Protection of Freedoms Bill

Delegated Powers - Memorandum by the Home Office

Introduction

1. This Memorandum identifies the provisions of the Protection of Freedoms Bill which confer powers to make delegated legislation, and explains in each case why the power has been taken and the nature of, and reason for, the procedure selected.

2. The Bill is in seven Parts as follows.

3. Part 1 makes provision for the destruction, retention and use of fingerprints, footwear impressions and DNA samples and profiles for purposes of the prevention and detection of crime, counter-terrorism and national security. It also introduces a requirement on schools and colleges to obtain the consent of parents before processing biometric information relating to children.

4. Part 2 provides for a code of practice in relation to CCTV and other surveillance camera systems and for the appointment of a Surveillance Camera Commissioner. This Part further provides for the use of covert investigatory powers by local authorities to be subject to judicial authorisation.

5. Part 3 confers powers to repeal, add safeguards to or rewrite powers of entry into premises and associated powers exercised by State officials; provision is also made for a code of practice in respect of such powers. This Part also makes it an offence to immobilise, move or restrict the movement of vehicles left on land and makes further provision in respect of vehicle keeper liability for unpaid parking charges in certain circumstances.

6. Part 4 replaces or substantially modifies certain terrorism stop and search powers and replaces the existing power to extend by order the maximum period of pre-charge detention for terrorist suspects to 28 days with one that is only exercisable where Parliament has been dissolved.

7. Part 5 makes amendments to the Safeguarding Vulnerable Groups Act 2006 (and the equivalent Northern Ireland legislation) and to Part 5 of the Police Act 1997 which set out the framework under which the Independent Safeguarding Authority ("ISA") and the Criminal Records Bureau ("CRB") respectively operate. This Part also establishes the Disclosure and Barring Service and provides for the transfer of the functions of the ISA and CRB to the new body. Provision is also made to disregard convictions and cautions for decriminalised offences involving consensual gay sex.

8. Part 6 makes amendments to the Freedom of Information Act 2000 ("the FOIA") and the Data Protection Act 1998 to provide for the publication of datasets in a re-useable format, to extend the scope of the FOIA to

companies wholly owned by two or more public authorities and to enhance the independence of the Information Commissioner.

9. Part 7 repeals certain unnecessary enactments, including section 43 of the Criminal Justice Act 2003 which makes provision for certain serious and complex fraud trials to be held without a jury, and contains supplementary provisions about transitional arrangements, commencement, extent, repeals and so forth.

PART 1: REGULATION OF BIOMETRIC DATA

Chapter 1: Destruction, retention and use of fingerprints and samples etc.

Schedule 1, paragraph 4: New section 18E(1) of the Counter-Terrorism Act 2008 – Power to define "responsible officer" in respect of certain law enforcement authorities

Power conferred on: *Secretary of State*

Power exercisable by: *Order made by statutory instrument*

Parliamentary procedure: *Negative resolution*

10. Section 18 of the Counter-Terrorism Act 2008 (which has yet to be brought into force) makes provision for the retention by law enforcement authorities in England and Wales and Northern Ireland of DNA samples and profiles and fingerprints obtained by or supplied to the authority in the way described in subsection (3) of that section (which includes covertly acquired material and material supplied by overseas authorities) and which is not held subject to existing statutory restrictions, such as those set out in the Police and Criminal Evidence Act 1984 ("PACE") or in Schedule 8 to the Terrorism Act 2000. Section 18 sets out the purposes for which this material may be used while it is retained, but permits retention without reference to a retention period.

11. Part 3 of Schedule 1 replaces section 18 of the Counter-Terrorism Act 2008 with new sections 18 to 18E which make new provision for the destruction and retention of DNA samples and profiles and fingerprints ("section 18 material"). A duty is placed on "the responsible officer" of a "law enforcement authority" to destroy section 18 material unless certain conditions are met, as set out in new section 18(3) and (4). A "law enforcement authority" is defined in new section 18E(1) and includes overseas authorities whose functions correspond to those of a police force or otherwise involve the investigation or prosecution of offences. The term "the responsible officer" is also defined in new section 18E(1), which identifies who is to be the "responsible officer" within a police force, the Serious Organised Crime Agency and the Commissioners for Her Majesty's Revenue and Customs. There is no equivalent definition provided for the "responsible officer" of an overseas law enforcement authority. This definition is instead left to be

specified in an order made by the Secretary of State (see paragraph (h)). Given the wide variety of overseas law enforcement authorities potentially engaged by section 18, it is considered that what is essentially a technical definition of "the responsible officer" is an appropriate matter for secondary legislation. By virtue of new section 18E(2) this order-making power is subject to the negative resolution procedure. This is considered to provide an appropriate level of parliamentary scrutiny given the technical nature of the matters to be addressed by such an order.

Schedule 1, paragraph 9(2) and (3): Power to make provision in relation to Northern Ireland about the destruction, retention and use of fingerprints etc. in respect of excepted and reserved matters.

Power conferred on: *Secretary of State*

Power exercisable by: *Order made by statutory instrument*

Parliamentary procedure: *Affirmative resolution for orders amending or repealing provisions in primary legislation; and negative resolution in all other cases*

12. Paragraph 9(2) and (3) of Schedule 1 enables the Secretary of State to make an order which makes provision in relation to Northern Ireland about the destruction, retention and use of fingerprints etc. Such an order can be made if an Act of the Northern Ireland Assembly is made in 2011 or 2012 with the same subject matter as contained (in relation to England and Wales) in clauses 1 to 18 and 23 to 25 of this Bill. Provision made in an order under paragraph 9(2) must relate to excepted or reserved matters (within the meaning of section 4 of the Northern Ireland Act 1998) and deal with the same subject matter as is made in relation to England and Wales in clauses 1 to 18 and 23 to 25 of this Bill. Provision made in an order under paragraph 9(3) may make such provision as the Secretary of State considers appropriate in consequence of the Act of the Northern Ireland Assembly. Such an order may amend, repeal, revoke or modify any provision of any enactment (including this Bill). And it may make incidental, supplementary, transitional, transitory or saving provision.

13. This power is considered necessary since it is expected that the Northern Ireland Assembly will enact legislation in 2011 or 2012 which makes provision for the destruction, retention and use of fingerprints etc for transferred purposes (the Northern Ireland Justice Minister, David Ford, launched a consultation on changes in the law in this area on 15 March 2011 (http://www.dojni.gov.uk/ford_launches_consultation_on_the_retention_of_fingerprints_and_DNA). It is only once this legislation has been enacted by the Northern Ireland Assembly that the Secretary of State can make certain excepted or reserved provision in that regard given that any such provision will need to operate on and in relation to the Police and Criminal Evidence (Northern Ireland) Order 1989 as amended by the forthcoming Northern Ireland Assembly legislation.

14. By virtue of paragraph 9(6) and (7), orders which amend or repeal provisions in primary legislation are subject to the affirmative procedure, whilst any other order is subject to the negative procedure. The Government considers that this split approach will ensure an appropriate level of parliamentary scrutiny, particularly in view of the requirement that any order makes provision analogous to that contained in Chapter 1 of Part 1 of the Bill.

Clause 22(1) and (5): Powers to issue and give effect to guidance about the making or renewing of national security determinations

Powers conferred on: *Secretary of State*

Powers exercisable by: *Guidance and order made by statutory instrument*

Parliamentary procedure: *Affirmative resolution with respect to the order*

15. This clause requires the Secretary of State to give guidance relating to the making or renewing of a determination that fingerprints or DNA profiles may be retained for the purposes of national security. Such a determination may be made by the responsible chief officer of police or, in the case of material subject to section 18 of the Counter Terrorism Act 2008, by the responsible officer. Subsection (1) requires the Secretary of State to give guidance. By virtue of subsection (5) such guidance, or any revisions to it, is brought into force by order. Persons making national security determinations will be required to have regard to the Secretary of State's guidance. Before making the guidance, the Secretary of State must consult the Commissioner for the Retention and Use of Biometric Material, who is responsible for reviewing all national security determinations and reporting to the Secretary of State.

16. The Government considers it appropriate for mandatory guidance to be issued to persons responsible for making national security determinations to ensure that decisions concerning such determinations are taken on a consistent basis. Although the decision will be that of the chief officer or responsible officer, the availability of guidance will ensure a national approach. The decision to use guidance rather than legislation for this purpose reflects the likelihood that decisions about the retention of material for the purposes of national security will be fact-specific, and will more readily be informed by general principles and illustrative examples rather than rigid rules. The Secretary of State will also have the power to make revisions to the guidance, which will allow it more flexibly to respond both to changing circumstances and to the observations of the Commissioner. Given the sensitivity of matters engaging national security it is considered appropriate that an order bringing such guidance into force should be subject to the affirmative procedure so that the guidance may be debated and approved by both Houses.

Clause 24: New section 63AB(2) of the Police and Criminal Evidence Act 1984 - Power to issue guidance about the destruction of DNA samples and DNA profiles retained under Part 5 of PACE

Power conferred on: *National DNA Database Strategy Board*

Power exercisable by: *Guidance*

Parliamentary procedure: *None*

17. This clause inserts new section 63AB into PACE, placing the National DNA Database Strategy Board on a statutory footing. Subsection (2) of that section requires the Board to publish guidance to chief officers on the circumstances in which DNA profiles should be removed immediately from the National DNA Database. Chief officers will be required to act in accordance with the Board's guidance.

18. The Government considers it is appropriate for mandatory guidance to be issued to ensure decisions on immediate destruction are taken on a consistent basis across England and Wales. Under section 63D(2) of PACE (as inserted by clause 1) such decisions will be for each chief officer to take, but the guidance will help to avoid there being a "postcode lottery". The decision to use guidance, rather than legislation, for this purpose reflects the likelihood that decisions about destruction of DNA samples and guidance will be fact-specific, and thus more readily informed by following general principles and illustrative examples, rather than by the application of rigid rules. The use of guidance will also enable the Strategy Board to update its advice to chief officers quickly in the light of experience.

19. As the overarching rules governing the retention and destruction of DNA samples and profiles are set out on the face of the Bill, it is not considered necessary for such guidance to be subject to any parliamentary procedure. The similar power to issue guidance in section 23 of the Crime and Security Act 2010 (to be repealed by the Bill) was likewise not subject to any parliamentary procedure.

Clause 24: New section 63AB(4) of the Police and Criminal Evidence Act 1984 - Power to issue guidance about the circumstances in which applications may be made to the Commissioner for the Retention and Use of Biometric Material under section 63G of PACE

Power conferred on: *National DNA Database Strategy Board*

Power exercisable by: *Guidance*

Parliamentary procedure: *None*

20. Clause 3 inserts new sections 63F and 63G into PACE which make provision for the retention of DNA profiles and fingerprints of persons arrested for or charged with a serious ("qualifying") offence. In the case of a person

arrested for, but not charged with, a qualifying offence new section 63G provides that the responsible chief officer of police may apply to the Commissioner for the Retention and Use of Biometric Material for the biometric material to be retained. Such applications may be made either where the alleged victim of the offence under investigation was under the age of 18, a vulnerable adult or in a close personal relationship with the alleged offender, or where the chief officer considers that the retention of the biometric material is necessary to assist in the prevention or detection of crime. In either case, the decision whether or not the material may be retained, initially for a three year period but extendable to five years with the approval of a magistrates' court, rests with the Commissioner.

21. New section 63AB(4) provides that the National DNA Strategy Board may issue guidance to chief officers about the circumstances in which applications may be made to the Commissioner under new section 63G. Such guidance is considered helpful given the special procedure that applies where a chief officer wishes to retain the DNA profile and fingerprints of a person arrested for, but not charged with, a qualifying offence. In other circumstances where retention of biometric material is permitted (for example, where a person has been convicted of or cautioned for a recordable offence, or where a person has been charged with, but not convicted of, a qualifying offence), the decision to retain such material is a matter for the responsible chief officer. That is not the case where a person has been arrested for, but not charged with, a qualifying offence where the decision to retain material rests with the Commissioner. The Strategy Board guidance, which must be prepared in consultation with the Commissioner, will help ensure consistency across the country as to the approach taken by police forces in determining whether to apply to the Commissioner for material to be retained in the circumstances provided for in new section 63G. The involvement of the Commissioner in setting the guidance will also help to avoid wasted time on the part of both the police and the Commissioner in making and considering applications in inappropriate cases.

22. The section 63AB(4) guidance is not subject to any parliamentary procedure. This is considered appropriate, first in view of the fact that the circumstances in which biometric material may be retained in the case of a person arrested for, but not charged with, a qualifying offence are set out on the face of the Bill and, second, because the guidance will be non-binding (there is no requirement on chief officers to either follow or have regard to the guidance), albeit that the Commissioner can be expected to have regard to it when determining a section 63G application.

