The Protection of Freedoms Act – Powers of Entry Review Guidance

Background

The Coalition's Programme for Government, launched by the Prime Minister and Deputy Prime Minister on 20 May 2010, included a commitment to introduce a 'Freedom' Bill which would form part of a wider civil liberty and freedom agenda for reform. On 11 February 2011, the Prime Minister announced the introduction of the Protection of Freedoms Bill as part of the government's civil liberties and freedoms agenda. The bill received Royal Assent on 1st May 2012 and includes reforms to rationalise the known powers of entry relating to domestic, commercial and other types of premises. It also contributes to the implementation of twelve other specific commitments in the Programme for Government.

Introduction

The Government recognises the importance of respecting Human Rights and is committed to preserving the rights of individuals in their homes and businesses from un-necessary intrusion. The intention of Government is very clear that public authorities should have fewer powers to enter peoples homes and that the privacy and rights of homeowners and businesses should be protected and strengthened wherever possible. It is essential that powers of entry as with any enforcement power, achieves the right balance between the need to enforce the law and ensure public protection and to provide sufficient safeguards and rights to the individual.

Why is the Government taking action?

There has been a significant rise in the number of powers of entry in recent years. There are now over 1300 separate powers of entry in primary and secondary legislation that allow authorised persons to legally enter domestic and business premises to undertake certain activities. These include carrying out inspections, taking samples and search and seizure of items. The Coalition Government is committed to significantly reducing this number and to ensuring that remaining powers contain sufficient safeguards and levels of protection for individuals and businesses, limiting the extent and impact of intrusion whenever these powers are exercised.

It is argued that having discrete individual powers is in itself a safeguard because it prescribes the use of powers in only specific circumstances, however, the number of powers today has accumulated to an arguably indefensible level. Such a large number of powers of entry impacts upon, both an individual's civil liberties, and their ability to understand the statute book. It is for these twin reasons that Government is taking the action set out in the Protection of Freedoms Act.

In more than 50 percent of all cases, powers of entry do not specifically exclude entry to private dwellings. This means that there are more than 600 powers that allow officials to

enter peoples homes to undertake inspection or remove items, in the majority of cases without a warrant. Also a significant number of powers allow entry into homes, allowing force to be used in some cases and without providing any notice. The Government is keep to roll back intrusive powers of the State and re-balance enforcement with protecting an individual's rights and freedoms.

Powers of Entry Provisions

What is a power of entry?

A power of entry is a right for a person (usually a State Official of a specified description, for example, police officers, local authority trading standards officers, or, the enforcement staff of a regulatory body) to enter into a private dwelling, business premises, land or vehicles (or a combination of these) for defined purposes (for example, to search for and seize evidence as part of an investigation, inspect animals for signs of disease or to inspect premises to ascertain whether regulatory requirements have been complied with).

Why doesn't the Protection of Freedoms Act simply sweep away all powers of entry and replace them with a single overarching power?

Powers of entry and associated powers fulfil many different purposes and functions, ranging from investigative powers (criminal and non criminal) to more routine powers of inspection and it would not be practicable to simply replace them all with a single power that satisfied all purposes and circumstances. A single overarching power of entry would not allow account to be taken of any specific investigative requirements associated with a particular power of entry and importantly would disapply the proportionality test which individual specific powers must pass.

Also, the Government does not intend to remove all powers of entry as it is clear that some powers are justified and needed, but there should be a compelling case, and clear safeguards, before a state official has the right to demand entry into a person's home or business premises. 1,300 or so powers of entry have been created over time and that is why the Government is taking action now under new measures in the Protection of Freedoms Act to ensure that the privacy of individuals is strengthened, to reduce overall numbers and to ensure that remaining powers of entry contain appropriate safeguards.

Equally, it would be impossible to prescribe a set of specific safeguards that should apply to all powers of entry in every single case for the same reasons, as operational imperatives can vary so widely, but it is necessary to have in place some common safeguards in most cases.

Single overarching powers do however have their place under the new provisions in the Act and while we cannot look to merge all existing powers into a single power, Departments must nevertheless consider rationalising their powers to create single over-arching powers for similar regimes where that is appropriate. Consolidation will ensure that safeguards on the use of powers are maintained, and indeed the new provisions demand that collectively they are heightened, whilst also simplifying and rationalising the powers of entry regime.

Lack of Transparency

There is a lack of transparency and accountability around the range of bodies, outside traditional law enforcement (such as police or immigration officers) able to use powers and how often they are used. The growing number of 'State' officials able to exercise powers and the level of intrusion this represents is concerning as is the lack of accurate data about how often powers are used. Powers that allow entry into homes are particularly sensitive and should be avoided unless there are compelling reasons to justify the intrusion. The Lord Chief Justice recorded his concern, also reflecting the views of other members of the Judiciary about the extent of the powers granted to local authority officials to enter peoples homes without a warrant. Other influential bodies have voiced their similar concerns.

Given the volume of powers and variation across them, the status quo is neither transparent or easily understandable for citizens. This is particularly pertinent in terms of the number of powers that relate to entry to people's homes. That is why this Government supports a full and comprehensive review of all powers of entry, examining them in isolation, as well as in groups of similar powers to understand what they provide for and whether they are needed. Those that are no longer justified or simply duplicate others must be highlighted during the review and a deadline set for their removal from statute. Groups of similar powers should be replaced with singular new powers that contain higher levels of protection than was the case before. The new order making powers in the Act under Section 41 enables this to happen.

How do Ministers intend to tackle this problem?

Chapter 1 of Part 3 of the Act makes provision in respect of powers to enter land or other premises. The provisions enable a Minister of the Crown (or the Welsh Ministers), by Order, to repeal un-necessary powers of entry, to add safeguards in respect of the exercise of such powers, or to replace powers that are similar with new powers subject to additional safeguards (by re-writing powers of entry and associated powers or any aspects of the powers including related enactments in primary legislation). Each responsible Minister is placed under a duty to review existing powers of entry with a view to considering whether to exercise any of the order-making powers. Provision is also made for the introduction of a new Code of Practice to improve transparency and govern the exercise of powers of entry and associated powers not already bound by other codes (including Police and Criminal Evidence Act 1984 – PACE) before, during and after their use.

What action are Departments required to take during the Review?

