HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

15th Report of Session 2021–22

Health and Care Bill

Cigarette Stick Health Warnings Bill [HL]

House of Lords (Hereditary Peers) (Abolition of By-Elections) Bill [HL]

Police, Crime, Sentencing and Courts Bill: Government Responses

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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.

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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.

Fifteenth Report

FOREWORD

1. This report sets out the Committee's recommendations in relation to a private members' Bill. It has long been, and remains, the Committee's approach to apply the same exacting standards of scrutiny to all bills, whether a government bill or a private member's bill. We acknowledge however that those members of the House who sponsor private members' bills, unlike ministers, do not have the support of departmental officials and Parliamentary Counsel in the preparation of their bills. Our comments on private members' bills are framed in the light of that understanding.

HEALTH AND CARE BILL

2. On the day we published *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*,[1] this Bill was brought from the House of Commons.

General comments on the Bill

3. The Bill currently runs to 244 pages and contains 155 substantive provisions (139 clauses, 16 Schedules). It contains 156 delegated powers. The Bill therefore averages more than one delegated power per provision. The Department for Health and Social Care (DHSC) has provided a delegated powers memorandum ("the Memorandum") that runs to 178 pages.

4. At paragraph 102 of *Democracy Denied?,* we said that the number of occasions on which the Government have sought to acquire legislative powers under the guise of various devices not subject to parliamentary scrutiny is perhaps the most striking and disturbing of recent developments that have had the effect of shifting the balance of legislative power from Parliament to the executive. **The Health and Care Bill is a clear and disturbing illustration of how much disguised legislation a Bill can contain and offends against the democratic principles of parliamentary scrutiny.**

5. The Bill allows legislative provision to be made by:

- Affirmative regulations (21)
- Negative regulations (42)
- Orders in Council
- Other Orders
- Schemes
- Rules
- Licence conditions
- Directions (46)

1 Democracy Denied? The urgent need to rebalance power between Parliament and the Executive, 12th Report, Session 2021-22 (HL Paper 106).

- Guidance (17)
- Publishing a document.[2]

6. Of these 156 delegated powers, more than half (79) are subject to no parliamentary procedure. And of the 10 species of delegated power identified above, only the first three are subject to any parliamentary procedure. **A Bill where fewer than 13% of the delegated powers require the affirmative resolution procedure and more than 50% are subject to no parliamentary procedure at all (including more than 60 provisions relating to guidance and directions) is a Bill in a category of its own**. It is the more noteworthy given that the Bill ultimately affects so many people.

7. The Government repeatedly argue that, given the technical and operational nature of the guidance — perhaps needing frequent revision and operating within the complex NHS structure — it would not be appropriate to attach any parliamentary procedure. But it remains striking how many delegated powers escape parliamentary scrutiny in this Bill.

8. In our view:

- **The Bill includes a significant amount of disguised legislation in the form of orders, schemes, rules, guidance, directions and other documents, which are legislative in effect without being subject to parliamentary oversight.**
- **Until this disguised legislation is actually made, it is difficult to assess the overall significance of the Bill. To that extent, the Bill is skeletal or framework legislation, despite being clothed in over 200 pages of legislative flesh.**
- **There could have been no timelier reminder of the need for our report, *Democracy Denied?*, than this Bill, containing - as it does - so much disguised legislation, including more than 60 delegated powers that allow guidance and directions to be issued without any parliamentary procedure at all.**

Comments on particular clauses

Clause 15 — people for whom integrated care boards ("ICBs") have responsibility

9. Clause 15 inserts a new section 14Z31 into the National Health Service Act 2006, allowing rules to make provision for determining the people for whom ICBs are responsible and allowing affirmative regulations to create exceptions in relation to people of a prescribed description.

10. However, clause 15 also contains a limited Henry VIII power allowing the Secretary of State to substitute new section 14Z31 with an alternative version of section 14Z31, and to do so by negative regulations. The Memorandum does not mention this clause in its list of Henry VIII powers.