Clause 25(1) and (6): Power to make provision for the destruction of material taken before commencement

Power conferred on: *Secretary of State*

Power exercisable by: *Order made by statutory instrument*

Parliamentary procedure: *Negative resolution*

23. This clause requires the Secretary of State to make an order making transitional, transitory or saving provision. It is intended that this will be exercised so as to provide for the destruction of fingerprints, samples and DNA profiles taken prior to the coming into force of relevant provisions of this Bill, if such material would have been destroyed under those provisions had they been in force when the material was taken. Effectively, therefore, it will allow for the retention periods for different categories of data that are set out in the Bill to be applied to material that has already been taken.

24. The Government considers that it is appropriate for the destruction of such material to be set out in secondary legislation because a very large amount of material relating to unconvicted people is currently retained – including some 1 million DNA profiles on the National DNA Database of persons against whom there is no recorded conviction or caution – and sufficient time needs to be allowed for the exercise of identifying and destroying this material in appropriate cases. The order-making power will allow the Secretary of State to set a realistic deadline for that destruction date, without delaying the implementation of the new retention and destruction regime in relation to material taken after the coming into force of these provisions.

25. The Government has considered whether this same objective could be achieved if the Bill provided for suitable transitional provisions to be included in the commencement order which brought the new regime into force. However it has concluded that it is preferable to proceed by way of a separate order, because this topic is sufficiently important to warrant Parliamentary scrutiny in the form of the negative procedure (as opposed to a commencement order, which would normally not be subject to such scrutiny).

26. Subsections (5) and (6) of this clause (which extend the order-making power in section 113(1) of PACE) makes equivalent provision in relation to material obtained by the Service police in each of the Armed Forces.

27. These order-making powers cover similar ground to those in the uncommenced section 22 of the Crime and Security Act 2010 (to be repealed by the Bill).

PART 2: REGULATION OF SURVEILLANCE

Chapter 1: Regulation of CCTV and other surveillance camera technology

Clause 29(1) and 30(1)(b): Code of practice for surveillance camera systems

Power conferred on: *Secretary of State*

Power exercisable by: *Code of practice and order made by statutory instrument*

Parliamentary procedure: *Affirmative resolution with respect to the order*

28. Clause 29 requires the Secretary of State to prepare a code of practice containing guidance about surveillance camera systems. It is envisaged that the code will contain guidance on CCTV systems (and other systems such as automatic number plate recognition). It will cover matters such as: what factors to take into account when deciding whether to install CCTV cameras; standards for equipment; what images to retain and how to store them; and what procedures to put in place for complaints. The code will not be binding but "relevant authorities" (as defined by clause 33(5)) will be required to have regard to the code. Subsection (5) requires the Secretary of State to consult various persons when preparing the code (including those who will subsequently be required to have regard to it).

29. Clause 30 requires the Secretary of State to lay the first draft code of practice before Parliament, together with an affirmative order providing for the code to come into force.

30. The Government considers it appropriate for the guidance on CCTV systems to be set out in a code of practice as it is intended that the code will contain a lot of detailed material, including on technical standards and setting out administrative and procedural best practice, and should be phrased in such a way as to make it easily accessible to users. Furthermore, the code will be subject to change as new types of surveillance technologies emerge. It is however considered appropriate for the first code of practice to be subject to the affirmative procedure to enable a high level of parliamentary scrutiny on the content of the new code.

Clause 31: Alteration or replacement of surveillance camera code

Power conferred on: *Secretary of State*

Power exercisable by: *Code of practice*

Parliamentary procedure: *Either House of Parliament can resolve not to approve the code within the 40-day period*

31. Clause 31 gives the Secretary of State power to prepare an altered or replacement surveillance camera code of practice (after the first code of practice has come into effect). When preparing a revised code, the Secretary of State is again required to consult the persons listed in clause 29(5), including those who will be required to have regard to the revised code. Once prepared, the revised code is to be laid before Parliament for a period of 40 days, during which time either House can pass a resolution refusing to approve the code. If no such resolution is passed, the revised code will come into effect. If a resolution is passed, the revised code will not come into effect and the original code will continue to stand (although the Secretary of State may subsequently choose to introduce another revision of the code, subject to the same procedure).

32. The Government considers it appropriate to have a 40-day laying procedure for revised codes which is separate from the statutory instrument procedure. The structure and content of the first code will already have been the subject of a high level of scrutiny since it will have been introduced following the affirmative procedure. It is envisaged that revisions of the code are likely to be either minor points (such as to reflect changes of name), or the addition of guidance on emerging new camera systems. In these circumstances the equivalent of the negative resolution procedure is considered to provide a sufficient level of scrutiny in respect of any changes to the original code or any replacement code. The Government considered adopting the standard negative procedure, but it was thought that the alternative 40-day laying procedure was preferable as it avoids any confusion about the status of the original code if the order which commences the revised code is annulled after the revised code has come into force. Furthermore, the procedure largely replicates the procedure which already exists for the introduction of and replacement of the data protection code (sections 52B and 52C of the Data Protection Act 1998, as inserted by section 174 of the Coroners and Justice Act 2009).

Clause 33(5)(k): Power to prescribe additional "relevant authorities" required to have regard to surveillance camera code

Power conferred on: *Secretary of State*

Power exercisable by: *Order made by statutory instrument*

Parliamentary procedure: *Affirmative resolution*

33. By virtue of section 33(1), a "relevant authority" will be required to have regard to the surveillance camera code of practice. Section 33(5) sets out who are relevant authorities - which are broadly speaking local authorities, police and crime commissioners, the police and any other person specified or described in an affirmative order made by the Secretary of State. In making such an order, the Secretary of State can restrict the description of a person to that person carrying out certain functions. For example, if a body has public and private functions, it might only be required to have regard to the code when carrying out its public functions. Before making an order, the Secretary of State is required to consult those who are being considered for addition, as well as the persons listed in subsection (8).

34. The Government considers it appropriate for the Secretary of State to have power to add relevant authorities by secondary legislation to allow the flexibility to add further bodies in future as suitable bodies are identified or as circumstances change. At this point in time, local authorities and the police have been identified as authorities which widely use public space CCTV and on whom it would therefore be appropriate, in the first instance, to place a duty to have regard to the code. In future, further types of authority may be identified, or circumstances may change and it may become apparent that it is necessary to extend the good practice guidance more widely to other users of CCTV. The order is subject to the affirmative procedure to ensure that there

is sufficient parliamentary scrutiny over extending the application of the code; this is considered appropriate given that any bodies specified in such an order will be required to have regard to new requirements.

Chapter 2: Safeguards for certain surveillance under RIPA

Clauses 37 and 38: Safeguards for certain surveillance under RIPA
(i) New sections 23A(5)(a)(iii), 23A(5)(b)(iii), 32A(4)(a)(iii), 32A(4)(b)(iii), 32A(6)(a)(iii) and 32A(6)(b)(iii) – Power to prescribe further conditions that must be satisfied for the purpose of judicial approval of local authority authorisation or notice.
(ii) New sections 23A(6) and 32A(7) – Power to prescribe further "relevant persons".
(iii) New sections 23A(5)(c), 32A(4)(c) and 32A(6)(c) – Power to prescribe conditions that must be satisfied for the purpose of judicial approval of authorisation or notice by other relevant person.

Powers conferred on:	*Secretary of State*
Exercisable by:	*Orders made by statutory instrument*
Parliamentary procedure:	*(i) Negative resolution; (ii) Affirmative resolution; (iii) Negative resolution*

35. Clauses 37 and 38 introduce into the Regulation of Investigatory Powers Act 2000 ("RIPA") new sections 23A and 32A. Sections 23A and 32A provide that local authorities may only use certain surveillance techniques open to them under RIPA if the local authority's authorisation of the technique has itself been approved by a relevant judicial authority (a magistrate or, in Scotland, a sheriff). It is provided that: (i) the Secretary of State may by order prescribe additional conditions which the judicial authority must be satisfied were met before approving a local authority authorisation or notice; (ii) the Secretary of State may by order provide that other public authorities or types of authorisations by other public authorities should be subject to the judicial approval process; and (iii) with respect to judicial approval of authorisations by public authorities other than local authorities, the Secretary of State may by order prescribe the conditions which the judicial authority must be satisfied were met.

36. Clause 37, which inserts new section 23A into RIPA, provides the judicial approval mechanism for local authority authorisations and notices for obtaining and disclosing communications data. Clause 38, which inserts new section 32A into RIPA, provides the same mechanism in respect of local authority authorisations of direct surveillance or the use of covert human intelligence sources. New section 23A(2) and 32A(2) provide that the authorisation or notice is not to take effect until the relevant judicial authority has made an order approving the grant or renewal of an authorisation or the giving or renewal of a notice.

37. By new sections 23A(3) and (4) and 32A(3) the relevant judicial authority may approve a local authority authorisation or notice where it is satisfied that obtaining the communications data, or using directed surveillance or a covert human intelligence source, was and remains proportionate and necessary on specified grounds. The judicial authority must also be satisfied that, when the authorisation or renewal was granted, the prescribed relevant conditions were satisfied.

38. The relevant conditions which apply to authorisations and notices granted or given by local authorities are set out in new sections 23A(5) and 32A(4). They are that the individual from the local authority who granted the authorisation, gave the notice or made the renewal was designated to do so, and that the grant, giving or renewal was not in breach of any restrictions or prohibition imposed by sections 25(3), 29(7)(a) or 30(3). Sections 25(3) and 30(3) allow the Secretary of State by order to impose restrictions on the individuals that may grant an authorisation or give a notice and on the circumstances in which or purposes for which the authorisation or notice may be given. Section 29(7)(a) creates a further power for the Secretary of State by order to impose a prohibition on particular uses of covert human intelligence sources or to impose particular requirements in that connection.

(i) New sections 23A(5)(a)(iii), 25A(5)(b)(iii), 32A(4)(a)(iii), 32A(4)(b)(iii), 32A(6)(a)(iii) and 32A(6)(b)(iii) – Power to prescribe further conditions that must be satisfied for the purpose of judicial approval of local authority authorisation or notice.

39. Order-making powers are provided in: new sections 23A(5)(a)(iii) (England and Wales) and 23A(5)(b)(iii) (Scotland and Northern Ireland) in respect of communications data; 32A(4)(a)(iii) (England and Wales) and 32A(4)(b)(iii) (Northern Ireland) in respect of directed surveillance; and 32A(6)(a)(iii) (England and Wales) and 32A(6)(b)(iii) (Northern Ireland) in respect of covert human intelligence sources. The purpose of these orders is to allow the Secretary of State to specify any further conditions that must be satisfied in respect of the grant or renewal of authorisations or the giving of notices by local authorities.

40. The key relevant conditions that the judicial authority must be satisfied were met before granting approval are set out in new sections 23A(5)(a) and (b), 32A(4)(a) and (b) and 32A(6)(a) and (b). These reflect most of the statutory conditions which must be met if the local authority is to grant the authorisation, renewal or give the notice. RIPA, however, specifies a number of other conditions which also apply to the authorisations of particular surveillance techniques. For example, the authorisation for communications data must be granted in writing (section 23(1)).

41. It would be cumbersome to set out in the primary legislation all of the statutory conditions which potentially apply to the underlying authorisation or notice and to require the magistrate to be satisfied that each has been met before granting the approval. To do so might appear to place equal emphasis on the conditions. Instead, the key conditions which the magistrate must be

satisfied were met are set out in new sections 23A and 32A. The order-making power then allows the Secretary of State to specify any additional conditions that the magistrate must be satisfied were met as a threshold for granting judicial approval.

42. It is not necessary for the Secretary of State to exercise any of these order-making powers so that the judicial approval mechanism can operate. There is already a residual discretion for the magistrate or sheriff to decline to give approval to the authorisation, renewal or notice under new sections 23A(3) and 32A(3). Thus it would be possible for the judicial authority to refuse to approve the authorisation even where it was satisfied that the conditions specified in new sections 23A(5)(b) or 32A(4) were met.

43. The order-making powers in new sections 23A(5)(a) and (b), 32A(4)(a) and (b) and 32A(6)(a) and (b) are, by virtue of section 78(3) of RIPA, subject to the negative procedure. This is considered appropriate as the orders will be used only to set out any additional conditions that the judicial authority must be satisfied have been met. The order will not affect the statutory conditions which attach to the underlying authorisation or notice which will still have to be met.

(ii) New sections 23A(6) and 32A(7) – Power to prescribe further "relevant persons".

44. These powers effectively provide that the Secretary of State may prescribe additional public authorities or descriptions of authorisations made by other public authorities to which the judicial approval process may be applied. This will allow the Secretary of State to apply the judicial approval process to authorisations made by public authorities other than local authorities. It is considered likely that the judicial approval process will be applied in the future to authorisations granted by other public authorities.

