HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

35th Report of Session 2022–23

Drawn to the special attention of the house:

Draft Non-Crime Hate Incidents: Draft Code of Practice on the Recording and Retention of Personal Data 2023

Immigration (Electronic Travel Authorisations) (Consequential Amendment) Regulations and Statement of changes to the Immigration Rules

Mandatory Travel Concession (England) (Amendment) Regulations 2023

Sentencing Act 2020 (Magistrates' Court Sentencing Powers) (Amendment) Regulations 2023

Correspondence: Quality of the Department of Health and Social Care's Explanatory Memoranda

Includes information paragraphs on:

Draft Microchipping of Cats and Dogs (England) Regulations 2023

Amendments of the Law (Resolution of Silicon Valley Bank UK Limited) Order 2023

Prison and Young Offender Institution (Adjudication) (Amendment) Rules 2023

Ordered to be printed 28 March 2023 and published 30 March 2023

Published by the Authority of the House of Lords

HL Paper 177

Secondary Legislation Scrutiny Committee

The Committee's terms of reference, as agreed on 12 May 2022, are set out on the website but are, in summary:

To report on draft instruments published under paragraph 14 of Schedule 8 to the European Union (Withdrawal) Act 2018; to report on draft instruments and memoranda laid before Parliament under sections 8 and 23(1) of the European Union (Withdrawal) Act 2018 and section 31 of the European Union (Future Relationship) Act 2020.

And, to scrutinise –

(a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;

(b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in the terms of reference.

The Committee may also consider such other general matters relating to the effective scrutiny of secondary legislation as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

Lord De Mauley
Baroness Harris of Richmond
Lord Hunt of Wirral (Chair)
Lord Hutton of Furness
Baroness Lea of Lymm
Lord Powell of Bayswater
Baroness Randerson
Baroness Ritchie of Downpatrick
Lord Rowlands
Lord Russell of Liverpool
Lord Thomas of Cwmgiedd

Registered interests

Information about interests of Committee Members can be found in the last Appendix to this report.

Publications

The Committee's Reports are published on the internet at https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/

Committee Staff

The staff of the Committee are Christine Salmon Percival (Clerk), Philipp Mende (Adviser), Chris Smith (Adviser), Jane White (Adviser) and Glenn Chapman (Committee Operations Officer).

Further Information

Further information about the Committee is available at https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/

The progress of statutory instruments can be followed at https://statutoryinstruments.parliament.uk/

The National Archives publish statutory instruments with a plain English explanatory memorandum on the internet at http://www.legislation.gov.uk/uksi

Contacts

Any query about the Committee or its work, or opinions on any new item of secondary legislation, should be directed to the Clerk to the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW. The telephone number is 020 7219 8821 and the email address is hlseclegscrutiny@parliament.uk.

Thirty Fifth Report

DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft Non-Crime Hate Incidents: Draft Code of Practice on the Recording and Retention of Personal Data 2023

Date laid: 13 March 2023

Parliamentary procedure: affirmative

This instrument is a draft Code of Practice intended to assist the police in deciding whether a non-crime hate incident (NCHI) record needs to be made, and, if so, how the personal data of the person being complained about should be processed. NCHIs are 'hate incidents' linked to a victim's "particular characteristic" (race, religion, sexual orientation, disability or transgender identity) that are not criminal offences but could lead to more serious harm in the future. The Code's aims—to better protect freedom of speech, give Parliament oversight of the NCHI process and increase public confidence in the police's handling of NCHIs—are commendable. However, the consultation on the Code's contents was deficient in excluding interest groups from outside government. ***This means the Home Office may have missed opportunities to improve the Code. A wider consultation, with published feedback, would also have contributed to the Code's aim of increasing public confidence in the NCHI process. We encourage departments to consult widely when formulating policy to ensure that the detail of secondary legislation takes into account a range of views at an early stage.***

These Regulations are drawn to the special attention of the House on the grounds that there appear to be inadequacies in the consultation process which relates to the instrument.

Background

1. This instrument is a draft statutory Code of Practice intended to assist the police in deciding whether a non-crime hate incident (NCHI) record needs to be made, and, if so, how the personal data of the person being complained about should be processed. NCHIs are 'hate incidents' linked to a victim's "particular characteristic" (race, religion, sexual orientation, disability or transgender identity) that are not criminal offences but could lead to more serious harm in the future. The Code was legislated for in the Police, Crime, Sentencing and Courts Act 2022 ("the Act").

2. The Explanatory Memorandum (EM) to the Code says that the police regard NCHI recording as "essential" to identifying patterns of individual behaviour or local incident 'hotspots'.

Aims of the Code

3. The Act provided the Government with the power to produce, in the form of a statutory instrument,[1] a new Code relating to the recording and retention of personal details in NCHIs. The EM states that its aims include:

1 The first iteration of the Code is an affirmative instrument; any subsequent versions would be subject to the negative procedure.

- better protecting the "fundamental right to freedom of expression";
- giving Parliament oversight of NCHI recording, responding to concerns expressed during the passage of the Act; and
- increasing public confidence in the police's handling of NCHIs.

4. The Code is intended to improve on the current oversight system, which is non-statutory guidance published by the College of Policing.[2]

5. The Code also responds to a Court of Appeal judgment in December 2021 that the recording of NCHIs is legal provided there are robust safeguards in place so that the interference with freedom of expression is proportionate.[3] The Court found that the College of Policing's guidance at the time did not offer sufficient safeguards. The EM states that in response the College produced further interim guidance, which will be updated again to align with the Code once it has been approved by Parliament.

6. We welcome the introduction of a code with statutory status. The House may, however, wish to seek clarification on how the statutory code and the non-statutory guidance interrelate.

What does the Code do?

7. The EM states that the Code "introduces new safeguards and provides additional clarification for police officers and staff in order better to protect personal data and the fundamental right to freedom of expression".

8. In particular, the Code introduces a new 'Additional Threshold Test', under which personal data may only be retained if the NCHI presents a "real risk" of significant harm or a future criminal offence.

9. According to an Economic Note accompanying the draft Code, the police has suggested that the Code could result in fewer NCHIs being recorded. The Home Office did not quantify this effect and, indeed, told us that data on NCHIs is not collected centrally as it is "collated locally" by police forces to inform local policing decisions.

Consultation process

10. In general, a key part of the policy development process should be consulting with interested parties on the intended policy. This can have many benefits, including ensuring that appropriate safeguards are maintained for all interest groups and allowing input from those with experience and expertise in the field, helping to improve the legislation. The Government's own Consultation Principles state that departments should "consider the full range of people, business and voluntary bodies affected by the policy, and whether representative groups exist. Consider targeting specific groups if appropriate."[4]

11. On the draft Code, the EM states that the Home Office had not carried out a "formal consultation" but that it had engaged with "key policing

2 College of Policing, 'Protecting freedom of expression – updated guidance' (21 July 2022): https://www.college.police.uk/article/protecting-freedom-expression-updated-guidance [accessed 20 March 2023].

3 Court of Appeal, *Miller v. College of Policing*, EWCA Civ 1926, 20 December 2021.

4 Cabinet Office, 'Consultation Principles: Guidance': https://www.gov.uk/government/publications/consultation-principles-guidance [accessed 21 March 2023].

stakeholders", including the College of Policing, the National Police Chiefs' Council, the Metropolitan Police Service Commissioner and the Chief Constables for Greater Manchester and Lancashire. The Home Office did not publish any feedback from this process.

12. We asked the Home Office whether it had consulted with other interested parties—for example, free speech advocates, those representing victims or data protection interest groups—and, if not, why was this not considered appropriate. The Home Office replied:

> "The draft code will be subject to the affirmative procedure which will provide democratic scrutiny. The debates on the draft code will provide an opportunity for all Parliamentarians to provide their views on the code.
>
> The Government engaged with data protection experts in Government - including the Information Commissioner's Office - to ensure the code will protect personal data.
>
> The Government worked closely with the National Police Chiefs' Council, the College of Policing and senior police officers to ensure the code can be operationalised. This operational input has ensured that the code will balance the need to protect vulnerable individuals and communities with the need to better protect free speech.
>
> Given the democratic scrutiny that the code will be subject to and the comprehensive policing input received, the Government did not consult more widely."

13. While it is welcome that the draft Code will be debated by Parliament, this is not a substitute for in-depth consideration by a range of interested parties and those with expert knowledge at the policy formation stage. In particular, while Parliament can debate the Code and can (in theory) reject it, neither House can amend a statutory instrument if it identifies a possible improvement. This means that the only way the Code could be changed at this stage is by the Home Office laying a further statutory instrument.

