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The *Digital Switchover* (*Disclosure of* *Information*) Bill

Bill 3 of 2006-07

On 15 September 2005, the Secretary of State for Culture, Media and Sport confirmed that national switchover to digital terrestrial television would be completed by 2012. The process would take place in stages, with individual ITV regions turning off their analogue broadcasts, beginning with the Border region in 2008.

At the same time, the Secretary of State announced, in broad outline, a financial and practical support scheme to help the most vulnerable households migrate to digital television. The present Bill would facilitate identification of qualifying households by allowing government departments to share relevant information with those administering this “targeted assistance” scheme, notably the BBC.

The Bill is due to have its second reading on 18 December. It is of UK extent.

Gavin Berman, Grahame Danby and Edward White

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Summary of main points

Over 70% of households in the UK receive digital television services via cable, satellite and broadcasts from ground-based, terrestrial, transmitters. A relatively small number benefit from digital television delivered down broadband telephone lines. The remainder of television owning homes continue to rely on analogue signals which can only deliver the five public service channels: BBC One, BBC Two, ITV, Channel 4 / S4C and Five.

The Government's position is that every home should be able to enjoy the benefits of digital television, be those an increased choice of channels or picture quality or free-to-air interactive services such as home shopping, banking, email and internet access. Further justification comes from the economic value associated with more efficient use of radio spectrum.

Widening the geographical coverage of the "Freeview" digital terrestrial broadcasts will necessitate switching off the conventional analogue television signals which compete for spectrum. This digital switchover process will take place in stages, beginning with the Border ITV region in 2008 and ending with Tyne Tees and Ulster in the second half of 2012. This will involve converting existing transmitters and, from the consumer standpoint, obtaining new equipment: either a digital TV or a set top box to convert analogue equipment.

A targeted assistance scheme, established and funded by the BBC, will help people over 75 and those who are registered blind or partially sighted or who have a significant disability. Precise details of how the scheme will operate, and its cost, are linked to the size of the new television licence fee settlement. An announcement on the latter is likely to occur by the end of this year.

It will help the BBC, and its agents, to target assistance with digital switchover if it is given access to government social security information on individuals. The *Digital Switchover (Disclosure of Information) Bill 2006-07* is a data sharing measure to enable the relevant government departments to provide this information to the BBC. As the Bill provides for disclosure in connection with digital switchover, only a subset of social security and war pensions information will be relevant. The precise kinds of information that may be disclosed will be left to secondary legislation.

This ties in with a wider government programme of data sharing aimed at achieving efficiencies in the delivery of public services. There is potential for this to come into conflict with the right to privacy embodied in Article 8 of the European Convention on Human Rights and exemplified by specific provisions in the *Data Protection Act 1998*. The Bill recognises such concerns by making it an offence for certain persons to disclose information supplied under the Bill without lawful authority.

CONTENTS

I	Digital switchover	7
	A. Digital television	7
	B. Coverage	11
	C. Timetable	12
	D. Implementing switchover	13
II	Targeted assistance	15
	A. Establishing a scheme	15
	B. Assistance for vulnerable groups	17
	C. Consultation on equipment requirements	20
	D. Trials	20
	1. Llansteffan & Ferryside Trial	20
	2. Bolton Trial	21
	E. Financing the scheme	22
III	Data sharing and data protection	25
	A. Data sharing	26
	B. Data protection and privacy	28
	1. Data Protection Act 1998	28
	2. Human Rights Act 1998	30
	3. Duty of confidentiality	31
	4. Administrative powers to disclose information	31
	C. Recent developments	32
IV	The Bill	33

I Digital switchover

A. Digital television

Conventional television broadcasts use radio waves to carry an analogue (continuously varying) signal. The development of digital broadcasting allows more efficient use of radio frequencies, thus enabling more or better services to be made available such as more channels, more interactivity or high definition TV. At present, digital terrestrial television (DTT) can reach 73% of all UK households via the “Freeview” service. This percentage cannot be increased significantly without switching off the powerful analogue transmissions that compete for radio spectrum.

The main alternative platforms for delivering digital television are satellite and cable. About 50,000 homes, the majority in London, receive television along broadband (asymmetric digital subscriber line, ADSL) telephone lines. Apart from a relatively small number (700,000) of homes with Sky’s free-to-view (FTV) satellite service, these alternative platforms all involve subscription payments. In its first report of 2004-05, *A public BBC*, the Culture, Media and Sport Committee recommended that the BBC develop its Freesat proposal as a free-to-view alternative to Freeview. This view has been supported by its successor Committee in its second report of 2005-06, *Analogue Switch-off: A signal change in television*.

Ofcom produces the authoritative guide to digital TV take-up in its quarterly *Communications Market: Digital Progress Report*. The latest of these shows the situation at the end of June 2006.¹

The proportion of the 25.3m TV households in the UK receiving digital television services on their primary set increased slightly from 69.7% at the end of March 2006 to stand at 70.2% by the end of June 2006. As the table below shows the number of households with digital TV equipment exceeded 17.7 million at the end of June 2006.

¹ http://www.Ofcom.org.uk/research/tv/reports/dtv/dtu_2006_q2/dtu_2006_q2.pdf

Platform figures Q2 2006

	Digital Households	
	000s	% of all households
<i>Pay TV digital Subscribers</i>		
Digital cable	2,843	11.3%
Digital satellite (pay)	7,749	30.7%
TV over ADSL	45	0.2%
Total pay TV digital subscribers	10,637	42.1%
<i>Free-to-view (FTV) digital households</i>		
DTT (Freeview) only homes	6,402	25.3%
FTV digital satellite	695	2.8%
Total FTV households	7,097	28.1%
Total UK digital households	17,734	70.2%

Source: Communications Market: Digital Television Progress Report, Q2 2006, OFCOM

In the UK there were approximately 60m TV sets at the end of June 2006 with more than half of these (57.6%) analogue terrestrial.

In April 2006 Ofcom and Digital UK (the body charged with overseeing switchover) launched a continuous tracking study to monitor the UK's conversion to digital TV for switchover. Over 8,300 households are being surveyed and quarterly results are published enabling assessment of the progress toward switchover.

Respondents are questioned on the following six areas:

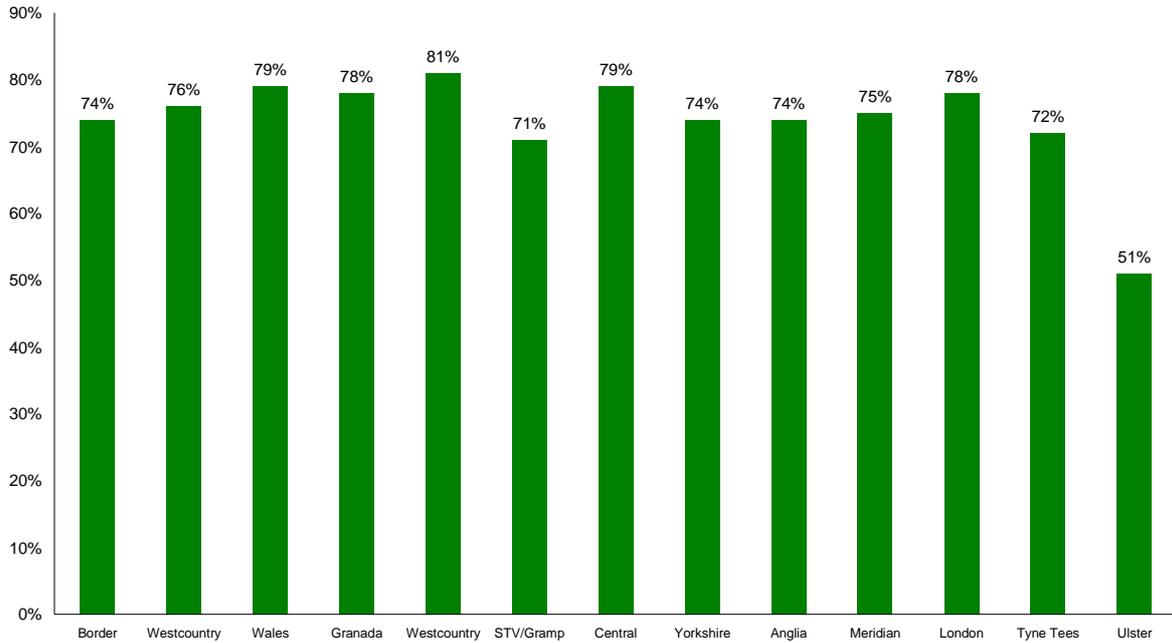
1. Awareness of digital TV and the switchover
2. Understanding of what the 'switchover' is and what individuals need to do
3. Attitudes toward the switchover
4. Intentions to convert to digital TV
5. Conversion rates for primary and other TV sets
6. Satisfaction with digital TV

Copies of the Ofcom/Digital UK Switchover Tracking Survey publications can be found on the Digital UK website.² A summary of the Q3 2006 results are provided below.

The following chart shows the proportion of households, in each TV region, whose primary TV set has been converted to digital.