45. The order-making powers in new sections 23A(6) and 32A(7) are, by virtue of new sections 23A(7) and 32A(8), subject to the affirmative procedure. Given that any such order would achieve the effect that additional public authorities would be subjected to (or, potentially, removed from) the judicial approval procedure, it is considered appropriate that any order made under these provisions should be debated and approved by both Houses.

(iii) New sections 23A(5)(c), 32A(4)(c) and 32A(6)(c) – Power to prescribe conditions that must be satisfied for the purpose of judicial approval of authorisation or notice by other relevant person.

46. The powers in new sections 23A(5)(c), 32A(4)(c) and 32A(6)(c) allow the Secretary of State to prescribe the relevant conditions which the judicial authority must be satisfied were met in relation to an authorisation, grant or notice made by any other public authority other than a local authority. This will allow the Secretary of State to prescribe all relevant conditions when additional authorisations or grants or renewals are subjected to the judicial approval process.

47. These order-making powers are, by virtue of section 78(3) of RIPA, subject to the negative procedure. This is considered appropriate as the orders will be used only to set out those relevant conditions the judicial authority must be satisfied are met before granting approval. The order will not affect the statutory conditions which attach to the underlying authorisation or notice.

Schedule 9, paragraph 15: New section 77B(1) of the Regulation of Investigatory Powers Act 2000 – Power to make further provision about the procedure and practice for the judicial approval process in Northern Ireland

Powers conferred on: *Lord Chancellor*

Exercisable by: *Order made by statutory instrument*

Parliamentary procedure: *Negative resolution*

48. The power in new section 77B of RIPA allows the Lord Chancellor to make provision about the procedure and practice to be followed in Northern Ireland in relation to an application to the district judge, for an order approving: (a) the grant or renewal of an authorisation or the giving or renewal of a notice relating to obtaining and disclosing communications data; or (b) the grant of an authorisation of directed surveillance or of covert human intelligence requiring judicial approval under new section 23A or 32A (inserted by clauses 37 and 38 of the Bill). In particular, the Lord Chancellor may provide for the manner in which, and the time within which, an application may be made to the district judge; that the application is to proceed on an ex parte basis; that any hearing is to be held in private and that notice of any order which is granted by the district judge is not to be given to the person to whom the authorisation or notice in question relates or such a person's legal representatives.

49. In Northern Ireland the Lord Chancellor has powers in relation to the making of Magistrates' Courts Rules which deal with excepted matters under article 13 of the Magistrates' Courts (Northern Ireland) Order 1981 (S.I. 1981/1675 (N.I. 26)) as amended by paragraph 133 of Schedule 18 to the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 (S.I. 2010/976). (The rules are actually made by the Magistrates' Courts Rules Committee.) The Department of Justice for Northern Ireland has similar powers in relation to the making of Magistrates' Courts rules which deal with reserved and transferred matters. The court rules in relation to new sections 23A and 32A of RIPA will need to deal with reserved as well as excepted matters. It is for this reason that the order-making power in new section 77B of RIPA is required. New section 77B(4) provides that the power of the Magistrates' Courts Rules Committee to regulate and prescribe the procedure and practice to be followed in relation to an application to the district judge under new section 23A or 32A is subject to, but not otherwise constrained by, the provisions relating to the judicial approval procedure in

sections 23B and 32B and any order made under new section 77B. Accordingly, if the Magistrates' Courts Rules Committee makes new court rules for the judicial approval process, it may not make provision which is contrary to that which is made by the Lord Chancellor in an order under new section 77B.

50. This order-making power is, by virtue of section 78(3) of RIPA, subject to the negative procedure. This is considered appropriate as the order-making power relates to the specification of aspects of court procedure and process. The principal matters in relation to which it is expected that the Lord Chancellor may wish to make provision are set out on the face of the Bill in new section 77B(2).

PART 3: PROTECTION OF PROPERTY FROM DISPROPORTIONATE ENFORCEMENT ACTION

Chapter 1: Powers of entry

Clause 39(1): Power to repeal unnecessary or inappropriate powers of entry

Power conferred on:	*Ministers of the Crown and Welsh Ministers*
Power exercisable by:	*Order made by statutory instrument*
Parliamentary procedure:	*Affirmative resolution (for orders repealing provisions in primary legislation); and negative resolution (for orders repealing provisions in secondary legislation)*

51. Clause 39 gives the appropriate national authority a power to repeal any powers of entry or associated powers which it considers to be unnecessary or inappropriate. The "appropriate national authority" is defined in clause 46 as being Ministers of the Crown and Welsh Ministers (in so far as the order relates to devolved matters). "Power of entry" and "associated power" are also defined in clause 46. A power of entry is a power to enter land or other premises, and an associated power is broadly speaking a power to do anything on the land or other premises once the power to enter has been exercised (for example, to search, seize documents, take possession of land, or carry out works). The definition of powers of entry and associated powers includes powers contained in any enactment. So, the power to repeal powers of entry and associated powers by order is wide enough to repeal powers in primary as well as secondary legislation.

52. It is envisaged that this power will be used to repeal any redundant or inappropriate powers of entry (and their associated powers) which currently exist in legislation. The Government has previously carried out a review which identified over 1200 powers of entry in legislation (primary and secondary), and the intention is to repeal those which are no longer needed (for example, because of lack of use, or because they are duplicated elsewhere). To-date,

Departments have identified some powers which are redundant and can therefore be repealed on the face of the Bill (see clause 39(2) which gives effect to Schedule 2). But, going forward, further work will need to be carried out by all Departments to see which other powers can be repealed. To this end, clause 42 places a duty to review powers of entry (and their associated powers) on all Cabinet Ministers; such reviews must be completed within 2 years of Royal Assent.

53. The Government considers it appropriate to repeal powers of entry (or associated powers) through secondary legislation precisely because it relates to the repeal, and not the extension of, such powers. It is considered that the repeal of such powers will enhance civil liberties, and therefore that it is unnecessary to have the same degree of scrutiny as needed for primary legislation. Furthermore, Departments are not yet in a position to identify all the powers of entry or associated powers which are ripe for repeal, and secondary legislation allows the flexibility to repeal powers once the statutory duty to review has been carried out.

54. By virtue of clause 44, orders which repeal provisions in primary legislation are subject to the affirmative procedure to ensure a sufficient level of parliamentary scrutiny. Orders which repeal provisions in secondary legislation are subject to the negative procedure which is considered appropriate given that this is about the repeal of existing powers, and given that some of the powers being repealed would only have been introduced through secondary legislation following the negative procedure in any event.

Clause 40: Power to add safeguards to powers of entry

Power conferred on:	*Ministers of the Crown and Welsh Ministers*
Power exercisable by:	*Order made by statutory instrument*
Parliamentary procedure:	*Affirmative resolution (for orders amending provisions in primary legislation); and negative resolution (for orders amending provisions in secondary legislation)*

55. Clause 40 gives the appropriate national authority a power to add safeguards to existing powers of entry or their associated powers. The definitions of “appropriate national authority”, “power of entry” and “associated power” are as described in relation to clause 39 above. So, there is a power to add safeguards to existing powers contained in primary and secondary legislation. Subsection (2) sets out a non-exhaustive list of safeguards, which could include a requirement to obtain a warrant, a restriction on the time of day a power may be exercised, or a requirement to record what has taken place upon exercising a power.

56. As with the power to repeal in clause 39, the Government considers it appropriate to add safeguards to powers of entry (or associated powers) through secondary legislation precisely because this is about increasing

protection for those against whom the power is exercised. Furthermore, having a power to add safeguards through secondary legislation allows the flexibility to add safeguards once the duty to review has been carried out by each Department and they identified what safeguards it would be appropriate to add.

57. As with the power to repeal in clause 39, orders which add safeguards to powers in primary legislation are subject to the affirmative procedure to ensure a sufficient level of parliamentary scrutiny. Orders which add safeguards to powers in secondary legislation are subject to the negative procedure which is considered appropriate given that this is about the adding of safeguards to existing powers, and given that some of the powers would only have been introduced following the negative procedure in any event.

Clause 41: Power to rewrite powers of entry

Power conferred on:	*Ministers of the Crown and Welsh Ministers*
Power exercisable by:	*Order made by statutory instrument*
Parliamentary procedure:	*Affirmative resolution (for orders amending provisions in primary legislation); and negative resolution (for orders amending provisions in secondary legislation)*

58. Clause 41 gives the appropriate national authority a power to rewrite existing powers of entry or their associated powers as long as, after the rewrite, the overall safeguards provide a greater level of protection than before. The definitions of "appropriate national authority", "power of entry" and "associated power" are as described in relation to clause 39 above. The power to rewrite existing powers of entry covers those contained in either primary or secondary legislation. It is envisaged that this power will primarily be used to consolidate different powers of entry. For example, where there are a number of powers exercised by the same authority for different purposes, it may be possible to rationalise those different powers into one power to be exercised for an overriding purpose. Importantly, subsection (3) provides that the safeguards attaching to the new power must provide greater protection than before.

59. The Government considers it appropriate to rewrite powers of entry (or associated powers) through secondary legislation because the rewritten powers must provide a greater level of protection than previously existed. Furthermore, having a power to rewrite through secondary legislation allows the flexibility to do so once the duty to review has been carried out by each Department and they identified what consolidation it would be appropriate to make.

60. As with the power to repeal in clause 39, and the power to add safeguards in clause 40, orders which rewrite powers in primary legislation are subject to the affirmative procedure to ensure a sufficient level of parliamentary scrutiny.

Orders which add safeguards to powers in secondary legislation are subject to the negative procedure which is considered appropriate given that this is about rewriting powers which provide a greater level of safeguards than before, and given that some of the powers would only have been introduced following the negative procedure in any event.

Clauses 47 and 48: Power to issue and give effect to code of practice in relation to non-devolved powers of entry

Schedule 3, paragraphs 1 and 2: Power to issue and give effect to code of practice in relation to Welsh devolved powers of entry

Power conferred on: *Secretary of State and the Welsh Ministers*

Power exercisable by: *Code of practice and order made by statutory instrument*

Parliamentary procedure: *Affirmative resolution with respect to the order*

61. Clause 47 requires the Secretary of State to prepare a code of practice containing guidance about the exercise of powers of entry and their associated powers. It is envisaged that the code will contain guidance on matters such as: notices to be given to owners/occupiers of premises, witnesses who may be permitted, conduct of officials during searches, and the retention of records about the exercise of powers. By virtue of subsection (3), the code need not contain guidance about every type of power of entry or associated powers. So, the code need not deal, for example, with powers whose exercise is dependent upon the suspicion that a criminal offence may have been committed. In those cases, any code currently issued under the Police and Criminal Evidence Act 1984 could continue to apply. Subsection (4) requires the Secretary of State to consult those who will subsequently be required to have regard to the code, as well as anyone else who is considered appropriate.

62. Clause 48 requires the Secretary of State to lay the first draft code of practice before Parliament, together with an affirmative order providing for the code to come into force.

63. The Government considers it appropriate for the guidance on powers of entry and their associated powers to be set out in a code of practice since the code will contain a lot of detailed guidance, and should be phrased in such a way as to make it easily accessible to users. Moreover, the substantive safeguards in respect of particular powers of entry will already be set out in the relevant primary or secondary legislation. It is however considered appropriate for the first code of practice to be subject to the affirmative procedure to enable a high level of parliamentary scrutiny on the content of the new code.

64. Paragraphs 1 and 2 of Schedule 3 make similar provisions in respect of devolved powers of entry in Wales. The one substantive difference is that a

power to prepare a code of practice is conferred on the Welsh Ministers rather than a duty to do so.

Clause 49 and paragraph 3 of Schedule 3: Power to alter or replace powers of entry code of practice

Power conferred on: *Secretary of State and the Welsh Ministers*

Power exercisable by: *Code of practice*

Parliamentary procedure: *Either House of Parliament (or the National Assembly for Wales) can resolve not to approve the code within the 40-day period*

65. Clause 49 gives the Secretary of State power to prepare an altered or replacement code of practice (after the first code of practice has come into effect). When preparing a revised code, the Secretary of State is again required to consult the persons who will be required to have regard to the revised code. Once prepared, the revised code is to be laid before Parliament for a period of 40 days, during which time either House can pass a resolution refusing to approve the code. If no such resolution is passed, the revised code will come into effect. If a resolution is passed, the revised code will not come into effect and the original code will continue to stand (although the Secretary of State may subsequently choose to introduce another revision of the code, subject to the same procedure).