14. The Code will be of interest to many groups external to government and the police; for example, advocates for freedom of speech, the interests of those with protected characteristics and those concerned with data protection. Such bodies will have hands-on experience of dealing with issues relating to NCHIs. **These groups may have been able to contribute to improving the Code**.

15. Further, one of the Code's aims is to increase public confidence in the police's handling of NCHIs. The interest groups described above are likely to be key to achieving this aim, but satisfying them would have been more straightforward had they been involved in the consultation process. **The lack of a wider consultation may, therefore, undermine the Code's expressed aim of increasing public confidence in the system.** Publishing the results of a consultation may also increase public confidence in a policy by demonstrating that stakeholders' views were taken into account. This might have been particularly helpful in the current climate of criticism of the police.

Conclusion

16. This draft Code of Practice on dealing with NCHIs has commendable aims and was presented with a clear EM and a helpful Economic Note.

17. We are not in a position to comment on the detail of the draft Code. We would, however, have taken reassurance if a wide range of interest groups had been consulted during the policymaking process. **That has not been the case**. The Home Office told us that parliamentary oversight meant that wider consultation was not necessary. **However, Parliament is not able to amend the Code and therefore the opportunity to improve the detail has passed**. Further, one of the stated aims of the Code is to increase public confidence in NCHI handling. **This is less likely to be achieved if those who are most interested feel excluded from the process and if the feedback from any consultation is not published.**

18. **We encourage departments to consult widely when formulating policy to ensure that the detail of secondary legislation takes into account a range of views at an early stage.**

Sentencing Act 2020 (Magistrates' Court Sentencing Powers) (Amendment) Regulations 2023 (SI 2023/298)

Date laid: 9 March 2023

Parliamentary procedure: negative

These Regulations reduce the maximum custodial sentence that a magistrate can impose from 12 months to six months. It is intended primarily to reduce short-term pressure on the prison system by slowing down the flow of people being sentenced. The reduction reverses an increase to the maximum sentence just ten months ago. Both changes appear driven not by evidence and analysis on what the optimum level is, but by the desire to counteract pressures elsewhere in the criminal justice system. While understandable when faced with such "acute" pressures, this is not an optimum way of making policy and fails to consider other potentially important factors. The Ministry of Justice should have completed a review of the May 2022 increase before changing the maximum sentence again. Such a review should take place as soon as possible and before considering any further changes to the maximum sentence.

These Regulations are drawn to the special attention of the House on the grounds that they are politically or legally important or give rise to issues of public policy likely to be of interest to the House.

Background

19. These Regulations reduce the maximum custodial sentence that a magistrate can impose in 'triable each-way offences' from 12 months to six months. It is primarily intended to reduce pressure on places in the prison system by slowing down the flow of people being sentenced.

20. All criminal cases are initially heard in a magistrates' court. The magistrate will decide, based on the seriousness of the offence, whether the case then continues in the magistrates' court (for the least serious) or is referred to the Crown Court (the most serious). For a middle category of 'triable either-way' (TEW) offences, the magistrate may decide either to refer the case to

the Crown Court or to retain it in the magistrates' court, although if the magistrate decides to retain the case the defendant can choose to be tried in the Crown Court instead. The Explanatory Memorandum (EM) for the Regulations states that the vast majority of criminal cases (over 95% in 2021) are completed in the magistrates' court.

21. The maximum custodial sentence that a magistrates' court can impose in a case with a single TEW offence is currently 12 months. This was increased from 6 months in May 2022, thereby allowing more cases to be heard in magistrates' courts by bringing cases with a maximum sentence of between six and 12 months into the scope of those courts. The stated reason for this change was to reduce pressures on the Crown Court, which, at the time, was suffering from an extensive backlog of cases following the COVID-19 pandemic (and, subsequently, also because of the strike by the Criminal Bar Association).

22. The May 2022 change did not alter the maximum sentence for any given offence. It simply changed which court might try cases expected to have a maximum sentence of between six and 12 months.

23. We wrote to Mike Freer MP, Parliamentary Under Secretary of State at the Ministry of Justice (MoJ), to ask for further information relating to the instrument. The full correspondence is enclosed at Appendix 1.

What is the rationale for the instrument?

24. The instrument changes magistrates' powers back to the pre-May 2022 position of being able to hand down a maximum custodial sentence of six months. The EM provides three reasons:

- The May 2022 change had a "reasonably rapid impact" in reducing the Crown Court backlog.
- "We are currently experiencing downstream pressures in the criminal justice system as, for example, manifested in Operation Safeguard and it is important that the government ensures a cohesive cross-system response to this growing pressure".
- It is "safest to temporarily reduce MSPs to six months so that the Crown Court retains power over decisions in respect of longer sentences".

25. We asked MoJ to expand on the second point, which as it stands contains little substance. MoJ said that "downstream pressures" refers to an increase in demand for prison places resulting from factors such as: the recruitment of an additional 20,000 police officers; tougher sentences; more recalls for serious offenders; an increased flow of cases through the courts as they work through the COVID-19 backlog; and the Criminal Bar Association strike, which led to growth in the remand (pre-trial custody) population.

26. MoJ said it had responded to these pressures in a number of ways. These include 'doubling up' cells where it is safe to do so, delaying non-essential maintenance work and installing 'rapid deployment' cells. In addition, MoJ has activated 'Operation Safeguard', an agreement with the National Police Chiefs Council that police cells can be temporarily used to hold prisoners.

27. Nevertheless, the latest figures suggest that the prison population is at 99% of usable operational capacity, despite the addition of nearly 3,600 places over the last year.[5] MoJ told us the situation was "acute".

What effect will the change have on numbers in custody and on bail?

28. The EM states that cases move through the magistrates' court system faster than through the Crown Court. MoJ told us that, as a result, the effect of the instrument will be to reduce the overall number of people in custody in the short-term. This is because, for those cases moved to the Crown Court, it will take longer for convicted criminals to enter post-trial custody. Mr Freer's letter estimated the effect would be 500 fewer adult prisoners by March 2025. We calculate that this represents around 0.6% of the overall prison population.[6]

29. Some of those waiting longer for trial will spend the time in pre-trial custody (remand), therefore not reducing the overall prison population. Those not on remand, however, will spend longer on bail. We asked the Minister whether there was a risk of increased reoffending if people were spending longer on bail. Mr Freer said that there was "no available data to assess the impact of this measure on reoffending for those waiting longer for their trial". **We believe that the impact of the Regulations on reoffending while on bail is a relevant factor that should have been assessed as part of the policymaking process.**

30. In the long run, the change in the Regulations is not expected to affect numbers in custody because it does not affect the number of cases entering the system or the sentences handed down.

Financial costs

31. The EM did not contain any information on possible financial costs and benefits of the measure. These might include costs arising from the additional time and expense of processing cases in the Crown Court rather than magistrates' courts, and any 'wasted' costs of training magistrates in relation to longer maximum sentences that they cannot now impose. We asked the Minister for further information on these points.

32. On the costs of the two court systems, Mr Freer said that the change does not give rise to any "direct financial pressure", because it "does not introduce new demand to the system, but simply transfers some cases to the Crown Court". We find this unconvincing: Crown Court trials involve a jury, and MoJ acknowledges that trials at Crown Court take longer to process, so it seems likely that they will cost more.

33. In relation to magistrates' training, Mr Freer said that MoJ's "intention, subject the findings of the planned review, is to reinstate the [12 month sentencing] powers in due course as long as this is supported by evidence. This would mean that the investment in training Magistrates will not have been wasted". This information reinforces our view that this change is not justified on its own merits. Whether the costs of training are wasted depends in part on the length of time before the 12 month limit is reinstated.

---

5 Ministry of Justice, 'Prison population figures: 2023' (data for 10 March 2023): https://www.gov.uk/government/publications/prison-population-figures-2023 [accessed 16 March 2023].

6 *Ibid.*

34. **We conclude that MoJ has not fully considered the possible financial costs of the change, reinforcing the view that the policy is being driven by other imperatives.**

Analysis of the May 2022 change

35. The May 2022 increase in the maximum sentence was brought in using powers introduced by the Judicial Review and Courts Act 2022. At Report stage of this Bill, Lord Ponsonby of Shulbrede (Labour) tabled an amendment that would have required regular reporting on the effects of the change. In response, the then Minister, Lord Wolfson of Tredegar, committed to considering what data could be published on the effect of extending magistrates' sentencing powers.[7] **We are not aware that any such data has been published**.

