PROTECTION OF FREEDOMS BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS

MEMORANDUM BY THE HOME OFFICE

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights (ECHR) in relation to the Protection of Freedoms Bill introduced in the House of Commons on 11 February 2011. The memorandum has been prepared by the Home Office with input from the Department for Education, Ministry of Justice, Northern Ireland Office and Cabinet Office. The Home Secretary has signed a statement under section 19(1)(a) of the Human Rights Act 1998 that, in her view, the provisions of the Bill are compatible with the Convention rights.

2. This is a human rights enhancing Bill. It seeks to protect the freedom of the individual by regulating the use of biometric data, surveillance camera systems, authorisations made under the Regulation of Investigatory Powers Act 2000 (RIPA) and powers of entry, by replacing certain stop and search powers and by permanently reducing the maximum period of pre-charge detention for terrorist suspects from 28 days to 14 days (as well as removing the possibility of extending the period by order from 14 to 28 days). It is also protected by making certain wheel-clamping unlawful, disregarding convictions for certain abolished offences and enhancing the independence of the Information Commissioner.

3. The publication of datasets and the extension of the Freedom of Information Act to companies wholly owned by two or more public authorities enhance the freedom of information regime and thereby help to protect the principle of freedom of information.

4. The provisions about criminal records protect the freedom of the individual by limiting the age at which people can apply for certificates and the persons to whom the information is revealed as well as by introducing additional safeguards into the regime. It also protects the wider freedom of society to live safely by providing for more regular up-dating of the certificates and making other minor amendments to the regime. The provisions about vetting and barring are also a mix of protecting the freedom of the individual from undue state interference while protecting the wider freedom of society to live safely.

5. This memorandum deals only with those clauses of and Schedules to the Bill which raise European Convention on Human Rights (ECHR) issues.

Part 1: Regulation of biometric data

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

Destruction, retention and use of fingerprints and samples taken under the Police and Criminal Evidence Act 1984

6. Clauses 1 to 18 amend the Police and Criminal Evidence Act 1984 ("PACE") to provide that DNA and fingerprints taken by the police in connection with the investigation of an offence are subject to a retention and destruction regime. The clauses clearly engage Article 8, and to a lesser extent appear to engage Articles 6 and 14.

7. These clauses represent the Government's response to the decision of the Grand Chamber of the European Court of Human Rights ("ECtHR") in *S and Marper v United Kingdom* (2008) 48 EHRR 1169. In that case the applicants complained that their fingerprints and cellular samples and DNA profiles were retained after criminal proceedings against them had ended with an acquittal or had been discontinued. The Administrative Court, Court of Appeal and House of Lords had all dismissed applications that this material should be destroyed.

8. The ECtHR found that the storage and retention of fingerprints and DNA samples and profiles constituted an interference with the right to private life under Article 8. It agreed that retention pursued the legitimate purpose of the detection and prevention of crime, but in relation to the justification for retention it noted that the power did not have regard to the nature or gravity of the offence, nor the age of the suspected offender; that the retention was not time limited, and material was retained indefinitely whatever the nature or seriousness of the offence; that there were limited possibilities for an acquitted individual to have the data removed; and that there was no provision for independent review of justification of retention. In conclusion, the Court found that the "blanket and indiscriminate nature" of the retention powers for fingerprints, samples and profiles of suspected, but not convicted, persons, did not strike a fair balance between the public interest of prevention of crime and the rights of the individuals to privacy. The United Kingdom had overstepped any acceptable margin of appreciation. The retention constituted a disproportionate interference with the applicants' right to respect for a private life and could not be regarded as necessary in a democratic society. Accordingly there had been a violation of Article 8.

9. In the light of the *Marper* judgment, Article 8 is clearly engaged by these clauses. Retaining people's fingerprints and DNA constitutes an interference with the right to private life which will only be lawful if it is in accordance with the law, in pursuit of a legitimate aim and is a proportionate means of achieving that aim. The Government is satisfied that the provisions will be "in accordance with the law" because they will be set out in detail in primary legislation, and it relies on *Marper* as

authority that retention for the purposes of the detection and prevention of crime pursues a legitimate aim. For a number of reasons the Government is also satisfied that the proposed retention regime is proportionate and compatible with Article 8 and fully implements *Marper*.

10. These clauses set out a new regime to replace both the existing regime in PACE, under which the fingerprints, DNA samples and DNA profiles taken from people in connection with the investigation of a recordable offence can be retained indefinitely, and also the replacement regime established by the uncommenced sections 14 to 23 of the Crime and Security Act 2010, under which the fingerprints and DNA profiles of people taken in connection with the investigation of any recordable offence – irrespective of its gravity – can be retained for six years. Instead, this Bill gives effect to the Coalition Agreement pledge to "adopt the protections of the Scottish model for the DNA database", and hence provides that the fingerprints and DNA profiles of a person who is not convicted can be retained only if he or she was charged with (or in limited circumstances arrested for) a serious violent or sexual offence, and then only for three years (subject to a two-year extension by order of the court).

11. In particular, the Government notes that the ECtHR in *Marper* referred to the position in Scotland with apparent approval. At paragraphs 109 and 110, it noted that "[t]he current position of Scotland, as a part of the United Kingdom itself, is of particular significance … This position is notably consistent with Committee of Ministers' Recommendation R(92)1, which stresses the need for an approach which discriminates between different kinds of cases and for the application of strictly defined storage periods for data, even in more serious cases".

12. The Scottish model was also advocated by the Parliamentary Joint Committee on Human Rights in its Twelfth Report of the 2009-10 Session. At paragraph 1.73, in its consideration of the Bill which led to the Crime and Security Act 2010, that Committee urged that:

> "[t]he Bill could be amended to adopt the Scottish model, which complies with the guidance of the Grand Chamber in *Marper* and the Council of Europe in its Recommendation on the use of DNA in the criminal justice system (R (92)1). The Scottish Government does not consider that this approach has undermined the ability of Scottish police to investigate criminal offences. While the Government argues that its approach has greater value for the purposes of the investigation and prevention of crime, the Scottish model is more likely to strike a proportionate balance between this important public interest and the right to respect for private life of those individuals whose samples are taken on arrest but who are subsequently not charged or convicted".

13. It is evident, therefore, that the measures in this Bill represent a very significant improvement in human rights terms compared to the regime which the ECtHR considered. The wide-ranging discretionary powers for the police to destroy or retain material are replaced with provisions which

will involve Parliament debating specific retention periods that will be set out on the face of legislation. Moreover, the Government considers that where a complex issue has been subjected to Parliamentary scrutiny, there is an argument that a wide margin of appreciation should be applied (for example, *Regina (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008]*).

14. Similarly, the Government considers that the retention proposals in this Bill are more readily justifiable in ECHR terms than those of the Crime and Security Act 2010. The provisions of that Act have been the subject of scrutiny by the Secretariat to the Committee of Ministers of the Council of Europe. The Secretariat welcomed some aspects of those provisions but remained unconvinced, in particular, that the previous Government had established that it was unnecessary to take into account the nature or gravity of the offence for which a person was arrested. The Government considers that those remaining concerns are met by the latest proposals, in particular because the seriousness of the original suspected offence is now to be a material criterion in determining if retention is appropriate.

DNA samples

15. The Government notes in particular that *Marper* held that the greatest interference with private life was caused by the retention of DNA samples (that is, the actual biological material taken from individuals), albeit that profiles too contained "substantial" amounts of unique personal data. Under clause 14 it is proposed to destroy all samples as soon as a profile has been obtained – a proposal that goes beyond the "Scottish model" – and the Government considers that this should go a long way to meeting some of the concerns as to excessive retention. In particular, fears as to "conceivable use of cellular material in the future", as noted in paragraphs 70 to 73 of *Marper*, can be allayed.

Modifications of the Scottish model

16. The Government acknowledges that in four specific respects, the proposals depart from the "Scottish model". In each case, the Government is satisfied that these modifications do not alter its conclusion that the proposals are compatible with the Convention rights.

17. Firstly, while the Scottish model allows for repeated extensions of the retention period, the proposals in this Bill allow only for a single extension. This avoids the possibility of allowing indefinite retention by the back door.

18. Secondly, it is proposed that in limited circumstances it will be possible to retain fingerprints and DNA profiles if a person is arrested for a "qualifying offence" but is not charged. Arrest requires only reasonable grounds for suspicion, whereas charging requires that there is sufficient evidence to provide a realistic prospect of conviction – a higher evidential test. Charging also requires that "where there is sufficient evidence to justify a prosecution or to offer an out-of-court disposal, prosecutors must go on to

consider whether a prosecution is required in the public interest."[1] However, the cases where retention without charge will be possible will be restricted to those where the circumstances make it particularly pressing to retain material for the purposes of the prevention or detection of crime. The detail of the circumstances will be set out in an order made by the Secretary of State subject to the affirmative resolution procedure. They might include, in particular, cases where the victim of the suspected offence was under 18, or was a vulnerable adult, or was in a close personal relationship with the arrested person. The decision whether to retain material in such cases will be taken by the independent Commissioner for the Retention and Use of Biometric Material. The Government considers that it is well within the Government's margin of appreciation to conclude that this is where the "fair balance between the competing public and private interests" lies. In reaching this conclusion it has taken into account the fact that there are many reasons why a person might not be charged, including poor prospects of a conviction because of intimidation or disappearance of witnesses. Its proposed approach thus recognises the particular public protection issues that arise from the difficult nature of proving some of the offences listed as qualifying offences.

19. Thirdly, the "Scottish model" restricts the retention of biometrics from people arrested for minor offences to cases where they are subsequently convicted <u>of that offence</u>, irrespective of whether that person had a previous conviction. The proposals in the Bill provide that the biometric data of a person who is arrested can be retained indefinitely if he or she has previously been convicted of any recordable offence. The Government is satisfied that this aspect of the proposals is proportionate and compatible with the Convention rights, even though it means that a person could be liable to have their data retained indefinitely on the basis of having committed a relatively minor offence a long time ago. This is because the public interest in retaining biometric data from people previously convicted of an offence is judged to be particularly strong, and the countervailing considerations of the presumption of innocence do not apply. The justification for retaining the data of convicted people is considered further in paragraphs 25 and 26 below.

20. Fourthly, it is intended to continue to allow speculative searching in all cases, rather than require that data be destroyed immediately after a decision has been made not to proceed further with criminal proceedings as is the case in Scotland. The Government accepts that following *Marper*, retention in itself constitutes an interference that must be justified as necessary at every step of the process. However, it considers that the additional degree of interference with a person's privacy resulting from the retention of an arrested person's fingerprints and DNA between the time a decision is made to take no further action and the time the speculative search results are obtained (only a few days at most) is very modest indeed. By contrast, the potential benefits for the prevention of crime and

[1] Paragraph 4.11, Code for Crown Prosecutors, February 2010

protection of others from checking to see whether biometric data can be matched against data taken from a previous crime scene are considerable. Once again, it is the Government's assessment that this modification of the Scottish model ensures a fair balance between the privacy of the individual and the need to facilitate the detection of offences.

21. An example of a case where demonstrable benefit arose from speculative searching is that of Mark Dixie, who was arrested for assault (not a qualifying offence) after getting into a minor scuffle in 2006 and subsequently released without charge. On a subsequent speculative search, his DNA was found to match a sample found at the scene of the murder of Sally Anne Bowman, and he was subsequently charged, convicted and sentenced to life imprisonment, with a minimum term of 34 years.

Juveniles

22. In proposing retention periods for juveniles, the Government has acted to balance the particular position of children in society, as highlighted in paragraph 124 of *Marper*, with the need to ensure that the retention policy reflects the period of peak offending (12-19 years).

23. For convicted juveniles, the Bill therefore bases retention on the length of custodial sentence, which would provide an approach which is individually risk-based. The DNA profile and fingerprints of juveniles on first conviction, reprimand or warning would be retained for five years, if the sentence was non-custodial, or for the length of sentence plus five years for those sentenced to immediate youth custody. Juveniles receiving a second reprimand or warning, a further conviction, or a first custodial sentence of over five years, would have their biometric data retained indefinitely, in the same way as convicted adults.

24. Juveniles who have been arrested or charged but not subsequently convicted would, as in Scotland, have their DNA profiles and fingerprints treated in the same way as adults, that is, not retained where the young person was arrested for or charged with a minor crime, and retained for three years where charged with more serious crimes, with the possibility of one two-year extension.

Convicted adults

25. The proposal that biometric data of adults convicted of any recordable offence may be retained indefinitely is made in the light of the unequivocal statement in paragraph 106 of *Marper* that "The only issue to be considered by the Court is whether the retention of the fingerprint and DNA data of the applicants, as persons who had been suspected, but not convicted, of certain criminal offences, was justified under Article 8, paragraph 2 of the Convention". In other words, the *Marper* judgment, the arguments the Court heard and the evidence it was presented with, were

all directed at the issue of retaining data from people who had not been convicted.