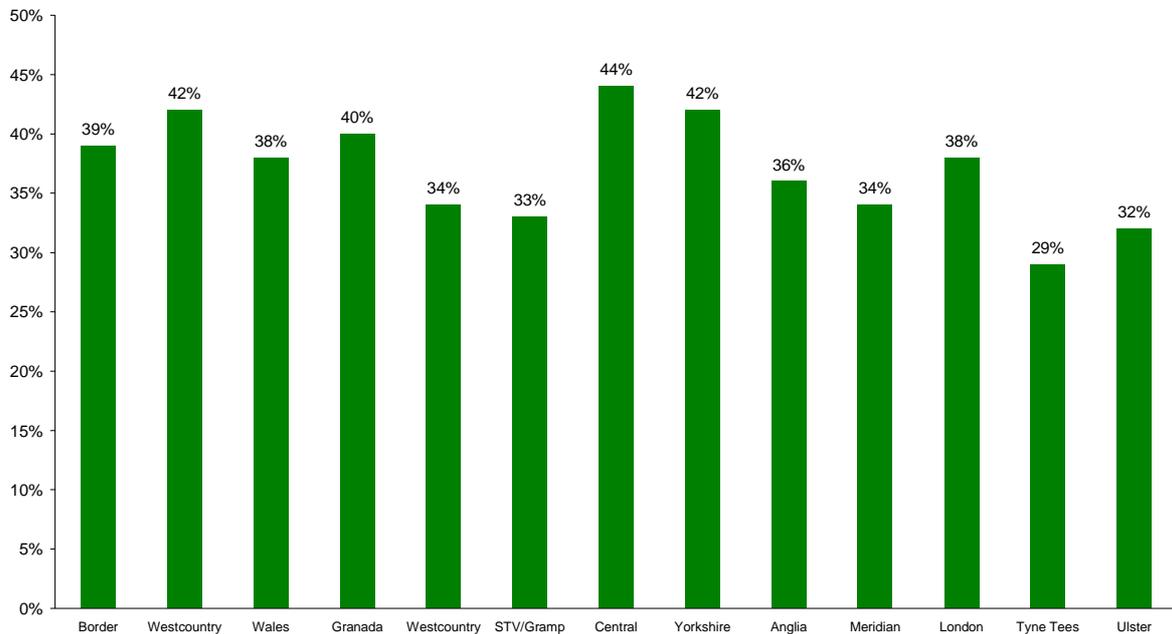
² <http://www.digitaluk.co.uk/en/tracker.html>

Primary set conversion by TV region, Q3 2006



The chart below shows the proportion of households, in each TV region, who have converted all TVs to digital.

Full household conversion by TV region, Q3 2006



The following summarises the primary set conversion rates at Q3 2006:

- There is little difference between higher and lower socioeconomic groups (77% & 74% respectively)

- The rate is 56% among single person households compared to 85% of families with children.
- Of those aged over 75 and eligible for the targeted assistance scheme only 39% had converted their primary TV set.
- Of those disabled people on Disability Living Allowance or Attendance Allowance, therefore eligible for the targeted assistance scheme, 86% converted their primary TV set.

The latest progress report provides some analysis for low income households:

- According to the Tracker figures, 67% of adults aged 65+ are from a low income household compared to 28% of adults aged under 65.
- Digital TV penetration is similar amongst those aged under 65 from low income households when compared with the population as a whole, 72% vs. 76% respectively, implying that low income is not a major barrier to ownership.
- Ownership levels are lower amongst adults aged 65+ from low income households (61%) and amongst adults aged 75+ from low income households (41%), indicating that age is the stronger influencing factor in the decision not to get digital TV in older low income households.
- Awareness of digital TV switchover is considerably lower amongst adults aged under 65 and from low income households than amongst the total population (57% vs. 68%). Older adults from low income households appear to have higher awareness than the younger group, 72% amongst adults 65+ from low income households and 64% amongst adults aged 75+ from low income households (in keeping with the demographic profile of awareness amongst the population as a whole). It should be noted that awareness does not imply understanding.
- Understanding of digital TV switchover is lower amongst adults under 65, 65+ and 75+ from low income households, compared to the total population; 63%, 54%, 44% vs. 75% respectively.
- Adults from low income households aged under 65 and 65+ both feel slightly less positive about switchover than the population as a whole, 63% respond positively or neutrally regarding feelings towards switchover compared with 68% across the population as a whole. The 75+ from low income households group are the least positive, with 58% responding positively/ neutrally. Adults aged under 65 from low income households are also slightly more uncomfortable with the switchover process, with just over a fifth (22%) feeling at least slightly worried by switchover compared with 17% of the total population.
- Slightly more adults (16%) from low income households aged both under 65 and 65+ claim they don't know why switchover is happening compared with 12% of the total population.

B. Coverage

The Government's position is that every home should be able to enjoy the benefits of digital television, be those an increased choice of channels or picture quality or free-to-air interactive services such as home shopping, banking, email and internet access. Further justification comes from the economic value associated with more efficient use of radio spectrum.

The Government is committed to ensuring that terrestrial analogue broadcasting signals are maintained until:

- Everyone who can currently get the main public service broadcasting channels in analogue form (BBC 1 and 2, ITV, Channel 4/S4C and Channel 5) can receive them on digital systems;
- Switching to digital is an affordable option for the vast majority of people;
- As a target indicator of affordability, 95% of consumers have access to digital equipment.³

The absolutist nature of the first of these conditions, coupled with the vagaries of television reception, cast a legitimate doubt as to whether it can be fully satisfied. In a Westminster Hall debate on 5 July 2005,⁴ the then Parliamentary Under-Secretary of State for Culture, Media and Sport, James Purnell, stated that, taking into account technical definitions of what it means to receive television, the Government now has a coverage guarantee of 98.5%. However, this is not the same as saying that the same 98.5% will be covered by digital signals as presently receive analogue. The Culture, Media and Sport Committee drew attention to this in its report on analogue switch-off:

114. Overall, the aim is for DTT to reach 98.5% of the population, the same percentage adjudged to receive analogue terrestrial TV today. However, some people are likely to lose some television services post-switchover, and others will gain, as confirmed by Clive Jones of ITV during oral evidence on 6 December: "The digital map will not completely follow the analogue map. There might be small regional variations. That 1.5% of the population which do not get analogue signals might be a different 1.5% which do not get digital signals." In oral evidence on 13 December, the Chief Executive of Ofcom, Stephen Carter, guessed that a few thousand households would find themselves no longer able to get a terrestrial TV picture after switchover.

115. In May 2004, Ofcom published a report which quantified current levels of coverage achieved by the four main analogue public service channels, BBC One, BBC Two, ITV1 and Channel 4 or S4C. The analogue coverage report gave a value of 98.5% of households with this core coverage. This percentage coverage

³ *Digital Television Action Plan*, Version 6.0, April 2003, deposited paper 03/1094. See also the Appendix to Version 12 of the Plan (October 2004)

http://www.digitaltelevision.gov.uk/pdf_documents/publications/ActionPlanvs12_oct04.pdf

⁴ HC Deb 5 July 2005 c58WH

should be substantially replicated following switchover. It compares to a figure of 99.4% of the population in receipt of free-to-air analogue channels that was cited by the former Secretary of State Chris Smith in 1999. A still lower coverage figure of 90% is expected for commercial multiplexes, which do not carry public service channels.⁵

Research that Ofcom is currently conducting should yield more detailed geographical information on reception throughout the UK.⁶ As a very general rule, households that today receive good analogue television reception should be able to receive digital terrestrial television when switchover takes place (at which point the powerful analogue frequencies can be assigned to digital television).

C. Timetable

Back in September 1999, the Government said digital switchover could start as early as 2006 and be completed by 2010. In July 2004, the Secretary of State announced after consultation with the broadcasters that 2012 was the most appropriate date for completion of switchover. The Government has a manifesto commitment to this completion date:

The success of satellite and cable television in driving take-up of digital shows how changes in technology bring real benefits – in terms of greater choice, and increasingly, in access to services. Our aim is to make those benefits available to all. We will achieve digital switchover between 2008 and 2012 ensuring universal access to high-quality, free-to-view and subscription digital TV. This will happen region by region, and we will make sure that the interests of elderly people and other vulnerable groups are protected.⁷

On 15 September 2005, the Secretary of State for Culture, Media and Sport confirmed that national switchover to digital terrestrial television would be completed by 2012.⁸ The process would take place in stages, with individual ITV regions turning off their analogue broadcasts, beginning with the Border region in 2008 (see the table below).

⁵ Culture, Media and Sport Committee, *Analogue Switch-off*, 29 March 2006, HC 650 2005-06

⁶ HC Deb 11 December 2006 c812W

⁷ *The Labour Party Manifesto 2005*, p98

⁸ DCMS Media Release 116/05, *Tessa Jowell Confirms Digital Switchover Timetable and Support for the Most Vulnerable*, 15 September 2005

Digital Switchover Timetable

	<u>Year of conversion</u>	
Border	2008	2nd half
West Country	2009	1st half
HTV Wales	2009	2nd half
Granada	2009	2nd half
HTV West	2010	1st half
Grampian	2010	1st half
Scottish TV	2010	2nd half
Yorkshire	2011	1st half
Anglia	2011	1st half
Central	2011	1st half
Meridian	2012	1st half
Carlton/LWT	2012	1st half
Tyne Tees	2012	2nd half
Ulster	2012	2nd half
Channel	To be confirmed	

Source: <http://www.digitaluk.co.uk/en/when.html>

The regional sequence for switchover has been determined by three technical factors: interference management, infrastructure and engineering resources, and international spectrum negotiations. The Channel Islands, not formally part of the UK's digital switchover plan, are due to switch over from analogue to digital broadcasts in 2013. Note that the above dates refer to the scheduled beginning of digital switchover in each ITV region. In the Border and STV Central (formerly Scottish Television) regions, the digital switchover process will continue into the following year. On 20 July 2006, the Government announced that the analogue television signal would be switched off in Whitehaven ahead of the rest of the Border region, in autumn 2007. This will involve converting the Whitehaven transmitter to broadcast digital signals, bringing Freeview to some 25,000 homes. Digital UK, the not-for-profit, independent group set up to oversee digital switchover, will run this pilot.⁹

D. Implementing switchover

Digital UK, the organisation charged with co-ordinating the country's switchover to digital television, was launched as SwitchCo on 13 April 2005. It was formed at the Government's request by the public service broadcasters, BBC, ITV, Channel 4, Five, Teletext and S4C, and the transmission companies, National Grid Wireless and SDN, all of whom are represented on its management board and provide funding. Also on the board are two positions representing the interests of the supply chain: television equipment manufacturers, retailers and aerial manufacturers and installers.