11. We normally require convincing reasons why Henry VIII powers should be exercised in negative regulations. Here, the Government justify the negative procedure on the ground that the change is a matter of "details" and "administrative and technical in nature" (Memorandum, paragraph 143). Another reason might be that the Minister has a more limited discretion

2 Clause 20, inserting section 14Z48 into the National Health Service Act 2006.

than normal. Instead of being able to replace text A with text B that can be freely devised in regulations, the choice is between alternatives that are both set out in the Bill.

12. Nevertheless, we rarely see legislation setting out alternative versions of text and allowing the Minister to substitute one for the other by negative regulations. This could set an unwelcome precedent, particularly if used regularly or in more controversial circumstances. If a criminal statute stated that the maximum penalty for an offence was a fine of £1,000 - but the Minister could substitute this by five years' imprisonment simply by making a one-page statutory instrument using the negative procedure - there would be an outcry.

13. **If Ministers wish to repeal section 14Z31 by regulations and substitute alternative text, they should use the affirmative resolution procedure rather than the negative.**

Clause 20 — power to impose liability by "publishing a document"

14. Clause 20 inserts new section 14Z48 into the National Health Service Act 2006, conferring a delegated power on NHS England to publish a document specifying circumstances in which an ICB is legally liable to make payments to a provider for services provided under arrangements commissioned by another ICB.

15. The Memorandum (paragraph 206) justifies the lack of any parliamentary procedure associated with the publication of the document on the ground that the power is concerned with operational and administrative matters.

16. Such a power is very unusual. If used in a context other than one involving public sector health bodies, it might give grave cause for concern and set an extraordinary precedent. Statutory liabilities should be imposed transparently, subject to clear legal conditions and parliamentary scrutiny. **The power to impose a legal liability by merely publishing a document, without any parliamentary scrutiny, is a striking example of disguised legislation. We regard it as an inappropriate delegation of power, which should be removed from the Bill.**

Clause 70 — procurement regulations

17. Clause 70 contains a power enabling the Secretary of State to make regulations imposing requirements on relevant authorities in relation to the procurement of health care services, and related goods or services.

18. **We draw the House's attention to the Government's justifications for taking this power:**

    (a) The Memorandum (paragraph 481) states that, although initial consultation has been carried out by NHS England on the content of the regime, full analysis has not been completed and there has not been time to produce a more developed proposal.

    We do not accept that the inclusion of regulation-making powers should be a cover for inadequately developed policy.

    (b) The Memorandum (paragraphs 481 and 485) says that a Cabinet Office procurement Bill will most likely follow the Health and Care Bill, which

may require some amendments to the procurement regulation-making power in the Health and Care Bill.

In other words, clause 70 may in part be a temporary measure. Ministers would not ordinarily propose clauses in one Bill possibly requiring imminent amendment in a subsequent Bill without expecting to face questions. **The House may wish to seek further and better particulars from the Minister concerning the possible effect of any Cabinet Office procurement Bill on the Health and Care Bill, and — given that the justification in (b) appears to negate that in (a) — to press the Minister on why it was necessary to include provision, based on inadequately developed policy, in the Health and Care Bill when the Government intend to introduce a procurement Bill.**

Clause 144 and Schedule 17 — advertising of less healthy food and drink

19. Schedule 17 to the Bill introduces a new section 321A into the Communications Act 2003, the Government's aim being to restrict advertising (on television, on-demand programme services and the internet) for "less healthy" food or drink products. This will include a watershed between 5.30 a.m. and 9 p.m. during which adverts for less healthy food and drinks cannot be shown.

20. The merits of restrictions on food and drink advertising are not within our remit; but the method of implementing the policy is. Food manufacturers, suppliers and advertisers will clearly be affected by this policy. However, the determination whether food or drink is "less healthy" is not set out on the face of the Bill but is delegated both to regulations and to guidance.[3]

21. It is one thing to say that "less healthy" means what regulations say it means. The main point of legislation, whether Acts or regulations, is to change the law. It is another thing to say that the meaning of a legislative provision is to be determined by both regulations and relevant guidance. In this Bill, the relevant guidance dates from 2011. But Ministers can alter this reference to the 2011 guidance, albeit by regulations made by affirmative instrument.

