

PROTECTION OF FREEDOMS ACT 2012

EXPLANATORY NOTES

THE ACT

Commentary on Sections

Part 4: Counter-terrorism powers

Section 57: Maximum detention period of 14 days

230. Schedule 8 to the Terrorism Act 2000 (“the 2000 Act”) makes provision in respect of the treatment of terrorist suspects detained under section 41 of or Schedule 7 to that Act. Paragraph 36(3)(b)(ii) of Schedule 8 provides that the maximum period for which a terrorist suspect may be detained without charge is 28 days from the time of arrest. As originally enacted, Schedule 8 provided for a maximum period of pre-charge detention of seven days. This was increased to 14 days by section 306 of the Criminal Justice Act 2003 (“the 2003 Act”) and then to 28 days by section 23 of the Terrorism Act 2006. However, in increasing the maximum period to 28 days, the Terrorism Act 2006 made this period subject to a ‘sunsetting’ provision. Section 25 of that Act provides that the maximum period of 28 days is subject to renewal by affirmative order for periods up to one year at a time, failing which the maximum period reverts to 14 days. Section 25 operates in such a way that where no order made under subsection (2) is in force, Schedule 8 is modified so as to provide for a maximum period of pre-charge detention of 14 days. The last order made under section 25(2) (The Terrorism Act 2006 (Disapplication of Section 25) Order 2010 (SI 2010/1909)) expired on 24 January 2011. *Subsection (1)* amends paragraph 36(3)(b)(ii) of Schedule 8 to the 2000 Act so as to make the maximum period of pre-charge detention, as provided for by that Act, 14 days. *Subsection (2)* repeals section 25 of the Terrorism Act 2006 so as to remove the order-making power contained in that provision and as a result, the ability to revert to a maximum period of pre-charge detention of 28 days through that mechanism.

Section 58: Emergency power for temporary extension and review of extensions

231. **Section 58** inserts a new paragraph 38 into Schedule 8 to the 2000 Act which provides a new power for the Secretary of State to make an order that will increase the maximum period of detention under Schedule 8 to the 2000 Act, to 28 days. The power to make an order can only be used where the Secretary of State considers it necessary by reason of urgency, and can only be exercised during a period when Parliament is dissolved or in the period before the first Queen’s Speech of the new Parliament, (fast track legislation would be introduced should a period of detention of more than 14 days be required at any other time, see paragraph 47 above). This limited order-making power was introduced as a response to a recommendation made in a report (published on 23 June 2011¹) by the Joint Committee convened to carry out pre-legislative scrutiny of the Draft Detention of Terrorist Suspects (Temporary Extension) Bills. Where an order is made, the maximum period of pre-charge detention under Schedule 8 is extended to 28 days. Any applications for warrants of further detention which would take the period

¹ <http://www.publications.parliament.uk/pa/jt201012/jtselect/jtdetent/161/161.pdf>

of detention beyond 14 days must be made to a senior judge, and be made with the consent of the Director of Public Prosecutions (in England and Wales), or the Director for Public Prosecutions for Northern Ireland (in Northern Ireland) or the Lord Advocate (in Scotland). *Subsection (2)* provides that an order made under new paragraph 38 must be laid before Parliament as soon as it is reassembled following a general election and that any order will cease to have effect after 20 days if a resolution by both Houses of Parliament is not passed to approve it. By virtue of section 7(1) of the Statutory Instruments Act 1946, in calculating the 20 day period no account is to be taken of any time during which Parliament is dissolved, or prorogued, or during which both Houses are adjourned for more than four days. *Subsection (3)* introduces a requirement for the person appointed as Independent Reviewer of Terrorism Legislation under the Terrorism Act 2006 (or someone on his behalf), to conduct a review of any application for a warrant of further detention which takes the period of detention in respect of an individual or individuals, beyond 14 days.

Section 59: Repeal of existing stop and search powers

232. *Section 59* repeals the stop and search powers in sections 44 to 47 of the 2000 Act.

Section 60: Replacement powers to stop and search persons and vehicles

233. *Subsection (1)* repeals section 43(3) of the 2000 Act which requires that searches of persons be carried out by someone of the same sex. This requirement is being repealed to make it the same as other (both non-terrorist and terrorist) stop and search powers which do not include a same sex search requirement. This is because any search will normally be carried out on the street and it is not always practicable to summon an officer of the appropriate gender in a reasonable time.

