

PUBLIC ORDER BILL

DELEGATED POWERS MEMORANDUM

Introduction

1. This memorandum has been prepared by the Home Office for the Delegated Powers and Regulatory Reform Committee (DPRRC) to assist with its scrutiny of the Public Order Bill. The Bill was introduced in the House of Lords on 19 October 2022. The memorandum identifies the provisions of the Bill which confer new or amended powers to make delegated legislation. It explains in each case why the power has been taken and the nature of, and reason for, the procedure selected.

Background and purpose of the Bill

2. The Bill will provide the police with new powers to better balance the right to protest peacefully with the rights of the general public to go about their daily lives free from serious disruption or harm. It will build on the public order measures in Part 3 of the Police, Crime, Sentencing and Courts Act 2022, taking account of the disruptive and dangerous tactics employed in recent months by protest groups such as Extinction Rebellion, Insulate Britain and Just Stop Oil. The Government had originally sought to bring forward the majority of the proposed measures as amendments to the Police, Crime, Sentencing and Courts Bill, but they were rejected by the House of Lords (Official Report, 17 January 2022, columns 1430-1476).
3. The Bill includes the following measures:
 - a. **Offences related to locking on** – creating two new offences designed to deter individuals from ‘locking on’ and ‘going equipped to lock on’. Locking-on is the tactic in which protesters attach themselves to other individuals; objects; or land, or attach objects together; or to land, creating an obstruction which is capable of causing serious disruption and is difficult and time consuming for the police to remove.
 - b. **Obstruction of major transport works** – creating a new offence of obstructing the construction or maintenance of major transport works.

- c. **Interference with key national infrastructure** – creating a new offence which covers any behaviour which prevents or significantly delays the operation of key infrastructure, defined as including airports, railways, oil refineries and printing presses.
 - d. **Powers to stop and search** – extending existing stop and search powers to allow the police to search and seize objects made, adapted, or intended for use in the course of specified protest-related offences. There will be both a suspicion-led power, amending section 1 of the Police and Criminal Evidence Act 1984, and a suspicion-less power.
 - e. **Serious Disruption Prevention Orders** – introducing a new preventative court order – the Serious Disruption Prevention Order (SDPO), aimed at tackling repeated highly disruptive behaviour related to protests.
 - f. **Power of chief officers of police to delegate certain functions under the Public Order Act 1986** - amending the seniority of police officer in London who may attach conditions to an upcoming protest or prohibit a trespassory assembly to match that applicable in forces outside of London. (The current minimum rank of Assistant Commissioner will be changed to that of Commander, which is equivalent to Assistant Chief Constables, who are able to perform these functions in forces outside London.)
 - g. **Extension of public order powers under the Public Order Act 1986 to the British Transport Police and the Ministry of Defence Police.**
 - h. **Offences related to tunnelling** – creating three new offences of tunnelling, being present in a tunnel, and going equipped to tunnel.
 - i. **Power for a Secretary of State to bring civil proceedings in relation to protest activity** - facilitating a Secretary of State in applying for an injunction in relation to protest activities where they may cause serious disruption or have a serious adverse impact on public safety.
 - j. On a free vote with cross-party support, an amendment was inserted into the Bill by the House of Commons on Monday 18 October. It establishes designated areas (buffer zones) around abortion clinics where interference with people accessing or providing abortion services would be an offence.
4. The measures at paragraph 3(b), (c), (d) and (e) above include new or amended delegated powers. The DPRRC commented on the power to issue guidance on the exercise of police functions in relation to SDPOs in its 13th Report of session 2021/22; the Government’s response was published in the Committee’s 15th Report of that session.

Clause 6(10) – new section 14(3A) of the Planning Act 2008: Power to amend clause 6(7)(a) of the Public Order Bill

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Order made by statutory instrument</i>
<i>Parliamentary procedure:</i>	<i>Affirmative procedure</i>
<u>Purpose of the power</u>	

5. Clause 6(1) provides for a new offence of obstructing the construction or maintenance of major transport works. Transport works are defined in clause 6(6) as works the construction of which are: (a) relating to transport infrastructure and authorised directly by an Act of Parliament; or (b) comprises development within clause 6(7) that has been authorised by a development consent order under section 114 of the Planning Act 2008 (“the 2008 Act”). Subsection (7) explains what type of development is within subsection (6)(b). In particular, clause 6(7)(a) provides that a development is within subsection (7) if it is or forms part of a nationally significant infrastructure project within any of paragraphs (h) to (l) of section 14(1) of the 2008 Act, namely a highway-related development; an airport-related development; the construction or alteration of harbour facilities; the construction or alteration of a railway; or the construction or alteration of a rail freight interchange.

