likely it is that magistrates would reject police assessments made for the purposes of such applications.
11. Clause 30 allows the Secretary of State to issue guidance to chief officers of police and chief constables²² in relation to SDPOs, including, in particular, on—
 - the exercise of their functions in relation to SDPOs;
 - identifying persons in respect of whom it may be appropriate for applications for SDPOs to be made; and
 - providing assistance to prosecutors in connection with applications for SDPOs.
 12. A chief officer of police or a chief constable “must have regard to” such guidance.
 13. We have repeatedly observed²³ that, although a duty to have regard to statutory guidance does not imply a duty to follow it in any or all respects, where legislation requires that regard must be had to statutory guidance, in practice this means that those to whom the guidance applies will normally be expected to follow it—including by the courts—unless there are cogent reasons for not doing so.
 14. The power in clause 30 to issue guidance would therefore allow the Secretary of State to influence the exercise of the significant statutory functions of the police in relation to SDPOs—including the identification of persons in respect of whom applications for SDPOs should be made and the types of restrictions that should be imposed.
 15. The guidance is subject to negative procedure scrutiny.²⁴ It is not subject to any consultation requirement.
 16. The Government’s view, as stated in the Memorandum,²⁵ is that—
 - guidance should be subject to parliamentary procedure only in “exceptional circumstances”; and

21 Though a decision of that court may be appealed to the Crown Court (see clause 29(5)(a)).

22 The chief constable of the British Transport Police Force, the chief constable of the Civil Nuclear Constabulary and the chief constable of the Ministry of Defence Police.

23 For example, *37th Report*, Session 2019–21, para 8; *18th Report*, Session 2015–16 (HL Paper 83), para 13; *20th Report*, Session 2015–16 (HL Paper 90), paras 10–11; *21st Report*, Session 2015–16 (HL Paper 98), para 27; *22nd Report*, Session 2015–16 (HL Paper 102), para 19; *1st Report*, Session 2016–17 (HL Paper 13), para 38.

24 See clause 31.

25 See para 24 of the Memorandum.

- the guidance in question merits this “given the extensive parliamentary and public debate about the appropriate balance between the rights of protesters to exercise their freedom of speech and assembly and the rights of other persons and organisations to go about their business without serious disruption”.

This is unchanged from the view expressed by the Government in the Memorandum that accompanied the power to which we drew the attention of the House in our 13th Report of Session 2021–22.

17. In that Report, we expressed surprise and disappointment that the Memorandum failed to address the issue of whether the affirmative procedure might be appropriate, particularly as we had already drawn the attention of the House²⁶ to two examples in the Bill in question of guidance to which the police “must have regard” that we said were sufficiently significant to merit affirmative procedure scrutiny—
- first, we considered that guidance issued by the Secretary of State on the exercise of police functions in relation to serious violence reduction orders should be subject to the affirmative procedure because the exercise of those functions could prove to be highly controversial.²⁷ We indicated that such scrutiny would benefit the police by whom the functions would be exercised as well as the wider public. There are significant similarities between serious violence reduction orders and SDPOs, both being preventative court orders under which significant restrictions on liberty may be imposed, backed by criminal sanctions; and
 - second, we considered that proposed revisions to an existing code of practice on the exercise of statutory stop and search powers²⁸ were sufficiently significant to merit affirmative procedure scrutiny. We noted that the Act governing that code gives Ministers a choice as to whether to make revisions by affirmative procedure regulations or by simply laying them before Parliament²⁹ but we explained that we have previously endorsed the principle (proposed by the Government in 2003) that “significant amendments” to that code should be subject to the affirmative procedure.³⁰
18. In that Report, we also said that there are two respects in which the exercise of police functions in relation to SDPOs could prove to be even more controversial than the exercise of police functions in relation to serious violence reduction orders—

26 *6th Report*, Session 2021–22 (HL Paper 65).

