HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

6th Report of Session 2021–22

Police, Crime, Sentencing and Courts Bill

Public Service Pensions and Judicial Offices Bill [HL]

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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 (Chair)
Baroness Browning
Lord Goddard of Stockport
Lord Haselhurst
Lord Hendy
Lord Janvrin
Baroness Meacher
Lord Rowlands
Lord Tope

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Contacts for the Delegated Powers and Regulatory Reform Committee

Any query about the Committee or its work should be directed to the Clerk of Delegated Legislation, Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3103. The Committee's email address is 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.

Sixth Report

POLICE, CRIME, SENTENCING AND COURTS BILL

1. This Bill was passed by the House of Commons on 5 July. It was introduced in the House of Lords on 6 July and has its Second Reading on 14 September.

2. The Bill contains 177 clauses and 20 Schedules. It covers a wide range of topics including:

   - protection of the police and other emergency workers;
   - prevention, investigation and prosecution of crime;
   - police powers in relation to non-violent protests;
   - unauthorised encampments;
   - road traffic;
   - cautions;
   - custodial sentences;
   - community sentences;
   - youth justice;
   - secure children's homes and secure 16 to 19 Academies;
   - management of offenders;
   - rehabilitation of offenders; and
   - procedures in courts and tribunals.

3. The Bill contains 62 delegated powers, 24 of which allow for the affirmative procedure. The Home Office and the Ministry of Justice have provided a Delegated Powers Memorandum ("the Memorandum").[1]

4. **We are surprised and concerned at the large number of inappropriate delegations of power in this Bill.**

5. **Although we do not comment on the merits of the measures to which these powers relate, it is of particular concern that some are undoubtedly highly controversial.**

6. **We are particularly concerned that the Bill would—**

   - **allow Ministers—and even a non-statutory body—to influence the exercise of new police powers (including in relation to unauthorised traveller encampments and stop and search) through "guidance" that is not subject to Parliamentary scrutiny;**

1 Memorandum by the Home Office and the Ministry of Justice, dated July 2021.

- **leave to regulations key aspects of new police powers—to restrict protest and to extract confidential information from electronic devices—that should instead be on the face of the Bill; and**
- **allow the imposition of statutory duties via the novel concept of "strategy" documents that need not even be published.**

7. **We are disappointed that the inclusion of these types of delegations of power—on flimsy grounds—suggests that the Government have failed when preparing this Bill to give serious consideration to recommendations that we have made in recent reports on other Bills.**

8. We draw the following powers to the attention of the House.

Clauses 7(9) and 8(9): power to make provision for, or in connection with, the publication and dissemination of a strategy to prevent and reduce serious violence

9. Clause 7 requires specified authorities[2] for a local government area to collaborate with each other to prevent and reduce serious violence in that area, including by preparing and implementing "a strategy for exercising their functions to prevent and reduce serious violence in the area".[3]

10. Clause 8 allows collaboration between authorities in more than one local government area to prevent and reduce serious violence, including by preparing and implementing a strategy for exercising their functions for that purpose.

11. A strategy under clause 7 or clause 8 can specify actions to be carried out by an educational authority, a prison authority or a youth custody authority[4] and such authorities are under a duty to carry out the specified actions.

12. There is, however, no requirement for any such strategy to be published. Instead, the Secretary of State has a power, exercisable by regulations subject to the negative procedure, to "make provision for or in connection with the publication and dissemination of a strategy".[5] This power would appear to allow the Secretary of State to provide that a strategy need not be published or even to decide not to make provision about publication at all.

13. We are concerned that the absence of a requirement to publish means that a strategy can have legislative effect—by placing educational authorities, prison authorities and youth custody authorities under a statutory duty to do things specified in it—but without appropriate transparency.

14. **Accordingly, we consider that the delegated powers in clauses 7(9) and 8(9) should be amended to require the publication of any action which is specified in a "strategy" as one that an educational authority, a prison authority or a youth custody authority must carry out.**

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2 The authorities are listed in the table in Schedule 1 to the Bill (see clause 10(1)). They include local authorities, probation service providers, youth offending teams, clinical commissioning groups, Local Health Boards, chief officers of police and fire and rescue authorities.

3 See clause 7(3)(c).

4 See clauses 7(5) and 8(5). Clause 11(1) defines "educational authority", "prison authority" and "youth custody authority" (see the persons listed in the first column of the first table in Schedule 2 to the Bill).

