

# **CLUSTER MUNITIONS (PROHIBITIONS) BILL [HL]**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These explanatory notes relate to the Cluster Munitions (Prohibitions) Bill [HL] as introduced in the House of Lords on 19th November 2009. They have been prepared by the Foreign and Commonwealth 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. So, where a clause or part of a clause does not seem to require any explanation or comment, none is given.

### **SUMMARY AND BACKGROUND**

3. The main purpose of this Bill is to create criminal offences in order to enforce the prohibitions set out in Article 1 of the Convention on Cluster Munitions that was signed by the Foreign Secretary in Oslo on 3rd December 2008, and to which the United Kingdom wishes to become a State Party. The Convention on Cluster Munitions will be referred to in these notes as “the Convention.”
4. Article 1 of the Convention prohibits States Parties from using, developing, producing, otherwise acquiring, stockpiling, retaining or transferring cluster munitions; and from assisting, encouraging or inducing anyone else to engage in these prohibited activities. The Article 1 prohibitions also apply to explosive bomblets that are specifically designed to be dispersed or released from dispensers affixed to aircraft. Criminalising these prohibited activities is necessary because Article 9 of the Convention stipulates that:

“Each State Party shall take all appropriate legal, administrative and other measures to implement this Convention, including the imposition of penal sanctions to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control.”

## **OVERVIEW OF STRUCTURE**

5. The Bill consists of 34 clauses.

6. Clause 1 defines the prohibited munitions to which this Bill applies. Clauses 2 to 4 create and define the criminal offences for breaches of the prohibitions in Article 1 of the Convention, and make provision for the offences to have some extra-territorial effect. For those offences, clauses 5 to 9 provide defences for certain purposes permitted under the Convention. Clause 10 ensures that only an evidential burden of proof with respect to the defences is required of the defendant.

7. Clauses 11 to 19 are provisions for identifying prohibited munitions, and securing the removal, immobilisation and destruction of them; and for creating offences relating to interfering with or obstructing destruction.

8. Clauses 20 to 23 make provision for the production of information and records for the purposes of the Convention, the investigation of alleged offences, and disclosure of information. Clauses 24 to 26 make provision relating to proceedings for an offence under the Bill.

9. Clauses 27 to 34 are general provisions which include safeguards on powers of entry, a power to modify the Bill, how notices are served, the application of the Bill to the Crown and the extent of the Bill.

10. There are three Schedules to the Bill. Schedule 1 sets out definitions from Article 2 of the Convention to assist interpretation. Schedule 2 sets out the offences to which clause 9 (interoperability defence) applies. Schedule 3 contains minor and consequential amendments of other Acts.

## **TERRITORIAL EXTENT AND APPLICATION**

11. The Bill extends to England and Wales, Scotland and Northern Ireland. Provisions of the Bill may be extended by Order in Council to any of the Channel Islands, the Isle of Man or any British Overseas territory.

12. This Bill does not contain any provisions falling within the terms of the Sewel Convention. Because the Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament, if there are amendments relating to such matters which trigger the Convention, the consent of the Scottish Parliament will be sought for them.

## **COMMENTARY ON CLAUSES**

### **Clause 1: Munitions to which Act applies**

13. This sets out the munitions to which the Bill applies and provides definitions of the Convention and of munitions, including references to their definitions in the Convention as set out in Schedule 1 to the Bill.

### **Clause 2: Offences**

14. Clause 2 creates the criminal offences which are central to this Bill. The offences apply to breaches of the prohibitions set out in Article 1(1) of the Convention. These criminal offences are the penal sanctions required by Article 9 of the Convention set out in paragraph 4 above.

15. *Subsection (1)* makes it an offence for a person to use, develop or produce, acquire, possess or transfer prohibited munitions. It also makes it an offence to make arrangements under which another person either acquires or transfers a prohibited munition.

16. *Subsection (2)* makes it an offence for a person to assist, encourage or induce another to engage in any conduct mentioned in subsection (1).

17. *Subsection (3)* provides that an offence under this clause will be punishable on conviction on indictment with imprisonment for up to fourteen years or an unlimited fine, or both.

### **Clause 3: Meaning of acquisition and transfer**

18. This clause specifies the meaning to be given to “acquire” or “transfer” a prohibited munition.

19. *Subsection (2)* provides that a person acquires a prohibited munition if the person acquires it or enters into a contract to acquire it.

20. *Subsection (3)* defines what “transfer” of a prohibited munition means. Transferring means:

- disposing of it
- moving it into or out of the United Kingdom
- entering into a contract to dispose of it, or to move it into or out of the UK.

21. *Subsection (4)* defines the meaning of “acquire” as “buy, hire, borrow or accept as a gift”, and defines “dispose” as “sell, let on hire, lend or give”.

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22. Under *subsection (5)* a person who acquires or disposes of an interest in, or right over, land which contains cluster munition remnants is not taken to acquire or dispose of a prohibited munition.

23. *Subsection (6)* defines “cluster munition remnants” with reference to Schedule 1 and Article 2 of the Convention, as failed cluster munitions, abandoned cluster munitions, unexploded submunitions and unexploded bomblets.

**Clause 4: Application of section 2**

24. Clause 4 defines where the offences in clause 2 apply. The conduct described in clause 2 would be an offence by anyone if it took place in the UK. It would also be an offence anywhere in the world if such conduct was by a UK national or a UK legal entity.

25. *Subsection (1)* specifies that the offences in clause 2(1) apply to conduct inside or outside the UK. *Subsection (2)* specifies that clause 2(2) applies to assistance, encouragement and inducements in the UK or elsewhere. They must be read in conjunction with *subsections (3) and (4)*.

26. *Subsection (3)* provides that clause 2(1) and (2) apply extraterritorially only to UK nationals and to legal entities formed under UK law, so that they would be liable to prosecution here for acts committed abroad in contravention of clause 2. This extraterritorial application is required by Article 9 of the Convention.

27. *Subsection (4)* provides that the offence in clause 2(2), of assistance, encouragement and inducement, applies regardless of whether the principal offence (the conduct assisted, encouraged or induced) takes place inside or outside the UK.

28. *Subsection (5)* enables application of clause 2 to be extended by Order in Council to acts done outside the UK by bodies incorporated under the law of any of the Channel Islands, the Isle of Man or any Overseas Territory. Natural persons from these places are likely to be covered by *subsection (6)*.

