

# **COUNTER-TERRORISM BILL**

---

## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These explanatory notes relate to the Counter-Terrorism Bill as brought from the House of Commons on 12th June 2008. They have been prepared by the Home Office in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
2. The 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. Where a section or part of a section does not seem to require any explanation or comment, none is given.

### **SUMMARY**

3. The Bill amends the law in relation to terrorism in a number of distinct ways. It includes provisions relating to: the gathering and sharing of information for counter-terrorism and other purposes, including the disclosure of information to and by the intelligence services; the period of pre-charge detention in terrorist cases; post-charge questioning of terrorism suspects; the prosecution of terrorism offences and punishment of convicted terrorists; notification requirements for persons convicted of terrorism-related offences; asset freezing proceedings under United Nations terrorism orders; inquests and inquiries dealing with sensitive information; and various other miscellaneous measures. New powers and offences will be created by the provisions of the Bill and existing terrorism legislation will be amended and reformed.
4. Prior to the introduction of this Bill, the Government undertook an extensive consultation on possible measures for inclusion in the Bill and published documents to facilitate that consultation. The consultation documents included measures recommended following an inter-departmental review of existing counter-terrorism legislation and in reports by the independent reviewer of terrorism legislation, Lord Carlile of Berriew Q.C.

## **OVERVIEW**

5. The Bill's Parts and Schedules are as follows.

6. Part 1 (powers to gather and share information) contains provisions for new powers relating to the removal of documents for examination in the context of a search under existing terrorism legislation. It also provides a power for a constable to take fingerprints and samples from individuals subject to control orders and amends the law relating to the retention and use of fingerprints and DNA samples. It also contains provisions on the disclosure of information to and by the intelligence services and their use of such information.

7. Part 2 (detention and questioning of terrorist suspects) provides for a temporary extension to the maximum amount of time that terrorist suspects can be held before being charged to 42 days. This extension may be made available by order by the Secretary of State in defined circumstances. This Part also provides that terrorist suspects may be questioned after they have been charged. The questioning will be limited to the offence for which the person has been charged with and adverse inferences from the silence of the suspect may be drawn by a court in England, Wales or Northern Ireland.

8. Part 3 (prosecution and punishment of offences) provides for specified terrorism offences committed anywhere in the UK to be tried in any part of the UK. It also requires the Attorney General's or Advocate General for Northern Ireland's consent for prosecution of specified terrorism offences committed outside the UK. This Part also deals with sentences for cases tried under the general criminal law: the court is to consider a terrorist connection as an aggravating factor when considering sentence. It also extends the forfeiture regime applicable in terrorist cases.

9. Part 4 (notification requirements) makes provision about notification of certain information to the police by individuals who are convicted of, and sentenced to 12 months or more for, a terrorism or terrorism-related offence. They must provide the police with certain personal information when they are not in custody, notify any subsequent changes to this information and confirm its accuracy annually. And under Schedule 6, courts may make foreign travel restriction orders which will enable restrictions to be placed on the overseas travel of those subject to the notification requirements.

10. Part 5 (asset freezing proceedings) amends the Regulation of Investigatory Powers Act 2000 so that intercept material can be used in asset freezing cases relating to terrorism (cases in which assets are frozen for the purposes of a UN terrorism order). It also provides an enabling power for the Lord Chancellor (in the first instance) to make court procedure rules about the use of special advocates, closed hearings and the withholding of evidence in civil court proceedings relating to asset freezing decisions.

11. Part 6 (inquests and inquiries) creates provisions for coroners' inquests to take place without a jury if the Secretary of State has certified that the inquest will involve the consideration of material that should not be made public in the interests of national security, the relationship between the United Kingdom and another country, or otherwise in the public interest. This Part also amends the Regulation of Investigatory Powers Act 2000 to allow intercept material to be disclosed in exceptional circumstances to: (i) coroners and counsel to the inquest in cases where the Secretary of State has issued a certificate requiring the inquest to be held without a jury; and (ii) to counsel to an inquiry held under the Inquiries Act 2005 (in addition to the inquiry panel).

12. Part 7 (miscellaneous) amends the definition of terrorism in section 1 of the Terrorism Act 2000 (and various other pieces of terrorism legislation) by inserting a reference to a racial cause. This Part also creates an offence of eliciting, publishing or communicating information about members of the armed forces, members of the intelligence and security agencies or police constables which is likely to be of use to terrorists, and amends the offence of failing to disclose information about a suspected terrorist finance offence. It also includes some amendments to the control order system, amendments to provisions on forfeiture of terrorist cash, a new scheme relating to the recovery of costs of policing at gas facilities and a provision on the appointment of special advocates in Northern Ireland.

13. Part 8 contains supplementary provisions.

## **TERRITORIAL EXTENT AND APPLICATION**

14. Most of the Bill extends to the whole of the United Kingdom, although provisions amending or repealing other enactments have the same extent as the enactment being amended or repealed. In addition, a number of provisions apply in only one of the three jurisdictions. The provisions of the Bill with a more limited territorial extent or application are as follows:

- In Part 1, in the clauses on taking fingerprints etc. from controlled persons, clause 10 amends the Police and Criminal Evidence Act 1984 ("PACE") and therefore extends only to England and Wales, clause 11 only applies to persons subject to control orders in Scotland and clause 12 amends the Police and Criminal Evidence (Northern Ireland) Order 1989 ("PACE NI") and therefore extends only to Northern Ireland.
- In the provisions in Part 1 on the retention and use of fingerprints and samples, clause 14 amends PACE and extends only to England and Wales and clause 15 amends PACE NI and extends only to Northern Ireland.
- In Part 2, in the clauses on post-charge questioning, clause 34 applies only in England and Wales, clause 35 in Scotland and clause 36 in Northern Ireland.

*These Notes refer to the Counter-Terrorism Bill  
as brought from the House of Commons on 12th June 2008 [HL Bill 65]*

- In Part 3, clause 42 (sentences for offences with a terrorist connection: England and Wales) applies to court proceedings in England and Wales and clause 43 applies to court proceedings in Scotland. There is no corresponding provision for Northern Ireland.
- In Part 6 (inquests and inquiries), clauses 77 and 79 amend the Coroners Act 1988 which extends only to England and Wales. Clause 78 amends the Coroners Act (Northern Ireland) 1959. This makes equivalent provision to clause 77.
- In Part 7, there are separate clauses applicable in England and Wales and in Scotland on the recovery of costs of policing at gas facilities (clauses 91 and 92).
- Clause 97 (appointment of special advocates in Northern Ireland) substitutes references to the “Advocate General for Northern Ireland” for references to the “Attorney General for Northern Ireland” in various pieces of legislation; the primary application of this clause will therefore be in Northern Ireland.

15. The Bill only deals with reserved matters as respects Scotland and excepted matters as respect Northern Ireland. It does not confer any functions on the National Assembly for Wales, and in general applies to Wales in the same way as it applies to England.

## COMMENTARY ON CLAUSES

### PART 1 – POWERS TO GATHER AND SHARE INFORMATION

#### *Power to remove documents for examination*

##### **Clause 1 – Power to remove documents for examination**

16. Clause 1 provides a new power for a constable to remove documents in the course of a terrorist-related search for the purpose of ascertaining whether they may be seized. Documents removed under clause 1 may be retained until the examination is complete. This power might be used, for example, to remove documents in a foreign language for translation.

17. *Subsection (1)* limits the situations in which the new power may be used: it may only be used in the context of searches under the listed provisions of the Terrorism Act 2000, the Anti-terrorism, Crime and Security Act 2001, the Prevention of Terrorism Act 2005 and the Terrorism Act 2006.

18. *Subsection (3)* makes provision in relation to documents stored in an electronic form.

19. *Subsection (4)* provides that where a document is removed under this power, a constable has the same powers of seizure (at common law and under statute) as if it had not

been removed. This will include the general power of seizure under section 19 of PACE which allows a constable lawfully on premises to seize a document if the constable believes that it is evidence in relation to any offence.

**Clause 2 – Offence of obstruction**

20. Clause 2 creates the offence of wilfully obstructing a constable in the exercise of the power conferred by clause 1. This is a summary offence, punishable by a maximum penalty of up to 51 weeks' imprisonment in England and Wales (but before section 281(5) of the Criminal Justice Act 2003 comes into force, 6 months), 12 months' imprisonment in Scotland and 6 months' imprisonment in Northern Ireland.

**Clause 3 – Items subject to legal privilege**

21. Clause 3 deals with documents that are, or may be, legally privileged. Under *subsection (1)* a constable may not remove a document if he has reasonable cause to believe that it is an item subject to legal privilege or has such an item comprised in it (for example it is a document which includes correspondence with a lawyer in it but also includes other information). If it is discovered that a document that has been removed is an item subject to legal privilege, or has such an item comprised in it, it must be returned immediately (*subsection (3)*). However, a document which has an item subject to legal privilege comprised in it may be removed or retained if it is not reasonably practicable to separate the legally privileged part from the rest of the document without prejudicing the lawful use of the latter if it were to be seized (*subsections (2) and (4)*). This will be the case for example where tearing out legally privileged information from a larger document would also remove non-legally privileged information, which might comprise evidence of an offence, on the reverse of the page.

22. *Subsection (5)* provides that where parts of a document which are subject to legal privilege are removed or retained because it is not reasonably practicable to separate them from those parts which are not, the legally privileged parts must not be used in any other way but to facilitate the examination of the rest of the document.

23. *Subsection (6)* defines an “item subject to legal privilege” for the purpose of this clause by reference to PACE, in England and Wales, the Proceeds of Crime Act 2002 in Scotland, and PACE NI in Northern Ireland.

**Clause 4 – Record of removal**

24. *Subsections (1) and (2)* provide that a constable who removes a document using the new power of removal must make a written record of the removal as soon as is reasonably practicable and in any event within 24 hours of the removal.

25. *Subsections (3), (4) and (5)* set out the matters to be included in such record and *subsection (10)* makes specific provision as to how the reference to the address of the premises in *subsection (3)* is to be interpreted where the search is of a vehicle. Many of the listed search powers include searches of vehicles (for example, searches under Schedule 5 to

the Terrorism Act 2000 may be of “any premises”, and “premises” is defined in section 121 of that Act to include vehicles).

26. *Subsections (7) and (8)* provide that a constable must, within a reasonable time of receiving a request, supply a copy of the search record to a person with an interest in the document as defined.

27. *Subsection (9)* provides that if a document has been found during the course of a search under a warrant in England and Wales or Northern Ireland, the constable must endorse the warrant stating that the document was removed under the provisions of clause 1 of this Bill. This is so that the person or court which issued the warrant will be aware of the action that has been taken under it when the warrant is returned to them.

#### **Clause 5 – Retention of documents**

28. Clause 5 provides that documents removed under clause 1 cannot be retained for more than 48 hours unless further retention – up to a maximum of 96 hours from the time of removal – is authorised by a constable of at least the rank of chief inspector provided he is satisfied of the matters contained in *subsection (2)*.

#### **Clause 6 – Access to documents**

29. Clause 6 allows a person referred to in *subsection (3)*, on request, to have supervised access to a document retained under the provisions of clause 5 or to be given a copy of such a document (*subsection (2)*). This is subject however to the officer in charge of the investigation (defined in *subsection (5)*) being able to refuse such access or a copy on the grounds set out in *subsection (4)*. The examination of a document under this power might not be part of an investigation into an offence (for example where the document was removed during the search of a terrorist suspect prior to arrest). This explains why the grounds in clause 6(4)(a) are required. *Subsection (4)(b)* covers the investigation of an offence. For example if it was thought access would tip off a person as to the documentation seized such that other evidence of the offence could be covered up. *Subsection (4)(c)* covers the prejudice of criminal proceedings. The ground in *subsection (4)(d)* is to cover for example a document which the officer has reasonable grounds to believe constitutes information useful to terrorists.

#### **Clause 7 – Photographing and copying of documents**

30. Clause 7 provides that a document removed under clause 1 may not be photographed or copied except for the purposes of clause 6 or to produce information stored in electronic form in a visible and legible form.

31. On return of the document, electronic copies must be destroyed and any hard copies made under *subsection (1)* must be returned at the same time (*subsection (2)*).

32. *Subsections (3) and (4)* provide that the persons referred to in *subsection (3)* can request a certificate to show that all copies have been so destroyed, made inaccessible or returned and such a certificate must be issued within three months of the request. The certificate is to be issued by the “relevant chief officer of police” as defined in *subsection (5)*.

#### **Clause 8 – Return of documents**

33. This clause provides that a document and any copy that is to be returned (because the time limit for retention has expired or the document is not one that may be seized) (and any copy) is to be returned to the person searched or the occupier of the premises on which it was found. However, where another person appears to have a better right to the document, the document must be returned instead to that person, and where different persons claim to be entitled to the document, it may be retained for as long as reasonably necessary to determine who has best claim to it.

#### **Clause 9 – Power to remove documents: supplementary provisions**

34. *Subsection (2)* means that when a search is carried out under section 52(1) of the Anti-Terrorism, Crime and Security Act 2001, references in these provisions to a constable should be read as references to an authorised officer as defined in that section – as that search power is conferred on an authorised officer rather than a constable.

#### ***Power to take fingerprints and samples from person subject to control order***

#### **Clause 10 – Power to take fingerprints and samples: England and Wales**

35. Clause 10 amends sections 61, 63, 63A, 64 and 65 of PACE, providing a constable with powers relating to the taking and use of fingerprints and non-intimate samples from an individual subject to a control order. (The control order regime is contained in the Prevention of Terrorism Act 2005.) Both “fingerprints” and “non-intimate samples” have the same meaning as that given in section 65 of PACE. That is, “fingerprints” include palm prints and “non-intimate samples” means a sample of hair other than pubic hair; a sample taken from a nail or from under a nail; a swab taken from any part of a person’s body including the mouth but not any other body orifice; saliva and a footprint or a similar impression of any part of a person’s body other than a part of his hand. These amendments will apply to all individuals subject to control orders that are in force from the time this clause is commenced, regardless of when the control order was made, but the provisions will not apply to individuals whose control orders have already lapsed (see *subsection (5)* and clause 13).

36. *Subsections (1) and (2)* provide a constable with the power to take fingerprints and non-intimate samples respectively without the appropriate consent of an individual subject to a control order. Appropriate consent is defined in section 65 of PACE as meaning: (a) in relation to a person who has attained the age of 17 years, the consent of that person; (b) in relation to a person who has not attained that age but has attained the age of 14 years, the consent of that person and his parent or guardian; and (c) in relation to a person who has not attained the age of 14 years, the consent of his parent or guardian. PACE Code D (Code of Practice for the Identification of Persons by Police Officers) provides that a constable can use

reasonable force to ensure compliance with this provision where the appropriate consent is withheld.

37. *Subsection (3)(a)* provides a constable with the power to check the fingerprints and non-intimate samples of an individual subject to a control order against the same databases that other fingerprints etc. taken under PACE may be checked against (see PACE section 63A, as amended by clause 14). So the fingerprints or samples may be checked against other such fingerprints or samples and/or information derived from other samples that are held by or on behalf of any relevant law enforcement authority or are held in connection with or as a result of an investigation of an offence or which are held by or on behalf of the Security Service or the Secret Intelligence Service. Relevant law enforcement authorities are defined in section 63A(1A) of PACE to include a police force and the Serious Organised Crime Agency. The definition also includes persons outside the territory of the United Kingdom whose functions correspond to those of a police force and any other public authority with functions in any part of the British Islands which consist of or include the investigation of crimes or the charging of offenders.

38. *Subsection (3)(b)* provides a constable with powers to require a controlled individual to attend a police station for the purposes of having their fingerprints and/or non-intimate samples taken. In the event that such a request is not complied with, the person may be arrested without a warrant (see the amendment to section 63A(7) made by *subsection (6)*).

39. *Subsection (4)* allows the retention of a controlled individual's fingerprints and non-intimate samples taken under the new provisions, subject to the safeguards in section 64 of PACE (as amended by clause 14). These safeguards ensure that any such samples retained are only used for purposes related to the interests of national security, the prevention or detection of crime, the investigation of an offence, the conduct of a prosecution or the identification of a deceased person or of the person from whom the material came.

40. *Subsection (6)* makes consequential amendments of PACE, many of which mean that fingerprints and non-intimate samples taken from a controlled person will be subject to the same provisions as fingerprints and non-intimate samples taken under current PACE powers. These include safeguards such as requiring a constable to inform the individual concerned of the reason for taking the fingerprints or non-intimate sample without consent (this will normally be simply that they are subject to a control order) before they are taken and informing them that the fingerprints and/or samples may be the subject of a "speculative search". The matters of information must also be recorded as soon as it is practicable to do so. The term "speculative search" is defined at section 65 of PACE and it is taken to mean that the fingerprints and/or non-intimate samples can be randomly checked against other samples that have been taken under current PACE powers as mentioned in relation to *subsection (3)*.

#### **Clause 11 – Power to take fingerprints and samples: Scotland**

41. Clause 11 makes similar provision to clause 10 for Scotland in relation to the taking of fingerprints and non-intimate samples from an individual subject to a control order. The

clause creates new free-standing powers rather than amending any existing legislation. The main area of difference between the powers in England and Wales and the powers in Scotland is that any samples that are obtained may be used only for the purposes of a terrorist investigation or in the interests of national security. This difference is necessary in order to avoid making provision in areas that are within devolved competence. In addition, in line with current procedures in Scotland, constables would need authorisation from an officer of the rank of inspector or above to take certain types of non-intimate samples (non-pubic hair or nail samples and external body fluid samples) from controlled individuals. (A constable does not require such authorisation to take fingerprints, palm prints, other external body prints and saliva samples.) In contrast, current procedures in England, Wales and Northern Ireland allow constables to take fingerprints and all non-intimate samples when individuals are arrested under PACE or PACE NI without such authorisation. The difference is thus because the provisions in clauses 10, 11 and 12 are intended to be in line with existing procedures in each country.

**Clause 12 – Power to take fingerprints and samples: Northern Ireland**

42. Clause 12 makes corresponding provision to clause 10 for Northern Ireland in relation to the taking of fingerprints and non-intimate samples from an individual subject to a control order. It amends PACE NI.