6. Clause 6(10) amends section 14 of the 2008 Act. Section 14(1) of the 2008 Act lists the categories of project which are “nationally significant infrastructure projects” for the purposes of that Act and section 14(3) enables the Secretary of State to make an order which amends those categories, including by adding new categories or removing existing categories. Subsection (10) of clause 3 inserts a new subsection (3A) in section 14 of the 2008 Act which enables an order made under section 14(3) to make consequential amendments to clause 6(7)(a) of the Bill.

Justification for taking the power

7. The existing order-making power in section 14(3) of the 2008 Act enables the list of nationally significant infrastructure projects set out in section 14(1) to be amended, including by adding or removing categories of significant transport infrastructure projects. In that event, it would be necessary to make consequential amendments to the reference to paragraphs (h) to (l) of section 14(1) of the 2008 Act in clause 6(7)(a) to ensure that the offence in clause 6(1) continues to capture the obstruction of the construction or maintenance of all major transport works.

Justification for the procedure

8. By virtue of section 232(6) of the 2008 Act, orders made under section 14(3) of that Act are subject to the draft affirmative procedure. As the new section 14(3A) adds to the Henry VIII properties of the order-making power, the existing parliamentary procedure continues to be appropriate.

Clause 7(7): Power to amend the definition of key national infrastructure

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative procedure

Purpose of the power

9. Clause 7 creates a new offence of intentionally and/or recklessly interfering, with the use or operation of key national infrastructure, as defined in the clause. It is a defence for a person to prove that they had a reasonable excuse or were acting in contemplation or furtherance of a trade dispute. Any person found guilty of this offence will face a maximum penalty on summary conviction of an unlimited fine and/or six-months imprisonment and on conviction on indictment of an unlimited fine and/or 12-months imprisonment. Interference is defined as an act which prevents the infrastructure from being used or operated to any extent for its intended purposes, including acts which significantly delay its operation. Key national infrastructure is defined in subsection (6) and clause 8 makes further provision about these kinds of infrastructure. Subsection (7) provides the Secretary of State with a delegated power to amend the list of key national infrastructure contained in subsection (6) and clause 8. Subsection (8) provides that such regulations may make different provision for different purposes and consequential, supplementary, incidental, transitional, transitory or saving provision.

Justification for taking the power

10. The purpose of this regulation-making power is to ensure the list of key national infrastructure within scope of this offence remains up to date. What constitutes “key national infrastructure” will change and develop over time. For example, oil in the future may no longer be considered key as other forms of fuel become more widespread, whilst new types of infrastructure may develop and become an integral part of our infrastructure network. Providing this delegated power will ensure this offence remains operable in future contexts.

Justification for the procedure

11. By virtue of subsection (9), regulations made under subsection (7) will be subject to the affirmative procedure. The affirmative procedure is considered appropriate as this power will amend the scope of a serious criminal offence. Additionally, this offence could impact a person's rights to freedoms of expression and assembly. The affirmative procedure is also considered appropriate for a Henry VIII power such as this. Therefore, Parliament should have the opportunity to debate and approve any such new arrangements before they take effect.

Clause 13(6): Power to make provision regulating the retention, safe keeping, disposal and destruction of things seized by a constable following the search under new powers conferred by clause 11

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative procedure

Purpose of the power

12. Clause 11 makes provision for a police officer of or above the rank of inspector to give an authorisation applying to a specified locality for a specified period and allowing a constable to stop and search a person or vehicle for an object made, adapted or intended for use in the course of or in connection with an offence listed in the clause, including the offence of wilful obstruction of a highway (under section 137 of the Highways Act 1980) where it involves activity which causes or is capable of causing serious disruption to two or more individuals or to an organisation, and the new offences of locking on and tunnelling, obstruction etc of major transport works and interfering with the use or operation of key national infrastructure (as provided for in clauses 1, 3, 4, 6 and 7). While the authorisation is in force the constable may exercise the power whether or not they have any grounds for suspecting the person or vehicle is carrying such an object. If in the course of a search under clause 11 a constable discovers an object which the constable has reasonable grounds for suspecting to be a prohibited object, the constable may seize it. Subsection (5) of clause 13 provides that anything seized as a result of a search may be retained by the constable in accordance with regulations made under subsection (6). Such regulations may make provision for the retention and safe keeping of seized items and for their disposal or destruction in prescribed circumstances (for example, following the conclusion of any criminal proceedings connected with the seized item). Subsection (8) provides that such regulations may make different provision for different purposes and consequential, supplementary, incidental, transitional, transitory or saving provision.

