

**EXPLANATORY MEMORANDUM TO
THE TERRORISM ACT 2000 (REMEDIAL) ORDER 2011
2011 No. 631**

1. This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

2.1 The purpose of this Order is to make immediate but temporary provision in relation to counter-terrorism stop and search powers pending the coming into force of similar (permanent) provision in the Protection of Freedoms Bill. The purpose of the Order is to provide that the Terrorism Act 2000 (“the 2000 Act”) is to have effect as if:

- i. sections 44-47 of the Terrorism Act 2000 (“the 2000 Act”) which were found to be incompatible with a Convention right by the European Court of Human Rights in *Gillan and Quinton v United Kingdom* (Application no. 4158/05) were repealed; and
- ii. these provisions were replaced with new counter-terrorism stop and search powers, exercisable without reasonable suspicion, which are compatible with Convention rights.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 This order comes into force the day after it is laid. The Secretary of State considers that the need for the police to be able to use the powers to be introduced by the order (that is, powers, available in limited circumstances where an authorisation is in place for a particular place and time, to stop and search vehicles and individuals without reasonable suspicion for counter-terrorism purposes) is urgent. She considers that the ability of the police to protect the public from acts of terrorism will be compromised if the commencement of the order were to be delayed to allow more time between laying and commencement.

4. **Legislative Context**

4.1 Sections 44 to 46 of the 2000 Act (referred to colloquially as “section 44”) enable a police constable to stop and search pedestrians or vehicles within an authorised area for the purposes of searching for articles of a kind which could be used in connection with terrorism, whether or not the constable suspects such articles are present. The power can only be used in a place where and during a time when an authorisation is in place. An authorisation may be made by a senior police officer where he or she considers it “expedient for the prevention of acts of terrorism”. An authorisation must be confirmed by the Secretary of State if it is to last more than 48 hours.

4.2 Section 47 of the 2000 Act makes it an offence for a person to fail to stop when required to do so by an officer in exercise of the power conferred by an authorisation under section 44, or to wilfully obstruct a constable exercising that power.

4.3 The use of these powers in relation to individuals and, in so far as they allow searches without suspicion, in relation to vehicles, was suspended by the Secretary of State for the Home Department in her statement to Parliament to this effect on 8 July 2010. She made this statement in response to the European Court of Human Rights' judgment in *Gillan and Quinton* becoming final on 28 June 2010. But sections 44 to 47 of the 2000 Act remain in force.

4.4 This Order provides that the 2000 Act is to have effect as if sections 44 to 47 were repealed, and as if new sections 47A, 47B and 47C and a new Schedule 6B were inserted into that Act. It also makes consequential amendments to other enactments.

4.5 New section 47A of and Schedule 6B to the 2000 Act introduce replacement stop and search provisions. An authorisation for the use of the new stop and search powers can only be given under section 47A where the person giving it reasonably suspects an act of terrorism will take place and considers the powers are necessary to prevent such an act. An authorisation can last for no longer and cover no greater an area than is necessary to prevent such an act. This represents a significantly higher threshold for giving an authorisation than the "expediency" test under section 44 of the 2000 Act.

4.6 An authorisation in place under section 47A(2) confers powers on a constable in uniform to search a vehicle, its driver, passengers and anything in or on the vehicle for evidence that the vehicle is being used for the purposes of terrorism or that any of the individuals are terrorists within the meaning of section 40(1)(b) of the 2000 Act (that is, that they are or have been concerned in the commission, preparation or instigation of acts of terrorism). An authorisation in place under section 47A(3) confers powers on a constable in uniform to stop and search a pedestrian or anything carried by the pedestrian for evidence that they are a terrorist within the meaning of section 40(1)(b) of the 2000 Act. The powers may be exercised whether or not the constable has reasonable suspicion that there is such evidence. Anything discovered during the course of a search which the constable reasonably suspects may constitute such evidence may be seized and retained.

4.7 Schedule 1 to the Order provides that the 2000 Act is to be read as if a new Schedule 6B is inserted, which makes supplementary provision about the authorisation process and the stop and search powers. The Secretary of State must be informed of any authorisation given and must confirm any authorisation specified to last more than 48 hours if it is to last beyond that period. The main changes from the way in which powers under sections 44-46 were authorised and used are:

- i. An authorisation may only be given when a senior officer reasonably suspects that an act of terrorism will take place;
- ii. An authorisation may only be given where the senior officer considers that it is necessary to prevent such an act;

- iii. An authorisation may last for a period no longer than the senior officer considers necessary and for a maximum of 14 days (as opposed to a 28 day maximum under section 46(2) of the 2000 Act);
- iv. An authorisation may cover an area or place no greater than the senior officer considers necessary;
- v. The Secretary of State may substitute an earlier date or time for the expiry of an authorisation when confirming an authorisation;
- vi. The Secretary of State may substitute the area or place authorised for a more restricted area or place when confirming an authorisation;
- vii. A senior police officer may substitute an earlier time or date or a more restricted area or place, or may cancel an authorisation;
- viii. An officer exercising the stop and search powers may only do so for the purpose of searching for evidence that the person concerned is a terrorist (within the meaning of section 40(1)(b) of the 2000 Act) or that the vehicle concerned is being used for the purposes of terrorism;
- ix. Officers (in both authorising and using the powers) must have regard to a statutory Code of Practice which further constrains the use of those powers.

