

TERRORIST ASSET-FREEZING ETC. BILL [HL]

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes relate to the Terrorist Asset-Freezing etc. Bill [HL] as introduced in the House of Lords on 15th July 2010. They have been prepared by the Treasury 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.

BACKGROUND TO BILL

3. The purpose of Part 1 of the Bill is to give effect in the United Kingdom to resolution 1373 (2001) adopted by the Security Council of the United Nations on 28th September 2001 (“resolution 1373”) relating to terrorism and resolution 1452 (2002) adopted on 20th December 2002 (“resolution 1452”) relating to humanitarian exemptions. It also provides for enforcement of Regulation (EC) 2580/2001 on specific measures directed at certain persons and entities with a view to combating terrorism (“the EC Regulation”).
4. Resolution 1373 includes a requirement that Member States of the United Nations must (a) prevent the financing of terrorist acts, including the freezing of funds and economic resources of persons who commit or attempt to commit terrorist acts or participate in or facilitate such acts, and (b) prohibit their nationals and those within their territories from making funds, financial services or economic resources available to such persons.
5. Resolution 1452 introduces exemptions to prohibitions on making funds, financial assets or economic resources available to permit payments necessary to meet basic humanitarian needs (such as payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, public utility charges and legal fees and expenses) and payments necessary to meet extraordinary expenses.
6. Obligations under resolution 1373 had been implemented by the Treasury by a number of Orders in Council made under section 1 of the United Nations Act 1946 (the “UN Act”).

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as introduced in the House of Lords on 15th July 2010 [HL Bill15]*

Under section 1 of the UN Act, there is a power to make an Order in Council to give effect to any decision of the UN Security Council where such provision appears “necessary or expedient for enabling those measures to be effectively applied”.

7. The Orders made under section 1 of the UN Act to give effect to obligations under resolution 1373 were the Terrorism (United Nations Measures) Order 2001 (the “2001 Order”), the Terrorism (United Nations Measures) Order 2006 (the “2006 Order”) and the Terrorism (United Nations Measures) Order 2009 (the “2009 Order”). In these Notes, those Orders are referred to collectively as the “UN Terrorism Orders”. The 2006 Order replaced and revoked the 2001 Order save that directions designating persons under article 4 of the 2001 Order which remained in force on the date the 2006 Order came into force continued to apply and the provisions of the 2001 Order continued to apply to such directions. Similarly, the 2009 Order replaced and revoked the 2006 Order save that directions under article 4 of the 2006 Order, which remained in force on the date the 2009 Order came into force, continued to apply and the provisions of the previous Orders continued to apply to such directions.
8. On 27th January 2010 the Supreme Court decided in the case *Ahmed & Ors v HM Treasury*¹ that the 2006 Order was ultra vires the UN Act and on 4th February 2010 made an order quashing the 2006 Order. The Supreme Court did not rule upon the lawfulness of the 2001 Order or the 2009 Order but both Orders were liable to be quashed on the same grounds as the 2006 Order. The Terrorist Asset-Freezing (Temporary Provisions) Act 2010 (the “Temporary Provisions Act”) provided that the UN Terrorism Orders were deemed to have been validly made under the UN Act and for directions made imposing asset freezes to have effect, for the period from Royal Assent (10th February 2010) until 31st December 2010. The Act therefore maintained terrorist asset-freezing restrictions which had been quashed by the Supreme Court ruling or which were vulnerable to being quashed as a consequence of that ruling.
9. On 18th March 2010 the Government published a public consultation with regard to the content of Part 1 of the Bill. A draft Bill and draft Explanatory Notes were annexed to the consultation. This consultation closed on 18th June 2010 and the Government’s ²response to the consultation replies was published on 15th July 2010. Part 1 of this Bill is broadly based on the consultation draft.
10. The purpose of Part 2 of the Bill is to make amendments to Schedule 7 to the Counter-Terrorism Act 2008. Schedule 7 provides the Treasury with powers by directions to impose financial restrictions in relation to persons connected with a country (a “country of concern”) in response to money laundering, terrorist financing or the development or production of nuclear, radiological, biological or chemical weapons that poses a risk to the national interests of the United Kingdom, or where the Financial Action Task Force has advised that measures

¹ [2010] UKSC 2.

² Documents relating to the consultation can be found on the Treasury’s website (hm-treasury.gov.uk/consult_terrorist_assetfreezing_bill.htm).

should be taken in relation to the country because of the risk of terrorist financing or money laundering activities.

11. Part 2 of the Bill makes amendments to the Schedule 7 powers to clarify the persons to whom a direction may be given, to broaden the definition of persons in relation to whom restrictions may be applied, and to introduce a prohibition on circumventing the requirements of a direction. There are also amendments to Schedule 7 to remove some enforcement functions of the Department of Enterprise, Trade and Investment in Northern Ireland (“DETINI”).

TERRITORIAL EXTENT AND APPLICATION

12. The Bill extends to England and Wales, Scotland and Northern Ireland. Clause 48 extends to Anguila, Bermuda, British Antarctic Territory, British Indian Ocean Territory, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, Pitcairn, Henderson, Ducie and Oeno Islands, St Helena and Dependencies, South Georgia and the South Sandwich Islands, the Sovereign Base Areas of Akrotiri and Dhekelia, Turks and Caicos Islands and Virgin Islands (“the British overseas territories”), the Channel Islands and the Isle of Man. There is power to extend Part 1 of the Bill by Order in Council, with such modifications as are appropriate, to the Channel Islands, the Isle of Man and any British overseas territory.
13. The Bill deals only with reserved matters in respect of Scotland. It does not confer any functions on the National Assembly for Wales, and applies to Wales in the same way as it applies to England.
14. 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.
15. Clause 45 contains provisions which affect the functions of Northern Ireland Ministers, and a legislative consent motion will accordingly be required. The Bill does not contain any other provisions that would require a legislative consent motion in Northern Ireland.