**Clause 13 – Power to take fingerprints and non-intimate samples: transitional provision**

43. Clause 13 makes transitional provision for the powers in clauses 10, 11 and 12 and provides that the powers to take fingerprints and non-intimate samples from a person subject to a control order will have effect at the time the clauses are commenced regardless of when the control order was made.

***Retention and use of fingerprints and samples***

**Clauses 14 to 18 – Retention and use of fingerprints and samples**

44. Clauses 14 to 18 (retention and use of fingerprints and samples) seek to ensure that fingerprints, DNA and footwear impressions (“samples”) can be effectively used for counter-terrorist purposes including by the security services by:

- a) allowing the cross checking of security services material with ordinary crime (PACE) samples in England, Wales and Northern Ireland. (Scotland does not have PACE);
- b) putting the retention and use of material not subject to existing restriction (mostly covertly acquired fingerprints and samples) on a statutory footing; and
- c) standardising the purposes for which fingerprints and samples can be used as between the Terrorism Act 2000, the Police and Criminal Evidence Act 1984 and material not subject to existing statutory restrictions (inserted by clause 18 of this Bill).

45. These clauses make amendments to the purpose for which samples obtained during criminal or terrorist investigations can be used. This includes adding that such samples can be used for the purposes of national security. National security is defined in section 1(2) of the Security Services Act 1989 and includes “*threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.*”

46. Section 64(1A) of PACE currently allows samples to be retained and used for the prevention or detection of crime, the investigation of an offence, the conduct of a prosecution or for the identification of dead people (the same uses are provided for in PACE NI. In contrast, paragraph 14 of Schedule 8 to the Terrorism Act 2000 provides that samples taken under the provisions of that Act can only be used for terrorist investigations or for the purposes related to the prevention or detection of crime, the investigation of an offence of the conduct of prosecution.

47. These clauses will standardise the purposes for which the samples can be used between the Terrorism Act 2000, PACE and PACE Northern Ireland. When the uses for the samples are different they cannot be stored on the inter-connected databases.

#### **Clause 14 – Material subject to the Police and Criminal Evidence Act 1984**

48. *Subsection (2)* amends section 63A(1) of PACE to allow samples (fingerprints, impressions of footwear or DNA samples) taken under PACE to be checked against other fingerprints, impressions of footwear or samples held by or on behalf of the Security Service (MI5) or the Secret Intelligence Service (MI6 or SIS). The clause adds a similar power to check information derived from other samples against that information derived from material held by the Security Services or the Secret Intelligence Service. Samples may be taken from a person under PACE if the person is suspected of being involved with a recordable offence, has been charged with a recordable offence or informed that he will be reported for such an offence, or, following the amendments made by clause 10, if he is subject to a control order.

49. *Subsection (3)* amends section 63A(1ZA) of PACE similarly to allow the cross checking against material held by the Security Service or the Secret Intelligence Service of material taken from a person under section 61(6A), which allows a constable to take a person’s fingerprints etc. if the person’s name cannot be ascertained or if the constable believes the person has given a false name.

50. *Subsection (5)* inserts a new subsection (1AB) into section 64 of PACE that sets out the purposes for which samples can be used. The clause expands the uses to permit samples to be used in the interest of national security as well as for the purposes already listed in section 64, which are purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution, or for purposes relating to the identification of a deceased person or the person from whom the material came.

**Clause 15 – Material subject to the Police and Criminal Evidence (Northern Ireland) Order 1989**

51. Clause 15 amends PACE NI to make changes for Northern Ireland that have the same effect to those made above to PACE for England and Wales. These will permit samples and fingerprints to be checked against records held by or on behalf of the Security Service or the Secret Intelligence Service and for the use of such samples to be expanded to include when it is in the interests of national security.

**Clause 16 – Material subject to the Terrorism Act 2000: England, Wales and Northern Ireland**

52. Clause 16 amends paragraph 14 of Schedule 8 to the Terrorism Act 2000 (the “2000 Act”). Schedule 8 to the 2000 Act governs the treatment of persons detained under that Act. Paragraph 14 applies to fingerprints or samples taken under Schedule 8. Paragraph 14 is amended so that such samples may be used in the interests of national security and in the identification of a deceased person or of the person from whom the material came, in addition to the uses already allowed for in paragraph 14 (in a terrorist investigation or in the prevention and detection of crime, the investigation of an offence or the conduct of a prosecution). This ensures that the purposes cover all those for which fingerprints and samples taken under PACE and PACE NI may be used following the amendments effected by clauses 14 and 15. It also provides that samples taken under the 2000 Act in England, Wales and Northern Ireland may be cross checked against material held under clause 18. Paragraph 14 already allows cross checking against material referred to in section 63A PACE (and PACE NI) and so the amendments to these provisions adding in references to material held by or on behalf of the Security Service or the Secret Intelligence Service means that the 2000 Act samples can be cross checked against those too.

**Clause 17 – Material subject to the Terrorism Act 2000: Scotland**

53. Clause 17 makes similar amendments to paragraph 20 of Schedule 8 to the 2000 Act. Paragraph 20 governs the use of fingerprints and samples of those detained under the 2000 Act in Scotland. *Subsection (2)* amends sub-paragraph 3 of paragraph 20 so as to allow samples obtained in Scotland under the 2000 Act to be used for purposes of a terrorist investigation, in the interest of national security, for the purposes related to the prevention and detection of crime or the investigation of an offence or the conduct of a prosecution.

54. *Subsection (3)* adds a new paragraph 21 to Schedule 8 that applies, with modifications, section 20 of the Criminal Procedure (Scotland) Act 1995. The effect is that the 2000 Act samples may be cross checked against samples taken under the 1995 Act, samples referred to in section 63A of PACE and against material held under clause 18.

**Clause 18 – Material not subject to existing statutory restrictions**

55. Clause 18 provides a statutory framework for the use and retention of DNA samples and fingerprints that are not held subject to other existing statutory restrictions.

56. *Subsection (2)* restricts the uses to which such samples and fingerprints held by a law enforcement authority in England, Wales or Northern Ireland may be put. They may only be used in the interest of national security, for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution or for the purposes related to the identification of a deceased person or of the person from whom the material came.

57. *Subsection (3)* imposes a condition that must be met before the samples and fingerprints may be used for the purposes set out in *subsection (2)*. The condition is that the material must have been either: (i) obtained by the authority pursuant to an authorisation under the Police Act 1997 or the Regulation of Investigatory Powers Act 2000; (ii) supplied to the authority by another law enforcement body (domestic or foreign); or (iii) otherwise lawfully obtained by the authority for one of the purposes in *subsection (2)*.

58. *Subsection (4)* clarifies certain terms used in *subsection (2)*: use of material includes allowing a check to be made against it and disclosing to another person. This phrase is used principally to allow samples to be exchanged with the security agencies who are not included in the definition of “law enforcement authority” and “police force” in clause 18(5). The reference in *subsection (2)* to crime includes actions which constitute a criminal offence under law of any part of the UK or a territory outside the UK or actions which would have been a criminal offence had they been conducted in the UK; and the references to investigations and prosecutions are also given a wide meaning, so as to apply equally to investigations and prosecutions which are conducted outside the UK.

59. *Subsection (5)* defines terms used in this clause.

60. *Subsection (6)* sets out “the existing statutory restrictions” which are referred to in *subsection (1)*.

### ***Disclosure of information and the intelligence services***

#### **Clauses 19 to 21 – Disclosure of information and the intelligence services**

61. Clause 19 allows anyone to give information to the intelligence services (defined as the Security Service, the Secret Intelligence Service, and the Government Communications Headquarters (GCHQ)) so that the organisation concerned can do its job as set out in its governing legislation. The provisions that set out the functions of the respective organisations can be found at clause 21(2). The person giving information can do so regardless of any duty to keep the information private or of any other restriction, other than those mentioned in clause 20 (*subsections (6) and (7)*). Information given to an intelligence service for one purpose can be used by it for another if that other purpose is also to enable the intelligence service to do its job as set out in law (*subsection 2*). Information obtained by an intelligence service may be disclosed by it if this is necessary for the exercise of its functions, or for specified other purposes (such as for the purposes of criminal proceedings): the purposes allowed for each of the three organisations are set out in *subsections (3) to (5)*. The intelligence services may disclose information in accordance with this clause regardless of

any other duties or pre-existing statutory restrictions, other than those mentioned in clause 20 (*subsections (6) and (7)*).

62. Clause 20 makes it clear that the limits on getting and passing on information in the laws governing each intelligence service still apply without change. It further makes it clear that the Data Protection Act 1998 and Part 1 of the Regulation of Investigatory Powers Act 2000 still apply unaffected. *Subsection (4)* introduces Schedule 1 which makes amendments consequential on clauses 19 – 21.

63. Clause 21 defines terms and references in clauses 19 and 20.

### **Schedule 1 – Disclosure and the Intelligence Services: Consequential Amendments**

64. *Schedule 1* reconciles the provisions at clause 19 with existing legislation.

65. *Paragraphs 1, 4 and 5* omit section 19(2)(a) of the Anti-terrorism, Crime and Security Act 2001, section 38 of the Immigration, Asylum and Nationality Act 2006 and section 67 and subsection 39(4)(g) of the Statistics and Registration Service Act 2007 as there will be no need for these specific information-sharing gateways once the new information-sharing gateway in clause 19 is brought into force.

66. *Paragraphs 2 and 3* make amendments to secondary legislation concerning the electoral register, removing restrictions in that legislation on onward disclosure by the intelligence and security agencies such disclosure will now be governed by clause 19 of the bill; but preserving all rights conferred on the intelligence and security agencies to obtain information from the electoral register under the regulations.

## **PART 2 – DETENTION AND QUESTIONING OF TERRORIST SUSPECTS**

### ***Pre-charge detention***

#### **Clause 22 – Grave exceptional terrorist threat**

67. *Subsection (1)* of clause 22 defines “grave exceptional terrorist threat” (which appears in clause 27 (statement to be laid before Parliament) as an event or situation involving terrorism which causes or threatens serious loss of human life or serious damage to human welfare in the UK (through, for example, disruption of energy supplies or transport facilities – see *subsection (2)*) or serious damage to the security of the UK. The provision in *subsection (3)(b)* is to ensure that terrorist plots which are foiled by the authorities or which otherwise fail are included in the definition. The terrorist attack planned or executed need not have taken place or have been planned to take place in the UK (*subsection (3)(a)*).

#### **Clause 23 – Power to declare reserve power available**

68. This clause refers to Schedule 2 to the Bill. Schedule 2 amends Schedule 8 to the Terrorism Act 2000 (the “2000 Act”) which deals with the detention (prior to charge) of those arrested under section 41 of the 2000 Act (persons reasonably suspected to be a terrorist). The

maximum period that such a person could be detained from the point of arrest (or examination under Schedule 7 if detained under that Schedule at the time of arrest) prior to his being charged was, when the 2000 Act was enacted, seven days. This was extended to fourteen days by section 306 of the Criminal Justice Act 2003 and to 28 days by section 23 of the Terrorism Act 2006 (subject to a “sunset provision” which means that whether the maximum period should be 14 or 28 days is debated annually by Parliament). Schedule 2 adds a new Part 4 to Schedule 8 to the 2000 Act which introduces a “reserve power” which allows senior prosecutors to apply to a judge for an extension of an individual’s detention beyond 28 days and for the judge to grant such extensions in periods of up to 7 days up to a maximum of 42 days. This amendment to Schedule 8 however is not to be brought into force permanently or in the usual way by commencement order.

69. *Subsection (1)* allows the Secretary of State to declare the reserve power in the new Part 4 of Schedule 8 to the 2000 Act exercisable by order. An order may only be made during periods when the maximum period of detention is 28 days (rather than 14) – that is where an order is already in force under section 25 of the Terrorism Act 2006 – and when the Secretary of State has received a report on the operational need for the further extension of the maximum period required from the Director of Public Prosecutions (or equivalent in Scotland or Northern Ireland) and the police (see clause 24).

70. The reserve power applies in relation to anyone detained under section 41 of the Terrorism Act 2000 at the time that the power comes into force and anyone so detained while it remains in force. It is therefore available in respect of persons other than those detained in relation to the circumstances that trigger the power.

**Clause 24 – Report of operational need for further extension of maximum period of detention**

71. The Secretary of State can only make the order clause 23 if he or she has received a joint report from the Director of Public Prosecutions and a chief officer of police in England and Wales; the Crown Agent and the chief constable of a police force in Scotland; or the Director of Public Prosecutions for Northern Ireland and the Chief Constable of the Police Service of Northern Ireland.

72. *Subsection (2)* sets out what the report must contain. The report must include a statement from both persons making the report that they are satisfied there are reasonable grounds for believing that the detention of one or more persons beyond 28 days will be necessary for the purposes of obtaining, preserving or analysing evidence that relates to the detained person’s commission of a “serious terrorist offence”. This term is defined in *subsection (4)* as an offence under the terrorism legislation or an offence with a terrorist connection (as defined in section 99 of the Bill) carrying a life penalty. The report must also give details of the grounds for their belief.

73. The report also needs to include a statement that those making it are satisfied the investigation of the suspect is being carried out diligently and expeditiously (*subsection (5)*).

74. The grounds set out in the report reflect the matters that must be proved to the court to obtain a further extension of detention beyond 28 days.

**Clause 25 – Independent legal advice**

75. Clause 25 provides that, before making an order declaring the reserve power exercisable, the Secretary of State must obtain independent legal advice on the matters mentioned in clause 27(2) (statement to be laid before Parliament). That advice must come from a lawyer outside the Government. The purpose of the advice is to inform Parliamentary debates on the order and to allow the chairmen of the Home Affairs Committee, the Joint Committee on Human Rights and the Intelligence and Security Committee, who are given immediate notification of the making of an order (see clause 26), access to such legal advice. The Secretary of State will obtain her own legal advice from the usual sources for the purposes of making the decision on whether to make an order.

76. The matters on which legal advice for Parliament and the chairs of the above committees are taken are:

- a) that a grave exceptional terrorist threat has occurred or is occurring;
- b) that the reserve power is necessary to investigate the threat and bring justice to those responsible;
- c) that the need for power is urgent; and
- d) that the order is compatible with the European Convention on Human Rights.

77. *Subsections (3) and (4)* define the meaning of “lawyer” and *subsection (5)* defines “government lawyer” (that is, lawyers excluded from giving the advice under this clause). The definition of “government lawyer” will exclude a lawyer who works or has worked for government as an employee or office holder, but it will not exclude a judge. Advice may therefore be taken for the purposes of this clause from an independent barrister, including Treasury panel counsel (but not First Treasury Counsel).

78. *Subsection (6)* states that, if an order is made under clause 23, the Secretary of State must lay before Parliament at the same time as the statement under clause 27 a copy of the advice obtained under this section.

79. *Subsection (7)* provides that, if it appears to the Secretary of State that the advice contains material that would be damaging to the public interest or might prejudice the prosecution of a person, the Secretary of State should lay before Parliament a redacted version of the advice (agreed by the lawyer).

**Clause 26 – Notification of chairmen of certain committees**

80. *Subsection (1)* provides that, when the Secretary of State makes an order under clause 23, he or she must immediately notify the chairman of the Home Affairs Committee, the

chairman of the Joint Committee on Human Rights and the chairman of the Intelligence and Security Committee.

81. *Subsection (2)* provides that the Secretary of State must, as soon as reasonably practicable, provide each of those chairmen with a copy of the report from the police and the Director of Public Prosecutions (or equivalent in Scotland or Northern Ireland) on the operational need for the further extension of the maximum period of detention and the (unredacted) independent legal advice.

82. *Subsection (3)* sets out that the information received under *subsection (1)* and the document received under *subsection (2)* must be held under privy counsellor terms, that is that the information is received in confidence and is not to be further disclosed – including to members of the chairman’s committee.

83. *Subsection (4)* is to cover the possibility that the Home Affairs Committee and the Joint Committee on Human Rights (which, unlike the Intelligence and Security Committee, are not statutory bodies) might change their names or have their functions transferred to another committee.

#### **Clause 27 – Statement to be laid before Parliament**

84. Clause 27 provides that, if the Secretary of State makes an order making the reserve power exercisable, then he or she must lay a statement before Parliament within two days of making the order (or if that is not practicable, as soon as is practicable).

85. The statement must state that the Secretary of State is satisfied that a grave exceptional terrorist threat has occurred or is occurring; that the reserve power is needed for the purpose of investigating the threat and bringing to justice those responsible; that the reserve power is needed urgently and that making it exercisable is compatible with Convention rights. It may also include any other information that the Secretary of State considers appropriate. This may include for example the threat level currently facing the UK. The statement must not include the name of any person then detained under section 41 of the 2000 Act (as a suspected terrorist) or anything that might prejudice any criminal proceedings that might result from the investigation or any other prosecution.

#### **Clause 28 – Parliamentary scrutiny**

86. *Subsection (1)* of clause 28 sets out that, where an order is made making the reserve power exercisable, the Secretary of State must lay the order before Parliament as soon as reasonably practicable and that the order will lapse at the end of the seven days beginning with the date of laying unless each House of Parliament passes a resolution approving it during that seven days.

87. *Subsection (2)* sets out that, if the reserve power lapses under this section, a detainee, whose detention was authorised by the power and is not otherwise legally detained, must be released immediately.

88. *Subsection (3)* provides that a new order may be made even if an order lapses. However, the Secretary of State would have to receive a further report from the Director of Public Prosecutions (or equivalent in Scotland or Northern Ireland) and police in advance of making such a further order. This subsection also provides that the lapsing of the order does not render unlawful any application made or granted for detention beyond 28 days before the order lapses.

#### **Clause 29 – Parliamentary scrutiny: prorogation and adjournment**

89. Clause 29 provides for the recall of Parliament during a prorogation or adjournment if an order needs to be approved at that time. If Parliament is dissolved (before a general election) at that time, the order will lapse 7 days after it is laid – because it will not have been approved by Parliament within that time limit in accordance with clause 28.

