

HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

3rd Report of Session 2019

Proposed Negative Statutory Instruments under the European Union (Withdrawal) Act 2018

Draft Public Bodies (Abolition of Public Works Loan Commissioners) Order 2019

Drawn to the special attention of the House:

Draft Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 14) Order 2019

Draft Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2019

Draft Representation of the People (Annual Canvass) (Amendment) Regulations 2019

Agreement between the United Kingdom and the United States of America on Access to Electronic Data for the Purpose of Countering Serious Crime

Includes information paragraphs on:

Agricultural Products, Food and Drink (Amendment etc.) (EU Exit) Regulations 2019

Common Organisation of the Markets in Agricultural Products (Producer Organisations and Wine) (Amendment etc.) (EU Exit) Regulations 2019

Common Agricultural Policy (Market Measures, Notifications and Direct Payments) (Miscellaneous Amendments) (EU Exit) Regulations 2019

Northern Ireland (Extension of Period for Executive Formation) (No. 2) Regulations 2019

Jobseeker's Allowance and Universal Credit (Higher-Level Sanctions) (Amendment) Regulations 2019

Jobseeker's Allowance and Universal Credit (Higher-Level Sanctions) (Amendment) Regulations (Northern Ireland) 2019

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Secondary Legislation Scrutiny Committee

The Committee's terms of reference, as amended on 11 July 2018, are set out on the website but are, broadly:

To report on draft instruments and memoranda laid before Parliament under sections 8, 9 and 23(1) of the European Withdrawal Act 2018.

And, to scrutinise –

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

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

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

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

Members

<u>Baroness Bakewell of Hardington Mandeville</u>	<u>Viscount Hanworth</u>	<u>The Earl of Lindsay</u>
<u>Rt Hon. Lord Chartres</u>	<u>Lord Hodgson of Astley Abbotts</u>	<u>Lord Lisvane</u>
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<u>Lord Faulkner of Worcester</u>	<u>Lord Kirkwood of Kirkhope</u>	<u>Baroness Watkins of Tavistock</u>

Registered interests

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

Publications

The Committee's Reports are published on the internet at <http://www.parliament.uk/seclegpublications>

Committee Staff

The staff of the Committee are Christine Salmon Percival (Clerk), Helen Gahir (Adviser), Philipp Mende (Adviser), Jane White (Adviser), Louise Andrews (Committee Assistant), Ben Dunleavy (Committee Assistant) and Paul Bristow (Specialist Adviser).

Further Information

Further information about the Committee is available at <https://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/>

The progress of statutory instruments can be followed at <https://beta.parliament.uk/find-a-statutory-instrument>

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

Contacts

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

Third Report

PROPOSED NEGATIVE STATUTORY INSTRUMENTS UNDER THE EUROPEAN UNION (WITHDRAWAL) ACT 2018

Proposed negatives about which no recommendation to upgrade is made

- Network and Information Systems (Amendment etc.) (EU Exit)
(No. 2) Regulations 2019

PUBLIC BODIES ORDER

Draft Public Bodies (Abolition of Public Works Loan Commissioners) Order 2019

Date laid: 14 October 2019

Introduction

1. The draft Public Bodies (Abolition of Public Works Loan Commissioners) Order 2019 (“the draft Order”) was laid before Parliament by HM Treasury (HMT) on 14 October 2019 under section 11(1) of the Public Bodies Act 2011 (“the 2011 Act”). The Order was laid with an Explanatory Document (ED). The Public Bodies Act 2011 gives Ministers powers to abolish or merge public bodies, modify their constitutional or funding arrangements or modify or transfer functions of public bodies through Public Bodies Orders. The draft Order proposes to abolish the Public Works Loan Commissioners (the “Commissioners”).

Context

2. The Public Works Loan Board (PWLB) is a statutory body that issues loans to local authorities and other specified bodies, operating within a policy framework set by HMT. Formally, the PWLB consists of up to 12 Commissioners who are appointed for four years and, by law, are unpaid. The Commissioners originated in 1793 and were established on a permanent statutory basis in 1817. There are six Commissioners in post at present.
3. HMT explains that the Commissioners were originally responsible for approving loan applications, including assessing the appropriateness of any security, and collecting the repayments. In practice, their functions and day-to-day operations have been delegated to the Commissioners’ Secretary in the UK Debt Management Office (DMO), an executive agency of HMT. The DMO also manages the National Loans Fund (NLF), which finances loans from the Commissioners. According to HMT, loans from the Commissioners are the main source of debt financing for local authorities. They are mainly used for capital projects and in 2018–19 net lending by the Commissioners to local authorities was £7.4 billion.
4. HMT says that, since 2004, local authorities have been responsible for making their own borrowing decisions without government consent under the prudential regime¹ which secures any borrowing automatically against their revenues.

Overview of the proposal and rationale for reform

5. The draft Order proposes to abolish the Commissioners and transfer their functions formally to HMT. The DMO will continue to carry out their functions within HMT and the PWLB will continue to exist as the statutory lending body. The Commissioners’ current interests in land are to be transferred to the Public Works Loan Secretary, a new statutory office to be established by this draft Order, to hold on behalf of HMT. All other rights, liabilities and property are to be transferred to HMT. In effect, the

¹ According to HMT, local authorities may borrow without government consent under the Local Government Act 2003 and the Capital Finance Regulations 2003. They are required to have regard to the “Prudential Code for Capital Finance in Local Authorities” published by the Chartered Institute of Public Finance and Accountancy.

new Public Works Loan Secretary will continue the functions and retain the powers of the previous Commissioner's Secretary.

6. HMT explains that the transfer of the Commissioners' functions to HMT will formalise the arrangements which already exist in practice between HMT and the DMO, without impacting on the financing arrangements for local authorities, or the amounts they may borrow. HMT says that apart from meeting once a year to review an annual report and accounts that are prepared by the DMO, the Commissioners have no role in the operational processes or the day-to-day management of local authority loans, such as collecting due repayments. While the Commissioners currently have the legal power to block or approve individual loans, HMT says that they have not used this power or their discretion in lending decisions since the introduction of the prudential regime in 2004. HMT describes their role as "quasi ceremonial" and says that while the role of the Commissioners is no longer required in practice, their lending functions are still needed and transferring them formally to HMT will "align policy and operational responsibilities with current practice". According to HMT, the draft Order would resolve legal ambiguities in the governance framework.

Role of the Secondary Legislation Scrutiny Committee

7. The Committee's role, as set out in its Terms of Reference, is to "report on draft orders and documents laid before Parliament under section 11(1) of the 2011 Act in accordance with the procedures set out in sections 11(5) and (6)".² A key aspect of this role is the Committee's power to trigger the enhanced affirmative procedure, which would require the Government to have regard to any recommendations made by the Committee during a 60-day period from the date of laying. The Committee may also take oral or written evidence, to aid its consideration of the orders.

Statutory Consultation

8. The Government conducted a public consultation on the proposed changes in accordance with section 10 of the 2011 Act. The consultation ran from 12 May 2016 to 3 August 2016 and received 35 responses, including 30 responses from local authorities, parish councils and local authority associations, two responses from private sector bodies, two from members of the public and one from a Commissioner.
9. As set out by HMT in the ED and in its consultation response,³ most responses to the consultation supported the proposed abolition of the Commissioners and the transfer of their functions to HMT. A number of responses highlighted the need for some form of independent oversight of local authority loans. HMT says that, in practice, the Commissioners have not been carrying out this oversight function since decisions on borrowing have been devolved to local authorities under the prudential regime. One local authority raised the possibility of transferring the Commissioner's functions to the Department for Communities and Local Government (DCLG, now Ministry of Housing, Communities and Local Government—MHCLG) as the lead department for local government finance. HMT says that the

² [Terms of Reference of the Secondary Legislation Scrutiny Committee.](#)

³ HM Treasury, 'Transfer of functions from the Public Works Loan Board: response to the consultation' (November 2016): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/568487/transfer_of_functions_from_PWLB_government_response.pdf [accessed 25 October 2019].

purpose of the proposed changes is to “provide a more streamlined, up to date governance arrangement and ensure that Ministers and Accounting Officers are properly accountable to Parliament”, and that transferring the functions to DCLG/MHCLG or using other organisations for oversight would “add another layer of bureaucracy”, as responsibility for the NLF as the source of local authority loans will need to remain with HMT. Most respondents to the consultation expected the proposed changes to have a negligible impact on borrowers. HMT emphasises that “the proposed governance changes will not affect existing local loans, the Government’s policy on lending to local authorities, or the process by which the loan applications or repayments are handled” and that interest rate policy will also remain the responsibility of HMT.