66. The Government considers it appropriate to have a 40-day laying procedure for revised codes which is separate from the statutory instrument procedure. The structure and content of the first code will already have been the subject of a high level of scrutiny since it will have been introduced following the affirmative procedure. In these circumstances the equivalent of the negative resolution procedure is considered to provide a sufficient level of scrutiny in respect of any changes to the original code or any replacement code. The Government did consider the negative procedure, but it was thought that the alternative 40-day laying procedure was preferable as it avoids any confusion about the status of the original code if the order which commences the revised code is annulled after the revised code has come into force. Furthermore, the procedure largely replicates the procedure which already exists for the introduction of and replacement of the data protection code (sections 52B and 52C of the Data Protection Act 1998, as inserted by section 174 of the Coroners and Justice Act 2009).

67. Paragraph 3 of Schedule 3 makes equivalent provision in respect of the alteration or replacement of the powers of entry code made by the Welsh Ministers.

Clause 51(5) and paragraph 5(5) of Schedule 3: Power to prescribe additional "relevant persons" required to have regard to powers of entry code

Power conferred on: *Secretary of State and the Welsh Ministers*

Power exercisable by: *Order made by statutory instrument*

Parliamentary procedure: *Negative resolution*

68. By virtue of clause 51(1), a "relevant person" will be required to have regard to the powers of entry code of practice. Clause 51(5) gives the Secretary of State power, by order, to specify or describe who is to be considered a relevant person. In making such an order, the Secretary of State can restrict the description of a person to that person carrying out certain functions. For example, if a body has public and private functions, it might only be required to have regard to the code when carrying out its public functions. Before making an order, the Secretary of State is required to consult those who are being considered for addition as relevant persons.

69. The Government considers it appropriate for the Secretary of State to have power to add relevant persons by secondary legislation to allow the flexibility to identify and add those persons at a future point. The legislation which confers the powers of entry (and associated powers) will already dictate who can exercise those powers, and they will be bound by whatever safeguards exist in that legislation. The code of practice will not add substantive safeguards to the exercise of those powers; it will instead provide guidance on additional administrative and procedural matters to take into account. Accordingly, it is considered appropriate for relevant persons to be added by order following the negative procedure.

70. Paragraph 5(5) of Schedule 3 makes similar provisions in respect of devolved powers of entry in Wales.

Chapter 2: Vehicles left on land

Clause 55: Section 99 of the Road Traffic Act 1984, as amended - Extension of powers to remove vehicles from land

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

71. Clause 55 amends section 99 of the Road Traffic Regulation Act 1984 ("the 1984 Act") to extend the regulation-making power contained therein. That regulation-making power empowers the Secretary of State to provide for the removal of vehicles which have been illegally, obstructively or dangerously parked, which appear to have been abandoned without lawful authority or

which have broken down. The power is to provide for removal of the vehicle from a road, or, where it appears to have been abandoned, from a road or from any land in the open air. Where the vehicle may be removed from a road, the regulations may provide for moving the vehicle from one position on the road to another position on that road or to another road.

72. By virtue of section 142 of the 1984 Act, "road" in England and Wales means any length of highway or of any other road to which the public has access, and includes bridges over which a road passes.

73. There has already been delegated legislation made under section 99 of the 1984 Act; in particular, the Removal and Disposal of Vehicles Regulations 1986 (S.I. 1986/183) as amended and the Removal and Disposal of Vehicles (Traffic Officers) (England) Regulations 2008 (S.I. 2008/2367). Several authorities have been empowered under section 99 to remove vehicles; these include the police, traffic wardens and local authorities.

74. The amendment will extend the regulation-making power regarding where the vehicles may be removed from and to where they may be removed. In particular, it will allow the regulations to provide for removal *from* land other than a road (in addition to the existing power to provide for removal from a road) and for removal *to* land other than a road (in addition to removal to a road). For vehicles appearing to have been abandoned, the existing power to provide for removal from a road or any land in the open air is extended so that provision may be made for their removal from a road (as now) or from any other land (whether or not in the open air).

75. This is an amendment of an existing delegated power. The nature of the amendment is not considered so extensive as to justify conferring the power by a mechanism separate from the mechanism already contained in section 99 of the 1984 Act.

76. By virtue of section 134(3) of the 1984 Act, regulations made under section 99 attract the negative procedure. The nature of the amendment is not considered so extensive as to justify requiring a different parliamentary procedure.

77. A particular proposed exercise of the amended power will be to give the police the power to remove vehicles from private land when they have been parked illegally, obstructively or dangerously, or have broken down. This will make it possible for anyone who is affected to ask the police to remove such vehicles from private land. It should be noted, however, that the Government's intention is that such exercise of the power would confer on the police a power rather than a duty to remove vehicles from private land.

Schedule 4, paragraph 10: Power to prescribe evidence which must accompany a notice to keeper

Power conferred on: *Secretary of State and the Welsh Ministers*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

78. This paragraph provides a power to prescribe evidence which must accompany a valid notice to keeper requesting payment of unpaid parking charges. Paragraphs 8(7) and 9(7) stipulate that any notice to keeper must be accompanied by the evidence prescribed in regulations under this power at the time the notice is given.

79. The purpose of this power is to leave flexibility to mandate the specific evidence which must accompany a notice to keeper if it becomes clear that creditors are attempting to recover parking charges without providing keepers with sufficient evidence to know whether the claim is valid or, if there is uncertainty on the part of landowners and their agents as to the methods at their disposal. As the scheme under Schedule 4 develops, this power will also allow for updates to the specific evidence required, for example, as technology progresses or if certain forms of evidence are dealt with unfavourably in court proceedings.

80. Paragraph 10(2) confirms that the power may provide for the means by which any prescribed evidence is to be generated – for example the specification of CCTV or ANPR equipment used for enforcement – and may also provide for equipment of an approved kind to be used. It is difficult to predict precisely how land owners and their agents may respond to the provisions in Schedule 4 and how they will choose to enforce them. It may be necessary to clarify precisely the evidence which must accompany a notice to keeper either in the light of concerns from keepers that they are receiving insufficient details or from landowners that there is not enough certainty as to the methods at their disposal. Particularly in the light of technological development in this area, the Government considers that this is an appropriate use of delegated powers. Given the technical nature of any such regulations, it is considered that the negative procedure (which applies by virtue of paragraph 17(1) of Schedule 4) provides an appropriate level of parliamentary scrutiny.

Schedule 4, paragraph 12(2): Power to prescribe requirements as to the display of notices on relevant land

Power conferred on: *Secretary of State and the Welsh Ministers*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

81. This paragraph provides a power to prescribe the requirements as to the display of notices on relevant land where parking charges may be incurred. In particular, the power may require: notices of more than one kind to be displayed on any relevant land; it may provide for the content or form of any notices required to be displayed and it may include provision for the location of any notices required to be displayed.

82. This power has been included to address concerns that the undesirable practices adopted by some private wheel clamping firms (which the ban on wheel clamping and towing seeks to address) will continue under the provisions of Schedule 4 through unfair 'ticketing' of vehicles.

83. In order to make use of the keeper liability provisions in Schedule 4, it is necessary to make an application to the Secretary of State (in practice the Driver and Vehicle Licensing Agency (DVLA)) for the registered keeper's details. In practice, the DVLA does not release this information unless the company requesting it is a member of an accredited trade association (in this case the British Parking Association). Members of the British Parking Association are required to sign up to and adhere to the Association's code of practice. It is therefore hoped that concerns over undesirable practices relating to the 'ticketing' of vehicles on private land will not materialise as only those who follow an approved code of practice will in effect have ready access to registered keeper details.

84. However, it is only once the scheme has had the chance to develop and evolve that it will be possible to assess whether or not landowners and their agents are adopting good practices in relation to the signage used to make drivers aware of the charges for parking. It may prove necessary to mandate the requirements which must be adhered to if it becomes apparent that parking charges are being unfairly issued and chased. The Government therefore considers that it is appropriate to provide for such a reserve power should it prove necessary to intervene in the interests of providing further protection for motorists. Given that any regulations made under this provision will set out technical specifications as to the content and location of notices it is considered that the negative resolution procedure (which applies by virtue of paragraph 17(1) of Schedule 4) provides an appropriate level of parliamentary scrutiny.

Schedule 4, paragraph 13(4): Power to prescribe form of statement which confirms a vehicle was hired at the material time and statement of liability signed by the hirer

Power conferred on: *Secretary of State and the Welsh Ministers*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

85. This paragraph provides a power to prescribe the form of the documents referred to at paragraphs 13(2)(a) and 13(2)(c) which a vehicle-hire firm must

provide to a creditor in order to escape liability under the Schedule. These are a statement to the effect that at the material time the vehicle was hired out to a named person under a hire agreement and a statement of liability signed by the hirer acknowledging responsibility for any parking charges during the period of hire.

86. This power mirrors powers in the existing scheme for the enforcement of on-road parking charges contained in section 109 of the Road Traffic Regulation Act 1984. As the provisions of paragraphs 13 and 14 have the potential to pass liability from the vehicle-hire firm (the keeper) to the hirer of the vehicle, it is necessary to ensure that hirers are made aware that they will be responsible for such charges. It is only once the scheme under Schedule 4 has developed that it will be possible to assess how vehicle-hire firms are dealing with the effect of the keeper liability provisions. The Government therefore believes it is appropriate to hold this power in reserve to, if necessary, intervene to protect the interests of hirers. Furthermore, if creditors experience practical difficulties with enforcement of parking charges under the Schedule in situations where vehicle-hire firms are able to escape liability, it may prove necessary to mandate the form of wording used by vehicle-hire firms to ensure that liability is effectively transferred to the hirer. Given the technical nature of the matters to be prescribed in any regulations made under this provision, it is considered that the negative resolution procedure (which applies by virtue of paragraph 17(1) of Schedule 4) provides an appropriate level of parliamentary scrutiny. This mirrors the position with the regulation-making power in section 109 of the Road Traffic Regulation Act 1984, read with section 134(3) of that Act.

Schedule 4, paragraph 16: Power to amend Schedule 4

Power conferred on: *Secretary of State and the Welsh Ministers*

Power exercisable by: *Order made by statutory instrument*

Parliamentary procedure: *Affirmative resolution*

87. Schedule 4 will, subject to certain conditions, impose liability on a keeper for unpaid parking charges incurred by a driver who parks on “relevant land”.

88. These provisions are intended to complement the ban on wheel clamping and towing contained in this Bill. By imposing liability on keepers of vehicles, the provisions give to landowners a means, other than clamping or towing, of controlling parking on their land.

89. These provisions are separate from, and unrelated to, the statutory penalty charge scheme in and under the Traffic Management Act 2004 (under which local authorities issue “parking tickets”).

90. The powers conferred by paragraph 16 of Schedule 4 are as follows—

- power to amend the definition of “relevant land” in paragraph 3;

- power to add to, remove or amend the conditions (contained in paragraphs 5 to 12) which must be met before the owner or occupier of relevant land can exercise the right to recover unpaid parking charges from the keeper of a vehicle.

The purpose of these powers is to give room to amend the keeper liability regime should that prove necessary in the light of experience. The ban on wheel clamping and towing will inevitably cause significant changes in the methods of enforcement of parking on private land. In an area which will continue to be governed substantially by the common law, however, it is hard to predict precisely how landowners, and their agents for parking purposes, will respond to the changes. They may well develop techniques for enforcing parking which are not immediately envisaged and to which it may, or may not, be appropriate to extend the right to enforce parking charges against a vehicle's keeper in future.

91. It may be necessary, in particular, to revise the conditions that must be satisfied before the owner or occupier of relevant land can seek to recover unpaid parking charges from a vehicle keeper in order to ensure that the regime strikes a proper balance between the efficacy of the scheme in terms of enabling landowners and occupiers to enforce unpaid parking charges and the rights of vehicle keepers. As the core elements of the scheme are set out in primary legislation, and will not generally be subject to amendment under these provisions, the Government considers that this is appropriate use of delegated powers. The use of the affirmative procedure (see paragraph 17(2) of Schedule 4) provides an appropriate level of parliamentary scrutiny given that an order made under these powers enables Ministers to amend certain aspects of the Schedule and is consistent with the usual presumption in this respect.

PART 4: COUNTER-TERRORISM POWERS

Clause 58(1): New paragraph 38(1) of Schedule 8 to the Terrorism Act 2000 – Power to extend temporarily the maximum period of pre-charge detention for terrorist suspects

Power conferred on: *Secretary of State*

Power exercisable by: *Order made by Statutory Instrument*

Parliamentary procedure: *Both Houses of Parliament must approve order within 20-day period*

92. The Government's review of counter-terrorism and security powers concluded that the maximum period for pre-charge detention for terrorist subject should be set at 14 days and that this limit should be reflected in primary legislation. Clause 57 of the Bill gives effect to that conclusion, including by repealing section 25 of the Terrorism Act 2006 which sets the

maximum period of pre-charge detention at 28 days – this limit is subject to renewal by order (subject to the draft affirmative procedure) for periods of up to a year at a time.

