

COUNTER-TERRORISM AND BORDER SECURITY BILL

DELEGATED POWERS MEMORANDUM

MEMORANDUM BY THE HOME OFFICE

Introduction

1. This Memorandum has been prepared by the Home Office for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Counter-Terrorism and Border Security Bill. The Bill was introduced in the House of Commons on 6 June 2018. The memorandum identifies the provisions of the Bill which confer or modifies powers to make delegated legislation. It explains in each case why the power has been taken and the nature of, and reason for, the procedure selected.

Purpose of the Bill

2. The purpose of the Bill is to:
 - Amend certain terrorism offences to update them for the digital age, reflecting contemporary patterns of radicalisation and to close gaps in their scope;
 - Strengthen the sentencing framework for terrorism-related offences and the powers for managing terrorist offenders following their release from custody, including by increasing the maximum penalty for certain offences, to ensure that the punishment properly reflects the crime, and to better prevent re-offending;
 - Strengthen the powers of the police to prevent terrorism and investigate terrorist offences;
 - Harden the United Kingdom's defences at the border against all forms of hostile state activity.

Overview of the delegated powers

3. The Bill contains five new regulation-making powers (three of which are standard powers relating either to the making of consequential amendments or to commencement) and modifies four existing delegated powers (including three standard powers to extend certain provisions to the Crown Dependencies).

Clause 14(9)(c) – new section 22D(5)(d) of the Road Traffic Regulation Act 1984: Power to enable a constable to authorise another person to exercise certain powers of a constable under the terms of a Anti-Terrorism Traffic Regulation Order

Power conferred on: Traffic authorities

Power exercisable by: Anti-Terrorism Traffic Regulation Order

Parliamentary procedure: None

Context and purpose

4. The Road Traffic Regulation Act 1984 (“the 1984 Act”) enables traffic authorities (broadly speaking local authorities in England and Wales, and Scotland, together with Transport for London and the Highways Agency) to put in place various restrictions on traffic within their areas by way of a Traffic Regulation Order (“TRO”). Section 1 of the 1984 Act provides for the making of permanent orders by a traffic authority outside Greater London (section 6 makes equivalent provision for Greater London). Amongst other things, a permanent order may be made for the purposes of:
 - avoiding danger to persons or other traffic using the road or any other road or for preventing the likelihood of any such danger arising (section 1(1)(a)), or
 - preventing damage to the road or to any building on or near the road (section 1(1)(b)).
5. Section 14 provides for the making of temporary TROs and Traffic Regulation Notices (“TRNs”). A traffic authority may make a temporary order where they are satisfied that traffic on the road should be restricted or prohibited, amongst other things, because of the likelihood of danger to the public, or of serious damage to the road, which is not attributable to road or street works (section 14(1)(b)). A traffic authority may make a temporary notice where it appears to the authority that it is necessary for the reason in section 14(1)(b) that the restriction or prohibition should come into force without delay. Temporary orders have a maximum duration of 18 months.
6. Under section 2 of the 1984 Act, TROs (or TRNs) may make any provision prohibiting, restricting or regulating the use of a road by traffic or pedestrians, including parking.
7. Section 22C of the 1984 Act make provisions for Anti-Terrorism TROs (“ATTROs”) and Anti-Terrorism Traffic Regulation Notices (“ATTRNs”). These are in effect a sub-category of TROs/TRNs and rely on the underlying powers to make permanent or temporary TROs and TRNs in sections 1, 6 and 14 of the 1984 Act. A permanent ATTRO may be made under section 1(1)(a) for the purpose of avoiding or reducing, or reducing the likelihood of, danger connected

with terrorism, or under section 1(1)(b) for the purpose of preventing or reducing damage connected with terrorism (section 22C(1) and (2)). Permanent ATTROs may be made in Greater London for the same reasons under the corresponding power in section 6 (section 22C(3)). A temporary ATTRO or ATTRN may be made under section 14 for a purpose relating to danger or damage connected with terrorism (section 22C(4) and (5)).