29. *Subsection (6)* defines the expression “UK national” so that it covers all individuals over whom the UK has jurisdiction on the basis of nationality in accordance with international law. The following are UK nationals:

(a) British citizens, including:

(i) British overseas territories citizens (persons whose British nationality derives from their connection with a United Kingdom Overseas Territory),

(ii) British Nationals (Overseas) (Hong Kong British Dependent Territory Citizens who registered before 1 July 1997 to become a British National (Overseas)),

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(iii) British Overseas citizens (persons who were citizens of the UK and Colonies immediately before the commencement of the British Nationality Act 1981 and did not at commencement become British citizens or British Dependent Territories citizens),

(b) British subjects under the British Nationality Act 1981,

(c) British protected persons within the meaning of the British Nationality Act 1981 (that is, persons connected with British protectorates, British protected states or UK trust territories).

30. *Subsection (7)* provides that proceedings for an offence committed under clause 2 outside the UK may be taken in any convenient court in the UK and the offence may be treated as having been committed in any place in the UK. *Subsections (8) and (9)* deal with the operation of subsection (7) in Scotland.

#### **Clause 5: Enabling destruction**

31. Under Article 3 of the Convention States Parties are obliged to destroy all their cluster munition stockpiles. This clause provides defences for prohibited conduct related to this stockpile destruction.

32. *Subsections (1) to (6)* provide defences for prohibited conduct in the cases of:

- possession of a prohibited munition for the purpose of enabling it to be destroyed (where a person is charged with an offence under clause 2(1)(e)) (see subsection (1))
- transferring a prohibited munition to enable it to be destroyed (where a person is charged with an offence under clause 2(1)(f)) (see subsection (2))
- making arrangements for transfer by another of a prohibited munition, to enable it to be destroyed (where a person is charged with an offence under clause 2(1)(g)) (see subsection (3))
- acquiring a prohibited munition, by means of a transfer for the purpose of enabling its destruction, for the same purpose (where a person is charged with an offence under clause 2(1)(c)) (see subsection (4))
- making arrangements for the acquisition by another person of a prohibited munition if at the time the arranger had reasonable cause to believe that the acquisition would be by a transfer for the purpose of enabling destruction, and the arrangements made were to enable the prohibited munition to be

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destroyed (where a person is charged with an offence under clause 2(1)(d))  
(see subsection (5))

- assisting, encouraging or inducing another person to engage in conduct mentioned in clause 2(1) if it was believed that other person would have had a defence relating to enabling the destruction of a prohibited munition under subsections (1) to (5) (where a person is charged with an offence under clause 2(2)) (see subsection (6)).

### **Clause 6: Other purposes permitted by Convention**

33. Clause 6 reflects Article 3 of the Convention which provides for limited exceptions to the general prohibition on retention, acquisition and transfer for the purposes of developing detection, clearance and destruction techniques in relation to cluster munitions, explosive bomblets and explosive submunitions, training in such techniques and developing cluster munition counter-measures.

34. *Subsection (1)* provides a defence to the offence in clause 2(1)(e) of possessing a prohibited munition if the person charged can show that he possessed the prohibited munition with the intention that it would be used only for ‘permitted purposes’ (as defined in *subsection (8)*) and that the possession was in accordance with the terms of an authorisation given by the Secretary of State. *Subsection (2)* provides an equivalent defence in the case of the offence in clause 2(1)(f) of transferring a prohibited munition.

35. *Subsections (3) to (5)* make defences available to persons charged with the offences in clause 2(1)(c), (d) and (g) of acquiring a prohibited munition and making arrangements under which another acquires or transfers a prohibited munition. Again, the defendant must show an intention, at the time of the conduct in question, that the prohibited munition would be used only for permitted purposes. The defendant must also show that the transfer which led to the acquisition (clause 2(1)(c) offence) or for which the defendant made arrangements (clause 2(1)(g) offence) had been authorised by the Secretary of State or that the defendant had reasonable cause to believe that the acquisition would be by means of a transfer which had been authorised by the Secretary of State (clause 2(1)(d) offence).

36. *Subsection (6)* provides that a person charged under clause 2(2) with assisting, encouraging or inducing conduct mentioned in clause 2(1), will have a defence if they had reasonable cause to believe that the person assisted, encouraged or induced would have had a defence under subsections (1) to (5) to a charge against them.

37. The intent of *subsection (7)* is that the amount of prohibited munitions retained or acquired should not exceed the number necessary for permitted purposes.

38. Subsection (8) defines what are the permitted purposes for this clause:

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- for development of techniques for the detection, clearance, and destruction of prohibited munitions and explosive submunitions;
- for training in those techniques;
- for development of counter-measures to be used against prohibited munitions and explosive submunitions;
- for any criminal proceedings or investigation in which the prohibited munition is or may be evidence: this includes proceedings and investigations overseas as well as in the UK.

39. *Subsection (9)* defines “explosive submunition” as having the same meaning as in the Convention:

“A conventional munition that in order to perform its task is dispersed or released by a cluster munition and is designed to function by detonating an explosive charge prior to, on or after impact.”

40. *Subsection (10)* provides that this definition is set out in Schedule 1 to the Bill.

#### **Clause 7: Defences relating to state of mind of defendant etc**

41. *Subsection (1)* provides that it is a defence for a person, when charged with an offence of using, acquiring, making arrangements for another to acquire, possessing, transferring or making arrangements for another to transfer a prohibited munition, to show that he did not know nor suspect, nor have reason to suspect, that the object in question was a prohibited munition.

42. *Subsection (2)* provides a defence to a charge of possession under clause 2(1)(e), if the defendant can show that he took all reasonable steps, as soon as reasonably practicable, after he first had knowledge or suspicion that the object was a prohibited munition to inform the Secretary of State or a constable or a member of the service police force (as defined in *subsection (5)*).

43. It is a defence under *subsection (3)* to a charge of possession of a prohibited munition if the defendant can show that he had no knowledge or suspicion, nor any reason for suspicion, that the object was a prohibited munition, until he became aware that the Secretary of State was exercising in relation to the prohibited munition a power conferred on him by the Bill.

44. Under *subsection (4)* where a person has been charged with an offence under clause 2(2) of the Bill, it is a defence if he can show that he had no knowledge or suspicion, nor reason to suspect, that the conduct he was encouraging, assisting or inducing related, or might relate, to a prohibited munition.

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**Clause 8: Visiting forces**

45. This clause provides defences to members of a visiting force of a State not party to the Convention, or to persons working with that visiting force. It is a consequence of Article 21(3) of the Convention which states:

“Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.”

46. Clause 30(3) defines a State Party as a State which has ratified, accepted or approved the Convention, or has acceded to it, and either the Convention is in force in relation to that State or the State is applying Article 1 of the Convention on a provisional basis until the Convention enters into force for it. Conversely, for the purposes of clause 8 a State not party to the Convention is one that does not meet these criteria.