Scope

It is important to understand what powers exist and how they are exercised and the starting point of the review process is the verification and collation of all known powers of entry, making them transparent to the relevant authorities and public affected by them. A preliminary review that began in 2008 found that there were over 1200 separate powers of entry. The Coalition Government has said this proliferation of powers is too high and must not be tolerated, and is committed to significantly reducing this total by repealing as many powers of entry (that are no longer needed) as possible.

The Home Office recently commissioned all Government Departments to update their powers of entry lists and the feedback provided highlighted that there are more than 1300 powers of entry. The compiled total list of powers of entry has been published on the Home Office website and is available to authorities and all members of the public (see link below):

http://www.homeoffice.gov.uk/publications/about-us/legislation/powers-entry/

Review

The Protection of Freedoms Act requires Ministers of the Crown to conduct a review of relevant powers of entry and associated powers for which they are responsible (relevant powers are those made under a Public General Act or Statutory Instrument made under such an Act) and present their findings in a report to Parliament within 2 years of Royal Assent of the Act (report due Mid 2014). **Progress reports must be sent to Parliament every six months while the review is underway.**

The review of powers of entry and associated powers will reveal who has the right to exercise powers, how those are used and what safeguards are attached to them. The reports must contain analysis relating to every individual power and explain the decisions relating to those powers including why they are being repealed or indeed retained by Government. Parliament will have opportunity to debate and question the findings. The **checklist at Annex A** sets out the framework that Departments must work within and the consideration and questioning that must apply in **every** case. In particular attention is drawn to requirements around private dwellings, consent and use of warrants.

The review should have regard to other related provisions contained in the Protection of Freedoms Act. Those include repealing powers of entry or powers associated with them (Section 39), adding further safeguards to ensure that remaining powers provide adequate protection for individuals and businesses (Section 40) and re-writing powers to group and consolidate similar powers together (Section 41). There are many powers of entry that predominantly relate to similar regimes, inspection and search requirements sharing many common features. Those might for instance relate to types of animal disease or powers to regulate similar sectors perhaps sharing common attributes, for instance trading, construction and maintenance, farming, produce etc.

During the review powers of entry should not simply be reviewed on an individual basis, rather groups of similar powers should be reviewed together to determine whether combining powers would improve transparency, synergy, provide more consistent safeguards and ultimately reduce numbers of powers of entry in statute, making powers of

entry easier to identify and understand. Similarly, this principle should apply to both domestic law as well as powers stemming from European Directive and laws. In the case of European law where powers are introduced under agreement, work is required during the preliminary stages of policy agreement to horizon scan and raise awareness of similar work that might be underway, joining up similar proposals wherever possible. It is also vital to consider whether powers of entry are needed at all or whether other less intrusive methods of enforcement might suffice. It is worth pointing out that while some form of regime enforcement is often necessary (particularly under EU law) the manner in which the regulations are enforced is often left to the discretion of lawmakers and need not necessarily mean creating new powers of entry.

The following table illustrates the process that will apply:

1. Identify all powers of entry
2.Identify relevant Reviewers / Owners - Teams
3. Ensure that lawyers are made aware of the review and resource required to undertake the work before any work starts
4. Establish timeframe for reviews, develop review plans and assign work (note any relevant consultation periods with partners / stakeholders and build those into review plans)
5. Consider wider Departmental landscape and other similar initiatives that may be underway (such as post legislative reviews, red tape challenges / reducing regulation exercises) and determine whether there is scope for targeted joined up approach
6. Similarly note whether Impact Assessments are needed and add those to review planning timetables
7. The Home Office will require **formal 'quarterly' updates and 6 monthly progress reports must be sent to Parliament**. Local work should be assigned and managed having regard to this requirement as well as the need for consultation etc
8. Home Office will sample and test emerging findings against review principles
9. Annual Report required for Home Office detailing progress / findings over first (and subsequent) 12 months of review
10. Compile Reports for Parliament – setting out what action is, or will be taken in respect of each power of entry

The Home Office will lead and co-ordinate the review and alongside the cross Government powers of entry steering group will consider findings as those emerge and help to ensure that reviews of all powers are transparent and conducted to a consistent standard. The Home Office will scrutinise outcomes and challenge any findings that are not consistent with review principles.

The review does not extend to powers within the legislative competence of devolved administrations (Wales, Scotland or Northern Ireland). However, the order making powers to repeal, add safeguards or re-write powers of entry or associated powers also extends to Welsh Ministers. Departments are required to consult with appropriate stakeholders to gauge any impact of making changes or abolishing the power. This might also include checking first with policy counterparts in the devolved administrations before seeing through certain actions as there may be some effect or interest.

Powers of entry and any associated enforcement powers should be proportionate to the nature of the breach or issue of public protection. Relevant Policy Leads within each Department are responsible for ensuring that existing powers of entry and associated powers are properly examined and reviewed in line with Government Civil Liberties principles and tests. Individuals and or Teams should work closely with lawyers in this regard and the resource implications and time required to properly conduct the reviews must be borne in mind and factored in to timetables. Powers should be considered in terms of their necessity, proportionality and whether or not they contain adequate safeguards. To this end the Home Office (which has lead responsibility for powers of entry) recently set out new principles in Home Office Gateway Guidance for the creation of new, re-enacted or amended powers of entry which equally apply to the statutory review.

While each power of entry will have been subject to individual parliamentary scrutiny and considered within the context of the wider primary or secondary legislation in the past, it is nevertheless right to periodically review regulation and powers of entry to determine whether there has been a change to the state of affairs or circumstances that led to their creation in the first place and therefore whether they remain justified. There are also likely to be political, social and economic changes that might require a fresh approach or the need to do things differently. During the review process powers of entry that are presented with inadequate safeguards or are not considered to have met the standards expected in terms of proper enforcement and protecting an individuals rights and freedoms, will be challenged and the findings may be reviewed by Parliamentary Committee.

Affordability / Allocating Resources / Timeline for Delivery

Reviews should formally begin as soon as possible and the Coalition Government has said Government Departments should prioritise the work now and formally commence their reviews as soon as the Protection of Freedoms Bill receives Royal Assent.