8. Section 22D of the 1984 Act makes supplementary provision in respect of ATTROs. In particular, subsection (5) provides that an order made by virtue of section 22C: (a) may enable a constable to direct that a provision of the order shall be commenced, suspended or revived; (b) confer a discretion on a constable; or (c) make provision conferring a power on a constable in relation to the placing of structures or signs. Clause 14(9)(c) provides that an ATTRO or ATTRN may enable a constable to authorise a person of a description specified in the ATTRO or ATTRN to do anything a constable can do by virtue of section 22D(5). Such a description of persons might include, for example, local authority staff, event stewards or security guards employed by a company contracted to provide security for an event to which the ATTRO relates (such as a sporting or musical event). Under such delegated authority, it might be left to a security guard or steward to determine when a provision of an ATTRO is to commence or cease operating on a given day – the ATTRO might, for example, provide for a road to be closed off from 10:00 to 22:00, but a security guard could determine that on a particular day the road can be re-opened an hour earlier. The ability for an ATTRO to confer a discretion on a constable may be utilised, in particular, to enable a police officer manning a barrier or gate that has closed off a road to exercise his or her discretion to allow accredited vehicles or persons through the barrier or gate; this provision would enable another authorised person to exercise such discretion.

Justification for taking the power

9. Provision for ATTROs was added to the 1984 Act by the Civil Contingencies Act 2004. A provision akin to new section 22D(5)(d) was originally contained in the Civil Contingencies Bill. In its report on the Bill (30th Report of session 2003/04), the Delegated Powers and Regulatory Reform Committee commented that “there are sensitivities concerning the exercise by employees of traffic authorities of powers which are otherwise exercisable by a constable”. In response to the Committee’s report, the then Government tabled an amendment at Lords Report stage of the Bill to remove this delegated power.
10. The way policing is delivered and the management of risk around sites vulnerable to terrorist attack has changed significantly since 2004. It is now common-place for policing powers to be exercised by police staff and contracted-out staff under the provisions of Part 4 of the Police Reform Act 2002, and that Act also enables chief officers of police to confer certain police powers (as specified in Schedule 5 to the 2002 Act), including powers in relation to road traffic, on accredited persons under the terms of a community safety accreditation scheme.

11. Moreover, much of the protective security around sporting events (such as the London marathon) and entertainment events (such as Christmas markets) which may need to be protected by an ATTRO is now commonly provided by security guards and stewards in partnership with the police. Such personnel are equally well placed as a constable to operate certain measures under an ATTRO, such as opening and closing barriers or gates to allow accredited vehicles and people through or determining whether restrictions on the flow of traffic can be commenced or suspended. Requiring all such decisions to be made by a constable is not always necessary and places an unnecessary burden on the police. In addition, such a requirement potentially limits the extent to which ATTROs can be used given the limitations it places on the deployment of the available personnel. Given this and the limited nature of the powers in question, the Government considers that an ATTRO should be able to enable the police to authorise approved persons to exercise the powers conferred on a constable by virtue of section 22D(5)(a) to (c). An ATTRO would need to specify the description of person who could exercise such powers and the circumstances in which such persons could then exercise the powers would be at the discretion of a constable and, in practice, the subject of a service level agreement or other protocol between the relevant police force and event organiser and/or traffic authority.

Justification for the procedure

12. ATTROs are local instruments and therefore not subject to any parliamentary procedure. The 1984 Act and regulations made under it make provision for the publication of ATTROs and other procedural requirements. The change made to section 22D(5) (which impacts on the enforcement of rather than scope of an ATTRO) does not, in the Government's view, warrant a change to the procedure for making ATTROs.