10. Given that the consultation was completed in summer 2016, we asked HMT why the draft Order had not been taken forward earlier. HMT told us that the intention was to lay the Order in 2016 but that, due to pressures on Parliamentary time following the EU referendum, it was deprioritised. HMT added that the draft Order is now a priority as the power to use the 2011 Act to abolish the Commissioners will run out on 12 April 2020 and the current terms for most of the Commissioners will end in 2021. The Committee notes the significant three-year delay in bringing forward the draft Order.

Other Tests in the Public Bodies Act 2011: assessment of the proposals

11. This Order is proposed under sections 1(1), and (2), 6(1), (2)(a) and (5), 23(1)(a), (2)(b), and (6) and 35(2) of the 2011 Act which, in effect, give Ministers powers to abolish a public body and transfer its functions and property, rights and liabilities to another public body.
12. Ministers may only make an order under sections 1 to 5 of the 2011 Act if they consider that the order serves the purpose of improving the exercise of public functions, having regard to (a) efficiency, (b) effectiveness, (c) economy, and (d) securing appropriate accountability to Ministers (section 8 of the 2011 Act). HMT addresses these issues in sections 8 and 9 of the ED.

Efficiency

13. HMT explains that efficiencies will be realised by formalising the existing arrangements between HMT and the DMO, and ensuring the new governance reflects those arrangements. HMT emphasises that under the new arrangements there will no longer be a requirement to hold an annual meeting with, and appoint, Commissioners.

Effectiveness

14. HMT sets out in the ED that effectiveness will be improved following the abolition of the Commissioners and the transfer of their functions to the DMO, as Ministers will be able to influence delivery and the implementation of policies more directly. The Committee notes that as the Commissioners only have a “quasi ceremonial” role in practice, the impact of their abolition on the effectiveness of the Public Works Loan scheme in practice is likely to be marginal.

Economy

15. HMT expects to achieve small economies by removing the requirement to appoint Commissioners, explaining that “vacancies typically attract

only a small field of candidates and appointing 12 Commissioners involves a drawn-out process” with approval required from HMT’s Permanent Secretary, the Cabinet Secretary, the Prime Minister and the Chancellor before appointments are made by Royal Warrant. We asked HMT about the cost savings that are expected. HMT told us that:

“[T]he role of Commissioners has become simply a formal requirement. Employing civil service assets in the long recruitment process for Commissioners ... therefore is not a good use of public resources, however we have not carried out a specific costing of this activity.”

16. The Committee notes that while it would have been helpful for HMT to provide Parliament with an estimate of the cost savings, these savings are expected to be small.

Accountability

17. HMT emphasises that accountability will improve following the transfer of functions to the DMO: Ministers will be accountable directly to Parliament as there will no longer be a separation between Ministers and the operation of the Commissioners in providing loans to local authorities. HMT says that under the new arrangements there will be a statutory requirement to present a report annually (with accounts annexed) to Parliament on local authority loans and to provide a copy to the Comptroller and Auditor General, so that it may present a further audited report to Parliament.

Safeguards

18. The ED states that the conditions in section 8(2) of the 2011 Act are satisfied in respect of the abolition of the Commissioners as their functions will be transferred to HMT. According to HMT, this change will not by itself alter the financing arrangements for local authorities, or how much they are able to borrow; it will only formalise the existing arrangements between HMT and the DMO.
19. HMT adds that these changes will not alter or remove any necessary protection or affect the exercise of any legal rights or freedoms. The abolition of the Commissioners will remove the requirement to have Commissioners and place responsibility for local loans with HMT, which will continue to provide reports and accounts to Parliament, with Ministers being directly accountable for any local loans made. HMT emphasises that the proposed changes will not impact on current financing arrangements for local authorities, or the amounts they may borrow.

Conclusion

20. While the practical effect of the abolition of the Commissioners and the transfer of their functions to the DMO is likely to be limited, given the Commissioners’ current “quasi ceremonial” role, HMT has demonstrated that the proposals will streamline some aspects of the provision of Public Works Loans to local authorities by clarifying the governance framework and improve accountability by making Ministers directly accountable to Parliament for these loans. The Committee notes that, while HMT has not provided any financial data, the economies that are expected to be realised by this draft Order are small. **The Committee concludes that the Government have demonstrated that the draft Order serves**

the purpose of improving the exercise of public functions and is in compliance with the tests set out in the 2011 Act. We are therefore content to clear the draft Order within the 40-day affirmative procedure.

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 14) Order 2019

Date laid: 14 October 2019

Parliamentary procedure: affirmative

*This Order would allow an Alcohol Abstinence and Monitoring Requirement (AAMR), enforced by use of an electronic tag to monitor the offender's sobriety, to be imposed as a sentencing option for alcohol-related offending anywhere in England and Wales. The Ministry of Justice (MoJ) has conducted two pilots in London and Yorkshire which it asserts have been very successful. Regrettably no data is yet available on the second of these pilots, and no information at all is available on the incidence of reoffending. Although the roll out of AAMR is to be incremental and is not scheduled to begin until Q3 (October–December) 2020, **the House is being asked to approve the programme on the basis of very limited information. This is unacceptable.** While we find the proposal interesting, it seems premature as the House currently has very little means of assessing whether the MoJ's assertions are overly optimistic. **The House may wish to press the Minister for more detail on all aspects of the department's roll-out plans and anticipated long-term outcomes.***

This Order is drawn to the special attention of the House on the ground that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation.

21. The Ministry of Justice (MoJ) has laid this affirmative instrument to bring into force section 76 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("the 2012 Act"). This will enable the Alcohol Abstinence and Monitoring Requirement (AAMR), which includes an electronic tag to monitor the offender's sobriety, to be brought into effect nationally. This will allow an AAMR to be imposed as a sentencing option for alcohol-related offending anywhere in England and Wales where a community order or suspended sentence order is imposed. The Order is accompanied by an Explanatory Memorandum (EM) and an Impact Assessment (IA).

The two pilots

22. Section 77 of the 2012 Act requires the AAMR programme to be piloted before any national roll-out. There have been two pilots. A pilot by the London Mayor's Office for Policing and Crime (MOPAC) was commenced in 2014, extended to cover all London Local Justice Areas in 2016, and ended in June 2018. The second pilot in the Local Justice Areas of Humber, Lincoln and North Yorkshire (HLNY) was due to commence in April 2017 but was delayed due to a General Election being called. The pilot ended in April 2019.
23. AAMR aims to provide a new option for sentencers by filling a gap where offenders who are not alcohol dependent nevertheless commit alcohol-related offences. The MOPAC pilot showed AAMRs were most commonly given in relation to violence (45%), of which 57% were low-level common assault. MoJ

states that it is reasonable to expect that a break in drinking alcohol, for up to 120 days, should remove a contributing factor or trigger to the behaviour of offenders who commit alcohol-related crimes, which could contribute to public sector savings in dealing with the outcomes of such crimes, lead to fewer victims and reduce the social, health and economic cost of alcohol-related harms.

24. The MoJ states that the two pilots have shown that there is appetite amongst sentencers for AAMR with a total of about 1,500 requirements having been imposed. Compliance with AAMR was high at 94% for the MOPAC pilot and a sober day rate of 98%.⁴ Similar levels of compliance are indicated from the HLNy pilot, although at this time the findings have not been published.

25. In additional material the MoJ added that:

“[T]he HLNy pilot adds to the MOPAC findings because it was significantly different in a number of ways; sentencers were asked not to order AAMR as a standalone requirement but alongside a rehabilitative requirement, and domestic abuse perpetrators were included. It is expected that this approach will have led to a greater ‘weight’ of sentence and for this to be reflected in the offenders who are subject to AAMR. In addition, HLNy had a different operational delivery model: probation staff carried out the monitoring and fitting. The intention of this model was to maximise the rehabilitative potential of AAMR for people whose alcohol misuse had led to criminal behaviour.”

26. **We find it regrettable that the report providing the detail of this “significantly different” pilot is not available to the House and is not due to be published until February 2020.**

27. The high level of compliance with the AAMR is not the full picture, as the AAMR was applied as part of a court order. MOJ states that:

“Of the court orders terminated in the quarter ending March 2019, 68% of community orders were terminated successfully (i.e. ran their full course or were terminated early for good progress); for the supervision periods of suspended sentence orders, 75% of all those terminated were terminated successfully over this period. These levels of compliance are not directly comparable, as the 94% compliance rate is only with AAMR rather than the full community or suspended sentence order it is a part of.”

The House may wish to ask the Minister to explain the effect of this distinction.

