

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 Lords on 12 September 2018. The memorandum identifies the provisions of the Bill which confer new or modify existing powers to make delegated legislation. It explains in each case why the power has been taken or modified 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 hostile state activity.

Overview of the delegated powers

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

**Clause 4(2) - new section 58C(1) of the Terrorism Act 2000 (“the 2000 Act”):
Power to designate area outside the United Kingdom for purpose of offence of
entering or remaining in designated area overseas**

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Made affirmative procedure

Context and purpose

4. Clause 4(2) introduces into the Terrorism Act 2000 (“the 2000 Act”) a new offence, in section 58B, of entering or remaining in a designated area outside the United Kingdom (“UK”). The offence can only be committed by a person who is a UK national or resident at the time of entering the area or at any time during which the person remains there.
5. A defence is available for those prosecuted under this new offence if the person can show they had a reasonable excuse for entering, or remaining in, the designated area. If a defence is raised, the jury is entitled to assume the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not (section 118 of the 2000 Act, as amended).
6. A person does not commit the offence if the person is already travelling to, or is already in, the area on the day on which it becomes a designated area and the person leaves the area before the end of the period of one month beginning with that day.
7. Nothing in the new offence imposes criminal liability on any person acting on behalf of, or holding office under, the Crown.
8. Section 117 of the 2000 Act will operate so as to ensure that the Director of Public Prosecutions or the Director of Public Prosecutions for Northern Ireland, will have to consent to any prosecution of the new offence, and such consent will be subject to obtaining the permission of the Attorney General or the Advocate General for Northern Ireland, as the case may be. In Scotland, all prosecutions are brought by the Lord Advocate or on his behalf, where to do so is in the public interest and so no consent or permission is required.
9. A person found guilty of the offence is liable on conviction on indictment to imprisonment for a term not exceeding 10 years, or to a fine, or to both.
10. Clause 4(2) also inserts into the 2000 Act a new section 58C which contains the designation power. This allows the Secretary of State to designate an area outside the UK where satisfied that it is an area to which it is necessary to restrict the entry of UK nationals or residents in order to protect the public from a risk of terrorism. The designation power would be exercisable by means of regulations.

New section 58C(4) requires the Secretary of State to keep under review whether the test for any designation continues to be met and where it is no longer met, to revoke the regulations (or revoke them so far as they have effect in relation to that area if the regulations designate more than one area).

Justification for taking the power

11. The new offence does not apply at large. A central component of the offence is that it applies only to the act of entering or remaining in an area outside the UK which has been designated by the Secretary of State under new section 58C(1). The new offence is intended to tackle the phenomenon, as seen in recent years in relation to Syria and Iraq, of UK nationals or residents travelling to an area outside of the UK to take part in a conflict involving terrorist organisations or to otherwise sustain such organisations. The power to designate an area only arises where the Secretary of State is satisfied that such designation is necessary for the purpose of protecting members of the public from a risk of terrorism. The triggering of the offence will therefore be case specific. As such, the designation of an area is appropriately a matter for secondary legislation so that the Government can respond swiftly to events overseas both in terms of initially designating an area once satisfied that it is necessary to do so to protect the public from a risk of terrorism, but also to revoke or modify the designation (to expand or contract the designated area) as the nature of the terrorism risk in the designated area evolves over time.

Justification for the procedure

12. By virtue of the amendments made to section 123 of the 2000 Act (see clause 4(3)), the designation power is subject to made affirmative procedure. However, any regulations revoking a designation are not subject to any Parliamentary procedure. The made affirmative procedure would also apply to any regulations modifying an earlier designation.

13. Events overseas which give rise to a risk of terrorism are often dynamic and rapidly evolving. The Government would need to be able to respond to such events as soon as it became apparent that they were acting as a draw to UK nationals and residents to that part of the world to engage in terrorist acts or otherwise support and sustain terrorist organisations. Accordingly, it is necessary that the Government has the ability to make and bring into force regulations designating an area as soon as practicable once a decision to designate an area had been taken. It is accepted, however, that the designation of an area has significant consequences in terms of triggering the operation of the section 58B offence and that accordingly any designation of an area should be subject to Parliamentary approval. The combination of these factors argues for the made affirmative procedure.

14. As the effect of any new regulations which only revoke previous regulations made under section 58C would be to decriminalise the entering or remaining in the designated area in question; given such effect, it is not considered necessary to

subject such regulations to any Parliamentary procedure beyond a requirement to lay the regulations before Parliament.