22. If the meaning of primary legislation is to be altered, the natural and obvious route is for it to be altered by further primary legislation. We accept that there will be cases where Ministers can properly be given the power to alter primary legislation by means of secondary legislation. However, the normal expectation is that such Henry VIII powers should be exercised by regulations made pursuant to the affirmative resolution procedure.

23. **Legislation, which of its nature affects the legal rights and liabilities of people, should not be capable of being altered by guidance. The purpose of guidance is, as the name indicates, to guide. It should not be used as a disguised attempt to change the law.** This is what the Government are doing here. The meaning of "less healthy", which will affect those advertising food and drink, is to be partly a matter for regulations and partly a matter for guidance.

24. Our report, *Democracy Denied?*, criticised the concept of mandatory guidance as a contradiction in terms and said that the power to make mandatory guidance will never be appropriate. Requirements that have legislative effect should always be expressed in legislative language, either in primary or

3 See proposed s321A(4)(c) of the Communications Act 2003, inserted by para 1 of Sch 17 to the Bill.

secondary legislation, and subject to parliamentary oversight. Here, guidance will have a mandatory effect because it will determine the legal meaning of what is meant by "less healthy" food or drink products.

25. It is true that, if the Government wish to alter the definition of relevant guidance found in the proposed new section 321A(4)(d) of the Communications Act 2003, they must be do so by affirmative resolution regulations. But legislation should not be alterable by guidance in the first place. The law should be changed by further law, not by guidance disguised as law.

26. **We consider that the power to define a food or drink product that is "less healthy" should be exercised solely through the making of regulations and not also through the making of guidance. The definition of "less healthy" will have a significant impact on the food and drink industry. For this reason, we also consider that the regulations defining what is meant by "less healthy" should be subject to the affirmative resolution procedure.**

Conclusion

27. This is not the first time the DHSC has introduced a Bill about which we have been extremely critical. In recent sessions, the Department has introduced two Bills which contravened many of the principles set out in our report Democracy Denied? and in our revised guidance to departments. The two Bills were the Healthcare (International Arrangements) Bill (later changed to the Healthcare (European Economic Area and Switzerland Arrangements) Bill) and the Medicines and Medical Devices Bill.

28. We reported on the Healthcare (International Arrangements) Bill in our 47th Report of session 2017-19. We said that it contained "unprecedented powers for ministers to make law by statutory instrument".[4] We drew attention to the inappropriate use of the negative procedure,[5] and the way in which the powers being sought were "in far wider terms than [were] necessary to give effect to the Department's limited aims".[6] We were critical of the inclusion of a Henry VIII power which enabled a minister to amend or repeal any Act of Parliament ever passed, including future Acts,[7] and we referred to clause 2 of the Bill as including delegated powers which "could hardly have been wider".[8]

29. In our 19th Report of session 2019-21, we said of clauses 1, 8 and 12 of the Medicines and Medical Devices Bill, that the Government had "failed to provide sufficient justification for this part of the Bill adopting a "skeleton bill" approach, with ministers given very wide powers to almost completely re-write the existing regulatory regimes for human and veterinary medicines and medical devices".[9] We were critical of the Bill allowing the ingredients of criminal offences to be set by delegated legislation,[10] and we expressed our dissatisfaction about departments arguing for powers otherwise subject to the affirmative procedure to be subject to the negative procedure because of a need to act quickly, without acknowledging the existence of the made

4 47th Report, Session 2017-19 (HL Paper 289), para 3.
5 *Ibid.*, para 4.
6 *Ibid.*, para 7.
7 *Ibid.*, para 12.
8 *Ibid.*, para 14.
9 19th Report, Session 2019-21 (HL Paper 109), para 28.
10 *Ibid.*, para 31.

affirmative procedure.[11] We criticised provision which allowed regulations to make the disapplication of legislation subject to conditions set out in a "protocol" which we described as another example of "camouflaging legislation",[12] and we expressed concern about the use of consultation being presented as a substitute for parliamentary scrutiny.[13].