234. *Subsection (2)* supplements the existing stop and search power in section 43 of the 2000 Act, by providing that where a vehicle is stopped in the course of stopping a person under section 43 (that is, where a constable reasonably suspects a person to be terrorist), the constable may search the vehicle as well as the person. 'Terrorist' is defined in section 40 of the 2000 Act.

235. *Subsection (3)* creates a new stop and search power in respect of vehicles by inserting new section 43A into the 2000 Act. New section 43A provides a power for police to stop and search a vehicle, including its driver, any passengers and anything in or on the vehicle, if a constable reasonably suspects the vehicle is being used for the purposes of terrorism. 'Terrorism' is defined in section 1 of the 2000 Act, and section 1(5) provides that a reference in that Act to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation. Anything discovered during a search which the officer reasonably suspects may constitute evidence that the vehicle is being used for the purposes of terrorism, may be seized and retained.

Section 61: Replacement powers to stop and search in specified locations

236. *Subsection (1)* inserts new section 47A into the 2000 Act. New section 47A replaces in part the powers in sections 44 to 46 of the 2000 Act repealed by section 59. The new powers allow a senior police officer (defined in paragraph 14(1) and (2) of new Schedule 6B to the 2000 Act, inserted by Schedule 5 to this Act) to give an authorisation to allow the stop and search of vehicles (including drivers of vehicles, passengers and anything found in or on a vehicle) and pedestrians (including anything carried by a pedestrian), to search for anything that may constitute evidence that a person is a terrorist, or the vehicle is being used for the purposes of terrorism. A constable in uniform may exercise the powers, once authorised, regardless of whether he or she has a reasonable suspicion that he or she will find such evidence in the course of a search. A constable includes a constable of the British Transport Police and Ministry of Defence Police, and the Civil Nuclear Constabulary where an authorisation covers an area where

its members have the powers and privileges of a constable. In England and Wales and Northern Ireland, a community support officer may also exercise the powers listed in new section 47A(2)(a) and (d), (3)(b) and (6) (see paragraphs 30 and 31 of Schedule 9 to this Act which amend the Police Reform Act 2002 and the Police (Northern Ireland) Act 2003 respectively). An authorisation can only be given if the person giving it reasonably suspects that an act of terrorism will take place and reasonably considers that the authorisation of the powers is necessary to prevent such an act and that the area or place specified in the authorisation are no greater than is necessary and the duration of the authorisation is no longer than is necessary.

237. *Subsection (2)* introduces Schedule 5 which inserts new Schedule 6B into the 2000 Act.

Schedule 5: Replacement powers to stop and search: Supplementary Provisions

238. **Schedule 5** inserts a new Schedule 6B into the 2000 Act which makes further provision about authorisations and searches in specified areas or places, as created by the new section 47A.
239. Paragraph 1 of new Schedule 6B states that a constable searching a person in public under powers given by the new section 47A, cannot require that person to take off more than headgear, footwear, outer coat, jacket or gloves.
240. **Paragraph 2** provides that a person or vehicle can be detained for as long as is reasonably required to search the person or vehicle, at or near to the place where the person or vehicle is stopped.
241. **Paragraph 3** places a duty on a senior police officer who has made an authorisation orally under new section 47A, to confirm it in writing as soon as reasonably practicable.
242. **Paragraph 4** requires that if a pedestrian or vehicle is stopped under new sections 47A(2) or (3) and the pedestrian or driver of the vehicle requests a statement that they were stopped by virtue of those sections, then a written statement must be provided, as long as it is requested within 12 months of the stop taking place.
243. **Paragraph 5** states that an authorisation given under new section 47A has effect from the time it is given and ends at the time or date specified in the authorisation, subject to the following paragraphs of the Schedule.
244. **Paragraph 6** provides that individual authorisations cannot be in place for any longer than 14 days.
245. **Paragraph 7** places a requirement on the senior police officer who has given an authorisation, to inform the Secretary of State as soon as reasonably practicable (sub-paragraph (1)). If the Secretary of State does not confirm the authorisation within 48 hours, it ceases to have effect (sub-paragraph (2)). If an authorisation is not confirmed, and ceases to have effect by virtue of sub-paragraph (2), it does not affect the lawfulness of anything carried out under the authorisation before it ceased to have effect (sub-paragraph (3)), including searches and seizures. The Secretary of State may amend the authorisation when confirming it, by shortening its duration or limiting the geographical extent of the authorisation (sub-paragraph (4)).
246. **Paragraph 8** gives the Secretary of State a power to cancel an authorisation at any time.
247. **Paragraph 9** confers a power on a senior police officer to cancel an authorisation, shorten its duration or reduce its geographical extent (sub-paragraph (1)). If an authorisation has already been confirmed by the Secretary of State under paragraph 7 when a senior police officer cancels it or amends it, the amended authorisation does not require further confirmation from the Secretary of State (sub-paragraph (2)).
248. **Paragraph 10** provides that if an authorisation is given by a senior officer in the Civil Nuclear Constabulary, then the power conferred by the authorisation is only available