26. The Government accepts that the retention of convicted people's data still needs to be justified as necessary in a democratic society, but considers this is supported by the substantial contribution which DNA records have made to law enforcement. In particular, it notes the decision of the Court in *W v the Netherlands* [2009] ECHR 277 where a distinction was drawn between convicted and non-convicted people, and where the Court agreed with its previous decision in *Van der Velden v the Netherlands* no. 29514/05, 7 December 2006, that the interference caused by DNA retention was "relatively slight". Moreover, two central aspects of the Court's reasoning in *Marper* are not applicable to the case of convicted people. First, these proposals avoid the concern expressed at paragraph 123 that "weighty reasons" would be needed to justify a difference between the treatment of the private data of people who had been arrested compared to that of other innocent people. And secondly, the fact of the conviction means that there is no risk of "stigmatisation" (see paragraph 122), which the Court in *Marper* considered would arise if people who have not been convicted of any offence and are entitled to the presumption of innocence are treated in the same way as convicted people. Furthermore, the Government notes that under this Bill the retention of convicted adults' data will be subject to an additional safeguard in that clause 24 provides for binding guidance to be issued to the police on the destruction of DNA profiles. There is thus a mechanism to ensure that if in respect of a particular category of case it appears that retention of DNA is not justified, this can be addressed in practice.

Independent review

27. The Government has also considered carefully whether implementation of *Marper* requires some provision for independent review of a decision to retain DNA profiles and fingerprints in some circumstances. Paragraph 119 of the judgment cites the lack of such provision as a factor leading to the ECtHR's conclusion that the power then under consideration was blanket and indiscriminate.

28. The Government considers that the availability of judicial review of chief officers' decisions, in the context of the proposals set out in the Bill, provides a sufficient measure of independent review in most circumstances, and that it is not necessary to have a statutory appeal right against a decision not to destroy DNA profiles. The Government notes that the comments of the ECtHR mentioned above were made in the context of an indefinite and blanket retention policy which applied alike to DNA samples, profiles and fingerprints, irrespective of the gravity of the (alleged) offences, and in which there were no defined statutory criteria for early deletion of data. The context of the current proposals is very different. As the Parliamentary Joint Committee on Human Rights acknowledged (at paragraph 1.59 of its report mentioned above),

the Court stopped short of requiring independent oversight as a prerequisite for any retention regime.

29. Moreover, clause 1 sets out circumstances in which chief officers will be required to arrange for DNA profiles and fingerprints to be deleted in advance of the expiry of a statutory retention period. The legislation thus sets out clearly defined criteria as to when deletion is appropriate, and imposes a duty on chief officers to delete records pro-actively in those circumstances. It will also be open to individuals who feel aggrieved by the continuing retention of their biometric data to request deletion in such circumstances. These proposals thus allow for an individualised examination of the justification for retention against statutorily defined criteria. Though it is true that decisions as to deletion will be taken by the same chief officer of the police force that took the DNA, clause 24 provides for mandatory national guidance to be in place to minimise the "postcode lottery" effect of variations in the approaches taken by different forces. In addition, in the case of retention in circumstances where a person has been arrested for, but not charged with, a serious offence decisions on retention with be taken by the independent Commissioner for the Retention and Use of Biometric Material.

Article 6

30. An issue arises as to whether Article 6 is engaged by the absence of an express appeal right by a person who is dissatisfied with a decision that his or her data be retained. However the Government considers that there is no civil right in play which would require a hearing by an independent and impartial tribunal. Even if there were, it considers that the availability of judicial review should be sufficient to satisfy the requirements of Article 6 in line with case law which establishes that in specialised areas of law Article 6 may be satisfied by an appeal on a point of law to a judicial body with limited jurisdiction as to matters of fact.

Article 14

31. An issue also arises as to whether Article 14 is engaged. The applicants in *Marper* claimed that the retention of their data constituted discriminatory treatment under Article 8 taken with Article 14, in that they were treated less favourably than other people whose data were not retained. The Court decided that it did not need to examine this complaint, given that it had already concluded that there was a violation of Article 8. Accordingly the judgment of the House of Lords on this issue still stands. Their Lordships decided that the difference of treatment relied on by the applicants was not based on “status” as required by Article 14: the difference simply reflected the historical fact, unrelated to any personal characteristic, that the authorities had already taken material from the applicants. Even if this was wrong, any difference in treatment was objectively justified.

32. The Government notes that the question of what constitutes "status" is now to be considered in the light of *Clift v United Kingdom* (application 7205/07, judgment 13 July 2010) where the ECtHR held that the protection of Article 14 is not to be limited to different treatment based on characteristics which are "personal" in the sense that they are innate or inherent. Even so, the Government is doubtful that the fact that a person has had their fingerprints or DNA taken can be considered a "personal" characteristic in any sense. And in any event, the Government considers that there are compelling arguments to justify any difference in treatment between people who are liable to have their data retained under this Bill and those who are not. In reaching these conclusions, the Government has regard to the judgment in *Van der Velden v Netherlands* cited above, where the ECtHR held that the applicant's claim of a breach of Article 14 was manifestly ill-founded because he was not treated any differently from other persons convicted of an offence of comparable severity, and because even if his situation was analogous to those of people who did not have to give their DNA, any difference of treatment was justified having regard to the aim of DNA testing of a specific category of convicted persons. In the present case, the Government considers that differences in treatment resulting from the retention of data of specific categories of people can be justified having regard to the purposes of the prevention and detection of crime, and the need to apply these provisions in a targeted way, rather than on a blanket and indiscriminate basis.

<u>Retention of DNA and fingerprints for purposes of counter-terrorism and national security</u>

33. Following the decision in *Marper*, it is clear that the retention of fingerprints and DNA samples and profiles engages Article 8. *Marper*, however, does not specifically address the extent to which the retention of biometric material for national security purposes may be justified. Indeed, at paragraph 58 of its judgment, when setting out the relevant provisions of Article 8, the Strasbourg Court makes no reference to justification of interference with Article 8 rights on the grounds of national security. The Court's focus is instead on whether it is necessary to retain material for "the prevention of disorder or crime".

34. There is, in the Government's view, a distinction to be drawn between retention of material for the purposes of the prevention of disorder and crime, and the purposes of national security or counter terrorism. Where national security interests may be engaged, it is impossible to prescribe in advance for how long it may be justifiable to retain such material. National security and terrorism investigations are often prolonged, with the effect that set retention periods could have potentially damaging consequences on the ability to investigate threats. In addition, terrorism is recognised as a special category of crime and there is limited evidence on recidivism.

35. The ECtHR in *Marper* does, however, make clear that a policy of, *"blanket and indiscriminate"* retention of biometric material does not strike a fair balance between the public interest in the prevention of crime and the

rights of individuals to privacy. The Government considers that the indefinite retention of all biometric material in the interests of national security would consequently be difficult to justify within the terms of Article 8(2).

36. Accordingly, it has been decided to impose further limits on the retention of material taken under the Terrorism Act 2000 and the Counter Terrorism Act 2008 where this material has been taken or obtained from individuals who have no relevant conviction history. The retention periods for DNA profiles and fingerprints that have been set in Parts 1 and 3 of Schedule 1 for these "unconvicted" individuals are for a maximum of three years for fingerprints and profiles taken under section 18 of the Counter Terrorism Act 2008, or where a person has been detained under section 41 of the Terrorism Act 2000. Where a person has been detained under Schedule 7 to the Terrorism Act 2000, the maximum retention period if he or she has no relevant conviction history is six months. It should be noted that retention periods will be the same irrespective of the age of the individual on the date of his or her detention.

37. The Government considers that these retention periods strike an appropriate balance between respecting the right to privacy of the individuals concerned and preventing and detecting crime and disorder and protecting national security (including counter-terrorism). The limited purposes to which the material may be put are specified in the Bill and, in the view of the Government, fall squarely within the scope of the legitimate purposes set out in Article 8(2).

38. The respective retention periods have been adjusted to reflect the circumstances in which the material is taken. The lower retention periods in the case of persons detained under Schedule 7 to the Terrorism Act 2000 reflect that a person may be detained under Schedule 7 without suspicion. The purpose of detention under Schedule 7 is to establish whether or not the individual appears to be a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism within the meaning of section 41(1)(b). Accordingly it is right that the retention of material taken from such a person should be for a lesser period than if he or she is arrested under section 41 of the Terrorism Act 2000 which covers those reasonably suspected of being a terrorist.

39. As to material that is subject to section 18 of the Counter Terrorism Act 2008, the Government notes again that nothing in *Marper* is directed at the question of the legitimacy of retaining data from people who have been convicted. By limiting the retention periods for such data to 3 years for "unconvicted" persons, Part 3 of Schedule 1 reduces the level of interference with Article 8 rights that may be occasioned by section 18.

40. The imposition of "level" retention periods which do not take into account the age of the individual concerned is considered proportionate given the relatively low retention periods now applicable, and noting that evidence

with respect to the offending history of minors does not support a more lenient regime.

41. The Government further considers that it is necessary to make provision for a limited extension of retention of fingerprints and DNA profiles taken from "unconvicted" persons (whether that material is subject to PACE, the Terrorism Act 2000 or the Counter-Terrorism Act 2008) where it is determined necessary to do so in the interests of national security. Clause 9 and Schedule 1 provide that the responsible chief officer of police (or, in the case of section 18 of the Counter-Terrorism Act 2008, the responsible officer) may determine that material which otherwise would be required to be destroyed may be retained for a further maximum period of 2 years. A national security determination may be renewed. The Government considers it essential that there should be a mechanism for keeping material beyond statutory time limits for the specified statutory purposes where national security interests are engaged. By avoiding a blanket retention period in such cases, and instead requiring the responsible officer positively to consider and review the national security justification at regular intervals, the Government considers that the interference can be justified within the meaning of Article 8(2).

42. Although not required by *Marper*, the Government considers that it is appropriate that a national security determination should be the subject of independent scrutiny. To that end clause 20 introduces an Independent Commissioner whose function it will be to review each and every national security determination, and the uses to which the material is put. The Commissioner will have the power, following his or her review, to quash a national security determination. The intention being that the justification for the interference with Article 8 rights in those circumstances will be independently reviewed in every case. The Government considers that this will add a further layer to the protection afforded to individuals where national security interests are said to be engaged. This protection will further be enhanced by the Commissioner's reporting role: the Commissioner is required by clause 21 to report annually to the Secretary of State regarding his or her functions.

43. Although there is to be no opportunity for an individual to appeal a national security determination (since any individual will in most instances be unaware of the national security determination), the Government does not consider that this constitutes any additional interference with Article 8 rights. Nothing in *Marper* would confer a right of appeal in these circumstances: as indicated above, the ECtHR's decision does not touch on the retention of material for national security purposes. There is to be no blanket retention of material in the interests of national security, and instead both the responsible officer and the Commissioner will independently evaluate the case for retention on national security grounds. By establishing a review function, the proportionality of interference will be closely assessed, and the individual's Article 8(1) rights safeguarded as closely as possible.

44. The Government notes that to confer a right of appeal against the national security determination would require the requesting officer to inform the individual that extended retention of the material is considered necessary for national security purposes. This would effectively require the authorities to put the individual on notice of the national security concern in issue, which could serve to undermine the very national security interest at stake. Accordingly, even if (which the Government does not accept) it were considered that Article 8(1) could or should confer a right of appeal in these circumstances, the decision not to extend such a right would be proportionate within the meaning of Article 8(2). It is in any event difficult to envisage what practical use an appeal right would serve in this context. The individual concerned would probably not be in a position factually to challenge the national security case that had been made, and Article 8(2) does not appear to confer any discrete right to challenge the state's assessment of its national security interests.

Chapter 2: Protection of biometric information of children in schools etc.

45. Biometric identification systems are being used in some schools to provide children with access to services such as catering facilities and access to school equipment and library facilities; they can also be used for recording and monitoring attendance at school.

46. Article 8 includes the right to respect for an individual's personal information. The use of a child's biometric information by a school[2] for the purposes of a biometric identification system is likely to constitute an interference with this right. Any such interference will only be lawful if it is in accordance with the law, in pursuit of a legitimate aim and is a proportionate means of achieving that aim. The Data Protection Act 1998 already offers some protection to ensure the Article 8 right to respect for privacy of personal information; such protection extends to the processing of biometric information relating to children.

