

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

37th Report of Session 2019–21

**Education (Guidance about Costs of School
Uniforms) Bill**

Prisons (Substance Testing) Bill

Forensic Science Regulator Bill

**Botulinum Toxin and Cosmetic Fillers
(Children) Bill**

**Education and Training (Welfare of
Children) Bill**

**British Library Board (Power to Borrow)
Bill**

Animal Welfare (Sentencing) 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

The members of the Delegated Powers and Regulatory Reform Committee who agreed this report are:

[Baroness Andrews](#)

[Lord Blencathra](#) (Chairman)

[Baroness Browning](#)

[Lord Goddard of Stockport](#)

[Lord Haselhurst](#)

[Lord Hendy](#)

[Lord Janvrin](#)

[Baroness Meacher](#)

[Lord Rowlands](#)

[Lord Tope](#)

Registered Interests

Committee Members' registered interests may be examined in the online Register of Lords' Interests at <https://www.parliament.uk/hlregister>. The Register may also be inspected in the Parliamentary Archives.

Publications

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

General Information

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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 and the fax number is 020 7219 2571. The Committee's email address is hldelegatedpowers@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.

Thirty Seventh Report

EDUCATION (GUIDANCE ABOUT COSTS OF SCHOOL UNIFORMS) BILL

1. The Education (Guidance about Costs of School Uniforms) Bill is a Private Member's Bill sponsored by Baroness Lister of Burtersett. It received a second reading on 19 March 2021. The Department for Education subsequently provided a Delegated Powers Memorandum ("the Memorandum").¹
2. The Bill imposes a duty on the Secretary of State for Education to issue statutory guidance to certain state-funded schools in England about the "costs aspects of school uniform policies".
3. Although paragraph 13 of the Explanatory Notes accompanying the Bill says that the Bill "sets out who has to comply with the guidance", strictly speaking no-one necessarily has to comply with the guidance. The legal duty on the appropriate authority of relevant schools is to "have regard to" the guidance when developing and implementing a school uniform policy for the school. Paragraph 12 of the Memorandum acknowledges this, saying: "by imposing a 'have regard' duty on appropriate authorities under clause 1(3), [the Bill] does not impose a particular course of action".
4. Currently, decisions about school uniform policy are matters for schools. The Department for Education publishes non-statutory guidance, which includes a section on cost considerations. If this Bill is enacted, statutory guidance will replace the costs aspects of the current non-statutory guidance.
5. There has, to date, been no sight of any draft statutory guidance, although the Department has helpfully undertaken to share the latest draft before the Bill reaches its committee stage in the House of Lords on 16 April. The Bill contains no duty on the Government to consult before publishing the guidance. Nor is the guidance subject to any parliamentary procedure.
6. The Department offers four reasons in its Memorandum² for the guidance not being subject to any parliamentary procedure:
 - (a) The guidance will be drafted with the engagement of representatives of schools, parents and key stakeholders including the Children's Society and the Schoolwear Association. The guidance will also consider the points made by members and peers throughout the progression of the Bill through Parliament.
 - (b) The Department produces a large amount of detailed and technical statutory guidance to support schools and the wider education sector. Parliament has already determined that such guidance should not be subject to Parliamentary scrutiny and the approach taken here is consistent with that position.

1 Department for Education, Delegated Powers Memorandum, 23 March 2021: <https://bills.parliament.uk/Publications/40996/Documents/106/EducationGuidanceaboutCostsofSchoolUniformsBillDPM.pdf>