5 See clauses 7(9) and 8(9).

Clause 18(1): power to issue guidance in relation to the prevention and reduction of serious violence;

Clause 31(1): power to issue guidance in connection with offensive weapons homicide reviews;

Clause 64 - new section 62F(1) of the Criminal Justice and Public Order Act 1994: duty to issue guidance in respect of the exercise by the police of functions relating to trespassers on land;

Clause 140(1) - new section 342J of the Sentencing Code: power to issue guidance in respect of the exercise by the police of functions in relation to serious violence reduction orders.

15. These four clauses all make provision for the Secretary of State to issue guidance to which persons exercising statutory functions "must have regard".

16. Clause 18 allows the Secretary of State to issue guidance about the exercise by specified persons[6] of new functions relating to the prevention and reduction of serious violence in a local government area through collaborative working. The specified persons "must have regard to" the guidance.[7]

17. Clause 31 allows the Secretary of State to issue guidance about the exercise by "review partners"[8] of new functions relating to reviews of deaths involving the use of offensive weapons ("offensive weapons homicide reviews"). Review partners "must have regard to" the guidance.[9]

18. Clause 64 requires the Secretary of State to issue guidance on the exercise of police functions in relation to a new offence—of residing on land without consent in or with a vehicle—and associated police powers to seize and retain property and powers allowing courts to order forfeiture of property seized. The offence is intended to address the problem of unauthorised traveller encampments. It will apply where a person aged 18 or over—

- is residing, or intends to reside, on land without the consent of the occupier of the land;
- has, or intends to have, at least one vehicle with them on the land;
- causes, or is likely to cause, "significant damage", "significant disruption" or "significant distress … as a result of offensive conduct"[10] (these terms are left undefined); and
- fails, without reasonable excuse, to leave the land or remove from the land property that is in their possession or under their control as soon as reasonably practicable when requested to do so by the occupier of the land or a constable.

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6 The persons specified are local authorities, probation service providers, youth offending teams, clinical commissioning groups, Local Health Boards, chief officers of police, fire and rescue authorities, local policing bodies, educational authorities, prison authorities, youth custody authorities and persons prescribed in regulations (see clause 18(2)).

7 See clause 18(1).

8 These are chief officers of police, local authorities, clinical commissioning groups and local health boards (see clause 35).

9 See clause 31(1).

10 See new section 60C(4) of the Criminal Justice and Public Order Act 1994, inserted by clause 62(1).

The offence is punishable by up to three months' imprisonment and a fine. The police "must have regard to" the guidance.[11]

19. Clause 140(1) allows the Secretary of State to issue guidance on the exercise of police functions in relation to serious violence reduction orders ("SVROs"). These are new orders that a court will be able to make in respect of an adult offender where it is satisfied[12] that the offender—or an accomplice—had an offensive weapon with them when the offence was committed.[13] A person who is subject to a SVRO must keep the police informed of their home address and any other premises at which they regularly stay. The police will have powers to stop and search them for weapons without any requirement for reasonable suspicion that they are carrying a weapon. Breach of a requirement under a SVRO, provision of false information to the police in purported compliance with a SVRO or intentionally obstructing a constable exercising the stop and search power is an offence punishable with up to two years' imprisonment. The police "must have regard to" the guidance.[14]

20. In all four cases, the guidance is not subject to any Parliamentary procedure. Guidance under clauses 18 and 31 need not even be published.

21. The Memorandum gives the following reasons for the absence of any Parliamentary procedure[15]—

- the guidance will provide "practical advice" on the discharge of functions;
- the guidance will have been the subject of consultation with interested parties;
- the guidance "will not conflict with" or "alter the scope of" powers and duties under the Bill; and
- although those to whom it applies will be required to have regard to the guidance, it will not be binding.

22. We find these reasons unconvincing—

- although a duty to have regard to statutory guidance does not imply a duty to follow it in any or all respects, we have repeatedly observed[16] that, where legislation requires that regard must be had to statutory guidance, in practice this means that those to whom the guidance applies will normally be expected to follow it—including by the courts—unless there are cogent reasons for not doing so. The guidance could therefore go much further than simply assisting those to whom it is directed: it would allow the Secretary of State to influence how statutory powers and duties are exercised; and

11 See new section 62F(3) of the Criminal Justice and Public Order Act 1994, inserted by clause 64.
12 On the balance of probabilities.
13 See new section 342A of the Sentencing Code (inserted by clause 140(1)). In the case of an accomplice, the court must be satisfied on the balance of probabilities that the offender "knew or ought to have known" that the accomplice had a weapon with them (see new section 342A(4)).
14 See new section 342J(4) of the Sentencing Code, inserted by clause 140(1).
15 See paras 44, 82, 152 and 268 of the Memorandum.
16 For example, 37th Report, Session 2019–21, para 8; 18th Report, Session 2015–16, HL Paper 83, para 13; 20th Report, Session 2015–16, HL Paper 90, paras 10-11; 21st Report, Session 2015–16, HL Paper 98, para 27; 22nd Report, Session 2015–16, HL Paper 102, para 19; 1st Report, Session 2016–17, HL Paper 13, para 38.

