



HOUSE OF LORDS

Delegated Powers and Regulatory Reform  
Committee

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40th Report of Session 2017–19

# **Counter-Terrorism and Border Security Bill: Government Response**

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### *The Delegated Powers and Regulatory Reform Committee*

The Committee is appointed by the House of Lords each session and has the following terms of reference:

- (i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;
- (ii) To report on documents and draft orders laid before Parliament under or by virtue of:
  - (a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,
  - (b) section 7(2) or section 19 of the Localism Act 2011, or
  - (c) section 5E(2) of the Fire and Rescue Services Act 2004;

and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and

- (iii) To report on documents and draft orders laid before Parliament under or by virtue of:
  - (a) section 85 of the Northern Ireland Act 1998,
  - (b) section 17 of the Local Government Act 1999,
  - (c) section 9 of the Local Government Act 2000,
  - (d) section 98 of the Local Government Act 2003, or
  - (e) section 102 of the Local Transport Act 2008.

### *Membership*

The members of the Delegated Powers and Regulatory Reform Committee who agreed this report are:

[Baroness Andrews](#)

[Lord Blencathra](#) (Chairman)

[Lord Flight](#)

[Lord Jones](#)

[Lord Lisvane](#)

[Lord Moynihan](#)

[Lord Rowlands](#)

[Lord Thomas of Gresford](#)

[Lord Thurlow](#)

[Lord Tyler](#)

### *Registered Interests*

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### *Publications*

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### *General Information*

General information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at <http://www.parliament.uk/business/lords/>.

### *Contacts for the Delegated Powers and Regulatory Reform Committee*

Any query about the Committee or its work should be directed to the Clerk of Delegated Legislation, Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3103 and the fax number is 020 7219 2571. The Committee's email address is [hldelegatedpowers@parliament.uk](mailto:hldelegatedpowers@parliament.uk).

### *Historical Note*

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that "in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion" (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, "be well suited to the revising function of the House". As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and certain instruments made under other Acts specified in the Committee's terms of reference.

# Fortieth Report

## COUNTER-TERRORISM AND BORDER SECURITY BILL: GOVERNMENT RESPONSE

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1. We considered this Bill in our 35th Report of this Session.<sup>1</sup> The Government have now responded by way of a letter from Baroness Williams of Trafford, Minister of State for Countering Extremism at the Home Office, printed at Appendix 1.

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<sup>1</sup> Delegated Powers and Regulatory Reform Committee (35th Report, Session 2017–19, [HL Paper 202](#))

## APPENDIX 1: COUNTER-TERRORISM AND BORDER SECURITY BILL: GOVERNMENT RESPONSE

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### Letter from Baroness Williams of Trafford, Minister of State for Countering Extremism at the Home Office, to the Rt Hon. Lord Blencathra, Chairman of the Delegated Powers and Regulatory Reform Committee

Thank you for your report following the Committee's scrutiny of the provisions of the Counter-Terrorism and Border Security Bill. The Government has considered carefully the Committee's conclusions and recommendations and our response to each of these is set out below.

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

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

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

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

The Government welcomes the Committee's support for the regulationmaking power in new section 58C(1) of the Terrorism Act 2000 being subject to the made affirmative procedure. In inviting Parliament to approve any such regulations, the Government agrees that the Home Secretary should set out the reasons why he or she considers that the condition for designation has been met in the case at hand. The Government is content to put on a statutory footing a requirement that such a statement be made. The Government has therefore tabled an amendment to this end.

Similarly, the Government accepts the Committee's conclusion that regulations which remove a designation should be subject to the negative procedure and has tabled an amendment to provide for this.

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

We consider that there will still be sensitivities about allowing a constable to delegate to local authority staff or contractors (such as stewards or security guards) important powers under anti-terrorism traffic regulation orders and notices which are currently exercisable only by constables. We

therefore recommend that the House press the Minister to provide fuller justification for this proposed provision. (Para 30).