4.8 Article 4 of the Order provides that the 2000 Act is to have effect as if new sections 47B and 47C were inserted into the 2000 Act. Section 47B requires the Secretary of State to issue a Code of Practice in relation to the power to make an authorisation under sections 47A(2) and (3), the exercise of the powers conferred by such an authorisation and section 47A(6) (the power of seizure), and any other matters in connection with those powers as the Secretary of State considers appropriate. New section 47C makes provision about the effect of the Code of Practice, in particular that constables must have regard to it and that it is admissible in legal proceedings.

4.9 As a result of this instrument, the non-textual amendments to the Terrorism Act 2000 summarised above will come into effect on 18 March.

4.10 Article 6 of the Order makes a sunset provision. It provides that if an Act passed in the same Session as that in which the Order is made repeals sections 44 to 47 of the 2000 Act, the non-textual amendments to the 2000 Act (and to other enactments) made by the Order cease to have effect on the coming into force of such provision. The Protection of Freedoms Bill contains clauses to repeal sections 44 to 47 of the 2000 Act and to introduce new stop and search provisions (including those similar to the provisions in the Order). The intention is that the provisions in the Order will cease to have effect on the coming into force of the provisions in the Protection of Freedoms Bill – after those provisions have received full Parliamentary scrutiny.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 The Secretary of State, Theresa May, has made the following statement regarding Human Rights:

“In my view the provisions of the Terrorism Act 2000 (Remedial) Order 2011 are compatible with the Convention rights”.

7. Policy background

- *What is being done and why*

7.1 On 28 June 2010, the European Court of Human Rights (ECtHR) made final its decision in the case *Gillan and Quinton* which found sections 44-46 of the Terrorism Act 2000 to be in breach of Article 8 (the right to respect for private and family life) of the European Convention on Human Rights (ECHR) because they were not “in accordance with the law”. The ECtHR found the powers in those provisions were neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. In a statement to Parliament on 8 July 2010, the Home Secretary announced that the police were no longer to make authorisations under section 44 for stop and search powers to be used without reasonable suspicion. She did this in order to take immediate steps to address the ECtHR’s judgment, whilst the issue was considered as part of the government’s review of various counter-terrorism and security powers.

7.2 The Home Secretary’s action represented an administrative measure to ensure the use of the powers no longer breached individuals’ Article 8 rights. However, the guidelines she gave on 8 July 2010 do not implement the *Gillan and Quinton* judgment, which can only be done by changes to the primary legislation. The government’s review of counter-terrorism and security powers published on 26 January 2011 concluded that a power to stop and search individuals and vehicles without reasonable suspicion in tightly circumscribed circumstances is operationally necessary.

7.3 The review concluded that sections 44 to 47 of the 2000 Act should be repealed. The review also took into account the fact that there may be circumstances in which stop and search powers requiring reasonable suspicion, or other measures such as high visibility policing, are insufficient to counter the threat of a terrorist attack. The police may, for example, become aware of an intended terrorist attack on a particular site or transport network, but have no (or incomplete) information about the identity or characteristics of those planning to conduct it. It would be difficult and probably impossible in such circumstances to reach the threshold required to conduct a stop and search under section 43 of the 2000 Act (power to search an individual on reasonable suspicion that the person is a terrorist). And yet it would be vital to have a power of stop and search available to address the potential terrorist threat in such circumstances. The review therefore concluded that it was necessary to introduce a replacement stop and search power, which is exercisable without reasonable suspicion, but which is available only in circumscribed circumstances. It was announced that the repeal of section 44 and the introduction of the replacement power would be contained in the Protection of Freedoms Bill.

7.4 The review also recommended that consideration should be given to whether the replacement provisions could be implemented more quickly than could be achieved by primary legislation (i.e. the Protection of Freedoms Bill), to fill the operational gap left by the non-availability of any powers exercisable without reasonable suspicion. In her opening speech at second reading of the Protection of Freedoms Bill, the Home Secretary announced that the outstanding action needed to implement the *Gillan and Quinton* judgment and the current threat environment which demands that ECHR-compatible counter-terrorism stop and search powers exercisable without reasonable suspicion are available as soon as possible, meant that there was an operational gap. She announced that she intended to address this by making this remedial order under section 10 of the Human Rights Act 1998, using the urgency procedure.

