

DIGITAL SWITCHOVER (DISCLOSURE OF INFORMATION) BILL

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Digital Switchover (Disclosure of Information) Bill as introduced in the House of Commons on 16th November 2006. They have been prepared by the Department for Culture, Media and Sport in order to assist the reader of the Bill and to help inform debate on it. These notes do not form part of the Bill and have not been endorsed by Parliament.
2. These notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or a part of a clause does not seem to require any explanation or comment, none is given.

BACKGROUND AND SUMMARY OF THE BILL

3. “Digital switchover” is the process by which analogue television broadcasting signals will be phased out in favour of digital signals. The process will allow many more television channels to be carried using less radio spectrum (which is a finite resource) than is currently used. It will involve converting the analogue terrestrial transmission network to digital, allowing digital television to be received via a conventional aerial as well as on other platforms.
4. Digital television services were launched in the UK on satellite and digital terrestrial television (“DTT”) networks in 1998 and on cable networks in 1999. DTT services were introduced alongside existing analogue terrestrial broadcasts with the long-term aim that the analogue terrestrial network – which at the moment carries BBC1, BBC2, ITV, Channel 4/S4C, Five and Teletext – would be switched off at some point in the future.
5. Around 70% of households have now converted at least one television set to digital, whether by satellite, DTT (also known as “Freeview”) and cable services or via broadband. Around 40% of households have converted all household sets to digital. However there are differences between age and socio-economic groups. Research carried out for DCMS and DTI in 2003 and 2004 found that people over 75 and

disabled people were less likely to have digital television and were more likely to have problems installing and using equipment.

6. In September 2005, the Government confirmed the timetable for digital switchover. Starting in Whitehaven at the end of 2007 and the rest of Borders in 2008, digital switchover will roll out by ITV region until the programme is completed in Northern Ireland in 2012 and the Channel Islands in 2013. All households that have not already done so will need to take steps to acquire the necessary digital television equipment as and when their region converts if they want to continue to receive television broadcasts. The effects of digital switchover are set out in the document “*Regulatory and Environmental Impact: the Timing of Digital Switchover*” published by DCMS and DTI in September 2005 (available from www.digitaltelevision.gov.uk).
7. A key part of the Government’s switchover policy is to ensure that adequate advice and assistance is available to those who need it to convert. In September 2005, the Government announced that a Digital Switchover Help Scheme would be established with the BBC under the new (2006) BBC Charter and Agreement and funded by the television licence fee. Under the Scheme, a household will be entitled to be provided with suitable equipment to convert one TV set, help with setting it up and any work necessary to improve their TV aerial, if that household includes a person aged 75 or over or a person with a severe disability, i.e., if that person has an award of disability living allowance or attendance allowance, an equivalent under the war pensions or industrial injuries disablement benefit legislation or is registered blind or registered partially sighted. Help will be available free of charge for those who are eligible and in receipt of pension credit, income support or income-based jobseeker’s allowance; others will pay a contribution towards the cost of assistance.
8. The present Bill is designed to support such a Scheme. Evidence gained from two small-scale trials in Llansteffan/Ferryside in 2004 and in Bolton in 2005, and from consultations with charities and other experts, indicates that the Help Scheme will best serve the needs of the target population if those administering it take active steps to communicate directly with people who are entitled to help. Using data held by the Department for Work and Pensions (“DWP”), the Department for Social Development in Northern Ireland (“DSDNI”) and the Veterans’ Administration within the Ministry of Defence (for war pensions), the administrator of the Scheme will identify people in the eligible categories and write to them, inviting them to apply for help. This should maximise take-up and (hence) help to vulnerable people, and minimise form-filling for recipients.
9. The disclosure of such data is, however, constrained by a number of legal controls, such as the law of confidentiality and statutory provisions – in particular the Social Security Administration Act 1992, section 123. That provision makes it an offence for a social security employee (amongst others) to disclose social security information without “lawful authority” (as defined in section 123(9)).
10. Section 123 of the 1992 Act would prevent the disclosure of social security

information to assist in the administration of the Help Scheme. Public authorities also owe a duty of confidentiality to people who supply them with personal information. The Bill will therefore create legal authority for the disclosure of social security information: *clause 1(1) and (2)*. Social security information of a prescribed kind may be disclosed to a “relevant person” for use in connection with “switchover help functions”, such as identifying persons who may be eligible for help, contacting them and establishing their entitlement: *clause 1(4)*. A “relevant person” includes the BBC, certain companies controlled by the BBC or the Crown, and any person engaged by the BBC, the Secretary of State or such a company to provide services or carry out functions in connection with switchover help functions: *clause 1(3)*. It is an offence for a person who has received information by virtue of this power to disclose it without lawful authority: *clause 3*.

