

PROTECTION OF FREEDOMS ACT 2012

EXPLANATORY NOTES

THE ACT

Commentary on Sections

Part 3: Protection of property from disproportionate enforcement action

Chapter 1: Powers of Entry

Section 39 and Schedule 2: Repealing etc. unnecessary or inappropriate powers of entry

189. *Subsection (1)* confers on the appropriate national authority a power, exercisable by order, to repeal any power to enter land or other premises in either primary or secondary legislation which the Minister considers to be either unnecessary or inappropriate. Such an order may also repeal any “associated power”, for example, a power to search or inspect the premises entered into, or to seize material found in such premises; the term is defined in section 46. The power to repeal an associated power may be exercised independently from the power to repeal a power of entry (and vice versa). The term “appropriate national authority” is defined in section 46 as either the Welsh Ministers or a Minister of the Crown; any order made by the Welsh Ministers may only make provision which is within the legislative competence of the National Assembly for Wales.
190. *Subsection (2)* introduces Schedule 2 which directly repeals 15 existing powers of entry that have been identified as unnecessary or that duplicate existing laws. These repeals include a number of antiquated powers of entry relating to agriculture that are no longer required. The list of those powers being repealed also includes a handful of antiquated miscellaneous powers, such as that relating to ‘German Enemy Property’, which are no longer relevant in today’s society.

Section 40: Adding safeguards to powers of entry

191. *Subsection (1)* confers on the appropriate national authority a power, exercisable by order, to add safeguards to any power of entry or associated power. *Subsection (2)* sets out a non-exhaustive list of the safeguards which may be included in such an order. Any such safeguards prescribed in an order would be in addition to (with or without modifications) those already contained in the legislation conferring the power of entry or any associated power. The safeguards which may be prescribed in an order made under this section may include, amongst other things:
- restrictions as to the types of premises in respect of which the power may be exercised. For example, provision could be made to limit the operation of the power to commercial or business premises, or to exclude private dwellings;
 - restrictions as to the times at which the power may be exercised. For example, provision could be made to limit the operation of the power to reasonable day time hours;

- a requirement for the power of entry to be subject to an authorisation. This could, for example, be an internal authorisation granted by an officer of a specified minimum seniority within the organisation concerned, or a warrant granted by a court (likely to be a magistrates' court or, in Scotland, a sheriffs' court), or both;
- obligations on the person exercising the power. For example, provision could be made to show the occupier of the premises some form of identification; to provide a written receipt for anything taken from the premises following a search; or to provide specified written information to the occupant (such as in respect of the procedure for making a complaint about the way the power of entry or an associated power was exercised).

Section 41: Rewriting powers of entry

192. *Subsections (1) and (2)* confer on the appropriate national authority a power, exercisable by order, to rewrite any powers of entry or associated powers with or without modifications. The powers extend to rewording related enactments. Such an order might consolidate a number of powers of entry exercisable for similar purposes or by a defined category of state officials. Whilst an order made under this section may alter a power of entry or associated power and any safeguard linked to such powers, the combined effect of the changes must be to add to the level of protection afforded by the safeguards when taken together (*subsection (3)*).

Section 42: Duty to review certain existing powers of entry

193. *Subsection (1)* places a duty on each Cabinet Minister to conduct a review of relevant powers of entry and relevant associated powers for which the Minister is responsible. The terms 'relevant powers of entry' and 'relevant associated powers' are defined in *subsection (3)* as those made under a public general Act or statutory instrument made under such an Act. It would, for example, accordingly fall to the Home Secretary to review powers of entry, and associated powers, exercisable by, amongst others, the police and UK Border Agency staff. In conducting such a review the Minister must consider whether, in relation to each power of entry (and associated power), to exercise the order-making powers in sections 39(1), 40 or 41. Each Cabinet Minister is required to prepare a report on the review and lay a copy of the report before Parliament. These reviews must be completed, and the report of each review laid before Parliament, within two years of Royal Assent to this Act. By virtue of *subsection (2)* any failure to review a particular power of entry (or associated power) does not affect the validity of that power.

Section 43: Consultation requirements before modifying powers of entry

194. Before making an order under sections 39(1), 40 or 41 the appropriate national authority must consult with the representatives of persons entitled to exercise the powers of entry (and associated powers) that are to be the subject of such an order. For example, in the case of powers of entry exercised by the police, the Home Secretary would normally consult the Association of Chief Police Officers. The Minister may consult any other persons he or she considers appropriate.

Section 44: Procedural and supplementary provisions

195. *Subsection (1)* provides that an order made under sections 39(1), 40 and 41 may modify any enactment and is to be made by statutory instrument, such an order may include any appropriate incidental, consequential, supplementary, transitory, transitional or saving provisions. The power to make consequential amendments could, for example, be used to repeal any offence which becomes redundant as a result of the repeal of a related power of entry. By virtue of *subsections (2) and (4)*, an order made by a Minister of the Crown under sections 39(1), 40 and 41 is subject to the affirmative resolution procedure

where it amends or repeals provisions in primary legislation, but is otherwise subject to the negative resolution procedure.

196. *Subsection (3)* disappplies the hybridity procedure should such procedure apply to an order made by the Minister of the Crown under sections 39(1), 40 and 41. The hybridity procedure is explained in paragraph 155.
197. *Subsections (6) and (7)* provide that a relevant order made by the Welsh Ministers is similarly subject to the affirmative resolution procedure in the National Assembly for Wales so far as it amends or repeals provisions in primary legislation. Otherwise it is subject to the negative resolution procedure.