30. In session 2017-19, a private member's Bill, the Mental Health Units (Use of Force) Bill, was introduced. It had the support of the DHSC which provided a delegated powers memorandum. We were critical of provision in the Bill which allowed for guidance which was, in effect, mandatory to be issued subject to no parliamentary oversight.[14] The Department argued, amongst other things, that the Secretary of State had to consult on the guidance before publishing it. In our report we said that consultation was "an elementary requirement when testing the merits of new policy" and was "an addition to, not a substitute for, parliamentary oversight".

31. **We acknowledge that the DHSC has been under a great deal of pressure as a result of the pandemic. It is disappointing nonetheless that the DHSC has again introduced into Parliament a Bill which, in terms of the delegation of powers, falls so short of the standards which the Committee — and Parliament — are entitled to expect. We have recently published revised guidance to departments and this Bill offends against many of its requirements. The revised guidance sets out the standards against which this Committee will judge bills in future. We therefore urge all ministers and departmental bill teams to pay it close attention, and reiterate the recommendation contained in our recent report *Democracy Denied?* that it should be set out in full in the Cabinet Office's Guide to Making Legislation.**[15]

CIGARETTE STICK HEALTH WARNINGS BILL [HL]

32. This Bill requires tobacco manufacturers to print health warnings on individual cigarette sticks and cigarette rolling papers.

33. Clause 2 reads:

> "(1) A producer of a tobacco product for smoking (other than an importer) must select the warning used for the purposes of this Act—
>
> (a) from the set of warnings which is specified in the Schedule for the production year during which the pack is produced; and
>
> (b) so that each of the warnings appears on a specified proportion of the total number of packs under each brand name produced by that producer within that production year.
>
> (2) The Secretary of State may by regulations made by statutory instrument specify the proportion mentioned in subsection (1)(b)."

11 *Ibid.*, para 37.
12 *Ibid.*, para 42.
13 *Ibid.*, paras 45 and 48.
14 31st Report, Session 2017-19 (HL Paper 177), paras 31 to 36.
15 See Democracy Denied? The urgent need to rebalance power between Parliament and the Executive, 12th Report, Session 2021-22 (HL Paper 106), para 148. Revised Guidance for Departments (November 2021): https://committees.parliament.uk/committee/173/delegated-powers-and-regulatory-reform-committee/content/111527/guidance-for-departments/.

34. Breach of clause 2 is a criminal offence carrying a sentence of up to two years' imprisonment.

35. We draw the attention of the House to the fact that each of the warnings must appear on a "specified" proportion of the total number of packs produced under each brand name. Clause 2(2) says that the Secretary of State "may" by regulations specify the proportion mentioned in clause 2(1)(b). If the Secretary of State does not make such regulations, clause 2(1)(b) will be deprived of meaning. It would be clearer if clause 2(2) were not worded to suggest that it confers power that may or may not be exercised. **To ensure that clause 2(1)(b) works as intended, the Secretary of State should be obliged to make regulations, rather than merely be permitted to do so. This result could be achieved by the substitution of "must" for "may" in clause 2(2).**

HOUSE OF LORDS (HEREDITARY PEERS) (ABOLITION OF BY-ELECTIONS) BILL [HL]

36. This Bill contains no delegated powers.

POLICE, CRIME, SENTENCING AND COURTS BILL: GOVERNMENT RESPONSES

37. We considered this Bill in our 6th and 13th Reports of this Session.[16] The Government have now responded by way of by way of two letters from Lord Wolfson of Tredegar QC, Parliamentary Under Secretary of State at the Ministry of Justice, and Baroness Williams of Trafford, Minister of State at the Home Office. The responses are printed at Appendix 1.

16 6th Report, Session 2021-22 (HL Paper 65) and 13th Report, Session 2021-22 (HL Paper 107).

APPENDIX 1: POLICE, CRIME, SENTENCING AND COURTS BILL: GOVERNMENT RESPONSES

Letter from Lord Wolfson of Tredegar QC, Parliamentary Under Secretary of State at the Ministry of Justice, and Baroness Williams of Trafford, Minister of State at the Home Office, to the Rt Hon. Lord Blencathra, Chair of the Delegated Powers and Regulatory Reform Committee on the DPRRC's 6th Report of Session 2021-22

Thank you for your report following the Committee's scrutiny of the provisions of the Police, Crime, Sentencing and Courts Bill ("the Bill"). The Government has carefully considered the Committee's recommendations and our response is set out below.