2 Paras 15–18.

- (c) The guidance is not equivalent to education Codes of Practice that are typically broad and extremely detailed texts which outline all the central requirements for an area and have many aspects which are controversial and may require debate and amendment. The school uniform guidance is “a very limited document covering one aspect of school uniform which will sit alongside and complement the non-statutory guidance”.³
- (d) The duty in section 571 of the Education Act 1996 for the statutory guidance to be published in such manner as the Secretary of State sees fit will ensure it remains accessible to those who need to refer to it.
7. In our view the Department’s reasons are unconvincing.
- (a) The fact that guidance will be produced in consultation with interested parties cannot be a reason for denying Parliament any scrutiny role whatsoever.
- (b) If Parliamentary scrutiny is thought to be appropriate on this occasion (and it is very rare that an entire Bill is given over to the question of statutory guidance) it is irrelevant that parliamentary scrutiny has been denied on previous occasions in other education contexts. Each Bill should be considered on its own merits.
- (c) The fact that guidance may or may not resemble a code of practice does not mean that parliamentary scrutiny of guidance should be ruled out. This Bill is concerned exclusively with a certain type of guidance. And yet Parliament is being asked to sanction the production of guidance that will never be required even to be laid before Parliament.
- (d) The key issue is not about accessibility of the guidance but whether the importance of the guidance is such that it is appropriate to subject it to a parliamentary procedure of some description. If an entire Bill can be dedicated to the cost aspects of school uniforms, the resulting guidance should be subject to a parliamentary procedure.
8. Although a duty to have regard to statutory guidance does not imply a duty to follow it in any or all respects, we have in recent years⁴ observed that a person or body that is required by statute to have regard to guidance will normally be expected to follow it and will in practice normally do so unless there are cogent reasons for not doing so. In practice, the guidance is likely to be highly influential and play a significant role in the way that schools operate their policies on school uniforms. It is sufficiently important for the Government to have supported a Bill that is entirely dedicated to the matter.
9. **The fundamental problem with the Bill is that the statutory guidance affords the maximum of discretion to the Government with no opportunity for parliamentary scrutiny. Accordingly, we recommend that the guidance should be subject to parliamentary scrutiny, with the negative procedure being appropriate in this instance.**

³ Memorandum, para 17.

⁴ For example, 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.

PRISONS (SUBSTANCE TESTING) BILL

10. The Prisons (Substance Testing) Bill is a Private Member’s Bill sponsored by Baroness Pidding. It was passed by the House of Commons on 12 March 2021 and had its first reading in the House of Lords on the same day. Its second reading is due to take place on 16 April 2021.
11. The purpose of the Bill, according to the Explanatory Notes accompanying the Bill, is “to improve the capability of prisons in England and Wales to test for the use of illicit substances by prisoners [in order to] help staff in Her Majesty’s Prison and Probation Service and other agencies to understand the full extent and nature of substance misuse in prisons, and to take appropriate action to prevent it”.
12. The Ministry of Justice has provided a Delegated Powers Memorandum (“the Memorandum”)⁵ which states that the Bill, “expands the existing power to conduct mandatory prisoner drug testing within prisons via urine samples, so that prisoners can be tested for a broader and more comprehensive range of substances”.⁶
13. We draw the attention of the House to changes made by the Bill which affect an existing delegated power to specify substances for which testing may be conducted.

Clauses 1 (testing prisoners for psychoactive substances and other substances) and 2(1) (consequential amendments)

14. The Prison Service and the Youth Custody Service have power under the Prison Act 1952 (“the Act”)⁷ to require a prisoner to provide a sample of urine for the purpose of testing for—
 - “controlled drugs”;⁸ and
 - “specified drugs”.
15. “Specified drugs” means those listed in the Prison Rules 1999 and the Young Offender Institution Rules 2000 (“the prison rules”).⁹ The prison rules are made by the Secretary of State by negative procedure statutory instrument.¹⁰
16. Testing is backed up by disciplinary offences under the prison rules: it is an offence against discipline to test positive for a “controlled drug” or a “specified drug”¹¹ or to refuse to provide a sample for testing.¹²
17. The Explanatory Notes describe how, in recent years, drugs have been developed with a chemical composition that can be easily changed by manufacturers to create new variants which are not covered by the testing

5 Ministry of Justice, Delegated Powers Memorandum, 15 March 2021: <https://bills.parliament.uk/Publications/40881/Documents/84/PrisonsSubstanceTestingDPM.pdf>

6 Para 2 of the Memorandum.

7 Section 16A of that Act.

8 Those controlled under the Misuse of Drugs Act 1971.

9 Schedule 2 to the Prison Rules 1999 (“the 1999 Rules”) and Schedule 2 to the Young Offender Institution Rules 2000 (“the 2000 Rules”).