We do not envisage that the examination of existing powers of entry is likely to generate significant costs for Departments, although sufficient resources will need to be allocated to the work (policy officials and legal assistance) to ensure that it is completed on time and to the standard demanded. There may also be occasion to consult with partners across other Government Departments with an interest (although not necessarily the lead), in the use of certain powers, before any decisions concerning the power are made. Similarly, Departments are asked to consult with any relevant persons authorised to use the powers, again before determining whether amendments to the power, or its repeal, is necessary and build those into timelines for delivery. The Act sets out that reviews must be completed

within 2 years of Royal Assent and outcomes must be reported to Parliament, however, given the importance that is attached to this complex area of work, as well as the need to consult others before making decisions the Government is keen that work should begin as early as possible. Parliament also requires six monthly updates on progress.

It is possible however that the addition of some further safeguards, such as the addition of a Magistrates warrant could generate some administrative costs but given that in many cases a warrant is likely to support the general power and be obtained only as a last resort, for instance following lack of co-operation or suspicion of an offence, the attributable costs are likely to be relatively low

Consultation

Departments are required to consult with partners or other bodies authorised to use powers of entry and any other relevant parties as determined by the responsible Secretary of State before taking decisions to repeal, add safeguards to or re-write powers of entry. This means for instance that responsible policy leads must consult with authorised persons that are able to use powers contained in legislation. In some cases, powers are exercised by the police or other law enforcement agencies as well as inspectors, local authority officials etc that are authorised to use particular powers. It is essential that the views of all those able to exercise the powers are taken into account. This might mean consulting relevant police leads within ACPO or local authorities before setting out any proposals for change. The timeframe for consultation should be built into the review planning process and review work.

Impact Assessments

It is necessary to undertake an impact assessment (IA) of any proposals to modify or repeal powers of entry and associated powers where those would impose or reduce costs on the private and third sectors, and public sectors where those costs exceed £5million. An impact assessment is an integral part of consultation and the policy-making process. It is a critical quantified analysis of a policy's costs, benefits and risks and should also include qualitative information. It also enables officials to analyse the potential impact of the policy proposal more effectively and helps to outline options for implementation.

An IA needs to be completed for **all** forms of intervention where the effect will be to increase or decrease costs, including:

- primary or secondary legislation;
- green papers and White papers;
- most consultation, strategy documents or action plans;
- codes of practice or guidance;
- voluntary codes;
- proposals which encourage self-regulation or opt-in regulation;
- EU proposals that would have force in the UK or require implementation in the UK (see below for further information).

An IA should also explain what the burden on the front line (for example the police and immigration etc) might be from the planned policy. Further guidance on developing Impact Assessments produced by the Better Regulation Executive can be found at:

http://www.berr.gov.uk/bre/policy/scrutinising-new-regulations/preparing-impact-assessments/page44077.html

Post Legislative Review

Acts of Parliament have always been liable to some form of post-legislative review, however since March 2008 an additional process has been in place. Three to five years after Royal Assent, the responsible Department must submit a memorandum to the relevant Commons Departmental Select Committee (unless there is prior agreement that a memorandum is not required) published as a Command Paper. The memorandum includes a preliminary assessment of how the Act has worked in practice, relative to its objectives. The Select Committee or another Committee will then decide whether a fuller post legislative inquiry is needed into the Act. When preparing new legislation, departments should take into account the commitment that, taken together, the Impact Assessment, Explanatory Notes and other statements made during the passage of a Bill should give sufficient indication of the Bill's objectives to allow any post-legislative reviewing body to make an effective assessment as to how an Act is working out in practice.

The process applies to all Acts receiving Royal Assent in or after 2005. The first of these Acts (enacted since 2005) will recently have been subject to this process or be getting ready to prepare the necessary memorandum for Committee.

It is important to consider whether Acts containing powers of entry falls into this category and where that is the case to plan the statutory review of powers and associated powers carefully to avoid duplicating work by repeating any required analysis, or consultation with partners etc. In this regard it would be sensible to look at whether any Acts or related secondary legislation that contain power of entry are subject to post-legislative scrutiny during the two year period following Royal Assent of the Protection of Freedoms Bill as inevitably this will have some effect on the powers of entry review. Relevant policy leads / teams should consult with their lawyers about whether post legislative review is needed and what if any impact this might have on the review of powers of entry.

Necessity

Departments should consider the purpose of the power, do the original circumstances, state of affairs, or enforcement requirement still exist to justify the power? It is important to determine;

- whether or not the power of entry is essential for effective enforcement;
- other similar powers might be used or can be modified for use;
- different measures are available that are better suited to achieving the same outcome;
- whether there are sufficient common elements between the power and others in existing law (such as its intent and purpose, the type of regime etc), to consider their possible consolidation.

Grouping similar powers together under a single overarching power rather than retaining each one independently would help to reduce their overall number, and improve their transparency, making their purpose clearer to those that exercise the power as well as those affected by them. Consolidation would also help to ensure that overall standards and the safeguards that apply are consistent. This is where the rewrite power under Section 41 can be used.

Similarly, in some cases there may be scope to make some changes to primary legislation (for instance by adding new safeguards or exclusions) using the order making powers in the Act. Such changes could for instance mean that some similar powers are no longer necessary and can be repealed or when used alongside other provisions in the Act, might help bring similar powers together under statutory instrument. These types of changes will be subject to the affirmative resolution procedure and would limit the creation of new powers of entry and help reduce existing numbers.

Officials should use this guidance (and have regard for the checklist at Annex A), and other relevant materials (such as the Protection of Freedoms Act and accompanying explanatory notes) during the Review of Powers of Entry to help determine the necessity of each power and also whether it is a proportionate response to the activity or state of affairs that requires monitoring or enforcement and whether the power contains sufficient safeguards or further ones should be added.

Proportionality

The use of the power must be proportionate in the circumstances while also sufficiently robust to deal with the most serious cases. The Government is committed to protecting the rights of individuals and businesses but equally recognises the need to preserve responsible levels of enforcement that are justified and proportionate and which protect the interests of the public more widely from risk of harm. It is not always easy to achieve this balance nevertheless such considerations must be made before determining what changes to a particular power may be necessary.

The principle two types of power of entry are reasonable suspicion (of a contravention of law, breach of regulation or a particular state of affairs such as an outbreak of disease) or, routine inspection (of a trade or business).

Where possible, the reasonable suspicion test should be combined with a Magistrate's warrant or other similar judicial approval or Court Order so that it is an independent authority that decides whether there are reasonable grounds to justify entry.