TERRITORIAL EXTENT

11. The Bill extends to the whole of the UK. There is power in *clause 6(3)* for Her Majesty to extend its provisions to the Isle of Man, with or without modifications. Jersey and Guernsey intend to establish their own help schemes, separate from the Scheme covering the UK and Isle of Man.
12. Broadcasting, social security and war pensions are all reserved matters in relation to Scotland. This Bill does not deal with any devolved matters.

COMMENTARY

Clause 1: Disclosure of information

13. *Subsection (1)* provides legal authority for the Secretary of State and DSDNI to supply social security information to relevant persons for use in connection with switchover help functions. It gives a power to supply such information on request, but not a duty to do so: in other words, the final decision on whether information is supplied in a particular instance lies with the Secretary of State (or DSDNI, as the case may be). *Subsection (2)* makes similar provision to allow the Secretary of State to supply war pensions information.
14. In practice, the Secretary of State concerned in *subsection (1)* is the Secretary of State for Work and Pensions, and in *subsection (2)* it is the Secretary of State for Defence. All war pensions are administered by the Veterans’ Agency (which is part of the Ministry of Defence) for the whole of the UK. “Social security information” and “war pensions information” are defined in *clause 2*.
15. The information may be supplied to “relevant persons” as defined in *subsection (3)*. Any “switchover help scheme” (as defined in *clause 5*) will be under the overall management of the BBC or a company controlled by the BBC or the Crown (or the BBC and the Crown together): the exact structure has not yet been finally determined.

In practice, much of the administration of the Scheme (e.g. contacting potential applicants, determining entitlements, and delivering equipment and help with installations) will be contracted out to private sector organisations.

16. Under *subsection (3)*, a “relevant person” means the BBC or a company controlled by the BBC or the Crown (or the BBC and the Crown together), or a person engaged by the BBC, by the Secretary of State, or by any such company to provide services or perform functions connected with switchover help functions.
17. In principle, “relevant persons” can then exchange information between themselves: this is envisaged by *subsections (1) and (2)* (as indicated by the phrase “for use (by the person to whom it is supplied or by another relevant person)”). For example, a contractor might be made responsible for mailing information to potential applicants. They will need social security and war pensions information in order to identify and contact the people concerned. Depending on precisely how the Scheme is administered, information might be supplied by the Secretary of State directly to the contractor, or indirectly, via a company that is also a “relevant person”, such as a subsidiary of the BBC or a company owned by the Crown and the BBC.
18. All exchanges of information permitted by the Bill are, however, to be controlled by:
 - the terms of *clause 3*, which creates offences of disclosure without lawful authority (see below);
 - the Data Protection Act 1998;
 - other aspects of the general law, such as any obligation of confidentiality owed to the subject of the information or the body that supplied it; and
 - the terms of any contract between the companies concerned.
19. “Switchover help functions” are defined in *subsection (4)*. The expression means—
 - the identification of people who may be eligible for switchover help;
 - making contact with such people with a view to providing help (e.g. writing a letter to them explaining the help available and inviting them to contact the Scheme and ask for help);
 - establishing whether or not an applicant is eligible for help.

Clause 2: “social security information” and “war pensions information”

20. This clause defines key expressions used in *clause 1*: “social security information” and “war pensions information”. It provides power for the Secretary of State to specify the precise kinds of social security and war pensions information that can be supplied under *clause 1*. In this case it is envisaged that the orders will be made by

the Secretary of State for Culture, Media and Sport.

