HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

35th Report of Session 2017–19

Counter-Terrorism and Border Security Bill

Tenant Fees Bill

Voyeurism (Offences) (No.2) Bill

Ivory Bill and Mental Health Units (Use of Force) Bill (Guidance): Government Response

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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)
Lord Flight
Lord Jones
Lord Lisvane
Lord Moynihan
Lord Rowlands
Lord Thomas of Gresford
Lord Thurlow
Lord Tyler

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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 Fifth Report

COUNTER-TERRORISM AND BORDER SECURITY BILL

1. The Counter-Terrorism and Border Security Bill had its Second Reading on 9 October. Committee Stage is scheduled to begin on 29 October.

2. Paragraphs 1 and 2 of the Explanatory Notes to the Bill state that its purpose is to:

   - amend certain terrorism offences to update them for the digital age, to reflect contemporary patterns of radicalisation and to close gaps in their scope;
   - strengthen the sentencing framework for terrorism-related offences and the powers for managing terrorist offenders following their release from custody;
   - strengthen the powers of the police to prevent terrorism and investigate terrorist offences; and
   - harden the UK's border defences against hostile state activity.

3. The Home Office has provided a Delegated Powers Memorandum ("the Memorandum").[1]

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

Clause 4(2)—Power for Secretary of State to designate an area for the purposes of the offence of entering or remaining in a designated area

5. Clause 4(2) of the Bill inserts new sections 58B and 58C into the Terrorism Act 2000 ("the 2000 Act"). Under new section 58B, a UK national or resident commits an offence if they enter or remain in "an area outside the UK" that is designated in regulations made by the Secretary of State. New Section 58C confers power on the Secretary of State to designate an area by regulations for the purposes of section 58B.

6. The Memorandum explains that this new offence is intended to tackle the phenomenon of UK nationals travelling to areas outside the UK to fight alongside terrorist organisations in conflicts (for example, in Syria and Iraq) or to otherwise sustain such organisations.[2] The offence is punishable by up to 10 years' imprisonment.

7. A person does not commit the offence if:

   - they have a reasonable excuse for entering, or remaining in, a designated area; or

1 Home Office, Counter-Terrorism and Border Security Bill Delegated Powers Memorandum
2 See para 11 of the Delegated Powers Memorandum.

- they are already travelling to, or are already in, the area on the day on which it is designated and they leave the area within one month of that day.[3]

8. It is a broadly defined offence:

- a person commits the offence merely by being in a designated area without a "reasonable excuse". It is not an essential element of the offence that the person has a particular intention;
- the offence may be committed by "a UK national" or "a UK resident", and "UK resident" is not limited to those who are 'ordinarily resident' in the UK[4]; and
- the Secretary of State's power to designate an area is sufficiently broad that it could be exercised to make it an offence to be anywhere in an entire country.

9. The Secretary of State may, by regulations, designate an area for the purposes of the section 58B offence if the following condition is met:

> "the Secretary of State is satisfied that it is necessary, for the purpose of protecting members of the public from a risk of terrorism, to restrict United Kingdom nationals and United Kingdom residents from entering, or remaining in, the area".[5]

For these purposes, "the public" includes the public of a country other than the UK[6].

10. Where an area is designated, the Secretary of State is required to keep under review whether the condition for designation continues to be met. Where the Secretary of State considers that it is no longer met, the regulations which designate that area must be revoked (or, if the regulations designate more than one area, they must be revoked so far as they have effect in relation to any area in respect of which the condition for designation is no longer met)[7].

11. The Department argues that designation is appropriately a matter for secondary legislation because the Government need to be able to act swiftly to designate an area where the Secretary of State is satisfied that this is necessary to protect the public.[8]

12. However, the Government recognise that designation of an area would have significant consequences ("in terms of triggering the operation of the section 58B offence").[9] The Bill therefore provides for regulations which designate an area to be subject to the 'made affirmative' procedure. This would allow the regulations to come into effect immediately but they would cease to have

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3 This is described in paragraph 44 of the Explanatory Notes to the Bill as "a period of grace" (see new section 58B(3) of the 2000 Act).
4 Broadly speaking, ordinary residence is established if there is a regular habitual mode of life in a particular place for the time being, whether of short or long duration, the continuity of which has persisted apart from temporary or occasional absences, and the residence is both voluntary and adopted for a settled purpose.
5 See new section 58C(2) of the 2000 Act.
6 See new section 58C(3) of the 2000 Act.
7 See new section 58C(4) of the 2000 Act.
8 See para 11 of the Delegated Powers Memorandum.
9 See para 13 of the Delegated Powers Memorandum.

effect if they were not approved by both Houses of Parliament within 40 days of being made.