47. Chapter 2 of Part 1 aims to provide further protections in addition to those provided by the Data Protection Act 1998 in relation to the processing[3] of a child's biometric information by requiring parental consent[4] to be obtained in writing before a child's biometric information can be used or otherwise processed by a school and by ensuring that such processing will not take place if a child refuses to participate in a biometric identification process. A child's refusal will override parental consent; equally, a parent's refusal to consent will be determinative of the issue.

48. Parental consent is to be sought in respect of all children under 18 years of age. This means that if a parent refuses to consent to the processing of

[2] The relevant clauses also apply also to institutions in the further education sector (including sixth form colleges and 16 to 19 Acadamies).
[3] 'Processing' includes obtaining, using, recording and storing the personal data of a child.
[4] Namely, the consent of a parent or other person who has the main responsibility for the care of a child.

his or her child's biometric information, a school must not in any way use or otherwise process such information – even if a child agrees to the processing. It could be argued that where a child (namely one who is able to understand what is being asked of him or her) is content for the school to process his or her biometric information, lack of parental consent should not be the determining factor. In such circumstances, the requirement for parental consent may be considered to be an interference with a child's right to make his or her own decisions and for those decisions to be respected.

49. In the case of *Pretty v United Kingdom* [2002] 2 FLR 45, the Court stated that, *"although no previous case has established any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of the guarantees [in that Article]".*

50. In *Torbay Borough Council v News Group Newspapers* [2003] EWCH, 2927, Mr Justice Munby, at paragraph [36], stated that:

> *"The personal autonomy protected by Article 8 embraces the right to decide…whether that which is private should remain private or whether it should be shared with others. Article 8 thus embraces both the right to maintain one's privacy and, if this is what one prefers, not merely the right to waive that privacy but also the right to share what would otherwise be private with others or, indeed, with the world at large."*

51. If the requirement to obtain parental consent in respect of a child of any age is a measure that may, in certain circumstances, constitute an interference with a child's right to respect for his or her private life (that is, the wishes of the child will be subject to the wishes of the parent), then in order for that interference to be lawful, it must comply with the conditions specified in paragraph (2) of Article 8.

52. The law relating to parental consent is not set out in any clear or coherent legal framework. Modern case law trends support the approach adopted in the landmark decision in *Gillick v. West Norfolk and Wisbech Area Health Authority* [1986] AC 112, namely that a parent's right to make decisions relating to his or child will in time yield to a child's right to make his or her own decisions where the child has reached a sufficient level of understanding and maturity such that the child understands the nature of the decision to be made - including the potential implications and risks involved. It can, therefore, no longer be accepted that children remain under parental control in all respects until a particular specified age.

53. However, in a number of instances, Parliament has seen fit to specify the age below which a child lacks legal capacity for certain purposes or where parental consent is required - for example, the right to marry[5], the capacity

[5] Section 3 of the Marriage Act 1949.

to make a valid will[6], the giving of consent to medical treatment[7] and the capacity of a child to hold a legal estate in land[8]. It is, therefore, possible for legislation to be enacted that requires parental consent to be obtained in relation to children of specified ages – including all children under 18 years of age. In addition, the common law provides protection to children who enter into contracts. The general rule is that any contract that is obviously prejudicial to a child (which would include contracts for loans) are void. Contracts that might be enforceable against a child include those that are for necessities of life such as food, clothes, lodging and contracts of service and apprenticeship if these are clearly beneficial to the child.

54. The Government's aim in imposing an obligation on schools to obtain parental consent is not only to protect the rights and freedoms of children in relation to the use of their personal information by schools but also to protect the rights and freedoms of parents (who have the primary responsibility to care for and to protect a child) to make decisions relating to the processing of a child's biometric information with the aim that parents are able to protect a child's biometric information. Parents should be able to act on any concerns that they may have about the use of a child's biometric information and, should ultimately, be able to prevent schools processing such information.

55. In the case of younger children or where a child lacks the capacity to understand the nature of the decision to be made, the requirement to obtain parental consent is clearly an important and proportionate safeguard against unwarranted intrusion by schools into a child's private life. In such cases, it would be difficult to identify an alternative means of ensuring that a child's right to privacy of information is protected.

56. In relation to older children, who may have some capacity to understand the issues relating to the processing of their biometric information, the issue of whether the obligation to obtain parental consent is proportionate is arguably less clear. The Government is of the view that, in light of the factors set out below, such a measure is a proportionate means of ensuring that personal information relating to children under 18 is adequately safeguarded. The factors are:

    (a) the importance of biometric information due to its very private and intrinsically personal nature (namely information that is physiologically unique to that individual and from which he or she can be identified);

    (b) the implications of a culture of increased surveillance and the desensitising influence of this on children's perceptions as to the use of their personal information;

    (c) the potential risks and implications around data security; and

[6] Section 7 of the Wills Act 1837.
[7] Section 8 of the Family Law Reform Act 1969.
[8] Section 1(6) Law of Property Act 1925.

(d) the ability of children fully to understand the issues that arise in relation to the processing of biometric information (in particular, the factors set out in (a) to (c) above).

57. For these reasons the Government is of the view that, whilst it is important that children should have the right to refuse to give their personal data, it is equally important that parents are able to protect a child's biometric information by withholding consent and thereby prohibiting the processing of such information. This approach serves to enhance the protections already in place under the Data Protection Act 1998 in relation to the right to respect for a child's personal information which is provided under Article 8.

58. Respect for a child's wishes and feelings in relation to the use of his or her biometric data are provided for by the clauses in that, irrespective of the competence of the child to make decisions relating to such use, a child may refuse or object to his or her biometric information being taken or used by a school or college and that parental consent will not override such refusal or objection.

59. Whilst the wishes of the child (where he or she is happy to participate in a biometric identification system) will not be determinative of the issue, it is important to bear in mind that the child will not, as a consequence, be at any practical disadvantage. This is because, where a child's biometric data is not to be processed, schools and colleges are under an obligation to provide reasonable alternative measures enabling the child to be able to access the services or facilities that he or she would have been able to access if using a biometric system.

60. The Government is therefore of the view that the provisions in Chapter 2 of Part 1 amount to additional safeguards in relation to the processing of a child's biometric information and, in this context, enhance the rights of a child under Article 8.

61. The clauses support the rights and protections afforded to children under the United Nations Convention on the Rights of the Child ("UNCRC"), in particular Articles 5, 12 and 16.

62. Article 5 places an obligation on States Parties to the UNCRC to respect the responsibilities, rights and duties of parents (and other who are legally responsible for the child) to provide appropriate direction and guidance to the child in the exercise of the child's rights. The requirement for parental consent to be obtained enables a parent to exercise such rights in order to protect a child's right to privacy of information which is provided for in Article 16 of the UNCRC.

63. Article 16 of the UNCRC is similar to the rights enshrined in Article 8 of the ECHR in that it requires that no child shall be subject to arbitrary or unlawful interference with his or her privacy; the clauses referred to above

provide the protection of the law against such interference by requiring parental consent to be obtained and ensuring that no such interference can lawfully take place if the child objects.

64. Article 12 of the UNCRC provides that a child, who is capable of doing so, should be able to express his or her own views freely in all matters affecting the child; clause 26 ensures that the child's views are given due weight in relation to his or her biometric data by prohibiting any processing of such data if the child objects even if parental consent has been obtained. Where the child agrees to his or her biometric information being processed for the purposes of a biometric identification system but parents do not consent to such processing, the views of the child will not override parental refusal to consent; however, for the reasons set out in paragraph 59(a) to (d) above, the Government's considers that in relation to the processing of a child's biometric information it is appropriate that the rights and duties of parents under Article 5 of the UNCRC should prevail.

Part 2: Regulation of surveillance

Chapter 1: Regulation of CCTV and other surveillance camera technology

65. Clauses 29 require the Secretary of State to produce a Code of Practice which will contain guidance on surveillance camera systems, such as closed circuit television (CCTV) and automatic number plate recognition systems. The Code will provide guidance on matters such as whether it is appropriate to use a surveillance camera system, and the location of cameras. The Code will initially only apply to local authorities and the police, although there is power to add further bodies by order (clause 33). Although the Government acknowledges that, in some instances, recording and/or disclosure of data captured by CCTV systems may give rise to interference with an individual's private life, we do not consider that the duty to produce a Code of Practice gives rise to an interference with Article 8. Indeed, the Government considers that the introduction of new standards through the Code of Practice will strengthen an individual's right to respect for his or her private life.

Chapter 2: Safeguards for certain surveillance under RIPA

66. Chapter 2 of Part 2 introduces a new requirement that local authorities may only use the investigatory powers currently available to them under the Regulation of Investigatory Powers Act 2000 ("RIPA") where the use of that power has been approved by a justice of the peace (in Scotland, a sheriff, and, in Northern Ireland, a district judge).

67. The coming into force of RIPA coincided with the coming into force of the Human Rights Act 1998. The main purpose of RIPA was to ensure that the relevant investigatory powers are used in accordance with the Convention rights, particularly Article 8. RIPA specifies the purposes for which the

powers can be used, which authorities may use the powers, how the use of the powers may be authorised and the use that may be made of the material gained. It also establishes independent judicial oversight of the use of the powers, and a means of redress for an aggrieved individual through the Investigatory Powers Tribunal.

68. Local authorities are presently able to deploy three surveillance techniques under RIPA: the acquisition and disclosure of communications data, directed surveillance and covert human intelligence sources. Local authority use of such techniques is already circumscribed by RIPA and the statutory instruments made under it. An authorising officer of a local authority may not presently authorise the use of the techniques unless he or she believes that the authorisation is necessary for the purpose of preventing or detecting crime or for preventing disorder, and believes that the use of the technique is proportionate to what is sought to be achieved by carrying it out. The authorising officer must be of a prescribed rank, and must comply with all other statutory restrictions relating to the authorisation process.

69. The Government is satisfied that the existing RIPA regime for authorising the use by local authorities of investigatory powers complies with Article 8. The Government now wishes to place further controls on the use of these powers by local authorities. Clauses 37 and 38 have the effect that local authorities may not use their surveillance powers unless the use of the power has been approved by a justice of the peace. The justice of the peace will be required to assess whether the use of the power is necessary and proportionate, and whether the authorisation for its use was made in accordance with the law, before approving the authorisation. In providing for independent judicial scrutiny of every authorisation, the balancing exercise required by Article 8(2) will now be addressed at two discrete stages, with the effect that greater protection for human rights will be afforded.

70. The fact that a justice of the peace has approved the local authority's use of the authorisation will not affect an aggrieved individual's right to seek redress in the Investigatory Powers Tribunal. Paragraph 9(3) of Schedule 7 provides that a person who is aggrieved may make a complaint to the Investigatory Powers Tribunal notwithstanding that the authorisation has been judicially approved. Thus the Government does not consider that the new approval process could serve to limit the rights conferred by Articles 6 or 8.

Part 3: Protection of property from disproportionate enforcement action

Chapter 1: Powers of Entry

71. Chapter 1 of Part 3 give the Secretary of State powers to repeal, add safeguards to, or rewrite (with a view to rationalisation) existing powers of entry and associated powers. These powers must be exercised by order. In addition, clause 39 and Schedule 2 provide directly for the repeal of

various obsolete or unnecessary powers of entry which are currently in primary and secondary legislation. The Government does not consider that these clauses infringe any ECHR rights. Indeed, when existing powers of entry are repealed, or new safeguards added, this will reduce any interference with the Article 8 rights of persons whose land or premises can currently be entered. It is possible that an order to rewrite powers of entry or associated powers could engage Article 8, but the power provided in this Bill is simply an enabling power. Any order must itself be compliant with the ECHR, and it is clear that the intention of exercising the power to rewrite is to provide a greater level of protection to the individual than the existing powers of entry.

Chapter 2: Vehicles left on land

Offence of immobilising etc, vehicles

72. Clause 54 introduces a new offence where a person either immobilises or moves or restricts the movement of a vehicle, without lawful authority.

73. The Government considers that Article 1 Protocol 1 (right to peaceful enjoyment of property) might be engaged by the introduction of this offence in two possible ways. Firstly, it could be engaged in the context of wheel-clamping operatives who might argue that they are being deprived of the use of their equipment. Secondly, it could be engaged in the context of landowners, who might argue that it interferes with their enjoyment of their land, by preventing them from deterring unwanted parking or removing unwanted vehicles effectively and economically. Both scenarios are dealt with in turn.

74. The Government also considers that Article 8 might be engaged in two possible ways. Firstly, it could be engaged in the context of wheel-clamping operatives who might argue that they are being deprived of their livelihood as clampers. Secondly, it could be engaged in the context of landowners who might argue that there is interference with their right to respect for their home.