- the fact that guidance would be produced after consultation with interested parties cannot be a reason for denying Parliament any scrutiny role (and, in the case of guidance under clauses 64 and 140(1), there is not even a requirement for consultation: the Government have merely indicated that the police will be consulted about the guidance that is to apply to them).

23. We are particularly concerned about the absence of Parliamentary scrutiny for guidance on the exercise of police functions under clauses 64 (in relation to the new "unauthorised encampments" offence) and 140(1) (in relation to serious violence reduction orders) because the exercise of these functions could prove to be highly controversial, as reflected in many of the contributions made in debates on the Bill in the House of Commons. We do not comment on the merits of the measures that confer these functions but, given their controversial nature, we consider that it is particularly important that the guidance is subject to Parliamentary scrutiny and such scrutiny would benefit the police by whom these functions will be exercised as well as the wider public.

24. **We consider that guidance under clauses 18(1), 31(1), 64 and 140(1) should be subject to Parliamentary scrutiny and that—**

- **the negative procedure should apply to guidance under clauses 18(1), 31(1) and 64; and**
- **the affirmative procedure should apply to guidance under clause 140(1).**

25. According to the Memorandum, guidance under clause 140(1) will, "complement separate revisions to the relevant code of practice (Code A) under section 66 of the Police and Criminal Evidence Act 1984 ("PACE") on the exercise of statutory stop and search powers which will be revised to set out the stop and search power under new section 342E"[17] (the new power to stop and search a person who is subject to a SVRO without any requirement for reasonable suspicion that they are carrying a weapon). Prior to the amendment of PACE by the Criminal Justice Act 2003, all revisions to such guidance were subject to affirmative procedure scrutiny but, since that Act, Ministers have a choice as to whether to make revisions by affirmative procedure regulations or by simply laying them before Parliament.[18] In our Report on the Bill that became the 2003 Act,[19] we endorsed the principle (proposed by the Government during that Bill's passage) that "significant amendments" to the code of practice in question should be subject to the affirmative procedure.

26. **We consider that revisions to the PACE code of practice on police powers to stop and search—to cover the new power to stop and search a person without any requirement for reasonable suspicion that they are carrying a weapon—are sufficiently significant to merit affirmative procedure scrutiny. The House may wish to press the Minister to confirm that any such revisions will be subject to affirmative procedure scrutiny.**

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17 See para 266 of the Memorandum.
18 See section 67(7A) of PACE.
19 DPRRC 21st Report of Session 2002-3, at para 9.

Clause 43 and Schedule 4, paragraph 37 - new section 50B of the Police and Criminal Evidence Act 1984: power to issue guidance on pre-charge bail

27. Clause 43 and Schedule 4 make provision relating to the granting of pre-charge bail, including the factors to be taken into account in determining whether to grant pre-charge bail.[20]

28. Paragraph 37 of Schedule 4 inserts a new section 50B into the Police and Criminal Evidence Act 1984 ("PACE"), which gives the College of Policing power to issue guidance relating to pre-charge bail.

29. The College of Policing is a non-statutory body. It is a company limited by guarantee with one member (the Home Secretary). It describes itself as "an operationally independent arm's-length body of the Home Office".[21]

30. The guidance may only be issued with the approval of the Secretary of State.[22] It may, in particular, cover the exercise of police powers to—

    - release a person on pre-charge bail;
    - impose or vary conditions of pre-charge bail;
    - arrest a person for failing to answer pre-charge bail or for breaching any conditions of pre-charge bail; and
    - extend the period of pre-charge bail.

    The guidance can also cover the duty to seek the views of alleged victims about conditions of pre-charge bail.[23]

31. Police officers who exercise functions relating to pre-charge bail "must have regard to" the guidance.[24] A failure to comply with the guidance "does not of itself render [a police officer] liable to any criminal or civil proceedings"[25] but the guidance "is admissible in evidence" in such proceedings and "a court may take into account a failure to comply with [the guidance] in determining a question in the proceedings".[26]

32. The guidance must be laid before Parliament[27] but is not subject to any Parliamentary scrutiny procedure. The Memorandum gives the following reasons for this[28]—

    - the guidance will provide "practical operational guidance" on the exercise of functions under PACE;

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20 Para 112 of the Memorandum explains that "Pre-charge bail is a tool used by the police to manage suspects, often with the imposition of conditions, who have been arrested on suspicion of an offence but where more time is needed to complete the investigation before a charging decision is made. The investigation can continue whilst the suspect is on pre-charge bail".