COMMENTARY ON CLAUSES AND SCHEDULES

PART 1 – TERRORIST ASSET-FREEZING

CHAPTER 1 - DESIGNATED PERSONS

Introductory

Clause 1 – Meaning of “designated person”

16. The financial restrictions contained in Part 1 of the Bill apply to “designated persons”. Clause 1 defines “designated person” as (a) a person designated by the Treasury or (b) a person included in the list provided for by Article 2(3) of the EC Regulation. The EC Regulation is a measure adopted by the EC to implement resolution 1373. It provides that the Council should establish a list of persons to whom asset-freezes apply. The list is made up of persons put forward for inclusion by a “Competent Authority” in a Member State and on the basis that the Authority has taken relevant steps (for example, to prosecute for a terrorist offence or freeze assets domestically) against that person. The Treasury is a Competent Authority for the purposes of the EC Regulation.

Clause 2 – Treasury’s power to designate persons

17. Clause 2 contains a power which allows the Treasury to designate a person for the purposes of Part 1 of the Bill. *Subsection (1)* provides that the Treasury may only exercise such power if the requirements of paragraphs (a) and (b) are met. Under paragraph (a) the Treasury must have reasonable grounds for suspecting that the person is or has been involved in terrorist activity (or is owned or controlled directly or indirectly by, or is acting on behalf or at the direction of, such a person). Under paragraph (b) the Treasury can only designate such a person if they consider that it is necessary for the purpose of protecting members of the public from terrorism that financial restrictions should be applied in relation to the person.
18. *Subsections (2) and (3)* define “terrorist activity”.
19. *Subsection (4)* defines “terrorism” for the purposes of clause 2 of the Bill by reference to the definition contained in section 1(1) to (4) of the Terrorism Act 2000.

Clause 3 – Notification of designation

20. Clause 3 requires the Treasury to give notice of and publicise any designations that they make. *Subsection (1)* requires the Treasury to give written notice of a person’s designation to that person and to take steps to publicise the designation.

21. Under *subsection (2)*, the designation must be publicised generally, unless one of the exceptions in *subsection (3)* applies, in which case under *subsection (4)* the Treasury must inform only such persons as they consider appropriate. The conditions in *subsection (3)* are that the Treasury (a) believe that the designated person is under the age of 18 or (b) consider that disclosure of the designation should be restricted in the interests of national security, for reasons connected with the prevention or detection of serious crime, or in the interests of justice. For example, the Treasury may consider restricting the publication of a person's designation where they are concerned that a wide publication might have the consequence of revealing the nature or extent of a police or intelligence investigation.
22. *Subsection (5)* specifies that where the Treasury have publicised a person's designation to only those persons they consider appropriate because one or more conditions in *subsection (3)* were met but such conditions subsequently cease to be met, the Treasury must give written notice of that fact to the designated person and take steps to publicise the designation generally.

Clause 4 – Duration of designation

23. *Subsection (1)* specifies that a designation expires after one year unless renewed. *Subsection (2)* gives the Treasury the power to renew a designation at any time before it expires provided that the requirements of clause 2(1) continue to be met. Such renewed designations also expire after one year following the date of renewal (*subsection (3)*) and a renewal of a designation must be notified and publicised in accordance with the provisions of clause 3 (*subsection (4)*). A designation may be renewed more than once. Upon the expiry of a designation, the Treasury must give written notice of the fact to the designated person and take appropriate steps to bring that fact to the attention of those informed of the designation (*subsection (5)*).

Clause 5 – Variation or revocation of designation

24. This clause gives the Treasury the power to vary or revoke a designation at any time (*subsection (1)*). Where they do so they must give written notice to the designated person and take such steps as they consider appropriate to bring the variation or revocation to the attention of those informed of the designation (*subsection (2)*).

Clause 6 – Confidential information

25. Clause 6 provides that where the Treasury inform only a limited number of persons of a designation the Treasury may specify that certain information contained in the notification is to be treated as confidential. Such a person (or another person who obtains the information) commits an offence if he or she discloses the information without lawful authority and knowing or having reasonable cause to suspect that it is to be treated as confidential (*subsections (1), (2), (3) and (6)*). *Subsection (4)* specifies the circumstances when

information is disclosed with lawful authority, *subsection (5)* provides that clause 6 does not apply to information that is already, or has previously been, available to the public from other sources and *subsection (7)* allows the person who is the subject of the information or the Treasury to apply to the appropriate court to grant an injunction (or interdict in Scotland) to prevent disclosure of the information.

CHAPTER 2 – PROHIBITIONS IN RELATION TO DESIGNATED PERSONS

Prohibitions

Clause 7 – Freezing of funds and economic resources

26. Clauses 7 to 11 set out the main consequences of a person being designated. Clause 7 makes it an offence for a person to deal with funds or economic resources owned, held or controlled by a designated person if the person who is dealing knows, or has reasonable cause to suspect, that the funds or economic resources in question are owned, held or controlled by a designated person (*subsections (1) and (4)*). The terms “funds” and “economic resources” are defined in clause 33.
27. *Subsection (2)* provides the meaning of “deal with” for the purpose of clause 7.
28. *Subsection (3)* states that the offence in *subsection (1)* is subject to the provisions of clause 12 (which set out exceptions to this and the offences in clauses 8 and 9) and clause 13 (which permits activities which would otherwise fall within the offences in clause 7 to 11 to be permitted by licence from the Treasury).

Clause 8 – Making funds or financial services available to designated person

29. Clause 8 makes it an offence for a person to make funds or financial services available (directly or indirectly) to a designated person if the person making the funds or financial services available knows, or has reasonable cause to suspect, that the funds or financial services are being made available (directly or indirectly) to a designated person. The term “financial services” is defined in clause 34.

Clause 9 – Making funds or financial services available for benefit of designated person

30. This clause makes it an offence for a person to make funds or financial services available to any person for the benefit of a designated person if the person making the funds or financial services available knows, or has reasonable cause to suspect, that the funds or financial services are being made available for the benefit of a designated person. In contrast to the prohibition in clause 8, which prohibits the making available of funds or financial services,

directly or indirectly, to the designated person, the clause 9 prohibition relates to the making available of funds or financial services to third parties but which are for the benefit of the designated person.