Impact on wheel-clamping operatives

75. In respect of wheel-clamping operatives, the Government considers that there may be an interference with the rights conferred by Article 1 Protocol 1. However, any such interference is both in pursuit of a legitimate aim and necessary and proportionate. In other words, it strikes a fair balance between the demands of the general interest of the community, and the protection of the individual's rights. Article 1 Protocol 1 is a qualified right, and a State has the right to enforce laws which it considers necessary to control the use of property in accordance with the general interest.

76. Here, the general public interest in banning vehicle immobilisation is to protect motorists from being deprived of the use of their vehicle, and from widespread abusive practices, including inadequate signage, extortionate

release fees, and the absence of an effective means to contest a charge. Successive governments have received numerous complaints from motorists who have suffered such abusive practices. The Government considers that six years of licensing of the wheel-clamping operatives by the Security Industry Authority has not managed to eliminate these abuses.

77. The Government considers that a ban on vehicle immobilisation is necessary because the problem of the motorist suffering loss of the vehicle when it is immobilised cannot be rectified by regulating the activity. The Government has considered a range of alternatives (as set out below) and has concluded that none would be sufficient to protect the public interest.

78. Firstly, a voluntary code of practice would have no effect on those who are responsible for the worst abuses in the industry, since they would not be obliged to follow it. Secondly, banning only vehicle immobilisation which charges a release fee would still leave motorists vulnerable to being denied access to their vehicle for potentially lengthy periods until it is released, and possible intimidation. Further it is unclear how the enforcement of clamping could work without a release fee. Thirdly, the Government considered setting maximum release fees and minimum requirements for signage, but these standards would be very difficult to police in practice without a comprehensive system of regulation. Fourthly, the Government considered restricting operators to members of an approved trade organisation, but concluded that it would be difficult to prevent clamping by non-members.

79. Finally, the regulatory system based on business licences as provided for in section 42 of the Crime and Security Act 2010 would be prohibitively expensive to operate. It would have cost a minimum of £2 million to set up the appeals system for motorists, and further public funding would be needed to maintain the system. Given that none of the alternative options would have been sufficient to protect the motorist, the Government considers that the ban is a proportionate response to the problem. Further, the policy is proportionate because the Government is not imposing a total ban, given that vehicle immobilisation where there is lawful authority (pursuant to existing statutory powers) will continue.

80. The Government considers that the effect of banning vehicle immobilisation will be a control on the wheel-clamping operatives' use of their property rather than a deprivation of property, given that there will be no outright seizing of the equipment by the State. This distinction is important, because the case law suggests that in cases of control on the use of property, a fair balance between the general public interest and the individual's rights does not generally require compensation – see Baner v Sweden (1989) 60 D & R 125, E Com HR.

81. The Government considers that the new offence strikes a fair balance, in that it does not subject any individual to an excessive burden or to

arbitrary treatment or uncertainty. In so far as the control on use of property adversely affects wheel-clamping operatives, they can mitigate this loss by selling their equipment on to other wheel-clamping operatives. Notably, wheel-clamping by local authorities on public land will continue pursuant to existing statutory powers, which might constitute a possible market for the equipment. There are also opportunities to sell clamping equipment to individuals who use clamps to secure their own vehicles, trailers and caravans. For example, it appears that there is a flourishing market for clamps on eBay (a search produced over 1,300 results).

82. The Government considers that any interference with Article 8 is justified for the reasons outlined above in relation to Article 1, Protocol 1. In particular, the Government relies on the fact that the government is not imposing a total ban, and therefore wheel-clamping will continue pursuant to existing statutory powers, for example by local authorities. It will also be open to wheel-clamping operatives to diversify their business by moving into other forms of parking enforcement, such as ticketing and barriers.

Impact on landowners

83. Secondly, in respect of landowners, it could be argued that the vehicle immobilisation ban restricts the right to peaceful enjoyment of land, because the landowner cannot use wheel-clamping to remove unwanted vehicles parked on their land, or to deter parking on their land.

84. The Government considers that there would be no interference with the rights conferred by Article 1, Protocol 1 here, because the landowner would be able to use other methods to prevent unwanted parking, including barriers, where appropriate. Clause 54 is clear that restricting the movement of a vehicle by a barrier which was present when the vehicle was parked does not fall within the offence. Secondly, pursuant to clause 55, the police will have extended powers to remove vehicles illegally, obstructively or dangerously parked, abandoned or broken down. Therefore, landowners will be able to request assistance from the police in removing unwanted vehicles.

85. Alternatively, the Government considers that, if there is interference under Article 1 of Protocol 1, any such interference is proportionate, for the reasons detailed above. Crucially, the offence is not one of strict liability, nor does it involve a reverse burden of proof. The mens rea requirement ensures that the offence cannot be committed unless the individual intended to prevent or inhibit the removal of the vehicle. This means that a landowner who moved a vehicle a short distance, intending only to regain access to their property would not be guilty of the offence. The Government considers that this acts as an important safeguard. Finally, the new offence is triable either way and punishable by fine. Guidelines in relation to mode of trial and sentencing will ensure that penalties are proportionate.

86. In respect of Article 8, the Government considers, for the reasons outlined above, that there is no interference; alternatively, the Government considers that any interference with Article 8 is justified.

Vehicle keeper liability for parking charges in certain circumstances

87. Clause 56 and Schedule 4 will, subject to certain conditions, impose liability on a keeper of a vehicle (as recorded by the DVLA) for unpaid contractual parking charges incurred by a driver who parks on private land.

88. The most likely ECHR right to be engaged on the part of the keeper is Article 8, that is, the right to respect for the vehicle keeper's private life, and the right to peaceful enjoyment of possessions under Article 1, Protocol 1. These rights of the keeper have to be balanced against the equivalent rights of landowners under those articles. The Government considers that the proposed statutory scheme, when viewed in the light of the protections discussed below, will strike a fair and proportionate balance between all these rights.

89. The provisions as regards keepers 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 an improved means, other than clamping or towing, of controlling parking on their land.

90. These provisions are separate from, and unrelated to, the statutory scheme under which local authorities issue penalty charge notices (commonly known as "parking tickets") for parking contraventions on public roads or in local authority car parks. Under Part 6 of the Traffic Management Act 2004, local authorities have power (if their area is designated under Schedule 8 to that Act) to effect civil enforcement of parking contraventions. This entails the issue of a penalty charge notice under the Civil Enforcement of Parking Contraventions (England) General Regulations 2007 (or their equivalent in Wales) by the local authority instead of criminal enforcement by the police. The penalty charge notice can be fixed to the vehicle or given to the person appearing to be in charge of the vehicle (or, if the driver drives off as the ticket is about to be placed on the windscreen, the notice can be sent in the post to the keeper).

91. Under that statutory regime, it is the keeper of the vehicle who is liable to pay the penalty charge, regardless of who was driving (regulation 5 of the 2007 Regulations). The Government is not aware of any successful human rights challenges to keeper liability under that statutory regime. Schedule 4 will be more generous to the keeper than the statutory regime since the keeper will be liable only if the landowner / car park operator does not know the name and address of the driver. Under the statutory regime, the keeper is liable even if the local authority knows both that the keeper was not driving at the time and knows the name and address of the driver. Furthermore, the right to enforce against the keeper will only

crystallise where the keeper is unable or unwilling to provide the name and address of the driver.

92. Where the statutory regime does not apply so that landowners cannot rely on the local authority to issue penalty charge notices in order to control or prevent parking on the landowner's property, they may seek to control parking on their land by putting up notices to the effect that a charge will be payable by those who park on the land (which may give rise to a contract under which a charge will be payable).

93. The difficulty for landowners is that, unlike the statutory scheme under which the keeper is liable, the contract relating to parking on private land is with the driver rather than the keeper and the latter may indeed not be, or falsely deny being, the driver. Moreover, landowners will rarely know the name and address of a driver but will much more reliably be able to trace the details of a vehicle's keeper by applying to the DVLA stating the registration number. The Government understands that the proportion of cases where the keeper denies being the driver is increasing. In such a case, the landowner is unlikely in practice to be able to pursue payment if the driver who was party to the contract cannot be identified.

94. Until now, landowners have had the alternative remedy of clamping or removing the vehicle. But once that is banned by this Bill, the only options available to a landowner, without these provisions, would be to erect a barrier (which not all can do and which may not receive planning consent) or to attempt to find and hold the driver liable for the parking. For the landowner to be left in this position would create an imbalance between on the one hand, the rights of drivers and keepers (which are protected by the clamping and towing ban) and on the other, the rights of landowners.

95. The provisions in Schedule 4 are intended to redress the balance. They will impose liability on a keeper to pay unpaid contractual parking charges incurred by a driver who parks on private land, but only if the driver would have been liable under the law of contract. This is a necessary and proportionate interference with the rights of the keeper under Article 8 and Article 1, Protocol 1, if indeed these rights are engaged at all, for the reasons set out below.

96. If the keeper was not the driver liability will be imposed on the keeper only if he or she does not give the name and address of the driver.

97. These provisions do not, however, require the keeper to disclose who was driving. He or she can choose not to. And if the landowner knows the name and address of the driver without being told this by the keeper, the keeper will nevertheless avoid liability (if he or she was not the driver). This is in contrast with the requirement in section 172 of the Road Traffic Act 1988 for keepers to disclose the identity of the driver in relation to criminal offences committed by the driver of a vehicle.

98. If the keeper was the driver (which will usually be the case) or is happy to accept responsibility for payment on behalf of the driver, there appears no reason why he or she should not have to pay any enforceable contractual charge for parking. And as he or she does not need to disclose for this purpose that he or she was the driver, human rights issues about disclosure do not arise.

99. The only increased restriction compared with the current position in the law of contract will be that the keeper cannot avoid paying by denying that he or she was the driver. But even if whoever was actually driving, whether this was the keeper or someone else, has the right to deny that he or she was the driver, and to rely on that denial to escape liability, that right must be balanced against the rights of landowners; in particular, the rights of landowners under Article 8 and Article 1, Protocol 1 not to have their home or other land trespassed on and obstructed. The Government considers that the balance lies in favour of not permitting an untrue denial by the keeper to outweigh the rights of the landowner.

100. The Schedule gives an additional protection compared with the current law of contract, by requiring a ticket to be given at the time the vehicle was parked. So the driver (whether the keeper or someone else) will be alerted to check the car park signs for visibility and content before he or she even leaves the car park. In a small minority of cases, the keeper may not know who was driving. So, if a valid contract arose with the driver, and if its terms are enforceable then the keeper will be liable to pay the contractual charge. In that small minority of cases, the main disadvantage to the keeper is that, since he or she was not present on the day, no evidence can be given to rebut the assertion that the signs' visibility and content created a valid contract for payment of the amount sought. As he or she does not know who the driver was, the keeper cannot ask the driver about those matters either. In addition, if the keeper wants to deny liability then the only current route is in the courts.

101. However, the car park operator / landowner will have to both assert the contract (by bringing proceedings for enforcement of the contract before the County Court) as well as satisfy the court with evidence that the various factors required to make up a valid and enforceable contract for the amount sought existed at the time. For instance, that the signs were adequate and visible, and that they created the contractual terms asserted.

102. A further safeguard for the keeper is that the sole Government-accredited trade association for the parking sector is currently piloting an independent appeals / complaints body for parking charges on private land. It is envisaged that this body will provide a forum other than a court in which to challenge contractual liability for a parking charge. The Government does not at present propose to commence the provisions in Schedule 4 until this body, or an equivalent, is operating throughout the country. This will mean that the keeper can choose to challenge liability in

a less formal setting, and using less formal procedures, than going to court.

103. Finally, Schedule 4 will also exempt the keeper from liability if the car was stolen.

104. For all these reasons, the provisions relating to keeper liability are considered to be consistent with Article 8 and Article 1, Protocol 1 and to strike a fair balance between the competing rights of vehicle keepers on the one hand and landowners/car park operators on the other.

Part 4: Counter-terrorism powers

Reduction of maximum period of pre-charge detention of terrorist suspects under Schedule 8 to the Terrorism Act 2000 to 14 days

105. Clause 57 reduces the maximum period of pre-charge detention for terrorist suspects under Schedule 8 to the Terrorism Act 2000 from 28 days to 14 days. It also repeals the provisions in the Terrorism Act 2006 which allow the Secretary of State to make an order which has the effect of providing, for any period of up to a year, that the maximum period of detention for terrorist suspects is 28 days.

106. Article 5 provides that everyone has the right to liberty and security of person. No one shall be deprived of their liberty unless that the detention falls within one of the six specified exceptions in Article 5(1) and is in accordance with a procedure prescribed by law. The provisions relating to the pre-charge detention of terrorist suspects engage Article 5 but are compatible with that ECHR right. Clause 51 amends those provisions so that the maximum period of pre-charge detention available for terrorist suspects under Schedule 8 to the Terrorism Act 2000 is 14 rather than 28 days. This is an ECHR-enhancing amendment to the legislation, the measures therefore remain within the limitations set out in Article 5 and remain compatible with that right.