36. As part of our consideration of these Regulations, we asked MoJ whether it had analysed the effect of the May 2022 increase. MoJ said it has been "monitoring internal court and prison data, but there has not yet been an analysis of the wider impact". MoJ suggested that the change put forward in these Regulations was a "pause" that represented an opportunity for a review. We are surprised that the May 2022 increase is being reversed so quickly and *before* an analysis of its effects (including those set out in the previous section), rather than *after*. **The House may wish to enquire why this approach has been taken and why no useful data has been published since Report stage of the Judicial Review and Courts Act 2022.**

37. The EM states that the power being used in this instrument can be used again to extend sentencing powers back to 12 months in the future "should circumstances allow", and, as described above, Mr Freer's letter said that this was MoJ's "intention". **We call on MoJ to complete and publish its review of the effect of changing the maximum sentence before it exercises its powers again**.

Impact on victims and the wider public

38. We asked the Minister whether the Government had considered the impact of the move on victims; for example, because of the slower processing of cases in the Crown Court. Mr Freer said that while the change will "introduce some delay to trials in the Crown Court", the Government have "invested a significant amount of extra money in the Criminal Justice System to help improve waiting times for victims of crime and reduce the Crown Court backlog". Mr Freer also said that "the budget for victim and witness support services has increased". **While investment in the criminal justice system and victim support is welcome, this was presumably introduced for separate reasons. MoJ has not analysed whether the additional funds are adequate to address the impact of these Regulations on victims.**

Average sentencing

39. We asked the Minister whether MoJ had compared the average sentences awarded by magistrates and by the Crown Court in the types of cases being removed from magistrates' jurisdiction by this instrument. Mr Freer said that: "Our monitoring has so far not identified that Magistrates are giving sentences that are different to those that would have been handed down

7 HL Deb, 31 March 2022, cols 1747 and 1751–2. The amendment was not moved.

by the Crown Court for equivalent cases, though […] it is not possible to make like for like comparisons". Mr Freer said this was because "every case is different".

40. A comparison of average sentence length might be relevant to the choice of policy. Over a large number of cases, when case-specific factors should even out, it should be possible to conduct an analysis. **The House may wish to enquire on whether more research can be done in this area.**

Conclusion

41. These Regulations alter, for the second time in less than a year, the maximum sentence that can be imposed by a magistrates' court. Both changes appear to have been driven not by what the appropriate maximum should be, based on evidence and analysis, but by the desire to counteract pressures elsewhere in the criminal justice system. While understandable in times of "acute" pressure, **using the maximum sentence available to magistrates as a 'valve' that can be opened and closed in response to wider developments is not an optimum way of making policy as it fails to consider other potentially important factors.**

42. It is a notable feature of these Regulations that the policy is being introduced specifically to make the system in question (processing criminal cases) *less* efficient. **The maximum sentence should be determined by the overall outcomes for society and should be evidence-based**.

43. **MoJ should have conducted and published an analysis of the May 2022 change before reversing the policy. Such a review should now be completed as soon as possible, and no further changes to the maximum sentence should be implemented in the meantime.**

Mandatory Travel Concession (England) (Amendment) Regulations 2023 (SI 2023/303)

Date laid: 14 March 2023

Parliamentary procedure: negative

Under normal circumstances the rules on funding for Mandatory Travel Concessions (free bus passes) require Travel Concession Authorities (TCAs) to ensure that bus operators are "no better and no worse off" as a result of the reimbursement arrangements. That provision was suspended during the COVID-19 pandemic to allow payments above the actual usage level. This instrument further extends the waiver until the end of the 2023–24 financial year because, the Department for Transport (DfT) states, that if TCAs were to pay out in line with actual levels of concessionary travel, there would potentially be a substantial gap in bus funding within 2023–24. The Department adds that, during this extra extension of more favourable rates, a review of the concessionary reimbursement methodology is being conducted in light of the impact of COVID-19 on travel patterns.

We suggest that the review of the methodology is timely but should not be limited to the effect of pandemic on concessionary travel but also consider more widely the other factors that are discouraging travellers from using their concessionary passes. ***We are concerned that no Impact Assessment is available. Large subsidies are being paid to bus operators, and there needs to be***

greater transparency and accountability about the degree to which they still relate to temporary factors or to broader sectoral support.

The Regulations are drawn to the special attention of the House on the ground that they are politically or legally important and give rise to issues of public policy likely to be of interest to the House.

Background

44. Under normal circumstances the rules on funding Mandatory Travel Concessions (free bus passes for the elderly or people with a disability) in England require Travel Concession Authorities (TCAs[8]) to ensure that bus operators are "no better and no worse off" as a result of the reimbursement arrangements. That provision was suspended during the COVID-19 pandemic to allow payments above the actual usage level to keep services running. Last year the pandemic subsidy was due to be reduced by 5% every two months to ease bus companies back into the normal arrangements[9] with the intention of returning to the normal "no better, no worse" compensation levels on 5 April 2023. This instrument extends the TCAs' permission to make higher level payments, if they wish, for a further 12 months.

Lack of evidence to support further extension

45. The Explanatory Memorandum (EM) provided gives very little information about the degree to which the extra scheme flexibility has been used, or about how much money above standard reimbursement costs has been paid out to bus operators under the previous statutory instruments. There is no Impact Assessment or any projection given of how many TCAs might continue to use this capacity.

46. In additional information set out in Appendix 2, the Department for Transport (DfT) states that this instrument further extends the waiver until the end of the 2023–24 financial year because, if TCAs were to pay out in line with actual levels of concessionary travel, there would potentially be a substantial gap in bus funding, as concessionary patronage provides around 20-25% of bus operator revenues. In the EM, the Department states that during this extra extension of more favourable rates a review of the concessionary reimbursement methodology is being conducted in light of the impact of COVID-19 on travel patterns.

47. The health and social benefits to the elderly and people with a disability from having free access to travel are well known. The research already available, described in DfT's response, indicates that it is unclear whether concessionary patronage being only around 60% of pre-pandemic levels is due to post-pandemic concerns or due to other factors such as bus services' unreliability and strike action. Various measures are proposed to improve take up.

Costs

48. The section on impact in the EM states that there "will not necessarily be any direct impact on public finances. This removes a legislative barrier to reimbursing operators at a rate greater than patronage, rather than

8 TCAs: County Councils, Unitary Authorities, Passenger Transport Executives and London Boroughs, Mayoral Combined Authorities.

9 Explanatory Memorandum to the Mandatory Travel Concession (England) (Amendment) Regulations 2022 (SI 2022/284).

requiring them to do so." **While the instrument is permissive, we were disappointed that the House was given no indicative figures in the EM to assess the scale of the scheme or the potential effect of the extension.** The additional information indicated that the net reimbursement paid in 2021–22 by English local authorities was £915 million, when a similar instrument was in place. The funds for that payment are provided by the Department of Levelling Up, Housing and Communities' Settlement Funding Assessment, and are therefore funded by taxation.

49. DfT has also told us that the 2021–22 reimbursement was around 95% of pre-pandemic levels in cash terms (2019–20), despite concessionary patronage being only around 60% of pre-pandemic levels. In the EM the Department comments that "TCAs complying with DfT's ask to pay out at a rate higher than due, arguably leaves operators financially better off as a result of providing the concession." **In which case we are surprised that no formal Impact Assessment is provided, since this appears to represent a benefit to private bus companies.**

Conclusion

50. Although DfT's proposed review of the methodology is timely, it should not, in our view, be limited to the effect of the pandemic on concessionary travel but also consider more widely the other factors that are discouraging travellers from using their concessionary passes.

51. This instrument continues the suspension of the normal rule that operators should be "financially no better and no worse off as a result of providing a concession", but we are concerned that the subsidy may currently be going beyond that rule: the Department has provided no financial information to explain the position. The House may wish to press the Minister to provide an Impact Assessment that sets out both the amount above reimbursement for actual concessionary usage that has been paid out in the pandemic period and also estimates the anticipated expenditure for the next 12 months above the "no better, no worse off" position.

52. The EM states that the continued payments are needed at pre-COVID-19 levels to support the bus sector–"if all TCAs paid out in line with actual levels, this would likely result in service cuts in 2023–24 which goes against the ambitions set out in the National Bus Strategy". We note from the supplementary information in Appendix 2 that other funds are also being used to support bus companies and we are unclear how the funds are allocated.[10] **Large subsidies are being paid to bus operators and there needs to be greater transparency and accountability about the degree to which they still relate to temporary factors or to broader sectoral support.**

10 See also House of Lords Library, 'Transport investment: Bus and rail': https://lordslibrary.parliament.uk/transport-investment-bus-and-rail/ [accessed 29 March 2023].