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

Anti-Terrorism Traffic Regulation Notices and Orders (ATTRNs/ATTROs) allow vehicle or pedestrian traffic to be restricted for counter-terrorism purposes. These can be permanent or temporary, and can include the installation of equipment such as bollards and barriers as well as restrictions on parking or access to roads. An ATTRO can only be made by the relevant traffic authority on the recommendation of a chief officer of police, typically advised by specialist Counter Terrorism Security Coordinators or Counter Terrorism Security Advisors or experts from the Centre for the Protection of National Infrastructure.

The Bill would enable a constable to delegate certain operational functions to another authorised person, such as a specified contracted security staff member or a local authority worker. This would enable police officers to be deployed elsewhere, thus improving the safety and security of the event or site for which the ATTRO is required. However, it is important to note that strategic decisions connected with the making of an order will remain with the traffic authority, acting on the advice of a chief officer of police, and that the police would retain overall operational control for the security of the event for which the ATTRO is needed.

For example, a decision to open the roads at the conclusion of an event which is subject to a policing operation would sit with the police Silver Commander (that is, the officer in charge of the overall tactical response). Once this decision has been made, a barrier or gate can be opened by the representative acting on those instructions. Thus, whilst a road may physically be reopened by a security guard, it would only happen under parameters set by the police.

Requiring solely the police to operate a barrier or gate under an ATTRO would place an unnecessary burden on the police. Not only would the police be needed to man such protective measures for the duration of the ATTRO (which could include those in place on a permanent basis), but this would, by extension, prevent police officers from fulfilling other roles needed to protect the public. This would limit the number of sites which could be effectively protected, as the operation of an ATTRO would be contingent on having sufficient police resource. This limitation would mean that ATTROs could not always be used to protect sites which are vulnerable to a terrorist attack, reducing our capability to protect and mitigate any threat of any such event.

The Government does, however, feel that it would be unnecessary to include in the Bill provisions equivalent to those in section 41 (4) of the Police Reform Act 2002. Adopting the approach under the Police Reform Act 2002 would be inappropriate in this context as the powers exercisable by an accredited person

under that Act include the power to issue fixed penalty notices and the power to require an individual to provide their name and address, which may impinge more on civil liberties than an individual not being able to drive down a road by virtue of a gate or barrier being closed.

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

We nonetheless consider it noteworthy that the power is drafted in a way that would allow the Secretary of State to specify any description of person (including an organisation in the private sector) to be allowed to receive sensitive information and to use it for any purpose set out in the regulations. The Memorandum does not explain why it is necessary for the power to be cast in such wide terms. We recommend that the delegation of such a broad power is inappropriate, unless the Minister can fully justify it. (Para 40).

The Government recognises the sensitivities around the sharing of information acquired by an examining officer as part of an examination under Schedule 3 to the Bill. In the light of the Committee's concern about the absence of any restriction on the categories of person who may be specified in regulations made under what is now paragraph 60 of Schedule 3, the Government has tabled an amendment which will narrow this power so that it can be used only to specify persons carrying out public functions. A similar amendment has been tabled to the equivalent regulation-making power in Schedule 14 to the Terrorism Act 2000.

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

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

As with existing powers under Schedule 7 to the Terrorism Act 2000, the draft Schedule 3 Code of Practice is clear that if someone is examined but not formally detained, consultation with a solicitor should be allowed if requested and if reasonably practicable. The right to consult a solicitor, for an individual detained under Schedule 3 to the Bill or 7 to the 2000 Act, mirrors the right of an individual detained at a police station.

Making arrangements for a solicitor to attend every examination would likely extend the length of each examination and unnecessarily prolong the disruption to the traveller. From our experience of exercising the Schedule 7 powers, the majority of examinations are concluded without the examinee being detained and do not require the presence of a solicitor.

A decision to detain an individual is often made because it has not been possible to conduct an adequate examination, so questioning needs to extend beyond one hour. In such circumstances, it is only right that a detainee should be eligible to receive publicly funded legal advice and assistance if requested.

**28 November 2018**

## APPENDIX 2: MEMBERS INTERESTS

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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.