107. Article 5(1)(c) permits detention for the purpose of bringing an individual before the competent legal authority on reasonable suspicion of having committed an offence. The provisions fall within this limb of Article 5(1) as they provide for the continued detention of persons reasonably suspected of having committed terrorism offences or offences with a terrorist connection, for the purpose only of enabling the charging of that person.

108. There is no specific ECtHR jurisprudence on the length of time that a person can be detained before they are charged, but there are the overarching principles that detention under Article 5 must not be arbitrary and must proportionate to the attainment of its purpose. The need to detain terrorist suspects for longer than other criminal suspects before charge is necessary for a number of reasons, including the following:

(a) With recent terrorist attacks designed to cause mass casualties, the need to ensure public safety by preventing such attacks means that it is necessary to make arrests at an earlier stage than for other offences. This often means that less evidence has been gathered at the point of arrest, which means that more time is needed post-arrest to gather sufficient evidence to charge a suspect.

(b) Longer time limits are needed to cope with the fact that terrorist networks are often international, requiring enquiries to be made in many different jurisdictions and evidence obtained from abroad and there is often the need to find interpreters for rare dialects.

(c) Terrorist networks are increasingly using sophisticated technology and communications techniques: in recent cases a large number (sometimes in the hundreds) of computers and hard drives have been seized with much of the data on those computers having been encrypted.

109. Detention under Schedule 8 to the Terrorism Act, as amended, will remain compatible with Article 5 for the following reasons:

(a) The maximum limit for pre-charge detention is to be reduced to 14 days following arrest (or the beginning of an examination under Schedule 7 to the Terrorism Act 2000). This is half the maximum period of time which was available under the Terrorism Acts 2000 and 2006 between 25 July 2006 and 24 January 2011.

(b) A judicial authority must approve ongoing detention beyond 48 hours, and applications for extended detention beyond that may only be for a period of 7 days or less at a time. This requirement to appear before the court within 48 hours and for continual judicial oversight provides the essential feature of the guarantee in Article 5(3) that persons arrested or detained in accordance with Article 5(1)(c) are entitled to a prompt appearance before a judge or judicial officer.

(c) Suspects are entitled to be legally represented in connection with the extension of detention hearings.

(d) Further detention may only be granted if the judicial authority is satisfied that (i) the investigation is being conducted diligently and expeditiously and (ii) there are reasonable grounds for believing that the detention is necessary for one of the reasons specified in paragraph 32(1A) of Schedule 8. Those reasons are that the detention is necessary to obtain or preserve relevant evidence, or pending the outcome of an examination or analysis of relevant evidence.

(e) The judicial authority may review the lawfulness of the arrest[9] – that is that the police had reasonable grounds to suspect the individual was a terrorist (namely, a person who has committed one of a number of specified terrorism offences or who is or has been concerned in the commission, preparation or instigation of an act of terrorism).

[9] In the matter of an application for judicial review by Collin Duffy and Others [2009] NIQB 31 paragraphs 28 and 29.

(f) If at any point before a warrant is due for renewal a person's detention no longer meets the test for detention he or she must be released immediately (paragraph 37 of Schedule 8).

(g) Further oversight is provided by the requirement on the independent reviewer of terrorism to report annually on the operation of the provisions in the Terrorism Act 2000. This report is laid before Parliament.

110. It is the Government's view that the provisions are compatible with Article 5.

Replacement powers to stop and search vehicles

111. Clause 59 makes provision for new police powers of stop and search under the Terrorism Act 2000 ("the 2000 Act"). Amendments to section 43 of the 2000 Act allow a constable, when exercising the existing power to stop and search an individual in a vehicle whom he or she reasonably suspects to be a terrorist, to also search the vehicle and anything in it. The power is to search for anything which may constitute evidence that the person is a terrorist and there is a corresponding power of seizure.

112. Clause 59 also inserts a new section 43A into the 2000 Act allowing a constable to stop and search a vehicle or anything or anyone in the vehicle on reasonable suspicion that the vehicle is being used for purposes of terrorism and to seize anything found during such a search on reasonable suspicion that it constitutes evidence that the vehicle was being so used.

113. Article 8 is prima facie engaged in cases of search and seizure. The ECtHR found in *Gillan & Quinton v UK*[10] that searches conducted under section 44 of the 2000 Act which 'require an individual to submit to a detailed search of his person, his clothing and his personal belongings' constituted an interference with the individual's Article 8 rights. The new powers provide mainly for the search of vehicles rather than the search of the person. Depending on the nature of the vehicle and the circumstances there may be cases where Article 8 is not engaged by the new powers, but in the majority of cases Article 8 is likely to be engaged. The Government considers however that any interference with that right will be justified under Article 8(2).

114. The provisions will be 'in accordance with the law' because they will be contained in primary legislation (supplemented by a statutory Code of Practice) and formulated with sufficient precision to enable a person to know in what circumstance the powers can be exercised.

115. The powers also pursue the legitimate aims of national security, public safety and the prevention of disorder or crime, as the search powers are directed at discovering evidence that the person stopped is a terrorist or that the vehicle stopped is being used for the purposes of terrorism. Such

[10] Application No. 4158/05 – see paragraph 63.

searches will help protect national security, prevent crime and facilitate the bringing of criminal proceedings.

116. The powers are also necessary in a democratic society, that is they are proportionate to the aim pursued and meet a pressing social need. The pressing social need that this clause addresses is the need to ensure that effective searches may be carried out of vehicles in which suspected terrorists are travelling or of vehicles which are reasonably suspected of being used for purposes of terrorism. At present there is the power to stop a vehicle in order to search a suspected terrorist under section 43 of the 2000 Act, but no power to search the vehicle in which that person is travelling. Similarly (other than under sections 44 to 47 of the 2000 Act which powers are to be repealed and re-enacted in significantly curtailed form under clause 60 of and Schedule 5 to this Bill) there is currently no terrorism power to search vehicles which are reasonably suspected of being used for terrorism – which could include for example where innocent drivers are being used to transport terrorist articles. In the context of counter-terrorism such a gap in the legislation could have serious implications. The new powers in clause 59 are proportionate for the following reasons:

(a) The powers may only be exercised by a constable.

(b) The power in section 43 is only available when the constable reasonably suspects that the person stopped is a terrorist and the power in section 43A is only available when the constable reasonably suspects that the vehicle stopped is being used for the purposes of terrorism.

(c) The power may only be used to discover whether there is anything which may constitute evidence that the person is a terrorist or that the vehicle is being used for terrorism as the case may be.

(d) When the search is conducted of a vehicle in which a suspected terrorist is present, the new power in section 43 does not extend to searching the person of any other individuals who are present in the vehicle.

(e) The powers are accompanied by a detailed Code of Practice as to the circumstances in which they may be exercised. This includes provision that the length of time for which a person or vehicle may be detained must be reasonable and kept to a minimum.

(f) The Code of Practice also makes provision for steps to be taken prior to a search being conducted, for the recording of any searches and for the provision of a record of the search to the individual.

(g) The Code of Practice also provides that supervising officers must supervise and monitor the use of the stop and search powers, to

include the maintenance of statistical records and the investigation of any apparently disproportionate use of the powers.

117. It is therefore the Government's view that the clause is compatible with Article 8.

118. Article 1, Protocol 1 will be engaged where these new powers are used to seize property.

119. Property seized under the new powers may be retained only for as long as is necessary (section 114(3) of the 2000 Act) and so the ECHR consideration relates to the control of use of property under Article 1, Protocol 1. The test for justification of a control of use of property has three limbs. The first is that the control must be in accordance with the law. The second is that the control must be for the general interest (or for the securing of the payment of taxes or other contributions or penalties). The third limb is that the measure must be proportionate to the aim pursued.

120. The powers of seizure in this clause will be in accordance with the law because they are to be contained in primary legislation and are formulated with sufficient precision to enable a person to know in what circumstance they can be exercised. The seizures will be in the general interest because the powers are to seize anything which may constitute evidence that the person is a terrorist or that the vehicle is being used for purposes of terrorism and so they are (a) aimed at the prevention or detection of terrorism, (b) in the interests of national security and public safety, and (c) in association with criminal proceedings, since the material seized could be used to prosecute a terrorist-related offence.

121. The powers of seizure are proportionate because:

(a) The articles seized could otherwise be used for the purposes of terrorism.

(b) The seizure could result in evidence (that would otherwise be missed or subsequently destroyed) being available for use in a criminal prosecution for a terrorist-related offence.

(c) Anything seized may only be retained for so long as is necessary in all the circumstances (section 114(3) of the 2000 Act).

(d) The Code of Practice makes provision for records to be made of any articles seized and for such records to be provided to the persons from whom the articles were seized.

(e) The other safeguards referred to in paragraph 120 above apply.

122. It is therefore the Government's view that the clause is compatible with Article 1, Protocol 1.

Replacement powers to stop and search in specified locations

123. Clause 60 and Schedule 5 make provision for new stop and search powers to be inserted into the 2000 Act which replace, in much restricted form, the powers in sections 44 to 47 of the 2000 Act which the ECtHR found to be incompatible with Article 8 in *Gillan and Quinton v UK*. If a senior officer reasonably suspects that an act of terrorism will take place and considers that the stop and search powers are necessary to prevent such an act of terrorism, they may authorise the use of those powers in an area no larger than necessary and for a period no longer than necessary for that purpose (and for a maximum of 14 days). Where an authorisation is in place, an officer in uniform may stop and search a person or a vehicle to search for evidence that the person is a terrorist or that the vehicle is being used for purposes of terrorism but need not reasonably suspect that such evidence will be present. Authorisations must be confirmed by the Secretary of State within 48 hours if they are to last beyond that period.

124. The replacement powers are largely modeled on the structure of the powers in sections 44 to 47 of the 2000 Act, in terms of the powers requiring an authorisation by a senior officer to be in place before the stop and search powers are available, that authorisation needing to be confirmed by the Secretary of State and the search powers being exercisable without the requirement for reasonable suspicion on the part of the constable. However, the circumstances in which an authorisation may be made and the length for which and geographical area over which such authorisations may be made are much narrower under the new provisions; and the circumstances in which the powers may be exercised will be governed by a detailed statutory Code of Practice.

125. The new powers will engage Article 8. As noted above, at paragraph 63 of their judgment in *Gillan*, the ECtHR found that the use of powers 'to require an individual to submit to a detailed search of his person, his clothing and his personal belongings amounts to a clear interference with the right to respect for private life'. This judgment related to the powers in sections 44 to 47 of the 2000 Act.

126. The ECtHR also found (at paragraph 87) that those powers were not 'in accordance with the law' because the powers of authorisation and confirmation as well as those of stop and search under sections 44 and 45 of the 2000 Act are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse'. Unlike those powers, the new powers will be 'in accordance with the law'. This is because not only will they be contained in primary legislation and in a statutory Code of Practice but their availability is circumscribed to proportionate and defined circumstances and there are safeguards in place. The most notable safeguard is that, because of the constrained circumstances in which the powers may be used, and in contrast to the powers in sections 44 to 46 of

the 2000 Act[11], the exercise of the powers will be properly amenable to legal challenge.

127. The new provisions afford protection against arbitrary interferences by public authorities with Convention rights and indicate with sufficient clarity the scope of the discretion conferred on the competent authorities and the manner of its exercise. In contrast to the powers contained in sections 44 to 46 of the 2000 Act, the new powers confer an appropriately constrained discretion on the police, both in terms of the authorisation of the power to stop and search and its use by constables on the ground. As such there are effective legal protections against arbitrary interferences with Convention rights:

Authorisations

(a) An authorising officer may only authorise the use of stop and search powers where they 'reasonably suspect an act of terrorism will take place and consider that the authorisation is necessary to prevent such an act of terrorism'. This test will explicitly require the authorising officer to consider both the necessity and the proportionality of the power as well as meaning the powers will only be available where that officer reasonably suspects an act of terrorism will take place. (This addresses the criticism the ECtHR expressed in paragraph 79 about the authorisation powers in section 44 of the 2000 Act, under which an authorisation could be given where the authorising officer considered it 'expedient' for the prevention of acts of terrorism.)

(b) The authorising officer must be of at least the rank of Assistant Chief Constable or Commander.

(c) An authorisation may only last for as long as the senior officer considers necessary to address the threat and for a maximum of 14 days.

(d) An authorisation is not renewable. Any new authorisation must be based on a fresh assessment of the intelligence. (This is in contrast to the position considered by the ECtHR where, in 2003, there had been a 'rolling programme'[12] of renewals in the Metropolitan Police District since the powers were first introduced in the 2000 Act).