7.5 The Home Secretary considered whether it would be more appropriate, rather than making this remedial order, to provide revised guidelines on the use of the existing section 44 powers (replacing the guidelines in her statement to Parliament on 8 July 2010). However, it was considered that attempting to operate existing powers under sections 44 to 46 of the 2000 Act in a more restricted way than provided for by the legislation would be unsatisfactory, including for the following reasons:

- i. it would not provide the legal certainty and clarity of legislative amendment;
- ii. the full range of changes considered necessary to make the existing powers Convention-compatible could not be achieved without legislative amendment; and
- iii. further (non-statutory) guidelines would still not implement the ECtHR's judgment.

7.6 The powers introduced by the Order are a much more circumscribed replacement for the provisions in sections 44-46 of the 2000 Act. The threshold for giving an authorisation is significantly higher than under the provisions of the order and there are additional restrictions and safeguards as outlined in paragraph 4.7. This fulfils the recommendations of the review of the powers, which stated that:

- i. *The test for authorisation should be where a senior police officer reasonably suspects that an act of terrorism will take place. An authorisation should only be made where the powers are considered "necessary", (rather than the current requirement of merely "expedient") to prevent the act of terrorism.*
- ii. *The period of authorisation should be reduced from the current maximum of 28 days to 14 days.*
- iii. *It should be made clear in primary legislation that the authorisation may only last for as long as is necessary and may only cover a geographical area as wide as necessary to address the threat. The duration of the authorisation and the extent of the police force area that is covered by it must be justified by the need to prevent the suspected act of terrorism.*
- iv. *The purposes for which the search may be conducted should be narrowed to looking for evidence that the individual is a terrorist or*

that the vehicle is being used for purposes of terrorism rather than for articles which may be used in connection with terrorism.

- v. *The Secretary of State should be able to narrow the geographical extent of the authorisation (as well being able to shorten the period or to cancel or refuse to confirm it as at present).*
- vi. *Robust statutory guidance on the use of the powers should be developed to ensure that the scope for misinterpretation or misuse of the powers is minimised.*

7.7 Taking all of these factors into account, there are compelling reasons for changing the primary legislation using this remedial order in order to ensure the legislation is compatible with Convention rights. It is also necessary to use the urgency procedure provided in paragraphs 2(b) and 4 of Schedule 2 to the Human Rights Act 1998 in order to have a coherent framework of legislation in place as soon as possible, which is compatible with ECHR, and which provides the powers required by police in order to protect the public from acts of terrorism. If this Order were to be made other than via the urgency procedure, it is unlikely that these powers would be available to the police before approximately September 2011. The Home Secretary considers that this is unsustainable given the urgent need for these powers to be available to the police now.

8. Consultation outcome

8.1 There is no requirement to consult on this instrument. However, a wide consultation took place as part of the review of counter-terrorism and security powers, the results of which can be found at:

<http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/sum-responses-to-cons?view=Binary>

8.2 There is also a statutory requirement to consult on the Code of Practice associated with the powers in the Protection of Freedoms Bill and this will take place before those provisions are brought into force.

9. Guidance

9.1 A Code of Practice on the use of the powers brought into force by this order is being issued simultaneously, as required by the non-textual amendments made to the 2000 Act by article 4 of the Order. This Code has been consulted on, so far as practicable, with relevant stakeholders, including the Association of Chief Police Officers, the Association of Chief Police Officers in Scotland, the National Police Improvement Agency, the Metropolitan Police Service, British Transport Police and the Lord Advocate. There are two Codes of Practice, one for Great Britain and one for Northern Ireland.

9.2 The Code of Practice will govern the way in which the powers are authorised and used. It includes guidance on:

- i. the test for giving an authorisation,
- ii. the need to consider whether other powers are more appropriate,
- iii. the geographical and temporal extent of an authorisation,
- iv. information to be provided to the Secretary of State in support of an authorisation,
- v. the fact that continual renewal of authorisations on the basis of a similar intelligence case cannot be justified,
- vi. briefing and tasking for officers using the powers,
- vii. avoiding discrimination,
- viii. the general conduct of stop and searches,
- ix. the monitoring and review of the use of the powers,
- x. community engagement.

10. Impact

10.1 The impact on business, charities or voluntary bodies is negligible.

10.2 The impact on the public sector is likely to be negligible, although there will be some impact on the work of the police.

10.3 An Equality Impact Assessment has been prepared separately and published alongside this instrument.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 Provisions to repeal sections 44-47 of the Terrorism Act 2000 and to replace them with provisions very similar to those in this Order are contained in the Protection of Freedoms Bill. Parliament will therefore have the opportunity to review the use of the provisions in this Order to inform its scrutiny of the provisions of the Protection of Freedoms Bill.

12.2 The Code of Practice published alongside the Order will include provisions requiring the monitoring of the use of the powers and the collation and reporting of statistics for publication.

12.3 The powers in the Order are subject to a sunset clause and will cease to have effect on the coming into force of the relevant provisions of the Protection of Freedoms Bill.

13. Contact

13.1 Ben Hale at the Home Office (Tel: 020 7035 6821 or e-mail: ben.hale@homeoffice.x.gsi.gov.uk) can answer any queries regarding this instrument.