Statement of Changes to the Immigration Rules (HC 1160) and Immigration (Electronic Travel Authorisations) (Consequential Amendment) Regulations 2023 (SI 2023/305)

Dates laid: 9 and 10 March 2023 respectively

Parliamentary procedure: negative

These instruments introduce the Electronic Travel Authorisation (ETA) scheme, under which all non-British or Irish passengers visiting or transiting through the UK who do not currently need a visa will be required to obtain permission in advance and submit biometric information. The instruments were submitted without an Impact Assessment (IA) or an explanation for its absence. While the Home Office subsequently provided reasons, that should not have prevented publication of at least some impact information, which would have been helpful in scrutinising the instrument.

Those who would be subject to an ETA for visiting the UK will need one for a journey from Ireland to Northern Ireland; however, there will be no border checks. This gives rise to questions about the impact of the ETA scheme on travel from Ireland to Northern Ireland via the land border, and potentially about onward travel from Northern Ireland to the rest of the UK.

These Regulations are drawn to the special attention of the House on the grounds that they are politically or legally important or give rise to issues of public policy likely to be of interest to the House, and that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation.

Background

53. Amongst the policies in the Statement of Changes to the Immigration Rules ("the Statement") are measures to introduce the Electronic Travel Authorisation (ETA) scheme, as legislated for in the Nationality and Borders Act 2022. Under ETA, all passengers visiting or transiting through the UK who do not currently need a visa, except British and Irish citizens, will be required to obtain permission in advance. The Government state that ETA will close a current "gap" in advance permissions and "enhance the Government's ability to screen arrivals and prevent the travel of those who pose a threat to the UK". ETA has similarities to the EU's European Travel Information and Authorization System.[11]

54. ETA will be introduced on a phased basis, initially applying to visitors from Qatar travelling to the UK on or after 15 November 2023 and subsequently being expanded to further countries. The Statement sets out details such as: who is required to obtain an ETA; the conditions for an ETA to be granted, refused or cancelled; how long an ETA will be valid for; and the process for making an application.

55. SI 2023/305 deals with a particular aspect of ETA: making it a legal requirement for applicants to submit biometric information (initially a facial photograph and, in the future, fingerprints) as part of their application. The Explanatory Memorandum (EM) states that having biometric information

11 European Union, 'New requirements to travel to Europe': https://travel-europe.europa.eu/etias_en [accessed 28 March 2023].

within ETA will ensure "appropriate levels of identity assurance on foreign nationals who are subject to immigration control".

Lack of Impact Assessments

56. In the EM for the two instruments, the Home Office states that a full Impact Assessment (IA) had been produced but was not being published. **The Committee believes it is a fundamental principle of transparency and accountability that any information, including any IA, that was relied upon to formulate policy should be published alongside the instrument**. We have set out our thoughts on this subject in more detail in a recent report on IAs.[12]

57. Our initial questions to the Home Office did not elicit any further information on the IA or the reasons for its non-publication. We therefore wrote to the Rt Hon. Robert Jenrick MP, Minister of State for Immigration at the Home Office, requesting that Home Office either publish the IA or provide reasons for not doing so. We received a reply from the Lords Minister at the Home Office, Lord Murray of Blidworth. The full correspondence is enclosed at Appendix 3.

58. Lord Murray's reply stated:

> "I can confirm that the Home Office will publish the ETA IA in due course, once the exact fee for an ETA has been agreed. The Home Office is in the midst of agreeing the final fee with HM Treasury and other government departments. I am sure that you will agree it would be far more beneficial to publish an IA which reflects the final policy and its impacts."

59. It would have been helpful if the original EM had provided this rationale. We agree that the level of the fees will be an important factor in determining the impact of the ETA; for example, on the number of people choosing to travel to the UK.

60. However, it would also have been possible to publish the IA as it exists in its current form. This is likely to inform the discussion of fees. In any case, the IA is likely to contain wider information not just relevant to, or affected by, fees. Such information is important for assessing the effect of the instrument and no rationale has been given for not publishing it. **The EM could and should have provided, at the very least, summary impact information to inform the scrutiny process.**

61. **We have asked the responsible Minister, Rt Hon Robert Jenrick MP, to provide further evidence on the Home Office's approach to this instrument, and its wider processes in relation to statutory instruments.**

ETA at the Ireland/Northern Ireland border

62. We also asked the Home Office about whether the ETA will act as a deterrent to travel and tourism from Ireland to Northern Ireland via the land border, for those subject to ETA (for example, tourists initially arriving in Ireland). The Home Office stated that:

12 Secondary Legislation Scrutiny Committee, *Losing Impact: why the Government's impact assessment system is failing Parliament and the public* (12th Report, Session 2022–23, HL Paper 62).

> "The UK will not operate routine immigration controls on journeys from within the Common Travel Area (CTA), with no immigration controls whatsoever on the Ireland-Northern Ireland land border. However, individuals arriving in the UK must continue to enter in line with the UK's immigration framework, which will include the requirement to obtain an ETA when it is introduced, which includes tourists visiting Northern Ireland via Ireland."

63. The CTA allows British and Irish citizens to move freely between and reside in either jurisdiction.

64. We question the usefulness of a requirement to have an ETA for a journey that will be subject to no checks. We are also unclear about whether ETAs will be routinely checked when travelling from Northern Ireland to mainland UK. Potentially, these arrangements could undermine the policy intention of preventing the travel of those who pose a threat to the UK. **The House may wish to enquire about the likelihood and implications of a foreign national who is subject to the requirement to have an ETA being able to enter Northern Ireland, and subsequently mainland UK, without undergoing any immigration checks.**

Introduction of fingerprint testing

65. We asked the Home Office about the costs and the timetable for the introduction of the technology to implement fingerprint identification. Lord Murray's letter stated:

> "The provision of fingerprints will not be required initially until a suitable solution is found for them to be self-up-loaded by applicants. [The Impact Assessment] therefore does not provide specific information on the timetable and costs associated with introduction of the technology to implement fingerprint verification."

66. We question whether it is appropriate to introduce legislation enabling the use of fingerprint information before the relevant technology has been developed and before costs are known. We trust that further information on the costs and benefits of introducing fingerprint biometric requirements will be published in due course.

Conclusion

67. These instruments introduce the ETA scheme, under which all non-British or Irish passengers visiting or transiting through the UK who do not currently need a visa, will be required to obtain permission in advance and submit biometric information. The instruments were submitted without an IA or an explanation for its absence. **While the Home Office subsequently provided reasons, these should not have prevented publication of at least some impact information. Any information, including any IA, that was relied upon to formulate policy should be published alongside the instrument to help in assessing its effect**.

68. **Questions also remain about the impact of the ETA scheme on travel from Ireland to Northern Ireland via the land border, and potentially about onward travel from Northern Ireland to the rest of the UK.**

CORRESPONDENCE: QUALITY OF THE DEPARTMENT OF HEALTH AND SOCIAL CARE'S EXPLANATORY MEMORANDA

69. In recent weeks we have drawn the House's attention to omissions and errors in the explanation of several instruments from the Department of Health and Social Care (DHSC).[13]

70. The Explanatory Memorandum (EM) to one particular instrument, the Health and Social Care Act 2008 (Regulated Care Functions) Regulations 2023, had almost no useful information in it at all. The information we published on those Regulations in our 33rd Report[14] was almost wholly composed of information to help the House understand what the content and effects of that instrument were intended to be. That is the fundamental purpose of an EM, and we should not have to ask a series of supplementary questions to obtain basic information on the instrument's policy content and the Department's rationale for laying it.

71. We therefore wrote to the Department's Minister with responsibility for statutory instruments, Lord Markham CBE, to ask what DHSC is doing to ensure that the material in support of its secondary legislation consistently meets an acceptable standard. The correspondence is published in Appendix 4 of this Report. We are reassured by the Minister's plans to make improvements but will be monitoring the Department's instruments closely to see whether they are delivered.

13 See for example correspondence in our *30th Report* (Session 2022–23, HL Paper 152) on the *Health and Social Care Information Centre (Transfer of Functions, Abolition and Transitional Provisions) Regulations 2023, and the d*raft Health Education England (Transfer of Functions, Abolition and Transitional Provisions) Regulations 2023 in our *32nd Report* (Session 2022–23, HL Paper 163) .