31. *Subsection (2)* provides that for the purposes of clause 9, funds or financial services are made available for the benefit of a designated person only if that person thereby obtains, or is able to obtain, a significant financial benefit, where “financial benefit” includes the discharge of a financial obligation for which the designated person is wholly or partly responsible. No particular threshold level or amount of financial benefit is specified as constituting a “significant” financial benefit. Whether a financial benefit is “significant” is dependent on the circumstances of each particular case. Various factors may lead to a conclusion that a financial benefit is or is not significant, including the value of the financial benefit, the frequency with which the financial benefit is conferred on the designated person and the nature of the financial benefit.

Clause 10 – Making economic resources available to designated person

32. Clause 10 makes it an offence for a person to make economic resources available (directly or indirectly) to a designated person if the person making the economic resources available knows, or has reasonable cause to suspect, that (a) the economic resources are being made available (directly or indirectly) to a designated person and (b) the designated person would be likely to exchange the economic resources, or use them in exchange, for funds, goods or services.

Clause 11 – Making economic resources available for benefit of designated person

33. This clause makes it an offence for a person to make economic resources available to any person for the benefit of a designated person if the person making the economic resources available knows, or has reasonable cause to suspect, that the economic resources are being made available for the benefit of a designated person. While the prohibition in clause 10 prohibits the making available of economic resources to the designated person, the clause 11 prohibition relates to the making available of economic resources to third parties but which are for the benefit of, or give rise to a benefit to, the designated person.
34. As is the case under clause 9(2), the prohibition in clause 11 is only engaged if the designated person obtains, or is able to obtain, a significant financial benefit as a consequence of the making available of economic resources to the third party.

Exceptions and licences

Clause 12 – Exceptions

35. Clause 12 sets out various activities which do not contravene the prohibitions in clauses 7 to 9 of the Bill. *Subsection (1)* provides that relevant institutions (defined in clause 35) which credit frozen accounts with interest or other earnings due on the account, or payments due under contracts, agreements or obligations that were concluded or arose before the account became frozen, are not in breach of the prohibitions in clauses 7 to 9. *Subsection (2)* exempts from the prohibitions in clauses 8 and 9 relevant institutions which credit frozen accounts where they receive funds transferred to a frozen account. Any funds credited to a frozen account in accordance with *subsection (1)* or *(2)* become frozen once they have been so credited.
36. *Subsection (3)* makes it clear that the payment of state benefits to a person other than a designated person is not caught by the prohibition in clause 9. This provision is intended in part to reflect the European Court of Justice decision in C-340/08. In this case the ECJ decided that the prohibition on making funds available for the benefit of a designated person in EC Regulations concerning Al-Qaida and the Taliban (there is similar provision in the EC Regulation on terrorism) did not apply to the payment of certain state benefits payable to members of the household of a designated person. *Subsection (3)* covers both the payment of benefits payable to persons other than the designated person, and in addition the payment of benefits due to a designated person but which are paid to a non-designated person (e.g. if the designated person requests that the benefit is paid to a family member and the paying body agrees to the request). Whilst *subsection (3)* allows benefits departments to make funds available to a non-designated person for the benefit of a designated person, it remains an offence under clause 8 for those funds then to be made available to the designated person. It also remains an offence under clause 9 for those funds then to be made available for the designated person's benefit where the designated person thereby obtains, or is able to obtain, a significant financial benefit.
37. *Subsection (4)* requires a relevant institution to inform the Treasury without delay if it credits a frozen account in accordance with *subsections (1)(b)* or *(2)*. *Subsection (5)* defines "frozen account".

Clause 13 – licences

38. Clause 13 provides that persons may take any actions which would otherwise breach the prohibitions in clauses 7 to 11 of the Bill if they do so under authority of a licence granted by the Treasury (*subsection (1)*). The Treasury have the power to vary or revoke a licence at any time (*subsection (4)*). *Subsection (2)* provides that, where relevant, such a licence also constitutes authorisation under Article 6 of the EC Regulation. Article 6 provides a similar power to Competent Authorities to authorise actions which would otherwise breach the prohibitions under the EC Regulation.

39. *Subsection (3)* deals with the contents, scope and duration of licences issued by the Treasury. A licence must specify the acts authorised by it and may be (a) general or granted to a category of persons or to a particular person, (b) subject to conditions and (c) of indefinite duration or subject to an expiry date.
40. *Subsection (5)* sets out the notification requirements on the Treasury in the event that they grant, vary or revoke a licence, which are that they give written notice of the grant, variation or revocation to the person to whom the licence is granted or, if it is a general licence or granted to a category of persons, they take such steps as they consider appropriate to publicise the grant, variation or revocation.
41. *Subsection (6)* makes it an offence for a person knowingly or recklessly to provide information that is false in a material respect, or provide or produce a document that is not what it purports to be, for the purpose of obtaining a licence. Under *subsection (7)* it is an offence for a person who purports to act under the authority of a licence to fail to comply with any conditions imposed on that person by the licence.

Clause 14 – Circumventing prohibitions etc

42. Under this clause it is an offence for a person intentionally to participate in activities knowing that their object or effect is (whether directly or indirectly) to circumvent, or enable or facilitate the contravention of, the prohibitions in clauses 7 to 11 of the Bill.

CHAPTER 3 – INFORMATION

Information for Treasury

Clause 15 – Reporting obligations of relevant institutions

43. Clause 15 imposes an obligation on relevant institutions to inform the Treasury as soon as practicable if, during the course of their business, they have or obtain information which causes the institution to know or suspect that a person is a designated person or has committed an offence under any provision of Chapter 2 (prohibitions in relation to designated persons) (*subsection (1)*). *Subsection (2)* requires that where a relevant institution has identified a person as a designated person or someone who has committed a Chapter 2 offence, the institution must inform the Treasury of the information which led to the person being so identified and state any information which can be used to identify the customer. *Subsections (3) and (4)* provide that if it knows or reasonably suspects that a customer is a designated person the institution must also tell the Treasury of the nature and amount of funds or economic resources it holds in respect of that customer. *Subsection (5)* makes it an offence for a relevant institution to fail to comply with any requirement of *subsection (1), (2) or (4)*.