#### **Clause 30 – Duration**

90. Clause 30 makes provision about how long the reserve power is to remain exercisable after the Secretary of State has made an order. The maximum time period for which the reserve power will remain exercisable is 30 days.

91. When the reserve power ceases to be available, a detainee, whose detention was authorised by the power and is not otherwise legally detained, must be released immediately. But again, any detention beyond 28 days is not rendered unlawful by the lapsing of the order under this clause; and when an order lapses, provided the other circumstances for making an order are in place, a new order may be made.

#### **Clause 31 – Independent review and report**

92. Clause 31 provides that after any period during which the reserve power was exercisable, the Government's independent reviewer of terrorism legislation must carry out a review and send a copy of his or her report on the outcome of the review to the Secretary of State. (The independent reviewer of terrorism is appointed under section 36 of the Terrorism Act 2006. The post is currently held by Lord Carlile of Berriew Q.C.) The report must be sent to the Secretary of State within six months of the power ceasing to be exercisable and the Secretary of State must lay a copy before Parliament, following which there will be a debate.

93. *Subsections (2) to (4)* set out what must be considered in the review and contained in the report. The report must state whether in the reviewer's opinion the Secretary of State's decision to make the reserve power exercisable was reasonable in all the circumstances – after considering whether the requisite report from the Director of Public Prosecutions (or Crown Agent or Director of Public Prosecutions for Northern Ireland) and police had been received, and all the other relevant information before the Secretary of State. The review must also consider the case of every individual detained in pursuance of the reserve power and the

report must state whether in the reviewer's opinion the relevant procedures for applications for extended detention were followed and the provisions relating to the treatment and review of detained persons were complied with.

94. *Subsection (5)* provides that the Secretary of State may pay the expenses and allowances of the independent reviewer.

#### **Clause 32 – Amendment to the Civil Contingencies Act 2004**

95. Clause 32 amends the Civil Contingencies Act to make it clear that regulations made under Part 2 of that Act cannot be used to extend the maximum limit for pre-charge detention in terrorist cases.

#### **Schedule 2 – Amendments relating to period of pre-charge detention**

##### **Part 1 – Reserve power to further extend maximum period of detention**

96. *Paragraph 1* inserts a new Part 4 into Schedule 8 to the 2000 Act (detention of terrorist suspects). Part 3 deals with extension to the detention (prior to charge) of terrorist suspects arrested under section 41 of the 2000 Act. The new Part 4 provides for a reserve power which enables the current maximum limit of pre-charge detention to be extended to 42 days.

97. *Paragraph 38* of the new Part 4 provides that the reserve power is only exercisable when an order made under clause 23 is in force.

98. *Paragraph 39* contains the “reserve power” itself. The reserve power is a power enabling specified persons to apply for an extension of a person's warrant of further detention, beyond 28 days. In England and Wales, such applications are to be made by the Director of Public Prosecutions or a Crown Prosecutor acting with his or her consent. (The consequential amendments made in paragraph 2 of Part 2 of this Schedule have the effect that these applications must be made by the Director of Public Prosecutions himself or herself or by a Crown Prosecutor acting with his or her personal consent or with the consent of a Crown Prosecutor authorised by the Director of Public Prosecutions to give such consent). In Scotland, applications are to be made by the Lord Advocate or procurator fiscal and in Northern Ireland by Director of Public Prosecutions for Northern Ireland.

99. Applications for an extension must be to a senior judge. “Senior judge” is defined in *paragraph 40(6) to (8)*. *Paragraph 39(3)* provides that the extension granted on an application under this paragraph lasts for a period ending with the earlier of 7 days from the end of the last period of extension, or 42 days from the “relevant time” (defined in *paragraph 39(5)* as the time of the person's arrest under section 41 or, if prior to their arrest they were detained under Schedule 7 to the 2000 Act, the beginning of their examination under Schedule 7).

100. But under *sub-paragraph (4)*, the judge need not extend the period for the total length of time set out in *sub-paragraph (3)*: he or she may require the suspect to be detained for a shorter period if he or she is satisfied that there are circumstances that mean that an extension for the full length of time would be inappropriate. A shorter period may also be granted if the application itself is for a shorter period.

101. Under *sub-paragraph (5)*, when an extension has been granted, the specified period must be shown on the warrant, and, where the extension takes the total period of pre-charge detention beyond 28 days, the person applying for the extension (or in Scotland, the Crown Agent) must inform the Secretary of State and provide him or her with the information set out in *paragraph 41(3) and (4)*, which is needed by the Secretary of State in order for him or her to inform Parliament about extensions under that paragraph.

102. *Paragraph 40(1)* states that paragraphs 30(3) and 31 to 34 of Part 3 of Schedule 8 to the 2000 Act apply to an application under paragraph 39 as they apply to any application for a warrant of further detention. These paragraphs relate to how an application for an extension is to be made (by oral or written notice to the judge), notice to be given to the detainee, grounds for the judge to extend detention, representation and information that may be withheld. Modifications are made however to reflect the fact the application will always be to a senior judge rather than a judicial authority (a judicial authority may only hear an application for an extension up to 14 days) and to provide that an extension beyond 28 days may only be made in relation to investigations into a “serious terrorist offence” (as defined in *subparagraph (4)*) committed by the detainee.

103. *Paragraph 40(4)* allows a senior judge to adjourn the hearing of an application under paragraph 42 but only if the hearing is adjourned to a date before the end of the person’s existing authorised period of detention. This does not apply to an adjournment under paragraph 33(2) of Schedule 8 to the 2000 Act, which is an adjournment to enable the detainee to obtain legal representation.

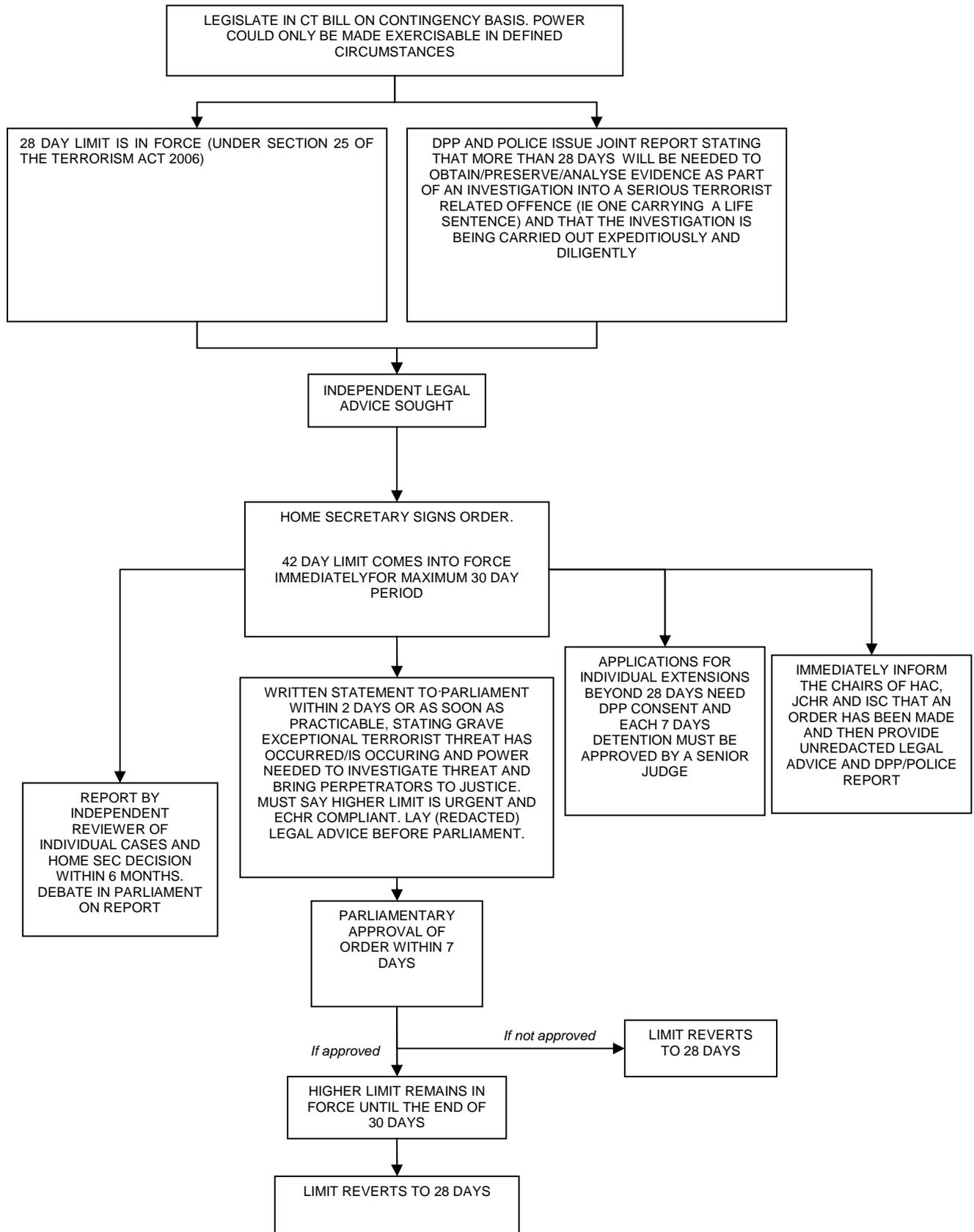
104. *Paragraph 41* sets out the Secretary of State’s duty to report to Parliament on any occasion an extension of detention beyond 28 days is granted. The Secretary of State must lay a statement before Parliament as soon as reasonably practicable giving details of the date on which the period was extended, the period by which the detention has been extended and the total number of days for which the person’s detention has been authorised. The statement must also give details of the court that heard the application and the place where the person is being detained but it must not give the name of the detained person or contain any material that might prejudice a prosecution.

***Part 2 – Consequential amendments***

105. Part 2 of Schedule 1 makes consequential amendments to the Prosecution of Offences Act 1985, the Terrorism Act 2000 and the Terrorism Act 2006. The effect of paragraph 2 is that the provisions of the Prosecution of Offences Act 1985 giving a Crown Prosecutor the same powers as the Director of Public Prosecutions do not apply, so that an application to extend pre-charge detention for terrorist suspects may be made only by the Director of Public Prosecutions himself or by a Crown Prosecutor with the express consent of the Director of Public Prosecutions or a Crown Prosecutor he personally authorises to give such consent. The amendments to the 2000 Act made by paragraphs 3 to 6 include the insertion of new paragraphs 36 of Schedule 8 (under which an extension beyond 7 days and up to 28 days may be authorised) and 36A (supplementary provisions) which do not change the substance of what is currently contained in paragraph 36. The consequential amendments to the 2006 Act made by paragraph 7 take account of the new paragraph 36A but do not change the main effect of section 25 of that Act which is the “sunset provision” that makes provision for the annual renewal by order of the maximum period of pre-charge detention of 28 days (failing which the maximum period reverts to 14 days).

***Diagrammatic representation of reserve power to further extend maximum of pre-charge detention***

*These Notes refer to the Counter-Terrorism Bill  
as brought from the House of Commons on 12th June 2008 [HL Bill 65]*



**Clause 33 – Pre-charge detention: minor amendments**

106. *Subsection (1)* of Clause 33 makes a minor amendment to paragraph 9 of Schedule 8 to the Terrorism Act 2000 (direction that detained person may consult a solicitor only within sight and hearing of a qualified officer). This is a consequential amendment that was overlooked when that Schedule was amended by the Proceeds of Crime Act 2002.

107. *Subsection (2)* amends paragraph 29(4) of Schedule 8 to remove the words “after consulting the Lord Chancellor”. This paragraph defines “judicial authority” for the purposes of detention hearings up to 14 days – which may, as amended, be conducted in England and Wales by a District Judge designated by the Lord Chief Justice and in Northern Ireland, by a county court judge designated by the Lord Chief Justice of Northern Ireland.

***Post-charge questioning***

**Clause 34 – Post-charge questioning: England and Wales**

108. Clause 34 allows a constable to question a person in England and Wales about the terrorism offence (as defined in clause 39) for which they have been charged or after they have been officially informed that they may be prosecuted for the offence. It is also possible to question the person after charge where a judge of the Crown Court makes an order for a preparatory hearing under section 29 of the Criminal Procedure and Investigations Act 1996 (c.25) and this order is made on the basis that the offence has a terrorism connection (see *subsection (3)*).

109. *Subsection (4)(a)* provides that the questioning under this clause must be authorised in the first instance by an officer of at least of the rank of superintendent for a maximum period of 24 hours in total. *Subsection (4)(b)* means that questioning beyond 24 hours must be authorised by a justice of the peace; they can authorise questioning of up to 5 days (this includes the initial period of questioning for 24 hours). On subsequent application they can authorise questioning for further periods of up to 5 days in total.

110. *Subsection (5)* means that a justice of the peace can only authorise post-charge questioning under this clause if they are satisfied that further questioning of the person is necessary in the interests of justice, and that the police investigation related to the suspect is being conducted diligently and expeditiously.

111. *Subsections (6) and (7)* provide that codes of practice under section 66 of PACE must make provision about post-charge questioning.

112. *Subsection (8)* extends the application of section 34(1) of the Criminal Justice and Public Order Act 1994 (c.33), which allows adverse inferences to be drawn from an accused’s silence, to cover the situation when an accused person is interviewed after charge or after they have been officially informed that they may be prosecuted.

**Clause 35 – Post-charge questioning: Scotland**

113. Clause 35 allows a constable to question a person in Scotland after they have been charged by the police with a terrorism offence or when they have appeared on petition in respect of the offence and the Crown considers (and it has been “averred in the petition”) that the offence has a terrorist connection (as defined in clause 99) (*subsections (2) & (3)*).

114. The suspect may be questioned about the offence with which they have been charged, and questioning may continue until the commencement of trial (*subsection (4)*).

115. *Subsections (5) and (6)* set out similar requirements for the authorisation of post-charge questioning in Scotland that exist for England and Wales under *subsections (4) and (5)* of clause 34. However, in Scotland, the authorisation of a period of questioning beyond 24 hours is on application to a sheriff rather than a justice of the peace.

**Clause 36 – Post-charge questioning: Northern Ireland**

116. Clause 36 allows a constable to question a person in Northern Ireland after they have been charged, or after they have been officially informed that they may be prosecuted, about the terrorism offence with which the person has been charged.

117. *Subsections (3) and (4)* set out the same requirements for the authorisation of post-charge questioning in Northern Ireland as for England and Wales under *subsections (4) and (5)* of clause 34.

118. *Subsections (5) and (6)* provide that codes of practice under Article 65 of PACE NI must make provision about post-charge questioning.

119. *Subsections (7) and (8)* amend the Criminal Evidence (Northern Ireland) Order 1988 (S.I. 1988/1987 (N.I. 20)) to allow adverse inferences to be drawn when a person remains silent when being questioned post-charge about a terrorist-related offence.

**Clause 37 – Recording of interviews**

120. Clause 37 sets out that post-charge questioning under clauses 34, 35, & 36 must be video-recorded with sound except where the Secretary of State provides by an order that this should not be the case (*subsections (1) & (2)*). An order to this effect is subject to the affirmative resolution procedure.

121. Codes of practice must be issued for the video-recording of interviews which must be observed in post-charge questioning under clauses 34, 35, & 36 (*subsections (3) & (4)*).

122. Any codes or orders made under this clause can make different provisions for different parts of the UK (*subsection (5)*). There are some areas, for example in Scotland, where facilities for video recording with sound are not yet available. The order making power

provided for in *subsection (2)* allows the Secretary of State to disapply the compulsory requirement.

**Clause 38 – Issue and revision of code of practice**

123. Clause 38 sets out the process for the issue and revision of a code of practice for the video-recording of post-charge questioning under clause 37. The code of practice is brought into operation by an order; this order is subject to the affirmative resolution procedure.

**Clause 39 – Post-charge questioning: meaning of “terrorism offence”**

124. Clause 39 sets out the terrorism offences to which clauses 36 to 36 apply: the list of terrorism offences in *subsection (1)* includes most of the offences under the Terrorism Act 2000 and the Terrorism Act 2006, and the inchoate offences related to these offences (conspiracy, attempt, incitement etc.) are also covered (see *subsection (2)*). *Subsections (3) and (4)* allow the Secretary of State to amend this list of offences by order; this is subject to the affirmative resolution procedure.

**PART 3 – PROSECUTION AND PUNISHMENT OF TERRORIST OFFENCES**

***Jurisdiction***

**Clause 40 – Jurisdiction to try offences committed in the UK**

125. Clause 40 provides for UK-wide jurisdiction for specified terrorism offences, regardless of where in the UK the offence took place. The purpose of this clause is to remove the need to have separate trials for connected terrorist offences which occur in different jurisdictions within the UK. The common law currently provides that a significant part of an offence must take place within the part of the UK in which the court trying the offence is located. Lord Carlile’s report on proposed measures for inclusion in the Bill, published on the 6th December 2007 highlighted this issue. *Subsections (2) and (3)* set out the offences to which this provision is to apply. These are the offence under section 113 of the Anti-Terrorism, Crime and Security Act 2001 and all offences under the 2000 and 2006 Terrorism Acts (other than those with an extra-territorial element and those that do not have UK-wide extent) and ancillary offences.

126. *Subsections (4) and (5)* allow the Secretary of State to amend the list of terrorism offences in *subsections (2) and (3)* by order (subject to the affirmative resolution procedure), and *subsection (6)* provides that an offence may only be added in this way if it appears to the Secretary of State necessary to do so for the purpose of dealing with terrorism. This means that where an offence under the general criminal law is added to this clause by order, the jurisdiction provided by the clause will only apply where such an offence is being used in a terrorism case. This clause and any offences added under the order-making power will not operate retrospectively in relation to offences committed before the coming into force of the relevant provision.