Routine powers of inspection, required under EU or UK law, are often needed to monitor a trade or business for compliance. In many cases, a warrant need not apply to such matters in the first instance where a general power can be used (unless for example a power is needed to enter a private dwelling), as routine inspection is often frequent and expected and the use of a warrant might be adjudged to be heavy-handed, disproportionate and potentially costly response to the investigation of routine issues.

Legislation should where appropriate however, prescribe the use of a warrant as the foremost power where for instance entry is required to private dwellings or where the particular circumstances befit taking such action. A warrant or similar judicially sanctioned power should act as a backstop power in other cases where entry is refused, likely to be refused, where the owner of occupier of a property cannot be found or where force is required. In many cases, legislation should be constructed in a way that makes clear a warrant or similar judicial power is an additional limb of enforcement and not necessarily a separate power. Policy leads are expected to consider the best possible construct of the power during the review and where necessary use the order making powers available under the Act to make the necessary changes to help clarify matters.

The power to 'search' and 'seize' is burdensome to the owner or occupier of premises and the powers should not necessarily accompany powers of inspection, unless there is a suspicion of a contravention or breach of some description (and preferably such powers should be accompanied by a Justice's warrant as well). Part II of the Police and Criminal Evidence Act 1984 ('PACE') places restrictions and conditions on police powers to search and seize and individuals and businesses should similarly be safeguarded as regards powers of search and seizure exercised by other types of officials.

Adding Safeguards to Powers of Entry and associated powers

The Government has instituted that all necessary powers of entry and associated powers should have as many relevant safeguards attached to them as possible in order to protect individuals and businesses from intrusion. Departments should seek to protect civil liberties by providing an appropriate level of protection for the individual that recognises the right to private and family life as well as the rights of business owners. However, the application of safeguards must be commensurate to operational imperatives, including preserving the requirement for proper enforcement and protecting the wider public interest.

The second order making power in the Protection of Freedoms Act, contained under Section 40 enables Ministers to add safeguards to powers of entry and those may, in particular, include:

- restrictions as to types of premises that can be entered;
- the time when entry may take place;
- the number or description of persons who may enter premises;
- the need for a warrant;
- the need to provide reasonable notice; and
- restrictions on use of force.

Powers of entry are numerous and varied that is why the legislation does not provide an exhaustive list but just some of the safeguards that may be added, however we recognise that there are others too and some of those are described below.

Types of premises that can be entered – where possible, the power should be confined to a particular type of premises eg a specific form of business. The Government is committed to ensuring that private and family life is respected at all times, including, in relation to the exercise of powers of entry, ensuring that premises consisting **'wholly' or 'mainly' of**

private premises are excluded from intrusion in as many cases as possible. Entry **must** be by consent, or by warrant, court order or other type of judicial authorisation which would allow entry to such places where there is good reason to suspect that there may be evidence of wrongdoing or non-compliance on the premises that requires further investigation.

However, there will be exceptional circumstances or state of affairs where entry is needed urgently. There may be an immediate need to protect life or property from harm, to carry out some police business or where entry is required in the national interest (examples include preventing terrorism, spread of disease, fire or dangerous chemical spillages or leaks). Article 8(2) of the European Convention of Human Rights (ECHR) lays down that interference to the right to respect private, family life and the home is permitted only "if such interference is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". ECHR Caselaw has established that in relation to private dwellings, save in urgent circumstances, prior judicial approval, such as a warrant is required.

Reasonable time – In general there should be a requirement that entry may be sought only at a reasonable time. An added safeguard would be to specify between exact times that powers may be used.

Numbers of Officials – Regulations should limit where possible the number of officials able to exercise the power per visit or accompanying the authorised person per visit.

Types of Officials – Powers should be limited to no more than one type of official under a particular regime

Judicial Authorisation – In almost all cases it is possible to attach a warrant condition, either replacing the principle power to enter or acting as a backstop power where enforcement has or is likely to be thwarted. The safeguard is provided through the Courts who decide whether or not the enforcement action is justified based on the information or evidence presented to them.

Reasonable Notice – Reasonable notice must be provided to the owner or occupier of premises in all instances other than in circumstances where doing so would defeat the object of inspection / visit, where providing notice would contradict European Law or in an emergency where there is serious risk of harm to public or animal health.

Use of force – Usually only prescribed under warrant. In the vast majority of cases we would not expect general powers to permit the use of force and this provision should be removed from general powers in legislation wherever possible. Any justification for retaining use of force must be made explicit.

Identification – Officials should carry and be prepared to show official documentation to identify themselves before entering.

Written authority – In addition to identifying themselves officials must be able to furnish the owner or occupier of premises with a document setting out what is allowed in plain English when a power is being exercised as well as explaining clearly what authority they possess or represent.

Seizure of property – There ought to be compelling reasons to include a power to seize items but where that is the case the power should clearly set out what can be seized (limited to items that appear relevant to the exercise of the power), how long those items can be held or whether they are held as evidence pending court proceedings, what redress is available to the rightful owner and a receipt should be provided of what has been taken

Non disclosure of information / legal privilege – The power may need to restrict disclosure of information obtained in the course of inspections (when obtaining, copying records or documents, seizing items etc) from third parties or for reasons of legal privilege (protecting all communications between a professional legal advisor and his or her clients from being disclosed without the permission of the client unless there is intent to further a criminal purpose).

Associated powers – Legislation must clearly set out what powers exist in addition to the power to enter (such as the power to search, seize, collect samples, copy or obtain documents and records etc) and again must attach any relevant safeguards.

Compensation – Legislation should specify where liability exists and where compensation is payable for damages to property, possessions or land.

Complaints procedure – there ought to be a clear procedure for individuals or businesses affected by the exercise of powers of entry to formally lodge complaints where they feel aggrieved.

State of premises – officials are required to leave premises and equipment as near as possible to the condition found, especially where force is used.

Associated Powers

Powers of entry often also have associated powers attached to them to allow officials to conduct actions whilst on premises in relation to the premises or any persons found on the premises. Typically associated powers include powers to inspect, search, seize, survey and retain. However there are many variants in other powers of entry and associated powers.