47. *Subsection (1)* affords to members of a visiting force of a State not party to the Convention, or persons working with such a force, a defence to a charge of having a prohibited munition in their possession on UK territory. *Subsection (2)* affords only to members of the visiting force a defence to a charge of being involved in the movement or contracting for the movement of prohibited munitions into or out of the UK. This means that no person working with a visiting force will be able to move, or enter into a contract to move, a prohibited munition into or out of the UK without incurring criminal liability. *Subsection (3)* affords to members of a visiting force or persons working with them a defence to a charge of making arrangements under which a member of a visiting force either moves or contracts to move a prohibited munition into or out of the UK.

48. In relation to the offences of possession or movement, the defence is only available if these activities were in accordance with the terms of an authorisation given to the State not party to the Convention by the Secretary of State. In relation to the offence of arranging a transfer by another person, this defence is only available to the arranger if they had reasonable cause to believe the transfer would be in accordance with the terms of an authorisation given to the State not party to the Convention by the Secretary of State.

49. *Subsection (4)* provides a defence to the offence of assisting, encouraging or inducing another person to engage in prohibited conduct if, at the relevant time, the person providing the assistance, encouragement or inducement was a member of a visiting force of a State that was not a party to the Convention or was working with such a force, and had reasonable cause to believe that the other person would have a defence under subsections (1) to (3).

50. *Subsection (5)* defines which persons are considered to be “working with a visiting force”; it covers contractors or others assisting the visiting force in any way.

51. *Subsection (6)* provides, by reference to the Visiting Forces Act 1952, definitions of “visiting force” and “member” of a visiting force.

**Clause 9: International military operations and activities**

52. This clause provides defences for persons involved in conduct that takes place in the course of certain international military co-operation and operations with States not party to the Convention. This defence will be referred to in these notes as “the interoperability defence.”

53. The intent of the interoperability defence is to give effect to Article 21(3) of the Convention which is quoted in paragraph 45 above. Article 21(4) of the Convention qualifies Article 21(3) by stipulating that:

“Nothing in paragraph 3 of this Article shall authorize a State Party:

- (a) To develop, produce or otherwise acquire cluster munitions;
- (b) To itself stockpile or transfer cluster munitions;
- (c) To itself use cluster munitions; or
- (d) To expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control.”

54. *Subsection (1)* provides a defence (the interoperability defence) to a person charged with any offence specified in Schedule 2, paragraphs 1 to 6. Paragraphs 7 and 8 of Schedule 2 set out limits to the application of the defence in the case of offences relating to the use and transfer of prohibited munitions and offences relating to conduct by visiting forces (see *subsection (6)*). The interoperability defence is not available, in accordance with Article 21(4) of the Convention, if a person is charged with the offence of: using a prohibited munition; developing or producing a prohibited munition; acquiring a prohibited munition; making arrangements under which another person acquires a prohibited munition; or transferring a prohibited munition. For the interoperability defence to apply the conduct must be in the course of or for the purposes of an international military operation or an international military co-operation activity as defined in *subsections (2) and (3)*. This reflects Article 21(3) of the Convention.

55. *Subsection (2)* defines an “international military operation” as any military operation involving members of UK armed forces and the armed forces of one or more other States where at least one of the other States is not a party to the Convention which involves (or might involve) conduct by armed forces of a State not a party to the Convention, or by persons under its authority, that, if it was done by armed forces of a State which is a party to the Convention, or by persons under its authority, would contravene the Convention.

56. *Subsection (3)* defines “an international military co-operation activity” as any activity, other than a military operation, involving the UK and another State or States in which their governments co-operate for purposes related to the defence or the armed forces of either the UK or any of those States where at least one of the other States is not party to the Convention which involves (or might involve) conduct by armed forces of a State not a party to the

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Convention (or by persons under its authority) that, if it were done by armed forces of a State which is a party to the Convention or by persons under that State's authority, would contravene the Convention.

57. *Subsections (4) and (5)* provide that, if a question arises in any judicial or similar proceeding as to whether subsection (2)(a) or (3)(a) applies the certificate of the Secretary of State about any fact relating to the question will be conclusive evidence of that fact so far as the Court or tribunal is concerned.

58. For the purposes of this clause "Her Majesty's armed forces" is to be given the same meaning as that given in the Armed Forces Act 2006 (*subsection (7)*). Subsection (7) also provides that a "military operation" includes any operation by a navy or an air force.

**Clause 10: Supplementary provision: evidential burden and authorisations**

59. The main purpose of this clause is to clarify that the burden of proof on the accused to raise an issue for the defence is an evidential burden only.

60. *Subsections (1) and (2)* provide that where an accused puts forward evidence in support of a defence, if the defence evidence is such that it raises an issue in favour of the defence, the Court must take the defence to be established unless the prosecution proves beyond reasonable doubt that it is not.

61. *Subsection (3)* provides that, for the purposes of clause 6 (permitted purposes) and clause 8 (visiting forces), authorisations given by the Secretary of State before the Bill enters into force will have the same effect as those given on or after the Bill enters into force.

**Clause 11: Suspicious objects**

62. The purpose of this clause is to ensure that whilst information is being collected to establish the nature of any object suspected to be a prohibited munition, the person in possession of the suspected prohibited munition does not let it out of their possession. This is achieved by conferring a power on the Secretary of State to issue a notice requiring the person who has the suspected prohibited munition in his possession to retain the suspected prohibited munition until a specified date.

63. *Subsection (1)* describes the conditions under which this section will apply. The Secretary of State must have grounds to suspect that an object is a prohibited munition and it must also appear that the persons in possession of the object would not have a defence under clause 5 or 6 (possession for destruction or permitted purposes), if charged with the offence of possession under subsection (1)(e) of clause 2.

64. *Subsection (2)* states upon whom the Secretary of State may serve a notice. This is both the person who appears to have physical possession of the object, and any other person

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who the Secretary of State believes may be materially affected if the object were destroyed; for example, the owner of the object.

65. *Subsection (3)* stipulates what the notice must include. *Subsection (4)* provides that a person who has possession of the object when the notice is served must retain it for the period specified in the notice.

66. *Subsection (5)* makes provision for any person served with a notice to object by claiming that either the object is not a prohibited munition, or that the persons who have the object in their possession would have a defence under clause 5 or 6 if charged with an offence of possession (possession for destruction or permitted purposes). The persons making the case may include not only the person who has the object in their possession, but any person who was served with a notice because they were understood to be materially affected: they may have relevant information to put forward about another person's possession.

**Clause 12: Power to enter premises and search for prohibited munitions**

67. The purpose of this clause is to provide a procedure whereby persons authorised by the Secretary of State can obtain access to premises and search for prohibited munitions in cases where there is reasonable cause to believe there are prohibited munitions present.

68. The term "premises" is defined in clause 30 and includes land, moveable structures, vehicles, vessels, aircraft and hovercraft.

