

POLICING AND CRIME BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

The Government has tabled amendments to the Policing and Crime Bill for day two of Commons Report stage. These include a number of new delegated powers. This supplementary memorandum explains why the new powers have been taken and the reason for the procedure selected.

New clause “*Inspection of fire and rescue authorities*” (NC48) – new section 28(A7)(e) of the Fire and Rescue Services Act 2004: Power to specify additional functions of a PCC-style fire and rescue authority which are not subject to inspection

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Negative procedure

1. The Fire and Rescue Services Act 2004 (“the 2004 Act”) provides powers to inspect fire and rescue authorities (“FRAs”). In particular, section 28 provides for the appointment of inspectors, assistant inspectors and other officers and confer powers on them to obtain information about the manner of discharge of functions by FRAs.
2. Subsection (2) of new clause “*Inspection of fire and rescue authorities*” inserts new subsections (A1) to (A9) into section 28 of the 2004 Act. These new subsections provide for a new method of appointment of inspectors (“English inspectors”), assistant inspectors and other officers for England. The subsections also introduce a requirement on the English inspectors to inspect and report on the efficiency and effectiveness of FRAs in England. New subsection (A6) provides that when carrying out an inspection under subsection (A3), an English inspector must not review or scrutinise decisions made, or other action taken, by an FRA created by an order under new section 4A of the 2004 Act (as inserted by Schedule 1 to the Bill) in connection with the discharge of an excluded function. (New section 4A provides for the creation of police and crime commissioner (PCC)-style FRAs.) New subsection (A7) sets out the relevant excluded functions, namely the functions of preparing a fire and rescue plan and a fire and rescue statement (within the meaning of new Schedule A2), the functions that an authority has in its capacity as a major precepting authority for the purposes of Part 1 of the Local Government Finance Act 1992, the function of appointing a chief finance officer under new section 4D(4), where functions of the authority have been delegated to a chief constable under an order under new section 4H, and the functions conferred on the authority by section 4J(4) and (5). In addition, paragraph (e) of new subsection (A7) further provides that the Secretary of State may

specify additional functions or additional functions of a description specified as excluded functions for the purposes of subsection (A6).

3. Subsection (6) of the new clause further amends the modifications of section 28 of the Police Reform and Social Responsibility Act 2011 (see paragraph 8(2) of new Schedule A2 to the 2004 Act, as inserted by Schedule 1 to the Bill) to provide that the references in subsection (6) of that section are to the functions of the relevant FRA that are excluded functions for the purposes of section 28(A6) of this Act. The effect of this provision is that responsibility for scrutinising the excluded functions of a PCC-style FRA will rest with the Police and Crime Panel.
4. The Delegated Powers Memorandum on reintroduction set out that the Government does not intend to mandate the transfer of fire and rescue services to PCCs and the policy intention is that arrangements for PCCs seeking responsibility for their local FRA should be locally determined. There is a requirement that before an order under new section 4A is made establishing a PCC as the FRA for an area, that the Home Secretary is satisfied that making the order would be in the interests of economy, efficiency and effectiveness, or in the interests of public safety (new section 4A(5)). This requirement for a PCC's proposals to meet one or other (or both) tests necessitates leaving the implementation of changes to the governance of particular fire and rescue services to secondary legislation as stated in paragraph 4 of the Delegated Powers Memorandum. The policy intention is that the excluded functions of a fire and rescue authority created by an order under new section 4A are those strategic functions which a PCC has not delegated in exercise of the power in new section 4D(10), or where functions have been delegated to a chief constable under new section 4H, those functions which the PCC has not delegated in exercise of the power in new section 4H(1). However, where the PCC has not delegated functions connected with the operation of the fire and rescue service, those functions are to be subject to inspection and so are not to be excluded functions. This policy intention necessitates enabling additional functions to be specified in secondary legislation, consequential on a section 4A or 4H order, to reflect local arrangements for the delegation of functions. The intention is also to exclude functions of the PCC which are not currently set out in primary legislation, but will be provided for within the section 4A order establishing the PCC as an FRA. For example, where the PCC has not delegated the function of approving a contract for services or equipment over a specified limit, the specified limit or the nature of the retained function may vary according to local arrangements.
5. By virtue of section 60(5) of the 2004 Act, orders made under new section 28(A7)(e) will be subject to the negative procedure. The principle that certain functions of a PCC-style FRA are not to be subject to inspection will have been established in primary legislation. Moreover, the key statutory strategy functions of a PCC-style FRA which are to constitute excluded functions are similarly to be set out in primary legislation. Given these factors, the Government considers that the negative procedure

provides an appropriate level of parliamentary scrutiny in respect of regulations specifying any additional excluded functions. As described above, there is also a close connection between orders made under new section 28(A7)(e) and those made under new section 4A which are also to be subject to the negative procedure.