Effect on Reoffending

28. MoJ states that stakeholders, including the offenders, indicated that the AAMR has the potential to have a positive impact on the lives of the offenders, particularly around reducing their alcohol consumption and reoffending. The majority of survey respondents indicated the AAMR would help in other areas of the offenders’ lives such as work, family and health.

⁴ MOPAC have published four evaluations of their pilot at different stages. The latest report is *Alcohol Abstinence Monitoring Requirement A review of process and performance from Year 2* (July 2018): https://www.london.gov.uk/sites/default/files/aamr_final_process_performance_y2_report_final.pdf [accessed 30 October 2019].

29. No data, however, is yet available on the incidence of reoffending following the imposition of an AAMR. The MoJ states that the MOPAC reoffending analysis was due in December 2018 but has slipped, and data for the HLNy pilot is due in February 2020. In response to questions, MoJ said:

“Reoffending findings will be available well in advance of commencing roll out and will inform the delivery of AAMR. However, it is our view that the findings we already have from the MOPAC and HLNy evaluations indicate that AAMR is an effective sentence option. It is the department’s intention to assess impacts much more substantially, including to inform the better targeting of resources to address alcohol harms, when we roll out AAMR.”

30. **Assessing whether the measure has been effective in the longer term is a key part of evaluating the likely success of the initiative. We therefore find it inappropriate for the House to be asked to decide on further roll-out before information on the reoffending rates is available.**

Projected Numbers

31. The IA states that the:

“... best estimate is that in steady state about 2,300 people will be sentenced to these orders each year, with a caseload of 400 at any given point. The main costs associated with this relate to the costs of electronic monitoring, including the hardware and the monitoring itself. There will also be field services costs for fitting and removing equipment. We estimate the hardware, monitoring and field services to cost £38m over 10 years. Costs to set up the operational delivery and some impact on probation for monitoring are included in this. We expect there will be costs associated with breach of these order for courts, legal aid, and an impact on prison places where breach results in custody. These additional costs are expected to total £6m over 10 years.”

32. While these costs will be offset by societal benefits from reduced violence, policing and court costs, without data about the incidence of reoffending it is difficult to assess whether the system offers real value for money.
33. Given the well-known pressure on prisons, we asked the department whether this new option might be used to much greater extent than anticipated and courts might find themselves in the position where the resources are not available to fulfil an AAMR. MoJ replied: “Subject to successful passage of the legislation, we intend to take an incremental and agile approach to rolling out AAMR, which will give us sufficient time to assess volumes and costs and adjust accordingly. We do not expect to reach steady state until 2023–24.”

Conclusion

34. Although the IA states that the roll out of AAMR is to be incremental and is scheduled to begin in Q3 (October–December) 2020, **the House is being asked to approve the programme on the basis of very limited information. This is unacceptable.** While we find the proposal interesting, it seems premature as the House currently has very little means of assessing whether the MoJ’s assertions are over-optimistic. **The House may wish to**

press the Minister for more detail on all aspects of the department's roll out plans and anticipated long-term outcomes.

Draft Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2019

Date laid: 14 October 2019

Parliamentary procedure: affirmative

*This Order moves the automatic release point for certain violent or sexual offenders from the half-way point of their sentence (under the provisions of the Criminal Justice Act 2003) to the two-thirds point. The change will only apply to offenders convicted after 1 April 2020 who are subject to sentences of more than seven years. The Explanatory Memorandum states that this will provide greater public confidence in sentencing and the administration of justice. The Committee, however, raises some practical concerns about how this increased prison population is to be accommodated. **In particular, the House may wish to seek reassurance from the Minister that adequate resources will be available in good time to meet this expanded remit, both in relation to prison accommodation and prison service staff.***

This Order is drawn to the special attention of the House on the ground that it gives rise to issues of public policy likely to be of interest to the House.

35. This Order has been laid by the Ministry of Justice (MoJ) and is accompanied by an Explanatory Memorandum (EM) and an Impact Assessment (IA). It proposes to change the amount of time actually served by those convicted of violent or sexual offences from half to two-thirds of their sentence. The new provision will apply to offenders convicted after 1 April 2020 who are subject to a sentence of more than seven years (including those sentenced to consecutive terms of imprisonment that add up to more than seven years).

Background

36. Automatic release from a fixed-term custodial sentence is a long-standing provision, first introduced in the Criminal Justice Act 1991. Currently, offenders sentenced to standard determinate sentences must be automatically released halfway through their sentence, under the provisions of the Criminal Justice Act 2003 ("the 2003 Act"), which also requires those offenders to serve the whole of the remainder of their sentence on licence. This Order would move the automatic release point for specified offenders from the halfway to the two-thirds point of their sentence, which will, in due course, reduce some of the burden on the probation service but also require more prison accommodation.
37. In proposing the change the EM states that it will not affect the more stringent regimes applied to those offenders deemed dangerous who are subject to an Extended Determinate Sentence (EDS) or to those subject to the new Sentence for Offenders of Particular Concern (SOPC), which applies automatically to offenders convicted of a specific sexual or terrorist offence listed in Schedule 18A of the 2003 Act.
38. The EM states that requiring offenders sentenced to seven years or more to serve two-thirds of their sentence aligns their release conditions with those of offenders who receive an EDS. The length of their sentence reflects

the seriousness of the offence, and they should therefore serve a greater proportion of their sentence in custody.

39. Paragraph 10 of the EM states that the current practice of releasing those charged with similarly violent offences at different points may be affecting public confidence in sentencing. “A recent report by the Sentencing Council found that that nearly three quarters of the public (70%) surveyed thought sentences are too lenient, and almost half of victims did not have confidence in the fairness of the criminal justice system (49%).”⁵ The MoJ states that the longer period of detention will make victims feel safer and give them more certainty since the offender’s date of release is fixed in advance and not discretionary.

Effect on the prisoner

40. At paragraph 7.15 of the EM, the MoJ cites research indicating that prisoners also benefit from knowing that they will be released on a determined date. Over time, they adjusted better, coming to terms with what they had done and learning new skills.⁶
41. The IA, however, raises some broader questions. As well as citing the same research quoted in the EM, paragraph 36 of the IA states that research also shows that serving a life sentence is linked to an increased risk of self-harm while in prison.⁷ Paragraph 40 mentions that it is unknown how the shorter period on licence after release will impact on these prisoners’ reintegration into society. **The House may wish to ask the Minister for further information on the effect of the change on prisoners.**
42. Paragraph 37 of the IA also comments that during the transition period there may be increased tensions due to prisoners who have been convicted of similar crimes serving different length sentences. However, MoJ says that that is not a new problem and is handled by the Prison Service as part of the daily operations of managing the prison population.

Numbers

43. Page 6 of the IA estimates that, in 2018, there were around 1,450 sentences for crimes that would be within scope of the new provisions. Table 4 in the IA extrapolates this to illustrate a progressive growth in numbers from fewer than 50 in March 2024 to around 2,000 additional prisoners needing to be accommodated by March 2030. The annual running cost of this additional caseload is estimated at £70 million.

Capacity

44. Paragraph 33 of the IA estimates that providing 2,000 additional prison places will require the construction or refurbishment of prisons at a median cost of £440 million. In the light of recent press reports of overcrowding in existing

5 Sentencing Council, *Public Knowledge of and Confidence in Criminal Justice System and Sentencing: A Report for the Sentencing Council* (August 2019): <https://www.sentencingcouncil.org.uk/wp-content/uploads/Public-Knowledge-of-and-Confidence-in-the-Criminal-Justice-System-and-Sentencing.pdf> [accessed 25 October 2019].

6 Ben Crewe, Susie Hulley & Serena Wright, ‘Swimming with the Tide: Adapting to Long-Term Imprisonment’, *Justice Quarterly*, vol. 34 no. 3 (2017), 517-541: <https://www.compen.crim.cam.ac.uk/PDFs/SwimmingwiththeTideAdaptingtoLongTermImprisonment.pdf/view>.

7 Laura Pope, HM Prison and Probation Service, *Self-harm by adult men in prison: A rapid evidence assessment (REA)* (2018): <https://www.gov.uk/government/publications/self-harm-by-adult-men-in-prison-a-rapid-evidence-assessment> [accessed 25 October 2019].

prisons and prisons being closed down as not fit for purpose,⁸ we asked how providing for these additional prison places fits into the Government’s wider plans for the provision of adequate prison capacity. MoJ replied:

“As the IA acknowledges, the change to sentencing will impact on the prison population, though the effects will not be felt immediately. The department has also been working with partners across the Criminal Justice System (CJS) to understand the impact that the recruitment of 20,000 additional police officers could have on the prison population. As a result, MoJ is investing up to £2.5bn to provide 10,000 additional prison places and an additional £156m next year to undertake maintenance across the prison estate, to manage the combined effects of the anticipated increases in demand ... We remain committed to reducing crowding across the prison estate, with all new accommodation, including the new prisons at HMP Wellingborough and HMP Glen Parva, planned on this basis.”