93. The review further concluded, however, that there may be exceptional circumstances where it was necessary to increase the limit on pre-charge detention to 28 days for a limited period and that, in such circumstances, Parliament should be asked to approve the increase in the limit by passing fast-track primary legislation. Subsequently, the Government published, for pre-legislative scrutiny, draft Detention of Terrorist Suspects (Temporary Extension) Bills which would provide for the temporary extension of the pre-charge detention limit from 14 to 28 days. The Joint Committee examining these draft Bills reported on 23 June 2011; the Government responded to the Joint Committee's report on 3 October 2011.

94. The Joint Committee agreed that there should be a contingency mechanism to extend the maximum period of pre-charge detention beyond 14 days in exceptional circumstances, but concluded that an order-making power would be preferable to fast-track legislation; the Joint Committee argued that such an order-making power should not be subject to any parliamentary scrutiny. Amongst the reasons put forward by the Joint Committee for its preferred approach was the practical difficulty of passing primary legislation at short notice, particularly during periods when Parliament was not sitting. The Government remains of the view that, in most circumstances, fast-track legislation is the appropriate mechanism to increase the maximum period of pre-charge detention. In their evidence to the Joint Committee, the Clerks of the two Houses had indicated that Parliament could be recalled in as little as 48 hours during a recess. The Government accepts, however, that the period covered by a dissolution presents a particular challenge given that Parliament cannot be recalled during this time. Clause 58 therefore enables the Secretary of State to make a 'temporary extension order' increasing, for three months, the maximum period of pre-charge detention to 28 days. A temporary extension order may only be made in cases of urgency and during the period when Parliament is dissolved or in the short interval between a new Parliament convening and the first Queen's Speech of the Parliament.

95. As indicated above, the Government accepts that the decision to increase the limit on pre-charge detention above 14 days is, in normal circumstances, properly a matter for Parliament to decide by passing primary legislation. However, as the review of counter-terrorism and security powers found, there may be circumstances where it is necessary for the limit on pre-charge detention to be increased at short notice, including in circumstances where terrorist suspects are already in detention and the 14 day clock is running. The Joint Committee has pointed out that should the need to increase the pre-charge detention limit arise during the period where Parliament has been dissolved, the option of recalling Parliament to consider fast-track primary legislation is not available. This order-making power deals with those limited set of circumstances.

96. The order-making power includes a number of additional safeguards. In particular, further to an order being made, any applications for warrants of further detention which would take the total detention time of an individual beyond 14 days, must be made with the personal consent of the Director of Public Prosecutions (DPP) in England and Wales, the Lord Advocate in Scotland and the DPP in Northern Ireland and any such application is then subject to approval by a senior judge.

97. By definition, as Parliament will have been dissolved, it is not possible for such a temporary extension order to be subject to the draft affirmative procedure. Instead clause 58(2) provides that both Houses must approve a temporary extension order within 20 days of the order being made. By virtue of section 7(1) of the Statutory Instruments Act 1946, in calculating the 20 day period no account is to be taken of any time during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days. This approach is similar to the urgency procedure that applies to certain orders subject to the affirmative procedure made under the Terrorism Act 2000, as provided for in section 123(5) of that Act. The requirement for a temporary extension order to be approved within 20 days, rather than the 40 days specified in section 123(5) of the Terrorism Act, reflects the fact that such an order may only extend the limit on pre-charge detention for three months and were such an order to be made soon after Parliament had been dissolved, that three month period could have expired, or be close to expiry, before a 40 day deadline for approval of the order had passed. Reducing the approval period to a maximum of 20 days ensures that Parliament will have an opportunity to consider the order in good time before the order ceases to have effect.

Clause 62: New section 43AB and 43AC of the Terrorism Act 2000: Order bringing into force a Code of Practice containing guidance about the powers conferred by sections 43, 43A and 47A of the 2000 Act.

Power conferred on: *Secretary of State*

Exercisable by: *Code of practice and order made by statutory instrument*

Parliamentary procedure: *Affirmative resolution with respect to the order*

98. Clause 62 inserts new sections 47AA to 47AE into the Terrorism Act 2000 which make provision for a code of practice containing guidance about (and in connection with) the exercise of the powers conferred by sections 43, 43A and 47A of the Terrorism Act 2000.

99. Section 43 of the 2000 Act contains the power to search a person reasonably suspected to be a terrorist and, as amended by clause 60(2) of the Bill, the power to search any vehicle in which such a person is stopped. New section 43A, inserted by clause 60(3) of the Bill, provides the power to stop and search a vehicle reasonably suspected of being used for the purposes of terrorism. And new section 47A (inserted by clause 61(1))

provides the power for a senior officer to authorise an area in which stop and search powers will then be available to search for evidence that a person is a terrorist or that the vehicle is being used for purposes of terrorism, whether or not the constable reasonably suspects that there is such evidence. Each power is accompanied by a corresponding power of seizure.

100. The main provisions and safeguards in relation to these terrorism stop and search powers are contained in the Bill. For example, the purpose for which the search may be conducted is set out in the Bill. In relation to the powers in new section 47A, safeguards concerning restrictions on the geographical and temporal extent of the authorisations are contained in the Bill (see new section 47A(1)). However, the Government considers that it is appropriate for guidance on the use of these powers to be set out in a code of practice, to be brought into force by secondary legislation because it is important for further, more detailed amplification of the safeguards to be provided and for further restrictions to be placed on the exercise of police officers' discretion – and these are matters which are suitable only for the more lengthy explanations that may be contained in a code of practice rather than on the face of a Bill. The absence of such meaningful guidance in relation to the powers of stop and search contained in sections 44 to 46 of the Terrorism Act 2000 was criticised by the European Court of Human Rights in its judgment in *Gillan and Quinton v UK*.

101. The code of practice will, for example, provide that the use of powers of search based on reasonable suspicion should be used as the 'norm' and considered first, and the powers available in new section 47A should only be considered where other powers are unsuitable or inadequate. The code will also provide guidance on the circumstances in which the powers in new section 47A may be exercised – which will be important in circumscribing the discretion conferred on officers in (a) making an authorisation and (b) exercising the search power. This is an important safeguard in ECHR terms. The code will also provide that the use of the stop and search powers should be monitored and statistics complied.

102. The inclusion of such guidance in a code of practice also has the advantage of flexibility, so that the guidance can be amended as necessary should operational practice demand. There is a duty on the Secretary of State to prepare a code of practice in relation to these powers, rather than a power to do so (new section 47AA(1)). The Secretary of State is also under a duty to keep the code under review (new section 47AC(1)(a)) and he or she may make alterations to the code to reflect any changes she considers necessary.

103. The code may make different provision for different purposes (new section 47AA(2)) and this includes the power to make different provision in respect of different parts of the United Kingdom. The code may need to make different provision for Scotland and Northern Ireland, reflecting the different law and customs in those jurisdictions in the United Kingdom as well as the different security situation in Northern Ireland.

104. The code is to be brought into force by order subject to the affirmative resolution procedure (new section 47AB(1) and (2)). If both Houses of Parliament approve the order, the code must be issued and published. If the order is not approved by both Houses, the Secretary of State must prepare another code (again to be brought into force by order subject to the affirmative resolution procedure). The issuing of alterations to the code or of a replacement code is subject to the same procedure (new section 47AC(3)). This provides the protection that a code of practice will be in place to supplement the safeguards in the Bill surrounding the stop and search powers, and that code of practice will have been through both consultation with relevant interest groups and debates in Parliament – and the code will only be brought into force once Parliament has approved it.

105. The Terrorism Act 2000 (Remedial) Order 2011 (SI 2011/631), made under section 10 of the Human Rights Act 1998, introduced on a temporary basis (pending passage of the Protection of Freedoms Bill) replacement terrorism stop and search powers which mirror those provided for in clause 61 of the Bill. That Order also introduced a similar duty on the Secretary of State to prepare a code of practice containing guidance about the exercise of the interim stop and search powers. The Order and code of practice came into force on 18 March 2011. The code of practice is available at: http://www.homeoffice.gov.uk/publications/counter-terrorism/terrorism-act-remedial-order/.

PART 5: SAFEGUARDING VULNERABLE GROUPS, CRIMINAL RECORDS ETC.

Chapter 1: Safeguarding of vulnerable groups

106. Chapter 1 of Part 5 makes significant amendments to the Vetting and Barring Scheme ("VBS") which operates under the Safeguarding Vulnerable Groups Act 2006 ("SVGA"); parallel changes are also made to the equivalent Northern Ireland legislation. As currently drafted, there are two key elements to the VBS – firstly the Independent Safeguarding Authority ("ISA") can bar individuals from engaging in a "regulated activity" in relation to children and/or vulnerable adults; secondly, any person engaging in such an activity is subject to monitoring by the Secretary of State (in practice the Criminal Records Bureau ("CRB")). Whereas the ISA is currently barring individuals, the monitoring system has not yet been brought into force.

107. The SVGA contains offences for individuals to work in activity from which they are barred and for employers to employ barred individuals in such activity. Regulated activity is defined in the SVGA and concentrates on roles involving contact with children and adults defined as "vulnerable" under the Act.

108. The SVGA contains provision for information about barred individual to be shared with employers and other relevant parties (for example, keepers of registers such as the General Medical Council) and contains obligations on

certain parties (for example, employers and keepers of registers) to provide the ISA with information that it might consider relevant for a barring decision.

Clause 66(2): New paragraph 7(1)(f) and (g) of Schedule 4 to the Safeguarding Vulnerable Groups Act 2006 – Power to define when driving vehicles for vulnerable groups will be regulated activity and define other types of health and personal care services as regulated activity.

Schedule 7, paragraph 3(2): New paragraph 7(1)(f) and (g) of Schedule 2 to the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 – Power to define when driving vehicles for vulnerable groups will be regulated activity and define other types of health and personal care services as regulated activity.

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

109. The power in new paragraph 7(1)(f) of Schedule 4 to the SVGA enables the Secretary of State to prescribe the circumstances in which driving a vehicle for the purpose of conveying vulnerable adults will be regulated activity. This mirrors the existing paragraph 7(1)(f) of Schedule 4. Regulations have been made under this paragraph (the Safeguarding Vulnerable Groups Act 2006 (Miscellaneous Provisions) Regulations 2009 (SI 2009/1548)) and it is envisaged that similar regulations will be made under this new power.

110. This power can only be used to limit the driving circumstances which will be caught by the definition of regulated activity and therefore it is considered that the negative resolution procedure provides adequate scrutiny for this level of detail. It is noted that the existing power in paragraph 7(1)(f) of Schedule 4 to the SVGA relating to driving vehicles is similarly subject to the negative resolution procedure.

111. The power in new paragraph 7(1)(g) ensures that health or personal care which is not provided by a health care professional or personal care worker (as defined in paragraph 7(1)(a) and (b)) will also fall within the definition of regulated activity. Although paragraph 7(1)(g) confers power to widen the circumstances in which personal or health care provision will be regulated activity, the categories will be clearly defined and will not be any broader than they need to be (which might otherwise be the case should there be a generic provisions that all personal and health care is covered). On the basis that the power can will used to set out the detail of the general principles already in paragraphs 7(1)(g), it is considered that the negative resolution procedure provides adequate scrutiny for this level of detail. It is noted that the current power in section 59(1)(g), for example, to prescribe welfare services, is also subject to the negative resolution procedure.

112. Paragraph 3(2) of Schedule 7 inserts identical regulation-making powers into the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007.

Clause 67(2) and (6): New paragraph 2(5)(a), 2(7), 8(5)(a) and 8(7) of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 – Power to prescribe time limit for making representations to the ISA

Schedule 7, paragraph 4(2) and (6): New paragraph 2(5)(a), 2(7), 8(5)(a) and 8(7) of Schedule 1 to the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 – Power to prescribe time limit for making representations to the ISA

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

113. These powers enable the Secretary of State to set time limits for the submission of representations to the ISA by persons whom the ISA is considering whether to include on either the children's or adults' barred lists. When information comes to light that a person has committed an offence which, whilst not so serious as to trigger automatic inclusion in the relevant barred list, is nonetheless sufficiently serious to warrant the ISA considering whether to include the person concerned in the relevant barred list, it is appropriate that the ISA consider the case promptly to minimise any potential risk to children or vulnerable adults. Paragraphs 2 and 8 of Schedule 3 to the SVGA currently provide that in such cases a person's name is added to relevant barred list and is then afforded the opportunity to make representations to the ISA as to why their name should be removed from the barred list. The Bill reverses this process so that the ISA must invite and consider representations before making a decision to bar. To ensure that barring decisions are taken promptly, it may be necessary to set a time limit on the submission of representations to the ISA. It is considered appropriate for any such time limits to be set out in secondary legislation so that there is the flexibility to alter the limits in the light of experience. In line with existing powers in the SVGA to set time limits (see paragraphs 15(2), 17(2)(a), 17(3) and 18(3) of Schedule 3), it is considered that the negative resolution procedure (which applies by virtue of section 61(2) of the SVGA) provides an appropriate level of parliamentary scrutiny for such a delegated power.