14 *33rd Report* (Session 2022–23, HL Paper 167).

INSTRUMENTS OF INTEREST

Draft Microchipping of Cats and Dogs (England) Regulations 2023

72. This instrument proposes to extend to cats the compulsory microchipping requirement which has been in place for dogs in England since 2016. The draft Regulations would also combine the requirements for cats and dogs in a single instrument and revoke the Regulations[15] which introduced the current requirement for dogs in England. The new micro-chipping requirement for cats will come into force on 10 June 2024 but will not apply to feral cats. There will be a penalty of up to £500 for non-compliance.

73. The Department for Environment, Food and Rural Affairs says that a Post Implementation Review concluded that the compulsory microchipping of dogs had led to an increase in the number of stray and stolen animals being reunited with their keepers and a subsequent reduction in the costs for local authorities, animal rescues and shelters. There are currently 9 million cats in England of which around 75% are microchipped voluntarily. The Department says that without intervention, it is unlikely that this rate will increase to the same level as for dogs, of which around 90% are microchipped. There was strong public support for the introduction of compulsory microchipping of cats in a public consultation in 2021.[16]

Amendments of the Law (Resolution of Silicon Valley Bank UK Limited) Order 2023 (SI 2023/319)

74. This instrument made amendments to the law so that the transfer of shares from Silicon Valley Bank UK Limited (SVB UK) to HSBC UK was effective and executed in a way that "best meets the public interest". Due to the urgency and commercial sensitivity of the sales process, the instrument came into force before it was laid before Parliament.

75. The US operations of SVB were taken over by US regulators on 10 March 2023. On 13 March 2023, the Bank of England ("the Bank") exercised its power under the special resolution regime established in the Banking Act 2009 ("the Act") to transfer the shares of the ring-fenced subsidiary SVB UK to HSBC UK. The Bank said this would "stabilise SVB UK, ensuring the continuity of banking services, minimising disruption to the UK technology sector and supporting confidence in the financial system". [17]

76. The Act allows primary and secondary legislation to be modified, if necessary to facilitate the transaction. Changes made by the instrument included allowing HSBC to provide liquidity to SVB UK at below market rates, and enabling the regulators' powers to be used, and without prior consultation, in connection with the instrument used to effect the transfer.

77. HM Treasury told us that the Government have not provided any support, guarantees or other commitments to HSBC in connection with this transfer,

15 Microchipping of Dogs (England) Regulations 2015 (SI 2015/108).

16 Department for Environment, Food and Rural Affairs, 'Consultation outcome: Summary of responses and government response', (December 2021): https://www.gov.uk/government/consultations/cat-and-dog-microchipping-and-scanning-in-england/outcome/summary-of-responses-and-government-response [accessed 29 March 2023].

17 Bank of England, 'Statement on Silicon Valley Bank' (13 March 2023): https://www.bankofengland.co.uk/news/2023/march/statement-on-silicon-valley-bank [accessed 17 March 2023].

other than one additional relaxation of ring-fencing rules, and that the Government do not hold any stake in HSBC.

Prison and Young Offender Institution (Adjudication) (Amendment) Rules 2023 (SI 2023/321)

78. This instrument corrects a fault in the prisoner and young offender (YO) disciplinary system, whereby someone accused of committing an offence while in custody may have their case dismissed because the referral system between those who might hear the case does not operate as intended.

79. A disciplinary offence in custody is first heard by the Governor of the institution. Governors can impose a limited range of sanctions. If they believe the case may warrant more serious punishment—for example, days added to the time to serve in custody—the Governor must refer it to an Independent Adjudicator (IA), who will be a District Judge or Deputy District Judge. (The Governor can also refer the case to the police if the offence may warrant a criminal prosecution.) In referring to an IA, the Governor must provide a written justification. Prior to a 2022 Judicial Review (JR),[18] if the IA disagreed with the referral, they could return the case to the Governor. The effect of the JR, however, was that an IA cannot return a case if the IA believes the referral is insufficiently justified; instead, the IA must dismiss the case altogether. This instrument will restore the pre-JR position.

80. The Ministry of Justice (MoJ) told us that dismissals had "risen sharply" since the JR. MoJ said that in the third quarter of 2022, 303 of 1,041 concluded IA cases (29%) were dismissed, although these would also include cases with insufficient evidence and cases out of time.

18 High Court, Kane v. Independent Adjudicator and Secretary of State for Justice, EWHC 1376 (Admin), 7 June 2022.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Instruments subject to affirmative approval

Draft	Microchipping of Cats and Dogs (England) Regulations 2023
Draft	Register of Overseas Entities (Definition of Foreign Limited Partner, Protection and Rectification) Regulations 2023

Made instruments subject to affirmative approval

SI 2023/319	Amendments of the Law (Resolution of Silicon Valley Bank UK Limited) Order 2023

Draft instruments subject to annulment

Draft	Modifications to the Standard Conditions of Electricity and Gas Supply Licences, the Smart Energy Code and the Conditions of the Smart Meter Communication Licences (Smart Meters No.[1] of 2023)

Instruments subject to annulment

SI 2023/296	Copyright and Performances (Application to Other Countries) (Amendment) Order 2023
SI 2023/308	Social Security (Contributions) (Amendment No. 2) Regulations 2023
SI 2023/309	Social Security (Contributions) (Amendment No. 3) Regulations 2023
SI 2023/315	Building Safety (Registration of Higher-Risk Buildings and Review of Decisions) (England) Regulations 2023
SI 2023/318[19]	Employment Rights (Increase of Limits) Order 2023
SI 2023/321	Prison and Young Offender Institution (Adjudication) (Amendment) Rules 2023
SI 2023/323	Armed Forces and Reserve Forces (Compensation Scheme) (Amendment) Order 2023
SI 2023/327	Tribunal Procedure (Amendment) Rules 2023
SI 2023/330	Social Security (Contributions) (Re-rating) Consequential Amendment Regulations 2023
SI 2023/331	Removal, Storage and Disposal of Motor Vehicles (Amendment) Regulations 2023
SI 2023/332	Personal Injuries (Civilians) Scheme (Amendment) Order 2023

19 This statutory instrument was subsequently found to have been sent to us by the Department in error. It is not subject to parliamentary procedure and therefore should not have been considered.

SI 2023/334	Food Additives, Food Flavourings and Novel Foods (Authorisations) (England) Regulations 2023
SI 2023/336	Ozone Depleting Substances (Grant of Halon Derogations) Regulations 2023
SI 2023/340	Social Security Benefits Up-rating Regulations 2023

APPENDIX 1: SENTENCING ACT 2020 (MAGISTRATES' COURT SENTENCING POWERS) (AMENDMENT) REGULATIONS 2023 (SI 2023/298)

Letter from The Rt Hon. the Lord Hunt of Wirral MBE, Chair of the Secondary Legislation Scrutiny Committee, to Mike Freer MP, Minister for Courts, Legal Services and International, Ministry of Justice

The Secondary Legislation Scrutiny Committee gave initial consideration to these Regulations at its meeting yesterday. The Committee is concerned that the Regulations reverse a policy change implemented in May 2022 without good evidence on the merits of the change, except to relieve pressure elsewhere in the criminal justice system.

Supplementary information from the Ministry of Justice (MoJ) explained that the MoJ has "been monitoring internal court and prison data, but there has not yet been an analysis of the wider impact—hence the pause to review now". We are surprised that the May 2022 increase is being reversed so quickly and *before* an analysis of its broad effects, rather than *after*.

The question of evidence to support the policy change also arose at Report stage of the Judicial Review and Courts Act 2022, which provided the power being used in these Regulations.[20] In the debate, the then Minister, Lord Wolfson of Tredegar, said that he had "heard" the request for "proper, in-depth analysis" of the effect of changes in the maximum sentence and would "consider what data we can publish that would go towards meeting that point".

I would, therefore, be grateful if you could please provide the Committee with all the analysis that has been undertaken and any other information on which you relied when deciding to reduce magistrates' capacity. This should cover (but may not be limited to) the following areas, in which Members of the Committee were specifically interested:

- The court and prison data referred to above.
- A comparison of the average sentences awarded by magistrates and by the Crown Court in the types of cases being removed from magistrates' jurisdiction by this instrument.
- The monetary costs and benefits of the change. Members noted that costs might include the additional expense of processing cases in the Crown Court rather than magistrates' courts, and the "wasted" costs of training magistrates in relation to longer maximum sentences that they cannot now impose.
- The impacts on victims of slowing down the trials of those charged with crimes.
- The impact on reoffending for those who will have to wait longer for their trial.