69. *Subsection (1)* stipulates the conditions which the Secretary of State must have reasonable cause to believe are satisfied before authorising a person to enter and search premises. The conditions referred to as A to C are set out in *subsections (3), (4) and (5)* respectively. The conditions to be satisfied are:

- Condition A: that there is a prohibited munition present on the premises.
- Condition B: the persons in possession of the prohibited munition would not have a defence under clause 5 or 6 (possession for destruction or permitted purposes).
- Condition C: that the public has access to the premises, or the occupier of the premises consents to the premises being entered and searched.

70. *Subsection (2)* stipulates the conditions under which a justice of the peace may issue a warrant authorising persons acting under the authority of the Secretary of State to enter and search premises. The justice of the peace must be satisfied, based on information given on oath, that there is reasonable cause to believe that a prohibited munition is present on the premises and that the persons in possession of the prohibited munitions would not have a defence under clause 5 or 6. This power is necessary for authorising access to private

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premises when the occupier does not consent to entry and search i.e. where only conditions A and B are met, not condition C.

71. The effect of *subsection (6)* is that the use of the powers of entry and search in subsections (1) and (2) does not depend on first serving a notice under clause 11. *Subsection (7)* provides that any person acting under the authority of the Secretary of State can apply for a warrant and the application must specify the relevant premises. *Subsection (8)* provides that a warrant can authorise entry on only one occasion.

72. Under *subsection (9)* the warrant can be executed by anyone authorised by the Secretary of State during the period of one month from the date of issue.

73. *Subsection (10)* addresses how in their application to Scotland the references to “justice of the peace” and “information on oath” in subsection (2) should be interpreted.

**Clause 13: Removal or immobilisation of prohibited munitions**

74. This clause confers powers on persons authorised by the Secretary of State to either remove any prohibited munition found as the result of the powers of entry conferred by clause 12 for the purposes of destruction or leave it in place forbidding anyone to interfere with it or move it within a specified period.

75. Under *subsection (1)* the persons authorised by a warrant under clause 12(2) to enter the premises may use force, if necessary, to enter the premises.

76. *Subsection (2)* enables the persons entering under a warrant or under an authorisation issued by the Secretary of State to take with them other people and such equipment as appear necessary, if for example it is expected that this object will be large and difficult to handle, or dangerous.

77. Under *subsection (3)* the person entering under a warrant or under an authorisation issued by the Secretary of State may make safe any prohibited munition found. *Subsection (7)* defines what is “safe” for the purposes of this clause. The prohibited munition is made safe by preventing it from being an immediate danger, but without it being destroyed.

78. Where in the course of an authorised search, a prohibited munition is found, the authorised person may also under *subsection (4)* seize and remove the prohibited munition, if it is reasonably practicable to do so. If it is not reasonably practicable to remove it, they can affix a notice either on the prohibited munition itself or in a conspicuous position near it. *Subsection (4)(b)* stipulates that this notice should state that the prohibited munition is not to be moved or interfered with before a specified date. The notice itself is also not to be interfered with before the specified date.

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79. *Subsection (5)* provides for the situation when a prohibited munition is found in the possession of persons who would have a defence to a charge of possession under clause 5 or 6. In that case, neither the powers to make safe, seize or remove the prohibited munition, nor the power to affix a warning notice to it, may be exercised.

80. The restriction in subsection (5) will not operate in the case of a prohibited munition that has been abandoned.

81. Under *subsection (6)* the authorisation given under clause 12(1) or warrant issued under clause 12(2) can provide that the authorised person may only exercise the powers conferred on them if accompanied by a constable (if they are not a constable themselves).

**Clause 14: Power to destroy removed prohibited munitions**

82. The effect of clause 14 is to confer powers on the Secretary of State to authorise the destruction of prohibited munitions that have been seized and removed under clause 13. The clause stipulates the procedure which must be followed before destruction. The intention of this procedure is to give anyone with an interest in the prohibited munition an opportunity to persuade the Secretary of State that the prohibited munition should not be destroyed.

83. *Subsection (1)* states that this clause applies when a prohibited munition has been removed under clause 13(4)(a). The succeeding subsections then divide the period of twelve months following the removal of the prohibited munition into two six-month stages.

84. *Subsection (2)* addresses the first six months following the removal of the prohibited munition. Within this period the Secretary of State must serve a notice on both any persons who appear to have had the prohibited munition in their possession before its removal, and any persons who appear to have an interest which would be materially affected by its destruction. The use of the word “appears” means that the Secretary of State is not required to be certain that the persons concerned fall into one of these groups. This first period of six months is intended to allow time for investigation, or for new facts to come to light.

85. *Subsection (3)* stipulates what the notice must cover:

- it must describe the prohibited munition and where it is;
- it must say that the Secretary of State proposes to have it destroyed and why; and
- it must tell the recipient of the notice that they can object and how to do so and by when.

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86. *Subsections (4) and (5)* provide the persons on whom a notice is served under this clause with the right to object to the destruction of the prohibited munition: they must do so in writing to the Secretary of State by a specified date and state their reason.

87. *Subsection (6)* addresses the second six-month period. Within this period the Secretary of State can make a decision to destroy the prohibited munition and authorise a person to carry out this destruction.

88. Under *subsection (7)* the persons on whom a notice has been served must be allowed time to respond and the Secretary of State must consider any objections to the destruction of the prohibited munition. The effect of the wording in brackets in subsection (7)(b) is that the objections to be considered must include any made by a person on whom a notice has not been served.

89. *Subsection (8)* provides for the Secretary of State to recover “reasonable” costs incurred in removing and destroying the prohibited munition from the person who had possession of the prohibited munition immediately before its removal. This subsection does not enable costs to be recovered from any person who only had an interest in the prohibited munition but did not have it in their possession.

90. The combined effect of *subsections (9) and (10)* is that if, at the end of the second six-month period, the prohibited munition has not been authorised to be destroyed and a person or persons had possession of the prohibited munition immediately before its removal the prohibited munition must be returned to that person. A prohibited munition that was in the possession of more than one person could be returned to just one of them if the Secretary of State thinks it is appropriate.

91. *Subsection (11)* defines the times from when the first and second six-month periods are to run.

**Clause 15: Destruction of immobilised prohibited munitions**

92. This clause sets out the procedure to be followed if, following a search under clause 12, a prohibited munition was found but it was not reasonably practicable to remove it from the premises, and a notice has been affixed on or near it under clause 13(4)(b).

93. The principles, structure and content of the procedure mirror the provisions of clause 14.

**Clause 16: Power to enter premises and destroy immobilised prohibited munitions**

94. If the decision is taken under clause 15(6) to destroy a prohibited munition, the effect of this clause is to confer the power of entry necessary to gain access to premises and the power to destroy the munition.