Section 46 of the Protection of Freedoms Act defines an ‘associated power’ as meaning any power which –

(a) is contained in an enactment,

(b) is connected with a power of entry, and

(c) is a power-

(i) to do anything on, or in relation to, the land or other premises entered in pursuance of the power of entry,

(ii) to do anything in relation to any person, or anything, found on the land or other premises entered in pursuance of the power of entry, or

(iii) otherwise to do anything in connection with the power of entry, and includes any safeguard which forms part of the associated power

What should you do following the examination of a power of entry?

Once you have reviewed a power of entry against the review guidance and Government criteria you will need to consider what action must be taken. The examination of the power will have revealed to you;

- whether the power is no longer needed and can be repealed

- whether the power should be retained, and if so, whether it contains appropriate safeguards in line with those set out under this guidance (and within the Protection of Freedoms Act), or, whether further safeguards must be added to ensure that the power complies with Government policy.

- whether the power can be merged with other similar powers to create a singular power of entry with common safeguards (over and above those currently in force)

- whether or not any associated powers can be removed

- whether any offences are made redundant as a result of proposed changes

Schedule

The two year review period does not require you to make any changes once those have been identified during the review period itself but it does require that you carefully consider how those changes will be made and by when. You will need to identify which legislative tools or vehicles will be used to make the changes and you will need to identify a timetable for the work to be carried out. The mechanisms contained in the Protection of Freedoms Act will allow you to deal with most of your requirements, including repealing, rewriting powers (under primary and secondary legislation) and adding further safeguards.

Home Office Gateway and Review Process

The Home Office Gateway has been established to deal with applications seeking to create, amend or re-enact powers of entry. Any changes that are proposed as a consequence of the powers of entry review ***where powers are being retained*** will require submission through the Gateway process and the approval of Home Office Ministers. However, unlike now, where applications are considered on an individual basis you may wish to submit bulk applications by 'subject area' or 'theme' from within your organisation.

Plans to repeal powers of entry need not be submitted formally through the Gateway process but you should notify the Home Office about any proposals to remove powers during the review.

Please note: Where ***less than five applications*** are being made at any one time you should continue to complete the Gateway application process and HO template as now.

However, where you intend to submit ***more than five applications*** at a time by bulk request, it will not be necessary to complete the formal HO template but you may instead simply send background information that you have collated during the review process with a

covering explanation setting out what changes are being made either across the board, or to the individual powers.

Annex A

Powers of Entry – Review Checklist

Necessity
• Is the power still necessary; do the original circumstances / state of affairs still exist that justified the power in the first place; • why is it being retained or repealed? (this might mean for example identifying similar individual or groups of powers, or, related or similar legislation to determine whether other powers might be used or provide for the same purpose) • Does the power overlap/duplicate other existing powers, if so, can it be repealed? • Could an existing power be amended to satisfy the requirement including those within primary legislation which enable the power being scrutinised to be repealed? • What would be the consequences/impact of repealing this power? • What if any other enforcement methods have you considered as a suitable alternative to the power of entry? Would these work instead, if not, why not?
Consolidation
• Consider similar groups of powers together – is there scope to consolidate them, could multiple similar powers be revoked and replaced with a single power? What safeguards are needed in that single power (they must be greater than the sum of those that are being replaced)
Consultation
• Have you consulted the views of the relevant authorities that exercise the powers, if so what are they, if not why? Have you sought advice or views from any partners linked to the legislation. What do they say?
Proportionality
• How is the power used and who is affected by it? • Is it or does it remain a proportionate response to the matters it seeks to address, if so, how? • Are the powers associated with the power to enter absolutely necessary? Are those proportionate?, can they be modified by adding further safeguards or qualifications

around their use?, could some of them be repealed where the power to enter remains? This could for instance mean removing powers to seize goods, documents, records etc where those are not needed or limiting seizure powers to a 'warrant'

- Are there other more effective ways of monitoring or regulating the industry, state of affairs that exist etc?
- It may be appropriate that in some cases certain exclusions apply unless the occupier of premises has consented to entry, inspection etc..
- How often has the power been exercised – is this information available? The Government suggests that this information should be held in future
- You will need to consult with stakeholders / partners before enacting changes to a power or when seeking its repeal (sufficient time should be prepared for consultation)

Safeguards

Does the power contain adequate safeguards, including;

- Does it exclude private dwellings, wholly or mainly? (The Government wants to ensure that all powers exclude private dwellings and has said that entry **must** be by consent or warrant or other similar judicial approval unless exceptional circumstances apply. Under the review it is important that you apply this particular safeguard wherever possible as review findings will be vociferously challenged in this particular regard)
- Does the power make provision for the use of a warrant? (all powers should provide for the use of warrants, in some cases as the foremost power i.e replacing general powers to enter and in other cases as the backstop power for use where enforcement has been or it is suspected maybe thwarted)
- Powers should provide sufficient reasonable notice and clearly set out what if any exemptions apply, for instance EU rules regarding unannounced checks, where giving notice would defeat the object of exercising the power, or in an emergency)
- Internal 'written' authorisation to exercise the power – this should be provided by a suitably senior authorised person (nominally Grade 7 or above equivalent)
- Exclusion of force unless prescribed under warrant
- Occupant of business or other premises should be shown or given copy of the official's written authorisation to enter the premises
- Officials should carry and be prepared to present means of identifying themselves
- Powers of entry should only be enforced during reasonable hours
- Complaints procedures should be made explicit and available upon request

- The exercise of powers should be recorded
- Premises should be left secure and as close to the condition they were in when entered
- Maximum numbers of officials entering premises at any one time – numbers should be limited wherever possible
- Associated powers should be limited by ensuring that there are appropriate qualifications, ie powers to seize might refer to 'specific' items only or to seizing items of a relevant kind under the relevant regulations
- An inventory of seized items should be given to the occupier or business owner
- Where possible you should set out how long items will be held for before they are returned

Other Considerations:

- Are any offences rendered redundant as a result of the repeal or modification of the power/s? – if so the enabling powers within the Act allow you to also amend related legislation to remove obsolete offences

Annex B

Part 3 Protection of property from disproportionate enforcement action

CHAPTER 1 Powers of entry

Repealing, adding safeguards or rewriting powers of entry

39 Repealing etc. unnecessary or inappropriate powers of entry

(1) The appropriate national authority may by order repeal any power of entry or associated power which the appropriate national authority considers to be unnecessary or inappropriate.