13. The House may wish to note that, although a designation could come into effect immediately, the "period of grace"[10] provided for in new section 58B(3) would significantly limit the chances of an offence being committed before the regulations were debated by both Houses: the offence is not committed by a person who is already travelling to, or is already in, an area on the day on which it is designated and who leaves that area within one month of that day.

14. **We consider that the made affirmative procedure strikes a sensible balance between effective Parliamentary scrutiny and the need for the Government to act quickly where the Secretary of State is satisfied that the condition for designation is met.**

15. **However, given the breadth of both the offence and the power to designate an area, we recommend that the Bill be amended so that, where an area is designated by regulations, the Secretary of State is required to lay before Parliament a statement setting out the reasons why he or she considers that the condition for designation is met[11] in relation to that area.**

16. Regulations which remove a designation would be subject only to a requirement that they must be laid before Parliament after being made. The Department's justification for this focuses solely on the beneficial impact of removal of a designation on those who would otherwise be at risk of committing the offence.[12] Yet such regulations would also affect those for whose protection the area was designated. **For this reason, we consider that the negative procedure is appropriate for regulations which remove a designation.**

Clause 15(9)—Allowing an anti-terrorism traffic regulation order or notice to enable a constable to authorise private security guards and others to exercise police powers

17. Clause 15(3) to (9) of the Bill amends section 22D of the Road Traffic Regulation Act 1984 ("the 1984 Act"), which makes provision with respect to anti-terrorism traffic regulation orders ("ATTROs") and anti-terrorism traffic regulation notices ("ATTRNs"). These are made by "traffic authorities".[13] They allow the use of a road to be prohibited or restricted in order to avoid or reduce danger connected with terrorism, or to prevent or reduce damage connected with terrorism.[14]

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10 See para 7 above.
11 The condition set out in new section 58C(2) of the 2000 Act (see para 9 above).
12 See para 14 of the Delegated Powers Memorandum.
13 As defined in section 121A of the 1984 Act. They include local authorities, Transport for London and Highways England.
14 "Terrorism" has the same meaning as in section 1 of the 2000 Act (see section 22C(6) of the 1984 Act).

18. ATTROs and ATTRNs are not made by statutory instrument and are not subject to any Parliamentary procedure.[15]

19. Section 22D(5) of the 1984 Act provides that an ATTRO may enable a constable to direct that a provision of the ATTRO shall (to such extent as the constable may specify) be commenced, suspended or revived. An ATTRO may therefore allow a constable to determine which of the prohibitions or restrictions specified in it shall apply at a given time.

20. The amendments made by clause 15(9) of the Bill would allow an ATTRO or ATTRN to give a constable power to authorise a person of a description specified in the ATTRO or ATTRN to do anything that the constable has power to do by virtue of section 22D(5).

21. The Memorandum explains that such specified persons might include local authority staff, event stewards or security guards employed by a company contracted to provide security for an event to which an ATTRO or ATTRN relates (such as a sporting or musical event).[16]

22. The amendment would, for example, allow a constable to delegate to a security guard discretion to:

- determine when a provision of an ATTRO or ATTRN is to commence or cease operating on a given day (an ATTRO might, for example, provide for a road to be closed off from 10:00 to 22:00 but could allow a constable to authorise a security guard to determine whether it should be re-opened an hour earlier); or

- allow accredited vehicles or persons through a barrier or gate on a closed-off road.

23. The Memorandum helpfully explains that a similar delegated power was originally included in the Civil Contingencies Bill in 2004 but was removed by the Government following the expression of concern by the Committee in its 30th Report of session 2003–04.[17] In that Report, the Committee noted that, "there are sensitivities concerning the exercise by employees of traffic authorities of powers which are otherwise exercisable by a constable".