127. *Subsection (7)* inserts a new subsection (6A) into section 1 of the Justice and Security (Northern Ireland) Act 2007 (c.6). Section 1 allows for a non-jury trial in Northern Ireland where certain conditions are met. This new subsection precludes the Director of Public Prosecutions for Northern Ireland from issuing a certificate for a non-jury trial where the proceedings are only taking place in Northern Ireland as a result of the jurisdiction provided by clause 40 and the only condition which would enable a non-jury trial to take place is the fourth condition of section 1. This means a prosecution in Northern Ireland arising from the jurisdiction provided by this clause could only be at a non-jury trial where the offence had a connection to a proscribed terrorist organisation whose activities are connected with the affairs of Northern Ireland (in the ways set out in conditions 1 to 3 in section 1 of the 2007 Act) and the Director of Public Prosecutions for Northern Ireland were satisfied that in view of this that there was a risk that the administration of justice might be impaired if the trial were to be conducted with a jury.

### ***Consent to prosecution***

#### **Clause 41 – Consent to prosecution of offence committed outside UK**

128. This clause amends section 117(2A) of the Terrorism Act 2000 and section 19(2) of the Terrorism Act 2006 so that the consent of the Attorney General or the Advocate General for Northern Ireland (or prior to the coming into force of section 27(1) of the Justice (Northern Ireland) Act 2002, the Attorney General for Northern Ireland) is required before the Director of Public Prosecutions or Director of Public Prosecutions for Northern Ireland may consent to the prosecution of the offences to which those provisions apply, if it appears to the latter that the offence was committed outside the UK. The offences which require such consent are any offence under the 2000 Act other than those listed in section 117(1) of the 2000 Act or any offence under Part 1 of the 2006 Act. This amendment is based on recommendation 15 of Lord Carlile's January 2007 report on the definition of terrorism.

### ***Sentencing***

#### **Clause 42 – Sentences for offences with a terrorist connection: England and Wales**

129. Clause 42 is included in response to recommendation 8 of Lord Carlile's January 2007 report on the definition of terrorism, that a terrorist connection should be considered to be an aggravating factor in sentencing. This is important where offenders are convicted of offences other than those under the terrorism legislation but where the offence is connected with terrorism (for example an explosives offence). Such offences (under the general law) account for approximately 40% of terrorist cases.

130. Under *subsections (1) to (3)* a court in England and Wales considering a person's sentence for an offence listed in Schedule 3 must, if it appears that there was or may have been a terrorist connection, make a determination (on the criminal standard of proof) as to whether there was such a connection. The court will make this determination on the basis of the usual information before it for the purposes of sentencing, that is the trial evidence or evidence heard at a *Newton* hearing (if necessary) following a guilty plea, and taking account of any representations by the prosecution or defence. A *Newton* hearing is where the judge hears evidence from both sides and comes to his or her own conclusion on the facts, applying

the criminal standard of proof. If it determines that there was a terrorist connection, the court must treat that as an aggravating factor when sentencing the offender (*subsection (4)*). “Terrorist connection” is defined in clause 99.

131. Schedule 3 sets out the list of offences under the general law (as opposed to offences under the terrorism legislation) for which the court must consider whether there is a terrorist connection. The offences included in this Schedule are those most frequently prosecuted in terrorism related cases. A determination that a Schedule 3 offence has a terrorist connection is relevant not only for aggravated sentencing but also allows the court to make a forfeiture order (clause 46) and means that (if the sentence is 12 months or more) the notification requirements of Part 4 will apply (see clause 53).

132. *Subsection (6)* provides that this statutory aggravating factor will apply only in relation to offences committed on or after commencement.

#### **Clause 43 – Sentences for offences with a terrorist connection: Scotland**

133. Clause 43 provides that in Scotland the sentencing court must treat a terrorist connection (as defined in clause 99), proved to the trial court, as an aggravating factor when sentencing for an offence specified in Schedule 3 to this Bill (offences where terrorist connection to be considered). *Subsection (3)* requires a court imposing an aggravated sentence for an offence connected to terrorism to state the extent and reasons for the difference between the sentences it imposed and that it would have imposed if the offence had not been determined to be connected to terrorism. *Subsection (4)* provides that evidence from a single source is sufficient in this connection – which is different from the usual position under the law in Scotland where corroboration is required. *Subsection (5)* provides that this new aggravating factor will only apply in relation to offences committed on or after commencement.

#### **Clause 44 – Power to amend list of offences where terrorist connection to be considered**

134. This clause provides the Secretary of State with a power to amend (by order subject to the affirmative resolution procedure) the list of offences in Schedule 3 for which the court must consider whether there was a terrorist connection.

#### **Schedule 3**

135. Schedule 3 sets out the list of offences under the general law (as opposed to offences under the terrorism legislation) for which a connection to terrorism must be considered for the purposes of aggravated sentencing (clauses 42 and 43), The list of offences and determination of terrorist connection are also relevant to the forfeiture provisions in the bill (clause 46) and the notification requirements of Part 4 (clause 53). The offences included in this Schedule are those most frequently prosecuted in terrorism-related cases.

### ***Forfeiture***

#### **Clause 45 – Forfeiture: terrorist property offences**

136. Clause 45 replaces section 23 of the Terrorism Act 2000 (forfeiture: terrorist property offences), which deals with the power of a court to order the forfeiture of money or other property from a person convicted of offences under sections 15 to 18 of the 2000 Act (“terrorist finance” offences). The principal change made to section 23 is that the court may make a forfeiture order in respect of money or other property which had been used for the purposes of terrorism. So, for example, the court could order the forfeiture of a flat which was used for making bombs.

#### **Clause 46 – Forfeiture: other terrorism offences and offences with a terrorist connection**

137. Clause 46 inserts a new section 23A into the Terrorism Act 2000. This allows the court which convicts a person of certain offences to order the forfeiture of money or other property in the possession or under the control of the convicted person at the time of the offence and which either had been used for the purposes of terrorism or was intended by that person to be used for those purposes, or which the court believes will be used for the purposes of terrorism unless forfeited. The offences in respect of which this power of forfeiture is available are certain offences under the 2000 Act and the Terrorism Act 2006 (but not the terrorist finance offences, which are covered by new section 23), and, in England and Wales and in Scotland (but not in Northern Ireland) offences falling within Schedule 3 which the court determines have a terrorist connection (as defined in clause 99) under clause 42 or 43.

138. Section 23A(5) allows the Secretary of State to amend the lists of offences to which the provision applies by order, subject to affirmative resolution (see *subsection (2)* of clause 46).

#### **Clause 47 – Forfeiture: supplementary provisions**

139. Clause 47 inserts a new section 23B into the 2000 Act which contains supplementary provisions in relation to the court’s power to make a forfeiture order under section 23 or 23A.

140. Section 23B(1) allows a person other than the convicted person who claims to have an interest in anything which can be forfeited to be given an opportunity to be heard by the court before it makes an order.

141. Section 23B(2) requires the court, before making an order, to have regard to the value of the property and the likely effect (financial or otherwise) a forfeiture order will have on the convicted person.

142. Section 23B(3) makes provisions for procedures in Scotland.

143. Section 23B(4) gives effect to Schedule 4 to the 2000 Act which makes further provision in relation to forfeiture orders made under sections 23 and 23A. Schedule 4 is consequentially amended by Schedule 4 to the Bill.

**Clause 48 – Forfeiture: application of proceeds to compensate victims**

144. *Subsection (1)* of clause 48 inserts a new paragraph 4A into Part 1 of Schedule 4 to the 2000 Act. Paragraph 4A(1) allows a court making a forfeiture order in a case where the offender has been convicted of an offence which has resulted in another person suffering personal injury, loss or damage, or where any such offence is taken into consideration, to order that an amount is to be paid to that person out of the proceeds of the forfeiture. The court may specify a sum which the amount to be paid may not exceed.

145. Paragraph 4A(2) defines for this purpose the proceeds of forfeiture as being the aggregate amount of any forfeited money plus the proceeds of any sale or disposal of forfeited property, after deduction of the costs of the sale or disposal. This sum will then be reduced by the amount of any payment made under paragraph 2(1)(d) (to a person with an interest in the property) or 3(1) (to a receiver appointed to implement the forfeiture order) of Schedule 4 to the 2000 Act.

146. Paragraph 4A(3) provides that a court may only make an order under this paragraph if it is satisfied that it would have made an order under section 130 of the Powers of Criminal Courts (Sentencing) Act 2000 (which is the general power under which a court may make a compensation order on conviction) requiring the offender to pay compensation, if it had not been for the inadequacy of the offender's means.

147. *Subsection (2)* inserts new paragraph 17A into Part 2 of Schedule 4, making similar provision in Scotland.

148. *Subsection (3)* inserts new paragraph 32A into Part 3 of Schedule 4, making similar provision for Northern Ireland.

**Clause 49 – Forfeiture: other amendments**

149. *Subsection (1)* of clause 49 substitutes a new section 120A into the Terrorism Act 2000.

150. New section 120A(1) sets out some specific items, connected to the offence, which may be forfeited in relation to specific offences in the Terrorism Act 2000. For sections 54 and 58, there is no change as to what may already be forfeited under the 2000 Act.

151. New section 120A(2) provides that the court must give an opportunity to be heard to any person other than the convicted person who claims to have an interest in anything which can be forfeited under this section. (This replicates provision to this effect which is currently in sections 54 and 58 of the 2000 Act.)

152. New section 120A(3) provides that a forfeiture order does not come into effect until all possibilities of it being varied or set aside on appeal have been exhausted. (Provision to this effect is currently in sections 54 and 58.)

153. New section 120A(4) allows the court to make any provision necessary to give effect to the forfeiture, including provisions relating to the retention, handling, disposal or destruction of what is forfeited. Destruction might be ordered for example in relation to articles seized whose continued existence are considered dangerous.

154. *Subsection (3)* of clause 49 inserts a new section 11A into the Terrorism Act 2006. *Subsection (1)* of new section 11A allows for the forfeiture on conviction for an offence under sections 9 or 10 of the Terrorism Act 2006 of any radioactive device or material, or any nuclear facility made or used in the commission of the offence.

155. *Subsection (2)* of new section 11A sets out similar powers in relation to an offence committed under section 11 of the Terrorism Act 2006, allowing the forfeiture of certain nuclear materials which were the subject of demands or threats falling within *subsections (1)* and *(3)* of that section.

156. There are similar supplementary provisions to those in the new section 120A.

**Clause 50 – Forfeiture: consequential amendments**

157. Clause 50 gives effect to Schedule 4 which makes amendments consequential upon the new provisions concerning forfeiture orders in clauses 45 to 49.

**Schedule 4 – Forfeiture: consequential amendments**

158. Schedule 4 contains amendments consequential on those made by clauses 45 to 49. These are mainly to amend Schedule 4 to the 2000 Act, to take account of the extended forfeiture regime. Schedule 4 makes supplementary provisions concerning forfeiture orders under section 23 of the 2000 Act, for example in relation to restraint orders and how forfeiture orders may be enforced.

**PART 4 – NOTIFICATION REQUIREMENTS**

**Clause 51 – Scheme of this Part**

159. This is an introductory clause relating to the new notification scheme for convicted terrorists sentenced to 12 months or more and the related civil orders.

***Offences to which this Part applies: terrorism offences***

**Clause 52 – Offences to which this Part applies: terrorism offences**

160. This clause lists a number of terrorism offences (and ancillary offences related to them, such as conspiracy and incitement) to which this Part of the Bill applies. It also provides the Secretary of State with an order-making power to amend this list of offences, subject to the affirmative resolution procedure and to transitional provisions.

**Clause 53 – Offences to which this Part applies: offences having a terrorist connection**

161. This Part of the Bill also applies to offences under the general law set out in Schedule 3 which have a terrorist connection (as defined in clause 99). *Subsection (1)* of clause 53 provides that the notification provisions apply when a court in England and Wales or in Scotland has determined that an offence has a terrorist connection for the purposes of the aggravated sentencing provisions under clause 43 or 44. Since the Bill does not contain corresponding provision on aggravated sentencing for offences with a terrorist connection for Northern Ireland, the notification provisions will apply in Northern Ireland only to terrorism offences falling within clause 52.

**Clause 54 – Exclusion of offences dealt with by service courts**

162. Clause 54 provides that the provisions of this Part do not apply when the offence is dealt with by a service court and defines service court. In practice it is not anticipated that offences which may trigger the notification requirements will ever be dealt with by service courts.

**Clause 55 – Offences dealt with before commencement**

163. Clause 55 provides that an individual will be subject to the notification requirements if he was convicted and given a relevant sentence (broadly, 12 months or more) for a terrorism offence prior to commencement of Part 4 and immediately before commencement the person is imprisoned or detained for the triggering offence (or would have been but for being unlawfully at large or otherwise temporarily out of custody) or has been released on licence. This retrospective application does not apply to offences with a terrorist connection as there will have been no determination to this effect by the court prior to commencement.

*Persons to whom the notification requirements apply*

**Clause 56 – Sentences triggering notification requirements**

164. Clause 56 provides that the notification requirements apply to a person who: (a) is convicted of a relevant offence and receives a sentence of imprisonment or detention for a period or term of 12 months or more in relation to that offence; or (b) is found not guilty by reason of insanity or is found to be under a disability and to have done the act charged in respect of such an offence punishable by 12 months' imprisonment or more and is made subject to a hospital order. The clause sets out all the different types of sentences that could be given in each jurisdiction of the UK for 12 months or more.

**Clause 57 – Power to amend specified terms or periods of imprisonment or detention**

165. Clause 57 allows the Secretary of State to change the sentence threshold for a person to be subject to the notification requirements by an order subject to the affirmative resolution procedure. The order will have effect subject to the transitional provisions described in *subsection (3)*.

### ***Notification requirements***

#### **Clause 58– Initial notification**

166. Clause 58 sets out the information the offender must supply to the police when first making a notification and the time scales within which the notification must be made. *Subsection (1)* provides that an individual must notify the police of the specified information within three days beginning with the day the person was dealt with for the offence or, where these provisions have retrospective application, within three days of the commencement of Part 4. In calculating the period within which an offender must give notification under *subsection (1)*, any time when the offender meets the conditions in *subsection (4)* – for instance any time when he is serving a sentence of imprisonment – does not count. As an offender will usually be sent straight to prison (or hospital) following his conviction for a relevant offence, this will usually mean that he will have to make his initial notification within three days of his release.

167. *Subsections (2) and (3)* set out the information which is required from the person subject to the notification requirements, and includes the person’s name (or names) and address (or addresses), his date of birth and national insurance number. The definition of “home address” is found at clause 68.

168. *Subsection (5)* relates to a case where a person who receives a triggering conviction and sentence is already subject to the notification requirements by virtue of an earlier offence. If in these circumstances the person has made an initial notification in accordance with *subsection (1)* in respect of the earlier offence, he is not required to notify again in accordance with *subsection (1)*. However, this applies only where the notification period in respect of the earlier offence lasts throughout the period specified in *subsection (1)*, as extended in accordance with *subsection (4)* if appropriate.

#### **Clause 59 – Notification of changes**

169. Clause 59 sets out the requirements on a relevant offender to notify the police of changes to the details he has already notified. This includes the requirement in *subsection (3)* that a person who stays at an address in the UK for a period of seven days or for a combined period of seven days within 12 months, must notify the police of this address. This might apply for example where the person stays at a friend or relative’s house or a hotel in the UK for this length of time.

170. *Subsection (4)* provides that a person who is subject to the notification requirements who is released from custody, released from imprisonment or detention pursuant to a sentence of a court or from detention in hospital must notify the police of this fact. This will mean for example that where a person who was given a suspended sentence subsequently has his sentence activated, he must notify the police on his release from prison. Clause 68 defines “release” as including release on licence but not temporary release.

171. *Subsections (7) and (8)* provide that notification of any changes must be made before the end of the period of three days following the events specified in this clause. Where the

event is residing or staying at another premises as described in *subsection (3)* then the three day notification period begins when the seven day period set out in that subsection ends. When determining the period within which notification is to be given under this clause, any periods spent in custody, imprisonment, detention or detained in a hospital are to be disregarded.

172. *Subsection (10)* provides that any notification under this section must be accompanied by the other information given to the police at the initial notification.

#### **Clause 60 – Periodic re-notification**

173. Clause 60 provides that one year after the initial notification, a notification of change or a notification under this clause, the individual must re-notify the police of the information specified in clause 58(2). The effect of this clause is that the offender must re-notify his details to the police at least annually. However, the requirement does not apply if an individual is in custody by an order of a court, imprisoned or detained in a hospital on the date on which they are due to re-notify; in this case the person would notify under clause 59 (notification of changes) (*subsections (2) and (3)*) on their release. These subsections are to ensure the person is not subject to overlapping requirements.

#### **Clause 61 – Method of notification and related matters**

174. This clause describes how and where an offender is required to notify information to the police under the clauses relating to initial notification, notification of change and periodic re-notification. *Subsection (2)* provides that the person must notify by attending a police station in the person's local police area (as defined in clause 62) and making an oral notification to a police officer or other person authorised by the officer in charge of the station. Where the person is away from their usual home address for a period of seven days or a period amounting to seven days during a year, then they can notify at a police station local to their temporary address (*subsection (3)*).

175. The police must acknowledge the notification by the person in writing and in the form specified by the Secretary of State (*subsections (4) and (5)*).

176. *Subsection (6)* allows the police to take fingerprints from the person making the notification and to photograph any part of him for the purpose of verifying the person's identity. "Photograph" is defined for these purposes in clause 68 and could include for example taking an iris scan.

#### **Clause 62 – Meaning of "local police area"**

177. Clause 62 defines "local police area" for the purposes of clause 61(2) (method of notification). *Subsection (1)(b) and (c)* deal with cases where the offender has no home address (as defined in clause 68). He may have no home address because for example he spends most of his time abroad and only returns to the UK occasionally, or because he is itinerant.

**Clause 63 – Travel outside the United Kingdom**

178. Clause 63(1) provides a power for the Secretary of State to make regulations setting out additional notification requirements for persons subject to the notification scheme in relation to foreign travel.

179. *Subsection (2)* sets out details the person must notify to the police concerning their departure (such as date of departure, the country the person is travelling to and their point of arrival) and allows the regulations to give further details. *Subsection (3)* concerns the details that must be disclosed about the person's return to the UK: these will be given in the regulations.

180. *Subsections (4) and (5)* provide that a notification under this clause must be made in accordance with the regulations; and the regulations will be subject to affirmative resolution procedure.

