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The Rt Hon. Lord Pitkeathley of Camden Town
Chairman, Delegated Powers and Regulatory Reform Committee
House of Lords
London
SW1A 0PW

28 October 2026

Dear Lord Pitkeathley of Camden Town,

The Henry VIII power in the Courts and Tribunals Bill to add to the list of offences that may be tried on indictment without a jury

1. I write on behalf of JUSTICE, the cross-party law reform and human rights organisation, regarding the Committee's scrutiny of the Courts and Tribunals Bill ("the Bill"). This letter concerns the Henry VIII power conferred on the Secretary of State by paragraph 20 of new Schedule 3ZA to the Criminal Justice Act 2003 ("the 2003 Act"), inserted by clause 3(5) and Schedule 1 to the Bill. This power was addressed in the Ministry of Justice's Memorandum to the Committee ("the Memorandum"). In summary, the power allows the Secretary of State to amend primary legislation so as to remove the right to trial by jury from further classes of non-excluded offences.

3. The draft affirmative procedure is an insufficient safeguard for a change of such constitutional significance. We respectfully invite the Committee to carefully scrutinise this expansive power in the Bill and report that it inappropriately delegates legislative power and affords insufficient parliamentary scrutiny.

The power and its character

4. Paragraph 20(1) of the new Schedule 3ZA provides that 'The Secretary of State may by order amend Part 1 of this Schedule so as to— (a) add an offence to the list in that Part; (b) remove an offence from that list.' Part 1 lists the offences that make a case eligible for an order for a trial to be conducted without a jury (under the new section 42A of the 2003 Act, inserted by clause 3).

5. The only offences explicitly excluded from the scope of judge-only trials are indictable-only homicide and sexual offences, and related ancillary offences (per the new section 42B of the 2003 Act, inserted by clause 3). These are excluded, 'because of the wider societal impact they have'; all other offences, as the Memorandum recognises 'fall within scope of this measure' (paragraph 17).

6. Once Schedule 3ZA is inserted into the 2003 Act, an order under paragraph 20 will amend that Act of Parliament. It is, therefore, a Henry VIII power to widen the list of offences for which a defendant may be denied trial by jury in the Crown Court.

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A matter of constitutional substance, not technical detail

7. The power is not merely procedural. It is substantive. It permits executive decision-making as to the categories of offence that may be tried on indictment in the Crown Court without a jury. The Government's Explanatory Notes are candid that the Secretary of State 'could add offences which are not related to fraud or financial crime to the Schedule' (paragraph 66). The Memorandum anticipates that 'over time, other offences, including new offences created as a result of technological advances... may be considered suitable for inclusion in the Schedule' (paragraph 18).

8. The Government has already withdrawn, following sustained criticism, its proposal for judge-alone trial of less serious cases in the Crown Court. Paragraph 20 would allow the scope of judge-alone trial to be widened once more, offence by offence, without primary legislation or full debate in both Houses.

9. Concern about this power was voiced from every part of the House at Second Reading (HL Deb 27 October 2026, vol 860). Lord Howard of Lympne described it as the 'one provision in this Bill which I hope all Members of this House would unite in opposing' (col 1077). Lord Marks of Henley-on-Thames called it 'unacceptable' (col 1118). Lord Keen of Elie, for the Opposition, invited the Government 'to think again on that issue' (col 1120) and Lord Ashcombe stated '[f]undamental changes to legislation should not be possible through secondary legislation' (col 1067). Baroness Chakrabarti expressed concern 'of the slippery slope towards every case involving computer, DNA or other technical or forensic evidence' being denied jury trial via secondary legislation (col 1088). Baroness Kennedy of The Shaws called the idea of a Secretary of State being able to decide whether to expand the list of cases denied jury trial 'shocking' (col 1107). Baroness Fox of Buckley called it 'undemocratic' (col 1101). Baroness Jones of Moulsecoomb expressed concern 'that a future Government could extend the restriction on jury trials even more, without having to bring forward primary legislation for Parliament to debate' (col 1093).

10. We respectfully submit that the classes of offence attracting trial by jury is a question which should be answered after full parliamentary scrutiny and in the form of primary legislation only.

The breadth of the power

11. The Memorandum accepts that the 'scope of the power is not otherwise specifically limited by statute' (paragraph 19). The only limits are practical. Summary offences cannot be tried on indictment, and the homicide, indictable-only sexual offences and related ancillary offences are excluded from the scope of the judicial order. Any other indictable offence could be added to the list in Schedule 3ZA. That would include, for example, drug and terrorism offences, whose trials may be as long and complex as fraud trials. It might also include offences arising from protest, or from the disclosure of official information, where the jury's role as a check on prosecution is of particular importance.