(2) Schedule 2 (which contains repeals etc. of certain powers of entry) has effect.

40 Adding safeguards to powers of entry

(1) The appropriate national authority may by order provide for safeguards in relation to any power of entry or associated power.

(2) Such safeguards may, in particular, include—

(a) restrictions as to the premises over which the power may be exercised,

(b) restrictions as to the times at which the power may be exercised,

(c) restrictions as to the number or description of persons who may exercise the power,

(d) a requirement for a judicial or other authorisation before the power may be exercised,

(e) a requirement to give notice within a particular period before the power may be exercised,

(f) other conditions which must be met before the power may be exercised,

(g) modifications of existing conditions which must be met before the power may be exercised,

(h) other restrictions on the circumstances in which the power may be exercised,

(i) new obligations on the person exercising the power which must be met before, during or after its exercise,

(j) modifications of existing obligations which must be met by the person exercising the power before, during or after its exercise,

(k) restrictions on any power to use force, or any other power, which may be exercised in connection with the power of entry or associated power.

41 Rewriting powers of entry

(1) The appropriate national authority may by order rewrite, with or without modifications—

(a) powers of entry, associated powers or any aspects of any such powers, or

(b) enactments relating to, or connected with, any such powers or aspects.

(2) The power under subsection (1) to rewrite a power of entry or associated power includes, in particular, the power to remove an aspect of such a power without replacing it.

(3) But no order under this section may alter the effect of—

(a) a power of entry,

(b) any associated power connected with it, or

(c) any safeguard relating to, but not forming part of, the power of entry or associated power,

unless, on and after the changes made by the order, the safeguards in relation to the power of entry and associated powers connected with it, taken together, provide a greater level of protection than any safeguards applicable immediately before the changes.

42 Duty to review certain existing powers of entry

(1) Each Minister of the Crown who is a member of the Cabinet must, within the relevant period—

(a) review relevant powers of entry, and relevant associated powers, for which the Minister is responsible with a view to deciding whether to make an order under section 39(1), 40 or 41 in relation to any of them,

(b) prepare a report of that review, and

(c) lay a copy of the report before Parliament.

(2) A failure by a Minister of the Crown to comply with a duty under subsection (1) in relation to a power of entry or associated power does not affect the validity of the power.

(3) In this section—

"relevant associated power" means any associated power in a public general Act or a statutory instrument made under such an Act,

"the relevant period" means the period of two years beginning with the day on which this Act is passed,

"relevant power of entry" means any power of entry in a public general Act or a statutory instrument made under such an Act.

43 Consultation requirements before modifying powers of entry

Before making an order under section 39(1), 40 or 41 in relation to a power of entry or associated power, the appropriate national authority must consult—

(a) such persons appearing to the appropriate national authority to be representative of the views of persons entitled to exercise the power of entry or associated power as the appropriate national authority considers appropriate, and

(b) such other persons as the appropriate national authority considers appropriate.

44 Procedural and supplementary provisions

(1) An order under section 39(1), 40 or 41—

(a) is to be made by statutory instrument,

(b) may modify any enactment,

(c) may include such incidental, consequential, supplementary, transitory, transitional or saving provision as the appropriate national authority considers appropriate (including provision modifying any enactment).

(2) Subject to subsection (4), no instrument containing an order of a Minister of the Crown under section 39(1), 40 or 41 is to be made unless a draft of it has been laid before, and approved by a resolution of, each House of Parliament.

(3) If a draft of an instrument containing an order of a Minister of the Crown under section 39(1), 40 or 41 would, apart from this subsection, be treated as a hybrid instrument for the purposes of the standing orders of either House of Parliament, it is to proceed in that House as if it were not a hybrid instrument.

(4) An instrument containing an order of a Minister of the Crown under section 39(1), 40 or 41 which neither amends nor repeals any provision of primary legislation is subject to annulment in pursuance of a resolution of either House of Parliament.

(5) In subsection (4) "primary legislation" means—

(a) a public general Act,

(b) an Act of the Scottish Parliament,

(c) a Measure or Act of the National Assembly for Wales, and

(d) Northern Ireland legislation.

(6) Subject to subsection (7), no instrument containing an order of the Welsh Ministers under section 39(1), 40 or 41 is to be made unless a draft of it has been laid before, and approved by a resolution of, the National Assembly for Wales.

(7) An instrument containing an order of the Welsh Ministers under section 39(1), 40 or 41 is subject to annulment in pursuance of a resolution of the National Assembly for Wales if it neither amends nor repeals any of the following—

(a) any provision of a public general Act,

(b) any provision of a Measure or Act of the National Assembly for Wales.

45 Devolution: Scotland and Northern Ireland

(1) An order under section 39(1), 40 or 41 may not make provision which would be within the legislative competence of the Scottish Parliament if it were contained in an Act of the Scottish Parliament.

(2) An order under section 39(1), 40 or 41 may not make provision which, if it were contained in an Act of the Northern Ireland Assembly, would be within the legislative competence of the Northern Ireland Assembly and would deal with a transferred matter.

(3) In subsection (2) “transferred matter” has the meaning given by section 4(1) of the Northern Ireland Act 1998.

46 Sections 39 to 46: interpretation

In sections 39 to 45 and this section—

“appropriate national authority” means—

(a) in relation to the making of any provision which would be within the legislative competence of the National Assembly for Wales, the Welsh Ministers,

(b) in any other case, a Minister of the Crown,

“associated power” means any power which—

(a) is contained in an enactment,

(b) is connected with a power of entry, and

(c) is a power—

(i) to do anything on, or in relation to, the land or other premises entered in pursuance of the power of entry,

(ii) to do anything in relation to any person, or anything, found on the land or other premises entered in pursuance of the power of entry, or

(iii) otherwise to do anything in connection with the power of entry,

and includes any safeguard which forms part of the associated power;

“enactment” includes—

(a)an enactment comprised in subordinate legislation (within the meaning of the Interpretation Act 1978),

(b)an enactment comprised in, or in an instrument made under—

(i)an Act of the Scottish Parliament,

(ii)

Northern Ireland legislation, or

(iii) a Measure or Act of the National Assembly for Wales,

“Minister of the Crown” has the same meaning as in the Ministers of the Crown Act 1975,

“modify” includes amend or repeal (and “modifications” is to be read accordingly),

“off-shore installation” has the same meaning as in the Mineral Workings (Offshore Installations) Act 1971 (see section 12 of that Act),

“power of entry” means a power (however expressed) in any enactment to enter land or other premises; and includes any safeguard which forms part of the power,

“premises” includes any place and, in particular, includes—

(a) any vehicle, vessel, aircraft or hovercraft,

(b) any off-shore installation,

(c) any renewable energy installation,

(d) any tent or movable structure,

“renewable energy installation” has the same meaning as in Chapter 2 of Part 2 of the Energy Act 2004 (see section 104 of that Act),

“repeal” includes revoke.