21 College of Policing, 'About us': https://www.college.police.uk/about [accessed 13 September 2021].

22 See new section 50B(1) of PACE.

23 See new section 50B(2) of PACE.

24 See new section 50B(7) of PACE—though this does not apply to Serious Fraud Office, Financial Conduct Authority, Revenue and Customs or National Crime Agency personnel.

25 See new section 50B(9) of PACE.

26 See new section 50B(10) of PACE.

27 Though this does not apply to any part of the guidance that the Secretary of State considers "could prejudice the prevention or detection of crime or the apprehension or prosecution of offenders, or could jeopardise the safety of any person" (see new section 50B(6) of PACE).

28 See para 120 of the Memorandum.

- the guidance "will not conflict with, or alter the scope of" the provisions of PACE; and
- "the absence of provision for parliamentary scrutiny is in line with other statutory codes of practice and guidance issued by the College of Policing".

33. We find these reasons unconvincing—

- as stated above,[29] where legislation requires that regard must be had to statutory guidance, in practice this means that those to whom the guidance applies will normally be expected to follow it unless there are cogent reasons for not doing so. The guidance would therefore allow the College of Policing and the Secretary of State to influence how statutory functions under PACE are carried out; and
- the Memorandum refers to other statutory codes of practice and guidance issued by the College of Policing but the examples given appear not to be comparable[30] as they do not directly influence the exercise by officers on the ground of statutory functions that affect liberty of the person.

34. **We consider that guidance under new section 50B of PACE should be subject to Parliamentary scrutiny, with the negative procedure applying.**

35. **We are also concerned that the power to produce the guidance in question is given to a non-statutory body (the College of Policing). When that body was created in 2012, the then Home Secretary said in a written ministerial statement[31] that it would be "established on a statutory basis as soon as parliamentary time allows". We are surprised that the opportunity to do so has not been taken in this Bill.**

Clause 41(1): duty to make regulations about the extraction of confidential information

36. Clauses 36(1) and 39(1) allow persons listed in Schedule 3 to the Bill[32] (including constables) to extract information stored on an electronic device if a user of the device consents[33] or if a person who was a user of the device

29 See para 22.

30 They include (a) high-level publications relating to the discharge of functions by chief officers of police, such as guidance on firearms training; guidance on the operation and use of the Police National Database; guidance on the management of police information; and a Code of Ethics - all issued under section 39A of the Police Act 1996; and (b) guidance about matters relating to the internal administration of police forces, including guidance to chief officers of police about the experience or qualifications that it would be appropriate for a person to have before becoming a community support volunteer or a policing support volunteer and the training to be undertaken by such volunteers; guidance to local policing bodies, chief officers of police and other members of police forces on the discharge of internal disciplinary functions; and guidance to members of police forces, special constables and civilian police employees as to matters of "conduct, efficiency and effectiveness".

31 Written ministerial statement laid in the House of Commons on 24 October 2012 by Theresa May, and in the House of Lords by Lord Taylor of Holbeach.

32 See clause 42(1).

33 See clause 36(1).

has died.[34] Clause 41(1) requires the Secretary of State to make regulations about the exercise of these powers in relation to "confidential information".[35]

37. The provision that may be made in the regulations includes—

- provision about conditions which must be met before the powers may be exercised in relation to confidential information;
- provision about the exercise of the powers in relation to confidential information; and
- provision applying where confidential information is obtained in the exercise of those powers.[36]

38. The Memorandum gives the following justification for the power[37]—

- "it is not currently technically possible" for most of the persons to whom the powers to extract information are to be given "to extract a subset of information held on a device" and so "the current practice… is to extract all the information and then isolate protected material from the rest of the extracted data and destroy it";
- "technological capabilities… will evolve and improve over time as new technology becomes available and best practice in the handling of confidential information will similarly evolve"; and
- "it is [therefore] appropriate to make provision in respect of the handling of confidential information in secondary legislation" as this will allow "the procedure governing the handling" of confidential information to be "readily updated".

39. The Government appear to be saying that—

- it is not appropriate to make provision in the Bill itself about the exercise of these powers in relation to confidential information because technological advances are likely to be made in the future that would leave any such provision outdated; and
- if the provision is instead in regulations, it can be readily updated as technology develops.

40. The Government acknowledge "the sensitivities around the processing of such confidential information and the likely high level of parliamentary interest"[38] and therefore considers it appropriate for the regulations to be subject to the affirmative procedure.

41. We consider that the prospect of future technological advances is not a convincing justification for making no provision in the Bill itself about the exercise of these powers in relation to confidential information and instead leaving it all to regulations—particularly given the sensitivities that the Memorandum rightly recognises.