***Period for which notification requirements apply***

**Clause 64 – Period for which notification requirements apply**

181. Clause 64 sets out the period during which a person will be subject to the notification requirements. In the most serious cases, where a person is sentenced to imprisonment or detention for 5 years or more, the notification requirements will apply for an indefinite period, which means the rest of his life (*subsection (1)*). Where the sentence is less than 5 years (but 12 months or more) or the person is subject to a hospital order, the requirements will apply for 10 years (*subsection (3)*). The notification period starts with the day on which the person is dealt with (*subsection (4)*). However, *subsection (7)* provides that in determining whether the notification period has expired, any time the individual has spent in custody by order of a court, serving a sentence of imprisonment or detention or detained in hospital shall be discounted. This means for example that where a person whose sentence attracts a notification period of 10 years goes to prison immediately following sentence, the 10 years will in effect run from the date he is released.

182. *Subsection (5)* describes how the period operates in respect of a person who has been found to be under a disability but who is subsequently tried for the offence.

183. *Subsection (6)* sets out how to calculate the notification period where an offender is sentenced for more than one terrorist-related offence and these sentences are terms of imprisonment running consecutively or partly concurrently. Where the terms are consecutive, they are to be added together. For example, where an offender is sentenced to 4 years' imprisonment for one terrorist-related offence and 10 years' imprisonment for another such offence, to run consecutively, the sentence would be treated as 14 years' imprisonment for the purposes of working out the notification period (in this case, life). Terms will be partly concurrent when they are imposed on different occasions. An example would be where an offender is sentenced to 2 years' imprisonment for a terrorist-related offence, and 6 months into this term he is sentenced to 4 years' imprisonment for a second such offence. Where this is the case, the notification period is based on the combined length of the terms minus any

overlapping period. In the example given, the combined length of the sentences would be 6 years and the overlapping period would be the remaining 18 months of the 2-year sentence. So the sentence for the purposes of working out the notification period would be four and a half years (resulting in a 10 year notification period).

### ***Offences in relation to notification***

#### **Clause 65 – Offences relating to notification**

184. Under clause 65, failure without reasonable excuse to comply with any of the notification requirements, or providing false information in response to any of the requirements, constitutes an offence. A reasonable excuse might be where an offender does not notify within the required timescale because he is in hospital following an accident. Such an offence is an either way offence with a maximum sentence of five years' imprisonment (*subsection (2)*). *Subsection (4)* provides that the offence of failing to give a notification continues throughout the period during which the required notification is not given, but an offender cannot be prosecuted more than once for the same failure. However if an offender fails to comply with a requirement, is convicted for this offence and then fails to comply again in respect of the same requirement, he commits a new offence and may be prosecuted again.

185. *Subsection (5)* provides that the offence may be tried in a court with jurisdiction in a place where the person resides or is found. The "is found" limb is to cover the case of a person with no fixed abode.

### ***Supplementary provisions***

#### **Clause 66 – Notification orders**

186. This clause gives effect to Schedule 5, which makes provision for notification orders. The police may apply for such orders in respect of individuals dealt with outside the UK for a corresponding foreign offence and their effect is to make such a person subject to the notification requirements of this Part of the Bill.

#### **Schedule 5 – Notification Orders**

187. Schedule 5 makes provision for notification orders. A notification order might be sought in respect of a UK national who has been convicted of a foreign terrorism offence and who is deported to the UK on release from prison abroad. It might also be sought in respect of a foreign national with such a conviction who is in the UK.

188. *Paragraph 2* defines "corresponding foreign offence" (those offences which may trigger an application being made for a notification order). These are acts which constitute an offence in the jurisdiction in which they are committed and which "correspond to an offence to which this Part applies". This means that it would have been an offence under clause 52 if committed in the UK (terrorism offences which, subject to the sentence threshold, automatically trigger the application of the notification provisions) or an offence with a terrorist connection.

189. *Paragraph 2(4)* provides that, on an application for a notification order, it will be deemed that an act corresponds to an offence to which Part 4 applies unless the defendant serves a notice disputing this and requiring the applicant to prove it or if the court allows the defendant to require such proof without the serving of a notice.

190. *Paragraph 3* sets out the three conditions for making a notification order. First, an individual must have been convicted of a corresponding foreign offence and given a sentence or hospital order equivalent to that required for notification requirements to apply where the conviction or relevant finding was in the UK (as set out in clause 52). Second, the sentence must either have been imposed after the commencement of this Schedule, or when the Schedule was commenced the individual was imprisoned or detained as a result of that sentence, or who would have been but for being unlawfully at large or otherwise temporarily out of custody or was released on licence or equivalent. Third, the period for which a person would be subject to notification requirements under clause 64 has not expired. A court must make a notification order if these three conditions are met.

191. *Paragraph 4* sets out the circumstances in which the police may apply for a notification order and the procedure to be followed in England and Wales. The application must be made by the chief officer of police for the area where the individual resides, or where the officer believes the person is or intends to come. This would enable, for example, the chief officer of Kent Police to make an application in respect of a person who is currently in France but who is believed (by the chief officer) to have plans to arrive in Dover within the next few days. Paragraphs 5 and 6 make corresponding provision for Scotland and Northern Ireland.

192. *Paragraphs 7, 8 and 9* provide, for England and Wales, Scotland and Northern Ireland respectively, a power for an individual made subject to a notification order to appeal against the making of their order to a higher court.

193. *Paragraph 10* provides that the notification requirements in Part 4 of the Bill apply to a person made subject to a notification order, but sets out the modifications to those provisions that are necessary to make them work in connection with such persons. In particular, the initial notification is to be made within 3 days of service of the order.

#### **Clause 67 – Foreign travel restriction orders**

194. This clause gives effect to Schedule 6, which makes provision for foreign travel restriction orders which may, in specified circumstances, be made in respect of persons subject to the notification requirements.

#### **Schedule 6 – Foreign Travel Restriction Orders**

195. *Paragraph 1* of Schedule 6 introduces the concept of a foreign travel restriction order. Such an order may be made in respect of individuals subject to the notification requirements (including by virtue of being subject to a notification order). This is a civil preventative

order under which the court may prohibit the person from travelling abroad where, and so far as it is necessary to prevent the person from engaging in terrorism activity abroad.

196. *Paragraph 2* sets out the conditions for making a foreign travel restriction order. If the court is satisfied that these are met, it may make an order. First, the person must be subject to the notification requirements. Second, the person must, since being dealt with (usually, sentenced for) the offence, have behaved in a way that makes it necessary to prevent him from taking part in terrorism activity outside the UK. “Terrorism activity” is defined in paragraph 16 of this Schedule. In the case where the notification requirements apply retrospectively, the person’s behaviour must have taken place since commencement. Although this is a civil order, the standard of proof in respect of the behaviour will be the heightened civil standard described in *R v Crown court of Manchester ex parte McCann* ([2002] 3 WLR 1313) as virtually indistinguishable from the criminal one.

197. *Paragraph 3* sets out the circumstances in which the police may apply to a magistrates’ court for a foreign travel restriction order and the procedure for doing so in England and Wales. *Paragraphs 4 and 5* make corresponding provisions for Scotland and Northern Ireland.

198. *Paragraph 6* enables a foreign travel restriction order to prevent a person subject to it from travelling to any country outside the UK which is named or described in the order, travelling to any country outside the UK other than the countries named in the order (this may be used, for example, where the offender is banned from travelling anywhere in the world other than to a named country which he may need to visit for family reasons) or travelling to any country outside the UK. A person subject to an order prohibiting all foreign travel must surrender all their passports at the police station specified in the order on or before the order takes effect or within a specified time. The person’s passports must be returned as soon as is reasonably practicable after the order ceases to have effect. “Passport” is defined in clause 68 and includes both foreign and UK passports and other travel documents.

199. *Paragraph 7* provides that the foreign travel restriction order lasts for a fixed period, to be specified in the order, of not more than 6 months and that where the person is already subject to a foreign travel restriction order, the earlier order ceases to have effect.

200. *Paragraphs 8* sets out provisions permitting the variation, renewal or discharge of a foreign travel restriction order in England and Wales. A defendant may wish to apply for a variation of an order if for example the order prohibits him from travelling to a particular country but during the course of the order he has to attend an urgent business meeting there. The police may wish to apply for a renewal of an order if, on the expiry of the previous order, they still have cause to believe that the defendant poses a risk of committing terrorist acts abroad. Any of the persons specified in *paragraph 8(1)* may make an application for an order varying, renewing or discharging a foreign travel order.

201. *Paragraph 8(2)* provides that an application for variation, renewal or discharge may be made to the court which made the original order; or to a magistrates' court in the area where the subject of the order resides (this will generally be the case where the subject of the order is making the application); or to any magistrates' court in the police area of the chief officer making the application.

202. *Paragraph 8(4)* provides that the court considering the application must hear any person mentioned in paragraph 8(1) who wishes to be heard. Having done so, paragraph 8(3) allows the court to make any order varying, renewing or discharging the order it considers appropriate, subject to the restrictions in paragraph 11.

203. *Paragraphs 9 and 10* make corresponding provision for Scotland and Northern Ireland.

204. *Paragraph 11* provides that a foreign travel restriction order may only be renewed or varied so as to contain prohibitions necessary to prevent the person subject to the order from taking part in terrorism activities outside the UK.

205. *Paragraph 12* provides a right of appeal in England and Wales for the person subject to the order to the Crown Court against the making of a foreign travel restriction order or against the making of an order varying, renewing or discharging a foreign travel order, or against the refusal to make such an order.

206. *Paragraphs 13 and 14* make corresponding provision for Scotland and Northern Ireland.

207. *Paragraph 15* makes it an offence for a person to breach any prohibition contained within a foreign travel restriction order without reasonable excuse. *Paragraph 15(4)* provides that the court cannot make a conditional discharge where someone is convicted of this offence in England and Wales or Northern Ireland, or a probation order where the conviction is in Scotland.

#### **Clause 68 – Minor definitions for Part 4**

208. Clause 68 provides definitions of terms used in Part 4, including in Schedules 5 and 6.

### **PART 5 – ASSET FREEZING PROCEEDINGS**

#### *Introductory*

#### **Clause 69 – Asset Freezing Proceedings**

209. Clause 69 defines “asset freezing proceedings” and related terms for the purposes of Part 5, which provides a power to make court rules for asset freezing proceedings. Asset freezing proceedings are proceedings on an application to set aside an asset freezing decision,

which is a decision of the Treasury to give a direction for the purposes of a UN terrorism order about the freezing of a suspected terrorist's funds. *Subsection (3)* contains the list of the UN terrorism orders, and *subsection (4)* includes a power for HM Treasury, by order, to make changes to the list.

***Rules of court, disclosure and related matters***

**Clauses 70 – General provisions about rules of court**

210. Clause 70 specifies matters about which the rules of court for asset freezing proceedings may make provision. *Subsection (2)* requires the maker of the rules of court to have regard to both the need for a proper review of the asset freezing decision which is subject to challenge, and the need to ensure that certain disclosures are not made, where this would be contrary to the public interest. *Subsections (3) and (4)* contain a non-exhaustive list of matters which the rules of court may cover. This includes provision concerning:

- a) mode of proof and evidence;
- b) proceedings being determined without a hearing;
- c) legal representation;
- d) the extent to which full particulars of reasons for decisions must be given;
- e) proceedings in the absence of parties and their legal representatives;
- f) special advocates and their functions;
- g) summaries of evidence taken in a party's absence.

**Clause 71 – Rules of court about disclosure**

211. Clause 71 requires rules of court to contain certain provisions relating to HM Treasury's disclosure obligations, including rules relating to applications by HM Treasury to withhold material from disclosure. *Subsection (3)* provides that the Treasury must be given an opportunity to apply for permission not to disclose sensitive material (and the application must be heard in private) and that the court must be required to give permission not to disclose the material if to do so would be contrary to the public interest. Where the court gives permission for material not to be disclosed, it must consider requiring HM Treasury to provide a summary of the material, although such a summary must not itself contain material the disclosure of which would be contrary to the public interest.

212. If, having applied, the Treasury do not receive the court's permission to withhold sensitive material, but elect not to disclose it anyway, rules of court must authorise the court to direct either that the Treasury may not rely on the material or, if it adversely affects their case, to make such concessions as the court specifies (*subsection (5)*).

213. *Subsection (6)* however makes it clear that nothing in clause 71, or in rules of court made under clause 71, is to be seen as requiring the court to act in a manner incompatible with the right of the applicant to a fair hearing. This provision is included to ensure that this Part, and rules of court made under it, comply with the European Convention on Human Rights,

following the House of Lords decision in *Secretary of State for the Home Department v. MB* ([2007] UKHL 46).

**Clause 72 – Appointment of special advocate**

214. Clause 72 permits the appointment of a special advocate in asset freezing proceedings. This procedure corresponds with the special representation procedure contained in the Prevention of Terrorism Act 2005 (see paragraph 7 of the Schedule to the Act). A special advocate is a qualified lawyer who has passed through the Government’s security vetting process, whose role is to represent the interests of a party to asset freezing proceedings (including any appeal) in circumstances where that party and his own legal representative are excluded from the proceedings. The special advocate is appointed by the appropriate law officer (as described in *subsection (3)*) and is not responsible to the party whose interests he is appointed to represent.

**Clause 73 – Intercept Evidence**

215. Clause 73 amends section 18 of the Regulation of Investigatory Powers Act 2000 (c.23) (“RIPA”), to enable the disclosure of intercepted communications in asset freezing proceedings. Section 17 of RIPA contains a general prohibition on the use of intercepted communications in legal proceedings. Section 18 of RIPA lists certain exceptions to that general prohibition and this clause adds asset freezing proceedings to that list of exceptions.

***Supplementary provisions***

**Clause 74 – Allocation of proceedings to Queen’s Bench Division**

216. Clause 74 provides that asset freezing provisions are to be allocated to the Queen’s Bench Division.

**Clause 75 – Initial exercise of powers by the Lord Chancellor**

217. Clause 75 allows the Lord Chancellor, the first time the power is used, to exercise the power conferred by clauses 70 and 71 to make rules of court. The Lord Chancellor must consult the Lord Chief Justice (or, where the rules are applicable to Northern Ireland, the Lord Chief Justice of Northern Ireland), before making such rules, but this requirement may be satisfied by any consultation that takes place before commencement (see *subsection (3)*). The rules will come into effect only if approved by the House of Commons and the House of Lords within 40 days of being made (*subsection (4)*). These rules will cease to have effect 40 days after being laid before Parliament if not approved by both the House of Commons and the House of Lords within that period.

**Clause 76 – Interpretation of Part 5**

218. Clause 76 identifies where the meanings of certain defined terms used in this Part can be found.

## **PART 6 – INQUESTS AND INQUIRIES**

### **Clause 77 – Certificate requiring inquest to be held without a jury: England and Wales**

219. Clause 77 amends the Coroners Act 1988 (c.13).

220. Clause 77(2) inserts a new section 8A into the Coroners Act 1988 which allows the Secretary of State to issue a certificate in relation to an inquest if, in his or her opinion, the inquest will involve the consideration of material that should not be made public in the interests of national security, in the interests of the relationship between the United Kingdom and another country, or otherwise in the public interest. The effect of such a certificate is that the inquest will be held without a jury. A certificate may be issued before an inquest has begun or at any time before its conclusion. If the inquest has already begun with a jury, the coroner must discharge the jury. The Secretary of State may revoke a certificate at any time before the conclusion of the inquest.

221. Clause 77(3) provides that the amendments to the Coroners Act 1988 will be capable of applying to any inquests which are ongoing on the day they come into effect, in addition to any inquests beginning on or after that day.

### **Clause 78 - Certificate requiring inquest to be held without a jury: Northern Ireland**

222. Clause 78 inserts a new section 18A into the Coroners Act (Northern Ireland) 1959 (c.15). This makes equivalent provision to clause 77.

### **Clause 79 – Specially appointed coroners**

223. Clause 79(1) inserts new sections 18A to 18C into the Coroners Act 1988.

224. New section 18A provides that the Secretary of State may, if a certificate has been issued under section 8A, appoint a “specially appointed coroner” to hold the inquest. *Subsection (2)* provides that the Secretary of State must establish and maintain an “approved list” of coroners eligible to be appointed as specially appointed coroners. A coroner may be included on the approved list only with the agreement of the Lord Chief Justice (or the nominated senior judge, as defined in *subsections (7) and (8)* of new section 8A).

225. *Subsection (4)* provides that the Lord Chief Justice must agree to each individual appointment of a specially appointed coroner to hold the inquest when a certificate has been issued. The person so appointed may be a coroner on the approved list, a High Court judge or a circuit judge.

226. New section 18B sets out provisions governing the powers and duties of specially appointed coroners who hear certified inquests.

227. New section 18C permits the Secretary of State to revoke the appointment of a specially appointed coroner on the grounds of the specially appointed coroner's incapacity or misbehaviour, or if the certificate issued under section 8A is revoked. The Secretary of State may revoke an appointment only if the Lord Chief Justice (or the nominated senior judge) agrees to the revocation.

228. Clause 79(2) provides that the amendments to the Coroners Act 1988 will be capable of applying to any inquests which are ongoing on the day they come into effect, in addition to any inquests beginning on or after that day.

#### **Clauses 80 and 81 – Inquiries and inquests: intercept evidence**

229. Clause 80(1) amends section 18 of RIPA to allow disclosure of intercept material to a person appointed as counsel to an inquiry held under the Inquiries Act 2005, in addition to the panel of an inquiry. But the inquiry panel may not order the disclosure of intercept material unless it is satisfied that there are exceptional circumstances that make the disclosure essential (see section 18(8A) of RIPA).

230. Clause 81(1) to (3) amends section 18 of RIPA to allow disclosure of intercept material to a coroner and to a person appointed as counsel to an inquest in cases where a certificate has been issued under new section 8A of the Coroners Act 1988 or new section 18A of the Coroners Act (Northern Ireland) 1959 but only if the coroner is satisfied that the exceptional circumstances of the case make the disclosure essential to enable the matters that are required to be ascertained by the inquest to be ascertained.