Paragraph 14

The Committee's recommendation

The Committee has made recommendations in relation to clauses 7 and 8, relating to the publication and dissemination of a strategy to prevent and reduce serious violence. At paragraph 14 the Committee recommended that:

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.

Government response

The Government accepts the Committee's recommendation. We will bring forward amendments at Report to make provision for the publication of strategies on the face of the Bill. This will be subject to certain safeguards: that material should not be included if the specified authorities consider that it might place the safety of any person in jeopardy, prejudice the prevention and detection of crime or the investigation or prosecution of an offence, or compromise the security of, or good order or discipline within, an educational, prison or youth custody authority.

Paragraph 24

The Committee's recommendation

The Committee has made recommendations in relation to clauses 18(1), 31(1), 64 and 140(1) related to the issuing of guidance across four areas: the prevention and reduction of serious violence, in connection with offensive weapon homicide reviews, in respect of the exercise by the police of functions relating to trespassers on land and in respect of the exercise by the police of functions in relation to serious violence reduction orders. At paragraph 24 the Committee recommend:

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)**

Government response

As the Committee will be aware, the Government set out its policy in relation to parliamentary scrutiny of statutory guidance in a letter from the Leader of the House of Lords, dated 16 October 2018, and reproduced at Appendix 1 of the Committee's 35th Report of session 2017/19. Amongst other things, the letter contained the following passage:

> "…….it is Government policy that guidance should not be used to circumvent the usual way of regulating a matter. If the policy is to create rules that must be followed, the Government accepts that this should be achieved using regulations subject to parliamentary scrutiny and not guidance. The purpose of guidance is to aid policy implementation by supplementing legal rules. This remains the Government's policy and there is no intention to alter this approach.
>
> There is a vast range of statutory guidance issued each year and it is important that guidance can be updated rapidly to keep pace with events. There is nothing to prevent Parliament from scrutinising guidance at any time. In certain exceptional circumstances it may be appropriate for guidance to be laid before Parliament or be subject to the negative procedure."

This remains the Government's policy and it informs the Government's response to the Committee's recommendations in relation to the parliamentary scrutiny of statutory guidance.

We note too the Committee's recommendations in relation to this session's Environment Bill where the Committee recommended that various statutory guidance to be issued under powers conferred by that Bill should be subject to a laying requirement only.

In view of the above, the Government will bring forward amendments at Report stage to provide for the guidance to be issued under clauses 18(1), 31(1) and 64 to be laid before Parliament and for the guidance provided for in clause 140(1) to be subject to the equivalent of the negative resolution procedure.

Paragraph 26

The Committee's recommendation

The Committee makes recommendations in relation to clause 140(1) which makes complements separate revisions to PACE code A in relation to stop and search powers. At paragraph 26 the Committee recommends:

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.

Government response

The Government accepts the Committee's recommendation and can confirm that the affirmative procedure will be applied to the consequential changes to PACE Code A.

Paragraphs 34 – 35

The Committee's recommendation

The Committee makes recommendations related to clause 43 and Schedule 4 which make provision with regard to the granting of pre-charge bail. At paragraphs 34 and 35 the Committee made the following recommendations:

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 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.

Government response

For the reasons set out above, the Government considers that the existing requirement in the Bill for the guidance under new section 50B of PACE to be laid before Parliament provides the appropriate level of parliamentary oversight.

The College of Policing retains a long term aim of achieving a Royal Charter. However, while it remains substantially publicly funded through the Home Office it retains the holding position of a company limited by guarantee. However, a number of the College's functions have statutory underpinning (see section 123 to 130 of the Anti-social behaviour, Crime and Policing Act 2014). The College Chair, Lord Herbert of South Downs, is currently undertaking a fundamental review of the College and the Government will consider carefully the recommendations flowing from that review.