24. The Government's argument for revisiting this is that, "the way policing is delivered and the management of risk around sites vulnerable to terrorist attack has changed significantly since 2004".[18] The Memorandum says:[19]

- "it is now common-place for policing powers to be exercised by police staff and contracted-out staff under the… Police Reform Act 2002";

- "much of the protective security around sporting events … and entertainment events… which may need to be protected by an ATTRO

15 The procedure for making permanent orders is set out in the Local Authorities' Traffic Orders (Procedure) (England and Wales) Regulations 1996 (SI 1996/2489) and the Local Authorities' Traffic Orders (Procedure) (Scotland) Regulations 1999 (SI 1999/614). The procedure for making temporary orders is set out in the Road Traffic (Temporary Restrictions) Procedure Regulations 1992 (SI 1992/1215).

16 See para 19 of the Delegated Powers Memorandum.

17 See para 20 of the Delegated Powers Memorandum.

18 See para 21 of the Delegated Powers Memorandum.

19 See paras 21 and 22 of the Delegated Powers Memorandum.

is now commonly provided by security guards and stewards in partnership with the police";

- "such personnel are equally well placed as a constable to operate certain measures under an ATTRO, such as opening and closing barriers or gates to allow accredited vehicles and people through or determining whether restrictions on the flow of traffic can be commenced or suspended";

- "requiring all such decisions to be made by a constable is not always necessary and places an unnecessary burden on the police… and potentially limits the extent to which ATTROs can be used".

25. The Memorandum seeks to draw a parallel between the provision in the Bill and provisions in the Police Reform Act 2002 ("the 2002 Act"), under which "accredited persons" may exercise specified police powers in relation to road traffic.[20]

26. However, we consider that the proposed amendment to section 22D(5) of the 1984 Act differs in significant respects:

- the police powers which may be exercised by "accredited persons" under the 2002 Act relate to what might be considered more routine policing matters[21] than the exercise of discretion in relation to the maintenance of measures put in place to protect against terrorist acts;

- under the 2002 Act, the police powers may only be exercised by a person accredited by a chief officer of police,[22] and

- a person may only be so accredited if the chief officer of police is satisfied that the person meets the following four conditions (as to suitability)—

  (i) that that person's employer is a fit and proper person to supervise the carrying out of the functions for the purposes of which the accreditation is to be granted;

  (ii) that the person himself is a suitable person to exercise the powers that will be conferred on him by virtue of the accreditation;

  (iii) that that person is capable of effectively carrying out the functions for the purposes of which those powers are to be conferred on him; and

  (iv) that that person has received adequate training for the exercise of those powers.

By contrast, the proposed amendment would simply allow "a constable" to authorise "a person of a description specified in the [ATTRO] or [ATTRN]" to exercise the powers that the constable has under section 22D(5).

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20 See section 41 of, and Schedule 5 to, the 2002 Act. The specified powers are listed in Schedule 5.

21 For example, the issue of fixed-penalty notices, requiring a person to give their name and address, stopping a vehicle for testing, and directing traffic.

22 See section 41 of the 2002 Act.

27. The Memorandum explains that the Government consider that the proposed change does not warrant a change to the procedure for making ATTROs as it "impacts on the enforcement of rather than scope of an ATTRO".[23]

28. However, we consider that the exercise of a discretion as to whether restrictions imposed by an ATTRO or ATTRN are maintained or are removed goes beyond mere 'enforcement'. Currently, only a constable has such discretion. We consider that allowing this to be delegated to others could go to the effectiveness of measures put in place to prevent terrorists from causing very serious harm. It would mean that decisions about the operation of such measures would no longer solely be in the hands of the police. Such decisions could potentially have very significant consequences (for example, a decision to re-open a road could facilitate a terrorist attack).

29. As the Cabinet Office acknowledged in its Supplementary Memorandum (dated 12 October 2004) to the Civil Contingencies Bill of 2004 (see the Committee's 30th Report of session 2003–04):

> "Control of entry of vehicles to sensitive areas has an important role to play in preventing terrorist attacks, in particular vehicle-borne suicide bombings."

30. We consider that there will still be sensitivities about allowing a constable to delegate to local authority staff or contractors (such as stewards or security guards) important powers under anti-terrorism traffic regulation orders and notices which are currently exercisable only by constables. **We therefore recommend that the House press the Minister to provide fuller justification for this proposed provision.**

31. Even accepting the appropriateness of the delegation, it is noteworthy that the power is drafted in a way that would allow *any* description of person to be authorised to exercise these important powers. **The Memorandum does not explain why it is necessary for the power to be cast in such wide terms. We see no reason to depart from the approach taken in the Police Reform Act 2002, under which police powers may be exercised by a person who is not a constable only if the person is accredited by a chief officer of police (with accreditation being dependent upon the chief officer of police being satisfied that the person meets the four conditions (as to suitability) set out in section 41(4) of that Act).**