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34 See clause 39(1).

35 For these purposes, "confidential information" includes confidential journalistic material, items subject to legal privilege, certain personal records held in confidence and material acquired in the course of a trade that is held in confidence (see clause 41(2) and (3)).

36 See clause 41(4).

37 At paragraphs 105 and 106.

38 See paragraph 107 of the Memorandum.

42. The Memorandum focusses on the point that most of those who will have the power to extract information will not have the technological capabilities to extract only non-confidential information but it does not explain why the Bill itself does not therefore—

- include a condition allowing confidential information to be extracted only in specified circumstances, including—or perhaps limited to—circumstances where it is not practicable to extract non-confidential information without also extracting confidential information; or

- contain any prohibitions on the processing of confidential information obtained in such circumstances.

43. **We consider that—**

- **clause 41(1) contains an inappropriate delegation of power because it leaves to regulations all provision about the exercise of the powers in clauses 36(1) and 39(1) to extract confidential information; and**

- **provision about the exercise of these powers should instead be on the face of the Bill, coupled with a power to amend that provision by affirmative procedure regulations.**

Clauses 55(4) and 56(6) - new sections 12(12) and 14(11) of the Public Order Act 1986: power to make provision about the meaning of—

(a) "serious disruption to the activities of an organisation which are carried on in the vicinity of" a public procession or a public assembly, and

(b) "serious disruption to the life of the community",

for the purposes of sections 12 and 14 of that Act (imposing conditions on public processions and public assemblies)

Clause 61 - new section 14ZA(15) of the Public Order Act 1986: power to make provision about the meaning of "serious disruption to the activities of an organisation which are carried on in the vicinity of a one-person protest" for the purposes of new section 14ZA of that Act (imposing conditions on one-person protests)

44. Under the Public Order Act 1986[39] ("the 1986 Act"), a senior police officer has power to give directions imposing conditions on the organisers of, or participants in, a public procession or a public assembly[40] where the officer reasonably believes that—

- the procession or assembly "may result in serious public disorder, serious damage to property or serious disruption to the life of the community"; or

- "the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do".

39 See sections 12 (imposing conditions on public processions) and 14 (imposing conditions on public assemblies) of that Act.

40 A public assembly means "an assembly of 2 or more persons in a public place which is wholly or partly open to the air" (see section 16 of the 1986 Act).

45. Such directions may impose such conditions as the senior police officer considers to be necessary to prevent such disorder, damage, disruption or intimidation. The conditions that may be imposed include conditions as to the route of a procession, the place at which an assembly is held, the duration of an assembly, or the number of persons who may assemble. It is an offence for an organiser or a person who takes part in a public procession or a public assembly to knowingly fail to comply with a condition that is imposed.

46. The Bill[41] introduces two new triggers for the imposition of conditions on public processions and public assemblies. Both triggers are based on "the noise generated by persons taking part".

47. The first new trigger allows a senior police officer to impose conditions where the officer reasonably believes that the noise generated "may result in **serious disruption** to the activities of an organisation which are carried on in the vicinity" of the procession or assembly.[42]

48. The second new trigger allows a senior police officer to impose conditions where the officer reasonably believes that the noise generated "may have a **relevant impact** on persons in the vicinity" of the procession or assembly and "that impact may be **significant**". For these purposes—

- noise may have a "relevant impact" if—

  (a) "it may result in the intimidation or harassment of persons of reasonable firmness with the characteristics of persons likely to be in the vicinity"; or

  (b) "it may cause such persons to suffer serious unease, alarm or distress";[43] and

- in considering whether the impact may be "significant", regard must be had to—

  (a) the likely number of persons in the vicinity of reasonable firmness who may be intimidated or harassed or caused to suffer serious unease, alarm or distress;

  (b) the likely duration of any such impact; and

  (c) the likely intensity of any such impact.[44]

49. Clause 61 amends the 1986 Act to give senior police officers equivalent powers to give directions imposing conditions in relation to the noise generated by a "one-person protest".[45]

50. For the purposes of the first new trigger ("serious disruption to the activities of an organisation … in the vicinity" of a public procession, a public assembly

41 See clauses 55 (which amends section 12 of the 1986 Act) and 56 (which amends section 14 of the 1986 Act).

42 See new section 12(1)(aa) of the 1986 Act, inserted by clause 55(2)(a) (in relation to public processions) and new section 14(1)(aa), inserted by clause 56(2)(b) (in relation to public assemblies).