Codes of practice in relation to powers of entry

47 Code of practice in relation to non-devolved powers of entry

(1) The Secretary of State must prepare a code of practice containing guidance about the exercise of powers of entry and associated powers.

(2) Such a code may, in particular, include provision about—

(a) considerations before exercising, or when exercising, the powers,

(b) considerations after exercising the powers (such as the retention of records, or the publication of information, about the exercise of the powers).

(3) Such a code—

(a) must not contain provision about devolved powers of entry and devolved associated powers,

(b) need not contain provision about every other type of power of entry or associated power,

(c) may make different provision for different purposes.

(4) In the course of preparing such a code in relation to any powers, the Secretary of State must consult—

(a) the Lord Advocate,

(b) such persons appearing to the Secretary of State to be representative of the views of persons entitled to exercise the powers concerned as the Secretary of State considers appropriate, and

(c) such other persons as the Secretary of State considers appropriate.

(5) In this section "devolved powers of entry and devolved associated powers" means powers of entry and associated powers—

(a) in relation to which the Welsh Ministers may issue a code under Schedule 3,

(b) which, if it were contained in an Act of the Scottish Parliament, would be within the legislative competence of that Parliament, or

(c) which, if it were contained in an Act of the Northern Ireland Assembly, would be within the legislative competence of that Assembly and would deal with a transferred matter (within the meaning given by section 4(1) of the Northern Ireland Act 1998).

48 Issuing of code

(1) The Secretary of State must lay before Parliament—

(a) a code of practice prepared under section 47, and

(b) a draft of an order providing for the code to come into force.

(2) The Secretary of State must make the order and issue the code if the draft of the order is approved by a resolution of each House of Parliament.

(3) The Secretary of State must not make the order or issue the code unless the draft of the order is so approved.

(4) The Secretary of State must prepare another code of practice under section 47 if—

(a) the draft of the order is not so approved, and

(b) the Secretary of State considers that there is no realistic prospect that it will be so approved.

(5) A code comes into force in accordance with an order under this section.

(6) Such an order—

(a) is to be a statutory instrument, and

(b) may contain transitional, transitory or saving provision.

(7) If a draft of an instrument containing an order under this section would, apart from this subsection, be treated as a hybrid instrument for the purposes of the standing orders of either House of Parliament, it is to proceed in that House as if it were not a hybrid instrument.

49 Alteration or replacement of code

(1) The Secretary of State—

(a) must keep the powers of entry code under review, and

(b) may prepare an alteration to the code or a replacement code.

(2) Before preparing an alteration or a replacement code in relation to any powers, the Secretary of State must consult—

(a) the Lord Advocate,

(b) such persons appearing to the Secretary of State to be representative of the views of persons entitled to exercise the powers concerned as the Secretary of State considers appropriate, and

(c) such other persons as the Secretary of State considers appropriate.

(3) The Secretary of State must lay before Parliament an alteration or a replacement code prepared under this section.

(4) If, within the 40-day period, either House of Parliament resolves not to approve the alteration or the replacement code, the Secretary of State must not issue the alteration or code.

(5) If no such resolution is made within that period, the Secretary of State must issue the alteration or replacement code.

(6) The alteration or replacement code—

(a) comes into force when issued, and

(b) may include transitional, transitory or saving provision.

(7) Subsection (4) does not prevent the Secretary of State from laying a new alteration or replacement code before Parliament.

(8) In this section "the 40-day period" means the period of 40 days beginning with the day on which the replacement code is laid before Parliament (or, if it is not laid before each House of Parliament on the same day, the later of the two days on which it is laid).

(9) In calculating the 40-day period, no account is to be taken of any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days.

(10) In this section "the powers of entry code" means the code of practice issued under section 48(2) (as altered or replaced from time to time).

50 Publication of code

(1) The Secretary of State must publish the code issued under section 48(2).

(2) The Secretary of State must publish any replacement code issued under section 49(5).

(3) The Secretary of State must publish—

(a) any alteration issued under section 49(5), or

(b) the code or replacement code as altered by it.

51 Effect of code

(1) A relevant person must have regard to the powers of entry code when exercising any functions to which the code relates.

(2) A failure on the part of any person to act in accordance with any provision of the powers of entry code does not of itself make that person liable to criminal or civil proceedings.

(3) The powers of entry code is admissible in evidence in any such proceedings.

(4) A court or tribunal may, in particular, take into account a failure by a relevant person to have regard to the powers of entry code in determining a question in any such proceedings.

(5) In this section "relevant person" means any person specified or described by the Secretary of State in an order made by statutory instrument.

(6) An order under subsection (5) may, in particular—

(a) restrict the specification or description of a person to that of the person when acting in a specified capacity or exercising specified or described functions,

(b) contain transitional, transitory or saving provision.

(7) So far as an order under subsection (5) contains a restriction of the kind mentioned in subsection (6)(a) in relation to a person, the duty in subsection (1) applies only to the person in that capacity or (as the case may be) only in relation to those functions.

(8) Before making an order under subsection (5) in relation to any person or description of persons, the Secretary of State must consult such persons appearing to the Secretary of State to be representative of the views of the person or persons in relation to whom the order may be made as the Secretary of State considers appropriate.

(9) No instrument containing the first order under subsection (5) is to be made unless a draft of it has been laid before, and approved by a resolution of, each House of Parliament.

(10) Subject to this, an instrument containing an order under subsection (5) is subject to annulment in pursuance of a resolution of either House of Parliament.

(11) If a draft of an instrument containing the first order under subsection (5) would, apart from this subsection, be treated as a hybrid instrument for the purposes of the standing orders of either House of Parliament, it is to proceed in that House as if it were not a hybrid instrument.