Section 45: Devolution: Scotland and Northern Ireland

198. This section provides that an order made under sections 39(1), 40 or 41 may not make provision that would be within the legislative competence of the Scottish Parliament if it were contained within an Act made by the Scottish Parliament, or the Northern Ireland Assembly if it were contained within an Act made by the Northern Ireland Assembly in so far as it deals with a transferred matter.

Section 46: Sections 39 to 46: interpretation

199. *Section 46* contains definitions of various terms used in sections 39 to 46. Amongst other things, it adopts the definition of ‘premises’ used in section 23 of the Police and Criminal Evidence Act 1984 (“PACE”).

Section 47: Code of Practice in relation to non-devolved powers of entry

200. *Subsection (1)* places a duty on the Secretary of State to prepare a code of practice in relation to the exercise of powers of entry and associated powers. *Subsection (2)* sets out a non-exhaustive list of matters which may be included in such a code of practice.
201. *Subsection (3)* provides that a code of practice must not make provision in respect of ‘devolved powers of entry and associated powers’ (as defined in *subsection (5)*). A code may make different provisions for different powers of entry and need not contain provision in respect of every power of entry. This ensures that where a power of entry is already subject to an existing code of practice (for example, a code of practice issued under PACE) there is not overlapping guidance in place.
202. *Subsection (4)* requires the Secretary of State, in preparing a code of practice, to consult the Lord Advocate, the representatives of persons entitled to exercise the powers of entry to be covered by the code and such other persons as the Secretary of State considers appropriate.

Section 48: Issuing of code

203. This section sets out the parliamentary procedure for approving the first code of practice made under section 47. *Subsection (1)* requires the Secretary of State to lay before Parliament the proposed code together with a draft order bringing the code into force. Such an order is subject to the affirmative resolution procedure (*subsections (2) and (3)*). If the draft order bringing into force the first code of practice is not approved, the Secretary of State is required to prepare a revised code; the draft order bringing such a revised code into force is again subject to the affirmative procedure (*subsection (4)*).
204. *Subsection (7)* disappplies the hybridity procedure should such procedure apply to the first order made under this section. The hybridity procedure is explained in paragraph 155.

Section 49: Alteration or replacement of code

205. *Subsection (1)* places a duty on the Secretary of State to keep the powers of entry code of practice under review. The Secretary of State may, in the light of such a review, amend the existing code or substitute a new code (*subsection (1)(b)*). *Subsection (2)* requires that in making any alteration to the code or when introducing a new code the Secretary of State must again consult the Lord Advocate, the representatives of persons affected by the code and such other persons as the Secretary of State considers appropriate. *Subsections (3) to (9)* make provision relating to the issuing of a replacement or amended code. In particular, either House of Parliament has 40 days (excluding any period during which Parliament is not sitting for more than four days) in which to pass a resolution refusing to approve the code. If such a resolution is passed then the Secretary of State may prepare another code of practice or amended code of practice for resubmission. Where no resolution is passed, the replacement or amended code will come into force at the end of the 40-day period.

Section 50: Publication of code

206. This section requires the Secretary of State to publish the powers of entry code of practice once approved under section 48, and to publish any subsequent revisions to that code or any replacement code.

Section 51: Effect of code

207. *Subsection (1)* provides that a ‘relevant person’ must have regard to the code of practice when exercising the powers of entry or associated powers to which the code relates. *Subsection (5)* provides that a ‘relevant person’ for these purposes is a person specified, or of a description specified, in an order made by the Secretary of State (such an order is subject to the affirmative resolution procedure (*subsection (9)*)). Such an order may provide that a relevant person is only required to have regard to the powers of entry code of practice when discharging specified functions or acting in a specified capacity (*subsections (6) and (7)*). This is intended to provide for those instances where certain bodies have dual or multiple roles or, for example, exercise both public functions and private sector functions, and where the duty to have regard to the code may therefore be limited to the exercise of one, or one part of, their functions. Before making such an order the Secretary of State must consult the representatives of the persons to be affected by it and other persons he or she considers appropriate (*subsection (8)*).
208. *Subsection (2)* provides that a failure to adhere to any aspects of the code of practice would not, of itself, render a person liable to civil or criminal proceedings. However, the code of practice is admissible in criminal or civil proceedings (*subsection (3)*) and a court or tribunal may take into account any failure of a relevant authority to comply with the duty to have regard to the code (*subsection (4)*).

Section 52: Sections 47 to 51: interpretation

209. This section applies the definitions of the terms ‘power of entry code’ contained in section 49(10) and of the terms ‘power of entry’ and ‘associated power’ contained in section 46 to the use of those terms in sections 47 to 51.

Section 53 and Schedule 3: Corresponding code in relation to Welsh devolved powers of entry

210. **Section 53** introduces Schedule 3 which confers a power on the Welsh Ministers to issue a code of practice about Welsh devolved powers of entry and associated powers. The Schedule makes broadly similar provisions to those contained in sections 47 to 52. The one substantive difference between the two sets of provisions is that section 50 places a duty on the Secretary of State to publish a powers of entry code of practice, whereas under Schedule 3 the Welsh Ministers have a discretion whether or not to issue a code in respect of devolved powers of entry.