New clause “*Extension of cross-border powers of arrest: urgent cases*” (NC51) - new section 137B(1) of the Criminal Justice and Public Order Act 1994: Power to prescribe “specified offences” in respect of which the additional cross-border powers of arrest may be exercised

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative procedure

6. Part 10 of the Criminal Justice and Public Order Act 1994 (“the 1994 Act”) provides for cross-border powers of arrest. In particular, section 136 provides that a person in respect of whom a warrant for arrest has been issued in any jurisdiction in the UK may be arrested in any other jurisdiction in the UK, by a constable in any police force (or other specified persons) from the issuing or executing jurisdiction or by any other person authorised in the warrant; section 137 provides that a constable from one jurisdiction can arrest without warrant (or in the case of Scottish constables, detain) a person in a jurisdiction other than his own ‘home’ jurisdiction, if that constable has reasonable grounds for suspecting that an offence has been committed or attempted in the constable’s own ‘home’ jurisdiction; and, section 140 confers reciprocal powers of arrest on constables of the police forces in the three jurisdictions of the UK.
7. New clause “*Extension of cross-border powers of arrest: urgent cases*” (which inserts new sections 137A to 137D into the 1994 Act) updates the provisions in Part 10 of the 1994 Act in a number of respects. In particular, it closes a gap in the cross-border arrest powers to ensure that a person who commits an offence in one UK jurisdiction and is then found in another UK jurisdiction can be arrested without a warrant by an officer from the jurisdiction in which the person is found. The provisions in new section 137A of the 1994 Act contain a number of safeguards; in particular, the additional cross-border power of arrest is only exercisable if: (a) the arresting officer has reasonable grounds for suspecting that the suspect has committed a specified offence in another jurisdiction and (b) the constable has reasonable grounds to believe that it is necessary to arrest the person to allow prompt and effective investigation or to prevent any prosecution from being hindered by the person’s disappearance (England and Wales and Northern Ireland) or the constable is satisfied that it would not be in the interests of justice to delay the arrest to allow an arrest to take place under one of the other cross-border powers

(Scotland).¹ These limitations ensure that the new power of arrest without warrant is only used when it is necessary and proportionate to do so.

8. New section 137B provides that a specified offence for these purposes is one specified in regulations made by the Secretary of State. The Secretary of State would specify the relevant offences in each of England and Wales, Scotland and Northern Ireland, with the consent of the Scottish Ministers and the Department of Justice in Northern Ireland. The Secretary of State will only be able to include an offence which may be tried on indictment in the jurisdiction where it was committed, setting a minimum level of seriousness. In addition, the Secretary of State will only be able to include an offence in the regulations if satisfied that the availability of the power of arrest in respect of the offence is necessary in the interests of justice. This additional safeguard will ensure that the Secretary of State specifically considers whether this new power of arrest is appropriate in relation to each offence.
9. Given that the criminal law differs in each of the three jurisdictions it is necessary to develop a bespoke, but analogous, list of offences for each jurisdiction. Moreover, as these provisions relate, in part, to devolved matters in Scotland and Northern Ireland it is appropriate that the list of offences in Scotland and Northern Ireland is subject to consultation with and the agreement of the Scottish Government and Northern Ireland Department of Justice. To allow for the list of specified offences, and any subsequent revisions to it, to be agreed with the devolved administrations, the Government considers it appropriate that the list of specified offences be prescribed in secondary legislation and for such secondary legislation to be subject to the consent of the Scottish ministers and Northern Ireland Department of Justice. This approach would also afford the flexibility to update the list in the light of experience and to reflect the creation of relevant new offences.
10. The Government recognises that in other contexts, for example in relation to the trigger offences for serious crime prevention orders (see Schedule 1 to and section 4 of the Serious Crime Act 2007), such lists of offences are commonly set out in primary legislation albeit with a power to amend by secondary legislation. The list in Schedule 1 to the Serious Crime Act 2007 is the basis for the imposition of a serious crime prevention order on a person for the purpose of restricting or disrupting involvement in criminal activity in the future. The nature of the criminal offences which form the basis of such an order is essential to ensure that the order is only imposed in relation to “serious” crime. The Government considers that that example can be distinguished from new cross-border power of arrest because the nature of the offence for which the person arrested is not core to the power of arrest, but an added safeguard in respect of the power. The other cross-