231. Clauses 80(2) and 81(4) provide that the amendments to RIPA set out in clauses 80 and 81 have effect with regard to any inquests or inquiries which have begun but have not been concluded before the day on which those clauses come into effect, in addition to any inquests or inquiries beginning on or after that day.

### **PART 7 – MISCELLANEOUS**

#### *Amendment of definition of “terrorism” etc*

##### **Clause 82 – Amendment of definition of “terrorism” etc**

232. Clause 82 gives effect to Lord Carlile's 12th recommendation in his January 2007 report on the definition of terrorism. This was that the definition of terrorism in section 1(1) of the Terrorism Act 2000 be amended to include, in paragraph (c), the purpose of advancing a racial cause (in addition to a political, religious or ideological cause). Although a racial cause will in most cases be subsumed within a political or ideological cause this amendment is designed to put the matter beyond doubt that such a cause is included. A similar amendment is made to paragraph 4(2)(c) of Schedule 21 to the Criminal Justice Act 2003 which makes provision in relation to the minimum term for mandatory life sentences. That paragraph provides that the starting point for a murder done for the purpose of advancing a

political, religious or ideological cause will be life. And similar amendments are made to other pieces of legislation where these words appear.

### ***Terrorist offences***

#### **Clause 83 – Offences relating to information about members of armed forces etc**

233. This clause, which inserts a new section 58A into the Terrorism Act 2000, creates a criminal offence which is committed when a person either elicits or attempts to elicit information about members of the armed forces, the intelligence services, or constables, which is likely to be useful to a person committing or preparing an act of terrorism, or publishes or communicates information of that kind. For the offence to be committed information obtained, published or communicated would have to be such as to raise a reasonable suspicion that it was intended to be used to assist in the preparation or commission of an act of terrorism, and must be of a kind that was likely to provide practical assistance to a person committing or preparing an act of terrorism (see the Court of Appeal decision in the case of *R v K* ([2008] All ER (D) 188 (Feb)), when it considered the legal effect of section 58 of the Terrorism Act 2000). Section 58 of the Terrorism Act 2000 already prohibits the collecting of information which is likely to be of use to a person taking part in acts of terrorism. The offence provided for in clause 83 is based in part on section 103 of the 2000 Act (which ceased to have effect on 31st July 2007 by virtue of the Terrorism (Northern Ireland) Act 2006). A person who is able to prove that he had a reasonable excuse for his actions is able to rely on that as a defence. This must be read with section 118 of the 2000 Act (as amended by clause 83(3)), the effect of which is to limit the burden on an accused, in respect of certain provisions in the Act, to prove a particular matter if the accused wishes to rely on proof of that matter as a defence. If the accused adduces evidence which is sufficient to raise an issue with respect to a particular matter, the prosecution must then prove beyond reasonable doubt that it does not exist. The offence is punishable with a maximum sentence of 10 years imprisonment, or to a fine or both.

234. Section 58A(5) adds supplementary provisions in an additional Schedule to the 2000 Act (Schedule 8A, inserted by Schedule 7 to the Bill). These are intended to ensure that the offence is compliant with Directive 2000/31/EC of the European Parliament and of the Council of 8th June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Official Journal L 178 17/07/2000 p.0001-00016) (known as the E-Commerce Directive).

#### **Clause 84 – Terrorist property: disclosure of information about possible offences**

235. *Subsection (2)* of this clause makes a clarifying amendment to section 19(1) of the 2000 Act. This makes it clear that the offence in section 19 of failing to disclose a belief or suspicion of an offence under sections 15 to 18 (a terrorist finance offence) applies to all persons in employment, whether or not they are employed in a trade, profession or business.

236. *Subsection (3)* inserts a new section 23C into the 2000 Act defining “employment” and a corresponding definition of “employer” for the purposes of Part 3 of that Act (terrorist property). The definition is wider than the usual definition of employment, including

contractors, office-holders (such as trustees of a charity), individuals on a formal work experience programme or training (for example an intern in a bank) and volunteers.

237. *Subsection (4)* makes transitional provision to the effect that, where the wider definition of employment catches a person it did not previously catch, that person will have a duty to inform of a belief or suspicion that a terrorist offence has been committed if they continue to hold that belief or suspicion after commencement, even if the information on which it is based came to the person before commencement.

### ***Control orders***

#### **Clause 85 – Control orders: powers of entry and search**

238. This clause adds three new sections after section 7 of the Prevention of Terrorism Act 2005 (“PTA”). The new sections provide constables with the power to enter and search the premises of individuals subject to control orders who are reasonably suspected of absconding or of failing to grant access to premises when required to do so. They also allow a constable to apply to a justice of the peace (or, in the case of Scotland, a sheriff and, in the case of Northern Ireland, a lay magistrate) for a warrant to enter and search premises for the purpose of monitoring compliance with a control order. In the context of the PTA “premises” can include vehicles that are owned or controlled by the controlled person (see section 15 of that Act). The three new sections are added by *subsection (1)*.

239. New section 7A (absconding) gives a constable the power to enter (if necessary by force) and search premises if the officer reasonably suspects that the controlled person has absconded. Once a constable has this initial “reasonable suspicion” the entry and search power can be exercised to determine whether the controlled person has in fact absconded and, if it appears that he has, to search for any material that may assist in apprehending him. However in circumstances where, prior to these powers being exercised a constable knows that a controlled person has absconded he can enter and search the property for any material that may assist in apprehending the controlled person without the purpose of this entry and search being to determine whether there has been an abscond.

240. The term “abscond” is not defined in the PTA and it is intended that it should have its ordinary meaning: “to leave hurriedly and secretly, flee from justice” and, in this particular context, to avoid the obligations of a control order. The premises to which new section 7A applies are the residence of an individual subject to a control order and any other premises to which a controlled person is or at any time has been, required to grant access in accordance with an obligation imposed by or under a control order (see *subsection (2)*).

241. New section 7B (failure to grant access to premises) gives a constable the power to enter (if necessary by force) and search premises where the constable reasonably suspects that the controlled person has failed to permit entry (as required by the control order) at a time when, by virtue of an obligation under the control order, the person is required to be in that person’s residence. The purpose of any such entry and search is to determine whether any of the obligations imposed by a control order have been contravened or, if it appears that there

has been such a contravention, to search for any material that may assist in any subsequent investigation. The premises to which this new section applies are premises to which the controlled person is obliged to grant access under the person's control order obligations.

242. New section 7C (monitoring compliance with a control order) allows a constable to apply to a justice of the peace (or, in Scotland, a sheriff and, in Northern Ireland, a lay magistrate) for a warrant to enter and search the premises of a controlled person to determine whether a controlled individual is complying with that person's obligations. Such a warrant may only be granted if the justice of the peace (or sheriff or lay magistrate) is satisfied that it is necessary for the purposes of determining whether the controlled person is complying with the control order obligations. In order for the requirement of necessity to be met it is envisaged that such warrants will most often be applied for where the police have previously attempted to conduct unannounced visits that have failed due to the apparent absence of the individual. The premises to which this new section applies are the same as for new section 7A (see above).

243. *Subsection (2)* of clause 85 provides that obstruction of a police officer acting under any of new sections 7A, 7B or 7C is an offence punishable, on summary conviction, by a fine not exceeding level 5 on the standard scale (currently £5000) and a prison sentence up to 51 weeks (in England and Wales) or six months (in Scotland and Northern Ireland). The powers of a magistrates' court to impose a prison sentence of 51 weeks are provided by section 281(5) of the Criminal Justice Act 2003. This provision has not yet been commenced and until it is reference to the prison sentence of 51 weeks should be read as a reference to a prison sentence of 6 months (see section 9(8) of the PTA).

244. *Subsection (3)* provides that these amendments will apply regardless of when the control order was made.

#### **Clause 86 – Control orders: meaning of involvement in terrorism-related activity**

245. Section 1(9) of the PTA defines involvement in terrorism-related activity as any one or more of the following:

- a) the commission, preparation or instigation of acts of terrorism;
- b) conduct which facilitates the commission, preparation or instigation of such acts, or which is intended to do so;
- c) conduct which gives encouragement to the commission, preparation or instigation of such acts, or which is intended to do so;
- d) conduct which gives support or assistance to individuals who are known or believed to be involved in terrorism-related activity.

246. *Subsection (1)* of clause 86 amends section 1(9)(d) so that it reads "conduct which gives support or assistance to individuals who are known or believed by the individual concerned to be involved in conduct falling within paragraphs (a) to (c)."

247. This amendment removes an unintended ambiguity in the original definition, which could be read as capturing individuals who unknowingly provided support or assistance to individuals known or believed by the Secretary of State to be involved in terrorism-related activity. It also removes an unnecessary potential circularity in the definition. Currently, an individual (A) could have a control order imposed on him because he was supporting another individual (B) known or believed to be supporting a third person (C) involved in terrorism-related activity within paragraphs (a) to (c). There could in theory be any number of links in this chain: A knows or believes B who knows or believes C who knows or believes D, and so on before it leads to someone (Z) who is actually engaged in conduct referred to within paragraphs (a) to (c). At present all persons in this chain could have a control order imposed against them. The definition was not and is not intended to be this wide. This amendment ensures that only support for someone directly involved in terrorism-related activity (conduct falling within section 1(9)(a) to (c)) is captured so that in the example referred to above only the person directly giving support and assistance to Z would be caught by the definition.

248. *Subsection (2)* provides that the revised definition set out in *subsection (1)* is deemed to have had effect since the 2005 Act came into force. This is the way in which the provision has always been interpreted and reflects the fact that the “tightened” definition is the one that has always been applied. This subsection is also intended to ensure that the basis upon which previous or current control orders have been made or upheld by the courts is not called into question as a result of a change in the definition of terrorism-related activity.

#### **Clause 87 – Time allowed for representations by controlled persons**

249. Section 3 of the PTA makes provision in relation to the supervision by the court of the making of non-derogating control orders. Once a non-derogating control order has been made, the Secretary of State’s decision to make the control order and impose the obligations in it are subject to mandatory review by the court. (In the case of a controlled person whose principle place of residence is in Scotland the court is the Outer House of the Court of Session; in the case of a controlled person whose principle place of residence is in Northern Ireland the court is the High Court in Northern Ireland; and in any other case the court is the High Court in England and Wales (see section 15 of the PTA)). This review is a full hearing with the court applying judicial review principles to the decisions taken (this is commonly known as a “3(10) hearing” after the section in the PTA that provides for it). Section 3 requires the court to give an individual subject to a control order the opportunity to make representations to the court about directions for the 3(10) hearing in relation to that control order.

250. This clause (*subsection (2)* and the new subsection (7A)(a) inserted by *subsection (3)*) amends section 3 so that when a control order is made following permission from the court, the individual will be given an opportunity to make representations within seven days from the time that the order is served upon him and not, as currently, seven days from the time the court gives permission. There may for operational reasons be a gap – possibly longer than seven days – between the time a control order is made and the time it is served. The PTA as currently drafted potentially requires the court to give an individual the opportunity to make representations before the order is served – and thus before the individual is aware of the

control order or bound by its obligations. This is impractical and operationally undesirable. This amendment will apply to control orders made after this clause comes into force.

251. By virtue of new subsection (7A)(b), the amendment does not change the position regarding the timing of the opportunity for an individual to make representations in relation to urgent control orders made without the permission of the court. By definition, the individual in such cases is already aware of the control order and bound by its obligations.

#### **Clause 88 – Applications for anonymity for controlled persons**

252. *Subsections (1) to (3)* of this clause make a technical amendment to the anonymity provisions in paragraph 5 in the Schedule to the PTA. The intention of paragraph 5 is to ensure that the anonymity of individuals subject to a control order can be maintained throughout the process. Paragraph 5 states that anonymity orders can be applied for after a control order has been made. It is the Secretary of State that has the power to make a non-derogating control order. However (except in cases of urgency) before the power to make an order arises the Secretary of State must apply to the court for permission to make a control order (or in the case of derogating control orders, when the Secretary of State applies for the court to make such an order). The amendments in this clause mean that the Secretary of State can make an application for an anonymity order to protect the identity of the controlled person at the stage when permission is being sought from the court to make the control order rather than when the control order is actually made.

253. *Subsection (4)* provides that this amendment will be deemed always to have had effect. This reflects the original policy intention and current practice followed by the courts, which the clause does not seek to change. Moreover, *subsection (4)* ensures that all current anonymity orders made when permission for the control order was sought from the courts and before this clause comes into force will be unaffected.

#### ***Forfeiture of terrorist cash***

#### **Clause 89 – Forfeiture of terrorist cash: determination of period for which cash may be detained**

254. This clause amends paragraph 3 of Schedule 1 to the Anti-Terrorism, Crime and Security Act 2001 (“ATCSA”) (detention of seized cash), so as to provide that in calculating the period of 48 hours for which cash may initially be detained, only working days are taken into account. Paragraph 3(1) corresponds to section 295(1) of the Proceeds of Crime Act 2002, which was amended in similar terms by section 100 of the Serious Organised Crime and Police Act 2005.

#### **Clause 90 – Forfeiture of terrorist cash: appeal against decision in forfeiture proceedings**

255. This clause substitutes paragraphs 7 and new 7A in Schedule 1 to ATCSA (appeals against decision in forfeiture proceedings). Some of the amendments are to take account of amendments made to the 2000 Act by section 22 of the Terrorism Act 2006 (name changes by proscribed organisations). Specific provision is made for the timing of appeals against a

decision in forfeiture proceedings relating to “terrorist cash” where the forfeiture depends on the proscription of an organisation and the organisation in question is subsequently de-proscribed as a result of an appeal to the Proscribed Organisations Appeal Commission (POAC). Section 22 of the 2006 Act amended the 2000 Act to allow the Secretary of State to specify by order an alternative name for a proscribed organisation and to provide for appeals to POAC against such orders. Where the appeal is successful, the Secretary of State is required by section 5(5) of the 2000 Act to make an order under section 3(8) effectively revoking the earlier order. New paragraph 7A takes account of this circumstance and provides that an appeal may be brought at any time before the end of 30 days beginning with the date the de-proscription order comes into force.

256. Paragraph 7 of Schedule 1 to ATCSA corresponds to section 299 of the Proceeds of Crime Act 2002. That section was substituted by section 101 of the Serious Organised Crime and Police Act 2005. The paragraph 7 substituted by this clause reflects the changes made to section 299 of the 2002 Act. These are: (a) the applicant for a forfeiture order is given the right of appeal against the court’s refusal to make an order; and (b) the requirement that the hearing of an appeal against a forfeiture order is by way of a rehearing is omitted.

257. The new paragraph 7 also provides that the right of appeal in Scotland is to the sheriff principal (rather than the Court of Session).

### ***Costs of policing at gas facilities***

#### **Clause 91 – Policing at gas facilities: England and Wales**

258. Clause 91 allows the Secretary of State to require gas transporters to pay certain costs of policing gas facilities in England and Wales. *Subsection (1)* sets out the circumstances in which these new powers may be exercised by the Secretary of State: the Secretary of State must consider that the provision of “extra police services” is necessary because there is a risk of loss or of disruption to the supply of gas which would have a serious impact on the United Kingdom (or a part of it).

259. *Subsection (2)* defines “extra police services” to mean either the use of police services from the Ministry of Defence Police under section 2(2)(e) of the Ministry of Defence Police Act 1987 (agreement by Secretary of State to provide MOD police services) or from English and Welsh police forces under section 25(1) of the Police Act 1996 (provision of special services on request).

260. *Subsection (3)* provides that the Secretary of State may require a designated gas transporter to pay all or part of the costs of the extra policing incurred by the Secretary of State.

261. *Subsection (4)* defines “gas facility” and *subsection (5)* explains what is meant in *subsection (3)* by a gas transporter having an interest in a gas facility.

**Clause 92 – Policing at gas facilities: Scotland**

262. Clause 92 makes corresponding provision for Scotland. *Subsection (1)* of this clause makes identical provision to that which applies in England and Wales.

263. *Subsection (2)* defines “extra police services” to mean either the use of police services from the Ministry of Defence Police under section 2(2)(e) of the Ministry of Defence Police Act (as for England and Wales) or police services provided under an agreement, entered into at the request of the Secretary of State, between the occupier of the gas facility and the police authority, chief constable of the police force or joint police board, for the police area where the gas facility is situated.

264. *Subsection (3)* provides that where the services of the Ministry of Defence Police have been used the Secretary of State may require a designated gas transporter to pay all or part of the costs of the extra policing incurred by the Secretary of State.

265. *Subsection (4)* provides that if requested by the occupier of the gas facility the Secretary of State must require a designated gas transporter to pay the reasonable costs incurred by the occupier under any agreement entered into at the Secretary of State’s request, between the occupier of the gas facility and the police authority, chief constable of the police force or joint police board, for the police area where the gas facility is situated.

**Clause 93 – Designated gas transporters**

266. *Subsection (1)* of this clause provides that the Secretary of State may by order designate a person as a gas transporter for the purposes of clauses 91 to 96. A designated gas transporter must be a holder of licence issued under section 7 of the Gas Act 1986. Such an order is subject to negative resolution procedure (see *subsection (3)*).

**Clause 94 – Costs of policing at gas facilities: recovery of costs**

267. This clause makes provision for the designated gas transporter to be able to recoup the costs that it has had to pay for the extra policing from its customers. *Subsection (1)* of this clause empowers the Secretary of State to determine the amount of the costs to be paid by the designated gas transporter under clause 91 or 92, the manner and time when the costs are to be paid and the persons to whom the costs are to be paid.

268. *Subsection (2)* provides that where a designated gas transporter is required to pay costs under clause 92, the occupier of the gas facility can recover the costs directly from the designated gas transporter.

269. *Subsection (3)* provides that, despite any licence condition to the contrary, a designated gas transporter can, in determining its charges for conveying gas, take into account: (a) any payments it has made under clauses 91 or 92; and (b) reasonable costs that it has incurred as a party to an agreement under section 13 of the Police (Scotland) Act 1967 for

the guarding, patrolling and watching of the gas facility entered into at the Secretary of State's request.