Justification for taking the power

13. Having provided for the power of seizure and retention on the face of the Bill, the detail as to the arrangements for the retention and disposal of seized items is properly a matter for secondary legislation. It is expected that regulations made under section 9(6) will make broadly analogous provisions in relation to bladed articles and offensive weapons to those contained in the Police (Retention and Disposal of Items Seized) Regulations 2002 (SI 2002/1372) made under section 60A of the Criminal Justice and Public Order Act 1994 (“CJPOA”). That is setting out the necessary arrangements which must be followed by the police for retention, safe-keeping, disposal and destruction which will apply to any item seized under the stop and search power to which existing provision, for example the Police (Property) Regulations 1997, would not apply.

Justification for the procedure

14. By virtue of subsection (9) of clause 13, regulations made under subsection (6) are subject to the negative resolution procedure. This is considered to afford an appropriate level of parliamentary scrutiny given the technical nature of the matters to be addressed in the regulations. This approach is consistent with the regulation-making power in section 60A of the CJPOA and in section 342F of the Sentencing Act 2020 as inserted by section 167 of the Police, Crime, Sentencing and Courts Act 2022.

Clause 23(7): Power to specify description of “responsible person” in relation to electronic monitoring for Serious Disruption Prevention Orders.

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: None

Context and purpose

15. Part 2 of the Bill confers a number of powers and duties on the police in relation to Serious Disruption Prevention Orders (SDPOs)). An SDPO is an order which a court may impose on a person who has been convicted of a protest-related offence (and, within the last five years, engaged in another protest related event as defined in clause 19(3)) or who has, on at least two occasions, been convicted of a protest-related offence, committed protest-related breaches of injunctions or caused or contributed to the commission of such offences or breaches or to activity related to a protest that resulted in serious disruption to the public. A court making a SDPO may impose any requirements that it considers necessary for the purposes in clauses 19(5) and 20(4) (to prevent the subject of the order committing a protest-related offence etc). Amongst the requirements that may be attached to a SDPO is an electronic monitoring requirement (clause 21(2)(b)). An electronic monitoring requirement may be imposed to support the monitoring of an individual's compliance with other requirements of the order (for example, a prohibition on the subject of the order being in a particular place). Electronic monitoring is undertaken using an electronic tag usually fitted to a subject's ankle.

16. The tag worn by the subject transmits data to a monitoring centre where it is processed and stored. The monitoring centre, operated by a "responsible person", reviews this data to see whether an individual being electronically monitored is complying with the conditions of the SDPO. Where a subject has failed to comply, the responsible person provides information to the relevant authority, in this case the police, responsible for the enforcement of the order.

17. Clause 23 sets out further provision about electronic monitoring requirements. Subsection (6) provides that a SDPO which includes an electronic monitoring requirement must specify the person who is responsible for the monitoring ("the responsible person"). Subsection (7) provides that the responsible person must be of a description specified in regulations made by the Secretary of State. Similar enabling powers are contained in, for example, section 3AC(2) of the Bail Act 1976, paragraph 31(2) of Schedule 9 to the Sentencing Act 2020 and section 37(7) of the Domestic Abuse Act 2021. The relevant statutory instrument for the first two of these powers is the Criminal Justice (Electronic Monitoring) (Responsible Person) Order 2017 (SI 2017/235), which has been updated in line with paragraph 31(2) of Schedule 9 to the Sentencing Act 2020.

Justification for the power

18. The regulations will effectively specify which service provider or providers are contracted for the time being to provide electronic monitoring services for the purposes of Part 2 of the Bill. The selection of one or more suitable contractors is properly an administrative procedure. In addition, such contractors will change over time and may need to be changed at short notice. For these reasons, the designation of the responsible person is considered an appropriate matter for secondary legislation.

Justification for the procedure

19. Regulations made under clause 23(7) are not subject to any parliamentary procedure. The primary purpose of these regulations is simply to put into the public domain the name of one or more persons contracted to provide electronic monitoring services for the purposes of Part 2 of the Bill as indicated above, the selection of the contractor(s) is properly an administrative matter for the executive. Given this, no form of parliamentary scrutiny is considered necessary. This mirrors the approach with the analogous delegated powers in section 3AC(2) of the Bail Act 1976, paragraph 31(2) of Schedule 9 to the Sentencing Act 2020 and section 37(7) of the Domestic Abuse Act 2021.