As part of its inquiry into analogue switch-off, the Culture, Media and Sport Committee took detailed evidence on the technical implementation of the switch over to digital

⁹ DCMS Media Release 105\06, *Whitehaven Chosen for National Switchover Flagship Project*, 20 July 2006

transmissions.¹⁰ A section of the Committee's report on project management considered the variety of roles that different organisations would be playing:

104. Annex E of Digital UK's written evidence provided an overview of the digital switchover programme structure. Implementation of switchover involves nine work streams, six of which are led by Digital UK (the Government and Ofcom lead the others which cover regulation and targeted assistance). The Digital UK Programme Office will develop monthly progress reports for a switchover steering group comprising representatives from Digital UK, Government and Ofcom. Overall, we have been impressed by the work Digital UK has undertaken, particularly in view of its limited resources. **However, we are concerned that the complexity of the management structure leaves lines of accountability blurred. There need to be clearer chains of command with precise responsibilities specifically defined. We also believe that there is a danger that Digital UK will lack the authority and resources to manage the interests of a diverse group of industry stakeholders should their bonds of mutual self-interest come under strain.** In the event of any dispute, the Chairman of Digital UK, Barry Cox, told us: "the people who resolve it would be either Ofcom or Government because they are the people to whom the broadcasters are accountable."

The Committee also noted that the BBC would be a "key agent for the delivery of switchover." Previously, the Government's Green Paper, *A strong BBC, independent of Government*, published on 2 March 2005, had stated: "One of the conditions of the new licence fee settlement will be that the BBC should play a leading role in the process of switching Britain over fully from analogue to digital television." The subsequent White Paper, *A public service for all: the BBC in the digital age* (Cm 6763, March 2006) confirmed the BBC's role in digital switchover:

A key outcome of digital switchover will be to ensure that all licence fee payers can receive the BBC's digital services. It is therefore right that the BBC should take a leading role in making digital switchover happen.

Under the new Charter and Agreement, the BBC's contribution will fall into three key areas: extending the digital network, informing the public and help for the most vulnerable TV viewers.

A targeted assistance scheme, established and funded by the BBC, will provide extra help with switchover for people over 75 and for those who are registered blind or partially sighted or who have a significant disability. Background on this is given in the next section of this paper. A DCMS media release of July 2006 noted: "More details of how the scheme will operate will be made available when the new licence fee settlement is announced later in the year."¹¹

¹⁰ Culture, Media and Sport Committee, *Analogue Switch-off: A signal change in television*, 29 March 2006, HC 650 2005-06

¹¹ DCMS Media Release 105\06, *Whitehaven Chosen for National Switchover Flagship Project*, 20 July 2006

II Targeted assistance

The effects of a digital switchover on the elderly or other vulnerable groups were raised as concerns during the initial development of digital television services in the UK. In early 1998 the Government was questioned on the provision of subsidised set top boxes for certain groups and it became clear that some form of assistance would be required to provide everyone with access to digital television after the analogue switch-off.¹²

A. Establishing a scheme

It was with the establishment of the digital television Consumer Expert Group that the issue was first addressed by Government. The Consumer Expert Group was appointed by the then Broadcasting Minister, Lord McIntosh, to advise Government on consumer issues relating to digital switchover on 17th June 2003. In a speech to the Westminster Media Forum he said, at the time.

“We have made it clear from the start that the interests, needs and concerns of consumers are at the heart of our plans to switch to digital television. We have set criteria relating to affordability and accessibility and welfare of consumers ...

...We cannot simply shift from a criteria-based approach to the announcement of a firm date, without knowing whether the interests of consumers are fully safeguarded.

“The Group will ensure that the public’s concerns are a continuing, integral part of the decision-making process. I look forward to listening to their views on the issues that matter to viewers on the switch to digital television.”¹³

In October 2004 the Group published their report *Persuasion or Compulsion? Consumers and analogue switch-off*. It recommended a number of measures to protect vulnerable consumers during analogue switch-off and advised the Government to continue working with the Group and other organisations in developing advice and assistance. The report’s summary sets this out:

Affordability

The affordability test should be revised as follows:

The whole household cost of converting to digital television, including reception equipment and installation where necessary, should be affordable to households on low and fixed incomes.

95% of those on low and fixed incomes should have adopted digital television before switchover takes place.

¹² HC Deb, 21 Jan 1998, c538W.

¹³ DCMS Press Notice 62/2003, *Andrew McIntosh Invites Consumer Experts To Advise On Switch To Digital Television*, 17th June 2003.

The Government should work with specialist consumer representatives to identify and target low income and special needs groups for the purposes of the test and assistance scheme.

Before switchover is announced:

Improved information about the likely cost of switchover, including the cost of converting additional TV sets and recording equipment, should be provided to consumers.

Specific measures should be put in place to assist low income and special needs groups to switch to digital television. These plans should include clear criteria identifying those who will be eligible for assistance under the scheme, and should provide them with assistance for the full costs of converting one set, including the cost of aerial replacement, installation and VCR conversion. Such assistance should be available immediately.

Before switchover takes place:

Manufacturers should be encouraged to develop low-cost conversion options, in particular for second sets and VCRs.

Government should ensure that the full range of access services and features are available via affordable digital equipment.

[...]

Accessibility

Before switchover is announced:

Specific plans should be in place to address the needs of disabled people before switchover actually takes place.

Any public information campaign or logo scheme should be fully accessible to all consumers, and consumers should be able to access specific advice and information about accessibility issues associated with digital TV.

Before switchover takes place:

There must be a choice of fully accessible digital television receivers, for all platforms and all digital equipment should include basic access features.

Outstanding accessibility issues associated with electronic programme guides and menus, remote controls, and connectivity must be resolved.

Government should ensure that the full range of access services is available via affordable digital equipment.¹⁴

¹⁴ DCMS, *Persuasion or Compulsion? Consumers and analogue switch-off A Report to the Broadcasting Minister by the Consumer Expert Group*, October 2004

B. Assistance for vulnerable groups

In September 2005, at the same time as announcing its digital switchover timetable, the Government also announced a support scheme promising that the most disadvantaged will receive assistance with switchover, when the time comes.¹⁵ The assistance is detailed on the DTI's Digital Television website:

This assistance will be provided to

- (a) households where someone is aged 75 or over; and
- (b) households with people with severe disabilities (defined as those people eligible for either Disability Living Allowance or Attendance Allowance or equivalent benefits); and
- (c) households with one person registered as blind or partially sighted.

Assistance will consist of providing the necessary equipment to convert one TV set and the relevant help to install and use such equipment, including where necessary provision of appropriate set-top aerials or aerial upgrades.

This help will be free for the poorest eligible households those on Income Support, Job Seekers' Allowance or Pension Credit. We will charge a modest fee to others.

The equipment provided needs to be easy to use and to allow consumers to get all the services they have now and all the specific functionalities they need, such as subtitles or audio-description. The scheme itself needs to be easy to access and be designed around the specific needs of those who will need assistance.

We envisage the assistance scheme being managed by an organisation, as yet not specified, which will contract with one or more companies for the installation service, reflecting the fact that those eligible for assistance will be able to choose between the different platform offerings. The installation service providers may be responsible for providing the necessary consumer equipment. This will include set top boxes but may also include integrated digital televisions and personal video recorders, against a charge.

More generally, the DTI is working with industry to encourage the development and availability in the UK market place of a wide range of digital TV receivers incorporating agreed "best practice" features in preparation for switchover.

The DTI and DCMS, with advice from the BBC, have worked with the Consumer Expert Group on Core Receiver Requirements for the consumer equipment which we believe best meet the needs of older and disabled people. The government is aware that the pace of technological change demands flexibility as well as the need to specify core requirements. Equally, we recognise that respective industries will need appropriate lead time, to manufacture and produce the relevant technology.

¹⁵ DCMS Press Notice 116/05, *Tessa Jowell confirms digital switchover timetable and support for the most vulnerable*, 15 September 2005.

In his evidence to the CMS Select Committee, James Purnell, the then Parliamentary Under-Secretary of State, stated that the targeted assistance scheme will assist up to 5m vulnerable households.¹⁶ However in the Government response to the Select Committee report it was estimated that approximately 6.5m households in the UK would be eligible.¹⁷

The latest estimate is that approximately 7m households in the UK will be eligible for the targeted assistance scheme.¹⁸ The figures below do not sum to 7m as some people will fit into more than one group.

The targeted assistance scheme uses the DWP benefit unit as its definition of a household.¹⁹ A benefit unit is a single adult or a couple, together with any dependent children. Each benefit unit is entitled to an act of assistance consisting of providing the necessary equipment to convert one TV set and the relevant help to install and use such equipment, including where necessary provision of appropriate set-top aerials or aerial upgrades.