21. Those expressions are defined as follows:
- “*Social security information*” is information of a description specified by order which is held by (or on behalf of) the Secretary of State or DSDNI and obtained as a result of, or for the purposes of, the exercise of functions in relation to social security.
 - “*War pensions information*” is information of a description specified by order which is held by (or on behalf of) the Secretary of State and obtained as a result of, or for the purposes of, the exercise of functions in relation to war pensions (see below).
22. “*Social security*” would, as in other statutes, encompass a range of benefits including state retirement pensions, income support, pension credit, income-based jobseeker’s allowance, disability living allowance and attendance allowance. Child support is not included.
23. “*War pension*” refers to a pension or other benefit for or in respect of a person who has died or been disabled in consequence of service as a member of the armed forces, and certain other pensions and benefits. See the definition given in section 25 of the Social Security Act 1989, which applies in the Bill by virtue of *clause 2(3)*.
24. Thus, the Bill will not permit the supply of all social security and war pensions information, but only of those descriptions of such information as have been prescribed by order under subsection (2) or (3). The precise details have not been finalised, but it is envisaged that this power will be used to specify for this purpose the following information about an identifiable person, namely—
- their name, and any alias by which they may be known, marital status (if known), address and date of birth;
 - their National Insurance number;
 - whether they are eligible for any of the benefits that will establish entitlement to help and (if so) those in respect of which they have an award of benefit;
 - the fact that they have ceased to receive such benefits, where that is the case;
 - details of any partner (including details of date of birth and National Insurance number) and whether they receive pension credit, income support or income-based jobseeker’s allowance (to check upon what level of support the household is entitled to);
 - if the qualifying person for disability living allowance is a

child, whether the responsible adult or adults is receiving pension credit, income support or income-based jobseeker's allowance;

- whether they live in a residential care or nursing home (so helping to ensure that the right kinds of help are available in residential care and nursing home settings);
- details of any person appointed to act on their behalf (to allow such people to be contacted to alert them to the availability of help);
- the fact that they have died, where that is the case.

25. The order is to be made by statutory instrument and will be subject to the negative resolution procedure, that is to say, it can be annulled by a resolution of either House of Parliament: see *subsections (4) and (5)*.

Clause 3: Offences

26. In order to protect information supplied under the Bill against further disclosure, *clause 3* makes it an offence for certain persons to disclose such information without "lawful authority" as defined in *subsection (6)*. The penalties available on conviction (see *subsection (7)*) are the same as those for comparable offences under section 123 of the Social Security Administration Act 1992. The offence may be committed either—

- under *subsection (1)*, by a relevant person (as defined in *clause 1(3)*) who has received information under *clause 1* directly from the Secretary of State or DSDNI, or indirectly from another relevant person (see paragraph 17 above for an illustration); or
- under *subsection (2)*, by a person who is or has been employed by a relevant person, or engaged (e.g. as a consultant, rather than an "employee" in the strict legal sense) to provide services or perform a function connected with carrying out a switchover help function.

27. It is not an offence to disclose information in a summary form, such as a statistical analysis, such that no information relating to a particular person can be ascertained from it (*subsection (4)(a)*), or to disclose it (*subsection (4)(b)*) in circumstances where the information in question had already been made public with lawful authority.

28. Also, the person charged has a defence if he can prove that, even though *in fact* the disclosure was made without lawful authority or was a disclosure of information that had not previously been made public with such authority, he *believed* that one or other of those conditions was met, and had no reason to believe that they were not met: *subsection (5)*. In principle, this reverses the burden of proof in this respect. In criminal matters it is usually up to the prosecution to prove the case beyond all reasonable doubt, but here the defendant must prove the matters that go to make up

the defence. The standard of proof is the balance of probabilities. Such “reverse burden” provisions raise issues under article 6 of the European Convention on Human Rights that are discussed below.

29. The meaning of “*lawful authority*” is given in *subsection (6)*. A disclosure is made “with lawful authority” if (but only if) it is made—
- for the purpose of carrying out a switchover help function (as defined in *clause 1(4)*) or for doing anything connected with the carrying out of such a function;
 - in accordance with any enactment or a court order;
 - for the purposes of court proceedings;
 - with the consent of the person to whom the information relates or a person authorised to act on his or her behalf.
30. *Subsection (7)* provides that any person found guilty of an offence under this provision is liable—
- a) on conviction in the Crown Court, to imprisonment for a term not exceeding two years or an unlimited fine or both;
 - b) on conviction in a magistrates’ court, to imprisonment for a term not exceeding twelve months or a fine not exceeding the “statutory maximum” (currently £5000) or both.
31. *Subsection (8)* is a transitional provision in England and Wales and Scotland, but has indefinite effect in Northern Ireland. Where an offence is committed before the coming into force (in England and Wales) of section 154 of the Criminal Justice Act 2003 or is committed in Northern Ireland, or a prosecution takes place (in Scotland) before the commencement of section 35(1) of the Criminal Proceedings etc. (Reform) (Scotland) Act 2006, *subsection (7)(b)* has effect as if it provided for a maximum term of imprisonment not exceeding six months.