Clause 30(1): Guidance in respect of the exercise of functions in relation to Serious Disruption Prevention Orders

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Statutory guidance</i>
<i>Parliamentary procedure:</i>	<i>Negative procedure</i>

Context and purpose

20. Part 2 of the Bill; confers a number of powers and duties on the police in relation to SDPOs. Clause 30 provides that the Secretary of State may issue guidance to the police in relation to SDPOs. Chief officers of police and the chief constables of the British Transport Police Force, Civil Nuclear Constabulary and Ministry of Defence Police are required to have regard to any guidance when exercising functions to which the guidance relates.

Justification for the power

21. The purpose of any guidance under clause 30 is to support the police in relation to the exercise of their functions in relation to SDPOs. Amongst other things, the statutory guidance will provide clear advice about the application process for SDPOs, the types of requirements or prohibitions that can be included in an SDPO and monitoring and reporting of their use. The guidance must be consistent with the legislative regime provided for in the Bill. There is a vast range of statutory guidance issued each year and it is important that guidance can be updated rapidly to keep pace with events and operational good practice.
22. The requirement for the guidance to be published in such manner as the Secretary of State sees fit will ensure that it remains accessible to those who need to refer to it.
- 23. SDPOs are not a new concept. Successive Governments, dating back at least to the creation of Ant-Social Behaviour Orders in the Crime and Disorder Act 1998, have legislated for civil preventative orders of this kind which can impose restrictions on liberty, backed by criminal sanctions. Many of these preventative order regimes include similar provision to that contained in clause 30 for the Secretary of State to issue guidance. Examples of these are set out in the attached annex.**

Justification for the procedure

24. By virtue of clause 31, the guidance will be subject to the negative procedure. It is the Government established position (see the letter from the Leader of the House of Lords to the Chair of the DPRRC reproduced at Appendix 1 to the Committee's 35th Report of session 2017/19) that "In certain exceptional circumstances it may be appropriate for guidance to be laid before Parliament or be subject to the negative procedure." Although the majority of the precedents relating to statutory guidance for civil prevention order regimes suggest that such guidance should not be subject to any parliamentary procedure, given the extensive parliamentary and public debate about the appropriate balance between the rights of protesters to exercise their freedom of speech and assembly and the rights of other persons and organisations to go about their business without serious disruption, it is the Government's view that, exceptionally in this instance, the guidance under clause 30 should be subject to the negative procedure, notwithstanding the recommendation in the DPRRC's 13th Report of session 2021/22.

Clause 32(1): Duty to issue code of practice relating to data from electronic monitoring

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Statutory code of practice</i>
<i>Parliamentary procedure:</i>	<i>None</i>

Context and purpose

25. Amongst the requirements which a court may attach to a SDPO is an electronic monitoring requirement (see clause 21(2)(b)). Clause 32(1) requires the Secretary of State to issue a code of practice on the processing of data gathered in the course of an electronic monitoring requirement of a SDPO.
26. The processing of such data will be subject to the requirements in the General Data Protection Regulation and the Data Protection Act 2018. The code of practice issued under clause 32 is intended to set out the appropriate tests and safeguards for the processing of such data, in order to assist with compliance with the data protection legislation. For example, the Government envisages that the code will set out the length of time for which data may be retained and the circumstances in which it may be permissible to share data with the police to assist with crime detection. It is intended that the code will cover the storage, retention and sharing of personal data gathered under a requirement that is imposed for the purpose of monitoring compliance with another requirement.
27. Similar provision for a code of practice in respect of the processing of data from electronic monitoring is included in section 395 of the Sentencing Act 2020 (replacing provision in the now repealed section 215A of the Criminal Justice Act 2003, as inserted by the Crime and Courts Act 2013). The code (as made under section 215A of the Criminal Justice Act 2003) is available [here](#). Like provision is also made in section 51 of the Domestic Abuse Act 2021.

Justification for the power

28. The Government considers that a code of practice is the most appropriate vehicle to set out expectations and broad responsibilities in relation to the processing of data gathered under the electronic monitoring requirement. There is a vast range of statutory guidance issued each year and it is important that guidance can be readily updated to keep pace with events and operational good practice.