27 See paras 19, 23 and 24; *6th Report*, Session 2021–22 (HL Paper 65). Serious violence reduction orders (“SVROs”) are orders that a court can make in respect of an adult offender where it is satisfied that the offender—or an accomplice—had an offensive weapon with them when the offence was committed. A person who is subject to an SVRO must keep the police informed of their home address and any other premises at which they regularly stay. The police have powers to stop and search such a person for weapons without any requirement for reasonable suspicion that they are carrying a weapon. Breach of a requirement under an SVRO, provision of false information to the police in purported compliance with an SVRO or intentionally obstructing a constable exercising the stop and search power is an offence punishable with up to two years’ imprisonment.

28 To cover the power allowing the police to stop and search a person who is subject to a serious violence reduction order without any requirement for reasonable suspicion that they are carrying a weapon.

29 See section 67(7A) of the Police and Criminal Evidence Act 1984.

30 *6th Report*, Session 2021–22 (HL Paper 65), at paras 25 and 26.

- first, an SDPO—unlike a serious violence reduction order - can be imposed on a person *even if they have not been convicted of any offence*. The power to issue guidance therefore allows the Secretary of State to influence the making of assessments by the police on the basis of which people who have not been convicted of any offence may be made subject to restrictions on liberty backed by criminal penalties; and
- second, serious violence reduction orders can only be imposed to protect the public from the risk of harm involving weapons, or to prevent offenders from committing offences involving weapons, whereas SDPOs can be imposed for purposes that are, by comparison, much more open-ended—including the prevention of harm of a kind that is arguably of a much lower order (such as preventing people from “contributing to” the carrying out by others of activities that “are likely to result in” serious disruption to as few as two people).

We remain of that view.

19. In its response to our 13th Report of Session 2021–22,³¹ the Government stated that it had “decided that, exceptionally, the negative procedure should apply to the SDPO guidance ... despite the general run of precedents that ... point to such guidance not being subject to any parliamentary procedure”. It argued that “similar provision ... to issue guidance” can be found in “many” statutory regimes under which orders “can impose restrictions on liberty, backed by criminal sanctions”,³² and it listed 16 “examples”.
20. These points are repeated in the Memorandum. However, of the “examples” given—
 - 10 are not comparable as they do not require anyone to “have regard to” the guidance;³³
 - a further 2 concern guidance that has a much narrower focus (as to “the effect” of statutory provisions);³⁴
 - another relates to functions (exercisable by a constable) that appear to be much more limited;³⁵
 - 4 concern guidance to which a requirement to consult applies;³⁶ and
 - the most recent one we reported to the House.³⁷
21. In addition, the “examples” relate to—
 - the prevention of harm that is much more specific—and which many would consider to be of a much higher order—than such things as

31 *15th Report*, Session 2021–22 (HL Paper 133).

32 See para 23 of the Memorandum.

33 The powers in sections 103J and 122J of the Sexual Offences Act 2003, sections 19, 41, 56, 73 and 91 of the Anti-Social Behaviour, Crime and Policing Act 2014, section 33 of the Modern Slavery Act 2015, section 12 of the Stalking Protection Act 2019 and section 341 of the Sentencing Act 2020.

34 The powers in section 5C of the Female Genital Mutilation Act 2003 and section 63Q of the Family Law Act 1996.

35 The power in section 31 of the Crime and Security Act 2010.

36 The powers in section 5C of the Female Genital Mutilation Act 2003, section 47 of the Policing and Crime Act 2009, section 31 of the Crime and Security Act 2010 and section 50 of the Domestic Abuse Act 2021.

37 The power in section 342J of the Sentencing Act 2020.

“contributing to” the carrying out by others of activities that are “likely to result in” serious disruption to as few as two people; and

- the exercise of functions that many would consider to be much less controversial because they do not give rise to the need to balance the rights of protesters to exercise their freedom of speech and assembly and the rights of other persons and organisations to go about their business without serious disruption.

22. **We consider that clause 30 contains an extreme example of a power to issue guidance on the exercise of statutory functions. It allows the Secretary of State to influence the exercise by the police of functions that could prove to be highly controversial—including identifying persons in respect of whom the courts may make serious disruption prevention orders under which people who have not been convicted of any offence—and are not considered to be at risk of offending—may nonetheless be made subject to restrictions on liberty backed by criminal penalties.**
23. **Accordingly, we consider that guidance under clause 30 is sufficiently significant to merit affirmative procedure scrutiny.**

APPENDIX 1: MEMBERS' INTERESTS

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