A household containing, for example, an elderly mother and registered blind son, or two elderly sisters would be entitled to two acts of appropriate assistance. This assistance will be available to those eligible households that already have some form of digital TV, not just those who only have analogue TV.

During the Culture, Media and Sport Select Committee inquiry on Analogue Switch-off, the Government's proposals to provide assistance to vulnerable people were explored. The Committee recommended, that the scope of the scheme be widened and that further consideration of the equipment to be used by households be made:

80. The Government is going to require the BBC to establish assistance schemes to ensure "the most vulnerable" do not lose access to television services post switchover. Free or subsidised provision will be available to households where someone is aged 75 or over, or where someone has a severe disability. Additional support will be offered to those who are registered blind. The Ofcom Consumer Panel believes that, by restricting free installation, equipment and instructions only to older people on pension credit, the Government is moving away from the principle of free TV reception for everyone over 75 regardless of income. David Sinclair of Help the Aged thought it "absurd" to means test a set-top box; he was particularly concerned about the 250,000 older people who were failing to claim this benefit.

81. In July 2004, the Secretary of State for Culture, Media and Sport had asked the Ofcom Consumer Panel to consider what measures might be necessary to protect the interests of "the most vulnerable" consumers during digital switchover.

¹⁶ Ev 235, HC 650-II

¹⁷ CM 6850, June 2006

¹⁸ http://www.digitaltelevision.gov.uk/sscheme/sscheme_who.html

¹⁹ Source: DCMS spokesperson

The Panel, which is independent of Ofcom, came to the key conclusion that “most vulnerable” in this context is most usefully defined in terms of social isolation; the latter can come about through a variety of factors such as age, disability and low English literacy. The Consumer Panel’s evidence made clear its “strong disappointment” that the Government has tied its assistance package to the benefits system, effectively ignoring the analysis based on social isolation. Help the Aged thought it vital that research be carried out to identify the vulnerable. Leen Petre, RNIB, thought there was a danger that the definition of vulnerability would be informed by cost considerations. The Government’s evidence acknowledged the work of the Ofcom Consumer Panel, and it noted the potentially important role of charities, social workers, the local community and neighbours.

82. The scope of the Government’s targeted assistance programme is too restricted and fails to acknowledge those who, by dint of income or social exclusion, are in genuine need. With analogue switch-off beginning in only two years, this matter requires urgent consideration.

83. The problem of identifying vulnerable consumers and delivering a package of assistance needs to be clearly owned. Giving oral evidence, Colette Bowe of the independent Ofcom Consumer Panel said: “I think a very pointed question would be who owns this issue of identifying vulnerable consumers and working out what they really want and then delivering it. At the moment there seems to be a plethora of diffuse responsibility.”

84. Ofcom’s written evidence noted that consumer issues are primarily the responsibility of Government and Digital UK. The present digital switchover programme structure indicates that responsibility for targeted assistance rests with the Department for Culture, Media and Sport. Digital UK are, however, involved in ongoing work to identify those who fall outside the targeted assistance scheme but who may need additional help with switchover. One concern of Help the Aged is that the voluntary sector should be adequately financed to play its key role in providing practical help with switchover.

85. Responsibility for the administration of the targeted assistance scheme for vulnerable groups must be clearly assigned. The scheme should take into account the need to provide adequate funding for the voluntary sector, which will play a vital role in providing practical assistance to vulnerable groups.

[...]

89. BSkyB is concerned that the Government’s support package for vulnerable people appears to focus on the cheapest digital option – invariably DTT. A memorandum from the Department for Culture, Media and Sport acknowledged that “targeted assistance is based on the lowest cost option”. With regard to targeted assistance, the Minister for Creative Industries and Tourism noted the technology neutral nature of the Government’s policy, adding: “In those areas where DTT is not the cheapest option then we will make the cheapest option there available to them (probably satellite)...” **The extent to which the emerging package of targeted assistance can be deemed to be platform-neutral and**

thus compatible with European competition law will have to be monitored and checked with care.²⁰

In a Westminster Hall debate on analogue switch-off, the Culture, Media and Sport Committee Chairman, John Whittingdale, later reinforced many of the above comments.²¹

C. Consultation on equipment requirements

To establish the functional specifications of the equipment to be made available through the assistance scheme, the Government published a set of requirements for consultation in July 2006. In establishing these draft core requirements the DCMS included work from the Consumer Expert Group and a number of other organisations, including Age Concern, Sense, the Royal National Institute for the Blind and the Royal National Institute for the Deaf. The full consultation documents are available online:

http://www.digitaltelevision.gov.uk/consultations/con_core_receiverreq.html

Responses to the consultation were positive and included recognition of the useful collaboration between the DCMS and the Expert Group. This response from Age Concern is typical:

We are extremely pleased that this document includes the recommendations from the CEG report 'Digital TV Equipment: Vulnerable Consumer Requirements' published earlier this year. There has been considerable research into the importance of the usability of digital equipment with accompanying design recommendations for equipment suppliers that has been commissioned over several years by the Government and Ofcom. We think the industry has had sufficient notice of the importance the Government places on usability as well as the necessary guidance from this research to enable them to produce more usable equipment in time to meet the start of the targeted help scheme which will not start until about six months before Whitehaven is switched over in the autumn of 2007.²²

D. Trials

Two digital switchover trials have been run which assessed the assistance required when supplying vulnerable groups with digital television services.

1. Llansteffan & Ferryside Trial

The Llansteffan and Ferryside trial was set up to gauge the technical issues for broadcasters and all consumers associated with the switch from analogue to digital television transmissions. Digital transmissions were switched on at the end of November 2004. Following a period of three months using the digital services and equipment, the

²⁰ Culture, Media and Sport Committee, *Analogue Switch-off: A signal change in television*, 29 March 2006, HC 650.

²¹ HC Deb 6 July 2006 cc324-58WH

²² Age Concern, *Response to DCMS consultation on Core Receiver Requirements*, April 2006.

households in the trial were asked if they wished to retain the digital services and equipment or to revert to the analogue services only. Over 85% of households responded of which 98% indicated that they wished to retain the digital services.²³

The trial subsidised the provision of digital equipment to households, to convert or replace their existing TVs and VCRs to become digitally ready. Householders installed this equipment themselves to simulate the reality of digital switchover as realistically as possible. About 20% of the community, including some elderly and disabled people, were given some assistance with this installation. The quantitative findings from the trial, relevant to assistance for vulnerable groups, are set out below (*vulnerable* has been defined as aged 75 or over and/or with a disability):

- 63% of households managed the initial installation without help from outside the household, and just 19% required the help of the trial team. 14% had help from a friend or family member outside of the household and 4% either had other help or they were not sure.
- 35% of those aged 65+ required trial team assistance for installation, 40% of the disabled and 37% of the vulnerable.
- 43% of the vulnerable group did not even consider tackling installation themselves.
- The confidence of the vulnerable to undertake the technical tasks themselves increased slightly throughout the trial.
- Amongst the vulnerable, the Electronic Programme Guide service really increased in popularity as the trial progressed, reaching almost the same level of usage as amongst the total sample.
- Vulnerable respondents promoted improved picture quality as the top benefit (above new channels) after analogue had been switched off.²⁴

The report of the trial also made a number of recommendations specific to vulnerable groups:

- A need for education and awareness among manufacturers of the needs of the elderly and other vulnerable groups
- The design of the handset is critical for all users, but particularly for the elderly. Buttons need to be larger and more spaced out and need to have large labels on them to be easily identified.
- Large type illustrated guide to remote control handset

2. Bolton Trial

The aim of the Bolton Digital TV trial was to investigate what type of support would be needed at digital switchover by people aged 75 and over. This looked at the issues around installing equipment, how help could be best provided and the cost of implementing any help schemes. The trial was started in July 2005 and over 400 households took part.

²³ DCMS, *Ferryside and Llansteffan Digital Switchover Technical Trial: Research on Vulnerable Households*, July 2005.

²⁴ *ibid*

On publication of the report on the Bolton trial, in May 2006, a DCMS press notice was released that summarises the key findings:

The vast majority of older people in a digital television trial thought switching over was easy and liked watching digital television, according to a report published today by Broadcasting Minister Shaun Woodward.

98 per cent of participants felt watching digital TV was better or the same as watching analogue and 93 per cent thought the process of switching to digital TV had been easy.

The trial also highlighted the importance of support from family and friends in installing and using the equipment and the need to give older and disabled people time to adapt to using new television equipment...

...The results of the trial, run jointly by the Department for Culture, Media and Sport (DCMS) and the BBC, also show that:

- 69 per cent of participants were able to install equipment themselves or with the help of friends and family.
- Once their equipment was installed, 67 per cent said they most liked the extra channels, whilst 20 per cent most liked the improved reception.
- 92 per cent found the specially prepared and clearly written instruction booklet helpful.
- Older and disabled people need time to adapt to using new equipment - after four weeks, 74 per cent of people were reporting problems with their equipment but more than 80 per cent reported no problems with equipment just four weeks later.²⁵

The full report of the trial is available online:

http://www.digitaltelevision.gov.uk/pdf_documents/publications/2006/7885BoltonDigital.pdf

E. Financing the scheme

The cost of the assistance scheme will be met by the BBC. The Government have not published figures on the overall costs of the targeted assistance scheme. The following response was provided to a recent PQ:²⁶

DCMS have made estimates of budget for the digital switchover help scheme. We will publish appropriate details in the context of the licence fee settlement. This is unlikely to include detailed information on per household costs (to avoid prejudicing negotiations to secure the contractor to deliver the scheme).