Clause 4

32. The offences of unlawful disclosure created by *clause 3* can in principle be committed by a “body corporate” (e.g. a company, or the BBC, which is a corporation by virtue of its Royal Charter). For example, company literature might reveal such information. By virtue of *clause 4(1)*, where such a body commits an offence under *clause 3*, an officer of that body can personally be convicted of a criminal offence alongside the company, if it is shown that the body committed the offence with the consent or connivance of the officer, or that the commission of the offence was attributable to any neglect on his part. Thus, if an officer, for example, neglects to make sure that staff are aware of the need to maintain the confidentiality of social security information, or neglects to take steps to control movements of information, with the result that there is a release of such information, he may face prosecution. An

individual convicted under this provision is liable to the same punishments as are set out in *clause 3(7)*.

33. The aim of *subsections (2) and (3)* is to ensure that this provision is apt to apply to many forms of corporate organisation. In particular, *subsection (3)* gives a broad definition of an “officer”, which means a director, member of the committee of management, chief executive, manager, secretary or other similar officer of the body. It also encompasses a person *purporting* to act in any such capacity, so a person who (for example) *in fact* gives orders in a company and is part of its management team might not escape liability by simply saying that technically (e.g. because of the terms of his job description) he does not fall into one of the categories of person mentioned.

COMMENCEMENT

34. The Bill comes into force on the day it receives Royal Assent.

EUROPEAN CONVENTION ON HUMAN RIGHTS

35. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement before Second Reading about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act). Tessa Jowell, the Secretary of State for Culture, Media and Sport, has made the following statement under section 19(1)(a) of the Human Rights Act 1998 in respect of this Bill—

“In my view the provisions of the Digital Switchover (Disclosure of Information) Bill are compatible with the Convention rights.”

36. The Bill raises issues under the European Convention on Human Rights in two respects.
37. First, the disclosure of social security and war pensions information about an individual is an interference with the rights of that individual under article 8 of the Convention (right to respect for private etc. life). However, article 8(2) provides that an interference with those rights is justified where it is in accordance with the law and necessary in a democratic society in the interests of certain legitimate objectives. These requirements are considered to be satisfied here. The Bill would provide the degree of legal certainty needed to establish that any transfer would be “in accordance with law”, and the extent of the authority provided to disclose information is considered to be proportionate to the legitimate objectives of protecting the rights of vulnerable people in society, by ensuring that they do not lose their access to television services, and detecting fraudulent claims under the Help Scheme.

38. Second, clause 3(5) provides that, where a person is charged with making an unauthorised disclosure, it is a defence for a defendant to prove that at the time of the alleged offence he believed he had lawful authority to make the disclosure or that the information in question was already in the public domain, and that he had no reason to think otherwise. In other words, it places a legal burden on the defendant to prove the circumstances which go to make up the defence, which reverses the normal position, that the prosecution must prove its case against a defendant. This raises the question whether clause 3(5) is consistent with article 6(2), which provides that every person charged with an offence must be presumed innocent until proved guilty.
39. It is considered that clause 3(5) complies with article 6(2). The European Court of Human Rights has held that article 6(2) does not place an absolute prohibition on such “reverse burden” provisions, but they must be “reasonable”. Clause 3(5) is considered to be reasonable: the offence is an important one because it is one of the mechanisms that safeguards personal information disclosed for the purposes of giving help with switchover, and while it is right that a defendant should be acquitted if there are extenuating circumstances, it is reasonable to require the defendant to prove those circumstances, especially as they relate to his state of mind (what he believed and what he knew at the time) which are matters peculiarly within his knowledge.

PUBLIC SECTOR FINANCIAL AND MANPOWER EFFECTS

40. The Bill is not expected to have any significant effect on public expenditure or on public sector manpower.

REGULATORY IMPACT ASSESSMENT

41. The measures set out in the Bill do not result in any cost to business or to the voluntary or charitable sectors; nor are there any environmental impacts. Allowing the Scheme’s administrator access to social security data will enable the Scheme to be operated more cost-effectively producing a significant saving in administrative costs. There are also benefits to eligible households who will not by and large need to complete extensive claims forms or have to prove entitlement.