Clause 16 – Powers to request information

44. Clause 16 gives the Treasury the power to request information from designated persons and others.
45. *Subsection (1)* gives the Treasury the power to request information from a designated person concerning funds and economic resources owned, held or controlled by or on behalf of that person and any disposal of such funds or economic resources.
46. *Subsection (2)* gives the Treasury the power to request from a designated person such information as they may reasonably require about expenditure by or on behalf of the designated person and for such person's benefit.
47. *Subsection (3)* makes it clear that the powers in *subsections (1)* and *(2)* are only exercisable where the Treasury believe it is necessary for the purposes of monitoring compliance with or detecting evasion of Part 1 of the Bill.
48. *Subsection (4)* allows the Treasury to request information from a person acting under a licence concerning funds, economic resources and financial services dealt with or made available under the licence.
49. *Subsection (5)* gives the Treasury the power to request any person in, or resident in, the UK to provide information for the purpose of establishing the nature and amount or quantity of any funds, economic resources or financial services owned, held or controlled by or on behalf of, or made available to or for the benefit of, a designated person, establishing the nature of any financial transactions entered into by the designated person, monitoring compliance with or detecting evasion of Part 1 of the Bill, or obtaining evidence of the commission of an offence under that Part.
50. *Subsection (6)* allows the Treasury to specify the manner in which, and the period within which, information is to be provided, although *subsection (7)* provides that if no period is specified, it must be provided within a reasonable time. *Subsection (8)* specifies that the Treasury is entitled to impose a continuing obligation to be informed as circumstances change or on such regular basis as they specify. *Subsection (9)* makes it clear that a request for information can cover any period of time when a person was designated, and *subsection (10)* provides that for requests made under *subsections (1)(b)*, *(2)* or *(5)(a)(iii)* requests for information can relate to a period before a person was designated.

Clause 17 – Production of documents

51. Clause 17 provides that where the Treasury make a request for information under clause 16, they may request that specified documents or documents of a specified kind or description are produced (*subsection (1)*).

52. *Subsection (2)* allows the Treasury to take copies or extracts from any such document and request any person producing a document (or, if the person producing the document is a body corporate, partnership or unincorporated body, any present or past partner, officer or employee of such body) to give an explanation of it.
53. *Subsection (3)* requires that a designated person or a person acting under a licence, who is requested to produce documents, must take reasonable steps to obtain the documents (if not in the person's possession or control) and keep the documents (if they have them already).

Clause 18 – Failure to comply with request for information

54. This clause makes it an offence for a person to (a) without reasonable excuse, refuse or fail within the time and in the manner specified (or within a reasonable time if no time is specified) to comply with any information request under Chapter 3 of Part 1 of the Bill, (b) knowingly or recklessly give any information or produce any document which is false in a material particular in response to such a request, (c) with intent to evade the provisions of Chapter 3, destroy, mutilate, deface, conceal or remove any document, or (d) otherwise intentionally obstruct the Treasury in the exercise of their powers under Chapter 3 (*subsection (1)*). *Subsection (2)* provides that where a person is convicted of any such offence, the court may make an order requiring that person to comply with the request.

Disclosure of information by Treasury

Clause 19 - General power to disclose information

55. This clause gives the Treasury power to disclose any information obtained by them in exercise of their powers under Part 1 of the Bill to various people and entities, including (a) any police officer, (b) any person holding or acting in any office under or in the service of the Crown in right of the Government of the UK, the Scottish Administration, the Northern Ireland Administration or the Welsh Assembly Government, the Channel Island States and the governments of the Isle of Man or any British overseas territory, (c) the Legal Services Commission and equivalent bodies in Scotland and Northern Ireland and (d) the respective financial regulators in the UK, Jersey, Guernsey and the Isle of Man (*subsection (1)(a) to (d)*).
56. The Treasury may also disclose any information to any organ of the UN or any person in the service of the UN, the Council of the European Union, the European Commission or the Government of any country for the purpose of giving assistance or cooperation, pursuant to certain UN Security Council Resolutions (defined in clause 36(2) to (4)) (*subsection (1)(e)*).
57. Information can be disclosed with a view to instituting, or otherwise for the purposes of, any proceedings in the UK for an offence under Part 1 of the Bill or in any of the Channel Islands, the Isle of Man or any British overseas territory for an offence under a similar provision in any such jurisdiction (*subsection (1)(f)*).

58. *Subsection (1)(g)* further allows information to be disclosed to any third party with the consent of a person who, in their own right, is entitled to the information or to possession of the document, copy or extract (*subsection (2)* defines “in their own right”).

Other

Clause 20 – Co-operation with UK or international investigations

59. Clause 20 requires the Treasury to take such steps as they consider appropriate to co-operate with any investigation, in the UK or elsewhere, relating to the funds, economic resources or financial transactions of a designated person.

Clause 21 – Application of provisions

60. This clause includes some general provisions, including (a) clarification that nothing done under Chapter 3 of Part 1 of the Bill is to be treated as a breach of any restriction imposed by statute or otherwise (*subsection (1)*), (b) provision that nothing in Chapter 3 of Part 1 of the Bill authorises a disclosure by the Treasury that contravenes the Data Protection Act 1998 or is prohibited by Part 1 of the Regulation of Investigatory Powers Act 2000 (*subsection (2)*), (c) clarification that no solicitor or counsel is required to produce any privileged information or document (*subsection (3)*), (d) provision that the Chapter is not to be read as limiting any other powers the Treasury has to disclose information (*subsection (4)*) and (e) stipulating that nothing in the Chapter is to be treated as limiting the powers of the Treasury to impose conditions in connection with the discharge of their functions under clause 13 (licences) (*subsection (5)*). *Subsection (6)* provides a definition of ‘privileged information’ for the purpose of this clause.

CHAPTER 4 – SUPPLEMENTARY PROVISIONS

Supervision of exercise of powers

Clause 22 – Review of decisions by the court

61. Clause 22 provides for the review and setting aside of any decisions made by the Treasury in connection with their functions under Part 1 of the Bill. Under *subsection (2)*, any person affected by such a decision may apply to the High Court or, in Scotland, the Court of Session, for the decision to be set aside.
62. *Subsection (3)* specifies that in determining whether a decision should be set aside, the court shall apply the principles applicable on an application for judicial review. If the court decides that a decision should be set aside, the court may make any order, or grant any relief, that may

be made or given in judicial review proceedings (*subsection (4)*), although if the court sets aside a decision to make a designation, it is obliged to quash that designation (*subsection (5)*).