¹ The provision in relation to constables in England and Wales and Northern Ireland mirrors the requirements under section 24 of the Police and Criminal Evidence Act 1984 and Article 26 of the Police and Criminal Evidence (Northern Ireland) Order 1989, respectively. The provision in relation to constables in Scotland mirrors the provision in section 1 of the Criminal Justice (Scotland) Act 2016.

border powers of arrest in Part 10 do not depend on the commission of a specified offence.

11. Despite this distinction, the Government considers it appropriate that the regulation-making power in new section 137B should be subject to the affirmative procedure (see subsection (3)) to afford both Houses the opportunity to debate and approve the list of specified offences and any revisions to it, ensuring that the power is only available where the underlying offence means that it is appropriate.

New clause “*Extension of cross-border powers of arrest: urgent cases*” (NC51) - new section 137D(5) of the Criminal Justice and Public Order Act 1994: Power to make modifications or exceptions to the provisions applying the rights of arrested persons

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative procedure

12. Under the existing cross-border powers of arrest in Part 10 of the 1994 Act (see above), different provision is made about the treatment of suspects arrested, depending on the jurisdiction in which the warrant was issued or the person was arrested. Under section 136 (execution of warrants), where the warrant was issued in England and Wales or Northern Ireland, no specific provision is made about the rights of suspects. Where the warrant was issued in Scotland, the person has the same rights as they would have had the warrant been executed in Scotland. Under section 137, where the offence was committed in England and Wales or Northern Ireland, the suspect has the same right to information on arrest as they would have had they been arrested in England and Wales or Northern Ireland (by virtue of the requirement that it would have been lawful for the arrest to be made in the ‘home’ jurisdiction²), but no further provision is made for the treatment of suspects while detained. Suspects are taken by the arresting officer to the jurisdiction in which the offence is being investigated as soon as reasonably practicable, at which time the rights of suspects in the investigating jurisdiction (i.e. England and Wales or Northern Ireland) will be applicable. Under section 137, where the offence was committed in Scotland, the suspect has the same rights as the person would have had the person been arrested in Scotland. Section 138(1A) and (1B) makes modifications to Scottish legislation when persons are arrested in respect of Scottish offences in another jurisdiction.

13. Under the new power of arrest without warrant, the person will be arrested in, and by a police force from, a jurisdiction other than the one in which the offence was committed. The person will be detained in the arresting

² In relation to Northern Ireland, this describes the effect of section 137(6) as amended by the Policing and Crime Bill.

jurisdiction for the purpose of obtaining and executing a warrant for their arrest under section 136 or for the purpose of enabling officers from the investigating jurisdiction to travel to arrest the person under section 137. In most cases, the person will be detained for a short period, as detention can only be authorised if satisfied that officers are acting expeditiously to re-arrest the person. However, there will be some cases in which the person is detained for the maximum period of 36 hours, for example because the person is arrested in a place which is very far from the location of the investigating force (for example, a person arrested in the Shetland Islands for an offence committed in Devon). Given the length of time for which a person may be detained outside the investigating jurisdiction, new section 137D(1) to (4) applies the principal provisions as to the rights which would be applicable to detained persons had they been arrested in the jurisdiction where the offence was committed. These are: the right to be provided with certain information on arrest; the rights to have certain persons notified of the fact of the arrest and the place where the person is being held; and the right of access to legal advice.