Paragraph 43

The Committee's recommendation

The Committee has made recommendations with regard to clauses 36(1), 39(1) which make allowance for specified persons to extract information stored on an electronic device with user consent or where the user has died and clause 41(1) which makes regulation about the exercise of powers in relation to confidential information. At paragraph 43 the Committee made the following recommendation:

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.**

Government response

The Government accepts the Committee's recommendation and will bring forward amendments at Report stage to place on the face of the Bill provision about the exercise of powers to extract confidential information, thus removing the regulation making power currently found in clause 41.

Paragraph 60

The Committee's recommendation

The Committee makes recommendations in relation to clauses 55(4) and 56(6) which provide for the ability to define serious disruption to the activities of an organisation and to the life of the community respectively in relation to a public procession or assembly and clause 61 which provides for the ability to define serious disruption to the activities of an organisation in relation to a one-person protest. At paragraph 60 the Committee made the following recommendation:

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.

Government response

The Government accepts the Committee's recommendation and will bring forward amendments at Report to give effect to it.

Paragraphs 66 and 75

The Committee's recommendations

Paragraphs 66 and 75 of the Committee's report made recommendations in relation to clauses 77(6)(b) and (c), 80(8), 81(3), 89(8) and 90(3) which relate to the creation of two new cautions: diversionary and community cautions.

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.

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

Government response

The Government maintains that it sets out those offences that are to be excluded for the purposes of community cautions via secondary legislation. This mirrors the approach taken in the Criminal Justice and Courts Act 2015 which sets out that the simple caution may not be used in relation to offences specified by order made by the Secretary of State by secondary legislation. This approach allows future changes to be incorporated without primary legislation. Secondary legislation is considered to be appropriate for setting out the list of excluded offences as the level of detail required may not be appropriate for the face of the bill. By utilising secondary legislation, stakeholders will have sufficient time for essential engagement to identify the relevant offences. The decisions on this point will be subject to parliamentary scrutiny via the affirmative procedure.

However, the Government agrees the Committee's further recommendation related to cautions, namely that both increases and decreases in the maximum number of hours of unpaid work or attendance, or in the maximum financial

penalty, will be subject to affirmative procedure, rather than increases alone. The Government acknowledges that a decision to decrease the maximum hours or financial penalty may be a matter of importance to Parliament.

Paragraph 84

The Committee's recommendation

The Committee also made recommendations relating to clause 129 and Schedule 13 which provide for the power to specify special procedures for community and suspended sentence orders. At paragraph 84 the Committee made the following recommendation:

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.

Government response

The Government accepts the Committee's recommendation and will bring forward amendments at Report Stage to give effect to this. The Government maintains that regulations made by the Secretary of State that specify which courts are pilot courts for the 18 month pilot period, which persons are subject to the orders (i.e. a specific cohort within a particular pilot site) and/or the offences to which the orders relate, or otherwise describe the orders that qualify for special procedures, should continue to be subject to the negative procedure. The Government accepts that changing the status of a pilot site to a permanent site absolutely should be subject to increased Parliamentary scrutiny via the affirmative resolution procedure. However, establishing which cohorts, and which sites, will be part of the pilot is primarily a policy matter, balanced against questions of timing and implementation, and so the Government believes that the negative resolution procedure is right in these circumstances.

1 December 2021

Letter from Lord Wolfson of Tredegar QC and Baroness Williams of Trafford to the Lord Blencathra on the DPRRC's 13th Report of Session 2021-22

Thank you for your further report dealing with the Government amendments to the Police, Crime, Sentencing and Courts Bill tabled for Committee stage. The Government has again carefully considered the Committee's recommendations and our response is set out below.

The Committee's recommendation

19. We consider that new section 342V contains an extreme example of a power to issue guidance on the exercise of statutory functions. It allows the Secretary of State to influence the exercise by the police of functions that could prove to be highly controversial—including identifying persons in respect of whom the courts may make serious disruption prevention orders under which people who have not been convicted of any offence - and are not considered to be at risk of offending - may nonetheless be made subject to restrictions on liberty backed by criminal penalties.

20.We are disappointed that the supplementary Memorandum fails to even acknowledge what we said in our earlier Report on this very Bill about powers to issue guidance to which the police "must have regard". We identified two examples of such guidance that we said were sufficiently significant to merit affirmative procedure scrutiny because they related to the exercise of police functions that could prove to be highly controversial. We consider that the exercise of police functions in relation to serious disruption prevention orders could prove to be even more controversial.