114. Paragraph 4(2) and (6) of Schedule 7 inserts identical regulation-making powers into the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007.

Clause 70(2): New paragraph 20(2) of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 – Power to prescribe information for purposes of making barring decision

Schedule 7, paragraph 7(2): New paragraph 20(3) of Schedule 1 to the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 – Power to prescribe information for purposes of making barring decision

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

115. This power enables the Secretary of State to prescribe details of a relevant matter and other information which must be provided by the Secretary of State to the ISA when the Secretary of State makes a referral to the ISA under paragraphs 1, 2, 7 or 8 of Schedule 3 to the SVGA.

116. Paragraphs 1, 2, 7 and 8 of Schedule 3 oblige the Secretary of State to refer a matter to the ISA when the Secretary of State is satisfied that these paragraphs apply to a particular person. This is likely to happen when the person makes an application under Part 5 of the Police Act 1997 ("the 1997 Act") for an enhanced criminal record certificate for the purposes of working in a regulated activity under the SVGA. If that person has a conviction or caution which is prescribed under the regulations made in relation to those paragraphs, the Secretary of State is obliged to refer the matter to the ISA. The ISA will then take a barring decision based on the information it receives. This power ensure that the ISA will receive prescribed details of all convictions, cautions, warnings and reprimands recorded on the Police National Computer (as the definition of "relevant matter" refers to that in section 113A of the 1997 Act). It is envisaged that the same prescribed details will be used for both criminal records certificates and information passed to the ISA. The details for criminal records certificates under the 1997 are currently prescribed in regulation 5 of Police Act 1997 (Criminal Records) Regulations 2002 (SI 2002/233) as the date of the conviction, the convicting court, the offence and the sentence.

117. The power also enables the Secretary of State to limit the types of conviction and caution information passed to the ISA. It is envisaged that this power might be used to ensure that the ISA only receives more serious information from the Secretary of State.

118. This power to prescribe the details of the information which the Secretary of State must send to the ISA is subject to the negative resolution procedure (by virtue of section 61(2) of the SVGA), as is the power to prescribe the details of the relevant matter under the 1997 Act. It is considered that this provides an appropriate level of scrutiny whilst retaining flexibility in the information that must be disclosed as experience may show that changes are necessary.

119. Paragraph 7(2) of Schedule 7 inserts an identical regulation-making power into the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007.

Clause 72(1): New section 30A(5) and new section 30B(8) of the Safeguarding Vulnerable Groups Act 2006 – Power to prescribe fee

Schedule 7, paragraph 9(1): New Article 32A(5) and new Article 30B(8) of the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 – Power to prescribe fee

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

120. There are powers in new sections 30A and 30B of the SVGA to set fees. These fees are payable by regulated activity providers who make a request to the Secretary of State for information about whether a particular individual is included on one of the ISA's barred lists.

121. This regulation-making power is subject to the negative resolution procedure (by virtue of section 61(2) of the SVGA) in the same way as the existing powers in the SVGA to prescribe fees (see sections 24(1)(d) and 24A(1)). The power ensures that the fee can be revised and, in line with the existing powers to prescribe fees for various applications contained in the SVGA, together with similar powers in Part 5 of the Police Act 1997 (including those in sections 112(1)(b), 113A(1)(b), 113B(1)(b), 114(1)(b) and 116(1)(b)), it is considered that the negative resolution procedure provides a sufficient level of scrutiny.

122. Paragraph 9(1) of Schedule 7 inserts identical regulation-making powers into the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007.

Clause 72(5): Revised paragraph 2 of Schedule 7 to the Safeguarding Vulnerable Groups Act 2006 – Power to amend Schedule 7 to the SVGA

Schedule 7, paragraph 9(5): Revised paragraph 2 of Schedule 5 to the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 – Power to amend Schedule 5 to that Order

Power conferred on: *Secretary of State*

Power exercisable by: *Order made by statutory instrument*

Parliamentary procedure: *Negative resolution*

123. Clause 72(1) inserts new section 30A into the SVGA which introduces arrangements for an interested party to obtain, on application, information indicating whether a person is barred from regulated activities from the Secretary of State. Eligibility to apply for such information is governed by the descriptions of persons listed in the table at paragraph 1 of Schedule 7 to the SVGA, and includes, for example, regulated activity providers (normally employers or organisations using volunteers) and personnel suppliers.

124. Entry 19 in the table at paragraph 1 of Schedule 7 enables the Secretary of State to add to the category of applicants who may obtain barring information about a person, and paragraph 2 of that Schedule enables the Secretary of State to amend entries 1 to 18 of the table. Paragraphs 3 to 6 of Schedule 7 define terms used in the table at paragraph 1. Clause 72(4) and (5) repeal entry 19 in the table and amend paragraph 2 of Schedule 7 so as to extend the order-making power contained therein so that the Secretary of State may amend any aspect of Schedule 7.

125. As with the existing powers in paragraphs 1 and 2 of Schedule 7, the Government considers that it is appropriate through this expanded power to have the flexibility to amend, add to or remove categories of persons who may apply for barring information (and to amend, add to or remove definitions of such categories) in order that the scheme may readily adapt to changes in the children's and vulnerable adults' sectors. Although the table in Schedule 7 is the main component, there are also other provisions in the Schedule which might also require amending in light of experience. As with the existing powers, it is considered that the negative resolution procedure (which applies by virtue of section 61(2) of the SVGA) provides an appropriate level of parliamentary scrutiny.

126. Paragraph 9(5) of Schedule 7 makes an identical change to the equivalent order-making power in the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007.

Clause 73: New section 34ZA(4), (5) and (6) of the Safeguarding Vulnerable Groups Act 2006 – Power to prescribe time limit

Schedule 7, paragraph 10: New Article 36ZA(4), (5) and (6) of the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 – Power to prescribe time limit

Power conferred on:	*Secretary of State*
Power exercisable by:	*Regulations made by statutory instrument*
Parliamentary procedure:	*Negative resolution*

127. These powers enables the Secretary of State to set time periods in which the duty to check whether a person is barred must be carried out. New section 34ZA obliges employers and personnel suppliers to check, before offering an individual a position in which they will be engaging in regulated

activity, whether a potential employee is on the ISA barred list (either in relation to children or relating to vulnerable adults).

128. The new section sets out three ways in which employers can discharge that duty and the power is to prescribe the time frame in which that must be carried out. The power will be used to set an appropriate time period (probably framed in terms of months) in which the employer must carry out the check before offering employment.

129. It is considered important to retain the ability to alter this time period in light of experience. Given that the principle of a time limit applying in such circumstances is established on the face of the Bill, it is further considered that the negative resolution procedure (which applies by virtue of section 61(2) of the SVGA) provides adequate scrutiny.

130. Paragraph 10 of Schedule 7 inserts identical regulation-making powers into the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007.

Clause 73: New section 34ZA(7) of the Safeguarding Vulnerable Groups Act 2006 – Power to dis-apply the duty to check

Schedule 7, paragraph 10: New Article 36ZA(7) of the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 – Power to dis-apply the duty to check

Power conferred on:	*Secretary of State*
Power exercisable by:	*Regulations made by statutory instrument*
Parliamentary procedure:	*Negative resolution*

131. This power enables the Secretary of State to dis-apply the duty to check under new section 24ZA of the SVGA in relation to either regulated activity providers or personnel suppliers of a prescribed description.

132. It is envisaged that this power might be used when it has been shown that a particular type of regulated activity provider (or personnel supplier) is already subject to sufficient duties to undertake such checks in their specific sector.

133. This power therefore can be used in order to remove any duplication of such requirements.

134. It is considered that the negative resolution procedure (which applies by virtue of section 61(2) of the SVGA) provided sufficient scrutiny on the basis that this power is to remove a legal requirement rather than impose one.

135. Paragraph 10 of Schedule 7 inserts an identical regulation-making power into the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007.

Clause 74(1) and (3): New paragraphs 5A(3) and 11A(3) of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 – Power to specify corresponding barred lists in Scotland and Northern Ireland

Schedule 7, paragraph 11(1) and (3): New paragraphs 5A(3) and 11A(3) of Schedule 1 to the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 – Power to specify corresponding barred lists in England and Wales, and Scotland

Power conferred on: *Secretary of State*

Power exercisable by: *Order made by statutory instrument*

Parliamentary procedure: *Negative resolution*

136. Clause 74 amends Schedule 3 to the SVGA to make further provision to prevent duplication between the barred lists held in respect of England and Wales, Scotland and Northern Ireland. It provides that the ISA must not include a person in the barred lists (which apply in England and Wales) if that the person is included in the corresponding list in Scotland or Northern Ireland. A corresponding list is one which is maintained under the law in Scotland or Northern Ireland and which is specified by order as corresponding to either the children's barred list or the adults' barred list. Allowing the corresponding lists in Scotland and Northern Ireland to be specified in secondary legislation provides the flexibility to amend the provisions in the event of a change in the relevant law in Scotland or Northern Ireland.

137. As specifying the relevant corresponding lists in Scotland and Northern Ireland is essentially a technical matter the negative resolution procedure (which applies by virtue of section 61(2) of the SVGA) is considered appropriate. Similar powers to specify corresponding lists are contained in section 3(2)(b) and (3)(b) of, and paragraphs 6(3) and 12(3) of Schedule 3 to, the SVGA.

138. Paragraph 11 of Schedule 7 inserts equivalent order-making powers into the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007.

Clause 75(3): New section 43(5H) of the Safeguarding Vulnerable Groups Act 2006 - Power to amend definition of relevant information to be provided by the ISA to the keeper of a register

Schedule 7, paragraph 12(2): New Article 45(5H) of the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 - Power to amend definition of relevant information to be provided by the ISA to the keeper of a register

Power conferred on: *Secretary of State*

Power exercisable by: *Order made by statutory instrument*

Parliamentary procedure: *Negative resolution*

139. This power enables the Secretary of State to amend new section 43(5G) of the SVGA in order to amend the definition of relevant information. Relevant information is information that the ISA considers appropriate to pass onto the keeper of a register (for example, the General Medical Council or the General Teaching Council) who has an interest in whether a particular individual on their register is on either of the ISA's barred lists.

140. Section 43 of the 2006 obliges the ISA to provide information about whether the individual is barred and the information on which the ISA relied in coming to its barring decision. The section also empowers the ISA (rather than obliges the ISA) to provide addition relevant information, either upon request from the keeper of the register, or of its own volition. This relevant information is defined in new section 43(5G). New section 43(5H) enables the Secretary of State to amend that definition if experience shows that more or less information should be included in the definition in order to ensure that only appropriate information is disclosed.

141. This power mirrors the existing power in section 44(6) of the SVGA which is also subject to the negative resolution procedure (by virtue of section 61(2) of the SVGA). Although this is a power to amend primary legislation, it is narrowly drawn and following the approach taken in section 44(6) the negative procedure is considered to provide an appropriate level of scrutiny for this type of detailed provision.

142. Paragraph 12 of Schedule 7 inserts an equivalent order-making power into the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007.

Clause 77(3): New section 50A(1)(d) of the Safeguarding Vulnerable Groups Act 2006 - Power to extend list of purposes in respect of which the ISA may provide information to the police

Schedule 7, paragraph 15(4): New Article 52A(1)(d) of the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 - Power to extend list of purposes in respect of which the ISA may provide information to the police

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

143. Section 50A of the SVGA confers a power on the ISA to provide information to police forces for specified purposes. The current list of

purposes is the prevention, detection and investigation of crime, and the apprehension and prosecution of offenders. Clause 77(3) adds to this list purposes in connection with the appointment of persons who are under the direction and control of a chief officer (that is, police officers and police staff). In addition, this subsection enables the Secretary of State to prescribe other purposes in respect of which the ISA may provide information to the police. This power will afford the flexibility to add to the list of purposes without the need for further primary legislation. The power is expected to be used, in particular, to facilitate the mutual exchange of barring information between police forces in England and Wales and those in other EU member states under forthcoming EU child protection measures ("Proposal for a Directive on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA" – which cleared scrutiny by the Lords EU Sub-Committee E: Justice and Institutions on 1 December 2010).