14. While it is appropriate to apply the provisions as to the rights which would be available in the investigating jurisdiction, those provisions will need to be modified in order to apply them to the very different context of cross-border arrest and of detention for the limited purpose of enabling re-arrest. New section 137D(5) gives the Secretary of State the power to make modifications or exceptions to the way in which those provisions are applied to persons arrested under cross-border powers, with the consent of the Scottish Ministers and the Department of Justice in Northern Ireland, as appropriate.
15. Given that the law on the treatment of suspects differs in each of the three jurisdictions it is necessary for modifications to be drafted differently in relation to each jurisdiction. Moreover, as these provisions relate, in part, to devolved matters in Scotland and Northern Ireland it is appropriate that the application and modification of those provisions in respect of suspects from Scotland and Northern Ireland is subject to consultation with and the agreement of the Scottish Government and Northern Ireland Department of Justice. To provide a mechanism for securing such prior agreement, including for revisions to the regulations, the Government considers it appropriate that the modifications or exceptions to the application of the provisions are made using secondary legislation which is subject to the consent of the Scottish Ministers and Northern Ireland Department of Justice.
16. As the provisions to be modified are provisions of primary legislation and relate to the rights of detained persons, the Government considers it appropriate that the regulation-making power should be subject to the affirmative procedure (see new section 137D(6)) to afford both Houses the opportunity to debate and approve any modifications or exceptions to the applied provisions.

New clause “*Licensing functions under taxi and PHV legislation: protection of children and vulnerable adults*” (NC56): Power to issue guidance to public authorities in respect of functions under taxi and private hire vehicle (“PHV”) legislation

Power conferred on: Secretary of State

Power exercisable by: Statutory guidance

Parliamentary procedure: None

17. Taxi and PHV licensing is carried out by local authorities and Transport for London under a number of different statutory provisions, including the London Hackney Carriage Act 1843, sections 37 to 68 of the Town Police Clauses Act 1847, the Metropolitan Police Carriage Act 1869, Part 2 of the Local Government (Miscellaneous provisions) Act 1976, the Private Hire Vehicles (London) Act 1998 and the Plymouth City Council Act 1975.
18. Licensing authorities must ensure, amongst other things that licenses are issued only to drivers who are “fit and proper”, but the term is not defined further in legislation.
19. The Department for Transport issues the Taxi and Private Hire Vehicle Licensing: Best Practice Guidance, the last version of which was issued in 2010³. The guidance has currently no statutory basis.
20. Both the Jay⁴ and Casey Reports⁵ into child sexual exploitation (“CSE”) noted the prominent role played by taxi drivers in a large number of cases of abuse. The Casey Report in particular uncovered what was described as “weak and ineffective arrangements for taxi licensing which leave the public at risk”. The Government strongly agrees that continued work with the taxi and PHV sector is needed to reduce the risk of CSE and other abuse of vulnerable individuals.
21. The Law Commission’s May 2014 report on Taxi/PHV legislation⁶ recommended a re-write of the existing, outdated taxi/PHV legislation and included a draft Bill to that end. The Government is currently considering the Law Commission’s report and draft Bill. Pending any codification of the existing legislation in this area, new clause “*Licensing functions under taxi and PHV legislation: protection of children and vulnerable adults*” empowers the Secretary of State (in practice the Secretary of State for Transport in consultation with the Home Secretary) to issue statutory guidance to local taxi and PHV licensing authorities in relation to the safeguarding of children and vulnerable adults and requires such

³ <https://www.gov.uk/government/publications/taxi-and-private-hire-vehicle-licensing-best-practice-guidance>

⁴ Independent Inquiry into Child Sexual Exploitation in Rotherham 1997 -2013 by Alexis Jay OBE

⁵ Report of Inspection of Rotherham Metropolitan Borough Council by Louise Casey CB

⁶ http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc347_taxi-and-private-hire-services.pdf

authorities to have regard to the guidance when exercising their taxi and PHV licensing functions (subsections (2) to (4)).

22. The Secretary of State is required to consult the National Police Chiefs' Council, persons representing the interests of public authorities who are required to have regard to the guidance, persons representing the interests of taxi and PHV drivers and others whose livelihood is affected by the licensing functions to which the guidance relates and such other persons (for example, children's organisations) the Secretary of State considers appropriate (subsection (5)). The aim of such statutory guidance is to promote the adoption of good practice by all relevant public authorities when exercising their licensing functions under the relevant taxi and PHV legislation.
23. Any guidance issued under this new clause will not be subject to any parliamentary scrutiny on the grounds that it will provide practical advice on the application of the relevant taxi and PHV legislative provisions (as specified in subsection (6)) and will be worked up in consultation with the police, the relevant public authorities, the taxi and PHV sector and others. The guidance will not conflict with, or alter the scope of, the provisions of the relevant taxi and PHV legislation. Moreover, whilst the relevant public authorities will be required to have regard to the guidance when exercising functions under the relevant legislation, the guidance will not be binding to the extent that this requirement falls short of a duty to follow the guidance. The approach taken in the new clause is consistent with other legislative provisions providing for statutory guidance in respect of local authority licensing functions, for example guidance issued by the Gambling Commission to local authorities under section 25 of the Gambling Act 2005.