²⁵ DCMS Press Notice 080/06, *98% Of Older People In Bolton Trial Happy With Digital TV*, 26 May 2006.

²⁶ HC Deb 22 November 2006 c113W

The Ofcom Consumer Panel has estimated the cost, of mobilising and training volunteers to help vulnerable people acquire and install equipment, to be around £100 per household. This is in addition to the cost of the equipment itself.²⁷

Findings from the Bolton trial and Llansteffan and Ferryside trial are being considered while setting out how the scheme should work and what should be provided. There is currently no detailed published estimate of the final cost of such a scheme. The report from the Bolton trial provides a breakdown of the cost of the trial, totalling £211 000, though this figure should not be regarded as a basis for estimating any much larger scale scheme. However the trial does provide a useful list of financial considerations:

- Call centre costs (central, and possibly regional)
- A significant information campaign targeted at those who can support people who need help to adapt to digital TV
- Liaison with support agencies (e.g. local authorities, voluntary groups) at a regional and local level
- Training, for engineers and volunteers.

Also, it would be cost-effective if a Support Scheme formed part of a co-ordinated approach to switchover:

- To minimise duplication of effort between the Support Scheme and the marketing, promotional, regional liaison and other work undertaken by Digital UK
- To ensure that there are sufficient qualified installers in each region
- To consider the needs of those who are not eligible for a Support Scheme, but who nevertheless need support in converting to digital TV.²⁸

The issue of financing the assistance scheme was considered during the Culture Media and Sport Select Committee inquiry. It was the Committee's opinion that the cost of assistance should not be covered by the BBC and thus, ultimately, the licence payer. Instead, and in common with the House of Lords Committee on BBC Charter Review,²⁹ they suggested that central Government should cover the cost (with concomitant Ministerial responsibility):

The total cost of the targeted assistance scheme is uncertain, and it has not been factored into the BBC's proposal for a licence fee settlement well in excess of inflation. Interestingly, targeted assistance is not included in the Government's cost-benefit analysis: it is treated as a transfer cost because the cost to the licence payer will, it is argued, be offset by the benefit gained by those in receipt of assistance.

It is planned to fund the scheme through the TV licence fee, the appropriateness of which will depend in part on the extent to which this is considered a broadcasting or a social cost. In its Second Report of 2005-06, the House of Lords Select Committee on BBC Charter Review argued against the Secretary of

²⁷ Para 90, HC 650-I

²⁸ DCMS, *Report of the Bolton Digital Television Trial*, May 2006.

²⁹ House of Lords Select Committee on BBC Charter Review, *Further Issues for BBC Charter Review*, 3 March 2006, HL Paper 128 2005-06

State's assertion that the targeted assistance scheme is a broadcasting cost: "We can see no reason why help for the over 75s, and other vulnerable viewers, with the costs of switchover should be borne by the BBC when the Government already accepts that it is responsible for bearing the costs of the licence fee for over 75s."

Caroline Thomson told us that the BBC was "content" to go along with the Government's request to fund targeted assistance from the licence. However, her contentment was on the basis of four criteria: "that the licence fee is not being used as a substitute for social security payments, which clearly would be totally inappropriate, that any scheme meets all the state aid requirements and is platform neutral, that it does not in the end, partly because of the flat rate nature of the licence fee, put an unreasonable burden on the licence fee payers that would put the long-term future of the licence fee at risk, and that it is not at the expense of our core services."

Written evidence from the National Consumer Council stated: "There is also a question of how the targeted assistance programme is being funded. Using funds raised from the television licence fee has the advantage of retaining a link between the funds and how they are used. It is also relatively cost-effective to collect. But it is not in line with the core purpose of the licence fee, which is to support programming, and NCC believes it would be false economy to direct money away from that. Using the licence fee is also likely to magnify the worst aspects of unfairness inherent in a flat-rate fee, where the burden is heavier on low-income households. As Government anticipates switching will deliver some financial benefit to the Treasury some of that money should be diverted to offset the burden for consumers." We agree. **While transmitter upgrading is clearly a broadcasting cost the provision of television and other receiving equipment is a social cost in recognition of the need to provide compensation to vulnerable groups. We believe that the use of Exchequer funds to meet this cost is more progressive and justified given the value of the spectrum released. It also places accountability properly on a Minister's desk. We recommend that the Government should reconsider this option.**³⁰

In their response to the Committee's report the Government explained their disagreement:

The Government takes note of the Committee's recommendation but disagrees. A key outcome of digital switchover will be to ensure that the BBC's digital services are available to all licence fee payers, and that all the licence fee payers benefit from more choice, better picture quality, and new services. Therefore the Government strongly believes that it is right for the BBC, as part of its role in building digital Britain, to help establish and fund the costs of providing assistance as part of its wider leadership role in the completion of digital switchover. We are working with the BBC to ensure that any accountability issues are properly addressed.³¹

³⁰ Culture, Media and Sport Committee, *Analogue Switch-off: A signal change in television*, 29 March 2006, HC 650.

³¹ DCMS, *Government Response to the Culture, Media and Sport Select Committee*, Session 2005-2006: Report on Analogue Switch-Off, June 2006.

III Data sharing and data protection

It will help the BBC, and its agents, to target assistance with digital switchover if it is given access to government social security data on individuals. This ties in with a wider government programme of data sharing aimed at achieving efficiencies in the delivery of public services. There is potential for this to come into conflict with the right to privacy embodied in Article 8 of the European Convention on Human Rights and exemplified by specific provisions in the *Data Protection Act 1998*. A flavour of the areas of debate can be obtained by following recent exchange in the House of Lords, during which Baroness Ashton of Upholland alluded to the International Data Protection and Privacy Commissioners' Conference held in London on 2 and 3 November 2006:

Lord De Mauley: My Lords, does the Minister agree in a wider context with her Government's Information Commissioner, Richard Thomas, when he suggests that the United Kingdom is in danger of,

“sleepwalking into a surveillance society”?

What measures is she taking to prevent that and to safeguard the liberties and privacy of honest law-abiding citizens?

Baroness Ashton of Upholland: My Lords, I was pleased to open the Information Commissioner's conference on this subject. I am keen that we identify data sharing appropriately. There are three issues. The first is the choice of a consumer—a citizen—to enable the data to be shared because our time is not free and there are lots of examples where we fill in the same information time and again. We should choose if we wish to share that. The second is transparency, so that people know how their information is used, and that when government departments share it appropriately citizens are informed and know what is happening. The third issue is to make sure that the role of government as a protector of the vulnerable is well understood and that people know that sharing information can be a critical way of helping the vulnerable either through better public services or through making sure that they do not suffer abuse or in other ways.³²

A Ministerial Committee on Data Sharing (MISC31), chaired by the Minister for the Cabinet Office and Social Exclusion, has as its terms of reference “to develop the Government's strategy on data-sharing across the public sector”.³³ This is related to the “Transformational Government” strategy published by the Cabinet Office in November 2005 (Cm 6683) which comments: “Modern government – both in policy making and in service delivery – relies on accurate and timely information about citizens, businesses, animals and assets. Information sharing, management of identity and of geographical information, and information assurance are therefore crucial.” It further observes: “data sharing is integral to transforming services and reducing administrative burdens on citizens and businesses. But privacy rights and public trust must be retained. There will be a new Ministerial focus on finding and communicating a balance between maintaining

³² HL Deb 28 November 2006 cc 644-5

³³ <http://www.cabinetoffice.gov.uk/secretariats/committees/misc31.asp>

the privacy of the individual and delivering more efficient, higher quality services with minimal bureaucracy.”³⁴ A Transformational Government *Implementation Plan* was subsequently published in March 2006.³⁵

A. Data sharing

In September 2000, the Prime Minister asked the Performance and Innovation Unit (PIU), based at that time in the Cabinet Office, to produce a report on privacy and data issues.³⁶ The PIU's report, *Privacy and Data-Sharing*, was subsequently published in April 2002.³⁷ (In July 2002, the PIU merged with the Prime Minister's Forward Strategy Unit to form the Strategy Unit.) The term “data-sharing” refers to the disclosure of personal information within and between departments, agencies and public bodies, including the sharing of information for purposes other than those for which it was originally collected. This can include:

- case-by-case sharing of information in support of service delivery
- bulk exchange of anonymised or pseudonymised data for policy making and statistical research
- bulk exchange of data, for example for crime prevention, relating to specific, identifiable individuals
- case-by-case sharing of data for investigation of crime or fraud in specific cases.³⁸

The legal framework and safeguards applicable to data sharing will vary according to the category it falls under and the circumstances of the case.