144. As the principle of information exchanges between the ISA and the police is established on the face of the SVGA it is considered that specifying the purposes for which such information exchanges may take place is a legitimate matter for secondary legislation and that the negative resolution procedures affords an appropriate level of Parliamentary scrutiny.

145. Paragraph 15 of Schedule 7 inserts an identical regulation-making power into the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007.

Clause 77(6): New paragraph 5A of Schedule 4 to the Safeguarding Vulnerable Groups Act 2006 – Guidance to regulated activity providers and personal suppliers

Schedule 7, paragraph 14(6): New Article 53A of the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 - Guidance to regulated activity providers and personal suppliers

Power conferred on: *Secretary of State*

Power exercisable by: *Guidance*

Parliamentary procedure: *None*

146. Clause 77(6) of the Bill inserts a new paragraph 5A into Schedule 4 to the SVGA which places the Secretary of State under a duty to issue guidance to regulated activity providers or personnel suppliers for the purpose of assisting them in deciding whether a person working with children and subject to supervision falls within the scope of regulated activity.

147. Part 1 of Schedule 4 to the SVGA defines regulated activity in relation to children. Most of the terms used therein require no further explanation. However, new paragraph 2(3A) of Schedule 4 provides that any form of teaching, training or instruction of children is not to constitute regulated

activity where such teaching, training or instruction of children is “on a regular basis, subject to day to day supervision” by another person who is engaged in regulated activity relating to children. It is considered that the term “supervision” in this context would benefit from further elucidation to assist regulated activity providers and personnel suppliers in determining whether a person engaged in teaching, training or instructing children under supervision is, or is not, engaged in regulated activity. Similar considerations apply to the use of the terms “day to day supervision” and “supervision” in paragraphs 1(2B)(b) and 2(3B)(b) of Schedule 4 to define other aspects of regulated activity in relation to children. The provision of statutory guidance on this matter is intended to assist regulated activity providers and personnel suppliers in this regard. Regulated activity providers and personnel suppliers will be under a duty to have regard to this guidance.

148. Guidance issued under new paragraph 5A of Schedule 4 is not subject to any parliamentary procedure. This is considered appropriate given that the purpose of the guidance is to provide practical assistance to regulated activity providers and personnel suppliers in discharging functions which are set out in primary legislation and, as such, have already been considered and approved by Parliament.

149. Paragraph 14(6) of Schedule 7 inserts into the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 an identical requirement to issue guidance.

Chapter 2: Criminal records

Clause 81(2): New section 113B(4A) of the Police Act 1997 – guidance to chief officers of police on the disclosure of non-conviction information to be included in an enhanced criminal record certificate

Power conferred on: *Secretary of State*

Power exercisable by: *Statutory guidance*

Parliamentary procedure: *None*

150. Under section 113B of the 1997 Act an enhanced criminal record certificate includes the details of any convictions and cautions recorded on the PNC and any other non-conviction information held in local police records which a relevant chief officer of police considers might be relevant and ought to be disclosed. In order to ensure the more proportionate disclosure of information, the Bill alters the “might be relevant” test to a “reasonably believes to be relevant” test. In addition, new section 113B(4A) confers a power on the Secretary of State to issue guidance to which chief officers of police must have regard when considering whether non-conviction information should be disclosed. The provision of statutory guidance will allow for the dissemination of best practice and thereby help to ensure a more consistent approach to disclosing non-conviction information. As the test to be applied by chief officers in deciding whether to disclose information will continue to be set

out in primary legislation and the guidance will simply serve to inform the application of that test in any given case it is not considered that any form of parliamentary scrutiny is required.

Clause 82: New section 116A(4)(b) and (5)(b) of the Police Act 1997 – Power to prescribe fee, and the manner of its payment, for subscription to up-dating arrangements for criminal record certificates

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

151. At present criminal record certificates issued by the Criminal Records Bureau provide only a snap-shot of the criminal record and other information held by the police at the point at which a certificate is issued. New section 116A of the 1997 Act, inserted by clause 82, introduces arrangements for updating criminal record certificates. The updating service will enable an employer to go online, with the consent of the holder of a criminal record certificate, and check whether there is any information that would appear on a new criminal record certificate if applied for now, or whether there is no new information. The Criminal Records Bureau is funded through fees charged for criminal record certificates and other services provided by the Bureau. New section 116A(4)(b) and (5)(b) enable the Secretary of State to set a fee which must be paid in order to apply to join and continue to participate in the up-dating service in relation to all types of criminal records certificates issued by the Criminal Records Bureau under Part 5 of the 1997 Act.

152. The power ensures that the fee can be revised and, in line with the other powers in Part 5 of the 1997 Act to prescribe fees for applications (including those in sections 112(1)(b), 113A(1)(b), 113B(1)(b), 114(1)(b) and 116(1)(b)), it is considered that the negative resolution procedure (which applies by virtue of section 125(4) of the 1997 Act) provides a sufficient level of scrutiny.

Chapter 3: The Disclosure and Barring Service

Schedule 8, paragraph 8(1)(d): Power to specify functions under Part 5 of the Police Act 1997 which are to constitute core function for the purposes of the restrictions on delegation

Power conferred on: *Secretary of State*

Power exercisable by: *Order made by statutory instrument*

Parliamentary procedure: *Negative resolution*

153. Schedule 8 to the Bill provides for the constitution and governance of the Disclosure and Barring Service ("DBS"). Paragraphs 6 to 8 of that

Schedule make provision for the delegation of functions. Under paragraph 6, any function may be delegated to a member of the DBS, a member of staff or to a Committee comprising any combination of DBS members or members of its staff. Paragraph 7 permits the contracting out of any function, other than a core function. A core function is defined in paragraph 8(1), this lists certain functions under the SVGA (or the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007) in relation to barring persons from working with children or vulnerable adults, but sub-paragraph (d) enables any functions in relation to the disclosure of criminal records under Part 5 of the Police Act 1997 to be specified in secondary legislation.

154. There are aspects of the functions of the CRB, and in future the DBS, which are particularly sensitive, for example, where they afford access to the Police National Computer, and which accordingly should continue to be exercised by public servants rather than contracted out to the private sector. This order-making power will enable those functions to be identified during the transition to the DBS and adjusted over time in the light of experience. The order which transfers functions of the Secretary of State under Part 5 of the 1997 Act to the DBS (under clause 86), may well include provision (by way of consequential amendment) setting out particular functions under the 1997 Act which are currently implied rather than express. When the functions are transferred to the DBS, the implied functions may need to be made express. This will enable core functions to be specified at the same time as this consequential order is being made. This approach will also ensure that the Secretary of State, rather than the DBS, is the ultimate arbiter of what functions under Part 5 of the 1997 Act may be contracted out, which reflects the current position by virtue of section 122A of the 1997 Act (delegation of functions of the Secretary of State). Given that the Secretary of State's powers under section 122A of the 1997 Act is not subject to any parliamentary procedure, it is considered that the negative resolution procedure provides a sufficient level of parliamentary scrutiny.

Clause 86(1), (2) and (3): Power to transfer functions of the ISA to the Disclosure and Barring Service ("DBS"), to transfer certain functions of the Secretary of State to the DBS and to dissolve the ISA

Power conferred on:	*Secretary of State*
Power exercisable by:	*Order made by statutory instrument*
Parliamentary procedure:	*Affirmative resolution (for orders amending or repealing provisions in primary legislation); otherwise negative resolution*

155. Clause 85 establishes a new executive Non-Departmental Public Body to be known as the Disclosure and Barring Service. The DBS is to bring together the barring functions of the ISA under the SVGA (and the equivalent Northern Ireland legislation) and the functions of the CRB in respect of the disclosure of criminal records under Part 5 of the Police Act 1997. Clause 86 creates three order-making powers which enable the Secretary of State to

give full effect to these organisational changes. First, subsection (1) of clause 86 enables any function of the ISA to be transferred to the DBS. Second, subsection (2) enables any function of the Secretary of State under Part 5 of the Police Act 1997, the SVGA or the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 to be transferred to the DBS. Third, subsection (3) provides, as a corollary, for the dissolution of the ISA. As the CRB is an agency of the Home Office, and as such not a free standing body corporate, it is not necessary to provide for the dissolution of that organisation.

156. As the creation of the DBS, and provision for its constitution and governance, is set out on the face of the Bill, it is considered appropriate for the organisational changes that flow from that in terms of the vesting of functions in the new body and the winding up of the precursor organisations to be provided for in secondary legislation. Moreover, the scope of powers is closely circumscribed in that the functions that are capable of being transferred to the DBS are similarly set out on the face of the Bill.

157. By virtue of clause 87, an order under clause 86 may include consequential amendments or repeals to primary and secondary legislation and any other necessary consequential, supplementary, incidental, transitional, transitory or saving provisions. The power to make consequential amendments to primary legislation is necessary as there are number references in the SVGA, Part 5 of this Bill and elsewhere to the ISA which will need to converted to references to the DBS. In addition, a number of the references to the Secretary of State in Part 5 of the Police Act 1997 will similarly need to be converted. Complex transitional provisions will be needed so that there is a smooth transition on vesting day for work commenced but not completed by the precursor organisations (for example, the processing of applications for a criminal record certificate). These are matters better left to secondary legislation.

158. Any order under clause 86 will be subject to the affirmative resolution where it amends or repeals primary legislation (clause 87(2)) as is befitting for a 'Henry VIII' power. An order which neither amends nor repeals primary legislation will be subject to the negative resolution procedure (clause 87(3)), this is considered appropriate given that such an order would be given effect to the detailed consequences of organisational changes expressly provided for in primary legislation.

Clause 88(1): Power to make a transfer scheme

Power conferred on:	*Secretary of State*
Power exercisable by:	*Statutory scheme*
Parliamentary procedure:	*Affirmative or negative, as the case may be, where included in a clause 86 order otherwise no Parliamentary procedure applies*

159. Clause 88 confers on the Secretary of State the power to make a transfer scheme in connection with an order made under clause 86. A transfer scheme is a scheme providing for the transfer of property, rights and liabilities (including rights and liabilities relating to contracts of employment) from either the ISA or the Secretary of State to the DBS. The transfers from the Secretary of State to the DBS in this context will be of civil service staff engaged by the CRB together with any property and other rights and liabilities which relate to the work of the CRB. As an agency of the Home Office the CRB has no legal persona separate from that of the Home Secretary.

160. Clause 88(3) lists consequential, supplementary, incidental and transitional provision that may be made by a transfer scheme. These include making provision the same as or similar to the TUPE regulations (the Transfer of Undertakings (Protections of Employment) Regulations 2006 (S.I. 2006/246)).

161. The Government considers it appropriate that the details of transfers of property, rights and liabilities, which may be very complex, should be set out in a transfer scheme. There are a number of precedents for such matters to be left to secondary legislation, including in Schedule 2 to the SVGA which made provision for staff and property transfer schemes in connection with the transfer of functions to the ISA.

162. A transfer scheme may be included in an order made under clause 86 (in which case the appropriate Parliamentary procedure applicable to that order by virtue of clause 87 would apply) but if not so included must be laid before Parliament.

163. The Government considers this is an appropriate procedure as it will allow details of the transfer scheme to be combined with an order under clause 86 of the Bill if that is considered appropriate; but provide flexibility for a transfer scheme to be made after such an order has been made where this is considered the appropriate course of action.

Clause 89(1): Power to vary taxation in connection with a transfer scheme

Power conferred on: *The Treasury*

Power exercisable by: *Order made by Statutory Instrument*

Parliamentary procedure: *Negative*

164. Clause 89 confers on the Treasury the power to make an order to provide for varying the way in which certain tax provisions apply either for anything transferred under a scheme made under clause 88, or anything done for the purposes of, or in relation to a transfer under such a scheme. For the purposes of this power the relevant taxes are income tax, corporation tax, capital gains tax, stamp duty and stamp duty reserve tax.

165. This power will enable the Treasury to ensure that appropriate tax provision is made, and at the appropriate time, to ensure that a transfer does not give rise to a tax change or confer a tax advantage on either party.

166. The power under clause 89 is exercisable by statutory instrument subject to negative procedure in the House of Commons. This reflects the level of Parliamentary procedure applicable to equivalent powers in clause 26 of the Public Bodies Bill. The Government also considers it appropriate that the order is not subject to any procedure in the House of Lords, as the House of Commons is the correct forum for the determination of matters in respect of taxation.

Chapter 4: Disregarding certain convictions for buggery etc.