Clause 23 – Review of decisions by the court: supplementary

63. This clause makes additional provision about proceedings in the High Court or the Court of Session (a) on an application under clause 22 (review of decisions by the court) or (b) on a claim arising from any matter to which such an application relates (“review proceedings”).
64. *Subsection (1)* inserts paragraph 2(bc) of Schedule 1 to the Senior Courts Act 1981. This ensures that review proceedings will be allocated to the Queen’s Bench Division.
65. *Subsection (2)* inserts section 18(1)(dc) of the Regulation of Investigatory Powers Act 2000 (“RIPA”). 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 paragraph (1)(dc) will enable the disclosure of intercepted communications in review proceedings.
66. *Subsection (3)* inserts reference to section 18(1)(dc) of RIPA into section 18(2)(zb) of that Act. This provides that the exception created by *subsection (2)* does not extend to disclosure to parties to proceedings, other than the Treasury or persons appointed as special advocates.
67. *Subsection (4)* applies sections 66 to 68 of the Counter-Terrorism Act 2008 in relation to review proceedings as they apply in relation to financial restrictions proceedings within the meaning of section 65 of that Act. These sections were introduced to make provision about the rules of court for applications to set aside decisions under the 2006 Order and similar Orders. They require the maker of the rules of court to have regard to both the need for a proper review of the decision subject to challenge, and the need to ensure that disclosures are not made where this would be contrary to the public interest. They also contain provisions requiring rules of court to include rules in relation to applications by the Treasury to withhold material from disclosure and provisions relating to the appointment of a special advocate in financial restrictions proceedings. 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 the proceedings (including any appeal) in circumstances where that party and his own legal representative are excluded from the proceedings. This would be necessary in review proceedings where, for example, closed source evidence is adduced. The special advocate is appointed by the appropriate law officer. Rules made under sections 66 and 67 of the Counter-Terrorism Act form Part 79 of the Civil Procedure Rules.

Clause 24 – Treasury report on operation of Part 1

68. Clause 24 requires the Treasury to prepare and lay before Parliament a report about the exercise of the powers conferred on them by Part 1 of the Bill on the next 31 March after Part 1 comes into force and every three months thereafter.

Clause 25 – Independent review of operation of Part 1

69. This clause requires the Treasury to appoint a person to review the operation of Part 1 of the Bill and for that person to carry out such a review after a period of 9 months after Part 1 of the Bill is passed and every subsequent 12 month period (*subsections (1) and (2)*). The reviewer must send the Treasury a report as soon as practicable after completion of the review (*subsection (3)*) and the Treasury must lay such report before Parliament (*subsection (4)*). The Treasury may pay the expenses and allowances of the reviewer (*subsection (5)*).

Offences

Clause 26 – Penalties

70. Clause 26 provides for penalties in relation to breaches of the prohibitions in Part 1 of the Bill. *Subsection (1)* provides that a person guilty of any of the offences under section 7, 8, 9, 10, 11 or 14 is, on conviction on indictment, liable to a maximum of 7 years' imprisonment or to a fine or to both or, on summary conviction, to imprisonment for a term not exceeding the "relevant maximum" (this term is defined in *subsection (3)*) or to a fine not exceeding the statutory maximum (which is currently set at £5,000) or to both.
71. *Subsection (2)* provides that a person guilty of an offence under clause 6 (confidential information) or clause 13 (licences) is liable, on conviction on indictment, to not more than 2 years' imprisonment or to a fine or to both or, on summary conviction, to imprisonment not exceeding the "relevant maximum" or to a fine not exceeding the statutory maximum or to both.
72. *Subsection (3)* defines "the relevant maximum" for the purposes of *subsections (1) and (2)* as being 12 months in England and Wales (or 6 months if the offence was committed before the commencement of section 154(1) of the Criminal Justice Act 2003), 12 months in Scotland and 6 months in Northern Ireland.
73. *Subsection (4)* provides that a person guilty of an offence under clause 15(5) (failure by relevant institutions to comply with reporting obligations) or 18 (failure to comply with request for information) is liable on summary conviction to imprisonment for a term not exceeding the "relevant maximum" or to a fine not exceeding level 5 on the standard scale (£5,000) or both. For the purposes of *subsection (4)*, the "relevant maximum" is, in England and Wales, 51 weeks (or 6 months if the offence was committed before the commencement of

section 281(4) and (5) of the Criminal Justice Act 2003) and, in Scotland or Northern Ireland, 6 months (*subsection (5)*).

Clause 27 – Extra-territorial application of offences

74. This clause provides that an offence under Part 1 of the Bill may be committed by a UK national or UK incorporated body even where the conduct in question (which may include acts or omissions) is wholly or partly outside the UK. *Subsection (2)* defines “UK national” as a British citizen, a British overseas territories citizen, a British National (Overseas), a British Overseas citizen, a person who under the British Nationality Act 1981 is a British subject or a British protected person within the meaning of that Act. *Subsection (3)* further provides that the application of clause 27 can be extended by way of Order in Council to bodies incorporated or constituted under the law of any of the Channel Islands, the Isle of Man or any British overseas territory. *Subsection (6)* specifies that nothing in clause 27 affects any criminal liability arising otherwise than under clause 27.

Clause 28 – Liability of officers of body corporate etc

75. Clause 28 provides that if an offence under Part 1 of the Bill is committed by a person other than a natural person, such as a body corporate, partnership or other unincorporated body, with the consent or connivance of any officer of that body or partnership, that officer as well as the body or partnership is guilty of the offence and is liable to be proceeded against and punished accordingly.

Clause 29 – Jurisdiction to try offences

76. Clause 29 provides that proceedings against a person in relation to offences under Part 1 of the Bill committed outside the UK may be taken at any place in the UK and the offence shall, for all incidental purposes, be treated as having been committed there (*subsection (1)*). *Subsection (2)* specifies that in the application of *subsection (1)* to Scotland, any such proceedings may be taken in any sheriff court district in which the person is apprehended or in custody or in such sheriff court district as the Lord Advocate may determine. *Subsection (3)* defines “sheriff court district” by reference to the definition in section 307(1) of the Criminal Procedure (Scotland) Act 1995).
77. *Subsection (4)* inserts into section 28(2) of the Counter-Terrorism Act 2008 (jurisdiction to try offences committed in another part of the UK: offences to which the section applies) reference to offences under this Part of the Bill, which has the effect of ensuring that proceedings in relation to offences under this Part of the Bill committed in the UK may be taken at any place in the UK and the offence shall, for all incidental purposes, be treated as having been committed there.