22 March 2023

20 HL Deb, 31 March 2022, cols 1747 and 1751–2.

Letter from Mike Freer MP to Lord Hunt of Wirral

Thank you for your letter of 22 March 2023, regarding your Committee's initial consideration of these Regulations.

The Government has always been clear that we needed flexibility to vary Magistrates' Court Sentencing Powers (MSPs), and that is why it took the power to do so last year in the Judicial Review and Courts Act 2022. I would like to reassure the Committee that this change is no reflection on the magistracy or their use of the extended powers: the Government places immense value on the continuing and outstanding contribution of Magistrates' to the justice system.

As the Committee will know, we are currently experiencing downstream pressures in the criminal justice system as manifested in Operation Safeguard and it is important that the government ensures a cohesive cross-system response to this growing pressure. Whilst increased MSPs is not the only factor behind this pressure and the data on the impact of MSPs is still limited, it is safest to temporarily reduce MSPs to 6 months so that the Crown Court retains power over decisions in respect of longer sentences, particularly given the Crown Court backlog is again recovering following the impact of the Criminal Bar Association strike action.

It is nearly one year on from the implementation of the extended powers, and this pause gives us time to properly review the measure, taking into account how it is being used and assessing relevant data across the criminal justice system, with a view to reinstating the powers in due course should this be supported by the evidence.

I am happy to provide the Committee with the relevant analysis that has been undertaken by my Department, and other information we have relied on in our decision to reduce (MSPs) as requested in your correspondence.

Court and Prison data

In the short term, this change will reduce the number of people in custody. Our provisional estimates indicate that by reducing MSPs from March 2023 the overall adult male prison population could reduce by up to 500 prisoners by March 2025. However, over the longer term, the overall number of people in custody will be the same as it would have been, absent this change coming into force, given this change delays defendants entering prison. This estimate is based on reversing the original assumptions we made when calculating the impact increasing MSPs would have on freeing up sitting days in the crown court at the time it was introduced.

Since extending MSPs in May 2022 we have been monitoring data relating to the risks highlighted in the Impact Assessment (IA) in order to identify any unsustainable impacts from the change, including increases in election and appeal rates and prison impacts:

- The number of elections for Triable Either Way offences at Crown Court receipt has largely remained stable from May 22 (17.3%) to Sept 22 (17.4%) since increased MSPs were introduced but mainly for offences not likely to be impacted by the MSP change - for example, offences that usually attract over a 12-month sentence. This compares to 17% in May 2021.
- The number of appeals to the Crown Court have remained consistent since the introduction of increased MSPs and therefore are not a cause for concern.

- We expected an increase in 6-12 months custodial sentence disposals from the Magistrates' court since commencement last May, as modelled in the Impact Assessment. However, this growth has been faster than our internal modelling initially anticipated. This may be due to an under-estimation of the impact of faster timescales at Magistrates' court, but could also be due to the disruptive action by the Criminal Bar Association last year.
- In relation to sentencing trends, our monitoring has so far not identified that Magistrates are giving sentences that are different to those that would have been handed down by the Crown Court for equivalent cases, though as noted below, it is not possible to make like for like comparisons.

A comparison of the average sentences awarded by Magistrates and by the Crown Court in the types of cases being removed from Magistrates' jurisdiction by this instrument

It is not possible to make like-for-like comparisons as every case is different and there is no accurate counterfactual–each sentence will be the result of a consideration of the facts of each case. Furthermore, given the number of variables and external factors at play, including the action by the Criminal Bar Association, it is not currently possible to draw clear conclusions on the specific impact of MSPs on sentencing behaviour. We are, however, aiming to include an analysis of whether there has been a change in sentencing behaviours as part of our planned review of the measure, if feasible.

The monetary costs and benefits of this change. Members noted that costs might include the additional expense of processing cases in the Crown Court rather than Magistrates' courts, and the 'wasted' costs of training Magistrates in relation to longer maximum sentences that they cannot now impose

Our intention, subject the findings of the planned review, is to reinstate the powers in due course as long as this is supported by evidence. This would mean that the investment in training Magistrates will not have been wasted.

On wider system costs, this change introduces no new demand to the system, but will see the transfer of some work, mainly shorter sentencing hearings, to the Crown Court–therefore there is no direct financial pressure created.

The impacts on victims slowing down the trials of those charged with crimes

It is anticipated that reducing MSPs will introduce some delay to trials in the Crown Court through the predicted increase in the number of outstanding cases. It is worth noting however that trials for cases expected to attract a custodial sentence of up to 18 months should still be retained in the Magistrates' courts in line with the 'Allocation to the Crown Court Guidance and Good Practice'.

We have invested a significant amount of extra money in the Criminal Justice System to help improve waiting times for victims of crime and reduce the Crown Court backlog. This includes recruiting up to 1,000 judges in 2022/23 across all jurisdictions and removing the limit on sitting days in the Crown Court for the second financial year in a row, to enable us to sit at maximum capacity over the coming years.

We also recently announced the continued use of 24 Nightingale courtrooms into the 2023/24 financial year and have opened two permanent 'super courtrooms' in Manchester and Loughborough, allowing up to an extra 250 cases a year to be heard across England and Wales.

We are seeking to ensure that victims can access the support they need by quadrupling funding for victim and witness support services by 2024/25, up from £41m in 2009/10. We have committed £154m of this budget per annum on a multi-year basis for this spending review period (2022/23 to 2024/25 inclusive). This will allow victim support services to build capacity and strengthen the resilience of services.

The impact on reoffending for those who will have to wait longer for their trial

There is no available data to assess the impact of this measure on reoffending for those waiting longer for their trial. As noted above, cases expected to attract a custodial sentence of up to 18 months should still be retained in the Magistrates' court for trial if the defendant does not elect. We do not envisage that this change will lead to more suspects released on bail pending trial. It is for the courts to decide, on a case-by-case basis, whether a defendant presents such a bail risk, including for the protection of the public, as to warrant custody before they have been convicted. Varying MSPs does not change this process.

27 March 2023

APPENDIX 2: MANDATORY TRAVEL CONCESSION (ENGLAND) (AMENDMENT) REGULATIONS 2023 (SI 2023/303)

Q1: What is the plan/timetable for the "wholesale review"? Will it be published?

A1: The plan for the review of the English National Concessionary Travel Scheme was set out in the National Bus Strategy. The Department plan to undertake this review in 2023, with an updated concessionary reimbursement guidance and calculator available for the 2024/25 financial year.

This means that updated guidance would be expected to be available by the end of November 2023 in order to allow authorities to publish schemes for 2024/25.

These changes to the guidance and calculator, based on the review, will be the most significant updates made since 2010/11 and will better reflect both a post-pandemic travelling environment, as well as changes to ticketing and technology over the intervening period.

The DfT publishes the reimbursement guidance[21] and calculator[22] annually on GOV.UK in order to guide operators and Local Authorities in calculating reimbursement and any changes to the guidance and calculator resulting from the review will also be published on GOV.UK.

This instrument extends the current suspension of the requirement for Travel Concession Authorities ('TCAs') to ensure that operators are not better off as a result of concessionary reimbursement arrangements. The extension is to last until the end of the 2023/24 financial year, whilst a review of the concessionary reimbursement methodology is conducted in light of the impact of COVID-19 on travel patterns.

Q2: As this is effectively an additional subsidy to private bus companies, please provide rather more explanation about the costs and outcome of the previous SI 2022/284 and why it was not sufficient.

A2: The 2022/23 Financial Year ends on 5th April 2023, so final expenditure on concessionary travel will not be available until the final revenue outturn data is collected and collated by DLUHC from Local Authorities later in 2023.

In the 2021/22 Financial Year, the net current expenditure incurred by English Local Authorities (including London) was £915m[23] on concessionary travel. This compares to £980m in 2018/19. This is a reduction of 7%, as compared to a reduction of 42% in patronage (951m to 554m using data from DfT BUS05ai).

From information we have received from bus operators, as well as Local Authorities in the Bus Network Review in June 2022, we believe that in 2022/23 most TCAs were continuing to choose to pay at rates greater than those justified by actual patronage.

21 Department for Transport, 'How to reimburse bus operators for concessionary travel' [December 2022]: https://www.gov.uk/government/publications/guidance-on-reimbursing-bus-operators-for-concessionary-travel [accessed 29 March 2023].