21.Accordingly, we consider that guidance under new section 342V is sufficiently significant to merit affirmative procedure scrutiny.

Government response

The Government does not agree that the new section 342V of the Sentencing Code contains "an extreme example of a power to issue guidance on the exercise of statutory functions". Serious Disruption Prevention Orders (SDPOs) are not a new concept. Successive Governments, dating back at least to the creation of Ant-Social Behaviour Orders in the Crime and Disorder Act 1998, have legislated for civil preventative orders of this kind which can impose restrictions on liberty, backed by criminal sanctions. Many of these preventative order regimes include similar provision to that contained in new section 342V for the Secretary of State to issue guidance. Examples in Table 1 (see below).

We can assure the Committee that in considering the appropriate level of parliamentary scrutiny for SDPOs we paid careful attention to the Committee's earlier report on the Bill. Indeed, it was in the light of that report, and in particular the Committee's recommendation in relation to the statutory guidance to accompany Serious Violence Reduction Orders, that the Government decided that, exceptionally, the negative procedure should apply to the SDPO guidance. This was despite the general run of precedents that, in our view, point to such guidance not being subject to any parliamentary procedure. We note that as recently as the Committee's 21st report of session 2019–21, the Committee made no comment or recommendation to the effect that the statutory guidance in relation to Domestic Abuse Protection Notices and Domestic Abuse Protection Orders should be subject to any parliamentary procedure. As the table above shows, the Committee took a similar position in relation to previous Bills providing for very similar statutory guidance. Given this, we remain of the view that the negative procedure is appropriate in this case.

Table 1: Examples

Name of order	Power to issue guidance	Parliamentary procedure, if any	DPRRC report and recommendations, if any
Female Genital Mutilation Protection Orders (FGMPO)	Section 5C of the Female Genital Mutilation Act 2003* – inserted by the Serious Crime Act 2015	None	The FGMPO provisions were added to the Bill in the Commons after the Committee had published its 2nd Report of session 2014/15
Sexual Harm Prevention Orders and Sexual Risk Orders	Orders and Sexual Risk Orders Sections 103J(1) and 122J(1) of the Sexual Offences Act 2003 – inserted by the Anti-social Behaviour, Crime and Policing Act 2014	None	12th Report of session 2013/14
Forced Marriage Protection Orders	Section 63Q of the Family Law Act 1996* - inserted by Forced Marriage (Civil Protection) Act 2007	None	Not known
Gang injunctions	Section 47 of the Policing and Crime Act 2009*	Laying only	Not known
Domestic Violence Protection Orders	Section 31 of the Crime and Security Act 2010*	None	Not known
Anti-social behaviour injunctions; dispersal powers; Community Protection Notices; Public Spaces protection Orders; Closure Notices.	Sections 19, 41, 56, 73 and 91 of the Anti-social Behaviour, Crime and Policing Act 2014	None	12th Report of session 2013/14

Name of order	Power to issue guidance	Parliamentary procedure, if any	DPRRC report and recommendations, if any
Slavery and trafficking prevention orders and slavery and trafficking risk orders	Section 33 of the Modern Slavery Act 2015	None	10th Report of session 2014/15
Stalking Protection Orders	Section 12 of the Stalking Protection Act 2019	None	45th Report of session 2017/19
Knife Crime Prevention Orders (KCPOs)	Section 30 of the Offensive Weapons Act 2019*	None	The KCPO provisions were added to the Bill at Lords Report after the Committee had published its 44th Report of session 2017/19
Criminal Behaviour Orders	Section 341 of the Sentencing Act 2021 (formally section 32 of the Anti-social Behaviour, Crime and Policing Act 2014)	None	12th Report of session 2013/14
Domestic Abuse Protection Orders	Section 50 of the Domestic Abuse Act 2021*	None	21st Report of session 2019/21

* *Includes duty on specified persons to have regard to the guidance.*

APPENDIX 2: 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 15 December 2021 Members declared the following interests:

Health and Care Bill

Lord Blencathra

Board Member, Food Standards Agency (appointed by Department of Health)

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.