52 Sections 47 to 51: interpretation

In sections 47 to 51—

"power of entry" and "associated power" have the meaning given by section 46,

"the powers of entry code" has the meaning given by section 49(10).

53 Corresponding code in relation to Welsh devolved powers of entry

Schedule 3 (which confers a power on the Welsh Ministers to issue a code of practice about Welsh devolved powers of entry and associated powers) has effect.

Annex C

The following provides explanatory notes of the Sections in the Act that are most relevant to the Statutory Review (Annex B contains the powers of entry provisions):

Section 39 – Repealing powers of entry

Section 39 contains the first of the three order-making powers contained in the provisions (the others are adding safeguards and rewriting powers). This provides for the repeal of unnecessary powers of entry contained in either primary or secondary legislation. The power also extends to what are known as 'associated powers' which can for instance include searching or inspecting the premises or seizing items relevant to the exercise of particular regulations.

The order-making power under this section enables an associated power to be repealed independently of a related power of entry. It may be appropriate for instance to remove any disproportionate associated powers while leaving the overarching power of entry alone.

Section 40 – adding safeguards

Section 40 enables safeguards to be added to any existing powers of entry or associated powers through secondary legislation.

The section also sets out some examples of safeguards such as; placing restrictions on the types of premises over which the power may be exercised, such as private dwellings; only exercising the power at a reasonable hour, providing sufficient notice or ensuring that a Magistrate's warrant or other such authorisation is obtained before the power may be exercised.

These safeguards would be in addition to any already in place relating to the power or associated power in question and therefore would increase the existing protections set out in the relevant legislation.

Section 41 – rewriting powers of entry

Ministers can by order re-write powers of entry or associated powers under Section 41.

Large numbers of existing powers of entry relate to very similar functions. For example there are numerous powers to inspect animals for disease where individual regulations and powers essentially contain similar inspection practices and controls. In those and other cases it may well be possible to have one overarching power in relation to animal welfare. Such a process, as well as bringing down overall numbers, will provide greater clarity for those exercising the powers and greater transparency for those affected by them.

The order making power under this Section is necessarily wide containing delegated powers often referred to as 'Henry VIII' powers, but only in so far as it relates to affecting changes to powers or entry or associated powers to afford the greatest possible protection to homeowners and businesses. Indeed, under this Section, the provisions of any order, when taken together, must provide a greater level of protection than was previously the case. This is an important safeguard and will ensure that any powers that are re-written by an order under this Section contain safeguards that are strengthened rather than weakened following any changes. The powers also extend to rewording related 'enactments'.

It is possible to create new powers of entry under this Section but only in so far as those being created replace one or more existing powers that are being re-written. The Section

cannot be used to extend powers to authorities not previously granted those powers within related legislation and it does not permit powers to be re-written to simply strengthen powers of the State.

When considering whether to bring together powers of entry under this rewrite power Departments must closely examine whether the current safeguards are adequate before deciding on other safeguards that should be added. However, additionally, the Section requires that as part of the rewriting process further safeguards must be attached either to the powers of entry, associated powers, or to both. Ultimately, the judgement as to whether an Order made under this Section sufficiently satisfies this test will be a matter for Parliament where the affirmative resolution procedure has been used (if changes relate to primary legislation) and also the responsible Minister. Such orders will also be subject to consideration by the Joint Committee on Statutory Instruments and by the Lords Merits of Statutory Instruments Committee and may be challenged under Judicial Review.

Changes cannot be made by Order under Sections 39 to 41 without Ministers having first consulted those responsible for authorising and exercising powers of entry and associated powers. Sections 39(1), 40 and 41 are also subject to the Affirmative Resolution Procedure where they would make changes to primary legislation (which means the orders must firstly be debated by both Houses of Parliament), otherwise the negative procedure applies (meaning Parliament is notified of the intentions and there is a period to raise objections).

Section 42 – duty to review certain existing powers of entry (those contained in an Act)

Section 42 provides that each Cabinet Minister must review the powers of entry and associated powers for which they are responsible within two years of Royal Assent of the Act, that is by early 2014. Ministers are required, following an assessment of the powers and associated powers that have been identified, to determine whether they continue to be necessary, are proportionate and contain adequate safeguards.

The reviews will also examine whether there is scope to bring together similar powers using the re-write power under Section 41.

The review requires Ministers to report findings to Parliament so gathering this information will lead to greater transparency on the use of these powers for Parliament and the general public.

The Section refers to ‘certain’ powers of entry to indicate that the duty catches powers in Public General Acts or Instruments made under them. It is not intended to apply to powers falling within the legislative competence of devolved administrations.

Each responsible Minister is required to submit a report to Parliament following each review. These are expected to identify all powers of entry and associated powers held by Departments and to identify which of these are suitable for repeal, rewriting or require strengthening with additional safeguards. However a failure by a Minister of the Crown to comply with the duty under subsection (1) in relation to powers of entry or associated powers does not affect its validity. That is to say that where powers are inadvertently omitted during the review or do not come to light until the two year deadline has passed, a failure to review those powers does not affect their validity.

Section 43 – Consultation requirements before modifying powers of entry

Section 43 requires Ministers to consult with representative organisations of persons or bodies authorised to use powers of entry and associated powers or other relevant persons

before exercising any of the order-making powers under Sections 39, 40 or 41, that is, to repeal, add safeguards to or re-write powers of entry.

So, for example, in the case of powers exercised by Trading Standards Officers, the responsible Department would consult the Association of Chief Trading Standards Officers before modifying the relevant powers of entry or associated powers.

The duty to consult ensures that the views of those authorised to use powers are properly taken into account before any decision is taken to repeal or rewrite powers or add further safeguards to them. In all cases Ministers are expected to consider fully the impact upon enforcement of modifying powers alongside whether such powers are justified and proportionate.

Section 44 - Procedural and supplementary provisions

Subsection (1) provides that an order made under Sections 39(1), 40 or 41 is to be made by statutory instrument, such an order may include any appropriate incidental, consequential, supplementary, transitory, transitional or saving provisions. The power to make consequential amendments could, for example, be used to repeal any offence which becomes redundant as a result of the repeal of a related power of entry. An order made by a Minister of the Crown under Sections 39(1), 40 and 41 is subject to the affirmative resolution procedure where it amends or repeals provisions in primary legislation, but is otherwise subject to the negative resolution procedure.