22 Department for Transport, 'Calculate your concessionary bus travel reimbursement' [December 2022]: https://www.gov.uk/government/publications/concessionary-bus-travel-reimbursement-calculator [accessed 29 March 2023].

23 Department for Transport, 'Government support for the bus industry and concessionary travel at current prices' (January 2023) (England): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1132744/bus05i.ods [accessed 29 March 2023].

Q3: The Regulations are permissive, so what is the projected spend for 2023–24 and how many TCAs are expected to use the facility?

A3: Due to the permissive nature of the instrument, the exact spend for concessionary bus travel for the 2023/24 Financial Year is uncertain. The instrument allows TCAs to pay out at pre-covid rates but does not require them to do so. The exact extent to which TCAs will take advantage of the instrument is not known. Due to the 2023/24 financial year having not yet started, some TCAs may still be in the process of negotiation with bus operators. The estimated range for concessionary bus reimbursement for England outside of London is £642m - £764m, with the former figure representing the estimated rate were TCAs to pay out at forecast actuals, and the latter were they to pay out at 2019/20 "cash" levels.

While it is not possible to determine exactly where within this range reimbursement will fall, we know uptake has been good historically. Notably the level of reimbursement was £723m for 2021/22 (England outside of London), when a similar instrument was in place. This was higher than the level of reimbursement that would have been granted had TCAs reimbursed at actual rates of patronage for the year, but lower than the pre-covid level of reimbursement.

To summarise in another way, reimbursement in the 2021/22 financial year was around 95% of pre-covid levels in cash terms (2019/20), despite concessionary patronage being only around 60% of pre-covid levels. However, the behaviour of TCAs may not remain consistent across years; the high level of reimbursement compared to patronage for 2021/22 does not necessarily mean that TCAs will have continued this in 2022/23, or into 2023/24 (but anecdotal evidence suggests TCAs have reimbursed at higher levels than actuals for 22/23)

Q4: Will the rolling 5% bimonthly reduction continue?

A4: The rolling 5% bimonthly reduction referenced relates to the historic transition plan guidance issued by the Department for Transport in the form of the 'Recovery Strategy' and 'Alternative Recovery Strategy' in October 2021 and early 2022 respectively. The strategies set out a plan of gradually reducing pre-Covid concessionary payments by 5% every other month back to reimbursement in line with patronage levels which Travel Concession Authorities could opt to follow.

However, as concessionary patronage has not recovered as quickly as anticipated (which we are working with industry to improve), the current request from the Department for Transport to Travel Concession Authorities is that they continue to pay concessionary fare payments to operators at pre-Covid levels, until the end of the 2023/24 financial year or to retain the funding within the wider supported bus sector. This was set out in a letter from Baroness Vere to Local Transport Authorities in August 2022.

However, it is ultimately the choice of Travel Concession Authorities as to the most appropriate method concessionary reimbursement for their local area, whether that's to continue to pay out at pre-Covid levels, to follow a transitional strategy or another approach. This statutory instrument would simply enable Travel Concession Authorities the option to reimburse operators for carrying concessionary passengers at a rate higher than due, should they wish to support critical bus routes

Q5: The 2011 Regulations stated that operators should be "financially no better and no worse off as a result of providing a concession" when does the DfT intend to return to that policy?

A5: The DfT intends to return to the principle of "No Better and No Worse" after the expiry of this Statutory Instrument in April 2024.

Q6: SI 2022/284 was supposed to return the position to normal incrementally avoiding a "cliff edge" - why did that not work?

A6: In 2022/23, there have been continued challenges with the recovery of elderly and disabled patronage to bus services. For the most recent full year of data (2021/22) from the Annual Bus Statistics, elderly/disabled journeys in England were around 60% of pre-covid levels (2018/19), but intel from the sector suggests that this has recovered further in 2022/23. This has not been unique to England, as there are similar patterns across the United Kingdom. Patronage return was also affected by bus availability and reliability issues in the summer of 2022 due to shortages of drivers and strike action.

Q7: How certain is DfT that usage will recover, as the elderly and disabled are the most vulnerable to COVID-19, they may continue to avoid crowds in confined spaces such as a bus?

A7: In a study conducted by Transport Focus[24] in July 2022, which explored the reasons why concessionary patronage recovery was lagging, those surveyed who were eligible for a concessionary bus pass but do not use buses set out a number of reasons for this. These included frequency and reliability of the bus network as well as fear of COVID-19 infection.

Only 18% of people using the bus once a month said they did not feel safe doing so, which was at a time when rates of Covid were higher than they are now (ONS Estimate[25] that 5.27% of England would test positive on 3rd July 2022 vs 2.36% for 3rd March 2023). Just under three quarters of those who do not use buses now, but used to, set out that they may return to bus travel in future, indicating that there is the potential for ridership to grow further.

As bus reliability, information and the availability of services are key aspects of encouraging a return to bus, the Department is undertaking a number of activities to promote and encourage bus travel that will encourage bus usage to recover. Through Bus Service Improvement Plans, DfT is funding 31 parts of England with £1bn in order to improve bus priority infrastructure, provide new bus services and make buses more frequent, more reliable, easier to understand and use and greener. These improvements will help encourage concessionary passholders, as well as commercial users, to return to buses. The DfT is also funding 12 initiatives to help tackle loneliness, some of which, such as that run by the Leeds Older Peoples Forum, aim to encourage older people to use transport, including buses.

In 2022, DfT surveyed Local Authorities as part of the network review process for the Bus Recovery Grant, including requesting information on marketing to encourage concessionary passholders to return. This confirmed that many

24 Transport Focus, 'Bus Concessionary Travel Survey' (June 2022): https://d3cez36w5wymxj.cloudfront.net/wp-content/uploads/2022/06/30133914/Bus-concessionary-travel-survey.pdf [accessed 29 March 2023].

25 Office for National Statistics, 'Coronavirus (COVID-19) latest insights: Infections': https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/conditionsanddiseases/articles/coronaviruscovid19latestinsights/infections [accessed 29 March 2023].

authorities were undertaking specific activities to encourage concessionary passholders to return and that it was a key priority in the recovery of bus services for operators and Local Authorities.

DfT will continue to promote bus use, particularly among holders of concessionary passes, and will work with Local Authorities and Operators to undertake a communications campaign on this subject in 2023.

Q8: "if all TCAs paid out in line with actual levels, this would likely result in service cuts in 2023/24 which goes against the ambitions set out in the National Bus Strategy" - how likely is this? What projections does DfT about likely cuts if this SI were not made?

A8: If TCAs were to pay out in line with actual levels, and concessionary patronage were not to increase within 2023/24, then there would be a potentially substantial gap in bus funding within 2023/24. As concessionary patronage provides around 20-25% of bus operator revenues, then any gap could be significant, and operators have informed DfT that concessionary travel represents the largest element of any funding gap in the 2023/24 Financial Year. It is likely that if authorities paid out at actual levels, operators would withdraw services which were previously viable and, if these services were to be maintained, they would require subsidy from Local Authorities. This may not be possible given other pressures on Local Authority finances.

The Bus Recovery Grant has been extended to the end of June 2023, partly mitigating this effect. This is because it aims to maintain services at a national level of at least 80% of 2019 levels. For the remaining 9 months of FY 2023/24, the impact of TCAs paying out at actual levels would depend on how much this differs to the level they have been paying out at in previous years.

As noted above, the level of reimbursement for Financial Year 2022/23 is not yet known, but bus operators have indicated TCAs were continuing to pay at rates greater than those justified by actual patronage and a number of authorities committed to this as part of 2022 Network Reviews. While there is an indication that TCAs on average are paying higher rates than actuals, due to the lack of published data for 2022/23 the extent of this is uncertain. Therefore, so too is the impact on service levels were TCAs to pay out at actuals in 2023/24.

However, even if there was relatively small percentage difference between pay-out in 2022/23 and 2023/24 and therefore only small service cuts in percentage terms at a national level, this would still represent a large number of services, particularly in rural areas where concessionary patronage is a higher proportion of journeys. If TCAs were able to pay out at significantly above actuals, this could save services and potentially even increase service levels from their current state.

21 March 2023

APPENDIX 3: STATEMENT OF CHANGES TO THE IMMIGRATION RULES (HC 1160) AND IMMIGRATION (ELECTRONIC TRAVEL AUTHORISATIONS) (CONSEQUENTIAL AMENDMENT) REGULATIONS 2023 (SI 2023/305)

Letter from The Rt Hon. the Lord Hunt of Wirral MBE, Chair of the Secondary Legislation Scrutiny Committee, to Rt Hon Robert Jenrick MP, Minister of State (Immigration), Home Office

I am writing in relation to the above two instruments, to which the Secondary Legislation Scrutiny Committee gave initial consideration at its meeting yesterday.