45. In its assessment of risks (Table 3), the IA notes that:

“There are constraints on how quickly new prison places can be provided due to identifying suitable sites, securing planning permission, having sufficient construction market capacity, as well as operational challenges of ramping up multiple prisons. If other policies were to increase prison population or the impacts of [this Order] are greater than anticipated, there is a risk that the increased capacity may not be able to meet the demand.”

MoJ has confirmed that there are no plans to ‘reserve’ places or whole prisons for the group of offenders who will be affected by this Order.

46. In relation to the Probation Service, the IA calculation assumes that any increase in the prison population due to prisoners serving longer in custody would be mirrored in a decrease in the probation caseload on licence. The MoJ explained that “the estimated £8m in benefits from reduction in demand for probation services is for a single year period (2030), when the caseload is expected to be 2,000 fewer. The IA has assumed this will build up over time, resulting in a 10–year saving of £29m rather than £8m per year over 10 years.”

47. However, on page 8 the IA mentions that the future design of the probation system is currently under discussion and the estimated costs and savings could therefore vary. The MoJ has published a draft Blueprint document,⁹ the development of which is ongoing, and which is subject to HM Treasury approvals. MoJ states that it intends to set out more details of the future operating model for probation before the end of the year.

Conclusion

48. While acknowledging that the intended benefits of MoJ’s policy relate to the protection of victims and the wider public rather than to offenders, the effect

8 For example, ‘The Grange ‘open’ prison to shut after being called ‘squalid’’, *BBC* (16 October 2019): <https://www.bbc.co.uk/news/uk-england-hereford-worcester-50070645> [accessed 25 October 2019].

9 HM Prison and Probation Service, *The Proposed Future Model for Probation: a Draft Operating Blueprint* (19 June 2019): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/822222/The_Proposed_Future_Model_for_Probation_-_A_Draft_Operating_Blueprint_-_HMPPS_-_19-06-2019_v.2.pdf [accessed 28 October 2019].

of the Order on their welfare in prison and their likelihood of reoffending after release should be taken into account. The welfare of prison officers and their ability to cope with these changes also needs to be addressed.

49. The Committee was concerned that the MoJ's plans to provide for the increased prison places required as a result of this Order were subject to a number of variables which may affect the outcome: significant changes to the probation system are planned; the announced increase of 20,000 police officers may increase the overall number of prisoners who need to be accommodated; and plans to increase prison stock may be subject to slippage.
50. Paragraph 38 of the IA sums up the key concerns: if the prison population increases at a faster rate than expected or the planned building programme does not keep pace with the increase, there may be overcrowding:

“Although crowding is not in and of itself a cause of prison violence it could impact upon the ratio of staff to offenders and the ability to provide a full regime of activities and time out of cell, a factor associated with increased levels of violence. If this were to result it could also have an associated impact on prisoner's rehabilitation”.

51. **The Committee acknowledges that this Order represents one piece of a large and complicated jigsaw, but the House may wish to ask the Minister for more information about how the pieces fit together. In particular the House may wish to seek reassurance from the Minister that adequate resources will be available in good time to meet this expanded remit, both in relation to prison accommodation and prison service staff.**

Draft Representation of the People (Annual Canvass) (Amendment) Regulations 2019

Date laid: 14 October 2019

Parliamentary procedure: affirmative

The annual canvass is an audit of the electoral register. The new process set out in these Regulations will incorporate a ‘data match’ at the outset of the process which will enable the Electoral Registration Officer (ERO) for the area to identify which properties are likely to have an unchanged household composition, and tailor his or her approach accordingly. Whilst the current canvass can only be completed by sending paper forms to each property, under the reformed canvass the ERO will be able to use a range of different types of communication methods. This will allow EROs to use the methods most appropriate for their local residents and is also anticipated to save £20 million per year in processing costs. Regrettably the Explanatory Memorandum (EM) provided by the Cabinet Office was, in our view, impenetrable. This report, therefore, sets out the key points of the proposed Regulations in a simplified form for the benefit of the House. We have asked the Cabinet Office to publish a revised EM.

These Regulations are drawn to the special attention of the House on the ground that they give rise to issues of public policy likely to be of interest to the House.

52. These affirmative Regulations have been laid by the Cabinet Office and are accompanied by an Explanatory Memorandum (EM), an Impact Assessment (IA) and a statutory report from the Electoral Commission.

Regrettably, the EM took a very legalistic approach that failed to provide a coherent overview of the intended policy changes. The IA and Electoral Commission report were however much clearer. The following report, based on additional material from Cabinet Office, sets out the key points of the proposed Regulations, along with some additional context about the policy. The Cabinet Office will also be asked to revise their EM so that it is clearer to the ordinary reader.

53. These Regulations apply to Great Britain in respect of the UK Parliamentary register and the local government electoral register in England, but it is anticipated that Wales and Scotland will wish to make similar reforms to their local government registers.

Policy Intention

54. The annual canvass is an audit of the electoral register with the purpose of identifying:

- the names and addresses of persons who are entitled to be registered, but who are not already registered;
- those persons who are on the register, but who are no longer entitled to be registered at a particular address (normally because they have moved).

55. The policy intention of these Regulations is:

- to make the process simpler and clearer for citizens;
- for Electoral Registration Officers (ERO) to have greater discretion to run a tailored canvass which better suits their local area;
- to reduce the administrative burden on EROs and the financial burden on taxpayers;
- to safeguard the completeness and accuracy of the registers;
- to maintain the security and integrity of the registers;
- to include the capacity for innovation and improvement, with a model that is adaptable to future change.

Canvass Reform

56. The new process set out in these Regulations will incorporate a ‘data match’ at the outset of the process, which will enable the ERO for the area to identify which properties are likely to have an unchanged household composition, and tailor his or her approach accordingly. Where the data the ERO holds on registered electors matches national government data and, where relevant, locally-held data sources such as Council Tax data or Housing Benefit records, the ERO can have some confidence that the details they hold on their register remain accurate and a simplified process can be used.

57. The reformed canvass proposes three different ways of canvassing properties:

- (1) The “*matched property*” process (new regulation 32ZBE) for properties where the data has matched, indicating that the household composition

is unlikely to have changed since the previous canvass was conducted. Under this process:

- EROs are able to send an e-communication (email or text message) to those electors registered at the property to try and obtain confirmation that the information currently held is still correct without the need to send a form. Reducing the number of paper communications sent out by the ERO will increase cost savings.
 - Electors are then required to respond to e-communication. It was felt an email or text message does not have the direct link to the property that a piece of paper delivered to it would.
 - If no response is received or no e-communication is sent (for example because the ERO does not have the relevant contact details) then the ERO is required to send a paper Canvass Communication A to the property. It will contain all the current elector details held by the ERO. If there are no changes to report at an address, the resident is not required to respond to Canvass Communication A.
- (2) The “*unmatched property*” process (new regulation 32ZBD) for properties where results of the data match indicate that the household composition is likely to have changed since the previous canvass was conducted:
- This is considered the default process and requires EROs to make three contacts with the property before they are able to close their chasing cycle. If they obtain the information at any stage in the cycle they are able to stop contacting the property.
 - A three-step chasing cycle is similar to the current canvass. However, the Regulations allow the ERO a number of different ways to make contact with the property, including the use of the paper letter, paper canvass form, e-communications, telephone calls and visits to the property.
 - The paper canvass form is similar to the current Household Enquiry Form and contains all the information the ERO holds on all currently registered electors at the property. It sets out the ways electors can respond, for example via an online service, over the phone or by returning the form to the ERO. It very clearly requires a response and is sent out with a prepaid pre-addressed envelope.
 - If EROs have not been able to obtain the information they require they are not permitted to close the chasing cycle unless this form has been sent as one of the contacts.
 - In line with the policy of allowing EROs great discretion over the way they run the canvass in their area, EROs may also choose to send Canvass Communication B (CCB) as one of the contact options. The content of CCB is not prescribed in the legislation, and the Electoral Commission, which is responsible for the design of the canvass reform forms and communications, is currently

user testing options for how it should look (for example, whether CCB may be more effective as a letter rather than a form).