(e) An authorisation may only cover an area or areas as wide as the senior officer considers necessary to address the threat, and the

[11] The ECtHR commented at paragraph 86 of their judgment that there were limitations to the availability of both judicial review and an action in damages in respect of these powers – in particular that, due to the breadth of the power, it was likely to be difficult if not impossible to prove that the power was improperly exercised.

[12] Paragraph 81 of the *Gillan* judgment.

Code of Practice will make clear that it is only in exceptional circumstances that a whole force authorisation is likely to be justified.

(f) An authorisation must be confirmed by the Secretary of State within 48 hours if it is to last beyond that period.

(g) The Secretary of State has the power to (i) narrow the geographical extent of the authorisation, (ii) substitute an earlier time of expiry, (iii) refuse to confirm an authorisation, or (iv) cancel an authorisation.

(h) The statutory Code of Practice accompanying the powers will set out guidance on the circumstances in which authorisations may be made. Importantly, authorisations can be made only where the use of other, less intrusive powers and measures are not considered adequate to address the threat and thus they will be used as a 'last resort' (in contrast to the position considered by the ECtHR, namely that in 2003 when authorisations were being made on a rolling basis across whole force areas and the powers were therefore available in some police areas on a routine basis).

Searches

(i) While the search may be conducted without the constable needing reasonable suspicion, the purpose of the search is to look for evidence that the person is a terrorist or that the vehicle searched is being used for purposes of terrorism. (This is in contrast to the purpose of the power under section 45 of the 2000 Act which was to search for 'articles of a kind which could be used in connection with terrorism' which, as the ECtHR identified in paragraph 83 of the *Gillan* judgment, potentially covered a wide range of articles).

(j) The statutory Code of Practice to be issued in connection with the powers will set out guidance on the circumstances in which the stop and search power may be exercised. This refers to two types of use: (i) where the officer can use objective factors such as behaviour or type of vehicle to make selections for a search, and (ii) where the selection of individuals or vehicles for searching is to be carried out on a random basis within the confines of a particular operation, the parameters of that operation having been established by the authorising officer. Such detailed provision in a statutory Code of Practice will address the criticism by the ECtHR of the position under the system in sections 44 to 46 of the 2000 Act where provision in PACE Code A 'governs essentially the mode' in which the powers are carried out 'rather than providing any restriction on the officer's decision to stop and search' (paragraph 83).

(k) The Code of Practice will also provide that the powers are not to be exercised in a way which unlawfully discriminates.

Other safeguards

(l) The operation of the powers will be reviewed annually by the independent reviewer of terrorism legislation appointed under section 36 of the Terrorism Act 2006 and the reviewer reports publicly on his findings annually (in relation to the operation of the 2000 Act and Part 1 of the 2006 Act).

(m) The Code of Practice will also provide that supervising officers must supervise and monitor the use of the stop and search powers, to include the maintenance of statistical records and the investigation of any apparently disproportionate use of the powers.

(n) The Home Office will also keep statistical records of the use of the power and will publish statistics on its use annually.

128. As well as being 'in accordance with the law', the new powers will be pursue the legitimate aims of national security, public safety and the prevention of disorder or crime, as the search powers are directed at discovering evidence that the person stopped is a terrorist or that the vehicle stopped is being used for the purposes of terrorism. Such searches will help protect national security, prevent crime and facilitate the bringing of criminal proceedings.

129. The powers are also necessary in a democratic society, that is they are proportionate to the aim pursued and meet a pressing social need. The pressing social need they meet is the need for a proportionate terrorism stop and search power to be available in circumstances where reasonable suspicion powers are inadequate to address a threat of terrorism. There are situations where the police reasonably suspect that an act of terrorism will take place but there is not sufficient intelligence about the details to provide 'reasonable suspicion' about particular individuals or vehicles in the area suspected of being the target. For example, there might be intelligence of a vehicle-borne attack being planned on a particular destination in the next few days but there may be no intelligence about the type of vehicle to be used to carry out the attack. In such circumstances there is not sufficient detail to provide the searching officer with 'reasonable suspicion' that the person stopped is a terrorist, but the severity of the consequences of the planned act of terrorism justifies the use of powers which do not require this level of suspicion in the limited and targeted circumstances set out in the draft provisions. The powers are proportionate because:

(a) The power will only be available in a restricted set of circumstances and there are the restrictions and safeguards set out at paragraph 127 above.

(b) The consequences of not having such a power in place could mean that an act of terrorism will take place that could otherwise have been prevented.

(c) A search is generally likely to take only approximately 10 minutes.

(d) The power may only be exercised by a constable in uniform.

(e) A constable may not require a person to remove any clothing in public except for headgear, footwear, an outer coat, a jacket or gloves.

(f) A constable may only detain a person or vehicle for such a time as is reasonably required to carry out the search at or near the location of the stop (paragraph 2(2) of new Schedule 6B to the 2000 Act)) and the Code provides that this period must be kept to a minimum.

(g) A person or driver of a vehicle stopped has the right to request a written statement recording that stop took place under the power (paragraph 4 of new Schedule 6B). In addition, the Code of Practice makes provision for steps to be taken prior to a search being conducted, for the recording of any searches and for the provision of a record of the search to the individual.

130. It is therefore the Government's view that the provisions are compatible with Article 8.

131. The House of Lords in *R (on the application of Gillan and another) v Commissioner of Police for the Metropolis* ([2006] UKHL 12) found that a stop and search under section 44 of the 2000 Act did not amount to a deprivation of liberty. Lord Bingham commented that the procedure was ordinarily relatively brief and did not involve features such as handcuffing or arrest (paragraph 25). The ECtHR observed (at paragraph 57) that 'although the length of time during which the applicant was stopped and searched did not in either case exceed 30 minutes, during that period the applicants were entirely deprived of any freedom of movement. They were obliged to remain where they were and submit to the search and if they refused they would have been liable to arrest, detention at a police station and criminal charges. This element of coercion is indicative of a deprivation of liberty within the meaning of article 5(1)'. The ECtHR however did not finally determine the question of whether Article 5(1) was engaged in light of its findings on Article 8.

132. If Article 5(1) is engaged, the question is then whether the detention is 'in accordance with a procedure prescribed by law' and whether it falls within one of the exceptions in Article 5(1). The detention would be in accordance with a procedure prescribed by law for the same reasons set out above in relation to the corresponding requirement under Article 8(2). The detention would also fall within the exception in Article 5(1)(b), namely

that it is 'in order to secure the fulfilment of any obligation prescribed by law'. The Commission held in *McVeigh, O'Neill and Evans v UK* (1981) 5 EHRR 71, that in limited circumstances of a pressing nature, a coercive power of detention is permissible where necessary to secure fulfilment of a specific obligation at a time when it arises and where there is no reasonably practicable alternatives available to secure compliance. (In that case, the Commission held there was no breach of Article 5(1) where the applicants were detained for 45 hours at the point of entry to the UK and were questioned, searched, photographed and fingerprinted for the purpose of ascertaining if they appeared to be a terrorist.)

133. Lord Bingham in paragraph 26 of his judgment in *Gillan* found that the exception in Article 5(1)(b) applied in relation to the stop and search powers in sections 44 to 46 of the 2000 Act, 'for the public are in my opinion subject to a clear obligation not to obstruct a constable exercising a lawful power of stop and search for articles which could be used for terrorism and any detention is in order to secure effective fulfilment of that obligation'.

134. It is therefore the Government's view that the provisions are compatible with Article 5(1).

<u>Replacement power to stop and search for munitions and transmitters in Northern Ireland</u>

135. Schedule 6 replaces paragraph 4(1) of Schedule 3 to the Justice and Security (Northern Ireland) Act 2007 ("the 2007 Act") to restrict the circumstances in which a constable may search a person in Northern Ireland without reasonable suspicion for munitions and wireless apparatus. Schedule 6 provides that this power can now only be exercised if a senior officer of the Police Service of Northern Ireland reasonably suspects that the safety of any person might be endangered by the use of munitions or wireless apparatus and considers it necessary to authorise the use of these powers to prevent such danger. A senior officer may authorise the use of these powers in an area no larger than necessary and for a period no longer than necessary for that purpose (and for a maximum of 14 days). Authorisations must be confirmed by the Secretary of State within 48 hours if they are to last beyond that period.

136. The replacement power will engage Article 8. In their judgment in *Gillan and Quinton v UK* 2010 the ECtHR found (at paragraph 63) that the use of powers to require an individual to submit to a detailed search of his person, his clothing and his personal belongings amounts to a clear interference with the right to respect for private life. That judgment related to sections 44 to 47 of the Terrorism Act 2000. It found (at paragraph 87) that those provisions were not 'in accordance with the law' because the powers of authorisation and confirmation as well as those of stop and search under sections 44 and 45 of the Terrorism Act 2000 were not sufficiently circumscribed or subject to adequate legal safeguards against abuse. Although the ECtHR has not ruled on whether paragraph 4 of

Schedule 3 to the 2007 Act is compatible with Article 8, Schedule 5 introduces an authorisation requirement and safeguards to ensure compliance. The safeguards adopted mirror closely those introduced to the Terrorism Act 2000 in clause 60 and Schedule 5 in response to *Gillan and Quinton*.

137. The replacement power to stop and search for munitions and wireless apparatus in Northern Ireland will be 'in accordance with the law' because the primary legislation and statutory Code of Practice will restrict use of the power to proportionate and defined circumstances and make provision for a number of safeguards. In particular, the exercise of the powers will now be properly amenable to legal challenge. The new provisions afford protection against arbitrary interference with Convention rights; they indicate with clarity the scope of the discretion conferred on senior officers and constables both in terms of the authorisation of the power to stop and search and its application on the ground:

Authorisations

(a) A senior officer may only authorise the use of these stop and search powers where he or she reasonably suspects that the safety of any person might be endangered by the use of munitions or wireless apparatus and considers the authorisation to be necessary to prevent such danger.

(b) The senior officer must be an officer of the Police Service of Northern Ireland of at least the rank of Assistant Chief Constable.

(c) An authorisation may only last for as long as is necessary to address the danger and for a maximum of 14 days.

(d) An authorisation is not renewable. Any new authorisation must be based on a fresh assessment of the intelligence.

(e) An authorisation may only cover an area or areas as wide as is necessary to address the danger. It can extend to the whole or part of Northern Ireland (including the internal waters).

(f) An authorisation must be confirmed by the Secretary of State within 48 hours if it is to last beyond that period.

(g) The Secretary of State has the power to (i) narrow the geographical extent of the authorisation, (ii) substitute an earlier time of expiry, (iii) refuse to confirm an authorisation, or (iv) cancel an authorisation.

(h) The statutory Code of Practice accompanying the powers (to be made under section 34 of the 2007 Act) will set out guidance on the circumstances in which authorisations may be made. Importantly, the guidance will make clear that other, less intrusive powers -

including the power to stop and question a person about their identity and movements contained in section 21 of the 2007 Act - should be used both to minimise the number of persons it is necessary to search and to minimise the necessity to search persons without either reasonable suspicion or any basis for that search.

Searches

(i) While the search may be conducted without the constable needing reasonable suspicion, the purpose of the search is very limited and must be to look for munitions held unlawfully or wireless apparatus.

(j) The statutory Code of Practice will set out guidance on the circumstances in which the stop and search powers may be exercised.

(k) The statutory Code of Practice will also provide that the powers are not to be exercised in a way which unlawfully discriminates.

Other safeguards

(l) The operation of the powers will continue to be reviewed annually by an independent reviewer appointed under section 40 of the 2007 Act. The Secretary of State must lay a copy of the reports before Parliament.

(m) The Chief Constable of the Police Service of Northern Ireland must ensure that a record is made of each exercise by a constable of the power so far as it is reasonably practicable to do so and a record is not required to be made under another enactment (section 37 of the 2007 Act).

(n) The Secretary of State must pay compensation to certain persons who suffer loss or damage as a result of an exercise of these powers which interferes with private property or which involves damage to, destruction of or the taking of real or personal property (section 38 of, and Schedule 4 to, the 2007 Act).

(o) It is an offence to fail to stop when required to do so under these powers. Proceedings for this offence will only be instituted with the consent of the Director of Public Prosecutions for Northern Ireland and, in certain circumstances, the Advocate General for Northern Ireland (section 39 of the 2007 Act).

138. As well as being 'in accordance with the law', the new powers will pursue the legitimate aims of national security, public safety and the prevention of disorder or crime, as the search powers are directed at discovering munitions and wireless apparatus that may endanger persons.