As you may be aware, our Advisers raised concerns with officials in your Department about the absence of an Impact Assessment (IA) for the Electronic Travel Authorisation (ETA) element of the Statement of Changes in Immigration Rules and its biometric elements (the subject of the second instrument above). Your officials told us that such an IA has been prepared but that you have decided not to publish it.

The Committee believes it is a fundamental principle of transparency and accountability that, in ordinary circumstances, any information, including IAs, that was relied upon to formulate policy should be published alongside the instrument. I would therefore be grateful if you could please either publish the assessment or provide a clear statement of reasons for not doing so. If you decline to publish, we would ask you please to provide a summary of the key points of the IA, together with an explanation of why it is important not to make the remainder public.

Members of the Committee were also interested in whether the IA covered the following areas; could I ask that you also refer to these in your response please:

- The possible reduction in travel and tourism as a result of the additional requirements prior to travel inherent in ETA: both at a UK level and, specifically, in relation to travel from the Republic of Ireland to Northern Ireland via the land border, for those subject to ETA.
- The costs and the timetable for the introduction of the technology to implement fingerprint identification.

22 March 2023

The Lord Murray of Blidworth, Parliamentary Under Secretary of State, Home Office to Lord Hunt of Wirral

Thank you for your letter to Minister Jenrick of 22 March regarding the publication of the Impact Assessment (IA) for the Electronic Travel Authorisation (ETA) Scheme and your further letter to myself on this matter. Please accept my sincere apologies for the slight delay in responding to your letter, nonetheless I hope my response enables the Committee to complete its work this week.

I can confirm that the Home Office will publish the ETA IA in due course, once the exact fee for an ETA has been agreed. The Home Office is in the midst of agreeing the final fee with HM Treasury and other government departments. I am sure that you will agree it would be far more beneficial to publish an IA which reflects the final policy and its impacts.

I can confirm that the IA will include analysis of the impact on demand for travel to the UK. The IA includes estimates of IT set up and processing costs needed to implement the full ETA scheme. This is an indicative range at this stage as implementation is still in development and the provision of fingerprints will not be required initially until a suitable solution is found for them to be self-up-loaded by applicants. It therefore does not provide specific information on the timetable and costs associated with introduction of the technology to implement fingerprint verification.

27 March 2023

APPENDIX 4: CORRESPONDENCE: QUALITY OF THE DEPARTMENT OF HEALTH AND SOCIAL CARE'S EXPLANATORY MEMORANDA

Letter from The Rt Hon. The Lord Hunt of Wirral MBE, Chair of the Secondary Legislation Scrutiny Committee, to Lord Markham, Parliamentary Under-Secretary of State, Department of Health and Social Care

I am disappointed to write to you again, so soon after the exchange published in our 30th Report. The Secondary Legislation Scrutiny .Committee has, however, drawn attention to another poor Explanatory Memorandum (EM) from your Department in our 32nd Report and to a particularly egregious example in this week's report, our 33rd.

My previous letter related to a factual error in the EM, in this latest instrument, the *Health and Social Care Act 2008 (Regulated Care Functions) Regulations 2023*, the issue was the absence of facts or indeed of any useful information. When we asked for supplementary material, it was provided immediately - so it would appear that the problem lay with the preparation and then the checking of the EM rather than the availability of the information.

We do occasionally receive good EMs from DHSC, but their quality is currently very erratic. So that we may understand better why your Department is having such difficulty in producing adequate EMs, I would be grateful if you could tell us the following:

- What quality assurance checks are made, and at what level of seniority, before an EM is authorised for laying?
- What training and supervision is given to officials when they draft their first EM?
- What training is given to the more senior official who signs at the end of the EM to "confirm that this Explanatory Memorandum meets the required standard"?
- What functions does your Department's Senior Responsible Official with responsibility for secondary legislation perform and what percentage of their job description is allocated to this role?
- What functions do you undertake as your Department's Minister with responsibility for secondary legislation, and what percentage of your "job description" does it occupy?

16 March 2023

Letter from Lord Markham to Lord Hunt of Wirral

Thank you for your letter dated 16th March 2023, regarding the quality of the Department's recent explanatory memorandums, specifically the Health and Social Care Act 2008 (Regulated Care Functions) Regulations 2023.

I take my obligations to Parliament extremely seriously and I appreciate the vital role which explanatory memorandums play in providing a clear explanation, both to Parliament and the public, about the impact of legislation.

We have recently begun a programme to make improvements across our secondary legislation work. As well as making a series of immediate short-term improvements, we are also embarking on an end-to-end review looking at how we can ensure clear senior accountability and build capability at all levels. Explanatory memorandums will be an important element of this programme and officials from my Department met the Adviser to the Secondary Legislation Scrutiny Committee last week to begin discussions on how we can work together to deliver it.

In response to your specific questions:

Quality assurance and training

First, you asked what quality assurance checks are made before an explanatory memorandum is authorised for laying, as well as what training and supervision are provided to officials drafting explanatory memorandums and the senior officials clearing them.

Our explanatory memorandums are drafted by officials using a template and guidance which are available on the Department's intranet. The explanatory memorandum is then reviewed by a senior leader within the relevant policy team, together with the drafting lawyer. After this, the senior leader is required to complete a check list to confirm that the explanatory memorandum is of satisfactory quality.

In response to your feedback, the Parliamentary Team in the Department will review the online guidance, working with your Committee's Adviser, to ensure it is as thorough and accessible as possible. We will also update it to add examples of best practice in explanatory memorandums, for example the Medicines (Products for Human Use) (Fees) (Amendment) Regulations 2023.

In addition, the Parliamentary Team will introduce a training programme for officials, including sessions on the drafting of explanatory memorandums. As well as drawing on expertise within the Department, this will also include external expertise, and we will work with the Adviser to the Secondary Legislation and Scrutiny Committee to run a session as part of this, to which all officials will be invited, including senior leaders.

Officials in the Department will also be running a programme of internal communications highlighting the importance of following correct parliamentary procedure, including key messages about the need for high quality explanatory memorandums. In addition, earlier this week all senior leaders across the Department were reminded directly about the importance of ensuring that explanatory memorandums meet the required standards.

In the future, senior leaders whose teams have recently submitted unsatisfactory explanatory memorandums will receive a follow up communication from the Parliamentary Team, explaining the reputational risk of poor-quality explanatory memorandums and offering the support of the Team to provide training and guidance.

SRO responsibilities

Second, you asked about the functions performed by the Department's Senior Responsible Official (SRO) with responsibility for secondary legislation. At DHSC, the SRO is the Deputy Director who has oversight of the Parliamentary Team as well as other responsibilities including private office, and they conduct

this role in line with guidance from the Cabinet Office on their responsibilities. They are responsible for monitoring parliamentary activity across the Department, including ensuring our secondary legislation programme is delivered according to schedule. They also review all of our Parliamentary Handling Plans and sign off on monthly returns to the centre on what statutory instruments will be laid each month.

Ministerial role

Finally, you asked what functions I undertake in my role as Minister with responsibility for secondary legislation. I maintain a strategic overview of the Department's secondary legislation programme, supported by written updates on a fortnightly basis from the Department's Parliamentary Team, which highlight emerging issues that might impact the timely delivery of the programme.

In particular, these regular updates note those statutory instruments which are awaiting parliamentary debate, drawing out when prayer motions have been tabled on these by Members, as well as what statutory instruments are expected to be laid in the next three months. I also clear the monthly return to the centre on what statutory instruments will be laid each month.

I hope that this letter provides reassurance that I, and my officials, have a robust plan in place to address the issues that you have raised. I have copied the four Business Managers into this reply and would be happy to meet with you to update in due course.

23 March 2023

APPENDIX 5: INTERESTS AND ATTENDANCE

Committee Members' registered interests may be examined in the online Register of Lords' Interests at http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 28 March 2023 and included in this report, Members declared no interests.

Attendance:

The meeting was attended by Lord De Mauley, Baroness Harris of Richmond, Lord Hunt of Wirral, Lord Hutton of Furness, Baroness Lea of Lymm, Lord Powell of Bayswater, Baroness Randerson, Baroness Ritchie of Downpatrick, Lord Rowlands, Lord Russell of Liverpool and Lord Thomas of Cwmgiedd.