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95. *Subsections (1) and (2)* provide for a person authorised by the Secretary of State to enter the premises and destroy the prohibited munition. This applies when the prohibited munition is on premises to which the public has access or on premises occupied by a person who consents to the destruction of the prohibited munition.

96. By virtue of *subsections (3) and (4)* a justice of the peace may issue a warrant authorising a person acting under the authority of the Secretary of State to enter the premises and destroy the prohibited munition.

97. *Subsection (5)* provides that any person acting under the authority of the Secretary of State can apply for a warrant. The application must specify the premises concerned. *Subsection (6)* provides that a warrant can authorise entry on only one occasion.

98. Under *subsection (7)* the warrant can be executed by anyone authorised by the Secretary of State during the period of one month from the date of issue.

99. Under *subsection (8)* the person authorised by the warrant issued under subsection (4) may use force, if necessary, to enter the premises.

100. Under *subsection (9)* a person acting under authority given under subsection (2) or under a warrant issued under subsection (4) may take with them other persons and such equipment as appear necessary.

101. Under *subsection (10)* the person authorised under subsection (2) or under the warrant issued under subsection (4) may be required to be accompanied by a constable under the terms of the authorisation or warrant, when they exercise the powers authorised.

102. *Subsection (11)* addresses how in their application to Scotland references to “justice of the peace” and “information on oath” in subsections (3) and (4) should be interpreted.

**Clause 17: Compensation for destruction**

103. This clause provides for compensation in limited circumstances where a prohibited munition has been destroyed under clause 14 or 16.

104. *Subsection (1)* stipulates who may make a claim under this clause. Under subsection (1)(d), a person can only be entitled to compensation if no notice was served on them, regardless of whether or not a notice was served on any other person. In addition, the claimant must have had an interest which was materially affected by the destruction of the munition and have suffered loss as a result of the destruction.

105. *Subsection (2)* states which court can adjudicate on claims. The relevant court is the High Court, or in Scotland, the Court of Session.

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106. Under *subsection (3)* it is in the Court's discretion as to what compensation should be paid to the claimant if the court finds that the claim is justified.

107. The effect of *subsection (4)* is that the Court is not to award compensation if it believes that the object would have been destroyed even if a notice had been served on the claimant providing the opportunity to make representations opposing destruction to the Secretary of State.

**Clause 18: Offences relating to destruction etc**

108. This clause creates offences related to interference with the procedures on investigations into alleged possession; powers of entry to search for prohibited munitions; and removal, immobilisation and destruction of prohibited munitions. The intended effect is to ensure the procedures contained in clauses 11, 12, 13, 14, 15 and 16 are not thwarted or obstructed.

109. *Subsection (1)* makes it an offence for a person to relinquish possession of a prohibited munition without reasonable excuse, once the Secretary of State has served a notice under clause 11 requiring it to be kept.

110. Under paragraphs (a) to (e) of *subsection (2)* it would be an offence to wilfully obstruct any person authorised under clauses 12 (power to enter and search), 13 (power to remove or immobilise), 14 (power to destroy removed munitions) or 16 (power to enter and destroy immobilised munitions) from exercising the powers conferred on them. *Subsection (2)(f)* has the effect of making any attempt to obstruct an offence.

111. *Subsection (3)* makes it an offence without reasonable excuse, where a warning notice has been affixed under clause 13(4)(b), to move or interfere with the prohibited munition, or to interfere with the warning notice.

112. *Subsection (4)* provides that the offences under subsections (1) to (3) may be prosecuted either summarily or on indictment. This subsection also lays down what the penalties would be: on summary conviction the penalty is a fine not to exceed the statutory maximum (£5,000); and on conviction on indictment, the penalty is a fine with no limit stipulated.

113. *Subsection (5)* makes it an offence knowingly to make a false or misleading statement in response to a notice served under clause 11, 14 or 15. The offence may be prosecuted either summarily or on indictment. This subsection also lays down what the penalties would be: on summary conviction a fine not exceeding the statutory maximum (£5,000) and on conviction on indictment the penalty may be imprisonment not exceeding two years or an unlimited fine, or both. The penalty is higher for making a false statement than for obstruction because, whilst obstruction may impose a delay, the making of a false statement may frustrate the whole process and prevent a potentially dangerous prohibited munition from being dealt with.

**Clause 19: Securing destruction of prohibited munitions: supplementary**

114. The purpose of this clause is to make clear that clauses 11 to 16 (powers to secure the destruction of prohibited munitions) do not affect any common law power or powers arising under other legislation which might be relevant to the search for and disposal of prohibited munitions.

**Clause 20: Information and records for Convention purposes**

115. The purpose of this clause is to enable the UK to make the reports required under Article 7 of the Convention. As a transparency measure under Article 7 a State Party is required to submit a first report within 180 days of the Convention entering into force for that State Party, and annual reports thereafter, on national implementation measures and other details (which include the cluster munitions retained for permitted purposes). This clause confers the necessary powers for the Secretary of State to require people to maintain records and provide information needed for the purposes of the Convention.

116. *Subsection (1)* enables the Secretary of State to obtain information needed in connection with the Convention by serving a notice on any person requiring the person to provide the information needed.

117. The effect of *subsection (2)* is that the information required to be given by a notice under this clause must be information that the Secretary of State has reasonable cause to believe is, or will be, needed in connection with anything to be done for the purposes of the Convention. *Subsection (2)(b)* provides that the information required may relate to situations, or events that have taken place, before either the Convention or the Bill has entered into force.

118. *Subsection (3)* provides that the notice served under *subsection (1)* may say in what form the information must be given, and a date by which the information must be given. It is implicit that the period specified in *subsection (3)(b)* must be reasonable.

119. *Subsections (4)* and *(5)* enable the Secretary of State to serve a notice requiring any person to keep the records specified in the notice. These are records which are thought likely to assist with providing the information which that person may be required to give under *subsection (1)*.

120. *Subsection (6)* prevents the Secretary of State obtaining information without consent if the information might incriminate the person on whom a notice has been served under *subsection (1)* or, if that person is married or a civil partner, the person's spouse or civil partner. *Subsection (7)* prevents the power in *subsection (1)* from being used to obtain information protected by legal professional privilege (or, in Scotland, confidentiality of communications).

121. To ensure the procedure in this clause is complied with, *subsection (8)* makes it an offence to not comply with a notice issued under either *subsection (1)* or *(4)* without a

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reasonable excuse; and *subsection (9)* makes it an offence knowingly to make a false or misleading statement in response to a notice served under subsection (1).

122. In both subsections (8) and (9) penalties are specified. Subsection (8) mirrors the penalties laid down in clause 18(4) for obstruction, and subsection (9) mirrors the penalties laid down in clause 18(5) for making false or misleading statements.