Paragraph 50(3) of Schedule 3: Power to bring codes of practice into operation

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Affirmative procedure

Context and purpose

13. Schedule 3 contains a power for "examining officers" (constables and designated immigration and customs officers) to stop and question people at ports and in the border area to determine whether they are or have been involved in "hostile activity". Paragraph 49(1) places a duty on the Secretary of State to issue codes of practice about the training of examining officers, the exercise by examining officers of the functions conferred by Schedule 3, the video recording (with sound) of interviews of persons detained under Schedule 3, and the review of detentions under Part 2 of the Schedule. An examining officer must perform the

functions conferred by virtue of Schedule 3 in accordance with any relevant code. These codes of practice are brought into force by regulations made by the Secretary of State (paragraph 50(3) of the Schedule). Analogous provisions are contained in paragraphs 1A of Schedule 7, paragraphs 3 and 20K of Schedule 8 and paragraph 6 of Schedule 14 to the Terrorism Act 2000. The current Schedule 7 code of practice, issued in March 2015, is available [here](#).

Justification for taking the power

14. The powers of examining officers are set out on the face of the Bill. Guidance for examining officers as to the exercise of the powers is appropriately a matter for secondary legislation (in this case, codes of practice). A code of practice is also the appropriate place to set out details of the training requirements for examining officers and of the process for reviewing the continued detention of persons detained under Part 2 of Schedule 3 (including the length of intervals between reviews). Providing such guidance in codes of practice enables it to be readily updated to take account of advances in good practice, operational experience, court judgments and other relevant factors.

Justification for the procedure

15. It is the Government's view that the nature of operational guidance (including codes of practice such as here) is such that, as a general rule, it is not necessary for such guidance to be subject to prior parliamentary scrutiny. This is one exception to that general rule. In this instance, the Government accepts that given the sensitive nature of the Schedule 3 powers and their significant impact on any member of the travelling public who is stopped, questioned and, possibly, detained, the affirmative procedure should apply (by virtue of paragraph 50(6)). The parliamentary procedure provided for here mirrors the position with the similar powers in the Terrorism Act 2000.

Paragraph 53(1)(e) of Schedule 3: Power to specify a person to whom information acquired by an officer may be supplied, and the use for which it may be supplied

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Affirmative procedure

Context and purpose

16. Paragraph 53 of Schedule 3 provides a power for an examining officer, as defined in paragraph 1 of Schedule 3, to supply information to the Secretary of State for use in relation to immigration; to the Commissioners of Customs and Excise or a customs officer; to a constable; or to the National Crime Agency. Paragraph 53(1)(e) confers a power to add further persons to this list. An

analogous power is contained in paragraph 4(1)(e) of Schedule 14 to the Terrorism Act 2000.

Justification for taking the power

17. The power to add further persons to this list is provided so that if in future it is judged operationally desirable, the supply of information to other agencies may be facilitated. This might occur if links with other agencies develop or relevant responsibilities change.

Justification for the procedure

18. By virtue of paragraph 53(4) of Schedule 3, regulations under paragraph 53(1)(e) are subject to the affirmative procedure. This is considered appropriate given that the exercise of the power would enable information, including personal information, to be passed to third parties. The similar power in Schedule 14 to the Terrorism Act 2000 is also subject to the affirmative procedure.

Clause 21(2): Power to make further consequential amendments

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative resolution (if it does not amend primary legislation), otherwise affirmative resolution

Context and purpose

19. Clause 21(2) confers a power on the Secretary of State to make consequential provision for the purposes of the Bill. Such provision may include repealing, revoking or otherwise amending primary and secondary legislation.

Justification for taking the power

20. The powers conferred by this clause are wide but they are limited by the fact that any amendments made under the regulation-making power must be genuinely consequential on provisions in the Bill. But there are various precedents for such provisions, including section 48 of the Counter-Terrorism and Security Act 2015. Schedule 4 already includes some changes to other enactments as a consequence of the provisions in the Bill, but it is possible that not all of the necessary consequential amendments have been identified in the Bill's preparation. The Government considers that it would therefore be prudent for the Bill to contain a power to deal with these in secondary legislation.