Paragraph 53(1)(e) of Schedule 3—Power of Secretary of State to specify persons to whom information acquired by an examining officer may be supplied

32. Schedule 3 to the Bill confers powers exercisable at ports and borders by "examining officers"[24] to stop, question, search and detain a person for the purpose of determining whether the person appears to be someone who is, or has been, engaged in "hostile activity" carried out for, or on behalf of, another State.[25] The powers may be exercised in relation to a person whether

23 See para 23 of the Delegated Powers Memorandum.

24 "Examining officer" is defined in paragraph 57(3) of Schedule 3 to the Bill. It means a constable, an immigration officer designated for the purposes of Schedule 7 to the 2000 Act, or a customs officer designated for the purposes of Schedule 7 to that Act.

25 See para 1 of Schedule 3 to the Bill.

or not there are grounds for suspecting that the person is or has been engaged in "hostile activity".[26]

33. For the purposes of Schedule 3, a person is, or has been, engaged in "hostile activity" if they have been concerned in the commission, preparation or instigation of a "hostile act" carried out for, or on behalf of, another State, or otherwise in the interests of another State. An act is "hostile" if it:

- threatens national security;
- threatens the economic well-being of the UK; or
- is an act of serious crime.

34. Wilful failure to provide information to an examining officer is an offence.[27]

35. The Explanatory Notes to the Bill state that the provisions are modelled on those in Schedule 7 (port and border controls) to the 2000 Act which confer powers exercisable at ports and borders by "examining officers" to stop, question, search and detain a person for the purpose of determining whether the person appears to be someone who is, or has been, concerned in the commission, preparation or instigation of acts of terrorism.[28]

36. Paragraph 53 of Schedule 3 to the Bill allows information acquired by an examining officer to be supplied to particular persons. Those persons include the Secretary of State, a customs officer and a constable. They also include, "a person specified in regulations made by the Secretary of State for use of a kind specified in the regulations"[29].

37. The Memorandum explains that the purpose of this regulation-making power is to ensure that information may be supplied to other agencies in the future should this be judged "operationally desirable".[30]

38. The exercise of the power would be subject to the affirmative procedure. The Government consider this to be appropriate as the power would enable information, including sensitive information, to be passed to third parties.[31]

39. Paragraph 53 of Schedule 3 to the Bill is almost identical to paragraph 4 of Schedule 14 to the 2000 Act, which deals with the supply of information acquired by examining officers under Schedule 7 to that Act in the exercise at ports and borders of powers to stop, question, search and detain[32]. Both include a power under which the Secretary of State may specify by secondary legislation persons to whom information may be supplied. In both, the exercise of that power is subject to the affirmative procedure.

40. We nonetheless consider it noteworthy that the power is drafted in a way that would allow the Secretary of State to specify *any* description of person (including an organisation in the private sector) to be allowed to receive sensitive information and to use it for any purpose set out in the regulations. **The Memorandum does not explain why it is necessary for the power**

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26 See para 1(4) of Schedule 3 to the Bill.
27 See para 16 of Schedule 3 to the Bill.
28 Explanatory Notes to the Counter-Terrorism and Border Security Bill, para 137
29 See para 53(1)(e) of Schedule 3 to the Bill.
30 See para 28 of the Delegated Powers Memorandum.
31 See paragraph 29 of the Delegated Powers Memorandum.
32 See paragraph 35 above.

to be cast in such wide terms. We recommend that the delegation of such a broad power is inappropriate, unless the Minister can fully justify it.

Paragraph 19 of Schedule 4—Consequential amendment relating to Schedule 3 to the Bill (border security): power of Scottish Ministers to prescribe circumstances in which legal aid is available

41. Paragraph 19 of Schedule 4 to the Bill amends section 8A of the Legal Aid (Scotland) Act 1986 ("the 1986 Act").

42. Section 8A allows the Scottish Ministers to make regulations which prescribe circumstances in which non-means tested state-funded legal advice and assistance is to be made available to a "relevant client". Such regulations are made by Scottish statutory instrument subject to affirmative resolution procedure in the Scottish Parliament.

43. Paragraph 19 amends the definition of "relevant client" for these purposes so that it includes persons detained under Schedule 3 to the Bill or Schedule 7 (port and border controls) to the 2000 Act. This means that regulations may provide for non-means tested state-funded legal advice and assistance to be made available to such persons.