Clause 30 – Time limit for proceedings for summary offences

78. This clause specifies that in England and Wales, Scotland and Northern Ireland summary proceedings in relation to an offence under clause 15(5) or 18 may be brought within three years from the time the offence was committed and within 12 months from the date on which evidence sufficient in the opinion of the prosecutor (or, in Scotland, the Lord Advocate) to justify the proceedings came to such person's knowledge.

Clause 31 – Consent to prosecution

79. Clause 31 provides that proceedings for an offence under Part 1 other than for an offence under clause 15(5) or 18 may not be instituted except by or with the consent of, in England and Wales, the Attorney General and, in Northern Ireland, the Advocate General (*subsection (1)*). *Subsection (2)* provides that nothing in clause 31 prevents the arrest or remanding in custody or on bail of a person charged with an offence under that Part.

Clause 32 – Procedure for offences by unincorporated bodies

80. Clause 32 deals with proceedings in relation to offences committed under Part 1 of the Bill by a body which is not a body corporate. *Subsection (1)* specifies that a fine imposed on an unincorporated body on its conviction of an offence under that Part must be paid out of the funds of the body. *Subsection (3)* specifies that in England, Wales and Northern Ireland proceedings for an offence alleged to have been committed by such a body must be brought in the name of the body rather than in that of any of its members. *Subsection (4)* makes provision for unincorporated bodies to be treated in the same way as bodies corporate in such proceedings, including in relation to rules of court governing the service of documents and in relation to various legislative provisions in England and Wales and Northern Ireland which relate to procedures in legal proceedings against corporations (for example, the appointment of a representative to enter a plea on behalf of such body). *Subsection (5)* applies similar provisions in Scotland to the provisions on service of documents set out in *subsection (4)(a)* and applies section 70 of the Criminal Procedure (Scotland) Act 1995 (which contains provisions on the service of documents to bodies corporate) to unincorporated bodies. Section 70 is proposed to be amended by the Criminal Justice and Licensing (Scotland) Bill 2010 to extend the provisions to unincorporated bodies. *Subsection (6)* anticipates that this provision will come into force and render *subsection 5(b)* unnecessary.

Interpretation

Clause 33 – Meaning of “funds” and “economic resources”

81. This clause defines what is meant for the purposes of Part 1 of the Bill by “funds” and “economic resources”, such terms being integral to the prohibitions in clauses 7 to 11 of the Bill.

Clause 34 – Meaning of “financial services”

82. This clause defines what is meant for the purposes of Part 1 by “financial services”. This is a key term for the purposes of the prohibitions in clauses 8 and 9 of the Bill.

Clause 35 – Meaning of “relevant institution”

83. This clause defines what is meant for the purposes of Part 1 by “relevant institution”. This is a key term for the provisions in clause 15 (reporting obligations of relevant institutions). The definition of relevant institutions includes those authorised under the Financial Services and Markets Act 2000 to carry on a regulated activity (as defined under section 22 of that Act), and Money Exchange bureaux.

Clause 36 – Interpretation: general

84. This clause contains definitions for the purposes of Part 1 of the Bill, including a definition of “the relevant Security Council resolutions” (*subsection (2)*). *Subsection (3)* gives the Treasury the power, exercisable by Order, to amend the list of relevant Security Council resolutions in that definition.

Miscellaneous

Clause 37– Service of notices

85. Clause 37 sets out the steps the Treasury must take in order to serve notice on a person in relation to the making, issuing, variation and revocation of a designation or a licence.

Clause 38 – Crown application

86. Clause 38 provides that the Crown is bound by the provisions of Part 1 of the Bill (*subsection (1)*) but will not be held criminally liable if it contravenes any such provision (*subsection (2)*). A person may, if it appears to the court that he or she has an interest, apply to the court to declare unlawful any act or omission of the Crown that constitutes a contravention of a provision of Part 1 of the Bill (*subsection (3)*). *Subsection (4)* ensures that nothing in clause 38 affects Her Majesty in her private capacity (*subsection (5)* defines “her private capacity” by reference to section 38(3) of the Crown Proceedings Act 1947).

Clause 39 - Consequential amendments, repeals and revocations

87. Clause 39 introduces Part 1 of Schedule 1 which contains amendments consequential on Part 1 of the Bill. The three Regulations referred to in Part 1 of Schedule 1 each refer to offences under the 2009 Order. These consequential amendments replace references to offences under the 2009 Order with the reference to the equivalent offences under Part 1 of this Bill.

88. Clause 39 also introduces Part 1 of Schedule 2 which contains repeals and revocations consequential on Part 1 of this Bill. The repeals include the repeal of the 2001 Order, the 2006 Order and the 2009 Order, and the repeal of ancillary provisions in other Orders and Regulations. The Temporary Provisions Act is also repealed (although clause 48(2) provides that certain provisions which have effect as part of the law of Guernsey, Jersey, the Isle of Man and the overseas territories shall remain in force until 31st March 2011).