43 See new section 12(1)(ab) and (2A) of the 1986 Act, inserted by clause 55(2) and (3) (in relation to public processions) and new section 14(1)(ab) and (2A), inserted by clause 56(2) and (5) (in relation to public assemblies).

44 See new section 12(2B) of the 1986 Act, inserted by clause 55(3) (in relation to public processions) and new section 14(2B), inserted by clause 56(5) (in relation to public assemblies).

45 Clause 61 inserts a new section 14ZA (imposing conditions on one-person protests) into the 1986 Act.

or a one-person protest), the Bill does not define "serious disruption to the activities of an organisation". Instead, it gives the Secretary of State power to define the expression in affirmative procedure regulations.

51. The Bill also gives the Secretary of State power to define "serious disruption to the life of the community" for the purposes of the existing trigger that allows the police to impose conditions on processions and assemblies to prevent such disruption.

52. The Secretary of State is given power not only to define these expressions but also to give examples of cases in which a procession, an assembly or a one-person protest is—or is not—to be treated as resulting in serious disruption for these purposes.[46]

53. The Memorandum justifies these powers on the basis that "protestors have become adept at rapidly changing their tactics to avoid the use of police powers" so provision on the face of the Bill "could soon become out of date".[47] It adds that the affirmative procedure is considered appropriate as the power "will have an impact on the police's ability to impose conditions on protest" and "given the implications on freedoms of expression and assembly, Parliament should have the opportunity to debate and approve any such new arrangements".[48]

54. It is true that recent years have seen protestors deploying new tactics of various kinds. However, as the definitions in question are concerned with the *consequences* of protests (such things as preventing the use of transport routes or the use of premises) rather than the precise *means* by which such consequences may be achieved, it is not clear how the definitions could be rendered "out of date" by changes in tactics used by protestors.

55. This is borne out by the illustrative draft statutory instrument that the Government have published,[49] in which "serious disruption to the activities of an organisation" and "serious disruption to the life of the community" are defined in terms which make no reference to tactics used by protestors. It provides that—

- there is "serious disruption to the activities of an organisation" if "persons connected with the organisation are, for a prolonged period of time, unable to reasonably carry out activities for that organisation such as serving customers, holding meetings or teaching classes, in that vicinity"; and

- there is "serious disruption to the life of the community" if there is—

  (a) "significant delay to the supply of a time-sensitive product impacting on the community"; or

  (b) "prolonged physical disruption to access to essential goods and services impacting on the community."

46 See new sections 12(13)(b) and 14(12)(b) of the 1986 Act, inserted by clauses 55(4) and 56(6) of the Bill.

47 See para 137 of the Memorandum.

48 See para 138 of the Memorandum.

49 Draft Public Order Act 1986 (Provision about the meaning of certain powers to impose conditions–Serious Disruption) Regulations 202[x].

We struggle to see how changes in tactics used by protestors could render such definitions "out of date". We are therefore not convinced by the Government's argument for the definitions being in regulations rather than on the face of the Bill.

56. We agree with the Government that "Parliament should have the opportunity to debate and approve" these definitions. However, as the definitions will determine the scope of restrictions that the police can impose on protests,[50] we consider that they merit the fullest Parliamentary scrutiny.

57. As we have said before—

> "the affirmative procedure offers nothing like the scrutiny given to a bill. A bill typically goes through several substantive stages in each House and can be amended. An affirmative statutory instrument is unamendable during its making and is debated once in each House".[51]

58. We consider that definitions of the expressions in question should be added to the Bill to give Parliament the opportunity to fully debate them now – and with the Government already having drafted definitions (which run to only approximately half a page of text) for the purposes of the illustrative statutory instrument, we see no reason why this cannot be done at the earliest opportunity.

59. This would also allow Parliament to properly consider the important issue of how the new restrictions will fit with existing law - including human rights law and, for example, the law regulating lawful picketing which protects the very long-established rights of pickets to seek to persuade people to do something (abstain from working) which is likely to cause "disruption to the activities of an organisation" and could in some cases cause delays or disruption that would appear to be at risk of falling within "serious disruption to the life of the community" as defined in the Government's illustrative statutory instrument.

60. **We consider that the definitions of the expressions "serious disruption to the activities of an organisation" and "serious disruption to the life of the community" are of such significance that they merit the fuller scrutiny afforded to Bill provisions and should therefore appear on the face of the Bill, coupled with a power to amend those definitions by affirmative procedure regulations.**

Clause 77(6)(b) and (c): prohibitions on the use of out of court disposals for excluded offences

61. Part 6 of the Bill creates two new types of caution: diversionary cautions and community cautions. According to the Memorandum, these will be among "the least onerous types of disposal a person can obtain for offending".[52] Both diversionary cautions and community cautions must have one or more conditions attached to them. These can include requirements to carry out

50 And the Bill also both increases the penalties for failure to comply with a police direction (clauses 57(6) and (11) increase the maximum custodial term from 3 months to 51 weeks) and removes the existing defence that a person did not "knowingly" fail to comply with such a direction (see the amendments made to sections 12 and 14 of the 1986 Act by clauses 57(3), (4), (5), (8), (9) and (10)).