(3) The “*defined property*” process (32ZBF):

- This is for properties such as care homes and hostels where the required information can be obtained from a responsible person (that is, a person who lawfully holds information on the residents of the property and is legally able to share it) using whichever means the ERO thinks appropriate. This may include the use of a paper communication, a visit to the property, telephone call or electronic means.
- The type of properties that may be included within this process are set out in the legislation and initial estimates indicate that they will form about 1% of properties.

Savings

58. To safeguard the completeness and accuracy of the register, every property will still receive a written communication. The main difference under the reformed canvass is that, where the ERO is satisfied there are no changes to be made, the property resident does not need to respond to the paper canvass communication and will not be subject to a follow up process. These changes are expected to save £20 million per year in processing costs and postage.
59. We asked whether the savings would be to central or local government. The Cabinet Office replied that it funds the additional costs of Individual Electoral Registration (IER) under the “new burdens doctrine”.¹⁰ It is anticipated that the savings made as a result of canvass reform will offset these costs and eventually cover them completely. The additional flexibility introduced through canvass reform will also give EROs the opportunity to establish new efficiencies in their work.
60. We also asked for how long is it intended to run the Household canvas and the Individual Registration scheme in parallel since, once embedded, they may largely duplicate information. The Cabinet Office responded:

“Individual electoral registration and the annual canvass work in conjunction to ensure each ERO can compile a complete and accurate electoral register. The introduction of IER in 2014 has been a success, ensuring that EROs check the identity of applicants before adding them to the electoral register. Alongside this, the introduction of online registration at the same time, has increased the accessibility and ease of people registering to vote. The annual canvass process sits alongside this as an audit of the details held on the electoral registers. Its purpose is to gather information on people who are not currently registered but should be, and thus be able to invite them to register individually, but also to identify electors who should no longer be registered and start the process to remove them.

The Cabinet Office worked with a series of EROs in 2016 and 2017 to conduct pilots on alternative approaches to the annual canvass. The

¹⁰ Whereby the lead government department must fully fund the costs of any new burdens placed on local authorities as a result of policy change.

results of these pilots did not suggest that abolishing the canvass is appropriate currently.”

Evaluation

61. The Electoral Commission monitors the annual canvas, amongst other matters, and will submit reports to the Secretary of State from time to time. The Cabinet Office will undertake a benefits realisation exercise in due course including measuring how this legislation has performed against its objectives and the lessons learned.
62. As part of this reform, a data matching test is to be held in early 2020 as a “dry run” to give EROs an indication of the sort of information that they will receive in their area for example the percentage of properties that are matched or unmatched. The Cabinet Office states that:

“We are in the process of completing development and testing of the end to end technical components to facilitate the data test. All components are currently on track to be ready to go live by the end of November 2019. We will be conducting the ‘dry run’ in two tranches, with a smaller group of EROs first, before all EROs go through the data test from January 2020. We have scheduled time between the two dry runs to make any further refinements to the data matching process. Following the main dry run data matching, we will complete an evaluation, and share it with our key stakeholders”.

Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America on Access to Electronic Data for the Purpose of Countering Serious Crime (CP 178)

Date laid: 7 October 2019

Parliamentary procedure: negative

*This Agreement will provide a mechanism that will allow those investigating serious crime in the UK or USA to have their requests for evidence from electronic data held in the other country to be processed much more quickly. This report sets out a number of restrictions that apply, and Appendix 1 gives some illustrative examples of different scenarios in which such data can or cannot be requested. Two weeks after laying the original Agreement the Foreign and Commonwealth Office on behalf of the Home Office also deposited four unnumbered Command Papers. These four papers had been signed on the same day as the original Agreement. **We regard this staggered laying of associated papers as poor practice and likely to impede the scrutiny process.***

*Two of the papers address the UK and USA’s mutual understanding of how the Agreement will operate in relation to offences attracting the death penalty in the US or the detention of individuals at Guantanamo Bay. We asked the Home Office whether the Agreement could be used in circumstances where a UK citizen’s data was sought in relation to a crime that could result in the death penalty or to transfer to the Guantanamo Bay detention facility (GTMO). The Minister repeated the UK’s long-standing opposition to the death penalty and stated that the risk of the Agreement being used to target data in relation to GMTMO was “very limited” but “theoretically possible”. **While these assurances are helpful, given the gravity of the matter, we take the view that even a theoretical***

possibility is alarming. For this reason, we draw this Agreement to the special attention of the House on the ground that it may imperfectly achieve its policy objective.

This Agreement is drawn to the special attention of the House on the ground that it may imperfectly achieve its policy objective.

63. Terrorists and criminals are increasingly using email and social media applications to facilitate their activities, but the companies that provide these services are primarily based in the USA. Under the current legislative regime in each country, obtaining data in connection with an investigation can take a year or more. This Agreement, laid by the Foreign and Commonwealth Office on behalf of the Home Office, provides a mechanism that will allow data requests to be processed much more quickly. It initially applies for five years but can be extended by mutual agreement.
64. Normal procedure will apply, for example investigators will require a warrant, and requests will still be subject to each country's data protection legislation and, in the UK, to the provisions of the Investigatory Powers Act 2016. The data provided is to "facilitate law enforcement in the prevention, detection investigation, and prosecution of serious crime".¹¹ There are also some specific restrictions in the Agreement, including:
- The crime being investigated must be serious, which is defined as one attracting a maximum sentence of more than three years. Although there are differences between the two penal systems the Home Office is satisfied that the regimes are broadly similar;
 - The UK cannot request data on US citizens or other persons located in the USA: US authorities cannot ask for data on any persons in the UK at the time of the request, but each may request data on its own citizens and those of third countries. This is an asymmetrical agreement (Appendix 1 to this report provides examples of different scenarios illustrating how such data can or cannot be requested.)
 - Where the crime under investigation is one that may lead to the death penalty in the US, a UK Minister must make the decision whether to allow the data requested to be used in court.
65. Two weeks after laying the original Agreement, four unnumbered Command Papers were deposited which address the UK and USA's mutual understanding of how certain provisions will operate.¹² These four papers had been signed on the same day as the original Agreement. **We regard this staggered laying of associated papers as poor practice and likely to impede the scrutiny process.**
66. Three of these four documents simply expand on matters touched on in the Agreement and its Explanatory Document—that is: the UK's reservations about providing data that may be used in prosecuting a crime subject to the death sentence in the USA (Article 8 (4)); limitations on preserving subscriber information (Article 10); and provisions to comply with certain

¹¹ Statement by Baroness Williams of Trafford HL Deb, 21 October 2019, [HLWS25](#)

¹² These four Command Papers, originally laid on 22 October 2019, were withdrawn and relaid on 29 October 2019 due to an administrative error. They are available with the Agreement on the Treaty website: <https://www.gov.uk/government/publications/ukusa-agreement-on-access-to-electronic-data-for-the-purpose-of-counteracting-serious-crime-cs-usa-no62019>

requirements in American law to do with freedom of speech (Article 8(4)). However, the fourth document relates to the provision of information that may relate to a current or potential detainee at Guantanamo Bay. Where such information is requested from the UK, the letter commits the USA to giving the UK specific notification of its intended use. **The House may wish to ask the Minister whether the Home Office has now provided all the relevant documents.**

67. The Home Office classifies these four documents as “side notes”, which are not annexed to the Treaty and therefore not subject to the same scrutiny process as the Treaty. It also states that although these “side notes” are non-binding, they are linked to the Agreement and can be used as a context for the purpose of interpreting the Treaty (in line with Article 31 of the Vienna Convention on the Law of Treaties). **The House may wish to ask the Minister to explain in more detail the exact status of these non-binding documents, particularly the document relating to Guantanamo Bay, which does not seem as firmly anchored in the Agreement’s Articles as the other three.**

Extradition and the death penalty

68. In additional information, the Home Office informed us that the Designated Authorities, who will oversee all requests made under this Agreement, are likely to be the Home Office Investigatory Powers Unit in the UK and in the USA the Office of International Affairs, which is part of the US Department of Justice.

69. We asked the Home Office whether this Agreement could be used to extradite someone to the USA for prosecution there. The Home Office replied:

“Such extradition requests would be considered by the UK’s courts and the Secretary of State in the normal way.

Extradition from the UK is barred where it is incompatible with a person’s human rights or where the person concerned could be, has been or will be sentenced to death, unless the Secretary of State receives credible assurances that the death penalty will not be imposed or, if imposed, will not be carried out.”