10 Under section 47 of the Act. The power to list “specified drugs” is in section 47(3A).

11 Rule 51(9) of the 1999 Rules and rule 55(1) of the 2000 Rules.

12 Rule 51(22) and (23) of the 1999 Rules and rule 55(25) and (26) of the 2000 Rules (disobeying a lawful order and disobeying or failing to comply with a rule or regulation).

regime until such time as a statutory instrument can be made to add each new variant to the list of “specified drugs”.

18. To address this problem, clause 1 replaces the existing power to test for “controlled drugs” and “specified drugs” with power to test for “controlled drugs, pharmacy medicines, prescription only medicines, psychoactive substances and specified substances”.
19. “Pharmacy medicine”, “prescription only medicine” and “psychoactive substance” are sufficiently broadly defined to allow testing for new variants of drugs without the need to add each new variant to the list of “specified drugs” by statutory instrument.
20. However, power to specify substances by statutory instrument for the purposes of testing is to be retained. The Memorandum explains that this is because of the possibility that prisoners may in the future misuse substances which are neither controlled drugs, pharmacy medicines, prescription only medicines nor psychoactive substances.
21. The power will allow “any substance or product” to be specified for the purposes of testing. The Memorandum does not explain the intended scope of what is, on the face of it, a broad power, other than to say that there is no substantive difference between this power and the existing power to list “specified drugs” by statutory instrument.
22. However, if that is the case, it is not clear why clause 1 of the Bill makes a number of changes to the language in the statutory power to test - small in scale but potentially significant in effect—so that references to testing for “drugs” are to become instead references to testing for the broader “substances”.¹³
23. On the face of it, these changes suggest an intention to broaden the scope of the power to test and, by extension, the delegated power to specify substances for which prisoners can be tested but the Memorandum provides no explanation.
24. **We recommend that the House press the Bill’s Sponsor to fully explain the scope of the delegated power to specify “any substance or product” for testing (in particular, what sort of substances it is intended that the power could be used to specify) and what the justification is for this given the breadth of the new powers to test for pharmacy medicines, prescription only medicines and psychoactive substances.**
25. The Bill appears to provide for a surprising de-coupling of the power to test for drugs from disciplinary offences relating to drugs under the prison rules. As explained above, the Act currently allows testing for (a) any “controlled drug” and (b) any drug specified under the prison rules and it is an offence against discipline under the prison rules to test positive for a drug which falls within either of those two categories.
26. However, clause 2¹⁴ of the Bill makes amendments to the prison rules which appear to have the effect that, although it will continue to be a disciplinary offence to test positive for a “controlled drug”—

13 Clause 1(2), (3) and (5)(a) and (d).

14 Clause 2(3) and (4).

- it will no longer be a disciplinary offence to test positive for a substance specified in the prison rules; and
- it will not be a disciplinary offence to test positive for a substance falling within the new categories of substances for which prisoners can be tested (pharmacy medicines, prescription only medicines and psychoactive substances).

The Memorandum provides no explanation for this.

27. **We recommend that the House press the Bill's Sponsor to explain and justify retaining the delegated power to specify substances for which prisoners can be required to be tested if there is to be no corresponding provision making it a disciplinary offence under the prison rules to test positive for any such substance.**

FORENSIC SCIENCE REGULATOR BILL

28. There is nothing in this Bill which we would wish to draw to the attention of the House.

BOTULINUM TOXIN AND COSMETIC FILLERS (CHILDREN) BILL

29. There is nothing in this Bill which we would wish to draw to the attention of the House.

EDUCATION AND TRAINING (WELFARE OF CHILDREN) BILL

30. This Bill contains no delegated powers.

BRITISH LIBRARY BOARD (POWER TO BORROW) BILL

31. This Bill contains no delegated powers.

ANIMAL WELFARE (SENTENCING) BILL

32. This Bill contains no delegated powers.

APPENDIX 1: MEMBERS' INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at <https://www.parliament.uk/hlregister>. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 24 March 2021, the following interests were declared:

Prisons (Substance Testing) Bill

Baroness Meacher

Chair of the APPG for Drug Policy Reform

Baroness Browning

Former Home Office Minister responsible for drug policy

Attendance

The meeting was attended by Baroness Browning, Lord Janvrin, Lord Haselhurst, Lord Hendy, Lord Goddard of Stockport, Baroness Meacher, Lord Rowlands and Lord Tope.