Justification for the procedure

21. If regulations made under this power do not amend or repeal primary legislation they will be subject to the negative resolution procedure (by virtue of subsection

(5)). If regulations made under this power do amend or repeal provision in primary legislation they will be subject to the affirmative resolution procedure (by virtue of subsection (4)) as befitting a Henry VIII power of this type. It is considered that this provides the appropriate level of parliamentary scrutiny for the powers conferred by this clause.

Clause 24(7) to (9): Channel Islands and Isle of Man.

Power conferred on: Her Majesty

Power exercisable by: Order in Council

Parliamentary procedure: None

Context and purpose

22. Section 338(1) of the Criminal Justice Act 2003 (“the 2003 Act”), section 39(6) of the Terrorism Act 2006 (“the 2006 Act”) and section 31(4) of the Terrorism Prevention and Investigation Measures Act 2011 (“the 2011 Act”) contain standard powers to allow some or all of the provisions of those Acts to be extended to one or more of the Channel Islands or the Isle of Man. Clause 24(7) to (9) provides that these powers may also be exercised in relation to any amendments to those Acts made by the Bill (see amendments made by clauses 4, 5 and 8 and Schedules 2 and 4).

Justification for taking the power

23. It is appropriate that primary legislation is not required to extend the amendments made by this Bill to the 2003 Act, 2006 Act and 2011 Act to the Crown Dependencies. The extension of the provisions to the Crown Dependencies would occur only with the agreement of those jurisdictions’ authorities, and would be the means by which the Bill could be extended without those jurisdictions being required to legislate for themselves. A similar extension of the section 39(6) of the 2006 Act power was included in section 51(4) of the Counter-Terrorism and Security Act 2015 and section 97(4) of the Criminal Justice and Courts Act 2015 and a similar extension of the section 338(1) of the 2003 Act power was included in section 97(3) of the Criminal Justice and Courts Act 2015.

Justification for the procedure

24. As with the original powers in the 2003 Act, 2006 Act and 2011 Act, the powers as extended by clause 24(7) to (9) are not subject to any parliamentary procedure. This reflects the customary position for Orders in Council extending provisions of an Act to the Crown Dependencies.

Clause 25(2): Commencement power

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: None

Context and purpose

25. Clause 25(2) contains a standard power for the Secretary of State to bring certain provisions of the Bill into force by commencement regulations.

Justification for taking the power

26. Leaving certain provisions in the Bill to be brought into force by regulations will provide the ability to commence the relevant provisions of the Bill (namely clauses 15, 16, 17 and 20, Schedules 2 and 3 and Part 3 of Schedule 4) at the appropriate time, having regard to the need to make any necessary secondary legislation, issue guidance, undertake appropriate training and put the necessary systems and procedures in place, as the case may be.

Justification for the procedure

27. As usual with commencement powers, regulations made under clause 25(2) are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at a convenient time.

Clause 25(4): Power to make transitional or saving provision

Power conferred on: Secretary of State

Power exercisable by Regulations made by Statutory Instrument

Parliamentary procedure None

Context and purpose

28. Clause 25(4) provides that the Secretary of State may by regulations make necessary transitional or saving provision in connection with the coming into force of any provision of the Bill.

Justification for delegation

29. This standard power ensures that the Secretary of State can provide a smooth commencement of new legislation and transition between existing legislation and

the Bill, without creating any undue difficulty or unfairness in making these changes. There are numerous precedents for such a power, for example, section 183(9) of the Policing and Crime Act 2017.

Justification for procedure selected

30. As indicated above, this power is only intended to ensure a smooth transition between existing law and the coming into force of the provisions of the Bill. Such powers are often included as part of the power to make commencement regulations and, as such, are not subject to any parliamentary procedure on the grounds that Parliament has already approved the principle of the provisions in the Bill by enacting them. Although drafted as a free standing power on this occasion, the same principle applies and accordingly the power is not subject to any parliamentary procedure.

Home Office
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