44. The Bill goes further: paragraph 27 of Schedule 4 to the Bill amends the relevant regulations (the Advice and Assistance and Civil Legal Aid (Financial Conditions and Contributions) (Scotland) Regulations 2011)[33] so that state-funded legal advice and assistance is made available to such persons. The Memorandum explains that this is "to facilitate early implementation of the provisions in Schedule 3".[34] The Scottish Ministers may reverse this amendment by Scottish statutory instrument should they wish to do so.

45. We note that the Memorandum does not explain why the amendment to the regulation-making power in the 1986 Act applies to a person who is detained under Schedule 3 to the Bill or Schedule 7 to the 2000 Act but not to a person who is questioned but not detained.

46. Under Schedule 3, a person may be questioned without being detained for up to one hour. At the end of the one hour period, they may not be questioned further unless they are detained.[35] We note that provision is made in Schedule 3 so that, where *a detainee* makes a request to consult a solicitor, an examining officer may not (other than in certain limited circumstances) question the detainee until the detainee has consulted a solicitor.[36] No such provision is made with respect to questioning a person who has not been detained.

47. **We consider that the Department has provided reasonable justification for the amendments to the 1986 Act and the 2011 Regulations. However, the House may wish to ask the Minister to explain why the amendments apply to persons who are detained but do not apply to persons who are questioned but not detained.**

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33 SSI 2011/217
34 See para 31 of the Delegated Powers Memorandum.
35 Schedule 3, para 5(2).
36 See (in relation to detention in Scotland) para 31 of Schedule 3 to the Bill.

TENANT FEES BILL

48. This Bill, which had its Second Reading on 10 October, makes provision for restricting the fees which may be imposed on tenants by landlords and letting agents. Provision is made for local weights and measures authorities and district councils to enforce the provisions of the Bill.

49. The Department for Housing, Communities and Local Government has provided a Delegated Powers Memorandum.[37] There is one matter we would draw to the attention of the House.

Clause 23—Guidance to enforcement authorities

50. Clause 23(2) imposes a duty on the lead enforcement authority (which may be the Secretary of State or a local weights and measures authority) to issue guidance to enforcement authorities about the exercise of their functions under the Bill. By virtue of clauses 6(4) and 7(2), an enforcement authority is under a statutory duty to have regard to the guidance in exercising its functions. The functions of enforcement authorities include imposing financial penalties and enforcing breaches of the Bill by prosecution for an offence under clause 12.

51. Guidance issued under clause 23(2) is not subject to parliamentary scrutiny. The duty on the lead authority is limited to issuing the guidance to enforcement authorities; there is no wider duty under the Bill to publish the guidance issued to enforcement authorities.

52. We considered the issue of guidance under the Bill in our submission to the House of Commons' Housing, Communities and Local Government Committee which reported on a draft of the Bill in March 2018. In that submission we concluded as follows:

> "In the 2015–16 Session, we reported on a provision in the Housing and Planning Bill which also concerned guidance covering the imposition of financial penalties and the circumstances in which it would be more appropriate to issue a financial penalty rather than to prosecute. In that case, we concluded that the guidance should be subject to parliamentary scrutiny because it was likely to be highly influential when an authority determines whether to impose a financial penalty instead of bringing a prosecution, and when it decides the level of that penalty.
>
> We take the view that similar considerations apply here. The Department acknowledges in its memorandum that the guidance will play an important role in ensuring consistency in the way in which different local weights and measures authorities exercise their enforcement functions, including deciding whether to impose a financial penalty or to prosecute. Since the guidance is likely to be highly influential as to how enforcement functions are exercised, we consider it should be made subject to parliamentary scrutiny, with the draft negative procedure offering an appropriate level of scrutiny."

37 Department for Housing, Communities and Local Government, Tenant Fees Bill Delegated Powers Memorandum

53. There have been a number of occasions in the recent past (of which our report on the Housing and Planning Bill[38] is one example) where we have found ourselves drawing the House's attention to a Bill because it failed to make provision for guidance to be subject to parliamentary scrutiny. In each case the body or bodies to whom the guidance is addressed are under a duty to have regard to the guidance in exercising statutory functions, with the result that the guidance is liable to have a significant impact on the way in which those functions are exercised.