Clause 15(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 an Anti-Terrorism Traffic Regulation Order

Power conferred on: Traffic authorities

Power exercisable by: Anti-Terrorism Traffic Regulation Order

Parliamentary procedure: None

Context and purpose

15. 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)).

16. Section 14 of the 1984 Act 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.

17. 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.

18. 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)).

19. 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 15(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

20. 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 that 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.
21. 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.

22. 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

23. 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

24. 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

25. 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

26. 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

27. 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

28. 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

29. 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.

Paragraph 19 of Schedule 4 – amendment to section 8A of the Legal Aid (Scotland) Act 1986: Power to prescribe circumstances in which criminal advice and assistance is automatically available

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Context and purpose

30. Section 8A of the Legal Aid (Scotland) Act 1986 (“the 1986 Act”) allows State funded legal advice and assistance to be made available in such circumstances as the Scottish Ministers may, by regulations, prescribe to any “relevant client”. The expression “relevant client” is defined to mean any person who has a right of access to a solicitor under section 32 of the Criminal Justice (Scotland) Act 2016. Thus, in the circumstances which the Scottish Ministers prescribe in regulations, advice and assistance will be available to anyone who is being questioned by the police prior to charge.

31. Paragraph 19 of Schedule 4 to the Bill amends section 8A(2) of the 1986 Act to augment the definition of a “relevant client” for the purpose of the regulation-making power. Under the expanded definition, relevant clients will also include persons detained under the hostile state activity ports power in Schedule 3 to the Bill or the counter-terrorism powers under section 41 of, or Schedule 7 to, the 2000 Act. This will enable regulations under section 8A to be made to provide State funded legal advice and assistance for such persons although, to facilitate

early implementation of the provisions in Schedule 3 to the Bill, paragraph 27 of Schedule 4 to the Bill directly makes the necessary amendment to regulation 8 of the Advice and Assistance and Civil Legal Aid (Financial Conditions and Contributions) (Scotland) Regulations 2011.

Justification for taking the power

32. Section 8 of the 1986 Act makes provision for means tested legal aid for advice and assistance. To comply with the ruling of the UK Supreme Court in the case of *Cadder v. Her Majesty's Advocate*, section 8A was inserted into the 1986 Act (by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010) to ensure comprehensive coverage in the provision of legal advice and assistance for suspects before and during police interview. In introducing section 8A to the 1986 Act, the then Scottish Government's justification for the approach taken was as follows:

“To allow a degree of flexibility in defining the circumstances in which advice and assistance is to be made available without reference to the financial limits, the Government considers it most appropriate to define those circumstances in subordinate legislation rather than attempt to do so in the Bill.”¹

33. The UK Government, in consultation with the Scottish Government, considers it appropriate for reasons of consistency with the existing approach in section 8A to expand the definition of a relevant client so that eligibility for State funded legal advice and assistance for persons detained under Schedule 3 to the Bill or under the 2000 Act is similarly prescribed in regulations.

Justification for the procedure

34. Regulations made under section 8A are subject to the affirmative procedure in the Scottish Parliament. In 2010, the then Scottish Government argued that “that any change to the eligibility criteria for State funded legal assistance requires thorough Parliamentary scrutiny. The affirmative procedure is therefore considered appropriate”. The extension of the regulation-making power does not alter such justification.

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[http://www.parliament.scot/S3_Bills/Criminal%20Procedure%20\(Legal%20Assistance%20Detention%20and%20Appeals\)%20\(Scotland\)%20Bill/b60s3-introd-dpm.pdf](http://www.parliament.scot/S3_Bills/Criminal%20Procedure%20(Legal%20Assistance%20Detention%20and%20Appeals)%20(Scotland)%20Bill/b60s3-introd-dpm.pdf)

Clause 22(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

35. Clause 22(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

36. 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

37. 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 25(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

38. 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 25(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 5, 6 and 9 and Schedules 2 and 4).

Justification for taking the power

39. 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

40. As with the original powers in the 2003 Act, 2006 Act and 2011 Act, the powers as extended by clause 25(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 26(2): Commencement power

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: None

Context and purpose

41. Clause 26(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

42. 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 16, 17, 18 and 21, 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

43. As usual with commencement powers, regulations made under clause 26(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 26(4): Power to make transitional or saving provision

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by</i>	<i>Regulations made by Statutory Instrument</i>
<i>Parliamentary procedure</i>	<i>None</i>

Context and purpose

44. Clause 26(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

45. 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

46. 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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