The PIU report was intended to set out “a new strategic approach to the use of personal data held by the public sector.” The motivation for this new approach was:

- first, an increasing recognition of the importance of effective and intelligent use of the personal data held by the public sector in delivering modern public services which better meet the needs of citizens; and
- second, an equal recognition that the public has both formal rights and legitimate expectations that personal privacy will be protected.³⁹

The issues considered in the report included data-sharing and data-matching across public sector boundaries. There were said to be three main areas where there is considerable potential to make better use of personal information to deliver benefits to the public:

³⁴ http://www.cio.gov.uk/transformational_government/strategy/index.asp

³⁵ http://www.cio.gov.uk/transformational_government/implplan/

³⁶ More detailed background is available in Library Research Paper 02/54, *The Anti-terrorism, Crime and Security Act 2001: Disclosure of Information*, 4 October 2002

³⁷ *Privacy and Data Sharing*, Performance and Innovation Unit, April 2002, http://www.strategy.gov.uk/work_areas/privacy/index.asp

³⁸ Op cit, Chapter 2 (introduction), para 2.07

³⁹ Op cit, executive summary, para 1.01

- better, more joined-up and more personalised public services - particularly in enabling e-government;
- more effective and better targeted policy making and evaluation; and
- more efficient public services, including using data to improve value for money and streamline services, to help tackle crime and fraud, and improve the effectiveness of the enforcement of civil judgments, criminal court fines and breaches of community penalties.⁴⁰

However, this potential would only be realised if the public trusted the way the public sector handles their personal data and protects their privacy:

Public trust in the way that public sector organisations handle their personal data - and protect their privacy - is vital to the relationship between the citizen and public services. There are concerns that information technology - with more remote interactions and the greater use of personal information that it allows - could be a threat to privacy and lead to mistaken identity, inadvertent disclosure of private information and inappropriate transfer of data. There are some signs that the level of public concern about privacy is on the rise - for example, with an increasing proportion of people saying that they regard the right to personal privacy as very important.⁴¹

The PIU suggested that it was both possible and desirable for Government to achieve the twin objectives of enhancing privacy and making better use of personal data to deliver “smarter” public services. This would require a more strategic approach by the public sector, underpinned by four “high level principles”:

- using the data available in the most efficient and effective way possible to achieve goals;
- adopting the least intrusive approach - i.e. where the public sector can achieve improvements in services or efficiency without requiring more data and affecting personal privacy, it should do so, recognising that the protection of privacy is itself a public service;
- wherever possible, and where the benefits of better use of personal data are for the person using the service, giving citizens more choice in the management and use of their personal data to deliver public services; and
- ensuring that where data are used or shared without the consent of the individual (for example, in law enforcement), there is openness, transparency and consultation in the policy-making process of striking a balance between individual rights and the wider public interest.⁴²

The report suggested that in seeking to apply these principles to decisions about the need for increased data use or data-sharing, public services should systematically:

- assess the benefits of the proposed data use/data-sharing in meeting public policy objectives;

⁴⁰ Op cit, executive summary, para 1.03

⁴¹ Op cit, executive summary, paras 1.07-8

⁴² Op cit, executive summary, key points

- consider alternative approaches to achieving the objectives which have a lesser impact on privacy;
- identify the costs and risks of increased data use/data-sharing, recognising that many of the risks to privacy will be difficult to quantify;
- assess safeguards that would minimise the risks (for example, using privacy enhancing technologies); and
- use the accumulated evidence to strike a balance between the benefits and the costs and risks.

Where increased data-sharing is proposed after this analysis, policy makers should therefore be in a position to explain why the public interest will benefit and that the proposed action is a proportionate response to the public policy objective.⁴³

B. Data protection and privacy

The legal regulation of data-sharing is based on a number of different elements:

- the statutory regulation set out, in particular, in the *Data Protection Act 1998* and the *Human Rights Act 1998*;
- the common law, particularly the duty of confidentiality; and
- the administrative powers that public bodies have to collect, hold, share and use personal data.⁴⁴

1. Data Protection Act 1998

The *Data Protection Act* (DPA) regulates the processing (collection, use and disclosure) of personal information held on computer, other electronic media and, in certain circumstances, in paper files. “Data controllers” (organisations etc. which process personal information) must comply with eight data protection principles set out in Schedule 1 of the Act:

The Data Protection Principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

⁴³ Ibid

⁴⁴ Performance and Innovation Unit, *Privacy and data-sharing: The way forward for public services*, April 2002, p99 <http://www.strategy.gov.uk/downloads/su/privacy/downloads/piu-data.pdf>

3. Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.
4. Personal data shall be accurate and, where necessary, kept up to date.
5. Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.
6. Personal data shall be processed in accordance with the rights of data subjects under this Act.
7. Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.
8. Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data

The first principle requires that personal data may not be processed at all unless one of the conditions in Schedule 2 of the DPA is met. These conditions are quite broad. The first condition is that the individual has given consent, but there are various conditions which would enable personal information to be processed without consent. For example, processing may be carried out where:

The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

Another condition is that the processing is necessary for the administration of justice; the exercise of any functions conferred on any person by or under any enactment; the exercise of any functions of the Crown, a Minister of the Crown or a government department; or for the exercise of any other functions of a public nature exercised in the public interest by any person. The *Digital Switchover (Disclosure of Information) Bill* 2006-07 would provide a suitable enactment for the processing of social security and war pensions data. Another Schedule 2 condition relates to the protection of the vital interests of the data subject (though access to television services would arguably be stretching a point here).

The conditions in Schedule 3 of the 1998 Act for processing “sensitive personal data” are more stringent, as one might expect. Sensitive data includes the racial or ethnic origin of the individual, political opinions or religious beliefs, whether he or she is a member of a trade union, physical or mental health or condition, sexual life and any information about criminal convictions or any offence he or she is alleged to have committed. The first condition is that the individual has given *explicit* consent. Again, there are various conditions which would enable sensitive data to be processed without consent, including the condition that the processing is necessary for the administration of justice; the exercise of any functions conferred on any person by or under an enactment; or for the exercise of any functions of the Crown, a Minister of the Crown or a government department.

Assuming that the data controller has the necessary authority to process personal information under Schedule 2 and, if necessary, Schedule 3, various data protection principles may place restrictions on the disclosure of such information, or data sharing (unless a relevant exemption applies). For example, it is not normally possible to disclose information if disclosure is incompatible with the purpose for which it was obtained (second principle). The *Digital Switchover (Disclosure of Information) Bill* 2006-07 would, in effect, circumvent this general principle for the specific purpose of enabling vulnerable groups to gain access to digital television.

Sections 7 to 9 of the DPA give an individual the right to be told by a data controller, on request in writing, whether they are processing that individual's information and if so, to be given a description of the information, the purposes for which it is being processed and those to whom it is or may be disclosed. A data controller can charge up to the prescribed maximum, currently £10, for the provision of this information. Data subjects also have a right, under section 10 of the DPA, to ask that their personal data should not be processed where it is likely that doing so would cause substantial and unwarranted damage or distress. The data controller is not, however, always bound to act on such a request.⁴⁵

There are various exemptions under part IV of the DPA which may free public authorities from the normal restrictions on the disclosure of personal information. For example, under section 29 of the 1998 Act, personal data processed for "the assessment or collection of any tax or duty or of any imposition of a similar nature" enjoys a qualified exemption from the first data protection principle.

2. Human Rights Act 1998

The Human Rights Act (HRA) is designed, as its long title says, to "give further effect to rights and freedoms guaranteed under the European Convention on Human Rights". The HRA requires all public authorities to act in a way which is compatible with Convention rights. "Public authorities" include courts and tribunals, central government, local government, the police and any other "persons certain of whose functions are functions of a public nature" if the nature of the particular act complained of is not private. The term does not include the Houses of Parliament (except the House of Lords in its judicial capacity) or people exercising functions in respect of proceedings in Parliament.

In addition, the HRA:

- requires that, as far as possible, all primary and subordinate legislation is interpreted by the courts and others in a way that makes it compatible with the rights under the Convention;
- enables courts from the High Court upwards (in Scotland, the High Court of Justiciary) to make declarations of incompatibility where they cannot interpret primary legislation in such a way as to make it compatible with the Convention;

⁴⁵ Section 10(2), *Data Protection Act 1998*

- enables the courts to disapply subordinate legislation which cannot be interpreted in a way which makes it compatible with the Convention, unless it is primary legislation which prevents the removal of the incompatibility; and
- enables individuals who believe that their rights under the Convention have been breached by a public authority to seek judicial review or to rely on their rights as a defence in civil or criminal proceedings.

The Convention rights protected under the *Human Rights Act 1998* are set out in Schedule 1 of the Act. The right most relevant to disclosure of personal information by public authorities is Article 8: the right to respect for private and family life. The right protected by Article 8 is sometimes referred to as a *qualified right*. In other words, the right is not absolute. Interference with qualified rights is permissible if what is done:

- a) has its basis in law;
- b) is done to secure a permissible aim set out in the relevant Article, for example for the prevention of crime, and
- c) is necessary in a democratic society, which means it must fulfil a pressing social need, pursue a legitimate aim and be proportionate to the aims being pursued.

The need for “proportionality” under condition (c) is an important restriction on the interference with an individual’s rights by any public authority.

3. Duty of confidentiality

The disclosure of personal information may give rise, under common law, to a claim in the courts for breach of confidence. For such a claim to succeed, it would be necessary to prove that:

1. the information has the necessary quality of confidence;
2. it was imparted in circumstances imposing an obligation of confidence; and
3. there is an unauthorised use of the information to the detriment of the original communicator of the information.⁴⁶

However, where the public interest in the disclosure of confidential information outweighs the desirability of enforcing the obligation to protect confidence, the disclosure of confidential information will be lawful.⁴⁷

4. Administrative powers to disclose information

The PIU report of April 2002 concluded that the main legal obstacles to achieving the policy goals on data sharing discussed above were centred around questions of the extent and scope of administrative powers rather than the statutory framework imposed by the *Data Protection Act 1998*. Local authorities and other statutory bodies may be

⁴⁶ *Coco v. AN Clarke (Engineers) Ltd* [1968] F.S.R.415

⁴⁷ Sallie Spilsbury, *Media Law*, 2000, p201

restricted by the requirement that they can do only what statute allows them to: this is known as the doctrine of *ultra vires* (literally, “beyond the powers”). Where no specific data-sharing power exists, consent does not necessarily provide a legal basis upon which to share data:

Consequently, several data-sharing initiatives [...] are currently blocked as the bodies concerned cannot share the information necessary to support the service, even if the individual has consented to the data-sharing.