270. *Subsection (4)* makes provision for the Secretary of State to direct the Gas and Electricity Markets Authority (GEMA) to allow the designated gas transporter to take into account in determining its charges: (a) any payments it has made under clauses 91 or 92; or (b) any payments made or costs incurred in or in relation to a specified period.

271. *Subsection (5)* imposes a consultation requirement upon the Secretary of State to consult GEMA and the designated gas transporter prior to making a direction under subsection (4).

**Clause 95 – Costs of policing at gas facilities: supplementary provisions**

272. This clause sets out an additional consultation obligation upon the Secretary of State. Under *subsection (1)* the Secretary of State must consult a designated gas transporter and GEMA prior to: (a) requiring the designated gas transporter to pay costs under clauses 91 or 92 for the first time; (b) requiring the gas transporter to pay costs in respect of a particular gas facility; and (c) requiring the gas transporter to pay the costs of extra police services provided on a subsequent occasion at a gas facility.

273. *Subsection (2)* states that the Secretary of State is not required to: (a) consult anyone other than GEMA or the designated gas transporter before requiring a designated gas transporter to pay costs under clause 91 or 92; or (b) to take into account representations made after 28 days from when the designated gas transporter or GEMA were first consulted under *subsection (1)*.

**Clause 96 – Application of provisions to costs incurred before commencement**

274. This clause makes provision for clauses 91 and 95 to apply to the costs of providing extra policing at key gas sites from 16 January 2007 to the day before these provisions come into force. They will be commenced two months after Royal Assent (see clause 104(3)).

***Appointment of special advocates in Northern Ireland***

**Clause 97 – Appointment of Special Advocates in Northern Ireland**

275. This clause provides that certain references to the Attorney General for Northern Ireland in current legislation are substituted with references to the Advocate General for Northern Ireland. The purpose of the amendments is to enable the transfer of a number of functions of the Attorney General for Northern Ireland relating to the appointment of special advocates to the Advocate General for Northern Ireland. The provisions of primary legislation to be amended are contained in section 6(2)(c) of the Special Immigration Appeals Commission Act 1997, paragraph 7(2)(c) of Schedule 3 to the Terrorism Act 2000, and paragraph 6(2) (c) of Schedule 6 to the Anti-terrorism Crime and Security Act 2001. A provision of secondary legislation contained in rule 9(1) of the Northern Ireland Act Tribunal (Procedure) Rules 1999 is also to be amended. These changes will come into force upon the devolution of justice matters in Northern Ireland, and the coming into force of section 27 of

the Justice (Northern Ireland) Act 2002 (c.26) which creates the office of Advocate General for Northern Ireland.

## **PART 8 – SUPPLEMENTARY PROVISIONS**

### ***General definitions***

#### **Clause 98 – Meaning of “terrorism”**

276. This clause defines “terrorism” for the purposes of the Bill by reference to the definition of terrorism in section 1 of the Terrorism Act 2000 (which is amended by clause 82 of the Bill).

#### **Clause 99 – Meaning of offence having a “terrorist connection”**

277. This clause explains what is meant in the Bill by an offence having a “terrorist connection”. This is relevant to the provisions on aggravated sentencing (see clauses 42 and 43), forfeiture (see clause 46) and notification (see clause 53), which apply in England and Wales and in Scotland (but not in Northern Ireland).

### ***Orders and regulations***

#### **Clause 100 – Orders and regulations**

278. This clause provides that orders and regulations under the Bill must be made by statutory instrument but that orders and regulations are interchangeable. It also makes general provision which allows such subordinate legislation to make different provision for different cases or circumstances and to include supplementary, incidental, consequential, transitional and saving provisions.

#### **Clause 101 – Orders and regulations: affirmative and negative resolution procedure**

279. This clause describes what is meant by the affirmative and negative resolution procedures. It also allows statutory instruments made under the Bill to be subject to a Parliamentary procedure offering a higher level of scrutiny than that provided for in the Bill.

### ***Financial provisions***

#### **Clause 102 - Financial provisions**

280. This is a standard clause relating to money to be paid out and received as a result of provisions of the Bill.

### ***Repeals***

#### **Clause 103 – Repeals**

281. This clause gives effect to Schedule 8 which sets out the repeals made by the Bill.

***Final provisions***

**Clause 104 – Commencement**

282. This clause makes specific provision as to when various provisions in the Bill are to come into force and provides that other provisions are to be commenced by order (which may also make transitional and saving provisions).

**Clause 105 – Extent**

283. This clause provides that the provisions of this Bill extend to the whole of the UK except as provided otherwise in the clauses of the Bill, and that the extent of amendments or repeals to existing legislation correspond to the extent of that existing legislation.

**Clause 106 – Short title**

284. This clause provides that the short title of the Bill is the Counter-Terrorism Act 2008.

**FINANCIAL EFFECTS OF THE BILL**

285. This Bill is unlikely to result in significant costs for the public sector. It is intended to contribute to a climate in which terrorism related activity is harder to carry out and therefore to deter terrorist attacks. It is, of course, impossible to quantify how many attacks might be prevented or the consequent benefit to the economy.

**EFFECTS OF THE BILL ON PUBLIC SECTOR MANPOWER**

286. Nearly all the costs resulting from the provisions are manpower costs. These costs will, however, be minimal.

**EUROPEAN CONVENTION ON HUMAN RIGHTS**

287. 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 about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act). Lord West of Spithead has made the following statement:

“In my view the provisions of the Counter-Terrorism Bill are compatible with the Convention rights”.

288. Where a measure is not expressly detailed in this section then it is not considered to raise any significant ECHR issues.

289. Clause 1 confers on a constable the power to remove a document found during a search under various terrorism-related search powers in order to examine it (for up to 96 hours) to ascertain whether it is one he has power to seize. The Secretary of State considers that this power will engage Article 8 (which protects the right to private and family life and correspondence) and Article 1 of the First Protocol (which protects a person's peaceful enjoyment of his property) but that any interference with these rights is justified.

290. The interference will be in accordance with the law because the power appears in the Bill. In terms of Article 8, the legitimate aims that this provision pursues are national security and the prevention of disorder or crime. The search powers and warrants to which the powers of removal apply are all contained in terrorism legislation. These include a search of a terrorist suspect, a search during a terrorist investigation, a search for evidence of commission of weapons-based offences, a search in connection with the enforcement of control orders and a search for terrorist publications. In terms of Article 1 of the First Protocol, the removal and ultimate seizure is in the general interest because it is aimed at the prevention of crime and is in association with criminal proceedings.

291. The interference is also necessary in a democratic society. The pressing social need that the power addresses is the need to ensure that effective searches may be carried out in order to seize evidence of offences connected to terrorism, to remove from circulation publications related to terrorism (which could result in offences being committed) and to assist in the enforcement of control orders. There are a number of aspects to these powers that make them proportionate:

- a) The power only exists in the context of searches carried out under the terrorism legislation.
- b) The criminal nature of some of the documents that might be found (encouraging or being useful to terrorists) means that they should be removed from circulation
- c) The removal could result in evidence being uncovered which could result or assist in a criminal prosecution for a terrorism-related or other offence.
- d) Documents subject to legal privilege are protected.
- e) A record of the removal must be made and on request, a copy must be given to a person with an interest in the document.
- f) On request, and subject to legitimate restrictions, supervised access must be granted to such a person.
- g) A document may only be retained under this power for a maximum of 96 hours.
- h) Restrictions and safeguards apply in relation to taking copies of the document removed.

292. Clauses 10 to 12 confer powers on constables to take, use and retain fingerprints and non-intimate samples from an individual subject to a control order without appropriate consent. It is likely that the power to take fingerprints and samples will engage Article 8,

which protects the right to respect for private life. In respect of the use and retention of any fingerprints and samples that have been taken there is case-law to suggest that Article 8 is not engaged. Even if the use and retention of fingerprints and samples does engage Article 8 the Secretary of State considers that any interference with Article 8 rights can be justified.

293. The power appears in the Bill, so it will be in accordance with the law. The power will pursue a legitimate aim as it will be exercised in the interests of national security and the prevention of disorder or crime. The Secretary of State considers that the exercise of the power will be proportionate because the power can only be exercised by a constable; the power can only be exercised in respect of a person who is the subject of a control order; reasons for the taking of any fingerprints and/or non-intimate samples and the use to which they may be put must be given and recorded; the fingerprints and non-intimate samples can only be used for a limited set of purposes related to national security, the prevention, detection or investigation of a crime, the conduct of a prosecution or the identification of a deceased person or of the person from whom a body part came; only fingerprints and non-intimate samples are caught by the power and it does not extend to intimate samples; the fingerprints and non-intimate samples will only be made available to a limited category of persons and an individual will not be identifiable to the untutored eye simply from the profile of their fingerprint and/or non-intimate sample.

294. These clauses also confers powers on a constable to arrest any controlled person who has failed to comply with a constable's request that the controlled person attend a police station in order to have their fingerprints and/or non-intimate samples taken. It is likely that this power of arrest will engage Article 5 which provides that everyone has the right to liberty and security of person and that no one shall be deprived of his liberty save in certain prescribed circumstances and in accordance with a procedure prescribed by law.

295. The power of arrest appears in the Bill so it will be in accordance with a procedure prescribed by law. Furthermore any such deprivation of liberty will come under Article 5(1)(b) which allows for the lawful detention of a person in order to secure the fulfilment of any obligation prescribed by law.

296. Clauses 14 to 18 concern the retention and use of DNA samples, fingerprints and impressions of footwear. Clause 14(1) to (3) amends section 63A of the Police and Criminal Evidence Act 1984 to provide that fingerprints, impressions of footwear and samples can be cross checked against similar material held by or on behalf of the Security Service or the Secret Intelligence Service. The purposes for which such cross checking may be undertaken is limited by existing restrictions in section 64(1A) of the 1984 Act that is amended by clause 14(4) and (5). Clauses 15 to 17 amend the Police and Criminal Evidence (Northern Ireland) Order 1989 and the Terrorism Act 2000 to ensure that fingerprints, impressions of footwear and samples collected under different powers can be used for the similar purposes. This is to facilitate easier use of the National DNA database. The use of fingerprints and DNA samples engages Article 8 (right to privacy) of the ECHR. Article 8 is a qualified right permitting interference where necessary and proportionate for the specified purposes. The leading

domestic case on DNA and fingerprints is the House of Lords' decision in *R v Marper* ([2004] UKHL 39) which held that the retention and use of fingerprints and DNA samples could be justified under Article 8. Clause 14(1) to (3) raise no ECHR issues as they do not expand the general purposes for which this material can be used but rather simply explicitly provides for cross checking against material held by or on behalf of the Security Service or the Secret Intelligence Service. The substantive new purpose for which DNA samples and fingerprints can be used for is that provided for by clauses 14(5) is the interests of national security. The use of private information for this purpose is specifically provided for by Article 8(2). Therefore whilst the use of material in each particular case would need to be justified, adding that additional purpose to Police and Criminal Evidence Act 1984 and the Terrorism Act 2000 is compatible with the ECHR.

297. Clause 18 provides a legislative regime to cover the retention and use of fingerprints and DNA samples by law enforcement bodies outside of the existing statutory regimes.

298. This clause seeks to mirror the restrictions on use found in the Police and Criminal Evidence Act 1984 which have been upheld by the House of Lords in *Marper*. They aim to confirm that the use of this material is "in accordance with the law" for the purposes of Article 8 of the ECHR by making the law more accessible and foreseeable. Clause 18 does this by providing a legal framework for DNA samples or fingerprints obtained in certain specified circumstances, providing that they may be used by specified law enforcement bodies (eg the police or SOCA) for certain specified purposes (eg national security). The framework is a permissive one and in each case to comply with Article 8 the actual retention and use of DNA samples and fingerprints within this new framework would still need to be necessary for one of the specified purposes.

299. The effect of clause 19 is three-fold. It provides first that, where a person discloses information to any of the intelligence services (the Security Service, SIS or GCHQ), for the purposes of that service's functions, such disclosure does not breach any duty of confidence owed by that person or any other restriction. Secondly, it provides that where any of the intelligence services discloses information for the permitted statutory purposes, similarly such disclosure does not breach any duty of confidence owed by that service or any other restriction. Thirdly, it provides that information obtained by any of the intelligence services for the purpose of its functions may be used for the purpose of any of its other functions.

300. However, it should be noted that these provisions substantially reflect the position at common law. The public interest exceptions to the general duty of confidentiality have been long-established and are well-recognised by the UK Courts, for example in relation to the protection of national security or the prevention of crime. The seminal case in this connection (in relation to the banker's duty of confidence to his customer) is *Tournier v The National Provincial and Union Bank of England* ([1924] 1KB 461). See also the judgment of Mr Justice Staughton (High Court) in the case of *Libyan Arab Foreign Bank v Bankers Trust* ([1989] 3All ER 252).

301. Under the existing statutory provisions (section 2(2)(a) of the Security Service Act 1989 and sections 2(2)(a) and 4(2)(a) of the Intelligence Services Act 1994), the intelligence services may acquire information where this is necessary for the proper discharge of their functions (in particular, in relation to the protection of national security). Similarly, they may disclose information for this purpose or for the prevention or detection of serious crime or for the purpose of any criminal proceedings). Before acquiring and disclosing information, the intelligence services take care to ensure that the acquisition or disclosure (as the case may be) is both necessary for the specified statutory purposes and proportionate. The intelligence services will continue to apply the necessity and proportionality tests following the enactment of clause 19 in relation to the acquisition and disclosure of information and will similarly apply these tests so far as their internal use of information for different statutory functions is concerned.

302. These clauses engage Article 8(1) of the ECHR (everyone has the right to respect for his private and family life, his home and his correspondence). These provisions are in accordance with the law as they appear in the Bill and they pursue the legitimate aims under Article 8(2) of the protection of national security and the prevention of crime.

303. Clause 19 permits information which is subject to an obligation of confidence to be disclosed, whether to or by an intelligence service. However, these clauses only allow such disclosure where it is necessary for the protection of national security or for the prevention of crime. This statutory constraint, coupled with the care taken by the intelligence services in applying the twin tests of necessity and proportionality, will ensure that such additional interference with the exercise of the right as may result from the enactment of clause the provisions will be justified under Article 8(2).

304. Clause 22 to 31 and Schedule 2 to the Bill provide that the maximum period of pre-charge detention that will be available for suspects arrested under section 41 of the 2000 Act will, for the period during which the reserve power is available, be 42 days. The Secretary of State considers that these provisions are compatible with Article 5 of the ECHR (right to liberty).

305. 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 terrorist offences for the purpose of enabling the charging of that person.

306. There is no specific ECtHR jurisprudence on the length of time that a person can be detained before he is charged but there is the overarching principle that detention under Article 5 must not be arbitrary. Extended pre-charge detention under these provisions is not arbitrary. This is because of the motivation and effect of the detention – the prevention of suspected terrorists from absconding or having further involvement in terrorism while the

expeditious investigation into a terrorist offence proceeds – and because the detention is in keeping with the reasons for detention in Article 5(1) and Article 5 more generally.

307. The detention is proportionate to the attainment of its purpose. The need to detain terrorist suspects for longer than others before charge is necessary for a number of reasons, including the following. First, 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 in the past. This often means that less evidence has been gathered at the point of arrest, which means that more time is needed to gather sufficient evidence to charge a suspect. Secondly, 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 often requiring finding interpreters for rare and remote dialects. Thirdly, 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.

308. In the light of this, the Secretary of State considers that detention for up to 42 days is not arbitrary for the following reasons:

- a) The maximum limit for pre-charge detention may only be made available by the Home Secretary when the 28 day limit is in force and following receipt of a report from the DPP and police confirming there is an operational need for it in relation to investigating serious terrorist offences. She must make a statement to Parliament that she is satisfied that a grave exceptional threat (as defined) has occurred or is occurring, that there is an urgent need for the reserve power for the purpose of investigating the threat and bringing those responsible to justice and that its availability is compatible with ECHR rights.
- b) The higher limit will only remain in force for 30 days, and then only if Parliament has approved the continuance of the limit by resolution in both Houses within 7 days of the order being laid (failing which the order lapses after those 7 days).
- c) There will still be the need for a high court judge to authorise any detention at least every 7 days, and applications for extensions beyond 28 days may only be made (in England and Wales) by the DPP or a Crown Prosecutor with the consent of the DPP or a designated Crown Prosecutor, (in Northern Ireland) by the DPP for Northern Ireland or (in Scotland) by the Lord Advocate or procurator fiscal with the Lord Advocate's consent. The requirement in these provisions for continual judicial oversight of extended pre-charge detention provides the safeguard guaranteed in Article 5(3) for judicial control of an individual's right to liberty.
- d) Further detention may only be granted if the police can demonstrate that one of the reasons in paragraph 32(1) and (1A) of Schedule 8 applies and the judge is satisfied that the investigation is being conducted diligently and expeditiously. Those reasons are that there are reasonable grounds for believing that further

detention is necessary: to obtain relevant evidence; to preserve relevant evidence; or pending the outcome of an examination or analysis of relevant evidence or that could lead to relevant evidence. For applications for extension beyond 28 days 'relevant evidence' is restricted to evidence in relation to a serious terrorist offence – that is one carrying a life penalty.

- e) If at any point before a warrant is due for renewal a person's detention no longer meets the test for detention he must be released as specifically provided for in paragraph 37 of Schedule 8.
- f) Parliamentary scrutiny of the order within 7 days of it being laid will be informed and strengthened by independent legal advice (clause 25) and the chairs of certain committees having had sight of the DPP report and the unredacted legal advice (clause 26). Further oversight is provided by the provision that the Secretary of State must report to Parliament on each occasion pre-charge detention is extended beyond 28 days; and by the requirement on the independent reviewer of terrorism to report on whether the decision to make the reserve power available was reasonable in all the circumstances and whether the proper procedures have been followed in respect of such pre-charge detention. This report is to be laid before Parliament and will be debated.

309. These clauses have been crafted so as to protect the Article 6 and 8 rights of any person detained beyond 28 days under section 41 of the 2000 Act. Although the Secretary of State makes a statement to Parliament after making an order declaring the reserve power exercisable, and informs Parliament of each extension beyond 28 days, clause 27(4) and new paragraph 41(5) of Schedule 8 to the 2000 Act provide that those statements must not include the name of any person detained under section 41 or any material that might prejudice the prosecution of any person.