139. The replacement powers are also necessary in a democratic society as they are proportionate to the aim pursued and meet a pressing social need. The pressing social need they meet is the need for a proportionate stop and search power in Northern Ireland to address the real threat posed there by the carrying of munitions and wireless apparatus. There are circumstances in which the Police Service of Northern Ireland will reasonably suspect that the safety of persons might be endangered by the unlawful use of munitions or wireless apparatus (for example, intelligence of an attack using munitions in the next few days) but there is not sufficient intelligence to provide 'reasonable suspicion' about a particular individual. In such circumstances, the severity of the consequences of the suspected attack justifies the use of powers which do not require reasonable suspicion of an individual in the limited and targeted circumstances set out. The powers are proportionate because:

(a) The power will only be available in a restricted set of circumstances and there are the restrictions and safeguards set out above.

(b) The consequences of not having such a power in place could mean that persons are endangered by munitions or wireless apparatus when the danger could otherwise have been removed.

(c) A search is generally likely to take only approximately 10 minutes a very short period of time.

(d) The replacement power is exercisable only by a constable.

(e) A person may not be required by a constable to remove any clothing in public except for headgear, footwear, an outer coat, a jacket or gloves.

(f) Under the replacement power, a person may only be detained by a constable for such time as is reasonably required to permit the search to be carried out at or near the place where the person is stopped.

(g) The Chief Constable of the Police Service of Northern Ireland will ensure that a record is made of each exercise by a constable of the power so far as it is reasonably practicable to do so and a record is not required to be made under another enactment (section 37 of the 2007 Act).

140. It is therefore the Government's view that the provisions in Schedule 6 are compatible with Article 8.

141. It is not clear whether a stop and search under these powers would engage Article 5. (Whilst indicating that the coercion involved in a stop and search under the Terrorism Act 2000 was indicative of a deprivation of liberty, the ECtHR did not finally determine the issue in *Gillan*.) If Article 5(1) is engaged, the detention must be 'in accordance with a procedure

prescribed by law' and must fall within one of the exceptions in Article 5(1). The detention would be in accordance with a procedure prescribed by law for the same reasons set out above in relation to the corresponding requirement under Article 8(2). The detention would fall within the exception in Article 5(1)(b), namely that it is 'in order to secure the fulfilment of any obligation prescribed by law': the European Commission on Human Rights has held that in limited circumstances of a pressing nature a coercive power of detention is permissible where necessary to secure fulfilment of a specific obligation at a time when it arises and where there is no reasonably practicable alternative available to secure compliance (*McVeigh, O'Neill and Evans v UK* 91981) 5 EHRR 71); and Lord Bingham in paragraph 26 of his judgment in *R (on the application of Gillan and another) v Commissioner of Police for the Metropolis* [2006] UKHL 12 found that the exception in Article 5(1)(b) applied in relation to the stop and search powers in sections 44 to 46 of the Terrorism Act 2000.

142. It is therefore the Government's view that the provisions are compatible with Article 5(1).

143. Schedule 6 makes provision in respect of legal challenges against a decision by the Secretary of State or a senior officer relating to an authorisation. In any legal proceedings in which such a decision is challenged the Secretary of State may issue a certificate that the interests of national security are relevant to the decision and the decision was justified. Any appeal against such a certificate will lie to the Tribunal established under section 91 of the Northern Ireland Act 1998. The Tribunal will be able to make a final determination as to whether the interests of national security are relevant to the decision and whether the decision was justified.

144. It is therefore the Government's view that the provisions are compatible with Article 6.

Part 5: Safeguarding vulnerable groups, criminal records etc.

Chapter 1: Safeguarding of vulnerable groups

145. The Vetting and Barring Scheme ("VBS") operates under the Safeguarding Vulnerable Groups Act 2006 ("SVGA"). 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.

146. 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.

147. The SVGA also contains offences (not yet in force) for individuals to work in regulated activity when not monitored by the CRB and for employers who fail to check whether their employees are monitored.

148. 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.

149. The Vetting and Barring Scheme’s purpose is to strike a necessary balance between the public interest in protecting vulnerable groups on the one hand, and ensuring that those who are in close contact with such vulnerable groups are not subjected to disproportionate scrutiny or to a culture of suspicion on the other hand. The Scheme itself will engage the Article 8 rights of those working with vulnerable groups, because of the need to carry out checks to establish that they are appropriate people to have contact with these groups.

150. Chapter 1 of Part 5 makes significant amendments to the VBS which operates under the SVGA. As part of the Coalition Agreement, the Government committed to reviewing the Vetting and Barring Scheme to scale it back to common sense levels. This is being done by ensuring that the tension between the individuals’ rights and the need to protect the public is re-balanced.

151. Clause 66 amends the barring regime set out in Schedule 3 to the SVGA in two ways. Firstly it ensures that the ISA can only bar an individual from working with either children or vulnerable adults if the ISA is satisfied that the individual is working or is likely to work with these groups. At present, there need be no suggestion that that the individual is seeking to work (or is actually working) with these vulnerable groups. This will mean that the stigma of being barred from working with either children or vulnerable adults will only attach to those who are seeking to engage in this work. This is in keeping with the re-balancing of individual Article 8 rights and the general interest in protecting vulnerable groups. The Government considers that this is a more targeted barring scheme which will result in fewer people barred without lowering the level of protection afforded to vulnerable groups. On this basis it is considered more proportionate than the current scheme.

152. The second change to the barring system is to the “automatic barring subject to representations” manner of barring an individual. At present, an individual who meets prescribed criteria under paragraph 2 or 8 of Schedule 3 to the SVGA will be automatically barred from working with children or vulnerable adults subject to their representations. At present

these representations are made after the ISA has barred the individual, however this was ruled incompatible with Article 6 and 8 in the November 2010 High Court judgment: Royal College of Nursing and others –v- Secretary of State for the Home Department [2010] EWHC 2761 (Admin). Therefore clause 68 amends paragraphs 2 and 8 to ensure that representations must be considered before the ISA bars any individual under these paragraphs. The Government considers that this will ensure compatibility with Articles 6 and 8 in light of the High Court judgment.

153. Clause 67 abolishes the concept of controlled activity in sections 21 to 23 of the SVGA. This was the activity which was not "regulated activity" under the SVGA because there was not direct or close contact with vulnerable groups, but nevertheless this activity would be controlled to a certain extent because it enabled individuals to access, for example, personal records about vulnerable groups. It has been decided that in line with reducing the overall scope of the Scheme, it would be targeted and proportionate to remove this concept from the Scheme on a risk-based approach.

154. Clause 68 abolishes the concept of monitoring in section 24 of the SVGA. This, in addition to the barring function of the ISA, was one of the two main tenets of the SVGA's scheme. The monitoring system would have required any individual engaged in "regulated activity" in relation to either children or vulnerable adults to make an application to the Secretary of State to be monitored. This would have involved the collation of any updated material (such as new convictions, cautions or referrals from employers and professional regulators) in relation to people registered with the scheme, and referral of any new information to the ISA. Offences would have attached to individuals who were not subject to monitoring and employers who employed those who were not subject to monitoring. The monitoring provisions have not been brought into force and the Government announced a halt to the start of monitoring when it decided to review the whole VBS. The approach taken in the new provisions is to remove the monitoring provisions and instead enable employers to check whether their employees are barred and be informed if current employees become barred (clause 71). In order to ensure that these provisions do not create a safeguarding gap, there will also be a duty for employers to check an employees barred status if that employee will be engaged in regulated activity (clause 72). The Government considers that this is a more proportionate interference with Article 8 rights since information will only be shared if it is serious and suggests a risk of harm to vulnerable groups.

155. The provisions also significantly reduce the scope of regulated activity, namely activity from which individuals can be barred, both in relation to children and in relation to vulnerable adults (clauses 63 to 65). This has been done in order to scale back the coverage of the VBS to common sense levels by taking a risk based approach, thereby resulting in what the Government believes to be a more targeted and proportionate scheme. The reason for this is that the legitimate aim of protecting vulnerable

groups is being achieved in a less wide-ranging manner, which focuses on a risk-based approach.

156. Finally the provisions give the ISA discretion to review cases and remove persons from the list in certain circumstances (clause 70) which the Government considers is important to ensure that exceptional cases can be dealt with swiftly.

Chapter 2: Criminal records

157. Chapter 2 of Part 5 amends Part 5 of the Police Act 1997 ("the 1997 Act") which provides for the disclosure of criminal records for employment vetting and related purposes. Part 5 of the 1997 Act provides for three levels of criminal record certificates. Firstly, section 112 provides for a criminal conviction certificate which contains the details of all un-spent convictions that are recorded on central records. Section 112 is not yet in force in England and Wales. Section 113A provides for a criminal record certificate (known as a "standard certificate") which contains all details of all convictions (including spent convictions) that are recorded on central records. Section 113B provides for an enhanced criminal record certificate (known as an "enhanced certificate") which contains all details of all convictions (including spent convictions) that are recorded on central records plus any information which a chief officer thinks might be relevant to the purpose for which the enhanced certificate was requested and ought to be disclosed; in prescribed cases, it can also contain information about the ISA's barred lists.

158. Convictions become spent in accordance with the Rehabilitation of Offenders Act 1974 ("ROA"), which determines whether a conviction becomes spent and, if so, after what period of time, which in turn is determined by the length of sentence attached to the conviction. However the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (SI 1975/1023 as amended – "Exceptions Order") provides for situations in which the protection for spent convictions is removed. The 1997 Act links into the Exceptions Order as the application for either a standard certificate or an enhanced certificate must state that the purpose for which the certificate required is an "exempted question" within the meaning of the Exceptions Order. What this means in practice is that applications for a standard certificate or an enhanced certificate are limited to certain positions including caring for children, child minding, being a foster parent, or being a registered immigration advisor amongst others. Coming within the scope of the Exceptions Order is sufficient for a standard certificate, however an application for an enhanced certificate must also fall within the prescribed purposes as set out in the Police Act 1997 (Criminal Records) Regulations 2002 (SI 2002/233 – regulation 5A, as amended).

159. Once the CRB (all of the functions of the Secretary of State under Part 5 of the 1997 Act are carried out by the CRB, an executive agency of the Home Office) has obtained all the information required in accordance with

section 113A or section 113B, the CRB issues the certificate to both the applicant and the registered body who countersigned the application (or who transmitted the application electronically).

160. The Government considers that the CRB process engages Article 8 rights as it is concerned with disclosing sensitive personal data. Although the Government considers that this is done in pursuance of a legitimate aim – namely the prevention of crime and the protection of the rights of others (for example, by ensuring that those working with vulnerable groups are suitable to do so), the current provisions aim to meet this legitimate aim in a more proportionate manner.

161. In total this Chapter amends the current provisions relating to CRB certificates in eight ways.

162. Firstly, this Chapter (clause 78) ensures that no application for any type of CRB certificate can be made unless the individual making the application is aged 16 or over. The current provisions do not set any age limit. The Government considers there to be human rights implications in carrying out CRB checks on minors in that this constitutes an interference with their Article 8 rights which is hard to justify in light of the need to protect children under both Articles 3 and 16 of the UN Convention on the Rights of the Child. As children are to be protected, the Government considers that they should not be subject to a criminal records disclosure process unless they are at the stage of working in positions of trust with vulnerable groups – therefore the Government has decided that under 16s should not be able to apply for any type of CRB certificate and no person aged under 16 should ever be asked to make such an application. On this basis the Government therefore considers that we are making the provisions in Part 5 more proportionate by including an age limit and also ensuring compliance with our UNCRC obligations.

163. Secondly, these provisions (clause 77) ensure that, contrary to the current position, the standard certificate and the enhanced certificate will be sent to the applicant only, rather than also to the registered person (normally the employer) at the same time. This means that sensitive personal data is only being disclosed to the person about whom it relates. This will enable an individual to decide whether to show the certificate to any other person and also enables any dispute about the information released on the certificate to be determined before it is seen by the potential employer. This means that sensitive personal data is sent only to the data subject who can then make an informed decision about any onward disclosure. We consider that this will remove any interference with the data subject's Article 8 rights which resulted in light of the obligation to send a copy to the registered person.

164. This is linked to the third change which is an amendment to the disputes process, whereby we are ensuring that any dispute over police intelligence information can be sent to an independent chief officer of police for consideration (clause 79). At present, the information is re-

considered by the same chief officer of police who took the original decision to disclose the information. The Government considers that this should improve the disputes process by enabling an independent but expert chief officer to consider any dispute.