**Clause 21: Power to search and obtain evidence: issue of warrant**

123. The purpose of this clause is to confer powers to enter and search premises to obtain evidence in connection with an offence under the Bill.

124. Under *subsection (1)* a justice of the peace may issue a warrant authorising a person acting under the authority of the Secretary of State to enter and search premises if they are satisfied that either condition A or B is met.

125. There must be reasonable grounds to suspect either: an offence under the Bill is being, has been, or is about to be, committed on the premises (condition A, *subsection (2)*); or that evidence of an offence under the Bill having been committed will be found on the premises (condition B, *subsection (3)*).

126. *Subsection (4)* provides that any person acting under the authority of the Secretary of State can apply for a warrant. The application must specify the relevant premises. Under *subsection (5)* the warrant may authorise entry on one occasion only. Under *subsection (6)* the warrant can be executed by anyone authorised by the Secretary of State during the period of one month from the date of issue.

127. *Subsection (7)* addresses how in their application to Scotland references to “justice of the peace” and “information on oath” in subsection (1) should be interpreted.

**Clause 22: Power to search and obtain evidence: supplementary**

128. This clause stipulates what the person authorised under a warrant issued under clause 21 may do, and who may accompany him.

129. Under *subsection (1)* the person authorised under the warrant issued under clause 21 may if necessary use force to enter the premises.

130. *Subsection (2)(a)* permits the person authorised under the warrant issued under clause 21 to take other persons and such equipment on to the premises as appear necessary. Paragraphs (b) to (g) of subsection (2) permit the authorised person to:

- inspect, seize and remove any document, device, equipment or substance considered to be evidence of an offence under the Bill

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- copy documents or sample substances found on the premises for the same purpose
- require information in electronic form to be produced in a form it can be removed and read, and take copies of, or seize and remove anything produced considered to be evidence of an offence under the Bill.

131. Under *subsection (3)* anything seized under subsection (2) may only be retained for as long as necessary.

132. Under *subsection (4)* any person who seizes anything under subsection (2) must provide a record of its seizure if requested by either: the person who occupies the premises at the time of the seizure; or the person who had possession or control of the thing immediately before it was seized.

133. The intention of *subsection (5)* is to protect claims to legal professional privilege, or in Scotland confidentiality of communications, with respect to information that can be obtained under subsection (2).

134. *Subsections (6) and (7)* provide for a constable to search persons who are found on the premises and whom he has reasonable cause to believe are in possession of any document, device, equipment or substance required as evidence.

135. *Subsection (8)* stipulates that no constable shall search a person of the opposite sex.

136. Under *subsection (9)* the warrant issued under clause 21 can stipulate that the powers conferred by the warrant are only exercisable in the presence of a constable.

137. To ensure compliance with the other provisions of this clause, *subsection (10)* makes it an offence for a person to obstruct a person exercising any power under this clause. The penalties on summary conviction or conviction on indictment are stipulated. The penalties mirror those in clauses 18(4) and 20(8) for obstruction.

### **Clause 23: Disclosure of information**

138. The purpose of this clause is to protect the information obtained under the Bill or the Convention. The clause does this, subject to certain exceptions, by making it an offence to disclose any information obtained under this Bill or the Convention.

139. *Subsection (1)* specifies the information to be protected by this clause. The intention is that it cover all information obtained under, or in connection with anything done under, this Bill or the Convention that relates to a particular business or other activity carried on by any person. The information protected by this clause is not limited to information obtained and held by the Secretary of State.

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140. *Subsection (2)* stipulates that the information is not to be disclosed while the business or activity is ongoing, unless one of the specific exceptions applies:

- with the consent of the person carrying on the relevant business or activity;
- for the purposes of the Convention or the Bill;
- regarding investigation of a criminal offence or for the purposes of criminal proceedings;
- relating to enforcement of trade controls;
- to ensure the UK's security.

141. To ensure compliance *subsection (4)* makes it an offence to disclose information covered by this clause. The penalties on summary conviction or conviction on indictment are stipulated. The penalties mirror those in clauses 18(5) and 20(9) for giving false and misleading information.

142. The effect of *subsection (5)* is that the exceptions set out in subsection (2)(b) to (f) override other obligations not to disclose the information concerned, for example a contractual duty to preserve its confidentiality.

#### **Clause 24: Consent to prosecution**

143. This clause requires that proceedings for offences under the Bill may be instituted only by or with the consent of the Attorney General or the Attorney General for Northern Ireland. The intention is to prevent frivolous or otherwise undesirable prosecutions by private persons and to ensure consistency of approach. A similar provision is not needed for Scotland since criminal proceedings there are only brought by or on behalf of the Lord Advocate other than in very exceptional circumstances.

#### **Clause 25: Forfeiture in case of conviction**

144. This clause provides that where a person is convicted of an offence under the Bill, the Court may order that objects related to that offence be forfeited.

145. *Subsection (1)* provides that this clause applies where a person is convicted of an offence under the Bill.

146. *Subsection (2)* enables the court which convicts a person for an offence under the Bill to order that anything it is satisfied is related to the offence be forfeited and thereafter destroyed, or otherwise dealt with, in the manner specified in an order made by the court.

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147. *Subsection (3)* provides that the court may order under subsection (2) that the object which has been forfeited be dealt with in such a way which the Secretary of State sees fit.

148. *Subsection (4)* provides that where the Court makes an order under subsection (3), the powers of the Secretary of State include the power to direct destruction of the forfeited item and the power to dispose of it in any other way which seems appropriate.

149. *Subsections (5) and (6)* provide that, where a court proposes to make an order under subsection (2), if a person claiming to have an interest in the thing to be forfeited applies to make representations to the court, the court must not make such an order unless that person has been given the opportunity to show why the object should not be forfeited.

**Clause 26: Offences by bodies corporate etc.**

150. This clause contains standard provisions imposing criminal liability on officers of corporate bodies which commit offences under the Bill.

151. *Subsection (1)* provides that where an offence is committed by a body corporate, and the offence is proved to have been committed with the consent or connivance of an officer of that body corporate, or the offence is proved to have been attributable to the neglect of such officer, then that person is guilty of the same offence as the body corporate and is liable to the same penalties.

152. *Subsection (2)* provides that where an offence is committed by a Scottish partnership and the offence is proved to have been committed with the consent or connivance of a partner, or proved to have been attributable to the neglect of a partner, the partner is liable to be prosecuted as well. In Scotland a partnership is a separate legal entity (unlike in England).

153. *Subsection (3)* defines “officer of a body corporate” for the purposes of subsection (1) as: a director, manager, secretary or other similar officer of the corporate body, or any person who was purporting to act in such a capacity; in relation to a Scottish partnership, “partner” includes any person purporting to act as a partner of the partnership.