70. **We find the Home Office’s answer deeply troubling, and the House may wish to press the Minister for answers to the following questions:**

- **Who in a US administration would be in a position to give these “credible assurances”, given that the decision whether to impose the death penalty would be a matter for the courts?**
- **What would constitute a “credible assurance”?**
- **How does allowing a UK citizen or someone extradited from a third country, on the basis of information provided by the UK, to be kept on death row on the “credible assurance” that the penalty would not be carried out, fully meet the UK’s long-standing opposition to the use of the death penalty *in all circumstances*?**

71. The letter of Understanding in relation to the death penalty states that the UK will be informed if the US intends to use information obtained during

the investigatory stage to prosecute someone for a crime that attracts the death penalty and may object on the ground that:

“... its essential interests under the Agreement may be implicated by the introduction of data received pursuant to the Legal Process recognised by the Agreement as evidence in the prosecution’s case in the United States for an offence for which the death penalty is sought.”

The House may wish to ask the Minister whether the UK could argue that its essential interests may be implicated if the information obtained by the USA is to be used to prosecute a person from a third-party state.

72. The Committee also noted that the Explanatory Memorandum to the Agreement states that if such a notification were received the UK will undertake an assessment under the OSJA process¹³ to inform the UK minister’s decision.” **The House may wish to ask the Minister whether this should be taken to mean that is possible that such permission could be given.**

73. In the parallel situation, where the US informs the UK of its intention to use such information “where the target of operations has been nominated for, or designated for, detention at Guantanamo” the additional material from the Home Office (see Appendix 1) states that the “UK would have the ability to make appropriate diplomatic representations to challenge any such use”.

Guantanamo Bay detention facility (GTMO)

74. We asked the Home Office whether the agreement could be used in circumstances where a UK citizen’s data was sought in relation to transfer to GTMO. We were told:

“... the risk of data being obtained under the Agreement being used in this way as very limited. Whilst it is theoretically possible, it is extremely unlikely that data obtained from a UK company under the Agreement would ever be used in this way.”

Conclusion

75. **In response to our questions, the Minister repeated the UK’s long-standing opposition to the death penalty and stated that the risk of the Agreement being used to target data in relation to GMTMO was “very limited” but “theoretically possible”. While these assurances are helpful, given the gravity of the matter, we take the view that even a theoretical possibility is alarming. For this reason, we draw this Agreement to the special attention of the House on the ground that it may imperfectly achieve its policy objective.**

13 Foreign and Commonwealth Office, *The Overseas Security and Justice Assistance Guidance* (26 January 2017) <https://www.gov.uk/government/publications/overseas-security-and-justice-assistance-osjaguidance> [accessed 30 October 2019]

INSTRUMENTS OF INTEREST

Agricultural Products, Food and Drink (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/1342)

76. These Regulations make extensive amendments to retained EU food and drink legislation, mainly in relation to rules on wine and spirit drinks and specifically concerning geographical indication (GI) schemes.¹⁴ The amendments reflect recent changes to EU law in this area, introduce tribunal procedure rules on wine and spirit GI decisions by the Secretary of State, and introduce transitional recognition of certain types of bottled natural mineral water in Northern Ireland. The instrument has been laid under the urgent “made affirmative” procedure to ensure that the changes come into effect in time for EU exit. The Department for Environment, Food and Rural Affairs (Defra) explains that, building on earlier EU exit instruments, the instrument converts the EU’s GI schemes for spirit drinks and wine into equivalent UK schemes and enables appeals to be made to the First-tier Tribunal when GI decisions are made under the new UK schemes. The instrument also removes an obligation on UK producers of agri-foods to use EU GI logos in the UK after exit. Defra says that it plans to lay a further instrument in December to introduce new UK GI logos which are to become compulsory after a three-year transition period. The Committee has asked the Department for additional information about the transition to the new UK GI schemes and the expected impact on industry and the public sector which we are publishing at Appendix 2. The Committee notes that the Minister’s description of the instrument as “predominantly technical in nature” is a somewhat elastic use of the expression and does not properly reflect the significance of some of the changes, such as empowering the Secretary of State to make decisions on UK GI applications regarding wines and spirit drinks.

Common Organisation of the Markets in Agricultural Products (Producer Organisations and Wine) (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/1343)

Common Agricultural Policy (Market Measures, Notifications and Direct Payments) (Miscellaneous Amendments) (EU Exit) Regulations 2019 (SI 2019/1344)

77. These two sets of Regulations amend retained EU law on the EU Common Agricultural Policy (CAP) and the Common Organisation of Agricultural Markets (CMO). The instruments have been laid with a shared Explanatory Memorandum (EM) and under the urgent “made affirmative” procedure to ensure that retained EU law in these areas can operate effectively in a UK domestic policy context after EU exit. The Department for Environment, Food and Rural Affairs (Defra) explains that, amongst other changes, SI 2019/1344 ensures that the EU’s financial discipline mechanism can continue to operate. Under this mechanism, farmers are reimbursed for contributions made towards an EU crisis reserve which is funded annually through a mandatory deduction to direct payments recipients in receipt of over €2,000. This deduction is then reimbursed the following year if unspent, to eligible direct payments recipients. While the Devolved Administrations will

¹⁴ Product names can be granted with a ‘geographical indication’ (GI) if they have a specific link to the place where they are made. GI recognition aims to enable consumers to trust and distinguish quality products while also helping producers to market their products better.

not continue this mechanism, Defra has chosen to retain it for England. The EM does not provide information about the size of the reimbursement fund, but Defra told the Committee that the UK fund amounted to €39.6 million in 2018, of which €25.9 million was allocated to England. SI 2019/1343, amongst other changes, introduces transitional arrangements to allow EU wine to enter the UK without third country wine import certificates after exit. Alternative forms of documentation will be allowed if the Secretary of State considers that the EU wine meets UK marketing standards. According to Defra, this is to avoid any risk of disruption to wine supplies after EU exit. The Department says that EU wines represent around half of wines sold in the UK. Without the changes there would be a “high risk that any disruption would impact [...] particularly on small and medium-sized enterprises including importers, restaurants, off licences and others” and a “significant adverse effect on Government revenues from excise returns, and consumer choice in wine”. Defra told the Committee that the transitional arrangements will be in place for nine months. We have asked the Department to revise the EM to reflect the additional information provided to the Committee.

Northern Ireland (Extension of Period for Executive Formation) (No. 2) Regulations 2019 (SI 2019/1364)

78. A Northern Ireland Executive has not yet been appointed following the Northern Ireland Assembly election on 2 March 2017. The Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 (“the 2018 Act”) specified a period during which Northern Ireland Ministers could be appointed, but, once the “period for Executive formation” ends, the Secretary of State will be required to propose a date for an Assembly election. A previous instrument extended the period for Executive formation to 21 October 2019; the current instrument further extends it to 13 January 2020. As a result, Northern Ireland departments will also continue to exercise their functions in accordance with section 3 of the 2018 Act until that date. The Regulations were made on 21 October 2019 using the made affirmative procedure, which has immediate effect but must be approved by resolution of each House of Parliament within 28 days, beginning on the day the Regulations were made.¹⁵ The Explanatory Memorandum notes that the Secretary of State did not make the Regulations earlier as he has been engaging with the Northern Ireland political parties and the Irish Government in talks to enable an Executive to form. He considered that to make Regulations to extend the period pre-emptively could have compromised that process and been prejudicial to the discussions.

Jobseeker’s Allowance and Universal Credit (Higher-Level Sanctions) (Amendment) Regulations 2019 (SI 2019/1357)

Jobseeker’s Allowance and Universal Credit (Higher-Level Sanctions) (Amendment) Regulations (Northern Ireland) 2019 (SR 2019/201)

79. Sanctions, or reductions in the amount of benefit paid to a claimant, are imposed by the Department for Work and Pensions if a claimant fails to take up an offer of paid work, ceases paid work for no good reason, or fails to comply with work-related activity. Currently, the sanctions in the Universal Credit Regulations 2013 and the Jobseeker’s Allowance Regulations 2013 are: 13 weeks for a first failure; 26 weeks for a second failure and 156 weeks

¹⁵ This period can be extended for periods of dissolution, prorogation or adjournment for more than four days.