54. There has been no change in the Department's explanation of the role of guidance in this case. The Department still acknowledges that it will help to ensure that the approach of enforcement authorities is consistent, including in relation to decisions on whether it is more appropriate to issue a financial penalty or to prosecute.[39] Also, there has been no change in the Department's reasons for not making the guidance subject to parliamentary scrutiny.[40] The only change of substance is the commitment referred to in the delegated powers memorandum that the Government will share draft guidance with Parliament in due course to provide greater clarity on the proposed contents.

55. **While we welcome the Government's offer to make draft guidance available, we take the view this is not sufficient to remove the need for the guidance to be made subject to parliamentary scrutiny. In our view, it is important that both Houses have the opportunity to scrutinise the actual guidance which is issued. It is also important that both Houses have the opportunity to scrutinise any revisions which may be made to that guidance in the future. Accordingly, we still consider that the guidance should be subject to parliamentary scrutiny, with the draft negative procedure offering an appropriate level of scrutiny.**

VOYEURISM (OFFENCES) (NO.2) BILL

56. This Bill contains no delegated powers.

IVORY BILL AND MENTAL HEALTH UNITS (USE OF FORCE) BILL (GUIDANCE): GOVERNMENT RESPONSE

57. We considered the Ivory Bill and Mental Health Units (Use of Force) Bill in our 31st Report of this Session.[41] The Government responses to the Report are printed in our 33rd[42] and 36th[43] reports. The Government have now provided a further response by way of a letter from the Rt. Hon Baroness Evans of Bowes Park, Leader of the House of Lords, setting out the Government's approach to guidance. This letter is printed at Appendix 1.

38 Delegated Powers and Regulatory Reform Committee (20th and 21st Reports, Session 2015–16, HL Paper 90 and HL Paper 98).
39 See in particular para 53 of the Delegated Powers Memorandum.
40 See para 60 of the Delegated Powers Memorandum.
41 Delegated Powers and Regulatory Reform Committee (31st Report, Session 2017–19, HL Paper 177)
42 Delegated Powers and Regulatory Reform Committee (33rd Report, Session 2017–19, HL Paper 186)
43 Delegated Powers and Regulatory Reform Committee (36th Report, Session 2017–19, HL Paper 204)

APPENDIX 1: IVORY BILL AND MENTAL HEALTH UNITS (USE OF FORCE) BILL (GUIDANCE): GOVERNMENT RESPONSE

Letter from the Rt Hon. Baroness Evans of Bowes Park, Leader of the House of Lords, to the Rt Hon. Lord Blencathra, Chairman of the Delegated Powers and Regulatory Reform Committee

In the 31st Report, published 24 July 2018, the Committee made recommendations in relation to both the Ivory Bill and the Mental Health Units (Use of Force) Bill regarding the use of a delegated power enabling guidance to be issued that you considered to be mandatory rather than advisory. In particular you were concerned that under these bills the guidance would not be subject to any parliamentary scrutiny.

Both the Department for Food, Environment and Rural Affairs and the Departments for Health and Social Care are responding to the Committee separately on the specific recommendations in respect of the bills. However, I wanted to address the Committee's comments on the approach to guidance more generally.

As you will be aware, 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.

The Government has carefully considered the recommendations made in the Committee's 31st Report. In respect of the Ivory Bill, we accept that in almost all instances it is more appropriate for these legal requirements to be set out in subordinate legislation rather than in guidance. The Government will table amendments to this effect for consideration at Report stage in the House of Lords.

As set out in the Government's response to the Committee on the the Mental Health Units (Use of Force) Bill, the Government believes it remains appropriate for the matters set out in clause 6(3) of the Bill to be covered by guidance rather than subordinate legislation. However, recognising the importance of the subject matter, the Government has committed to laying this guidance before Parliament.

I am grateful for the continued work of the Committee in scrutinising the legislation put before Parliament.

16 October 2018

APPENDIX 2: MEMBERS AND DECLARATIONS OF INTERESTS

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

For the business taken at the meeting on 17 October 2018, Members declared no interests in relation to the Counter-Terrorism and Border Security Bill, Tenant Fees Bill and Voyeurism (Offences) (No.2) Bill.

Attendance

The meeting on the 17 October 2018 was attended by Baroness Andrews, Lord Blencathra, Lord Jones, Lord Lisvane, Lord Moynihan, Lord Rowlands, Lord Thomas of Gresford and Lord Tyler.