New clause “*Powers of litter authorities in Scotland*” (NC57) – new section 94(1) of the Environmental Protection Act 1990: Power to prescribe description of premises in respect of which a street litter control notice may be issued

Power conferred on: *The Scottish Ministers*

Power exercisable by: *Order made by Scottish Statutory Instrument*

Parliamentary procedure: *Negative procedure*

24. The Anti-social Behaviour, Crime and Policing Act 2014 (“the 2014 Act”) introduced a range of new powers to tackle anti-social behaviour. These replaced a number of existing ones, including the power to serve litter abatement notices under section 92 of the Environmental Protection Act 1990 (“the 1990 Act”) and street litter control notices under section 93 (and associated section 94) of the 1990 Act. The intention was that the Community Protection Notice, provided by sections 43 to 58 of the 2014 Act, would replace these notices in dealing with littering issues in England and Wales. Accordingly the relevant provisions of the 1990 Act were repealed by paragraph 21 of Schedule 11 to the 2014 Act. The intention

was that this repeal should apply to England and Wales only. However, the unintended effect of section 184(8) of the 2014 Act was that this repeal was extended to Scotland as well as England and Wales. The Community Protection Notice is not available in Scotland, so this repeal has left a gap in the powers available in Scotland to tackle littering. New clause (*Powers of litter authorities in Scotland*) therefore re-enacts sections 92, 93 and 94 of the 1990 Act in Scotland and so reinstates the powers for Scottish local authorities to issue litter abatement notices and street litter control notices.

25. New section 93 of the 1990 Act, as with its predecessor, would enable a Scottish local authority to issue a street litter control notice on the occupier or owner of premises which are of a description prescribed under new section 94(1)(a). New section 94 of the 1990 Act, again as with its predecessor, confers on the Scottish Ministers the power, by order, to prescribe the different types of commercial or retail premises against which a street litter control notice may be issued, the descriptions of the land which may be included in a specified area and the maximum area of land which may be included. The power also allows the Scottish Ministers to describe the premises or land by reference to occupation or ownership or to the activities carried out there. Given that street litter control notices impose duties on the owner or occupier of relevant premises (see new section 94(4)), and it is an offence to fail to comply with a notice without reasonable excuse, it is appropriate to target the power to issue these notices on commercial or retail premises (for example, fast food enterprises) which generate litter in their immediate surrounds rather than provide for a generic power in primary legislation to issue a notice on the occupier or owner of any premises (including domestic dwellings). Given the wide variety of commercial and retail premises and the differing locations they may be sited, it is appropriate to use secondary legislation to specify the descriptions of premises to be subject to these notices. Secondary legislation also affords the flexibility to update the list of specified premises, for example, to take account of new types of commercial or retail enterprises which may become the cause of littering problems.
26. The Street Litter Control Notices Order 1991 (SI 1991/1324), as amended by SI 1997/632, was made under the original section 94 of the 1990 Act. Amongst the descriptions of premises specified in that Order as it applies in Scotland are: premises used wholly or partly for the sale of food or drink for consumption off the premises, service stations, cinemas and theatres, banks and building societies with automated teller machines and betting offices. Subsection (2) of the new clause revives that Order.
27. By virtue of new section 94(1), an order made under that subsection is subject to the negative procedure. Given that the framework for street litter control notices will continue to be provided for in primary legislation, including the limitation on applying such notices only to commercial or retail premises, the UK and Scottish Governments consider that the negative procedure continues to afford an adequate level of (Scottish) parliamentary scrutiny for an order setting out the detail of the particular

description of such premises. The application of the negative procedure is consistent with the order-making power in the original section 94 of the 1990 Act.

Home Office
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