165. The fourth, fifth and sixth changes are linked to the disclosure of police intelligence information on enhanced certificates (clause 79). The provisions heighten the test that must be met in order for a chief officer to decide to disclose police intelligence or other information from a "might be relevant" test to a "reasonably believes to be relevant" test. The provisions also enable a more centralised system of decision making. At present, each chief officer of police takes decisions in relation to information that they hold. As the computer systems are centralised, these provisions will enable all "relevancy" decisions to be taken by a smaller number of chief officers which should help to ensure a minimum level of expertise and consistency. In addition, the provisions enable the Secretary of State to issue guidance in relation to information disclosed by the police which should also help to ensure consistency of decision. The Government considers that these three measures should result in more proportionate disclosure of information, because of the higher test for disclosure and the more consistent decision-making process which should result in less sensitive personal information being disclosed overall.

166. The seventh change is to remove the statutory basis under the enhanced CRB certificate provisions for the police to disclose information directly to the registered person while not disclosing to the individual (in relation to whom the information pertains) when doing so would harm the interests of crime prevention or detection (clause 77(1)(b)). The Government considers that this can already be properly done when appropriate under the police's common law powers to disclose information. The Government believes that it would help to emphasise the exceptional nature of the circumstances and the need for the police to justify the approach in each individual case on the basis of their operational discretion supported by common law powers. Again the Government consider this to be more proportionate approach to disclosing sensitive personal information.

167. The eighth change is to make CRB certificates portable (clause 80). At present, a CRB certificate is a snap-shot in time and any new employer will need to see a new certificate and employers who continue to employ the same person may still at various intervals require a new certificate. The updating system will enable an employer to go online, with the individual's consent, and check whether there is any information that would appear on a new CRB certificate if applied for now, or whether there is no new information. It is estimated that over 90% of re-checks result in no new information. The online system will not disclose any personal information, simply an indication as to whether there is no new information or whether a new application for a CRB certificate should be made. As well as being a measure likely to be welcomed by both the employer and the individual, the Government considers that this will significantly reduce the

amount of personal data being re-sent (because certificates with the same information will not be re-sent) and therefore will result in a more proportionate system.

168. Overall the Government considers that this package of measures enhances the respect for an individual's private life and will lead to a more targeted and proportionate CRB disclosure system.

Chapter 3: Disregarding certain convictions for buggery etc.

169. Chapter 3 of Part 5 set up a scheme whereby individuals who were convicted or received a caution in respect of section 12 (buggery) or 13 (gross indecency between men) of the Sexual Offences Act 1956 (or corresponding military service offences) may apply to the Secretary of State to have their convictions or cautions disregarded. An individual will only be successful in his application if the behaviour which constituted the offence was consensual and the other party was aged 16 or over.

170. Consensual heterosexual activity in private has never been criminalised, however until relatively recently consensual homosexual activity in private was still criminal. The European Court of Human Rights in the 2000 case of *A.D.T. –v- UK* considered that, bearing in mind the narrow margin of appreciation in the case, the absence of any public health considerations and the purely private nature of the behaviour in the case, the continuing existence of section 13 and prosecution for that offence, in the particular case, was not justified under Article 8.

171. The Government therefore considers that this scheme is a human rights enhancing measure under both Article 8 and Article 14 in order to ensure that convictions for consensual sexual behaviour (which is inherently extremely personal), and prosecutions for offences which were arguably discriminatory in nature, can be deleted from official records. In addition, a successful application under the scheme will result in the individual being treated in law as someone who has not been convicted of that offence.

172. The Bill provides a right of appeal to the High Court to ensure that an independent judicial body can review the Secretary of State's decision. It is not considered necessary to provide for either an oral hearing or for a further appeal from the decision of the High Court in order to safeguard the individual's Article 6 rights. This is because the Government does not consider that this scheme directly determines an individual's civil rights. The Government is mindful that it is not for a Government Department to "re-try" an offence to decide the facts years after the event and that others involved in the historic conduct may have no wish to be involved in this new scheme at all (hence making the scheme subject to application), which they would need to be if any sort of "re-trial" were to be contemplated. The Government notes that Schedule 4 to the Sexual Offences Act 2003 which provides for a similar scheme in relation to the

notification requirements under that Act does not provide for a further appeal after the High Court.

Part 6: Freedom of information and data protection

Publication of certain datasets and other amendments relating to freedom of information

173. Clause 92 makes provision for the publication of datasets held by public authorities within the meaning of the Freedom of Information Act 2000 (the "FoI Act"). Under new section 11A in the 2000 Act a public authority is required to make dataset information which is communicated to the applicant in response to a freedom of information request available for re-use in accordance with a licence specified in a code of practice under section 45 of the FoI Act. The intention is that the "open government licence" will be one of the specified licences. The duty to make the dataset available under the terms of a specified licence does not apply where the public authority which received the request under the FoI Act for the dataset is not the only 'owner' of the 'relevant copyright work'. A 'relevant copyright work' means a copyright work, a work in which Parliamentary copyright subsists, or a database subject to a database right, but excludes a work in which Crown copyright subsists. The 'owner' in this context means the copyright owner or the owner of the database right in a database. If the dataset includes a relevant copyright work which is owned either jointly with the authority or is owned by a third party, then the duty to make the dataset available under a specified licence would not arise. The duty to make the dataset available for re-use would also not arise if the dataset does not include any copyright work.

174. New section 19(2A) ensures that publication schemes must include a requirement that a public authority makes its datasets where they include relevant copyright work available for re-use in accordance with the terms of a specified licence.

175. Intellectual property rights such as copyright have been held to be possessions for the purposes of Article 1, Protocol 1[13].

176. Certain "Public authorities", within the meaning of sections 3 to 7 of, and Schedule 1 to, the FoI Act, would be capable of falling into the category of "legal person" and therefore capable of enjoying rights under Article 1, Protocol 1.

177. Not all of the bodies which fall within the definition of "public authorities" in the FoI Act would be able to assert Convention rights. It is clear that certain "core" public authorities, namely those falling within section 6 of the Human Rights Act 1998, cannot be "victims" for the purposes of Article 34

[13] Ashdown v Telegraph Group [2002] QB 546 paragraph 28 and Melnychuk v Ukraine (2006) 26 EHRR 42.

of the Convention[14]. Central Government, local government, the police and the armed forces would clearly fall within this category. However, "hybrid public authorities", which exercise both public functions and non-public functions are not absolutely prevented from exercising Convention rights. A distinction must be drawn between their public functions and the acts which they perform which are of a private nature.

178. It is the Government's view that any such hybrid bodies, in fulfilling their duties under the FoI Act, would be performing public functions rather than exercising private rights and, accordingly, would not be able to assert Convention rights in relation to new section 11A or section 19(2A). However, it is possible that a hybrid public authority may be able to argue that it is capable of asserting Convention rights in relation to new section 11A or section 19(2A) and, in that event, the Government has therefore considered whether the provisions are in breach of Article 1, Protocol 1.

179. The restrictions on a public authority to assert its rights in relation to a relevant copyright work which falls within new section 11A and section 19(2A)(b) are most likely to be found to be a "control of the use of property", as opposed to a deprivation or expropriation of property, as far as Article 1, Protocol 1 is concerned. The owner is prevented from asserting the full extent of their rights in relation to their relevant copyright work but instead must adopt the standardised terms of a specified licence. The public authority is not prevented from asserting fully its rights in situations which fall outside section 11A and section 19(2A)(b) but is prevented from doing so when section 11A or section 19(2A)(b) applies.

180. For a measure constituting control of use to be justified it must be in accordance with the law, for the general interest and must be proportionate to the aim pursued.

181. The law must be sufficiently precise and foreseeable. The primary legislation which makes this provision provides the requisite precision, accessibility and foreseeability. The licence, in accordance with which the information must be released, will be specified in guidance under section 45 of the FoI Act. This guidance is laid before Parliament (section 45(5)) and is publicly available. The exact requirements of the licence will therefore be clear to the public authority, allowing them to regulate their conduct accordingly.

182. For a measure constituting a 'control of use' to be in accordance with the law, it would also be necessary that it complied with any obligations under EU law. In relation to EU law, it is necessary to consider whether the policy requiring public authorities to make their datasets available for re-use under the terms of a prescribed licence is compatible with Directive 2001/29 EC on the harmonisation of certain aspects of copyright and related rights in the information society. The Directive sets out various

[14] Aston Cantlow PCC v Wallbank [2004] 1 AC 546 at paragraph 8. See also R (Westminster City Council) v Mayor of London [2003] BGLR 611 in which a local authority was found not to be a victim for the purposes of section 7 of the Human Rights Act 1998.

exclusive rights, including the Reproduction right under Article 2, which Member States must provide for authors of their works. Article 5 provides for certain exceptions to the reproduction right which members may provide for in domestic legislation, although the list would not appear to cover the policy proposal. However, Article 9 (Continued application of other legal provisions) provides: "This Directive shall be without prejudice to provisions concerning in particular... access to public documents". Further the Recital (60) states: "The protection provided under the Directive should be without prejudice to national or Community legal provisions in other areas, such as... access to public documents... which may affect the protection of copyright or related rights". Accordingly, it is the Government's view that the proposed imposition of a licence in relation to re-use of datasets would be compatible with the Directive.

183. As regards the requirement that a 'control of use' is for the general interest, the UK enjoys a wide margin of appreciation in determining the existence of a problem of general public interest and implementing measures designed to meet it. The provisions in section 11A and section 19(2A)(b) are designed to ensure that the public have the ability to access datasets which enables them to scrutinise the manner in which public authorities provide services and spend public money. These provisions enable the public to re-use datasets for commercial purposes. The ability of the public, including journalists, data experts and academics, to hold public authorities to account for the decisions which they make depends in part on the availability of relevant information which can be tested and scrutinised. The ability of a requester to re-use data sets which are released under the terms of the specified licence enhances their ability to analyse and interrogate the data and therefore to effectively hold the public authority to account. The effective public scrutiny of public authorities is vital to a healthy democracy. Prior to these provisions, public authorities were not required to make datasets available in a manner which enabled recipients to manipulate and interrogate the data. This can only be done when the recipient is able to re-use the data, including for commercial purposes, and cannot be done effectively when the data is otherwise subject to copyright or a database right.

184. The measures employed are proportionate to the aim of enhancing the accountability and openness of public authorities**.** The specified licence will preserve other intellectual property rights (such as trade marks and patents) and sets certain restrictions on the use of the information in the interests of the public authority, whilst allowing for the re-use of information in a manner which is not possible if a public authority is able to assert its rights in relation to a relevant copyright work. Individuals can already access the information under the FoI Act and the new provisions simply give the recipient the ability to re-use the information in accordance with a specified licence. The public authorities are not prevented from asserting their rights fully in respect of their works which do not fall within the definition of a data set. Material which is subject to the copyright ownership of third parties will still be afforded the full protection of copyright and database rights legislation. Thus, the provision is targeted to

ensure that only public authorities, which exercise public functions and (in most cases) use public funds in producing datasets are required to make their work available for re-use to the public.

185. The public will benefit from the enhanced scrutiny of the public bodies which this provision will allow and the economic benefits flowing from the re-use of this information in a commercial context.

186. A fair balance has been struck between the rights of the public authority which produced the information and right interests of society at large in holding such authorities to account in the exercise of their functions. The public authority would still be able, in certain circumstances, to charge for licensing their datasets for re-use. This would adequately compensate them for any interference with their rights and the requirement to make their datasets available for re-use.

187. In the event that a public authority under the FoI Act is able to assert Convention rights, the Government considers that any interference with the right under Article 1, Protocol 1 can be justified.

188. Clause 93 makes provision for companies wholly owned by more than one public authority to come within the definition of public authority in the FoI Act.

189. Information held by companies wholly owned by more than one public authority or contained in datasets held by any public authority may contain personal information the disclosure of which may engage Article 8. However, the exemption contained in the FoI Act concerning the disclosure of personal information (section 40) is retained for this information. This means that any Article 8 interest which may arise will continue to be protected.

190. Schedule 7 to the Constitutional Reform and Governance Act 2010 (CRaG Act) amends the FoI Act to reduce the length of time that certain exemptions apply under the FoI Act from 30 to 20 years and expands the exemption in the FoI Act for information relating to communications with the Royal Family and Royal Household. Paragraph 6 of Schedule 7 to the CRaG Act inserts section 80A to the FoI Act which preserves the effect of the pre-amendment provisions of the FoI Act for Northern Ireland bodies. Clause 94 repeals section 80A of the FoI Act and paragraph 6 of Schedule 7 to the CRaG Act. The repeals will bring Northern Ireland bodies into line with other public authorities subject to the FoI Act in relation to the amendments in Schedule 7.

191. Article 10 is not engaged in relation to the expansion of the exemption in the FoI Act for information held by Northern Ireland bodies which relates to communications with the Royal Family and the Royal Household. This is because Article 10 does not establish a general right of access to public information.

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