310. Clauses 34 to 39 allow a person to be questioned about a terrorism-related offence after they have been charged with the offence or after they have been officially informed that they may be prosecuted for it. The clauses also allow the court (in England, Wales or Northern Ireland) to draw a negative inference from a suspect's silence if he fails to mention things when questioned that he later relies on in court. It is possible that the questioning of a suspect after charge may exonerate them and so might in certain circumstance be to the benefit of the suspect. It will also enable the police to give suspects the opportunity to respond to any new evidence and to give their explanation.

311. The right to a fair trial under Article 6 includes the right of a person charged with a criminal offence to remain silent and not to incriminate himself. UK criminal law already allows for negative inferences to be drawn from a silence when a suspect is questioned. The circumstances in which this can be done are set out in sections 34, 36 and 37 of the Criminal Justice and Public Order Act 1994, which will also apply in relation to post-charge questioning. The European Court of Human Rights has considered the question of whether or not the drawing of adverse inferences is a breach of Article 6(2) on a number of occasions,

*These Notes refer to the Counter-Terrorism Bill  
as brought from the House of Commons on 12th June 2008 [HL Bill 65]*

notably in the case of *John Murray v. the United Kingdom* ([1996] 22 EHRR 29, Times, 9 February). They have held that the drawing of negative inferences is not, of itself, a breach of a defendant's Article 6 rights. It is therefore considered by the Secretary of State that these provisions are compatible with Article 6(2).

312. Clauses 42 to 44 provide that where a court (in England and Wales or Scotland) determines that an offence has a connection to terrorism, it must treat this as an aggravating factor when sentencing the offender.

313. The Secretary of State considers that this provision will engage Article 6 but that it is compatible with the criminal limb of that Article which guarantees a fair trial. The determination will only be made where the court is satisfied that the offence has a terrorist connection to the criminal standard. The person convicted of the relevant offence will have all the protections afforded by Article 6 in criminal proceedings. After the conclusion of a trial, the person will be able to make submissions as to why the court should not make a determination; and if the person pleaded guilty and denies the offence had a connection to terrorism, the matter will be determined by hearing evidence and witnesses may be cross-examined.

314. Article 7 prevents a heavier penalty being imposed on an offender than that which was applicable at the time the offence was committed. The provisions relating to aggravated sentencing will apply only to offences committed on or after commencement and so no issue as to Article 7 arises.

315. Clauses 45 to 50 extend the forfeiture provisions that attach to various terrorism offences. The Secretary of State considers that these provisions engage Article 8 and Article 1 of the First Protocol but that any interference with these rights is justified.

316. The provisions are in accordance with the law, as they appear in the Bill. In terms of Article 8, they pursue the legitimate aims of national security and the prevention of disorder or crime. In terms of Article 1 of the First Protocol, the forfeiture is in the general interest because it is aimed at the prevention of crime and, in particular terrorism, and because property that may now be forfeited is that which the court believes would otherwise be used for the purposes of terrorism. Removing such property from circulation is aimed at disrupting terrorist activity. The forfeiture is also in association with criminal proceedings because the forfeiture is made on conviction and is imposed in addition to any sentence. It will therefore act as a deterrent to participating in terrorist-related offences.

317. The Secretary of State considers the provisions are proportionate to these pressing social needs for the following reasons:

- a) There is provision that where a person other than the convicted person claims to be the owner of or otherwise interested in anything which can

- be forfeited, the court shall give him an opportunity to make representations before a forfeiture order is made.
- b) The criminal purposes for which the money or other property has already been used means that the offender should not be able to continue to benefit from it.
  - c) In relation to the potential future use of property, the court must either be satisfied that the offender intended its use for the purposes of terrorism, or that there are reasonable grounds for believing it would be used for the purposes of terrorism.
  - d) There is provision that the victim of personal injury or loss as a result of the offence may be compensated from the proceeds of the forfeiture.
  - e) The court has a discretion as to whether or not to make a forfeiture order. It is unlawful for a court to act in a way which is incompatible with the ECHR (section 6 of the Human Rights Act 1998). A court may not therefore make an order which infringes Article 8 or Article 1 of the First Protocol.

318. Clauses 51 to 68 set out a new notification regime in relation to persons convicted of terrorist-related offences and sentenced to 12 months' imprisonment or more. This may also apply to persons convicted of such offences overseas where a UK court imposes a notification order under Schedule 5.

319. The Secretary of State considers that the notification scheme does not amount to a penalty for the purposes of Article 7 and so its retrospective application is not incompatible with Article 7. The scheme will apply to persons who have been convicted but not sentenced for a terrorist-related offence prior to commencement and to offenders convicted of terrorism offences prior to commencement, who are still serving their sentence, are on licence or are unlawfully at large immediately before commencement.

320. This scheme is not a penalty for the following reasons:

- a) The nature and purpose of the notification scheme is to contribute to a lower rate of re-offending and the protection of the public, not to punish the offender.
- b) The domestic characterisation points to the measures being an administrative requirement as they simply impose an obligation on offenders to furnish information to the authorities.
- c) The requirement to provide information to the police is not sufficiently severe as to amount to a penalty.
- d) Although the requirements are imposed following a conviction, they are not imposed at the discretion of the court as part of the sentencing process, and independent criminal proceedings have to be brought for breach of the notification requirements.

321. Further, although the notification requirements engage Article 8, as they constitute an interference with an offender's private life, such interference is justified. The measures are clearly in accordance with the law, being a measure in the Bill, and pursue the legitimate aims of the interests of national security, the prevention of crime and the protection of rights and freedoms of others. They are also proportionate because of the gravity of harm that the measures are designed to address. Indeed, the ECHR imposes a duty on States to take certain measures to protect individuals from such serious forms of harm. The purpose of the notification scheme is to enable the police to monitor the whereabouts of convicted terrorists and conduct expeditious investigations of terrorist offences.

322. The Court of Appeal in *Forbes v Home Secretary* ([2006] EWCA Civ 962) upheld the mandatory nature of the application of the sex offender notification provisions on the grounds that the effectiveness of the scheme might be undermined without it. The same reasoning applies in the context of the terrorist notification scheme.

323. Schedule 6 makes provision in relation to a foreign travel restriction order which restricts the foreign travel of a person subject to the notification requirements. Such orders constitute civil rather than criminal proceedings and so attract, and are compatible with, the protections afforded under the civil limb of Article 6. The proceedings are not criminal because the purpose of the order is not directed at trial and punishment but rather the restraint of a person with a proven record of terrorist-related offending and whose conduct satisfies the court that a proportionate restriction on foreign travel is necessary to prevent him from being involved in terrorist activity overseas. Furthermore the orders do not impose a penalty. Separate criminal proceedings are required for a breach of an order.

324. This view on Article 6 is supported by case law concerning various other types of preventative orders, including *B v Chief Constable of Avon & Somerset Constabulary* ([2001] 1 WLR 340) (concerning preventative orders imposing prohibitions on sex offenders in the community), *R v Crown court of Manchester ex parte McCann* ([2002] 3 WLR 1313), (anti-social behaviour orders) and *Gough and another v Chief Constable of the Derbyshire Constabulary* ([2002] EWCA Civ 351) (football banning orders). However, despite the civil classification, which means the civil rules of evidence apply, the court will (following *McCann*) apply an exacting standard of proof, which will be hard to distinguish from the criminal standard.

325. The Secretary of State believes that the foreign travel restriction order is compatible with Article 7 notwithstanding that the triggering conviction may have taken place prior to the commencement of the legislation. The order does not constitute a penalty for the same reasons set out above in relation to the notification scheme. This is supported by the decision in *Gough* that a similar type of order restricting foreign travel (a football banning order) does not constitute a penalty.

326. Foreign travel orders will engage defendants' Article 8(1) rights as they will prevent them from travelling freely to countries of their choice. However, the imposition of the orders

is justifiable under Article 8(2). The legitimate aims of the orders are the interests of national security, public safety or the economic well-being of the country, the prevention of crime and protection of the rights and freedoms of others. The order can only be imposed where the court is satisfied that the offender has acted in such a way that it is “necessary” to make one in order to prevent him from being involved in terrorist activity overseas. This is a high threshold and the harm the order is aimed at preventing is grave. Under section 6 of the Human Rights Act 1998 the court must act compatibly with the defendant’s Convention rights when imposing an order. Further, the provisions in the Bill are drafted so that the prohibitions on travel must be proportionate. Similar preventative orders have been found to be compatible with Article 8 in domestic and ECtHR case law.

327. Clause 69 is a permissive clause outlining the potential scope of the rules of court to be prepared in connection with asset freezing proceedings. *Clause 71* includes provision allowing the Treasury to withhold material which would otherwise have to be disclosed. But *subsection (6)* provides that the clause (or rules of court made under it) does not require the court to act in a manner inconsistent with the applicant’s Article 6 ECHR rights. The House of Lords recently considered (in *Secretary of State for the Home Department v MB* [2007] UKHL 46) the corresponding (and virtually identical) provision of the Prevention of Terrorism Act 2005 allowing the withholding of evidence (and use of special advocates), noting that the provision would not normally infringe an applicant’s Article 6 rights, but that it could in extreme cases. The House of Lords therefore ruled that it did not infringe Article 6, provided that an express preservation of the Article 6 rights was implied into the provision. For that reason, the qualification on the Rules’ ability to provide for proceedings which proceed without telling the applicant the nature of the case against him, has been expressly stated in the Counter-Terrorism Bill, so that the wording of the clause reflects the meaning the court would give it. In light of the House of Lords decision, the provision is human rights compliant.

328. Clause 72 permits the actual appointment of the special advocate. This is on the same basis as in other legislation. The Secretary of State considers that the actual appointment of the special advocate does not itself engage the ECHR. The special advocate is appointed to represent the applicant, and this is an important aspect of the context which makes the provisions ECHR compliant..

329. Clause 73 provides an extension of the use of intercept evidence and engages Article 6 and Article 8 of the ECHR. With regard to Article 6, this issue was considered by the European Court of Human Rights in *Khan v United Kingdom* (ECHR case 35394/97). In that case the Court found that the use of intercept evidence did not violate the appellant’s right to a fair hearing. The Court found that the central consideration was whether the proceedings as a whole were fair, concluding that they were. This approach was followed in *PG and JH v UK* (ECHR case 44787/98) with regard to Article 6.

330. Any interference with Article 8 is justified. The provisions are (i) in accordance with the law, (ii) in pursuit of a legitimate aim and (iii) necessary in a democratic society. In this

case the first limb is satisfied by virtue of the provisions being set out in the Bill. The purpose of the ability to rely on intercept evidence is to enhance the robustness of the asset freezing regime, which exists in pursuit of public safety and national security. The necessity of the ability to rely on such evidence may vary on a case by case basis, but it is clear that, in the context of asset freezing, a preventative procedure, it may be necessary to be able for the Treasury to use all available evidence in order to explain and support the view that it has “reasonable suspicion” as set out in the UN terrorism orders.

331. Clause 83 inserts a new section 58A into Terrorism Act 2000 which makes it a criminal offence to elicit, or attempt to elicit, information about members of the armed forces, the intelligence services, or constables, which is likely to be useful to a person committing or preparing an act of terrorism or to publish or communicate information of that kind. A person who is able to prove that he had a reasonable excuse for his actions is able to rely on that as a defence. The offence is punishable with a maximum sentence of 10 years imprisonment, or to a fine or both.

332. The offence is likely to engage rights under Articles 8 (private and family life) and 10 (freedom of expression) but any interference with these rights is justified as it will be in accordance with the law, in pursuit of a legitimate aim and necessary in a democratic society. As this provision will be included in legislation it will satisfy the first requirement. Its purpose is to prevent serious crime and protect national security. This is a legitimate aim that appears in Articles 8 and 10. It is also proportionate. Article 2 requires everyone’s life to be protected by law. Where individuals in a particular group are considered to be a risk it is legitimate for proportionate measures to be put in place aimed at reducing the risk. This clause is intended to protect the lives of members of the armed forces, the intelligence services and police officers. Its ambit and the prescribed penalty are considered to be necessary and proportionate having regard to the effect of Article 2. A defence of reasonable excuse is provided for. The court must balance interference with the person’s rights and freedoms against the need to protect society from the harm caused by serious crime. The court is a public authority for the purposes of the Human Rights Act 1998 and it must, therefore, act compatibly with the Convention rights as required by section 6 of the Human Rights Act 1998.

333. This clause will also engage the right to a fair trial under Article 6. Section 58A(2) provides that it is a defence for a person to prove that he had a reasonable excuse for his action. This is to be read in conjunction with section 118 of the 2000 Act which provides that this will be an evidential rather than a legal burden – the defendant will only have to raise an issue as to his reasonable excuse; it will be for the prosecution to prove beyond reasonable doubt that this is not the case. The courts have ruled that an “evidential burden” such as this is compatible with the presumption of innocence under Article 6(2) provided it is imposed in pursuance of a legitimate aim and is proportionate to the achievement of that aim. The Secretary of State considers that this provision satisfies both of those conditions.

334. Clause 84 inserts a new definition of “employment” in Part 3 of the 2000 Act which extends the scope of the offence in section 19 of that Act (disclosure of information), to

include persons such as volunteers, trustees of a charity and interns in a bank. This clause will engage a person's rights under Article 8(1), as a criminal sanction will be imposed on a new range of people for failure to disclose to a constable a belief or suspicion that a terrorist finance offence has been committed. However, such interference is justified.

335. This provision will be included in legislation, which meets the first requirement for it to be in accordance with the law. Its purpose is to prevent crime and to protect the interests of national security - legitimate aims that appear in Article 8(2). Action against terrorist finance offences is widely recognised, both domestically and internationally, as being vitally important in order to combat terrorism.

336. The provision is proportionate:

- a) The extension of the offence is designed to cover persons who might well come across information giving rise to a suspicion of a terrorist finance offence during the course of their work.
- b) The disclosure must be based on actual belief or suspicion.
- c) The provisions only require disclosure to the police or an authorised member of staff of SOCA.
- d) It is a defence to prove that the person disclosed his suspicion in accordance with his employer's established procedures.
- e) Section 19 does not require the disclosure of information subject to legal privilege.

337. Clause 85 confers powers on constables to enter and search the premises of individuals subject to control orders. Such powers will engage a person's right to respect for his private life under Article 8 of the ECHR. Interference with this Article of the Convention can be justified if it meets the three stage test of being in accordance with the law, being in pursuit of a legitimate aim and being necessary in a democratic society.

338. The powers of entry and search will be set out in the Bill, which meets the first limb of the test for justification. The purpose of powers is that they will be exercised in the interests of national security and public safety that are legitimate aims for the purposes of the second part of the test for justification.

339. The Secretary of State believes that the exercise of the power will be proportionate for the following reasons. First the power can only be exercised by a constable. Secondly the power under section 7C can only be exercised with a warrant from a justice of the peace and such warrant will only be granted where it is necessary to determine whether the controlled person is complying with obligations imposed by or under his control order and for the purpose of determining whether a controlled person is complying with the obligations imposed by or under the control order. Thirdly under sections 7A and 7B any entry and search will take place without a warrant but then only in tightly defined circumstances relating to

reasonable suspicion on the part of a constable of abscond or failing in a duty to grant access to premises. Furthermore any entry and search will be for specified and limited purposes. Fourthly, force to enter can only be used if it is necessary to do so. Finally the premises that can be searched and entered have been tightly defined.

340. Clauses 91 to 96 make provision for the payment of costs incurred in providing extra police services at key gas sites. Costs incurred by the Ministry of Defence or by a police authority on or after 16th January 2007 in policing, at the Secretary of State's request, key gas sites with a view to their increased protection will be funded, with effect from the commencement of these provisions, by gas transporters who may pass on the costs to gas consumers in accordance with arrangements made by the Secretary of State.

341. The funding arrangements can apply where the Secretary of State considers that the provision of extra police services at the site is necessary because of a risk of loss of or disruption to the supply of gas connected with it; and that such loss or disruption would have a serious impact on the UK or any part of it.

342. It is also considered that that these provisions exhibit predominantly public law features and therefore Article 6(1) of the ECHR is not engaged. The State, not the gas transporter, has responsibility for determining when, where and how extra policing should be provided at key gas sites. Accordingly, the proposal cannot be considered as involving the determination of either the gas transporter or the gas consumer's civil rights or obligations

343. However, even if Article 6 were found to be engaged, the Secretary of State also considers that the gas transporter and consumers rights are safeguarded by the availability of judicial review, by which means these persons can challenge the Secretary of State's decision. These provisions would therefore be compatible with Article 6(1).

344. The provisions may involve interference with either the gas transporter's licence or the gas transporter's economic interest in the pursuit of the licensed activity of the level of severity required in order to engage Article 1, Protocol 1 of the ECHR. However, in the view of the Secretary of State, such interference is justified. The provisions are clearly in accordance with the law. They pursue the legitimate one of ensuring security of gas supply for gas consumers. In determining whether interference is proportionate, States are accorded a wide margin of appreciation. A number of factors point to the proposal's being proportionate. Firstly the Secretary of State's power to put the funding arrangements in to place is limited to particular the existence of particular circumstances. Secondly, the gas transporter must be consulted before being required to pay any costs. Thirdly, the gas transporter is able to recover all reasonable costs incurred or payments made and will not end up out of pocket. The Secretary of State is able to direct the Gas and Electricity Markets Authority to ensure that there is no impediment to the recovery of the gas transporters costs.

# COUNTER-TERRORISM BILL

## EXPLANATORY NOTES

*These notes refer to the Counter-Terrorism Bill  
as brought from the House of Commons on 12th June 2008  
[HL Bill 65]*

---

*Ordered to be Printed,  
12th June 2008*

---

© Parliamentary copyright House of Lords 2008

*Applications for reproduction should be made in writing to Information Policy Team,  
Office of Public Sector Information, Kew, Richmond, Surrey TW9 4DU*

LONDON: THE STATIONERY OFFICE

Printed in the United Kingdom by  
The Stationery Office Limited

£x.00