(three years) for third and subsequent failures. In Northern Ireland the highest-level sanction is 78 weeks. These instruments reduce the sanction for third and subsequent failures to six months (26 weeks) throughout the UK. These instruments also contain transitional provisions so that those currently subject to a higher-level sanction will have it terminated after 26 weeks or immediately if the person's award has already been reduced for longer than that.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft instruments subject to affirmative approval

Criminal Justice and Courts Act 2015 (Consequential Amendment) Regulations 2019

Made instruments subject to affirmative approval

- SI 2019/1338 Civil Jurisdiction and Judgements (Civil and Family) (Amendment) (EU Exit) Regulations 2019
- SI 2019/1339 Rights, Equality and Citizenship Programme (Revocation) (EU Exit) Regulations 2019
- SI 2019/1340 Persistent Organic Pollutants (Amendment) (EU Exit) Regulations 2019
- SI 2019/1342 Agricultural Products, Food and Drink (Amendment etc.) (EU Exit) Regulations 2019
- SI 2019/1343 Common Organisation of the Markets in Agricultural Products (Producer Organisations and Wine) (Amendment etc.) (EU Exit) Regulations 2019
- SI 2019/1344 Common Agricultural Policy (Market Measures, Notifications and Direct Payments) (Miscellaneous Amendments) (EU Exit) Regulations 2019
- SI 2019/1352 INSPIRE (Amendment) (EU Exit) Regulations 2019
- SI 2019/1364 Northern Ireland (Extension of Period for Executive Formation) (No. 2) Regulations 2019

Instruments subject to annulment

- SI 2019/1327 Patents (Isle of Man) (Amendment) (EU Exit) Order 2019
- SI 2019/1341 Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2019
- SI 2019/1351 Local Government Pension Scheme (West Midlands Integrated Transport Authority Pension Fund and West Midlands Pension Fund Merger) Regulations 2019
- SI 2019/1353 Nicaragua (Asset-Freezing) Regulations 2019
- SI 2019/1357 Jobseeker's Allowance and Universal Credit (Higher-Level Sanctions) (Amendment) Regulations 2019
- SI 2019/1354 Control of Trade in Endangered Species (Miscellaneous Amendments) Regulations 2019
- SR 2019/201 Jobseeker's Allowance and Universal Credit (Higher-Level Sanctions) (Amendment) Regulations (Northern Ireland) 2019

Treaties subject to scrutiny under the Constitutional Reform and Governance Act 2010

CP 181 Agreement between the United Kingdom and Montenegro concerning Air Services

APPENDIX 1: AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA ON ACCESS TO ELECTRONIC DATA FOR THE PURPOSE OF COUNTERING SERIOUS CRIME (CP 178)

Additional information from the Home Office

Q1: Para 11 says that a serious crime is defined as one with a maximum term of at least 3 years—how contiguous are the UK and US penalties?

A1: The definitions of serious crimes are broadly similar, but the reality is that they will not be contiguous. This risk has been offset by our assessment of the United States as a country governed by a strong rule of law, with a strict codified constitution including respect for fundamental human rights. As a consequence, the individual lists may differ, but the overall effect is unlikely to be that different.

Part of the reason that this will differ is that certain activity may be criminalised in different ways in different countries. Consequently, you will have different offences that hit the threshold in each country, as well as the same offences that attract slightly different sentences. We expect the differences that do exist to be limited in nature. This of course cuts both ways: we know for example that some UK offences, particularly those in relation to hate speech and on-line support for proscribed organisations are offences in the UK, but not in the United States.

Q2: Para 14—who can you obtain data on? It would be useful if you could clarify with a few illustrative examples of how each of the parties could use these provisions

A2: If a UK or US authority wishes to request Agreement data from a communications service provider (CSP) located in the other party's jurisdiction, it may only do so if they have an approved domestic authorisation for the data. For the UK this means an interception warrant or communications data authorisation pursuant to the Investigatory Powers Act (IPA) 2016, or an overseas production order pursuant to the Crime (Overseas Production Orders) Act 2019, and the request is compliant with the terms of the Agreement.

The UK cannot use the Agreement to request data on a US person (person regardless of their geographical location), and neither can it request data on a non-US person who is geographically located in the US when the CSP is giving effect to the request. In other words, the UK can only use the Agreement to request data on non-US persons who are geographically outside of the US when the CSP is giving effect to the request.

The US cannot use the Agreement to request data on a person of any nationality if they are geographically located in the UK when the UK CSP is giving effect to the request. In other words, the US can target any person of any nationality who are geographically outside the UK when the CSP is giving effect to the request.

The following scenarios illustrate these restrictions. All examples assume a domestic authorisation has been obtained and that the data sought is held by a CSP in the other party's jurisdiction.

Example UK requesting scenarios that would be permitted under the Agreement

- The UK requests Agreement data on a UK person who is currently located in the UK.
- The UK requests Agreement data on a UK person who is currently in the UK but who was previously known to have travelled to the US.
- The UK requests Agreement data on an EU person¹⁶ who is currently located in the UK.
- The UK requests Agreement data on an EU person who is currently located outside the UK but not in the US.

Example US requesting scenarios that would be permitted under the Agreement

- The US requests Agreement data on a US person who is currently located in the US.
- The US requests Agreement data on an US person who is currently located in the US but who was previously known to have travelled to the UK.
- The US requests Agreement data on an EU person who is currently located outside the UK.
- The US requests data on a UK person who is currently travelling outside the UK.

Example UK requesting scenarios that would not be permitted under the Agreement

- The UK requests Agreement data on a US person who is currently located in the US.
- The UK requests Agreement data on a US person who is currently located in the UK.
- The UK requests Agreement data on an EU person who is currently located in the US.

Example US requesting scenarios that would not be permitted under the Agreement

- The US requests Agreement data on a UK person who is currently in the UK.
- The US requests Agreement data on an EU person who is currently in the UK.

Q3: Could the US ask the UK for information on a UK citizen who was being held in the US in connection with a crime that might result in either:

- The death penalty?*
- That person being removed to the Guantanamo Bay detention facility (GTMO)?*

A3: The manner in which the Agreement works is that the US and UK directly request data from telecommunications operators (TO) and communications service providers (CSP) respectively in the other country. The US could therefore

¹⁶ An EU person is used simply illustratively here, information can be sought on any third party national.

request data relating to a UK citizen from a UK TO—if that UK citizen was not in the UK. The US cannot use the Agreement to target data related to an individual located in the UK but can target data relating to UK citizens not located in the UK.

In relation to a UK citizen's data being sought in relation to the death penalty, the Agreement and relevant side note covers data which the US designated authority has received from a UK TO. Before a US prosecutor could seek to use that data as evidence in a case for an offence where the death penalty is sought, permission has to be granted by the UK's designated authority. The decision to grant such permission is a decision for the relevant Minister, equivalent to the current arrangements for obtaining data under the Mutual Legal Assistance Treaty process. If permission is not granted, the Agreement states that the US prosecutor shall not use the data. It is the UK's long-standing position that we oppose the use of the death penalty in all circumstances.

In relation to a UK citizen's data being sought in relation to transfer to GTMO, the relevant side note covers data which the US intends to request from a UK TO under the Agreement and data which it has already obtained from a UK TO under the Agreement. The US has committed to inform the UK if it intends to use the Agreement to target data for the purpose of obtaining evidence or information to support or justify the detention of a current or future detainee at GTMO. The US has also committed to inform the UK if it intends to use data known to have been previously obtained under the Agreement:

- (i) as evidence in the prosecution's case at GTMO;
- (ii) as information to be used against a detainee in reviews of such detention;
- (iii) as evidence to support the US's case in legal proceedings challenging the Department of Defence's authority to detain a current or future GTMO detainee;
- (iv) as intelligence in support of military detention operations where the target has been nominated or designated for detention at GTMO.

If the US informed the UK that it intended to use the Agreement to target data in relation to GTMO or use data known to have been obtained under the Agreement in relation to GTMO in the circumstances set out above, the UK would have the ability to make appropriate diplomatic representations to challenge any such use in line with the UK Government's long-standing position is that the detention facility at Guantanamo Bay should close. In extremis, both the UK and the US also have the power to terminate the Agreement through written notification.

HMG judge the risk of data being obtained under the Agreement being used in this way as very limited. Whilst it is theoretically possible, it is extremely unlikely that data obtained from a UK company under the Agreement would ever be used in this way. This is due to:

- (i) The limited US use of GTMO (there have been no new transfers to the facility since 2007, and despite President Trump's Executive Order reversing his predecessor's decision to close it, no-one has been transferred there during his term); the criteria for transferring detainees to GTMO, and the status of those already there.
- (ii) The likely limited US use of the Agreement overall; and

- (iii) The fact that those vulnerable to being transferred are unlikely to be using the services of UK TOs.

Q4: Could the information provided under this Treaty be used to extradite someone to the USA for prosecution there?

A4: There are no restrictions on the use of the UK US Data Access Agreement (the “Agreement”) in relation to extradition. Extradition between the US and the UK takes place within a separate legal framework. It is governed by the UK/US Extradition Treaty which in turn is implemented by Part 2 of the Extradition Act 2003.