to members of that Constabulary at times and places where they have the powers and privileges of a constable.

249. [Paragraph 11](#) provides that a new authorisation may be given, regardless of whether a previous authorisation exists, has been cancelled or expired.
250. [Paragraph 12](#) provides that a senior police officer (other than those of the British Transport Police, Ministry of Defence Police or Civil Nuclear Constabulary), may give an authorisation which covers internal waters adjacent to an area or place which is covered by an authorisation, or a place within those internal waters. ‘Internal waters’ means waters in the United Kingdom which are not part of a police area.
251. [Paragraph 13\(a\)](#) provides that where an authorisation includes more than one area or place, it may specify different end dates for those areas or places, and where it does so, the powers of the Secretary of State or the senior police officer to shorten the duration of the authorisation includes the power to shorten any one or more of those periods. [Paragraph 13\(b\)](#) provides that if an authorisation is given which covers more than one area or place, then the Secretary of State or senior police officer may remove areas or places from the authorisation under their powers to restrict the geographical extent of an authorisation in [paragraph 7\(4\)\(b\)](#) or [9\(1\)\(c\)](#) respectively.
252. [Paragraph 14](#) defines a number of terms used in new Schedule 6B.

Section 62: Code of Practice

253. This section, which inserts new sections 47AA to 47AE into the 2000 Act, makes provision for a code of practice for terrorism stop and search powers. New section 47AA places a duty on the Secretary of State to prepare a code of practice about the powers in sections 43 and 43A of the 2000 Act (stop and search with reasonable suspicion), and those created by new section 47A of the 2000 Act. New section 47AB makes provision for the code to be brought into force by order, subject to the affirmative resolution procedure. New section 47AC requires that the code is kept under review; any amendments to the code or replacement code are subject to the same parliamentary procedure as provided for in new section 47AB. New section 47AD requires that the code and any altered versions are published. New section 47AE(1) requires a police officer (or police community support officer) to have regard to the code when exercising the powers to which it relates and explains the effect of the code. New section 47AE(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 search powers code is admissible in criminal or civil proceedings (new section 47AE(3)) and a court or tribunal may take into account any failure by a police officer (or community support officer) to comply with the duty to have regard to the code (new section 47AE(4)).

Section 63: Stop and search powers in relation to Northern Ireland

254. [Section 63](#) introduces Schedule 6 which amends the stop and search power for munitions and transmitters in relation to a constable.

Schedule 6: Stop and search powers: Northern Ireland

255. [Paragraph 1](#) amends paragraph 4 of Schedule 3 to the Justice and Security (Northern Ireland) Act 2007 (“the 2007 Act”) which provides, in subsection (1), that a constable or member of Her Majesty’s forces on duty (an “officer”) may stop a person in a public place in Northern Ireland to search that person for munitions held unlawfully and wireless apparatus. In exercising this power, the officer does not need to have reasonable suspicion for doing so.
256. [Paragraphs 1\(2\)](#) and [\(3\)](#) replace the word “officer” with “a member of Her Majesty’s forces who is on duty”. A constable can no longer stop and search a person in a public

place without reasonable suspicion but the existing power for the military to stop and search a person remains unchanged.