51 34th Report, Session 2017–19, HL Paper 194, para 6 (on the Agriculture Bill).

52 See para 172 of the Memorandum.

unpaid work, to attend a specified place for a specified purpose and to pay a financial penalty.

62. Community cautions are for less serious offences. The Bill provides that they cannot be given for the most serious offences (indictable-only offences)[53] but it gives the Secretary of State power to determine—by affirmative procedure regulations—the other offences for which they cannot be given.[54]

63. The Memorandum provides the following justification for this: "The list of offences which may not be suitable for [a community caution] is likely to change regularly" and "will be subject to continual updating and changing which makes it more suitable for secondary legislation".[55] The Memorandum acknowledges that excluding offences from a community caution disposal "will have a significant impact on offenders, victims and the public". It states that the affirmative procedure "is considered appropriate as it enables Parliament to debate the details of the restrictions [on community cautions]".[56]

64. According to the Memorandum, the proposed approach is consistent with a comparable power in section 130 of the Sexual Offences Act 2003, which allows the Secretary of State to prescribe offences for the purposes of notification requirements for sexual offenders. However, the approach in that Act is different: the prescribed offences are listed in the Act itself[57] and the Secretary of State has power to amend the relevant lists by statutory instrument. By contrast, the approach proposed in the Bill is for the relevant offences to be listed only in regulations.

65. We consider that replicating the approach taken in the 2003 Act is preferable because it would allow the House to see and debate now the list of offences that the Government consider are not suitable for community caution disposal. This may be considered particularly important as the way in which the power to prescribe offences is exercised is capable of having a significant effect on the way in which the policy works: and this is because the range of offences that the Secretary of State could prescribe is so wide that the power could be exercised so as to see community cautions available for only a small number of very low-level offences or for a very wide range of offences.

66. **We therefore consider that the Bill should be amended so that the offences which are to be excluded from community caution disposal are listed on the face of the Bill coupled with a power to amend that list by affirmative procedure regulations.**

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53 An indictable-only offence is a serious criminal offence that can be tried only in the Crown Court. Examples include murder, manslaughter and rape.

54 The Secretary of State has power to exclude from community caution disposal any offence "triable either way" or any "summary offence". A "triable either way" offence is an offence that can be tried in the Magistrates' Court or in the Crown Court: such an offence is tried in the Crown Court if the Magistrates' Court considers that its sentencing powers are not sufficient to deal with the offence or if the defendant elects Crown Court trial. Examples include theft, assault occasioning actual bodily harm and most cases of burglary. A summary offence is an offence that is normally dealt with in the Magistrates' Court. Examples include most motoring offences, minor criminal damage and common assault causing minor injury.

55 See para 172 of the Memorandum.

56 See para 173 of the Memorandum.

57 In Schedules 3 and 5 to that Act.

Clauses 80(8) and 89(8): power to amend the maximum number of hours of unpaid work and attendance attached to a diversionary caution or a community caution

Clauses 81(3) and 90(3): power to set and vary the maximum financial penalty attached to a diversionary caution or a community caution

67. A diversionary caution or a community caution must have one or more conditions attached to it. These can include requirements to carry out unpaid work, to attend a specified place for a specified purpose and to pay a financial penalty.

68. The Bill specifies the maximum number of hours of unpaid work and attendance that can be required:

- a diversionary caution can require up to 20 hours of unpaid work and up to 20 hours' attendance; and
- a community caution can require up to 10 hours of unpaid work and up to 10 hours' attendance.[58]

69. The Secretary of State is given power to increase or reduce these maxima by regulations.[59]

70. The Secretary of State is also given power to prescribe in regulations the maximum amount of a financial penalty that a person can be required to pay as a condition of a diversionary caution or a community caution.[60]

71. The Bill provides for the Parliamentary procedure that is to apply to any changes to these maxima to differ depending on whether they are being increased or reduced[61]—

- *increases* in the maximum number of hours of unpaid work and attendance are subject to the affirmative procedure but decreases are subject to the negative procedure; and
- the first regulations that prescribe the maximum amount of a financial penalty—and subsequent *above-inflation increases*—are subject to the affirmative procedure but decreases—and *increases in line with inflation*—are subject to the negative procedure.