Clause 93(5): Power to prescribe meaning of "delete" in relation to certain official records, "relevant data controller" and "relevant official records" for the purpose of clause 93

Power conferred on: *Secretary of State*

Power exercisable by: *Order made by statutory instrument*

Parliamentary procedure: *Negative resolution*

167. Chapter 4 of Part 3 makes provision for persons with a conviction or caution for an offence under section 13 (buggery) or 13 (gross indecency between men) of the Sexual Offences Act 1956, and associated offences, involving consensual gay sex with another person aged 16 or over to apply to the Secretary of State for such a conviction and caution to become a disregarded conviction or caution. By virtue of clause 93 where a conviction or caution is disregarded, the Secretary of State must direct the "relevant data controller" to delete the details of the disregarded caution or conviction contained in "relevant official records", the aim being that such disregarded convictions and cautions no longer show up on criminal record checks.

168. This power enables the Secretary of State to prescribe "relevant official records" in addition to those held on the names database on the Police National Computer (PNC) as records from which all information about a disregarded conviction or caution must be deleted in accordance with clause 93. The names database on the PNC is the primary database where details of convictions and cautions, including for offences under sections 12 and 13 of the Sexual Offences Act 1956, are recorded. However, it is also possible that the police, Crown Prosecution Service, Her Majesty's Court Service and others may have details of disregarded convictions and cautions stored in other local databases and this power will enable the Secretary of State to prescribe those records, together with the appropriate data controller. It is considered appropriate that the Secretary of State retains this flexibility otherwise the ability for the Secretary of State to order deletion will be limited to the PNC. If in fact records exist elsewhere, it could undermine the policy if the Secretary of State cannot order deletion of these records.

169. In addition, this power enables the Secretary of State to prescribe officials records for which "deletion" will in fact entail recording the fact that the particular conviction or caution is now disregarded and the consequences that flow from that. This is to ensure that for some official records where it is simply not practicable to ensure that the details are deleted (for example, court records which may be in bound hard copy only and refer to many convictions on the same page) that the records are accurately marked to the effect that the conviction is to be disregarded for all purposes.

170. Given that the policy objective is set out on the face of clause 90, namely that all information about a disregarded conviction or caution should be removed from all official records, and the limited nature of the power (it can only be used to quality the meaning of deletion where the complete removal of a record is not practicable and to prescribe official records and the relevant data controller in respect of such records), it is considered that the negative resolution procedure provides an appropriate level of scrutiny.

PART 6: FREEDOM OF INFORMATION AND DATA PROTECTION

Clause 100(3): New section 11B(1) of the Freedom of Information Act 2000 – Power to charge fees in relation to release of datasets for re-use

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative*

171. Clause 100(3) inserts a new section 11B into the Freedom of Information Act (FOIA), which includes a new power to make regulations to charge fees in relation to the release of datasets for re-use. Subsection (1) provides for the power to make regulations, subject to Treasury consent, to charge fees in connection with the new duty to make datasets, where they contain a relevant copyright work, available for re-use under section 11A(2) (in response to requests under the FOIA) and section 19(2A)(c) (publication schemes). Subsection (2) makes provision for what the regulations may prescribe, including which cases fees may, or may not be, charged, the amount of any fee payable or how such amount is to be determined, and the timing for payment of fees; subsection (3) provides that the regulations, in prescribing the amount of any fees payable, may make provision for a reasonable return on investment; and subsection (4) provides that "relevant copyright work" has the same meaning given by new section 11A(3).

172. The intention is that public authorities, in certain prescribed cases, should be able to charge a fee for making their dataset available for re-use. There is already an existing power to make regulations in section 9 of the FOIA in relation to charging by public authorities for complying with their section 1 duty to give access to the information requested; the existing power

is subject to the negative resolution procedure (by virtue of section 82(3) of the FOIA).

173. A regulation-making power relating to charging for re-use is considered necessary so that regulations can prescribe the cases in which fees may or may not be charged; set out the details of the levels of the charge, including any maximum limit; and set out any other necessary details relating to the levying of charges. In line with the current regulation-making power in section 9, in respect of charging fees for compliance with the duty in section 1 to give access to information, it is considered appropriate to leave the same level of detail to secondary legislation, and to apply the same level of Parliamentary scrutiny, in respect of charging fees for compliance with the new duty concerning re-use of datasets in new section 11A(2) and 19(2A)(c).

Clause 100(5): New section 45(2A) of the Freedom of Information Act 2000 - Extension of matters that must be covered in code of practice under section 45 of the Freedom of Information Act 2000

Power conferred on: *Secretary of State*

Power exercisable by: *Code of Practice*

Parliamentary procedure: *None*

174. Clause 100(5) amends section 45 of the FOIA which requires the Secretary of State to issue a code of practice providing guidance to public authorities as to the discharge of their functions under Part I of the FOIA. New section 45(2)(da) and (2A) makes provision to extend the matters covered in the code of practice to include datasets (as defined in new section 11(5) as inserted by clause 100(2) of the Bill). New section 45(2)(da) provides that the code of practice must include provision relating to the disclosure by public authorities of datasets held by them. New section 45(2A) provides for particular matters concerning datasets which may be covered in the code of practice, including the giving of permission for datasets to be re-used; the disclosure of datasets in accordance with the terms of a licence; the disclosure of datasets in an electronic form which is capable of re-use; other matters relating to the making of datasets available for re-use; and standards applicable to public authorities in connection with the disclosure of datasets.

175. The new code will enable the Secretary of State to give guidance to public authorities on how to comply with their new duties under FOIA in respect of datasets. Separately it will enable the Information Commissioner to promote the following of good practice by public authorities in accordance with his functions under sections 47 and 48 of FOIA.

176. It is considered appropriate for the detail of these matters to be set out in a code of practice, rather than primary legislation, because the code can provide for a level of detail and explanation that is not possible in the Bill. Furthermore, the standards applicable to public authorities in connection with the disclosure of datasets, particularly the terms of the licence under which datasets are to be made available, may change over time. The new code will

ensure that public authorities have access to detailed and up-to-date guidance on the practice to be followed when dealing with the release of datasets, whether upon request or through their publication scheme. The additional matters which will be covered in the revised code will deal with similar practical and procedural issues which the code currently makes provision for.

177. Under section 45(4), the Secretary of State is required to consult the Information Commissioner before revising the code of practice; and under section 45(5), the Secretary of State is required to lay the revised code before each House of Parliament. There is no sanction for failing to comply with the code; the Commissioner may give any public authority a "practice recommendation" under section 48 for nonconformity with the code of practice. These existing provisions are unaffected by the new amendments to section 45 and will apply to the provisions made in the code in relation to datasets. Accordingly, it is not considered necessary for the code to be the subject of Parliamentary approval.

Clause 105(1) and (3): New section 51(8B) of the Data Protection Act 1998 and new section 47(4B) of the Freedom of Information Act 2000 – Power to amend definition of "relevant services"

Power conferred on: *Secretary of State*

Power exercisable by: *Order made by statutory instrument*

Parliamentary procedure: *Negative resolution*

178. This clause enables the Secretary of State to make an order to amend the list of relevant services for which the Information Commissioner may charge fees. New section 51(8A) of the Data Protection Act 1998 ("the DPA") and 47(4A) of the Freedom of Information Act 2000, inserted by clause 105(1) and (3) respectively permit the Commissioner to charge fees, without the consent of the Secretary of State and the Treasury, for the provision of more than one copy or versions of published material, training and conferences on a cost recovery basis. The relevant services listed are largely provided by the Commissioner under his non-statutory duties and in the past the Commissioner has had to seek approval from the Ministry of Justice and Treasury to charge for them. The proposed list of relevant services to be inserted into the 1998 and 2000 Acts was agreed upon following discussions between the Information Commissioner and the Ministry of Justice. The order-making powers are necessary because there may be future developments in matters such as information technology that affect the way the Information Commissioner provides services and that requires an amendment to the list of relevant services. The proposed list of services can be amended by removing a service, adding a service or altering the definition of an existing service.

179. Although the clauses will allow the Secretary of State to make an order to amend primary legislation, the Ministry of Justice considers it appropriate

for the list of relevant services to be subject to the negative procedure for a number of reasons. First, the scope of the order-making power is tightly drawn in that it only relates to the services provided by the Information Commissioner's Office under Part 6 of the DPA and section 47 of the FOIA which relate to promoting good practice. It would not be possible to use the power to widen the charging arrangements in respect of the Information Commissioner's wider functions under the DPA and FOIA. Second, in practice any amendment of the list of relevant services would follow consultation and agreement between the Ministry of Justice and the Information Commissioner. It would not appear necessary to take up a significant amount of Parliamentary time on a matter already considered in detail and agreed by the two organisations with expertise in that area. Third, the services in the proposed list are largely provided under the Commissioner's non-statutory duties, for example, one of the relevant services in the proposed list is the provision that the Commissioner may charge for more than one copy or versions of published material. The Ministry of Justice would only consider making an order in the future for services where it is clear that the service is something the Commissioner should be able to charge for and where it would be inappropriate and inefficient for the Commissioner to have to obtain the prior approval of the Secretary of State. Given these factors, the Government considers that the negative resolution procedure provides an appropriate level of parliamentary scrutiny.

PART 7: MISCELLANEOUS AND GENERAL

Clause 109(3): Power to make consequential provisions for the purposes of the Bill

Power conferred on: *Secretary of State*

Power exercisable by: *Order made by statutory instrument*

Parliamentary procedure: *Affirmative resolution where primary legislation is amended or repealed; otherwise negative resolution*

180. Clause 109(3) confers power on the Secretary of State to make such consequential provision as he or she considers appropriate for the purposes of the Bill. The power includes a power to make transitional, transitory or saving provision, and to amend or repeal any Act or subordinate legislation (subsection (4)(b) and (c)).

181. The powers conferred by this clause are wide. But there are various precedents for such provisions including section 333 of the Criminal Justice Act 2003, section 173 of the Serious Organised Crime and Police Act 2005, section 51 of the Police and Justice Act 2006 and section 148 of the Criminal Justice and Immigration Act 2008. There are far-reaching changes made by various provisions of this Bill and it is possible that not all of the consequences of them have been identified in the Bill's preparation; this is

particularly the case with the amendments made by Part 5 to the Safeguarding Vulnerable Groups Act 2006. The Government considers that it would therefore be prudent for the Bill to contain a power to deal with these in secondary legislation. To the extent that an order under this clause amends or repeals primary legislation, it will be subject to the affirmative resolution procedure, otherwise it will be subject to the negative resolution procedure (see subsections (5) to (7)). It is submitted that this provides the appropriate level of parliamentary scrutiny for the powers conferred by this clause.

Clause 110: Power to make transitional, transitory or saving provisions

Power conferred on: *Secretary of State*

Power exercisable by: *Order made by statutory instrument*

Parliamentary procedure: *None*

182. This clause confers power on the Secretary of State to make such transitional, transitory or saving provisions as he or she considers appropriate in connection with the coming into force of the provisions in the Bill. This is a standard power to enable the changes made by the Bill to be implemented in an orderly manner. Such powers are often included as part of the power to make commencement orders (for example, section 19 of the Bribery Act 2010) 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.

Clause 112: Channel Islands and Isle of Man

Power conferred on: *Her Majesty*

Power exercisable by: *Order in Council*

Parliamentary procedure: *None*

183. This clause enables Her Majesty by Order in Council to extend, with or without modifications, the amendments made by this Bill to Part 5 of the 1997 Act and the Safeguarding Vulnerable Groups Act 2006 to the Channel Islands and the Isle of Man. The provisions in Chapter 3 of Part 5 establishing the Disclosure and Barring Service may be similarly extended. The clause follows the example in section 168 of the Serious Organised Crime and Police Act 2005 which enabled Part 5 of the 1997 Act to be extended by Order in Council to the Channel Islands and the Isle of Man; this has been done, with appropriate modifications, in S.I. 2009/3215 (Guernsey), S.I. 2010/764 (Isle of Man) and S.I. 2010.765 (Jersey). This also follows the example in section 66(4) of the Safeguarding Vulnerable Groups Act 2006 which enables that Act to be similarly extended; this power has not yet been used. As with the powers conferred by the Serious Organised Crime and Police Act 2005 and

the Safeguarding Vulnerable Groups Act 2006 the power in this clause in not subject to any parliamentary procedure.

Clause 114(1) and (2): Commencement power

Power conferred on: *Secretary of State/ the Welsh Ministers*

Power exercisable by: *Order made by statutory instrument*

Parliamentary Procedure: *None*

184. Subsections (1) and (2) of clause 114 contain standard powers to bring provisions of the Bill into force by commencement order. They are conferred on the Secretary of State (subsection (1)) and, in respect of the provisions in Chapter 2 of Part 1, Chapter 1 of Part 3 and clause 56 and Schedule 4 insofar as they relate to devolved matters in Wales, on the Welsh Ministers (subsection (2)). As usual with the commencement orders, they are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by order enables the provisions to be brought into force at a convenient time.

Home Office
October 2011