257. *Paragraph 1(4)* inserts new sub-paragraph (4) into Schedule 3 to the 2007 Act so that a constable can search a person whom he or she reasonably suspects to have munitions unlawfully with him or her or to have wireless apparatus with him or her regardless of whether he or she is in a public place or not (currently the reasonable suspicion requirement only applies where the person is not in a public place).
258. *Paragraph 2* inserts a new paragraph 4A into Schedule 3. New paragraph 4A(1), read with the definitions in new paragraph 4A(8), provides that a senior officer of the Police Service of Northern Ireland of at least the rank assistant chief constable may authorise the use of the stop and search power without reasonable suspicion in a specified area if the senior police officer reasonably suspects that the safety of any person might be endangered by the use of munitions or wireless apparatus. The authorisation can be given only if the senior police officer reasonably considers that it is necessary to prevent that danger and the area or place specified in the authorisation is no greater than is necessary and the duration of the authorisation is not longer than is necessary.
259. New paragraph 4A(2) states that any constable is authorised to stop and search an individual in the area or place specified in the senior police officer's authorisation.
260. New paragraph 4A(3) specifies that a constable may exercise the power conferred by the authorisation only for the purpose of ascertaining whether the person is carrying munitions unlawfully or wireless apparatus.
261. New paragraph 4A(4) provides that the power conferred by the authorisation may be exercised whether or not the constable reasonably suspects the person has such munitions or wireless apparatus.
262. New paragraph 4A(5) states that a constable searching a person in public under new paragraph 4A, cannot require that person to remove clothing with the exception of headgear, footwear, outer coat, jacket or gloves.
263. New paragraph 4A(6) provides that a person can be detained for as long as is reasonably required to carry out the search of the person at, or near to where he or she was stopped.
264. New paragraph 4A(7) places a duty on a senior police officer who has made an authorisation orally under new paragraph 4A, to confirm it in writing as soon as reasonably practicable.
265. New paragraph 4B states that an authorisation given under new paragraph 4A has effect from the time it is given and ends at the time or date specified in the authorisation subject to new paragraphs 4C to 4G of the Schedule.
266. New paragraph 4C provides that an authorisation cannot specify a date or time which is more than 14 days after the date the authorisation is made.
267. New paragraph 4D places a requirement on the senior officer who has made an authorisation under new paragraph 4A to inform the Secretary of State of it as soon as reasonably practicable (sub-paragraph (1)). If the Secretary of State does not confirm the authorisation within 48 hours of it having been made, it ceases to have effect (sub-paragraph (2)). If an authorisation is not confirmed and ceases to have effect by virtue of sub-paragraph (2), it does not affect the lawfulness of anything carried out under the authorisation before it ceased to have effect (sub-paragraph (3)). The Secretary of State may, when confirming an authorisation, shorten its duration or reduce its geographical extent (sub-paragraph (4)).
268. New paragraph 4E provides that the Secretary of State may cancel an authorisation at any time.

*These notes refer to the Protection of Freedoms Act
2012 (c.9) which received Royal Assent on 1 May 2012*

269. New paragraph 4F confers a power on a senior police officer to cancel an authorisation, shorten its duration or reduce its geographical extent (sub-paragraph (1)). If an authorisation has already been confirmed by the Secretary of State under paragraph 4D when a senior police officer cancels it or shortens its duration or reduces its geographical extent, the amended authorisation does not require further confirmation from the Secretary of State (sub-paragraph (2)).
270. New paragraph 4G provides that a new authorisation can be given regardless of whether a previous authorisation continues in force, has expired or has been cancelled.
271. New paragraph 4H provides that a senior police officer may give an authorisation which covers either the whole of or part of Northern Ireland or all or part of the internal waters adjacent to it or any combination of them (sub-paragraph (1)). 'Internal waters' are defined as waters in the United Kingdom that are adjacent to Northern Ireland (sub-paragraph (2)). Sub-paragraph (3) makes provision for authorisations which specify more than one area or place and provides that such an authorisation can specify more than one end date or time (consequently the powers of the Secretary of State or a senior officer to substitute earlier end dates or times also apply) and that the Secretary of State and a senior officer, when substituting a more restricted area or place under new paragraphs 4D(4)(b) and 4F(1)(c) respectively, may remove an area from the authorisation.
272. New paragraph 4I deals with circumstances in which a decision of a senior officer, or of the Secretary of State, to give, vary or cancel an authorisation is challenged in any legal proceedings. Under sub-paragraph (2) the Secretary of State may certify that the interests of national security are relevant to the decision and the decision was justified. Such a certificate can be appealed to the tribunal established under section 91 of the Northern Ireland Act 1998 ('the National Security Certificates Appeals Tribunal'). The Tribunal has the power to uphold or quash a certificate. The procedural rules which are currently used by the Tribunal make provision for sensitive material to be considered in closed session and for the appointment of special advocates.