72. The Memorandum justifies this by reference to the impact of increases on offenders and on operational resources.[62] It describes decreases as, by contrast, "administrative in nature"[63] and it refers to existing delegated powers to set a maximum number of hours for youth rehabilitation order requirements and to set maximum penalties.

73. However, those existing powers do not distinguish between increases and decreases: the same Parliamentary procedure (which is the affirmative

58 See clause 80(5) and (6) (in relation to diversionary cautions) and clause 89(5) and (6) (in relation to community cautions).
59 See clause 80(8) (in relation to diversionary cautions) and clause 89(8) (in relation to community cautions).
60 See clause 81(3) (in relation to diversionary cautions) and clause 90(3) (in relation to community cautions).
61 See clause 99(4)(b), (c) and (d).
62 See paras 177 and 182 of the Memorandum.
63 See para 179 of the Memorandum.

procedure in two of the three examples cited) applies whether the maximum is increased or reduced.

74. We consider that the Government's justification for its approach is flawed because it focusses solely on the impact of increases or decreases on the rights of offenders and on operational resources and fails to take into account the significant effect that decreases are capable of having on the way in which the policy works—and that making the new cautions less onerous forms of disposal may be something about which stakeholders (including victims of crime) and members of both Houses may have legitimate concerns.

75. **Accordingly, we consider that both increases and decreases in the maximum number of hours of unpaid work or attendance, or the maximum financial penalty,[64] that may be attached to a diversionary caution or a community caution merit the same level of scrutiny, with the affirmative procedure applying.**

Clause 129 and Schedule 13, paragraph 2 - new section 395A of the Sentencing Code:[65] power to specify "special procedures" for community and suspended sentence orders

76. Clause 129 and Schedule 13 give courts powers to review community orders[66] and suspended sentence orders and to commit offenders to custody for breach of such orders.[67]

77. The Memorandum explains that "the aim… is to improve offender compliance with community orders and suspended sentence orders and to reduce reoffending. This is achieved through a multi-agency approach with links to wider support services, one element of which is providing for close oversight by a court of particular sentences being served in the community".[68]

78. The intention is to pilot the measures for an initial 18-month period and that "the pilot may be applied to different cohorts in different areas so that, for example, it may apply only to female offenders in certain areas, or only to those being sentenced for domestic abuse offences in others".[69]

79. The Secretary of State is given power to specify, by negative procedure regulations, categories of community orders and suspended sentence orders that qualify for the review process, including by reference to[70]—

- the courts by which the orders are made (for example, courts sitting in particular areas);
- the persons who are subject to the orders (for example, persons of a particular sex); or

64 With the exception of increases in line with (or below the level of) inflation, for which we consider the negative procedure to be appropriate.
65 Parts 2 to 13 of the Sentencing Act 2020 together make up a code called the "Sentencing Code" (see section 1(1) of that Act).
66 A community order is a type of sentence that can impose a range of requirements including unpaid work, rehabilitation activity, curfews, alcohol treatment and drug rehabilitation (see sections 200 and 201 of the Sentencing Code).
67 he Bill refers to these as "special procedures" relating to review and breach; the Memorandum and the Explanatory Notes to the Bill refer to clause 129 and Schedule 13 forming "the legislative basis of the problem-solving court approach" (see para 949 of the Explanatory Notes).
68 See para 227 of the Memorandum.
69 See para 229 of the Memorandum.
70 See new section 395A(3) of the Sentencing Code (inserted by paragraph 2 of Schedule 13 to the Bill).

- the offences to which the orders relate.

80. Where regulations specify a category for the first time, there must be an initial pilot period of 18 months.[71] After the conclusion of that period, further regulations may be made to specify that category indefinitely.

81. Both regulations that specify a category for the purposes of a pilot — and subsequent regulations that specify that category indefinitely — are subject to the negative procedure.

82. The Government's justification for this is that "the principle of the provisions is made clear on the face of the legislation, and the power is limited by the legislation such that it may only be used to apply the provisions to different courts and cohorts of offenders … These matters are administrative in nature".[72]

83. We disagree: the categories of persons and the offences to which the review process will apply go to the heart of the underlying policy. The power gives the Secretary of State maximum discretion— as to whether the review process is to be made available widely or only in very limited circumstances — but with minimal scrutiny. We consider that the level of scrutiny that may be acceptable for the purposes of piloting is not acceptable for the purposes of provision of indefinite duration.

84. **We therefore consider that regulations that provide for a category of community orders or suspended sentence orders to be subject to the review process on an indefinite basis should be subject to the affirmative procedure.**

71 See new section 395A(4).
72 See para 237 of the Memorandum.

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

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 8 September 2021 Members declared no interests.

Attendance

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