In some instances, the report observed, it is considered necessary to have power to share data without the individual’s consent. One example relates to operational concerns where “the cost of establishing a system based on consent may be too high or the benefits may be realised only if all data subjects opt in”.

The PIU concluded that public authorities’ administrative powers lacked sufficient flexibility to be able to respond to new needs for data-sharing:

The sufficiency of powers to share data in each instance is constantly in question. Where consent is given, organisations may still be unable to share data due to the narrow definition of their administrative powers...

...Consequently, public bodies are restricted in their options for taking advantage of new opportunities, even where there is explicit demand for new services or where citizens are willing to give consent for their information to be shared. What is clear is that better data use will be a key enabler for more effective public services.⁴⁸

C. Recent developments

The Department for Constitutional Affairs has responsibility for data protection and data sharing, its website providing an overview of ongoing activity in these areas:

Responsibility for Freedom of Information, Data Protection and Data Sharing rests with the Information Rights Division of the Department for Constitutional Affairs, which is part of the Department's Constitution Directorate.

The data sharing team is developing policy that strikes a balance between personal privacy and the needs of public authorities to share personal data in the delivery of public services. We are doing this by:

- Providing guidance to the public sector on when they can and cannot share personal information
- Providing guidance to the public sector on best practice in information handling; in particular, on producing data sharing protocols
- Talking to people to find out more about their views on privacy and data sharing

⁴⁸ Op cit, chapter 10, paras 10.10-11

- Consulting the public and public sector on how best to let people know about their rights over their personal information and how it is protected.
- Working with stakeholders to consider whether legislation is needed to facilitate data sharing and, if so, what form it should take.⁴⁹

In September 2006, the Department published its *Information sharing vision statement* giving several examples of activities in this area and promising the publication of a plan in April 2007. The document continues with a synopsis of the Government's vision:

There are enormous benefits to sharing information. As these examples show there is already a lot of information being shared within the present legal framework - but within existing law we can and must do more. We must, of course, properly use the provisions in the Data Protection Act as a safeguard to protect privacy and confidentiality but it must not be used to justify unnecessary barriers to sharing information. Our vision is to ensure that information will be shared to expand opportunities for the most disadvantaged, fight crime and provide better public services for citizens and business, and in other instances where it is in the public interest.⁵⁰

In the specific context of targeting vulnerable groups for help with digital switchover, the Government cites, in its regulatory impact assessment for the *Digital Switchover (Disclosure of Information) Bill* 2006-07, the Consumer Expert Group. That Group reported in April 2006:

There should be a clear duty on the Government to get in touch with people who are eligible for the targeted assistance scheme for vulnerable groups.

The Government has to give the targeted assistance scheme for vulnerable groups the possibility of using central databases that help identify people who would be eligible for targeted help. Data protection issues should not stand in the way of doing this.⁵¹

IV The Bill

The *Digital Switchover (Disclosure of Information) Bill* 2006-07 received its first reading in the House of Commons on 16 November 2006.⁵² As noted in the accompanying Explanatory Notes,⁵³ the Bill is designed to support a targeted scheme to provide practical and financial assistance with digital switchover to identified vulnerable groups.

⁴⁹ <http://www.foi.gov.uk/sharing/index.htm>

⁵⁰ <http://www.foi.gov.uk/sharing/information-sharing.pdf>

⁵¹ Consumer Expert Group, *Supporting Vulnerable Consumers with targeted assistance at and after Digital TV Switchover*, April 2006

⁵² HC Deb 16 November 2006 c 143

⁵³ *Digital Switchover (Disclosure of Information) Bill: Explanatory Notes*, Bill 3 – EN

The Explanatory Notes summarise the extent and scope of the scheme that will be administered by the BBC as part of the new Royal Charter, Agreement and licence fee settlement (an announcement on the last of these is expected later this year)⁵⁴:

Under the Scheme, a household will be entitled to be provided with suitable equipment to convert one TV set, help with setting it up and any work necessary to improve their TV aerial, if that household includes a person aged 75 or over or a person with a severe disability, i.e., if that person has an award of disability living allowance or attendance allowance, an equivalent under the war pensions or industrial injuries disablement benefit legislation or is registered blind or registered partially sighted. Help will be available free of charge for those who are eligible and in receipt of pension credit, income support or income-based jobseeker's allowance; others will pay a contribution towards the cost of assistance.⁵⁵

In order to identify and contact individuals qualifying for assistance, the BBC and its contractors will need to be provided with information held by government departments: the Department for Work and Pensions, the Department for Social Development in Northern Ireland and the Veteran's Administration within the Ministry of Defence. However, the provision of social security information is constrained by a number of legal controls such as the law of confidentiality, the *Data Protection Act 1998* and the *Social Security Administration Act 1992*. The first two can provide general checks on data sharing, particularly if the data is of a private nature or if its sharing would be for a purpose for which it was not originally collected. Section 123 of the *Social Administration Act 1992* specifically proscribes the unauthorised disclosure of information relating to particular persons by those employed or formerly employed in social security administration or adjudication. According to section 123(9) lawful authority for disclosure can arise from, among other things, any enactment (the purpose of the present Bill). A disclosure is also lawful if it is made in accordance with official duties but this, apparently,⁵⁶ would not include sharing information with an outside body like the BBC.

Clause 1 of the Bill provides the legal authority to allow, but not compel, the disclosure of social security information to relevant persons in connection with "switchover help functions". The latter are defined in subsection (4) as:

- (a) the identification of persons who may be eligible for help under a switchover help scheme;
- (b) making contact with such persons with a view to the provision of such help; and
- (c) the establishment of any person's entitlement to such help.

The potential recipients of the social security information include the BBC and those engaged by the Corporation to provide services related to switchover. It is not clear if this would include TV Licensing (to which the BBC delegates some of its functions as

⁵⁴ HC Deb 18 October 2006 c 1227W

⁵⁵ Bill 3 – EN, para 7

⁵⁶ Bill 3 – EN, para 10

licensing authority), though possession of a television licence would presumably be a prerequisite for assistance. It is possible also that assistance with switchover, and the prospect of receiving multi-channel digital television, might be an incentive for some individuals to purchase a television and to acquire a licence (including the free licence available to the over-75s).

Digital UK styles itself “the independent, non-profit organisation leading the process of digital TV switchover in the UK.”⁵⁷ As such it may be surprising that the company is not explicitly identified as a potential recipient of social security information, though it would appear to fall within the, broad, definition of “relevant person” given in **clause 1(3)**. The explanatory notes add:

Any “switchover help scheme” (as defined in clause 5) will be under the overall management of the BBC or a company controlled by the BBC or the Crown (or the BBC and the Crown together): the exact structure has not yet been finally determined. In practice, much of the administration of the Scheme (e.g. contacting potential applicants, determining entitlements, and delivering equipment and help with installations) will be contracted out to private sector organisations.⁵⁸

Furthermore, relevant persons will be able to exchange information among themselves: **clause 1(1)** and **clause 1(2)** provide for the disclosure of, respectively, social security information and war pensions information for use “by the person to whom it is supplied or by another relevant person”.

Clause 2 provides for a definition of the terms “social security information” and “war pensions information” used in clause 1. The precise kinds of information that may be disclosed will be left to secondary legislation: an order made by the Secretary of State by statutory instrument. This will be subject to the negative resolution procedure. In a memorandum to the Delegated Powers and Regulatory Reform Committee the Government included the following in its justification for this order making power:

12. It is important that the Bill should allow disclosure only to the minimum extent necessary to operate the Scheme effectively. Otherwise, the new powers could be characterised as a disproportionate interference with individuals’ privacy.

13. The Government considers that it is appropriate for this information to be specified by order rather than setting out these categories on the face of the legislation, because of the need for flexibility in the future. In particular, it is possible that the name or structure of the benefits relevant to the Help Scheme will change, in which case it would be necessary to change the description of the information that can be disclosed. Also, the Scheme will operate over a period of five years or slightly longer, and it is quite possible that, during that time, experience will show that if other, or different, information was available to the Scheme’s administrators, the help could be given more effectively or at a lower cost. Finally, the Scheme itself might be altered in the light of experience or a

⁵⁷ <http://www.digitaluk.co.uk/en/about.html>

⁵⁸ Bill 3 – EN, para 15

change in policy, necessitating access to other or different information (although no such changes are currently contemplated).⁵⁹

The Explanatory Notes suggest that orders prescribing the relevant information will be made by the Secretary of State for Culture, Media and Sport.⁶⁰ The Bill is not explicit on this point and would allow for the prescribing orders to be made by the Secretary of State who actually holds the information. For example, **clause 2(2)** defines social security information in relation to the Secretary of State as “information of a prescribed description held by him (or on his behalf) and obtained as a result of, or for the purpose of, the exercise of functions of his in relation to social security”. Analogous definitions appear in relation to the Northern Ireland department and for war pensions information.