Clause 40 – Transitional provisions and savings

89. *Subsection (1)* provides that the Temporary Provisions Act no longer has effect when Part 1 of this Bill comes into force. Section 2 of that Act provided that certain acts or omissions by persons other than the Treasury in the period 4th February 2010 to 10th February 2010 are to be treated as lawful. *Subsection (2)* makes clear that even when section 2 of that Act ceases to have effect such acts or omissions will continue to be treated as lawful. *Subsection (3)* ensures that *subsection (2)* is to be read alongside section 16(1) of the Interpretation Act 1978, which provides that the repeal of an Act does not affect the operation of the Act while it was in force. Section 1 of the Temporary Provisions Act deems certain Orders validly made under section 1 of the United Nations Act 1946 and decisions made under those Orders to have effect. *Subsection (4)* applies section 16 of the Interpretation Act to those Orders so that notwithstanding the repeal of section 1 of the Temporary Provisions Act, decisions under the Orders will continue to have had effect while section 1 was in force. *Subsection (5)* provides that after the coming into force of Part 1 of the Bill, any act or omission by the Treasury under the 2009 Order will be deemed to be an act or omission under the corresponding provision in the Bill. *Subsection (6)* makes it clear that *subsection (5)* includes any directions made, licences granted or requests for information made under the 2009 Order which remain in force immediately before Part 1 of the Bill comes into force. *Subsection (7)* states that the deeming provisions in *subsections (5)* and *(6)* have effect notwithstanding that the 2009 Order was not validly made under the United Nations Act 1946. *Subsection (8)* provides that any such ‘deemed’ designation ceases to have effect three months after Part 1 of the Bill comes into force unless renewed or revoked before then. *Subsection (9)* provides that the references in the Regulations in Part 1 of Schedule 1 to sections 7, 8, 9, 11 or 14 of Part 1 of this Bill are to be read as including references to the corresponding provisions under the 2006 Order and the 2009 Order for the period the Temporary Provisions Act was in force.

Clause 41 – Power to repeal Part

90. This clause provides that the Treasury must lay before Parliament a statutory instrument to repeal part or all of Part 1 of the Bill (as appropriate) if the UN Security Council takes any decision that has the effect of terminating (permanently and without replacement), in whole or in part, the operation of the relevant Security Council Resolutions that require the maintenance of an asset-freezing regime.

PART 2 – TERRORIST FINANCING, MONEY LAUNDERING ETC

Directions in particular cases

Clause 42 – Directions to branches of credit institutions and financial institutions

91. Directions under Schedule 7 to the Counter-Terrorism Act 2008 (see paragraph 10 above) may be given to a person operating in the financial sector i.e. a credit institution or financial institution, where the institution is a UK person or is acting in the course of business carried on by it in the UK (paragraphs 3 to 5 of that Schedule). The amendments made by clause 42 ensure that such directions can apply to branches of a relevant person, wherever located.

General directions and other requirements

Clause 43 – Directions in relation to subsidiaries

92. Directions under Schedule 7 may impose requirements on credit or financial institutions in relation to their transactions or business relationships with certain persons. The amendment made by this clause will allow such requirements to be imposed in relation to a person who is a subsidiary of a person incorporated in a country of concern (see paragraph 10 above) or carrying on business there.

Clause 44 – Circumventing requirements of Schedule 7 directions

93. This clause introduces a prohibition on knowing and intentional circumvention of the requirements of a direction under Schedule 7. A civil penalty may be imposed in response to breach of the prohibition, and breach of the prohibition is a criminal offence.

Minor amendments and repeals

Clause 45 – Northern Ireland credit unions

94. Schedule 7 makes provision for the supervision and enforcement of relevant persons' compliance with the requirements of a direction. Clause 45 makes amendments to remove those functions in relation to credit unions in Northern Ireland from the Department for Enterprise, Trade and Investment in Northern Ireland. The functions in relation to Northern Ireland credit unions will become exercisable by other enforcement authorities, and arrangements will be made to ensure that they are exercised by the Financial Services Authority.

Clause 46 – Consequential amendments and repeals

95. Clause 46 introduces Part 2 of Schedule 1, which makes amendments consequential on Part 2 of the Bill, and Part 2 of Schedule 2, which contains repeals consequential on Part 2 of the Bill.

PART 3 – FINAL PROVISIONS

Extent etc.

Clause 47 – Extent

96. This clause sets out which provisions of the Bill form part of the law of which jurisdictions.

Clause 48 – Channel Islands, Isle of Man and British overseas territories

97. *Subsection (1)* provides a power to make an Order to extend the provisions of Part 1 of the Bill to any of the Channel Islands, the Isle of Man or any of the British overseas territories. *Subsection (2)* provides that certain provisions of the Temporary Provisions Act (which deem certain Orders validly made under the United Nations Act 1946) which have effect as part of the law of Guernsey, Jersey, the Isle of Man and the overseas territories shall remain in force until 31st March 2011. The purpose of this extension of the Temporary Provisions Act is to provide time for the provisions of Part 1 of this Bill to be extended to such of the territories or islands as seek to have such provisions, or for the territories and islands to enact their own provisions should they decide to do so.

Commencement and short title

Clause 49 - Commencement

98. This clause sets out that Part 1 of the Bill and most of Part 2 will come into force on the day after the day on which Royal Assent is given. *Subsection (2)* provides that clause 45, which provides for the transfer of supervisory and enforcement functions in relation to credit unions in Northern Ireland, and related provisions, are to be commenced by order.

Clause 50 – Short title

99. This clause sets out the short title to the Bill.

FINANCIAL EFFECTS OF THE BILL

100. Part 1 of the Bill imposes specific reporting requirements on relevant institutions under clause 15. Relevant institutions will already have systems in place in respect of obligations arising under the 2009 Order, the EC Regulation and other EC Regulations imposing financial restrictions on persons. Similar systems and controls are also required to meet other obligations arising under money laundering legislation, notably the Proceeds of Crime Act 2002. Clause 15 will continue the reporting obligations that exist in the 2009 Order on relevant institutions except in relation to historic information. The Treasury have been working with financial institutions to try to identify types of information which the Treasury

should seek to provide to make it quicker and easier for those institutions to undertake the necessary searches.

101. The asset-freezing regime set out in Part 1 of the Bill will be operated by the Treasury. Most of the provisions in the that Part are a substitute for requirements under the 2009 Order and the other UN Terrorism Orders, and are part of a wider requirement to implement asset-freezing obligations (for example, in relation to sanctions against other countries pursuant to UN Security Council Resolutions and EC Regulations). Clause 25 requires the Treasury to appoint a person to review the operation of Part 1 of the Bill and allows the Treasury to pay the expenses of the reviewer and such allowance as the Treasury may determine. The provisions in Part 1 of the Bill should not result in any significant additional public expenditure.
102. The provisions in Part 2 of the Bill make amendments to the Treasury's powers to impose financial restrictions under Schedule 7 to the Counter-Terrorism Act 2008. Financial and credit institutions should already have systems in place in respect of restrictions imposed under the Act and these should be sufficient in relation to any restrictions imposed under the amended powers. Accordingly there should be no significant additional expenditure for financial institutions.
103. Part 2 of the Bill should not result in any significant public expenditure.