As with evidence exchanged currently under the framework of Mutual Legal Assistance, evidence shared with the US under the Agreement could ultimately form part of the content of an extradition request. Such extradition requests would be considered by the UK’s courts and the Secretary of State in the normal way.

Extradition from the UK is barred where it is incompatible with a person’s human rights or where the person concerned could be, has been, or will be sentenced to death, unless the Secretary of State receives credible assurances that the death penalty will not be imposed or, if imposed, will not be carried out. Article 8 (4) of the Agreement requires that the US obtain permission to use any evidence obtained as part of the prosecution’s case if the evidence relates to an offence for which the death penalty is sought, and the UK has declared that its essential interests may thereby be implicated. If the UK declares that its essential interests would be implicated prior to an extradition request being made, it could then decline to give permission for the evidence to be used.

It is worth reiterating that the Agreement prevents the US from targeting individuals located in the UK. For an individual to be extradited from the UK to the US using data obtained under the Agreement, they would need to have been outside the UK when the data was obtained, and subsequently entered the UK in order to be extradited. We assess the likelihood of such a scenario to be extremely low.

Information received 15–29 October

APPENDIX 2: AGRICULTURAL PRODUCTS, FOOD AND DRINK (AMENDMENT ETC.) (EU EXIT) REGULATIONS 2019 (SI 2019/1342)

Additional information from Defra

Overview of GI (Geographical Indication) SIs

This instrument is one of a number of exit SIs carrying GI provisions. The existing EU GI framework is complex, with the rules for the four different GI schemes set out in multiple regulations. These all require amendments to create functional UK GI schemes.

Several SIs were made in the spring, however additional secondary legislation has since been required, primarily due to a replacement EU regulation coming into force since April, but also due to further operational corrections having been identified.

Q1: The SI deals with GI schemes and makes changes to ensure that a stand-alone UK GI scheme can operate after EU exit. What is the current position on the continued recognition of EU GIs in the UK after exit and the recognition of current EU GIs for UK products in the EU after exit?

A1: EU GIs in the UK: If the UK leaves the EU without a deal, the default position is that EU GIs will not be protected in the UK. Current legislation only allows the UK to protect non-UK GIs which have successfully applied to the UK schemes, or those included as part of a ratified International Agreement. However further consideration of this approach is currently being undertaken, with the potential for any variation to be reflected in a final ‘urgent SI’ to be made before exit day.

UK GIs in the EU: The Government considers that UK GIs should remain protected in the EU. However, if the EU takes steps to remove them from the EU registers, the Government will support UK GI holders in reapplying for EU GI recognition.

Q2: Will the new UK GI schemes become operational on exit day?

A2: Yes, they will. This will be achieved through the underpinning legislation being in place, and guidance and the UK GI registers being published. The new UK logo designs will also be released (their establishment in UK law following slightly later, see Q5). Additionally, a team have been recruited and trained to ensure we can process new scheme applications.

Q3: Paragraph 7.1 of the EM refers to the creation and maintenance of a UK spirit drinks GI register. With EU exit day on 31 October 2019, has this register been set up and will it be operational on 31 October? Who will be managing this register?

A3: Yes—the spirit drinks register is one of a suite of UK GI registers that will be published on exit day (with links from our main published guidance pages). These registers are currently being finalised and checked in Defra, and will be managed by Defra after exit.

Q4: Paragraphs 7.3, 7.6 and 7.7 refer to the UK rules on tribunal procedures on GI decisions on spirit drinks decisions and wine traditional terms. These rules include a 28-day deadline for appeals—is this a reduction in the time available for making an appeal as compared to the current EU arrangements?

A4: In short, no—this SI in fact enhances the rules on appeals against GI scheme decisions. Within the parameters of operability changes, this instrument establishes a formal appeals mechanism for wines and spirits GI schemes, which is not currently in place. This move recognises the importance of allowing room for these decisions to be challenged through fair hearing.

Q5: Paragraph 7.10 states that provisions which require EU GI logos on agri-food products will be revoked from exit day, and that a further instrument later in 2019 will introduce new UK GI logos. When does Defra expect to lay this further SI? Will industry be given time to prepare, e.g. will there be a transitional period for phasing out current EU GI logos in the UK and the requirement for a new UK GI logo?

A5: At present, we plan to lay the additional SI introducing the new UK GI logo in December. The Secretary of State will be using ex-Commission powers to make this legislation, which is set to be negative procedure.

There will be a three-year transitional period, from exit day, until use of the new UK logos becomes mandatory on UK agri-food products on sale in the UK. Use of the logos will remain optional for wine and spirit products. This transitional period has already been communicated to UK GI producers following the GI scheme consultation late 2018 where this proposal was supported, see link below, and will also be in our Day 1 guidance: <https://www.gov.uk/government/consultations/geographical-indications-gi-creating-uk-schemes-after-eu-exit>.

To note that whilst UK GIs remain on the EU registers, UK GI holders have the option to continue to also wear the EU logo. This has also been communicated to UK GI producers and will set out in our published guidance.

Q6: Paragraph 7.11 refers to a transitional period in relation to the recognition of bottled water sold in Northern Ireland. How long will this transitional period be for?

A6: There is no limiting end date specified; the provisions include rolling over the recognition of existing European Economic Area (EEA) Natural Mineral Waters (NMW) for a minimum of 6 months, after which at any time the Department of Health in Northern Ireland could give EEA NMWs notice of withdrawal, which would entail another 6 months (so from that date notice of withdrawal could be given, but not necessarily after the end of the 6 month period).

Q7: With regard to impact, the EM states that there will be no significant impact on business or the public sector. Given that UK producers and retailers will need to switch to a new UK GI regime, will there not be a considerable impact on this sector, in terms of familiarisation, registering, labelling etc? Has there been any assessment of the expected costs? Similarly, has there been an assessment of the impact on the public sector of managing the new UK GI scheme?

A7: This SI only makes operability changes to the EU schemes to enable functional UK schemes, it does not make policy changes (so too amendments made by the other GI SIs). “Switching” to the new UK schemes for existing UK GI producers will be automatic—there is no action they need to take to ensure their products remain protected in the UK. Producers will have to start using the relevant new UK logo within three years, but in practice, this period means there will be negligible material impact on UK businesses: the changes can be made as part of the normal business cycle for refreshing labels and packaging. As such, it was determined that an impact assessment was not needed, based on the preferred options consulted on, as it was clear that the costs would be well below the £5m impact threshold for completing one. Where there is some element of scheme change, such as the new

logo, Defra will provide familiarisation support to producers and enforcement bodies.

Additionally, there are costs to Defra in terms of setting up and managing the new schemes, largely staffing time. When considering the possible need for an impact assessment, the Defra view was that this kind of internal administrative cost did not form part of the assessment.

Q8: Paragraph 5.2 of Part 2 of the EM refers to the new UK process for GIs, setting out why an administrative process is appropriate. Could you briefly explain how GI applications are scrutinised under current EU arrangements and how they will be scrutinised under the new UK system? Will it be possible to object to GI decisions made by the Secretary of State, as it is possible under the current EU arrangements?

A8: Under the current EU arrangements there is a two-stage process whereby the GI application is first scrutinised and consulted on at a member state level. This part of the process is to ensure that there are no outstanding objections to the registration of a name as a GI in the country of origin, and to ensure that there is agreement on what the product is (its specification). The application is then passed to the European Commission for a second round of EU and international scrutiny and consultation (known as the ‘opposition procedure’). This phase ensures that the name is not commonly used for a similar product elsewhere in the EU, and also gives producers from other countries the chance to object to the registration of the name.

Under the new UK schemes, the Defra Secretary of State will carry out the scrutiny and opposition functions currently undertaken by the Commission. This includes the opportunity for all those with an interest (national and international) to object to the registration of the name as a GI. The UK schemes will have a new appeals process. Where an interested party disagrees with a decision of the Secretary of State, it will be able to appeal to a First-tier Tribunal.

22 October 2019

APPENDIX 3: INTERESTS AND ATTENDANCE

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

For the business taken at the meeting on 29 October 2019, Members declared the following interests:

Agricultural Products, Food and Drink (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/1342)

The Earl of Lindsay

Chairman, United Kingdom Accreditation Service (UKAS)

Attendance:

The meeting was attended by Baroness Bakewell of Hardington Mandeville, Lord Chartres, Lord Cunningham of Felling, Lord Faulkner of Worcester, Viscount Hanworth, Lord Hodgson of Astley Abbots, the Earl of Lindsay, Lord Lisvane and Lord Sherbourne of Didsbury.