154. *Subsection (4)* defines “director” for the purposes of subsection (3) as a member of the body corporate. This subsection is only relevant where the affairs of the body corporate are managed by its members.

**Clause 27: Safeguards etc. in connection with exercise of powers of entry**

155. A person authorised under clause 12(1) or 16(2) to search premises must produce identification and the authority to search to anyone on the premises who asks (*subsection (1)*).

156. *Subsection (2)* stipulates that the provisions of *subsections (3) to (5)* apply where a person enters premises under the authority of a warrant issued under clause 12(2), 16(4) or 21(1). Under *subsections (3) to (5)* the authorised person is required to provide evidence of

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identity and a copy of the warrant to the occupier or in his absence to whoever is in charge of the premises. If the occupier is absent, and no-one appears to be in charge of the premises, a copy of the warrant must be left there.

157. *Subsection (6)* provides that entry under clause 12(1) or (2), 16(2) or (4) or 21(1) must be at a reasonable hour unless the purpose of entry would be frustrated if done then. *Subsection (7)* provides that authorised persons entering unoccupied premises under these same clauses must take all reasonable steps to leave them as secure as they found them. *Subsection (8)* provides that the safeguards in subsections (3) to (6) do not apply to a constable entering under a warrant: this is because other statutory provisions cover the conduct of constables.

**Clause 28: Service of notices**

158. This clause sets out how notices under this Bill may be served.

159. *Subsection (1)* provides that a notice to be served on a person may be delivered to the person or sent by post to his usual or last-known residence, or usual or last-known place of business, in the United Kingdom.

160. Details of how notices may be served on a Scottish partnership are set out under *subsection (2)*: delivery in person to a partner of the partnership, or to a person having control or management of the partnership business, at the principal office of the partnership; or by sending it by post to that office to a partner of the partnership, or person who has control or management of the partnership business.

161. Details of how notices may be served on a body corporate are set out under *subsection (3)*. A notice to a body corporate may be served by delivering it to the secretary or clerk of the body corporate at its registered or principal office; or by sending it by post to the secretary or clerk at that office.

162. In relation to a company registered outside the United Kingdom, “principal office” includes the principal office within the United Kingdom (if any). A notice could be served using the company’s principal office outside the UK.

**Clause 29: Power to modify Act**

163. Clause 29 provides that the Secretary of State may modify the Bill by order to give effect to any amendments made to the Convention. Article 13 of the Convention provides for amendments to the Convention, and sets out the procedures whereby amendments may be made to the Convention.

164. The power is limited to implementing amendments to the Convention and is not intended to be used to make other changes to this Bill.

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165. *Subsection (1)* empowers the Secretary of State to make amendments to the Bill by an order in the form of a statutory instrument to give effect to an amendment to the Convention.

166. *Subsection (2)* empowers the Secretary of State to include in any order made under subsection (1) consequential modifications, which are necessary or desirable, to any other enactment. *Subsection (4)* defines enactment and modification for the purposes of this clause.

167. *Subsection (3)* provides for an order under subsection (1) to be subject to the affirmative resolution procedure which would require that a draft of the order be laid before and approved by each House.

**Clause 30: Interpretation**

168. This clause provides interpretation of terms used in the Bill.

**Clause 31: Amendments of other Acts**

169. This clause introduces Schedule 3, which contains minor and consequential amendments to other Acts.

**Clause 32: Crown application**

170. This clause provides that, subject to certain qualifications, the Bill will bind the Crown (*subsection (1)*).

171. *Subsection (2)* provides that the Crown itself will not be criminally liable for any contravention by the Crown of any provision of the Bill.

172. *Subsection (3)* provides that, notwithstanding the provisions of *subsection (2)*, the Bill applies to Crown servants as it applies to other people.

173. Under *subsection (4)* an interested party may apply to the High Court, or in Scotland the Court of Session, for the Court to declare unlawful any act or omission committed by the Crown which is deemed to be a contravention of the Bill.

174. *Subsection (5)* provides that the Bill does not bind the Queen in her private capacity.

**Clause 33: Extent**

175. The purpose of this clause is to provide the jurisdictional extent of the Bill.

176. *Subsection (1)* provides that the Bill extends to England and Wales, Scotland and Northern Ireland.

177. *Subsection (2)* provides that an amendment made by this Bill will have the same extent as the provision which is amended.

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178. *Subsection (3)* provides that the Queen may by Order in Council extend the Bill with modifications (or without modifications) to any of the Channel Islands, the Isle of Man or any British overseas territory.

**Clause 34: Commencement and short title**

179. The purpose of this clause is to make provision for when the Bill comes into force; that is on the day it is passed. It also provides that the Bill may be cited as the Cluster Munitions (Prohibitions) Act 2010.

**SCHEDULES**

**Schedule 1: Definitions of cluster munition, explosive bomblet etc**

180. This contains extracts from the Convention, setting out the meanings of terms used in the Convention, as referred to in clauses 1(6), 3(7) and 6(10) of the Bill. The following Convention definitions are included:

Cluster munition and related terms

- Cluster munition
- Explosive submunition
- Unexploded submunition
- Self-destruction mechanism
- Self-deactivating

Explosive bomblet

Dispenser

Mine

Cluster munition remnants and related terms

- Cluster munition remnants
- Failed cluster munition
- Unexploded submunition

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- Abandoned cluster munition
- Unexploded bomblet

### **Schedule 2: Offences to which section 9 applies**

181. This Schedule sets out the offences to which the interoperability defence in clause 9 applies, and when it applies.

182. Paragraphs 1 to 6 establish that the interoperability defence would be available to any person charged with possession or making arrangements for another person to transfer prohibited munitions (or with attempting or conspiring to do either of those things). It would also be available to a person charged with assisting, encouraging or inducing another to use, possess, transfer, or make arrangements under which another person transfers, a prohibited munition, as well as to a person charged with other forms of secondary or inchoate liability relating to these types of conduct. A person charged with attempt or conspiracy in relation to any of the types of secondary and inchoate liability covered by paragraphs 2 to 5 would also be able to invoke the defence.

183. Paragraph 7 stipulates that with regard to conduct related to the use or transfer of a prohibited munition (including making arrangements under which another transfers a prohibited munition), the interoperability defence will only apply if the person charged can demonstrate that the use or transfer was, or was to be, only by a member or members of the armed forces of, or a person or persons acting under the authority of, a State not party to the Convention, or that they had reasonable cause to believe this to be the case.