PUBLIC SECTOR MANPOWER

104. There are no public sector manpower implications arising from the Bill.

SUMMARY OF IMPACT ASSESSMENT

105. The impact assessment is published with the Bill. Members of Parliament can obtain a copy of the impact assessment from the Vote Office³.
106. The benefits are not quantifiable. The Government's policy objective is to help prevent terrorist attacks by preventing frozen funds becoming unfrozen and used for terrorist purposes. Disrupting terrorist-related activities contributes to national security and preventing the UK financial sector from being unknowingly used to facilitate terrorism-related activities. Part 2 of the Bill makes amendments to financial restrictions powers which can be used to tackle the risk posed to the UK by money laundering, terrorist financing and proliferation activities.

³ The impact assessment is also available on HM Treasury's website – hm-treasury.gov.uk/consult_ria_index.htm.

COMPATIBILITY WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS

107. 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. Lord Sassoon has made the following statement:

“In my view the provisions of the Terrorist Asset-Freezing etc. Bill [HL] are compatible with the Convention rights.”

108. The Bill confers a number of powers on the Treasury. In exercising those powers, the Treasury will be subject to the duty imposed by section 6(1) HRA not to act in a way that is incompatible with the Convention rights (subject to the limited exceptions in section 6(2)).

109. The provisions of Part 2 of the Bill, save in one respect, do not raise additional human rights issues beyond those already arising from Schedule 7 to the Counter-Terrorism Act 2008. The effect of the amendments is to increase the number of persons who may be required to comply with the requirements of a direction, or against whom restrictions may be imposed, and whose rights may potentially be affected by a direction.

110. Set out below are details of the most significant human rights issues thought to arise from the Bill. In each provision where such issues are engaged the Treasury have sought to balance human rights considerations against the public interest purpose behind the provisions.

Protocol 1, Article 1 (protection of property)

111. Article 1 of the First Protocol (“A1/P1”) of the Convention provides that every person (natural or legal) is entitled to the peaceful enjoyment of his possessions and that no one shall 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.

112. The effect of a direction designating a person is that the person’s funds and economic resources are frozen. Further provisions prohibit making funds, economic resources or financial services available to or for the benefit of a designated person. These provisions can include restrictions on the enjoyment of the property of others (notably through restrictions on the provision of such property to a designated person).

113. The prohibitions on the designated person impose either a deprivation of property or at least a control of the use of their property. The Treasury consider that (a) the interference is lawful because the prohibitions are sufficiently accessible and certain, (b) the interference pursues a legitimate aim which is in the general interest, namely the disrupting of persons suspected of involvement in terrorist activity from financing such activity, whether in the UK or abroad, and (c) a fair balance has been struck between the public interest and the interests of the

property owner, in particular by means of a licensing system which allows controlled access to funds.

Article 8 (respect for privacy and family life)

114. The clauses include a number of provisions which interfere with a person's right to respect for private and family life. Any interference by a public authority must be justified as being in accordance with the law and 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.
115. The collection of personal information is an interference with the right to respect for private life. The disclosure of information – such as the fact of a direction – by a public body will also involve an interference with the right to respect for private life.
116. The Treasury consider that there is a clear national security or public safety basis for such interferences and that they are in accordance with the law on the basis that they are clear and foreseeable. The decisions include clear rights to challenge decisions involving interferences and the Treasury believe that these provisions offer adequate and effective safeguards against arbitrary interference.

Article 6 (right to a fair trial)

117. Article 6(1) of the Convention entitles an individual to a fair and public hearing in the determination of his civil rights or obligations or any criminal charge against him. A designation made under clause 2 is likely to be a decision which impacts upon civil rights and obligations (notably the interference with rights to free enjoyment of property). Whilst not expressly set out as a qualified right, the courts, both domestically and in Strasbourg, have acknowledged some need for qualification. Challenges to decisions under the Bill would not constitute criminal hearings and therefore the express minimum standards in Article 6(3) do not apply
118. Clause 23(4) of the Bill applies particular provisions of the Counter-Terrorism Act 2008 to proceedings brought in respect of decisions of the Treasury under the Bill. Those provisions (similar to provisions in the Prevention of Terrorism Act 2005) were enacted in respect of challenges to asset freezes made under the UN Terrorism Orders. The provisions are directed in part at the use of “closed material” in proceedings and set up a procedure for the appointment of special advocates. The issue of the compatibility of the use of closed material and special advocates with Article 6(1) has been considered a number of times in the UK and in Strasbourg, particularly in connection with control orders. The House of Lords in *Secretary of State for the Home Department v AF (No 3)*⁴ following the decision of the Grand Chamber

⁴ [2009] UKHL 28.

of the European Court of Human Rights at Strasbourg in *A v United Kingdom*⁵, referred to the Grand Chamber's decision that the controlled person had to be given sufficient information about the allegations against him to be able to give effective instructions to the special advocate in respect of the controlled person, and concluded that "provided that requirement was satisfied, there could be a fair trial notwithstanding that he was not provided with the detail or sources of the evidence forming the basis of the allegations" (para 59). Section 67(6) of the Counter-Terrorism Act 2008 provides that the special advocate procedure should not be applied where to do so would be inconsistent with Article 6.

119. Clause 44 introduces into Schedule 7 to the Counter-Terrorism Act 2008 a new prohibition on circumventing the requirements of a direction, and provides for the imposition by supervisory authorities of civil penalties for breaches of this prohibition. This is subject to a right of appeal to an independent tribunal.
120. The Treasury therefore believe that the provisions in the Bill are compatible with Article 6.

COMMENCEMENT DATE

121. Parts 1 and 2 (except for clause 45 and related provisions) will come into force on the day following that on which the Bill obtains Royal Assent. Part 3 will come into force on the day on which the Bill obtains Royal Assent.

⁵ (Application No 3455/05), ruling 20 February 2009.

TERRORIST ASSET-FREEZING ETC. BILL [HL]

EXPLANATORY NOTES

*These notes refer to the Terrorist Asset-Freezing etc. Bill [HL]
as introduced in the House of Lords on 15th July 2010
[HL Bill 15]*

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