Justification for the procedure

29. Given the likely content and nature of the code, and in particular the fact that it will not define or create new legal responsibilities and that the processing of data must be in accordance with the requirements of data protection legislation, the Government does not consider it is necessary for the code to be subject to any parliamentary procedure. This approach is consistent with the analogous code provided for in section 395 of the Sentencing Act 2020 and section 51 of the Domestic Abuse Act 2021.

Clause 35(5): Commencement powers

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: None

Context and purpose

30. Clause 35(5) contains a standard power for the Secretary of State to bring provisions of the Bill into force by commencement regulations.

Justification for the power

31. Leaving provisions in the Bill to be brought into force by regulations will afford the necessary flexibility to commence the provisions of the Bill at the appropriate time, having regard to the need to make any necessary

secondary legislation, issue guidance, undertake appropriate training and put the necessary systems and procedures in place, as the case may be.

Justification for the procedure

32. As is usual with commencement powers, regulations made under clause 35(5) are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at a convenient time.

Clause 35(7): Power to make transitional, transitory or saving provision

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: None

Context and purpose

33. Clause 35(7) confers on the Secretary of State power to make such transitional, transitory or saving provisions as they consider appropriate in connection with the coming into force of the provisions in the Bill. Clause 35(8) provides that such regulations may make different provision for different purposes or areas.

Justification for the power

34. This standard power ensures that the Secretary of State can provide a smooth commencement of new legislation and transition between existing

legislation and the Bill, without creating any undue difficulty or unfairness in making these changes. There are numerous precedents for such a power, for example, section 208(6) of the Police, Crime, Sentencing and Courts Act 2022.

Justification for the procedure

35. As indicated above, this power is only intended to ensure a smooth transition between existing law and the coming into force of the provisions of the Bill. Such powers are often included as part of the power to make commencement regulations and, as such, are not subject to any parliamentary procedure on the grounds that Parliament has already approved the principle of the provisions in the Bill by enacting them. Although drafted as a free-standing power on this occasion, the same principle applies and accordingly the power is not subject to any parliamentary procedure.

Home Office

24 October 2022

Annex

Parliamentary procedure for statutory guidance relating to civil prevention order regimes

Name of order	Power to issue guidance	Parliamentary procedure, if any	DPRRC report and recommendations, if any
Female Genital Mutilation Protection Orders (FGMPO)	Section 5C of the Female Genital Mutilation Act 2003* – inserted by the Serious Crime Act 2015	None	The FGMPO provisions were added to the Bill in the Commons after the Committee had published its 2nd Report of session 2014/15
Sexual Harm Prevention Orders	Sections 103J(1) and 122J(1) of the	None	12th Report of session 2013/14

and Sexual Risk Orders	Sexual Offences Act 2003 – inserted by the Anti-social Behaviour, Crime and Policing Act 2014		
Forced Marriage Protection Orders	Section 63Q of the Family Law Act 1996* - inserted by Forced Marriage (Civil Protection) Act 2007	None	Not known
Gang injunctions	Section 47 of the Policing and Crime Act 2009*	Laying only	Not known
Domestic Violence Protection Orders	Section 31 of the Crime and Security Act 2010*	None	Not known
Anti-social behaviour injunctions; dispersal powers; Community Protection Notices; Public Spaces protection Orders; Closure Notices.	Sections 19, 41, 56, 73 and 91 of the Anti-social Behaviour, Crime and Policing Act 2014	None	12th Report of session 2013/14
Slavery and trafficking prevention orders and slavery and trafficking risk orders	Section 33 of the Modern Slavery Act 2015	None	10th Report of session 2014/15
Stalking Protection Orders	Section 12 of the Stalking Protection Act 2019	None	45th Report of session 2017/19
Knife Crime Prevention Orders (KCPOs)	Section 30 of the Offensive Weapons Act 2019*	None	The KCPO provisions were added to the Bill at Lords Report after the Committee had published its 44th Report of session 2017/19

Criminal Behaviour Orders	Section 341 of the Sentencing Act 2021 (formally section 32 of the Anti-social Behaviour, Crime and Policing Act 2014)	None	12 th Report of session 2013/14
Domestic Abuse Protection Orders	Section 50 of the Domestic Abuse Act 2021*	None	21 st Report of session 2019/21
Serious Violence Reduction Orders	Section 342J of the Sentencing Act 2020 – inserted by section 165 of the Police, Crime, Sentencing and Courts Act 2022*	Negative	6 th Report of session 2021/22

***Includes duty on specified persons to have regard to the guidance.**