184. Paragraph 8 disapplies the interoperability defence with respect to members of a visiting force of a State not party to the Convention and those working with such a force (as defined in clause 8) when they are charged with:

- the offence of possession of a prohibited munition (clause 2(1)(e));
- making arrangements under which another person transfers a prohibited munition if that other person was a member of the visiting force of a State not party to the Convention and the arrangements were for that person to move the prohibited munition into or out of the UK or enter into a contract to do so;
- an offence specified in paragraphs 2 to 6 and the conduct was related to anything to which sub-paragraph (4) applies. Sub-paragraph (4) applies to: the possession of a prohibited munition by a member of a visiting force of a State not party to the Convention, or a person working with such a force; the movement of a prohibited munition into or out of the UK, or entering into a contract to move a prohibited munition into or out of the UK, by a member of a visiting force of a State not party to the Convention; or the making of arrangements by a member of a visiting force of a

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State not party to the Convention, or a person working with such a visiting force, under which a member of such a visiting force moves a prohibited munition into or out of the UK, or enters into a contract for such a movement.

### **Schedule 3: Amendments of other Acts**

185. This Schedule contains consequential amendments to the Criminal Justice and Police Act 2001 and to the Serious Crime Act 2007.

186. Under paragraph 1, the powers of seizure conferred by the Bill are inserted in Schedule 1 to the Criminal Justice and Police Act 2001 which sets out the powers to which section 50 of the 2001 Act applies (additional powers of seizure from premises). The effect of this amendment is to extend the powers of seizure conferred by the Bill in cases where it is not reasonably practicable for it to be determined on the premises whether or not property is seizable property and in cases where the seizable property is comprised in something from which it is not reasonably practicable for it to be separated.

187. The offence under clause 2(2) of this Bill will be added to the list of offences in Schedule 3 to the Serious Crime Act 2007. Under clause 2(2) the Bill contains a specific offence of assisting, encouraging and inducing another person to engage in prohibited conduct under clause 2(1). The amendment will be made so as to avoid the possibility of a person being prosecuted under Part 2 of the Serious Crime Act 2007 for assisting or encouraging another person to assist, encourage or induce a contravention of clause 2(1).

### **FINANCIAL EFFECTS OF THE BILL**

188. Implementation of the provisions in the Bill is likely to incur only negligible costs that will be met within existing Departmental budgets.

### **SUMMARY OF THE IMPACT ASSESSMENT**

189. The conclusion of the impact assessment is that the Bill is not expected to incur any significant costs for either business or the Government. A copy of the impact assessment is available from the Vote Office in the House of Commons and the Printed Paper Office in the House of Lords. The impact assessment is also available on the Department's website ([www.fco.gov.uk](http://www.fco.gov.uk)).

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

190. The measures within the Bill will draw upon existing resources.

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## **EUROPEAN CONVENTION ON HUMAN RIGHTS**

191. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement before second reading about the compatibility of the provisions with the Convention rights (as defined by section 1 of that Act). The Minister of State (Baroness Kinnock of Holyhead) has made the following statement:

“In my view the provisions of the Cluster Munitions (Prohibitions) Bill [HL] are compatible with the Convention rights.”

192. The Bill engages Articles 6 (right to a fair trial) and 8 (right to respect for private and family life) of the European Convention on Human Rights (“the ECHR”) and Article 1 of the First Protocol to the ECHR (protection of property) but is compatible with the rights set out in those Articles.

193. Article 6(2) of the ECHR provides that everyone charged with a criminal offence is to be presumed innocent until proved guilty according to law. Under the Bill, it will be for the prosecution to prove beyond reasonable doubt that a defendant has committed the elements of the offence with which the defendant is charged but the defendant will bear a burden of proof should they seek to rely on one of the defences in clauses 5 to 9. For example, if a defendant seeks to rely on the defence in subsection (1) of clause 7 (defences relating to state of mind of defendant etc.), they will have to show that, at the time of the conduct constituting the offence, they neither knew nor suspected, nor had reason to suspect, that the object was a prohibited munition.

194. However, by virtue of clause 10, the burden of proof that the defendant bears as regards the defences in clauses 5 to 9 is an evidential burden only. This means that it will be enough for the defendant to adduce evidence which is sufficient to raise an issue with respect to the defence in question. The legal burden of proof will then be on the prosecution to prove beyond reasonable doubt that the defence does not apply. As the Bill places only an evidential burden of proof on the defendant, the Government considers that clauses 5 to 9 are compatible with the ECHR.

195. Article 8 of the ECHR confers a right to respect for a person’s private and family life, home and correspondence and prohibits interference with this right by a public authority unless that interference is “in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”. Article 8 is engaged by the powers of search and entry conferred by clauses 12, 13, 16, 21 and 22 of the Bill.

196. The Government considers that any interference with the right as a result of the exercise of these powers will be in accordance with the law, necessary for the prevention of

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crime and necessary in a democratic society, by virtue of being proportionate to the aim of preventing crime. The Bill contains various safeguards, to prevent arbitrary interference that would cause concern under the ECHR. Where entry is under a warrant, the entry must be effected within one month of the date of issue of the warrant and there can only be entry on one occasion (see clauses 12(8) and (9), 16(6) and (7) and 21(5) and (6)). Entry other than under a warrant is limited to premises to which the public has access and premises which are occupied by a person who consents to the entry (see clauses 12(1) and (5) and 16(1)). Whether entry is under a warrant or under an authorisation granted by the Secretary of State the additional safeguards in clause 27 will apply. These relate to the production of documents to prove that entry is authorised, entering at a reasonable hour and leaving unoccupied premises as secure as they were found.

197. Article 1 of the First Protocol to the ECHR confers a right to peaceful enjoyment of possessions. A person cannot be deprived of their possessions “except in the public interest and subject to the conditions provided for by law and by the general principles of international law”. Under clause 13 prohibited munitions can be made safe and either seized and removed or left in place with a warning affixed to them. The Secretary of State may then, under clause 14 or 15, decide that those prohibited munitions should be destroyed. The Government considers that any deprivation of possessions, by virtue of the provisions of clauses 13 to 15, will be in accordance with Article 1 of the First Protocol. It will be in the public interest and the Bill contains procedural safeguards to ensure that those affected are given an opportunity to make representations before their possessions are destroyed.

198. Article 1 of the First Protocol is also engaged by clause 25, the court’s power of forfeiture on conviction. Again, the Government considers clause 25 to be compatible with the ECHR. The court must give any person claiming to have an interest in the item to be forfeited an opportunity to be heard and to explain why it should not be forfeited (see clauses 25(5) and (6)).

## **COMMENCEMENT DATE**

199. All the Bill’s provisions will come into force on Royal Assent.

# **CLUSTER MUNITIONS (PROHIBITIONS) BILL [HL]**

## **EXPLANATORY NOTES**

*These notes refer to the Cluster Munitions (Prohibitions) Bill [HL]  
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