As the Bill provides for disclosure in connection with digital switchover,⁶¹ only a subset of social security and war pensions information will be relevant. The Explanatory Notes comment that “the precise details have not been finalised” but that it is “envisaged” that the following information about an identifiable person will be prescribed:

- their name, and any alias by which they may be known, marital status (if known), address and date of birth;
- their National Insurance number;
- whether they are eligible for any of the benefits that will establish entitlement to help and (if so) those in respect of which they have an award of benefit;
- the fact that they have ceased to receive such benefits, where that is the case;
- details of any partner (including details of date of birth and National Insurance number) and whether they receive pension credit, income support or income-based jobseeker's allowance (to check upon what level of support the household is entitled to);
- if the qualifying person for disability living allowance is a child, whether the responsible adult or adults is receiving pension credit, income support or income-based jobseeker's allowance;
- whether they live in a residential care or nursing home (so helping to ensure that the right kinds of help are available in residential care and nursing home settings);
- details of any person appointed to act on their behalf (to allow such people to be contacted to alert them to the availability of help);
- the fact that they have died, where that is the case.

⁵⁹ DCMS, *The Digital Switchover (Disclosure of Information) Bill: Memorandum to the Delegated Powers and Regulatory Reform Committee*, 16 November 2006

⁶⁰ Bill 3 – EN, para 20

⁶¹ Clause 1(1) and clause 1(2)

It is not clear the extent to which the disclosure exercise covered by the Bill could help to encourage take-up of social security benefits. In evidence to the Culture, Media and Sport Committee, David Sinclair of Help the Aged claimed that 250,000 older people were failing to claim the guarantee credit element of pension credit to which they were entitled.⁶²

One possible consequence of publicity surrounding the switchover process is that pensioners might be more likely to claim entitlements such as pension credit. Pension credit also consists of a savings credit element and, at this stage, it is not clear what role this will have in assessing eligibility for digital switchover help.

Another issue relates to assistance for individuals who live in residential care homes or sheltered housing. Some such places qualify for an Accommodation for Residential Care (ARC) concessionary television licence, currently £5 for each flat or room.⁶³ Converting analogue television sets to digital could be comparatively expensive for those residents, some as young as 60, who are ineligible for the targeted assistance programme. Furthermore, television sets in communal areas are not covered by the ARC reduced licence but there may be calls for assistance to convert these if residents are dependent on them.

Clause 3 makes it an offence for certain persons to disclose information supplied under the Bill without lawful authority. Effectively this captures everyone with a legitimate need for, and access to, social security and war pensions information. It also includes individuals who have had access to this information for legitimate reasons in the past, but no longer need it, perhaps because of a change of employment.⁶⁴

Quite apart from general privacy rights, there are specific reasons why disclosure of personal information could be damaging to individuals. The Culture, Media and Sport Committee's report on *Analogue Switch-off* drew attention to this:

149. Many viewers will need new aerials to receive digital television. Present estimates are that, post switchover, about 10% of analogue terrestrial households will have to replace their aerial to receive digital terrestrial television. It is crucial that opportunities are denied for "cowboy" aerial installers to exploit any information vacuum, particularly in relation to vulnerable people. Help the Aged has expressed concern that "a small number of older people are likely to find themselves being targeted by rogue traders or bogus callers" using digital TV as an excuse to gain access to their homes. These sentiments were endorsed by Age Concern particularly in the context of aerial installations and "distraction burglars possibly gaining entrance on the pretence of retuning the television." The National Consumer Council has suggested that a scheme similar to that operated by Channel 5 for retuning equipment should be deployed to prevent

⁶² Culture, Media and Sport Committee, *Analogue Switch-Off*, 29 March 2006, HC 650-II 2005-06, Q82, p51

⁶³ Age Concern Factsheet 3, *Television licence concessions*, September 2006
http://www.ageconcern.org.uk/AgeConcern/Documents/TELEVISIONLICENCECONCESSIONS_FS3.pdf

⁶⁴ Clause 3(1) and clause 3(2)

rogue traders from coming into people's homes or selling unsuitable products and services.⁶⁵

It would not be an offence for someone to disclose information in a summary form, for example to aid statistical analysis, provided information on particular persons cannot be gleaned from this. Nor would it be an offence to disclose information that had already been made public lawfully.⁶⁶

As it raises a potential presumption of innocence issue under the European Convention on Human Rights, **clause 3(5)** is discussed at length in the Explanatory Notes:

38. Second, clause 3(5) provides that, where a person is charged with making an unauthorised disclosure, it is a defence for a defendant to prove that at the time of the alleged offence he believed he had lawful authority to make the disclosure or that the information in question was already in the public domain, and that he had no reason to think otherwise. In other words, it places a legal burden on the defendant to prove the circumstances which go to make up the defence, which reverses the normal position, that the prosecution must prove its case against a defendant. This raises the question whether clause 3(5) is consistent with article 6(2), which provides that every person charged with an offence must be presumed innocent until proved guilty.

39. It is considered that clause 3(5) complies with article 6(2). The European Court of Human Rights has held that article 6(2) does not place an absolute prohibition on such "reverse burden" provisions, but they must be "reasonable". Clause 3(5) is considered to be reasonable: the offence is an important one because it is one of the mechanisms that safeguards personal information disclosed for the purposes of giving help with switchover, and while it is right that a defendant should be acquitted if there are extenuating circumstances, it is reasonable to require the defendant to prove those circumstances, especially as they relate to his state of mind (what he believed and what he knew at the time) which are matters peculiarly within his knowledge.

When legislation provides a statutory defence to an offence it may require the defendant either to prove the ingredients of the defence (the legal, or persuasive, burden), or only to provide enough evidence to raise the issue, so that it will be for the prosecution to prove that the defence does not apply (the evidential burden).

Reversing the burden of proof is not new to English law but legislation introducing new reverse burden provisions has increased, as has litigation on whether such provisions are compatible with the presumption of innocence. While clause 3(5) is clear on where the burden of proof lies (i.e. on the defendant), it is unclear as to whether the legal or evidential *standard* of proof would apply. The legal burden of proof, when reversed, would require a defendant to prove something, on the balance of probabilities, for his defence to succeed. An evidential burden is merely a burden of raising an issue as to the matter in question; once successfully raised by the defendant, it would then be for the prosecution to prove that, beyond reasonable doubt, the defence does not apply.

⁶⁵ Culture, Media and Sport Committee, *Analogue Switch-Off*, 29 March 2006, HC 650-I 2005-06, para 149

⁶⁶ Clause 3(4)

Section 3 of the *Human Rights Act 1998* requires courts, so far as it is possible to do so, to interpret legislation in a way compatible with the Convention rights. As a result, the courts may “read down” a provision even if it was intended to impose the legal burden, and construe it as imposing only an evidential burden on the accused. This would be the case if reading the legislation as imposing a legal burden would be an unacceptable infringement of the presumption of innocence.⁶⁷

Clause 3(6) defines “lawful authority” in relation to disclosures of social security and war pensions information. A disclosure is made “with lawful authority” if (but only if) it is made:

- for the purpose of carrying out a switchover help function (as defined in clause 1(4)) or for doing anything connected with the carrying out of such a function;
- in accordance with any enactment or a court order;
- for the purposes of court proceedings;
- with the consent of the person to whom the information relates or a person authorised to act on his or her behalf.⁶⁸

Other controls on disclosure, not part of the Bill, are the *Data Protection Act 1998*, the common law duty of confidentiality and any contracts between concerned companies. Taken together they are meant to minimise interference with the right to privacy, enshrined in Article 8 of European Convention on Human Rights:

Article 8 – right to respect for private and family life:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest 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.

The offence of disclosure without lawful authority would be triable either way. On conviction in the Crown Court, the maximum penalty would be a two year prison sentence and an unlimited fine. On summary conviction (e.g. in a magistrates’ court) the statutory maximum fine (currently £5,000) would be available, as would a prison sentence of, initially, up to six months.⁶⁹ This maximum will be raised to twelve months in England, Wales and Scotland when relevant legislation is commenced.⁷⁰

⁶⁷ *Sheldrake v DPP; Attorney-General’s Reference (No. 4 of 2002)* [2004] UKHL 43

⁶⁸ Bill 3 – EN, para 29

⁶⁹ Clause 3(7)

⁷⁰ Clause 3(8)

Clause 4 provides that individual “officers” (broadly defined) can be liable for unlawful disclosure offences committed by the body corporate to which they belong. The Explanatory Notes provide elaboration and examples:

32. The offences of unlawful disclosure created by clause 3 can in principle be committed by a “body corporate” (e.g. a company, or the BBC, which is a corporation by virtue of its Royal Charter). For example, company literature might reveal such information. By virtue of clause 4(1), where such a body commits an offence under clause 3, an officer of that body can personally be convicted of a criminal offence alongside the company, if it is shown that the body committed the offence with the consent or connivance of the officer, or that the commission of the offence was attributable to any neglect on his part. Thus, if an officer, for example, neglects to make sure that staff are aware of the need to maintain the confidentiality of social security information, or neglects to take steps to control movements of information, with the result that there is a release of such information, he may face prosecution. An individual convicted under this provision is liable to the same punishments as are set out in clause 3(7).

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

Clause 5 interprets a number of terms in the Bill and includes the following broad definition of a “switchover help scheme”:

any scheme for the provision of help to individuals in connection with digital switchover which is agreed between the BBC and the Secretary of State in pursuance of the BBC Charter and Agreement, as the scheme has effect from time to time.

Clause 6 extends the Bill throughout the UK and includes a power for Her Majesty to apply its provisions, with or without modifications, to the Isle of Man. The latter receives terrestrial broadcasts from relays associated with the Caldbeck transmitter in Cumbria, which is due to switch to digital in the second quarter of 2009. The Channel Islands are not due to switch until 2013 and intend to establish their own targeted assistance schemes, so they are not covered by the Bill.

If Parliament approves the Bill, it would come into force on the day it receives Royal Assent, since there are no explicit commencement provisions.