12. Nothing in the Bill requires that an added offence be of a financial or economic character or connected with complexity or length. The Bill imposes no duty to consult the Lady Chief Justice, the Criminal Procedure Rule Committee, or any other body. It requires no published evidence to support a claim that trials for the offence are unusually long, technical, or complex, no assessment of how long it will take judges to write their reasoned determinations, no requirement to first manage complexity through presentation of material to juries, no limitation

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that the matters to be decided are technical rather than factual, and no other attempt to define 'serious and complex' fraud or other cases in the manner recommended by Lord Leveson of Liverpool (at page 314, of his Independent Review of the Criminal Courts).

13. The Memorandum suggests that the power's practical effect is limited because 'adding offences to the Schedule will not result in all (or even any) cases for that offence being tried without a jury, only those which meet the statutory test' (paragraph 19). We do not find this persuasive, for two reasons:

    a. Part 1 of Schedule 3ZA is the only gateway that Parliament itself defines. The remaining conditions in new section 42A(3) are broad judicial evaluations of what is 'appropriate' and in 'the public interest'.

    b. New section 42A(5) provides that '[t]here is no right of appeal against a decision to make, or not to make, an order under this section'. Once an offence is added, the individual decision lies with a single judge, without an appeal. It, therefore, further deviates from Lord Leveson's recommended process, in which the decision would 'be capable of interlocutory appeal' (page 316). Therefore, insufficient parliamentary scrutiny is to be compounded by inadequate appellate review.

The justification offered

14. The Memorandum, at paragraph 18, offers two reasons for the expansive power.

15. The first is to remove offences that 'rarely result in sufficiently complex or protracted cases'. We have no objection to that: removal restores jury trial and raises no comparable constitutional concern.

16. The second is that other offences, 'including new offences created as a result of technological advances', may in time be considered suitable. The power is said to enable the Secretary of State 'to respond swiftly as evidence emerges on appropriate offences to list in the Schedule'.

17. The second reason is speculative. No offence is identified as a likely candidate, and no reason is given why speed should curtail the right to trial by jury. New offences are created by primary legislation. If Parliament considers that a new offence should be tried by judge alone, the creating Act can amend Schedule 3ZA, with the benefit of full debate in both Houses.

18. The two halves of the power are asymmetric. Removing an offence widens jury trial, but adding one narrows it, and only the latter calls for the scrutiny that primary legislation provides.

19. The Memorandum invokes the Independent Review of the Criminal Courts. Lord Leveson recommended clear definitions of eligible cases. An open-ended power to extend the list is difficult to reconcile with a clear definition. The Memorandum's justification for the procedure (at paragraph 21) is a single paragraph and does not address why primary legislation would not be the appropriate vehicle for further curtailment of jury trial.

The affirmative procedure is not a sufficient safeguard

20. The affirmative procedure does not appear on the face of Schedule 1. It arises by cross-reference. An order under paragraph 20 is made under a power conferred by the 2003 Act, so section 330 of that Act applies. Clause 3(4) of the Bill adds 'paragraph 20 of Schedule 3ZA' to the list in section 330(5)(a), so that an order 'may only be made if a draft of the statutory instrument has been laid

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before, and approved by a resolution of, each House of Parliament'. Without that amendment, section 330(6) would make the order subject only to annulment.

21. The Minister confirmed during Second Reading in the House of Lords that 'Amendments to the schedule can be made only through the affirmative procedure'.

22. We do not doubt that the affirmative procedure applies. With all due respect to the Committee, which conducts excellent and vital work scrutinising draft statutory instruments, the procedure is an inadequate safeguard for a change of this kind. A draft order cannot be amended. It may only be approved or rejected as a whole, and rejection of a draft affirmative instrument is, in practice, exceptional. The last such instrument that failed to receive Commons approval was in 1978. Removing jury trial from a further class of offences is a change of constitutional significance, and it should require primary legislation.

23. Two further points merit assurance from the Minister:

    a. **Commencement.** Clause 3(2) to (5), which includes both the insertion of Schedule 3ZA and the amendment to section 330, is brought into force by regulations made by the Lord Chancellor under clause 26(3), and those regulations 'may make different provision for different purposes' (clause 26(4)). The Committee may wish to seek confirmation that paragraph 20 will not be commenced before clause 3(4). If it were, an order made in the interval would attract only the negative procedure under section 330(6) of the 2003 Act.

    b. **The consequential power in clause 21.** The Memorandum states (paragraph 61) that the clause 21 power 'does not extend to amending provisions of this Bill, or future legislation'. Once inserted, however, Schedule 3ZA is a provision of the 2003 Act, and clause 21(2) permits the amendment of 'provision made by an Act passed before, or in the same session of Parliament as, this Act'. The Committee may wish to seek confirmation that clause 21 may not be used to add offences to Schedule 3ZA.

Conclusion

24. We respectfully invite the Committee to report to the House that:

    a. the power in paragraph 20(1)(a) of Schedule 3ZA is an inappropriate delegation of legislative power and should be removed, leaving in place the power to remove (but not add) offences from that Schedule; and

    b. the Minister should give the assurances sought at paragraph 23 above.

25. We would be glad to provide any further information that may assist the Committee in its scrutiny of the Bill.

Yours sincerely,

Zoe Bantleman

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